Public Version

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

BETWEEN:

MOBIL INVESTMENTS CANADA, INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

REJOINDER

December 16, 2016

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I. INTRODUCTION

1. The Claimant's Reply Memorial presents a misleading narrative of how it argued its original claim to the Mobil/Murphy tribunal, the outcome of that arbitration and how the rules of international law should apply in this case.

2. Canada's submission as to why this Tribunal cannot even consider whether the Claimant is owed any of the damages claimed rests on two legal pillars. The first pillar is the explicit text of the international treaty applicable in this dispute, a *lex specialis* rule of the NAFTA which engages the Tribunal's jurisdiction *ratione temporis* and precludes, without exception, claims which are filed more than three years after a claimant first learned of a treaty breach and damage arising therefrom. The second pillar is a long-standing general principle of international law that bars the same claimant from initiating against the same respondent a claim based on the same cause of action as was previously presented to another tribunal. The Claimant's Reply Memorial provides no credible response to either argument.

3. With respect to the first pillar, when NAFTA Articles 1116(2) and 1117(2) are applied as written, as interpreted by all NAFTA tribunals (save for one) and as intended by the NAFTA Parties, this claim must fail. The Claimant's retainer of an outside expert to argue its position on the straightforward application of treaty text to uncontroverted facts is futile because there is no way to rewrite the plain wording of these provisions: a claimant cannot file a claim challenging a measure more than a decade old regardless of whether it is characterized as a continuing violation or not. Whatever the rule regarding continuing breaches might be in general international law, the NAFTA's explicit text must prevail.

4. The Claimant cannot ask the Tribunal to ignore the plain words of the treaty to suit the particular circumstances of this case or to appease the *obiter dictum* speculation by the Mobil/Murphy Majority that the Claimant could continue to file claims for the lifetime of the Hibernia and Terra Nova projects (an assumption which the Claimant itself did not share during the first arbitration). This Tribunal can only apply the text of Articles 1116(2) and 1117(2) as written and intended. It would be neither an *abus de droit* nor a "grave injustice" to do so, as the Claimant argues, especially because it was the Claimant that chose in the Mobil/Murphy arbitration to rely on a solitary and flawed damages model which the tribunal found to be

"extremely hazardous" and lacking in evidence. Endorsing the limitations period work-around devised by Professor Sarooshi would seriously damage the predictability and credibility of the NAFTA Chapter Eleven regime (with spill-over effects on many other investment treaties which have identical time-bar provisions), not only because it runs directly contrary to the overwhelming weight of authority which rejects the Claimant's argument and its solitary source (*UPS*), but also because it will cause future claimants to believe that there is indefinite time as long as it frames a measure as "continuing".

5. With respect to the second pillar of Canada's argument, the Claimant is apparently unaware that the doctrine of *res judicata* includes the long-standing rule of cause of action estoppel which is separate and distinct from the issue estoppel branch of the doctrine that occupies the entirety of the Claimant's argument on the subject in its Reply Memorial. While Canada disagrees with the Claimant's issue preclusion analysis – the Mobil/Murphy Majority did in fact make a determination on the Claimant's damages claim for 2012-2015, that is, the Claimant failed to prove those damages with reasonable certainty – issue preclusion is ultimately the wrong test to apply in this case. It is the cause of action estoppel (also referred to as claim preclusion) effect of *res judicata* that acts as an absolute bar to making the same claim based on the same cause of action whenever the triple identity test (parties, object, and grounds of claim) is fulfilled.

6. The Claimant does not deny that it already sought to recover $27 million in damages arising from the 2004 Guidelines for the 2012-2015 period during the Mobil/Murphy arbitration, nor does it deny that the Mobil/Murphy tribunal confirmed that it had both the jurisdiction to award those damages and that the claim was admissible. This is a textbook example of when the cause of action branch of *res judicata* in public international law is supposed to operate. It is a long-standing international legal principle that:

> [A] judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented…when applied to the demand or claim in controversy. Such demand, or claim, having passed into judgment, can not again be brought into

> litigation between the parties in proceedings at law, upon any ground whatever.[1]

7. The Claimant's Reply Memorial ignores this rule entirely because it wants a second chance at proving what it failed to prove the first time. But international law does not permit this and Canada cannot be vexed twice for the same cause.

8. There is symmetry between Canada's position on time-bar and cause of action estoppel. Together, the rules – one enshrined in a treaty and the other a general principle of international law – demand that a claimant under NAFTA Chapter Eleven present its full claim for damages arising out of an alleged breach in a single proceeding initiated within three years of the time that it first acquired knowledge of the treaty breach and that some damage or loss has been suffered. The Claimant met these criteria in the Mobil/Murphy arbitration and was awarded damages for that which it was able to prove with reasonable certainty. The Claimant was not able to prove with reasonable certainty its damages for the period of time the Claimant is seeking damages for again before this Tribunal (contrary to what the Claimant says in its Reply Memorial, Canada never argued before the Mobil/Murphy tribunal it was "too soon" to claim future damages – the problem was *how* the Claimant modelled its future damages claim). But once an award is rendered and a tribunal is *functus officio*, a claimant cannot again arbitrate for the same cause of action for which it was unable to marshal sufficient evidence to satisfy a tribunal the first time. NAFTA Chapter Eleven tribunals do not have continuous and unlimited jurisdiction – they are limited in scope and mandate. This Tribunal must exercise *competence-competence* and determine for itself whether it has authority over this claim.

9. The Claimant can only blame itself for the current situation. In the Mobil/Murphy arbitration, it took the risk of presenting only one damages model, which it thought would satisfy the tribunal. But that model was not only legally problematic, but also extremely uncertain on the facts. The Claimant did not attempt to provide even a single alternative valuation that could have satisfied the reasonable certainty standard or at least provided comfort to the tribunal that its primary damages model was not overly speculative. Whatever the reason the Claimant had for arguing its damages case in that way, it must now be held to the consequences of that decision. There is no legal scope for the Claimant to try again and this Tribunal cannot create one. Both

[1] **CL-88**, *The Orinoco Case* (1902) 10 RIAA 184, p. 278 ("*Orinoco*").

the NAFTA limitations period and the rule of cause of action estoppel lead to the same result – a rejection of this claim.

10. Finally, while Canada maintains this Tribunal cannot even consider whether it should award any part of the nearly $20 million in damages sought by the Claimant for 67 different allegedly "incremental" R&D and E&T expenditures, even if the Tribunal did, the Claimant's Reply Memorial and witness statements perpetuate the same problems which inevitably arise from the self-judging method pursuant to which it demands compensation. The Claimant has no real response to the basic proposition that it should not be compensated for the [redacted] of R&D and E&T spending beyond what it was required to spend under the 2004 Guidelines in the 2012-2015 period. Its proffered excuse that it is too hard to plan project spending from year to year (which is a total repudiation of its position in the Mobil/Murphy arbitration) might be acceptable on the margins, but it is entirely unreasonable to demand compensation for millions of dollars of overspending because the Claimant decided to do more R&D and E&T than it was obligated to. Alternatives that would have eliminated the Claimant's surplus spending, as well as the uncertainty and debate over the true level of its "ordinary course" and "incremental" expenditures were available to the Claimant (e.g., depositing monies into an R&D fund; letter of credit drawdowns). Its decision not to pursue such options does not exempt it from basic principles of compensation in international law.

11. Moreover, the Claimant's Reply Memorial reveals evidence that the Mobil/Murphy Award has incentivized the Claimant to leverage R&D projects through the Hibernia Project for the benefit of its parent company's global oil and gas operations to take advantage of having its co-partners share the cost and then have Canada pay for the Claimant's share. The Claimant is also wrongly seeking [redacted] in compensation for a significant R&D project (the Gas Utilization Study) that was plainly not caused by the 2004 Guidelines – it is being undertaken because the Claimant has an economic incentive and regulatory imperative to do it. The Claimant says Canada is trying to improperly "chip away" at its damages claim. That is not true. Canada is holding the Claimant to the proper legal standard and demanding that it prove with reasonable certainty that the full amount of its claimed expenditures were damages caused by the 2004 Guidelines. If the Claimant fails to meet its burden, then the full amounts of its expenditures should not be recoverable.

12. If the Tribunal does not agree with Canada's time-bar and *res judicata* objections, it should, just as the Mobil/Murphy tribunal did, award the Claimant far less than it demands. Canada asks the Tribunal to ensure that any compensation awarded properly reflect the financial or other benefits that accrued to the Claimant from any R&D or E&T expenditure it claims as damages. Ensuring that the Claimant is not overcompensated is the only way to place a check on the moral hazard inherent in the way the Claimant has chosen to present its damages claim.

II. THE CLAIMANT PAINTS A FALSE PORTRAIT OF HOW IT ARGUED ITS CLAIM BEFORE THE MOBIL/MURPHY TRIBUNAL, CANADA'S POSITION IN THAT ARBITRATION AND THE EFFECT OF THE AWARD ON THIS TRIBUNAL

13. The Claimant's Reply Memorial attempts to portray the Mobil/Murphy arbitration as a one-sided affair with straightforward effect for this Tribunal. But the Claimant's narrative ignores its own role in why the Mobil/Murphy Majority refused to award it damages arising from the 2004 Guidelines for 2012-2015 (which it claims again now) and beyond. This important context supports Canada's position with respect to the NAFTA limitations period in Articles 1116(2) and 1117(2), as well as the *res judicata* effect of the Mobil/Murphy Award. In this Part II, Canada provides a more accurate description of what the Claimant presented to that tribunal and how those arguments impacted the Majority's decisions.

A. The Claimant's Defective Approach to Damages Was the Cause of the Mobil/Murphy Tribunal's Rejection of its Claim

14. In the Mobil/Murphy arbitration, the Claimant and Murphy Oil Corporation alleged damages totaling $65.41 million[2] "for the cost of [their] compliance with the Guidelines through the remaining life of the Hibernia and Terra Nova projects."[3] To arrive at this figure, the Claimant chose a damages model that predicted the level of its "incremental" R&D and E&T under the 2004 Guidelines (that is, expenditures the Claimant would spend pursuant to the 2004 Guidelines beyond what they would spend in the "ordinary course of business") for each year

[2] **R-68**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Expert Report of Howard Rosen dated July 30, 2009, ¶ 14 ("Mobil/Murphy – Rosen I").

[3] **R-65**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Memorial dated August 3, 2009, ¶ 223(f) ("Mobil/Murphy – Claimants' Memorial"). For the sake of simplicity when discussing the Mobil/Murphy arbitration in this Rejoinder, Canada will refer to the Claimant in the singular although there were two claimants in the Mobil/Murphy arbitration: Mobil, the current Claimant, and Murphy Oil Company.

over the duration of the life of the Hibernia project (2004 to 2036) and the Terra Nova project (2004 to 2018).[4]

15. The Claimant filed five pleadings,[5] six expert reports,[6] and nine witness statements[7] in support of its proffered damages model. Canada filed five pleadings[8] and six expert reports[9] in

[4] **R-68**, Mobil/Murphy – Rosen I, Schedules 2 and 3. The lives of the Hibernia and Terra Nova projects have since been extended, in part due to shut-ins at the two projects where no oil was produced (**CW-9**, Second Witness Statement of Paul Phelan, ¶ 57) ("Phelan Statement II"), as well as enhanced techniques that have allowed further reservoirs to be accessible (see for example, **R-266**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Canada's Reply to the Claimants' Submission on Damages dated October 19, 2012, ¶ 19 citing **C-162**, HMDC, Hibernia R&D Work Plan to Meet CNLOPB R&D Guidelines (Mar. 31, 2010), p. MOB0003050), and the development of new reserves such as the Hibernia Southern Extension. The Hibernia project is now estimated to end in the year 2047 and the Terra Nova project in the year 2028.

[5] **R-65**, Mobil/Murphy – Claimants' Memorial; **R-72**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Claimants' Reply Memorial dated April 8, 2010 ("Mobil/Murphy – Claimants' Reply Memorial"); **R-267**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Updated Damages Calculations dated August 6, 2010; **R-87**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Claimants' Post-Hearing Brief dated December 3, 2010 ("Mobil/Murphy – Claimant's Post-Hearing Brief I"); **R-67**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Claimants' Reply to Canada's Post-Hearing Submission dated January 31, 2011 ("Mobil/Murphy – Claimants' Post-Hearing Brief II").

[6] **R-68**, Mobil/Murphy – Rosen I; **R-268**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Reply Report of Howard N. Rosen dated April 8, 2010 ("Mobil/Murphy – Rosen II"); **R-33**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Updated Calculation Report of Howard Rosen dated August 6, 2010 ("Mobil/Murphy – Rosen III"); **R-269**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Price Forecast of Hibernia and Terra Nova: 2009-2036 dated July 24, 2009 ("Mobil/Murphy – Emerson Report I"); **R-270**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Response to Expert Report by Peter Davies dated April 2010 ("Mobil/Murphy – Emerson Report II"); **R-271**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Price Forecast of Hibernia and Terra Nova: 2009-2036 UPDATED dated July 31, 2010 ("Mobil/Murphy – Emerson Report III").

[7] **R-272**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) First Witness Statement of Cal Buchanan dated July 31, 2009 ("Mobil/Murphy – Buchanan Statement I"); **R-232**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) First Witness Statement of Edward Graham dated July 30, 2009 ("Mobil/Murphy – Graham Statement I"); **R-273**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) First Witness Statement of Rod Hutchings dated July 31, 2009; **R-274**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) First Witness Statement of Ted O'Keefe dated July 30, 2009; **R-248**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) First Witness Statement of Paul Phelan dated August 3, 2009 ("Mobil/Murphy – Phelan Statement I"); **R-245**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) First Witness Statement of Andrew Ringvee dated August 1, 2009 ("Mobil/Murphy – Ringvee Statement I"); **R-275**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Second Witness Statement of Paul Phelan dated April 8, 2010 ("Mobil/Murphy – Phelan Statement II"); **R-276**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Second Witness Statement of Andrew Ringvee dated April 8, 2010 ("Mobil/Murphy – Ringvee Statement II"); **R-277**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*

opposition to the Claimant's damages claim. The Mobil/Murphy tribunal held a full hearing on jurisdiction and merits (including damages) from October 19-22, 2010, which included cross-examination of the Claimant's damages witnesses and experts.[10] The disputing parties filed collectively four post-hearing submissions regarding the Claimant's damages arguments.[11] The entire evidentiary and legal record concerning the Claimant's damages claim was before the Mobil/Murphy tribunal.

16. To predict its future "incremental" expenditure requirements, the Claimant's damages model attempted to predict with reasonable certainty for each individual future year until 2036

(ICSID Case No. ARB(AF)/07/4) Third Witness Statement of Paul Phelan dated August 6, 2010 ("Mobil/Murphy – Phelan Statement III").

[8] **R-2**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Counter-Memorial dated December 1, 2009 ("Mobil/Murphy – Canada's Counter-Memorial"); **R-79**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Rejoinder Memorial dated June 9, 2010 ("Mobil/Murphy – Canada's Rejoinder Memorial"); **R-278**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Pre-Hearing Submission on Damages dated September 8, 2010; **R-80**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Post-Hearing Submission dated December 3, 2010 ("Mobil/Murphy – Canada's Post-Hearing Submission I"); **R-73**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Reply to Claimants' Post-Hearing Brief dated January 31, 2011 ("Mobil/Murphy – Canada's Post-Hearing Submission II").

[9] **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 dated December 1, 2009 ("Mobil/Murphy – Walck Report I"); **R-279**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Expert Report of Peter A. Davies dated December 1, 2009; **R-280**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Rejoinder Report of Richard E. Walck dated June 8, 2010; **R-281**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Expert Reply Report of Peter A. Davies dated June 8, 2010; **R-282**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Pre-Hearing Calculations and Report of Richard E. Walck dated September 8, 2010; **R-283**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Pre-Hearing Report of Peter A. Davies dated September 8, 2010.

[10] **R-74**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Transcript from the Hearing on the Merits, Day 1 (Oct. 19, 2010) ("Mobil/Murphy – Day One Hearing Transcript"); **R-284**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Transcript from the Hearing on the Merits, Day 2 (Oct. 20, 2010) ("Mobil/Murphy – Day Two Hearing Transcript"); **R-285**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Transcript from the Hearing on the Merits, Day 3 (Oct. 21, 2010); **R-286**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Transcript from the Hearing on the Merits, Day 4 (Oct. 22, 2010) ("Mobil/Murphy – Day Four Hearing Transcript").

[11] **R-87**, Mobil/Murphy – Claimants' Post-Hearing Brief I; **R-80**, Mobil/Murphy – Canada's Post-Hearing Submission I; **R-67**, Mobil/Murphy – Claimants' Post-Hearing Brief II; **R-73**, Mobil/Murphy – Canada's Post-Hearing Submission II.

variables including: production volumes at the Hibernia and Terra Nova projects, the price of oil, the exchange rate between the Canadian and U.S. dollar required to convert oil prices into Canadian dollars, the percentage of oil revenues that would be required to be spent on R&D and E&T under the Guidelines in the future, and the "normal" amount the Claimant would spend on R&D and E&T each year.[12] The Claimant's damages experts presented these yearly predictions to the Mobil/Murphy tribunal and said they were confident that those future annual numbers were reasonably certain and should be awarded as damages.

17. Canada's principle critique of the Claimant's damages model was that it was predicated on damages that the Claimant had "not yet incurred," that is, it sought compensation for loss it *would incur* in the future (for example, the $27.68 million in incremental R&D and E&T expenditures to be paid between 2012 and 2015 at the Hibernia and Terra Nova projects[13]) rather than seeking compensation for loss it *had incurred* at present (for example, the decrease in the value of its investment in the Hibernia project because the 2004 Guidelines would require future incremental expenditures).[14] Thus, the Claimant had asked the tribunal to adopt its forecasts for each future year as predictive of what would occur as a matter of fact in the future. Canada explained that what the Claimant was arguing was not only extremely speculative but was "inconsistent with international principles of compensation"[15] and that no international tribunal had ordered compensation in the way the Claimant sought.[16]

18. Rather than provide the Mobil/Murphy tribunal with an alternate damages model – one based on damages incurred and in line with established international legal principles – the

[12] **C-1**, M*obil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 453-463 ("Mobil/Murphy – Decision").

[13] **R-2**, Mobil/Murphy – Canada's Counter-Memorial, ¶ 183.

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

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

[16] See **R-73**, Mobil/Murphy – Canada's Post-Hearing Submission II, ¶ 130. In Canada's Rejoinder in the Mobil/Murphy arbitration, Canada explained that forecasting future variables such as the price of oil "may be legitimate in a case of expropriation where the tribunal must determine the fair market value of an expropriated asset on the date of the taking" but is not legitimate when a claimant "asks the Tribunal to adopt its forecasts as an 'expectation of fact.'" (**R-79**, Mobil/Murphy – Canada's Rejoinder, ¶ 310 and fn. 453).

Claimant posited that it had *already incurred* all of the future losses that it claimed,[17] and argued that its prediction of incremental spending in each future year met the evidentiary standard of "reasonable certainty."[18] At other times, the Claimant also argued that its damages model did not need to be "reasonably certain" so long as it could prove the "fact" that it would incur damages:

> The legal standard is reasonable certainty, and numerous texts and awards have confirmed that this is the case, and reasonable certainty is required only as to the fact of damage. Once this level of certainty is established, less certainty is required, perhaps none at all, in proof of the amount of damages. While the proof of the fact of damage must be certain, proof of the amount may be an estimate, uncertain, or inexact.[19]

19. The Mobil/Murphy tribunal confirmed that it had jurisdiction over the Claimant's entire claim for damages ("the Tribunal has jurisdiction to grant compensation for future damages")[20] but did not see the Claimant's damages model as one for damages incurred,[21] which was obvious – the Claimant had not, in 2009, incurred as damage the incremental spending it predicted it would undertake in 2036.[22] Moreover, the tribunal disagreed with the Claimant's argument that it need not prove its claim for damages to the standard of reasonable certainty.[23] Ultimately, the Mobil/Murphy tribunal found the Claimant's damages model was "extremely hazardous"[24]

[17] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 246: ("Canada ventures that an award of damages to reflect the Claimants' post-December 2008 exposure under the Guidelines would be "inconsistent with international principles of compensation," which extend only to "loss sustained," "actual loss," and "damage suffered."), ¶ 247: ("…Claimants' loss *has* already been incurred and consists of the obligations created through the Board's implementation of the Guidelines.").

[18] See for example, **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 256: ("As one commentator observes: 'A commonly accepted standard for awarding forward-looking compensation…is that damages must be proved with reasonable certainty.' Claimants endorse that proposition.").

[19] **R-74**, Mobil/Murphy – Day One Hearing Transcript, p. 132:14-22 (Ms. Lamb).

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

[21] **C-1**, Mobil/Murphy – Decision, ¶¶ 440, 469-470, 472, 478.

[22] The Mobil/Murphy tribunal agreed; see for example, **C-1**, Mobil/Murphy – Decision, ¶ 440: ("[F]or 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. In the Majority's view, 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."). The Claimant did not have a "firm obligation" in 2010 to pay the specific amount of predicted incremental expenditure requirements in 2036.

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

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

because it required predicting several variables that, when compounded, could not meet the test of reasonable certainty.[25]

20. The Claimant's position in the Mobil/Murphy arbitration that it could reasonably predict damages it had yet to incur stands in striking contrast to what it says in this arbitration, which is that "it is virtually impossible for the operators to forecast their expenditure obligations under the Guidelines with exactitude."[26] The Claimant's witness Mr. Phelan now says that:

- "the five-year average of the Statistics Canada benchmark is an unpredictable input,"[27] when the Claimant's damages model in the Mobil/Murphy arbitration predicted the benchmark for each year twenty-seven years into the future;[28]
- the future price of oil "is not entirely predictable,"[29] when the Claimant argued in the Mobil/Murphy arbitration that its future oil price predictions were reasonably certain because they were "conservative";[30]
- the oil produced by the Hibernia and Terra Nova projects in a given year is "variable" because they both "experience[] shut-ins" and sometimes produce "no oil at all",[31] when the Claimant's oil production forecasts in the Mobil/Murphy arbitration accounted for no such shut-ins[32] and the Claimant argued that its forecasts were "reasonable";[33]

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

[26] Claimant's Reply Memorial, ¶ 144. See also ¶ 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.").

[27] **CW-9**, Phelan Statement II, ¶ 58.

[28] **R-68**, Mobil/Murphy – Rosen I, Schedule 2.

[29] **CW-9**, Phelan Statement II, ¶ 54.

[30] See for example, **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 287: ("They remain conservative forecasts, despite Canada's attempts to demonstrate otherwise."). The Claimant's oil price predictions were not, however, conservative. For example, the Claimant's expert predicted that the average price of oil in 2015 would be $79.56 (Mobil/Murphy – Rosen I, Schedule II), when in fact it was $66.65 (derived by adding up the actual 2015 oil price figures in R-31 and R-32 and dividing by 12 to arrive at the monthly average (**R-31**, Letter from Mike Baker, CNLOPB to Jamie Long, HMDC attaching Jan-Apr 2015 R&D/E&T Expenditure Obligations (Jun. 25, 2015), p. 2; **R-32**, Letter from Mike Baker, CNLOPB to Jennifer Walck, HMDC attaching May-Dec 2015 R&D/E&T Expenditure Obligations (Feb. 9, 2016), p. 2).

[31] **CW-9**, Phelan Statement II, ¶ 57.

[32] **R-33**, Mobil/Murphy – Rosen III, Schedules 2 and 3.

[33] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 277.

- the exchange rate between the US and Canadian dollars experiences unpredictable "fluctuations,"[34] when the Claimant argued in the Mobil/Murphy arbitration that its predictions were "reasonable" because they were based on "actual and third party short-term forecasts."[35]

21. That the Claimant is now willing to disavow so many of its arguments from the Mobil/Murphy arbitration reveals the fallibility of how it argued its damages case the first time. Even more revealing is what we now know to be true concerning the variables the Claimant estimated in the Mobil/Murphy arbitration.

22. For example, the damages the Claimant sought from Canada for the 2012-2015 period in the Mobil/Murphy arbitration was $27.68 million, whereas the damages it seeks from Canada for that same period in this arbitration is down to $19.88 million, of which only [redacted] is actually required spending (the Claimant did not include surplus spending in its predictions before the Mobil/Murphy tribunal). The fact that the Claimant's self-assessed damages could change so radically (arguably by more than half) over such a short period of time confirms how problematic its approach to damages was in the Mobil/Murphy arbitration.

23. Another cause of the striking change in the Claimant's prediction of the damages it would incur in the future was its understatement of its "ordinary course" R&D and E&T expenditures. The Claimant argued before the Mobil/Murphy tribunal that its R&D and E&T spending in the "ordinary course of business" would be "nominal" because both the Hibernia and Terra Nova projects "ha[d] little need for ongoing technological innovation to support project operations."[36] The Claimant maintained this position throughout the Mobil/Murphy arbitration (its minimal projection of future ordinary course R&D spending was a key factor in convincing the Majority that the 2004 Guidelines fell outside of Canada's Annex I reservation[37]). But as Canada explained in its Counter-Memorial, the Claimant's actual ordinary course figures between 2004 and 2015 (which became known *after* the Mobil/Murphy tribunal's Decision on Liability and on Principles of Quantum) prove conclusively that the Claimant underestimated its R&D and E&T

[34] **CW-9**, Phelan Statement II, ¶ 59.

[35] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 291.

[36] **R-65**, Mobil/Murphy – Claimants' Memorial, ¶ 3.

[37] Canada's Counter-Memorial, ¶ 77, citing **C-1**, Mobil/Murphy – Decision, ¶ 401.

spending in the ordinary course between 2004-2015 at Hibernia by 219% and at Terra Nova by 719%.[38]

24. The Claimant does not deny this, but Mr. Phelan says Canada is making an "apples to oranges" comparison between the "ordinary course" figures forecast by the Claimant's expert, Mr. Rosen, in his first report during the Mobil/Murphy arbitration and the Claimant's present actual ordinary course figures through 2015.[39] While using the Claimant's own forecasted versus actual "ordinary course" spending is certainly not an "apples to oranges" comparison, Mr. Phelan suggests that a more accurate forecast was provided by Mr. Rosen in this third expert report: "The Mobil I tribunal had the benefit of Mr. Rosen's updated report when it rendered its Decision on Liability and Principles of Quantum in May 2012."[40] However, even Mr. Rosen's updated report significantly understated the Claimant's actual ordinary course figures. This was explained by Canada's damages expert for the period up to 2012 during the Mobil/Murphy arbitration with a table in his fourth expert report showing the Claimant's assessment of its ordinary course figures in Mr. Rosen's first report and updated report (which were submitted to the tribunal before it rendered its Decision), as well as in Mr. Phelan's fourth witness statement (which was submitted after the tribunal's Decision):

> 26. I have set out in Table 1 and Table 2 below, the Claimants' assertions regarding the ordinary course Hibernia and Terra Nova expenditures, as set out first in Rosen I, then in Mr. Rosen's third report ("Rosen III"), and finally, in Phelan IV.
>
> **Table 1: Comparison of Ordinary Course Spending at Hibernia[18]**

	2004-2008	2009	2010	2011	Jan-Apr 2012
Rosen I – July 2009	[redacted]				
Rosen III – Aug 2010					
Phelan IV – July 2012					

[38] Canada's Counter-Memorial, ¶¶ 74-75.

[39] **CW-9**, Phelan Statement II, ¶ 76. In this paragraph Mr. Phelan refers to Claimant's actual ordinary course expenditures through 2015 as "Canada's actual figures." Canada's assessment does not, however, adjust the Claimant's own assessment in any way. Nor does Mr. Phelan dispute the figures presented by Canada. Thus, the actual ordinary course figures presented through 2015 belong to the Claimant, not Canada (who believes that the figures are actually higher).

[40] **CW-9**, Phelan Statement II, ¶ 79.

Table 2: Comparison of Ordinary Course Spending at Terra Nova[19]

	2004-2008	2009	2010	2011
Rosen I – July 2009	[redacted]			
Rosen III – Aug 2010				
Phelan IV – July 2012				

27. Not only have the Claimants' ordinary course figures changed substantially between Rosen I and Phelan IV, but their most recent figures in Phelan IV show that their ordinary course spending has increased during the production phase. Since each additional dollar of ordinary course spending means a dollar less of damages, the Claimants' experience suggests that their damages will decrease over time.

25. As these tables show and Canada's expert Mr. Walck explained, the Claimant's assessment of its "ordinary course" figures has not only changed significantly, but has only gone in one direction – up.[41] The Claimant's constantly changing figures confirm that the solitary damages model it presented to the Mobil/Murphy tribunal, seeking that the tribunal accept its future "ordinary course" predictions as a matter of fact, was inherently fallible.

26. The above demonstrates why it is wrong for the Claimant to say that Canada argued in the Mobil/Murphy arbitration that its claim for future damages was "too early."[42] That is simply not true. Canada's criticism was premised on the principled distinction between establishing the quantum of damages that has been incurred at the present time and trying to divine what specific level of damage would be incurred as a matter of fact in a given year far off in the future (that is, damages not yet incurred).[43] Canada stated this explicitly to the Mobil/Murphy tribunal and noted that the Claimant could have overcome this problem by presenting an alternative valuation model:

> [T]he Claimants argue that they have no choice but to claim uncertain and un-incurred damages because they cannot request an order that the Guidelines be revoked. However, the Claimants did have a choice. For example, the

[41] Other ordinary course predictions made by the Claimant during the Mobil/Murphy arbitration have also turned out to be false. For example, the Claimant told the Mobil/Murphy tribunal that Terra Nova' ordinary course R&D needs "would decrease by 50% in 2016" (**C-1**, Mobil/Murphy – Decision, ¶ 458). Given that Terra Nova met its spending obligations under the 2004 Guidelines between 2012 and 2015 entirely with "ordinary course" R&D and E&T, it is highly unlikely that its "ordinary course" R&D needs will "decrease by 50% in 2016."

[42] Claimant's Reply Memorial, ¶¶ 4, 28, 94.

[43] **R-2**, Mobil/Murphy – Canada's Counter-Memorial, ¶¶ 325-341.

> Claimants could have claimed for any loss of value to their business from the Guidelines. Under this method, the Claimants' damages would be any difference between the value of the projects with and without the Guidelines. That difference, if any, may be a loss they have already incurred. The Claimants chose not to value their damages in this way. Instead, they chose to provide the Tribunal with only one way to quantify their losses. The Claimants cannot rely on their own choices to avoid the plain limits of the NAFTA and their burden of proof.[44]

27. In his first expert report in this arbitration, Mr. Walck confirms that the Claimant could have provided an alternative damages model to the Mobil/Murphy tribunal based on damages *incurred* rather than damages it might *incur in the future*:

> Mobil and Murphy could have calculated their claims as the difference in value of their investments in Hibernia and Terra Nova (a) without the 2004 Guidelines and (b) with the 2004 Guidelines. That would be one measure of the impact of the 2004 Guidelines on Mobil and Murphy's investments (i.e., a calculation of 'damages incurred'), and, assuming sufficient support for the calculations, would have fully resolved the dispute, since the value of the investment would consider all of the future Hibernia and Terra Nova cash flows. And, to the extent there was concern over the ability to estimate cash flows well into the future, the valuation could have been supported with transactional or other data on market comparables.[45]

28. In his most recent witness statement, Mr. Phelan suggests that the Claimant had no choice but to provide the Mobil/Murphy tribunal with the damages model it did.[46] This *ex post facto* excuse is not credible.

29. Mr. Phelan concedes that the Claimant could have tried a different approach but says he is unsure whether a different model "would have comported with the principles of quantum enunciated by the Mobil I Majority."[47] This is a red herring – such an alternative model should have been presented by the Claimant *before* the Mobil/Murphy tribunal rendered its Decision. The Claimant had ample opportunity prior to the tribunal's Decision to present a different damages model – especially given that Canada had specifically put the damages model the

[44] **R-73**, Mobil/Murphy – Canada's Post-Hearing Submission II, ¶¶ 154-155.

[45] **RE-1**, Expert Report of Richard E. Walck, Global Financial Analytics dated June 30, 2016, ¶ 30. Mr. Walck explains this again in his second expert report. **RE-2**, Expert Report of Richard E. Walck, Global Financial Analytics, ¶¶ 30-35 ("Walck Report II").

[46] **CW-9**, Phelan Statement II, ¶ 89.

[47] **CW-9**, Phelan Statement II, ¶ 89.

Claimant presented at issue[48] – and could have adduced other evidence to buttress the credibility of its future damages claim. As the tribunal in *Vivendi* noted when addressing a similar excuse presented by the claimant in that case:

> Claimants were never prevented from a full and fair presentation of their case. It was always open to the [c]laimants to assert alternative bases for their damages, e.g., claims based on the book value of the assets or the value of the investments actually made by the Claimants. Claimants had the opportunity in the Reply to introduce evidence in support of alternative approaches to damages…Claimants declined to do so, preferring to rely on their claims based on lost profits.[49]

30. It is normal practice to provide alternative means by which to measure damages, especially when there are uncertainties with respect to future variables.[50] In his second expert report in this arbitration, Mr. Walck explains that the Claimant could have in the Mobil/Murphy arbitration relied on additional methods and evidence (such as market comparables) "to corroborate the impact of the Guidelines on the value of Claimants' investment holdings in the Projects."[51] Such

[48] **R-2**, Mobil/Murphy – Canada's Counter-Memorial, ¶¶ 325-341; **R-79**, Mobil/Murphy – Canada's Rejoinder Memorial, ¶¶ 287-300; **R-286**, Mobil/Murphy – Day Four Hearing Transcript, p. 1308:3-19, pp. 1310:22-1311:11; **R-73**, Mobil/Murphy – Canada's Post-Hearing Submission II, ¶¶ 129-133.

[49] **CL-53**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award, 20 August 2007, Schedule A, ¶ 11. See also, *id*., ¶ 7: ("Claimants' approach to damages was specifically put in issue by Respondent…In its counter-memorial, Respondent disputed the availability of a claim for lost profits and challenged the methodology upon which the Claimants relied for its calculations and the basis and assumptions upon which Claimants based their claim."). This description applies to the situation in the Mobil/Murphy arbitration as well.

[50] **RE-2**, Walck Report II, ¶ 35, fn. 2. For example, in the *Yukos* arbitration, the claimants presented three distinct damages methods: discounted cash flow ("DCF"), comparable transactions method and comparable companies method – the tribunal did not accept the first two but accepted the third (**RL-46**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL) Final Award, 18 July 2014, ¶¶ 1784-1785). Similarly, in the *Crystallex* arbitration, the Claimant submitted 4 alternative methods to quantify damages, namely an income based approach, a relative market multiple approach, a stock market study approach, and a market transaction valuation (or indirect sales comparison) approach - the tribunal found the income based approach to be unreliable and the indirect sales comparison method to be excessively speculative, and ultimately decided to quantify damages by averaging the stock market and market multiples approaches (**RL-47**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016, ¶¶ 887, 916). In the *Terra Raf Trans Traiding Ltd* arbitration, although both parties engaged in a DCF valuation and the tribunal accepted that a DCF valuation was appropriate, issues still remained as to the appropriate manner in which to engage in the DCF analysis (**RL-48**, *Anatolie Stati, Gabriel Stati, Ascom Group, S.A. and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan* (SCC Arbitration V (116/2010)) Award, 19 December 2013, ¶ 1617). The tribunal actually found it necessary to refer to the comparable transactions valuation method to reach an amount it was satisfied with (¶ 1625). Hence, alternative methods may have some relevance even in scenarios where parties agree in principal on what the appropriate damages quantification method is, but can be key when there is a dispute between parties as to the right method.

[51] **RE-2**, Walck Report II, ¶ 35.

a model could have reflected the Claimant's future R&D and E&T spending obligations under the 2004 Guidelines. Mr. Walck concludes:

> [T]he problem with Mobil's view is not that its attempt to quantify its future damages was too soon, but that it was too speculative to stand on its own, without the corroborative support that might have been available from the use of other valuation methods. Alternative methods may have provided an independent "sanity check" on Claimants' calculations, as suggested by multiple sources of valuation guidance, and may have enabled the Mobil/Murphy Tribunal greater confidence in the Claimant's damages assessment.[52]

31. It was the Claimant's choice to provide the Mobil/Murphy tribunal with a solitary damages model. It had its chance to prove its losses, it cannot now ask for another.

B. The Claimant's Assumptions With Respect to NAFTA Chapter Eleven Are Misguided

32. The Claimant presents a fallacy to this Tribunal with respect to the Mobil/Murphy Award: "Canada is required to cease" enforcing the 2004 Guidelines.[53] That is not what NAFTA Chapter Eleven requires. There is no obligation on the part of a NAFTA Party vis à vis a claimant investor to remove a measure which has been found to violate NAFTA Chapter Eleven.[54] Instead, the NAFTA Parties chose a different remedy: payment of monetary damages to the investor.[55]

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[52] **RE-2**, Walck Report II, ¶ 35.

[53] Claimant's Reply Memorial, ¶ 1: ("Canada is required to cease its wrongful conduct and to offer appropriate assurances of non-repetition.").

[54] Moreover, the assertion that Canada can even do so in the way the Claimant suggests is also based on an overly simplistic and inaccurate description of the measure at issue. First, other than its authority under s. 123 of the Accord Act to cancel an interest for failure to meet its statutory requirements, the Board has no legal authority over individual owners like the Claimant; it only has regulatory power over the operator of the project, which is HMDC in the case of Hibernia and Suncor in the case of Terra Nova. Hence, the Board cannot legally stop "enforcing" the 2004 Guidelines specifically with respect to the Claimant because it is only a minority interest holder in both projects. See **CL-1**, *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, ss. 53 and 138(1)(b) ("Accord Act"). Furthermore, HMDC concluded an agreement with the Board on November 19, 2010 to amend the 1986 Hibernia Benefits Plan to incorporate the 2004 Guidelines in exchange for the Board's approval of HMDC's application to develop an additional oil field called the Hibernia Southern Extension ("HSE"). See **R-21**, Letter from Paul Leonard, HMDC to Max Ruelokke, CNLOPB (Nov. 16, 2010): ("Hibernia Management and Development Company Ltd., including the Hibernia Southern Extension Project, confirms that the Board's guidelines related to Diversity, Research and Development, and Education and Training apply to the entire Hibernia project including the Hibernia Southern Extension."); **R-22**, Letter from Max Ruelokke, CNLOPB to Paul Leonard, HMDC (Nov. 19, 2010); **C-54**, CNLOPB, Decision Report 2010.02: Hibernia Development Plan Amendment Application 2010-09-02 (2010).

[55] NAFTA Article 1135(1) states: ("Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in

Indeed, the Mobil/Murphy tribunal expressly recognized that Article 1135(1) stipulates that the "only" award a NAFTA Chapter Eleven tribunal may render for a breach of NAFTA Chapter Eleven is one for monetary compensation.[56] This remedy stands in contrast to Article 2018(2), which applies to disputes between the NAFTA Parties themselves and expressly contemplates that the remedy for a violation of the NAFTA is "non-implementation or removal of a measure not conforming with this Agreement […]"[57]

33. There is an important implication arising from the NAFTA Parties having chosen to limit the extraordinary right of ad hoc investor-State arbitration with the advance consent of the State (which is purely a creation of treaty, not general international law) on the condition that claims be brought within three years of first acquired knowledge and that only monetary damages be ordered. NAFTA Chapter Eleven compels a claimant to bring the entirety of its claim against a particular measure within one proceeding. In some cases, calculating damages may be a straightforward exercise. In others cases, it may be more difficult. But that behooves a claimant to provide adequate models and evidence in support of its quantification so a tribunal can have reasonable confidence that it is awarding appropriate compensation for a violation of Chapter Eleven. If the claimant does not do so and it fails to get the damages demanded, there is no means by which it can get another chance.

34. In the Mobil/Murphy arbitration, the Claimant brought a timely claim against the 2004 Guidelines in accordance with NAFTA Articles 1116(2) and 1117(2). It was successful in convincing two of three members of the tribunal that the adoption of this subordinate measure fell outside of Canada's NAFTA Annex I reservation to Article 1106 with respect to the *Accord Act*. While Canada respectfully disagrees with the Majority's reasoning, Canada has accepted that conclusion as binding between it and the Claimant. The Mobil/Murphy tribunal ordered Canada to pay monetary compensation to the Claimant for damages which arose between 2004-

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which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution."). Restitution of property is an available alternative under NAFTA Article 1135(1), although the disputing Party has the legal right to choose to pay monetary damages and applicable interest instead.

[56] **C-1**, Mobil/Murphy – Decision, ¶ 414: ("The parties do not dispute that the claim concerns purely monetary damages which is permissible under NAFTA Article 1135.").

[57] NAFTA, Article 2018(2): ("Wherever possible, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Annex 2004 or, failing such a resolution, compensation.").

2011. It refused to award the Claimant damages for 2012-2015 and beyond because the Claimant failed to prove those losses with reasonable certainty. The Award was paid by Canada and that marked the legal termination of the Claimant's cause of action under NAFTA Chapter Eleven with respect to the 2004 Guidelines regardless of their "continued application" to the Hibernia and Terra Nova projects.

III. NAFTA'S THREE-YEAR LIMITATIONS PERIOD IS A QUESTION OF JURISDICTION *RATIONE TEMPORIS*, AND THE CLAIMANT CANNOT EVADE THE EXPLICT *LEX SPECIALIS* RULE IN ARTICLES 1116(2) AND 1117(2) REGARDLESS OF WHETHER THE 2004 GUIDELINES ARE A CONTINUING BREACH OR NOT

A. Summary of Canada's Position

35. The Claimant challenges the preclusive effect of the limitations period under NAFTA Articles 1116(2) and 1117(2) to this claim. As a general complaint, the Claimant accuses Canada of arguing now that "Mobil's claim is too late" while arguing in the Mobil/Murphy arbitration that it was "too early."[58]

36. This is false. As described in Part II above, Canada never argued in the Mobil/Murphy arbitration that the Claimant's claim was "too early." Rather, Canada argued that the manner in which the Claimant modeled its damages case – requiring the Mobil/Murphy tribunal to prognosticate unpredictable variables, including the future price of oil, in order to foretell what damages the Claimant would in fact incur as actual damages some 27 years into the future – was unprecedented in international arbitration and unsupported by legal authority. The barriers the Claimant faced during the Mobil/Murphy arbitration with respect to its future damages (including for 2012-2015, as it claims again here) could have been avoided had the Claimant provided the tribunal with an alternative damages model and better evidence. Instead, the Claimant chose to leave all of its damages eggs in a single speculative basket.

37. The Claimant is correct, however, when it states that Canada now argues, "Mobil's claim is too late."[59] When this Tribunal considers the plain wording of Articles 1116(2) and 1117(2) and the consistent interpretations of those provisions by NAFTA tribunals, and the three NAFTA

[58] Claimant's Reply Memorial, ¶ 28.

[59] Claimant's Reply Memorial, ¶¶ 4, 28, 94.

Parties, as well as the explicit statements by the Claimant itself during the Mobil/Murphy arbitration, the conclusion must be that it has no jurisdiction over a claim filed on January 16, 2015 with respect to a measure adopted on November 5, 2004.

38. The Claimant argues that Articles 1116(2) and 1117(2) are "inapplicable" because "Canada is committing a continuing breach of the NAFTA"[60] by its "refusal to cease the application of the Guidelines to Mobil."[61] As explained in Part II.B above, the premise of this argument is defective because there is no obligation on NAFTA Parties to alter a measure that has been found to violate NAFTA Chapter Eleven. But the Claimant's argument about "ceasing" application of the 2004 Guidelines is moot in any event because a continuing course of conduct does not render Articles 1116(2) and 1117(2) "inapplicable" as argued by Professor Sarooshi.[62] In effect, the Claimant argues that this Tribunal should ignore the plain meaning of the NAFTA text so that it can have a second chance at proving the damages it failed to prove in the Mobil/Murphy arbitration.

39. In this Part III, Canada will first demonstrate the well-founded principle that NAFTA Articles 1116(2) and 1117(2) serve as a prerequisite to engage Canada's consent to arbitrate under Article 1122(1) and the Tribunal's jurisdiction *ratione temporis*. NAFTA Chapter Eleven's three-year limitations period is not a mere issue of admissibility, as the Claimant contends. Theoretical debates on jurisdiction and admissibility and how limitation periods might be decided under other treaties do not matter for this Tribunal because under the NAFTA, which is the only text that is relevant, a NAFTA Party's consent to arbitrate is not perfected without compliance with Articles 1116(2) and 1117(2).

[60] Claimant's Reply Memorial, ¶ 43.

[61] Claimant's Reply Memorial, ¶ 74.

[62] That the Claimant decided to jettison the principle of *jura novit curia* and hire an outside expert on what is a straightforward application NAFTA Articles 1116(2) and 1117(2) to the uncontroverted facts of this case speaks to the weakness of the Claimant's legal position on this point. This Tribunal has been charged with the responsibility to construe and apply Articles 1116(2) and 1117(2) in accordance with international principles of treaty interpretation and international law, a task for which it is well-qualified and any legal opinion that purports to provide the Tribunal with the answer to the decision its members have been appointed to make is unnecessary. Furthermore, Canada must register is objection to the inappropriate selection of Professor Sarooshi by the Claimant, whose close ties to members of this Tribunal could raise a perception of bias and unnecessarily taint the arbitration proceedings.

40. Next, Canada will show that the Claimant cannot contest that it "first acquired" knowledge of breach and loss in November 2004, when the Board adopted the 2004 Guidelines. This issue has been foreclosed by the Claimant's own admissions and the specific findings of the Mobil/Murphy tribunal and cannot be revisited by this Tribunal. Canada will then refute the Claimant's contention that continuing breaches toll the limitation period under Articles 1116(2) and 1117(2), an argument that has been rejected consistently by NAFTA tribunals and runs contrary to the long-standing agreement and practice of all three NAFTA Parties. Finally, Canada will respond to the Claimant's final plea that it would be an *abus de droit* to reject this claim on the basis of NAFTA Articles 1116(2) and 1117(2), an argument which ignores the Claimant's own past arguments and its own role in failing to prove its current damages claim in the Mobil/Murphy arbitration.

B. A NAFTA Party's Consent to Arbitrate is Conditioned on Compliance With NAFTA Articles 1116(2) and 1117(2), Making Time-Bar a Question of Jurisdiction, Not Admissibility

41. In its Reply Memorial, the Claimant argues that compliance with Articles 1116(2) and 1117(2) is an issue of admissibility rather than of the Tribunal's jurisdiction *ratione temporis*. The Claimant's analysis ignores the plain wording of the treaty and intentions underlying these provisions. Under Article 1122(1), the NAFTA Parties conditioned their consent to arbitrate claims on it being "in accordance with the procedures set out in this Agreement." The Claimant is wrong to argue that filing a timely claim pursuant to Articles 1116(2) and 1117(2) is not captured by Article 1122(1) as a condition on a NAFTA Party's consent to arbitrate.

42. The Claimant's position before this Tribunal is completely opposite to the position it took before the Mobil/Murphy tribunal. In that arbitration, the Claimant correctly confirmed that NAFTA Articles 1116(2) and 1117(2) were a matter of jurisdiction:

> In Chapter 11 of the NAFTA, Canada agreed to submit to arbitration of disputes pertaining to the substantive obligations undertaken therein. Claimants accepted this offer in their Request for Arbitration, which was received by the ICSID Secretary-General on November 1, 2007. This acceptance formed an agreement to arbitrate on that date. Claimants' Request was timely received by the Secretary-General within the three-year period of limitations established in the treaty.

> [footnote 279] Articles 1116(2) and 1117(2) of NAFTA state that an investor may not make a claim if more than three years have elapsed between the time when the investor first knew or should have known of the alleged breach and the time when the claim is brought. The Request for Arbitration was made within three years of the promulgation of the Guidelines and the Board's efforts to enforce their terms.
>
> The record thus amply establishes the Tribunal's jurisdiction *rationae temporis*.[63]

43. NAFTA tribunals agree that Articles 1116(2) and 1117(2) implicate jurisdiction. The *Methanex* tribunal understood that the requirement to file a claim within three years of the alleged breach and loss engaged the NAFTA Parties' consent to arbitrate and a tribunal's jurisdiction over the claim:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 and 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[64]

44. The *Bilcon* tribunal also agreed that failure to comply with the limitation period in Articles 1116(2) and 1117(2) impacts on the consent of a NAFTA Party to arbitrate:

> The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent…[65]

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[63] **R-65**, Mobil/Murphy – Claimants' Memorial, ¶¶ 143-144.

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

[65] **RL-6**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Award, 17 March 2015, ¶ 229 ("*Bilcon – Award*"). The *Bilcon* tribunal went on to consider whether measures fell outside its jurisdiction because of Articles 1116(2) and 1117(2) and decided that some did while others did not. *See id.,* ¶¶ 266-282, and 742(a)(i): ("The Tribunal has jurisdiction insofar as these Investors base their claims on events occurring on or after 17 June 2005; the Respondent's jurisdictional objection is upheld insofar as the Investors base their claims on events occurring prior to that date.").

45. *Feldman*, *Grand River* and *Apotex* have also treated Articles 1116(2) and 1117(2) as going to the jurisdiction of the tribunal.[66]

46. All three NAFTA Parties agree that consent to arbitrate under NAFTA is conditioned on compliance with Articles 1116(2) and 1117(2).[67] In *Apotex*, in response to the tribunal's question on this issue, the United States confirmed its long-standing position that the limitations period is a question of jurisdiction:

> Article 1116(2), thus, contains a temporal requirement for jurisdiction over the investor's claim. It's a jurisdictional objection *ratione temporis*. Just as the United States does not consent to be bound by obligations and treaties which are not in force, also an objection *ratione temporis*, the United States did not consent to arbitrate NAFTA Chapter Eleven claims that arise outside of the applicable three-year limitations period.[68]

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[66] **RL-8**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶ 63 ("*Feldman – Award*"); **RL-3**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶ 38 ("*Grand River – Decision on Objections to Jurisdiction*"); **RL-5**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 314-315, 324, 335 ("*Apotex – Award on Jurisdiction*"). See also, **RL-13**, W. Michael Reisman, Opinion with Respect to the Effect of NAFTA Article 1116(2) on Merrill & Ring's Claim, 22 April 2008, ¶ 16: ("In this opinion, I consider the three year time limitation under NAFTA Article 1116(2), that is, jurisdiction *ratione temporis*.").

[67] This has been Canada's long-standing position with respect to Articles 1116(2) and 1117(2). See for example, **RL-49**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Submission of Canada Pursuant to NAFTA Article 1128, 6 October 2000, ¶¶ 2, 12; **RL-50**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Submission of Canada Pursuant to NAFTA Article 1128, 6 July 2001, ¶¶ 24-27; **RL-51**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Canada's Rejoinder Memorial, 27 March 2009, ¶ 45: ("…the structure of Article 1116 indicates that both sub-paragraphs (1) and (2) are jurisdictional provisions. Article 1116(1) sets out the jurisdiction *ratione materiae* of Chapter 11 tribunals; in other words, the type of claims that a Tribunal can hear. Article 1116(2) sets out the jurisdiction *ratione temporis* of Chapter 11 tribunals by providing a clear time limitation for an investor to bring a claim").

[68] **RL-5**, *Apotex – Award on Jurisdiction*, ¶ 314. See also, **RL-14**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) 1128 Submission of the United States, 14 July 2008, ¶ 2 ("*Merrill & Ring – U.S. 1128 Submission*"); **RL-52**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Objection to Jurisdiction of Respondent United States of America, 5 December 2005, p. 2: ("NAFTA Chapter Eleven prescribes a three-year limitations period in which claims must be brought. The United States has thus only consented to arbitrate claims that are submitted to arbitration within three years of the date that the investor or enterprise first knew or should have known of the alleged breach and any resulting loss or damage."); **RL-53**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Hearing on Jurisdiction Day 1, 23 March 2006, p. 12:22: ("Time bar is jurisdictional in nature"); **RL-11**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 February 2014, fn. 2 (as quoted above in Merrill & Ring) ("*DIBC – U.S. 1128 Submission*"); **RL-54**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Reply in Further Support of Request for Bifurcation, 29 April 2005, p. 3: ("Article 1117(2)'s limitations period is at the core of the NAFTA Parties' consent to arbitration. It establishes unequivocally the temporal limitations to that consent."). See also, **RL-55**, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Submission of the United States of America, 17 April 2015, ¶

47. Mexico similarly stressed the jurisdictional nature of the limitations period in its Article 1128 submission in the *Eli Lilly v. Canada* dispute:

> The NAFTA Parties made their consent to arbitration conditional upon compliance with the procedural requirements established in NAFTA Chapter Eleven, including Article 1116(2) and 1117(2). Mexico agrees, and has previously stated, that a Chapter Eleven arbitral tribunal's jurisdiction *ratione temporis* is reliant on a claimant's compliance with the requirement to submit its claims to arbitration within three years of the date that it first acquired, or ought to have first acquired, knowledge of the alleged breach and knowledge that the investor (or investment, as the case may be) has incurred loss or damage.[69]

48. Despite the weight of authority against it, and the total contradiction to its previous legal position, the Claimant now says that it has no obligation to establish jurisdiction *ratione temporis* under Articles 1116(2) and 1117(2) because, in its view, compliance with these provisions goes towards the admissibility of its claim and the burden is on Canada to prove the claim is untimely.[70] The Claimant is wrong.

49. First, the Claimant's interpretation does not accord with a plain reading of Article 1122(1) and the procedural requirements under Articles 1116-1121 that establish Canada's consent to arbitrate. The Claimant argues that the purpose of Articles 1116(2) and 1117(2) is to state "what an investor must do in order to 'claim that another Party has breached an obligation,'"[71]

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10 ("*Spence – U.S. Submission*"); **RL-22**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Submission of the United States of America, 11 March 2016, ¶ 7 ("*Corona Materials – U.S. Submission*"); **RL-56**, *The Renco Group, Inc. v. Republic of Peru* (UNCITRAL Case No. UNCT/13/1) Second Submission of the United States of America, 1 September 2015, ¶ 4.

[69] **RL-10**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶ 5 ("*Eli Lilly – Mexico 1128 Submission*"). See also **RL-57**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 25 July 2014, ¶ 4 ("*Mesa – Mexico 1128 Submission*"); **RL-58**, *ADF Group Inc., v. United States of America* (ICSID Case No. ARB(AF)/00/1) Second Article 1128 Submission of the United Mexican States, 22 July 2002, p. 4.

[70] Claimant's Reply Memorial, ¶¶ 34-35. It is also a well-established principle, which the Claimant does not deny, "that the Claimant has to prove that the Tribunal has jurisdiction." (**CL-75**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.11 ("*Pac Rim – Decision on Jurisdictional Objections*"); **RL-59**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011, ¶ 277; **RL-6**, *Bilcon – Award*, ¶ 228) Thus, if this Tribunal determines that Articles 1116(2) and 1117(2) impose jurisdictional bars (as it should), the Claimant agrees that it has the burden of establishing compliance with these provisions.

[71] **CE-1**, Expert Report by Professor Dan Sarooshi, ¶ 38 ("Sarooshi Report I").

dismissing Article 1122(1) as simply an "enabling provision."[72] The Claimant's interpretation, however, would render Article 1122(1) *inutile*. That provision states: "Each Party consents to the submission of a claim to arbitration *in accordance with the procedures set out in this Agreement*."[73] The Claimant's argument that Article 1122(1) is merely an "enabling provision" ignores the latter part of the sentence. Moreover, the Claimant's interpretation ignores the basic principle that "an agreement [to arbitrate] is formed by offer and acceptance,"[74] meaning that an agreement to arbitrate between States and foreign investors comes into existence only when an investor accepts "a host state's standing offer as made (i.e., under its terms and conditions)."[75] Under the NAFTA, the "terms and conditions" pursuant to which Canada consents to arbitrate include the submission of timely claims under Articles 1116(2) and 1117(2). If a claim is not timely, then Canada has not consented to arbitration and the tribunal has no jurisdiction.

50. Second, the Claimant tries to use the title of Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration) to distinguish Articles 1116(2) and 1117(2) as concerning "other procedures referred to in Chapter 11" that are unrelated to the terms and conditions necessary to establish consent.[76] This is a weak form-over-substance argument that says nothing as to why Article 1121(1) is a "procedure" necessary to engage consent to arbitrate but Articles 1116(2) and 1117(2) are not. Indeed, the similar wording in Articles 1116(2), 1117(2), and Article 1121(1) establishes that all three provisions describe necessary criteria to engage consent to arbitrate. Article 1121(1) states "A disputing investor *may submit a claim* under Article 1116 to arbitration *only if* […]" The Claimant agrees this makes Article 1121(1) a jurisdictional provision.[77] But Article 1116(2) says the same thing except in the negative: "An investor *may not make a claim if* [...]" It is sophistry for the Claimant to argue that one is a jurisdictional provision but the other is not merely because one is phrased in the positive and the other in the negative. Indeed, the meaning of Article 1116(2) would not change at all if it was switched into

[72] **CE-1**, Sarooshi Report I, ¶ 37.

[73] NAFTA, Article 1122(1) (emphasis added).

[74] **RL-60**, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1) Award, 2 July 2013, ¶ 6.2.1 ("*Kilic – Award*").

[75] **RL-60**, *Kilic – Award*, ¶ 6.2.1.

[76] **CE-1**, Sarooshi Report I, ¶ 39.

[77] Claimant's Reply Memorial, ¶ 39.

an affirmative sentence: "An investor may make a claim only if no more than three years have elapsed…" The French and Spanish texts of the NAFTA also establish the same and further discredit the Claimant's argument on this point.[78] The better explanation is the obvious one – Articles 1116(2) and 1117(2) describe conditions that must be complied with in order to submit a claim to arbitration.

51. Third, the Claimant cherry-picks which "procedures" would engage consent to arbitration under Article 1122(1). For example, the Claimant agrees that compliance with Articles 1116(1) and 1117(1) is a jurisdictional requirement,[79] but argues that the subparagraphs that immediately follow (Articles 1116(2) and 1117(2)) go to admissibility. This makes little sense in light of the text of the provisions themselves. Article 1116(1) states: "An investor of a Party may submit to arbitration under this Section a claim…" while Article 1116(2) states "An investor may not make a claim if…" Again, it is specious for the Claimant to argue that the former concerns jurisdiction while the latter concerns admissibility. The Claimant's argument that it carries the burden of establishing both jurisdiction *ratione materiae* and *ratione personae* but not *ratione temporis* is indiscriminate.

52. Fourth, the Claimant's argument that Articles 1116(2) and 1117(2) concern questions of admissibility that require the respondent NAFTA Party to prove when a claimant "first acquired" knowledge of breach and loss illogically imposes the burden on the party with more limited information on the issue. It is the claimant's knowledge that triggers the limitations period and it makes little sense to impose the burden on the respondent to prove when the claimant first acquires knowledge. While in some scenarios relevant facts may be ascertainable from public sources, it is ultimately the claimant that possesses the most direct information on when it first acquired knowledge of breach and loss. If such information is not publically available, the only

[78] The French and Spanish versions of the NAFTA further discredit the Claimant's attempt at distinguishing Article 1121(1) from Articles 1116(2) and 1117(2). In French, Article 1121(1) is phrased in the positive tense: ("Un investisseur contestant pourra soumettre une plainte à l'arbitrage, aux termes de l'article 1116, uniquement…") whereas Article 1116(2) is in the negative: ("Un investisseur ne pourra soumettre une plainte à l'arbitrage si plus de troise ans…"). In Spanish, Article 1121(1) states: ("Un inversionista contendiente podrá someter una reclamación al procedimiento arbitral de conformidad con el Articulo 1116, sólo si…" while Article 1116(2) states "El inversionista no podrá presentar una reclamación si han transcurrido más de tres anos..."). The meaning of these provisions would not change if their tenses were changed to be the same.

[79] **CE-1**, Sarooshi Report I, ¶ 34 with respect to the elements of investments under article 1139 proving *ratione materiae*. The Claimant's expert quotes the words in NAFTA Article 1116(1): ("claim that another Party has breached an obligation"); Claimant's Memorial, ¶¶ 171-175.

way for the respondent NAFTA Party to establish the claimant's knowledge would be through document production. A reasonable interpretation of Articles 1116(2) and 1117(2) requires the Claimant to prove its own knowledge in order to establish the timeliness of its claims, and the jurisdiction of the Tribunal.[80]

53. Fifth, the Claimant's reliance on an article written by Jan Paulsson is inapposite as the article says nothing about the NAFTA.[81] The text of the treaty, in particular Articles 1116(2), 1117(2) and 1122(1), is the source of the conditions under which a NAFTA Party consents to arbitrate.[82] Whatever academic debate exists on how to distinguish between jurisdiction and admissibility generally, and however the question of jurisdiction versus admissibility might be treated differently under different treaties, when it comes to the only question that matters for this Tribunal – do NAFTA Articles 1116(2) and 1117(2) engage consent to arbitrate under Article 1122(1) – the theoretical distinctions that Professor Sarooshi discusses in the abstract are beside the point.

54. Sixth, and finally, the cases relied upon by the Claimant in support of its assertion that compliance with Articles 1116(2) and 1117(2) is a question of admissibility are inapposite and unhelpful to its cause. In *Pope & Talbot*, the tribunal did not assert that time-bar was a question

[80] The *Apotex* tribunal stated that "Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction in this regard." (**RL-5**, *Apotex – Award on Jurisdiction*, ¶ 150). In coming to this determination, the Tribunal relies on the decision in *Phoenix v. Czech Republic* which examined the parties' burden of proof encompassing the ratione materia, personae and temporis elements at the jurisdictional level. It stated that: ("when a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven."). **CL-84**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶ 64.

[81] Claimant's Reply Memorial, ¶¶ 36-38, citing **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).

[82] In any event, the Claimant's own submission proves this point, where it quotes Professor Paulsson when he states: ("[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."). Claimant's Reply Memorial, ¶ 36. That the NAFTA limitation period is *lex specialis* has been confirmed numerous times, including by the tribunal in *Bilcon*: ("The Tribunal agrees that the general rules of international law on time-limits and their consequences are applicable to the question before it, but is also aware that specific terms of NAFTA might enjoy priority as leges speciales. Thus, case law must be viewed in the context of the particulars of the laws at play and the factual situations in each case."). **RL-6**, *Bilcon – Award*, ¶ 258.

of admissibility, as the Claimant suggests.[83] The tribunal's statement that Canada's motion was "in the nature of an affirmative defense" was not a general legal conclusion on jurisdiction versus admissibility (indeed, the question was never raised) but rather an observation as to how Canada had raised its time-bar objection in response to a non-consecutive submission of a waiver by the investor's investment.[84] Similarly, *Feldman* concerned whether Mexico should be estopped from relying on the limitations period given its own actions,[85] which is clearly a different issue and says nothing as to whether time-bar relates to jurisdiction or admissibility under NAFTA Chapter Eleven. Indeed, Professor Sarooshi misunderstands *Feldman* as confirming NAFTA time-bar as "a matter of admissibility and not jurisdiction"[86] when in fact the tribunal explicitly declared NAFTA Article 1117(2) to be a "jurisdictional question."[87] The Claimant's reliance on *Tecmed* is also irrelevant because that tribunal's analysis did not consider whether consent to arbitrate in that treaty was linked to compliance with filing the claim within the limitations period, which is the case in the NAFTA.[88]

55. For all of the above reasons, submitting a claim within the requisite three-year window under Articles 1116(2) and 1117(2) is an essential element of a NAFTA Parties' consent to arbitrate and failure to do so means a tribunal has no jurisdiction to consider the claim.

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[83] **CE-1**, Sarooshi Report I, ¶ 32, referring to **CL-70**, *Pope & Talbot v. Government of Canada* Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record (the "Harmac Motion"), 24 February 2000, ¶ 11 ("*Pope & Talbot – Harmac Motion*").

[84] **CL-70**, *Pope & Talbot – Harmac Motion*, ¶ 11. The investor had filed a timely claim but omitted to file a waiver with respect to its investment Harmac Pacific, Inc. pursuant to Article 1121(1) until after its Notice of Arbitration. Canada argued that this meant the limitations period had expired with respect to Harmac, but the tribunal decided that there was no evidence to presume that there had been actual or constructive knowledge of damage at the time Canada suggested. The scenario there bears no resemblance to this or other NAFTA cases in the past 15 years.

[85] **RL-8**, *Feldman – Award*, ¶¶ 55, 59. The case concerned the taxing of cigarette exports by the Claimant, who alleges the Respondent failed to provide rebates under tax legislation exported abroad. The Claimant's sought to estop the Respondent from invoking any limitation period as they allege oral assurances made by government officials constituted an agreement which should "toll" the limitation period. The Tribunal dismissed the Claimant's request at ¶ 63, noting that: ("[A]ny other state behavior short of such formal and authorized recognition would only under exceptional circumstances be able to either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense.").

[86] **CE-1**, Sarooshi Report I, ¶ 35, fn. 12, arguing that the *Feldman* tribunal considered time-bar to be "a matter of admissibility and not jurisdiction")

[87] **RL-8**, *Feldman – Award*, ¶¶ 46-47 (referring to time-bar as a "preliminary jurisdictional question" and a "jurisdictional issue.").

[88] **CE-1**, Sarooshi Report I, ¶ 33. The *Tecmed* tribunal's analysis did not extend to or discuss any matter engaging the treaty parties' consent to arbitrate. **CL-71**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2) Award, 29 May 2003, ¶ 72.

C. The Claimant "First Acquired" Knowledge of the Alleged Breach and Knowledge of Incurred Loss Before January 16, 2012, Which Means the Tribunal Has No Jurisdiction Under NAFTA Articles 1116(2) and 1117(2)

56. As explained in Canada's Counter-Memorial, Articles 1116(2) and 1117(2) stipulate the conditions that trigger the three-year limitation period under NAFTA Chapter Eleven.[89] A claimant "first acquires" knowledge once, and at a particular moment in time; that is, knowledge is acquired on a specific "date". The task of a NAFTA tribunal is straightforward: it must determine the specific date that a claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of incurred loss.[90] This interpretation has been consistently applied by NAFTA tribunals[91] and consistently affirmed by all three NAFTA

[89] Canada's Counter-Memorial, ¶¶ 139-151.

[90] The Claimant must prove with evidence that it "first acquired" knowledge of the alleged breach and incurred loss on a specific date that falls within the limitation period. The Claimant cannot merely assert when it "first acquires" knowledge because the acquisition of knowledge is a question of fact. **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 54: ("This is foremost a question of fact."). With the exception of constructive knowledge, which is imputed; **RL-61**, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Interim Award, 25 October 2016, ¶ 163: ("If the Claimants cannot establish, to an objective standard, that they first acquired knowledge of the breaches and losses that they allege in the period after 10 June 2010, they fall at the first hurdle. To surmount this obstacle, each claimant must show, in respect of each property claim, that they have a cause of action, a distinct and legally significant event that is capable of founding a claim in its own right, of which they first became aware in the period after 10 June 2010.") ("*Spence – Interim Award*"). See also ¶ 166: ("The jurisdictional aspects of this case are heavily fact-specific. Although interpretations of law, notably of CAFTA Article 10.1.3 and 10.18.1, are necessary, the Tribunal's assessment ultimately turns on appreciations of fact."); ¶ 239: ("[T]he Tribunal observes that it is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction."). The burden on a claimant to prove knowledge with evidence was also elucidated by the CAFTA tribunal in *Pac Rim v. El Salvador*: ("Accordingly, this Tribunal is here required to determine finally whether it has jurisdiction over the Claimant's CAFTA claims on the proven existence of certain facts because all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour.") (**CL-75**, *Pac Rim – Decision on Jurisdictional Objections*, ¶ 2.9). In this case, the Claimant must prove with evidence that it "first acquired" knowledge of the alleged breach and of incurred loss on a specific date on or after January 16, 2012 (This date is not in dispute between the parties. NAFTA Article 1137(1)(a) – Time when a Claim is Submitted to Arbitration: ("1. A claim is submitted to arbitration under this Section when: (a) the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention has been received by the Secretary-General…")), and the task of this Tribunal is to determine based on the evidence provided whether the Claimant has met its burden. If the evidence shows that the Claimant "first acquired" or "should have first acquired" knowledge of breach and loss before January 16, 2012, the Tribunal must conclude that the Claimant's Request for Arbitration was submitted after the expiration of the limitation period and that it has no jurisdiction to hear the claim.

[91] **RL-6**, *Bilcon – Award*, ¶ 281: (establishing that the three year cut-off date is June 17, 2005); **RL-5**, *Apotex – Award on Jurisdiction*, ¶ 315 (establishing that the three year cut-off date is June 5, 2006); **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 53: (establishing that the three year cut-off date is March 12, 2001).

Parties.[92] It was also recently affirmed by the tribunal in *Spence v. Costa Rica*, which was interpreting the nearly identical time-bar language in CAFTA[93]:

> Article 10.18.1 concerns *the date* on which the claimant *first* acquired knowledge of the breach that is alleged. The linkage between the date and the claimant's first acquisition of knowledge requires the identification of a date certain on which knowledge was first acquired. While it is possible to conceive of a claim in which a sequence of temporally closely linked events warrants a conclusion that the claimant first acquired knowledge *on or about a given date*, a plain reading of the text of the provision, legal certainty and the object and purpose of the limitation clause, all require the identification of a specific date on which the claimant must have been said to have acquired knowledge of the breach.[94]

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[92] **RL-14**, *Merrill & Ring – U.S. 1128 Submission*, ¶ 5: ("An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular '*date*.' Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis") (emphasis added); **RL-12**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of Mexico, 14 February, 2014, ¶ 22: ("As Canada has demonstrated, all three NAFTA Parties have agreed that the term "first acquired" means that the time limitation starts when an investor first acquires knowledge of an alleged breach and loss at a particular moment in time") (emphasis added) ("*DIBC – Mexico 1128 Submission*"); **RL-16**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Canada's Reply to the NAFTA Article 1128 Submissions, 3 March 2014, ¶ 33: ("The NAFTA three-year time limitation provision exists to ensure claims are brought within a finite period of time from the moment an investor first acquired knowledge of the breach and loss") (emphasis added) ("*DIBC – Canada's Reply to 1128 Submissions*"); **RL-19**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of the United States of America, 8 May 2015, ¶ 5: ("An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular 'date'") (emphasis added) ("*Mercer – U.S. 1128 Submission*"); **RL-21**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of the United States of America, 18 March 2016, ¶ 4: ("An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis") (emphasis added) ("*Eli Lilly – U.S. 1128 Submission*").

[93] CAFTA Article 10.18.1 states: ("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.").

[94] **RL-61**, *Spence – Interim Award*, ¶ 208 ("*Spence – Interim Award*") (emphasis in original). The interpretation and approach was also recently affirmed by the CAFTA tribunal in *Corona Materials v. Dominican Republic*: ("Article 10.18.1 requires the Tribunal to determine the date on which the Claimant "*first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.1 6.1 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*." A comparison of that date with the 'critical date' [i.e. three years before the date of the claim was filed] will then enable the Tribunal to decide whether it is competent to hear the claims in this proceeding: Should the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and of the corresponding damage be earlier than the critical date, the Tribunal would have to conclude that the Claimant's Request for Arbitration was submitted after the expiration of the limitation date and, as a consequence, the Tribunal would have no jurisdiction to hear the Claimant's claims.") See **RL-9**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article

57. The "specific date" on which the Claimant "first acquired" knowledge of the alleged breach and knowledge of incurred loss arising from the 2004 Guidelines is *res judicata* and the Claimant's attempt to circumvent Articles 1116(2) and 1117(2) by arguing otherwise is barred.

58. In the Mobil/Murphy arbitration, the Claimant argued that the Board's adoption of the 2004 Guidelines on November 5, 2004 triggered an obligation to make expenditures that would continue throughout the entire life of the projects.[95] It contended "compliance with the 2004 Guidelines is mandatory, and [would] compel Hibernia and Terra Nova to spend $189 million more on R&D throughout the remaining life of the Hibernia and Terra Nova projects, than they would have otherwise undertaken".[96] The Claimant argued that its "substantial obligations are actionable now and already involve the Respondent in NAFTA violations,"[97] including for the 2012-2015 period. The Claimant cited *Grand River* (which it now says has no relevance[98]) to justify the timeliness of its Mobil/Murphy claim under Articles 1116(2) and 1117(2):

> [F]or limitation purposes, time starts to run because a loss is incurred from the date on which the relevant act or measure takes effect or the date of the Investor's knowledge, even if the Investor is not required to make a financial outlay at that point…So, in our case, Claimants' loss in damage consists in the obligations created through the Board's implementations of the Guidelines, and those obligations, of course, already exist. The fact that some of their effects will not be felt until later years or indeed that Claimants' obligations are met in part through future conduct, through future expenditure, is irrelevant. So, *Grand River* confirms that Claimants have incurred loss or damage.[99]

10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 200 (emphasis added) ("*Corona Materials – Award on Preliminary Objections*").

[95] As noted in the Mobil/Murphy Decision: the "adoption of the 2004 Guidelines" created "a legal obligation for HMDC and Suncor to undertake additional expenditures over the life of the projects" (**C-1**, Mobil/Murphy – Decision, ¶ 421). See also, **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶¶ 238, 247, 301(d); **C-1**, Mobil/Murphy – Decision, ¶ 358. See also Canada's Counter-Memorial, ¶¶ 183-185.

[96] **C-1**, Mobil/Murphy – Decision, ¶ 199.

[97] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 248.

[98] See for example, Claimant's Reply Memorial, ¶ 60; **CE-1**, Sarooshi Report I, ¶ 34.

[99] **R-74**, Mobil/Murphy – Day One Hearing Transcript, pp. 127:18-128:22. The Claimant made an identical argument in its pleadings; see for example, **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶¶ 238-239: ("Claimants' loss and damage consist in the obligations created through the Board's implementation of the Guidelines. Those obligations already exist. The fact that some of their effects will not be felt until later years, or indeed that Claimants' obligations are to be met in part through future conduct or expenditure, is irrelevant…Under the circumstances, to the extent that Article 1116 is relevant at all, *Grand River* unequivocally confirms that, through the obligations to which Claimants are exposed by virtue of the Board's implementation of the Guidelines, Claimants have already "incurred loss or damage" for the purposes of the NAFTA.") (emphasis added).

59. Indeed, it was precisely because the Claimant had "first acquired" the requisite knowledge of breach and loss on November 5, 2004 that it demanded an award of all its future damages:

> [T]he NAFTA provides for a three-year statute of limitations, which may well prevent Claimants from bringing future claims based on the Guidelines (which were first applied to the Hibernia and Terra Nova Projects in 2004). Thus, it appears that Claimants can only receive full relief for the damages caused by the Guidelines through a calculation of future damages on the principles and variables espoused by the Claimants…[100]

60. The Claimant was correct with respect to the impact of NAFTA Articles 1116(2) and 1117(2), which made all the more critical to provide the Mobil/Murphy tribunal with a different (or alternate) damages model rather than rely solely on the highly speculative approach it took. In any event, it cannot now be disputed that November 5, 2004 is the "specific date" on which the Claimant "first acquired" knowledge of breach and loss for the purpose of NAFTA Chapter Eleven.[101]

61. The Mobil/Murphy tribunal confirmed this in its Decision:

> According to the Claimants, the compensable damage was incurred at the adoption of the 2004 Guidelines [on November 5, 2004], which they assert created a legal obligation for HMDC and Suncor to undertake additional expenditures over the life of the projects. This obligation to make future expenditures is, the Claimants say, "loss or damage" within the meaning of Article 1116.[102]

62. While the tribunal disagreed that the Claimant had in fact incurred all of the specific damages it sought to recover,[103] the tribunal agreed that the Claimant "first acquired" knowledge

[100] **R-87**, Mobil/Murphy – Claimants' Post-Hearing Brief I, ¶ 67.

[101] Even the Claimant's Request for Arbitration confirmed this understanding: "Canada's treaty partners allowed it to keep the local content requirement that existed in 1994, but they did so based on Canada's explicit obligation not to put into place any new local content requirement or make the existing one in 1994 more restrictive. Ten years later, Canada breached that obligation. In November 2004, the Canada-Newfoundland Offshore Petroleum Board (the "Board") adopted Guidelines for Research and Development Expenditures (the "Guidelines") that require investors in offshore petroleum projects to pay millions of dollars per year for research and development in the Province of Newfoundland and Labrador (the "Province"). Request for Arbitration, ¶ 2.

[102] **C-1**, Mobil/Murphy – Decision, ¶ 421.

[103] **C-1**, Mobil/Murphy – Decision, ¶¶ 440, 469.

of breach and loss on November 5, 2004 because "the introduction of the 2004 Guidelines triggered an obligation to make expenditures that would continue over the life of the projects."[104]

63. No further evidence or inquiry is needed for the purposes of applying Articles 1116(2) and 1117(2). The issue of when the Claimant first acquired knowledge of breach and loss over the lifetime of the projects has already been determined by a competent tribunal and this Tribunal cannot reconsider it.

64. The Claimant tries to avoid this in its Reply Memorial by inventing the new approach that it "first acquired" knowledge of the breach after November 5, 2004 and before the time-bar cut-off date of January 16, 2012 because the "alleged breach" at issue in this arbitration is not the adoption of the Guidelines by the Board in November 2004, but "the express failure of Canada to cease applying the Guidelines to Mobil on the basis of the findings in the Decision."[105] The Claimant attributes this alleged "breach" to a letter written by the Board to the Claimant on July 9, 2012 where the Board confirmed its mandate "to ensure that research and development and education and training projects, initiatives and expenditures are aligned with the eligibility criteria and benchmarks established by these guidelines."[106] According to the Claimant, the Board's letter of July 9, 2012 is a new breach of the NAFTA and the limitation period under Articles 1116(2) and 1117(2) starts to run only as of that date.[107] The Claimant's argument can be dismissed on any one of the following eight grounds.

65. First, the Claimant cannot allege an entirely new breach of the NAFTA for the first time in its Reply Memorial. Upon receipt of the Claimant's Request for Arbitration, the ICSID Secretariat wrote to the Claimant and specifically asked it to identify the alleged breach at issue

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

[105] Claimant's Reply Memorial, ¶ 77.

[106] The Claimant wrote the Board on July 5, 2012, seeking "the Board's assurance that the Guidelines will not be applied to [the Claimant] for 2012 or any future period." (**C-174**, Letter from P. Sacuta, ExxonMobil Canada Ltd., to J. Bugden, CNLOPB (Jul. 5, 2012)). On July 9, 2012, the Board responded stating: ("[T]he validity of the Board's guidelines have been affirmed by the Courts and we will continue to verify an Operator's obligation to ensure that research and development and education and training projects, initiatives and expenditures are aligned with the eligibility criteria and benchmarks established by these guidelines.") (**C-176**, Letter from J. Bugden, CNLOPB to P. Sacuta, ExxonMobil Canada Ltd. (Jul. 9, 2012)).

[107] Claimant's Reply Memorial, ¶ 77: ("[T]he 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.").

in its claim in light of the limitation period under Articles 1116(2) and 1117(2).[108] In response, the Claimant confirmed that the alleged breach at issue in this claim is the Board's adoption of the Guidelines in November 2004 and did not identify the Board's July 9, 2012 letter as a separate alleged breach.[109] Based on this representation, the ICSID Secretariat registered the Claimant's Request for Arbitration on February 18, 2015.[110] The Claimant cannot now unilaterally amend its claim to allege an entirely new breach of the NAFTA.

66. Second, the Claimant does not explain how the Board's letter constitutes a breach of the NAFTA, nor does it identify any provision of the NAFTA that the Board's July 9, 2012 letter infringes. The Claimant appears to allege that the Mobil/Murphy Decision created new obligations pursuant to the NAFTA that can lead to a stand-alone independent breach of the NAFTA. However, the Claimant fails to explain how this results.

67. Third, the Claimant's argument that the Mobil/Murphy tribunal's Decision "required" the Board to refrain from "implementing the 2004 Guidelines" and that the Board's letter is a breach of that requirement[111] is false. The Decision does not (and cannot) contain any such requirement because, as the Claimant itself has confirmed, "the NAFTA permits only monetary relief [and] this Tribunal does not have the option of simply enjoining enforcement of the Guidelines against the Claimants."[112] As explained in Part II.B above, there is no obligation on the part of a NAFTA Party to revoke or change a measure which violates the treaty.

68. Fourth, the Claimant's argument that the Board's July 9, 2012 letter constitutes a new breach of the NAFTA for which the Claimant "first acquired" knowledge under NAFTA Articles 1116(2) and 1117(2) contradicts its prior (and repeated) recognition in the Mobil/Murphy

[108] **R-287**, Letter from Martina Polasek, ICSID to Claimant (Feb. 2, 2015).

[109] **R-288**, Letter from David W. Rivkin, Debevoise & Plimpton LLP to Martina Polasek, ICSID (Feb. 6, 2015), p. 2: ("The Decision establishes that *(i)* the Guidelines represent a continuing violation of Article 1106 of the NAFTA, and *(ii)* Canada is liable for actual damages incurred by MICI as a result of the Guidelines…").

[110] Notice of Registration of the Claimant's Request for Arbitration.

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

[112] See for example, **R-87**, Mobil/Murphy – Claimants' Post-Hearing Brief I, ¶ 67. This is a result of NAFTA Article 1135(1)(a): ("Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest…").

arbitration that the 2004 Guidelines would apply over the lifetime of the Hibernia and Terra Nova projects:

- "[T]he contested measure is still in force at the date of the hearing; it will still be in force at the date of the Award; and it will still be in force in the future years to come."[113]
- "[F]or purposes of Canadian law, Claimants and other owners of Hibernia and Terra Nova accept the application of the Guidelines to those projects."[114]
- "[T]here can be no serious doubt that Claimants are entitled to compensation for the damage resulting from Canada's prospective application of the Guidelines through the end of the projects."[115]
- "[T]he Guidelines are going to remain in force."[116]

69. In fact, it was precisely because the 2004 Guidelines would apply for the duration of the Hibernia and Terra Nova projects that they were found to fall outside of Canada's Annex I reservation.[117] In light of this, and the Claimant's statements above, the Claimant cannot now credibly argue that it "first acquired" knowledge of the breach (i.e., the application of the 2004 Guidelines to the Hibernia and Terra Nova projects) only when it received the Board's letter on July 9, 2012.

70. Fifth, it is not possible that the Claimant "first acquired" knowledge of the alleged breach on July 9, 2012 because the Claimant alleges that it incurred damages before that date.[118] If the Board's letter was in fact the "alleged breach" at issue in this arbitration then the Claimant could only incur damages for that breach after July 9, 2012 – a claimant cannot seek damages for a breach that has yet to transpire. But, the Claimant seeks damages that it alleges were incurred

[113] **R-74**, Mobil/Murphy – Day One Hearing Transcript, pp. 129:21-130:3.

[114] **R-87**, Mobil/Murphy – Claimants' Post-Hearing Brief I, ¶ 86. See also, **R-245**, Mobil/Murphy – Ringvee I, ¶ 11: ("By that time [2009], the Canadian court case challenging the Guidelines had been dismissed. We therefore recognized…that we were bound by Canadian law to comply with the Guidelines.").

[115] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 234.

[116] **R-74**, Mobil/Murphy – Day One Hearing Transcript, pp. 136:6-7.

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

[118] See e.g. **R-288**, Letter from David W. Rivkin, Debevoise & Plimpton LLP to Martina Polasek, ICSID (Feb. 6, 2015), p. 2 (states that the Claimant incurred damages as of January 1, 2012); Claimant's Reply Memorial, ¶ 73; **CW-1**, First Witness Statement of Paul Phelan, ¶ 50, List of Annexes, Annexes A, C, D, K, L ("Phelan Statement I"); **CW-9**, Phelan Statement II, ¶ 12, List of Annexes, Annexes A, C, D, K, L.

between January 1, 2012 and July 9, 2012.[119] The flaw in the Claimant's reasoning is evident, but in any event, the Claimant does not specify any damages caused by the Board's letter that are independent of the damages it alleges were caused by the adoption of the 2004 Guidelines.

71. Sixth, the Claimant's new argument is a transparent and impermissible attempt at fabricating a breach within the limitation period so as to save an otherwise time-barred claim. If the Claimant's approach is accepted in this case, then any claimant could meet the requirements of Articles 1116(2) and 1117(2) by simply writing a letter to the respondent government requesting that it withdraw a measure no matter how many years after the measure was enacted. This would completely erode legal certainty and the purpose of NAFTA Chapter Eleven's limitation clause.

72. Seventh, the Claimant's letter dated July 5, 2012 requesting the Board to "waive" its obligations under the 2004 Guidelines is a red herring. The Claimant is fully aware that the Board is not legally empowered under the Accord Act or Benefits Plans to regulate individual interest holders of projects, and rather only has the authority to regulate the operators – HMDC at Hibernia and Suncor at Terra Nova.[120] The Board does not have the legal authority to "waive" the Claimant's obligations under the 2004 Guidelines and the Claimant's reliance on the Board's so-called "refusal" to "waive" is inapposite.

73. Eighth, and finally, the Claimant's assertion of the "fact" that it "first acquired" knowledge of breach of the NAFTA only on July 9, 2012 is grounded solely on a block citation to Professor Sarooshi's opinion and makes no mention of the voluminous contrary statements the Claimant itself made during the Mobil/Murphy arbitration.[121] Professor Sarooshi's time-bar work-around based on the Board's July 9, 2012 letter constituting a new breach of the NAFTA which restarts the limitation periods is not legally or factually sound.

74. The Claimant then argues that if the Board's July 9, 2012 letter is rejected as constituting a new breach of the NAFTA, then the limitation period should start to run when the Claimant "first

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

[120] See footnote 54 above, which explains that the Board's authority under ss. 53 and 138(1)(b) of the Accord Act extends only (with a limited exception not relevant here) to the operator of the project and not to individual owners like the Claimant.

[121] Claimant's Reply Memorial, ¶ 76.

acquired" knowledge of loss, which it argues is the date it incurs "actual losses".[122] Relying on the Mobil/Murphy tribunal's reasoning on the meaning of "incurred" under principles of compensation (that is, a loss which is actual),[123] the Claimant argues that the same meaning should be applied to "first acquired…knowledge of incurred loss" under Articles 1116(2) and 1117(2). The Claimant's argument has no merit.

75. First, the Claimant's argument contradicts the well-established principle that the specific quantum of loss need not be known to establish the requisite knowledge under Articles 1116(2) and 1117(2). As Canada explained in its Counter-Memorial,[124] this has been confirmed in *Grand River*,[125] *Mondev*,[126] *Apotex*,[127] *Bilcon*[128] and *Mesa*.[129] It was also recently confirmed under the CAFTA in *Spence*:

> On the issue of whether loss or damage must be crystallised, and whether the claimant must have a concrete appreciation of the quantum of that loss or damage, the Tribunal agrees with the approach adopted in *Mondev, Grand River, Clayton* and *Corona Materials* that the limitation clause does not require full or precise knowledge of the loss or damage. Indeed, in the Tribunal's view, the Article 10.18.1 requirement, inter alia, to point to the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It

[122] Claimant's Reply Memorial, ¶¶ 77-83.

[123] Claimant's Reply Memorial, ¶ 80.

[124] Canada's Counter-Memorial, ¶ 142.

[125] **RL-3**, *Grand River – Decisions on Objections to Jurisdiction*, ¶¶ 77-78.

[126] **RL-4**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87 ("*Mondev – Award*") .

[127] **RL-5**, *Apotex – Award on Jurisdiction*, ¶¶ 318-320, 324-325.

[128] **RL-6**, *Bilcon – Award*, ¶ 275: ("The Tribunal agrees with the reasoning of its predecessors on this point. The plain language of Article 1116(2) does not require full or precise knowledge of loss or damage. It might be that some qualification can be read into the plain language, such as a requirement that the loss be material. To require a reasonably specific knowledge of the amount of loss would, however, involve reading into Article 1116(2) a requirement that might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue; it would have to be determined in each case not only whether there is actual or constructive knowledge of loss of damage, but whether the investor has knowledge that is sufficiently "actual" or "concrete".).

[129] **RL-7**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 31 March 2016, ¶ 313. The Claimant argues that Mesa is irrelevant because it was addressing Article 1116(1) rather than 1116(2) (Claimant's Reply Memorial, ¶ 63). Thus, the Claimant alleges that the meaning of "incur" is different under Article 1116(1) than 1116(2). This is illogical and should be rejected.

> neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.[130]

76. Second, the Claimant already confirmed its understanding of the meaning of "first acquired…knowledge of incurred loss" under Articles 1116(2) and 1117(2) during the Mobil/Murphy arbitration. Specifically, the Claimant took the position that: "a Party [is] said to incur losses, debts, expenses or obligations, all of which may significantly damage the Party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred, even though the amount or extent may not become known until some future time."[131]

77. The Claimant cited the *Grand River* decision multiple times over the course of the Mobil/Murphy arbitration in support of its assertion that the projects were already exposed to R&D and E&T obligations pursuant to the 2004 Guidelines across their entire lifetimes.[132] While the Claimant attempts to rely on the Mobil/Murphy Decision to establish a different meaning of "incur" under Articles 1116(2) and 1117(2), the Claimant obviously overlooked that tribunal's own statement affirming the reasoning of the tribunal in *Grand River*.[133]

78. Third, even the Mobil/Murphy tribunal recognized that the meaning of "incur" under Article 1116 is different than its meaning under principles of compensation: "The issue of whether the damages are *incurred* so as to allow the Tribunal to exercise jurisdiction under Article 1116(1) and grant compensation is different from the issue of whether the amount of these damages can be established with sufficient certainty to be compensated."[134] The Claimant's reliance on the Mobil/Murphy tribunal's understanding of the meaning of "incur" under principles of compensation is thus inapposite under Articles 1116(2) and 1117(2).

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[130] **RL-61**, *Spence – Interim Award*, ¶ 213 (emphasis added).

[131] **R-74**, Mobil/Murphy – Day One Hearing Transcript, pp. 128:6-12.

[132] See e.g. **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶¶ 238-248: ("Under the circumstances, to the extent that Article 1116 is relevant at all, *Grand River* unequivocally confirms that, through the obligations to which Claimants are exposed by virtue of the Board's implementation of the Guidelines, Claimants have already "incurred loss or damage" for the purposes of the NAFTA."); **R-74**, Mobil/Murphy – Day One Hearing Transcript, pp. 127:10-128:16; **R-87**, Mobil/Murphy – Claimants' Post-Hearing Brief I, ¶ 33.

[133] **C-1**, Mobil/Murphy – Decision, ¶ 428: ("This view is confirmed by the *Grand River* decision, which states that 'damage or injury may be incurred even though the amount or extent may not become known until some future.'").

[134] **C-1**, Mobil/Murphy – Decision, ¶ 431.

79. Fourth, the Claimant already sought $27.68 million in compensation from Canada for damages incurred between 2012 and 2015.[135] As the Claimant explained to the Mobil/Murphy tribunal: "[T]his is a claim for a 'loss incurred'"[136] and "[these] obligations are actionable now."[137] Thus, the Claimant has already admitted that it "first acquired" knowledge of losses for the 2012-2015 period prior to making actual payments for specific amounts of expenditures. It cannot reverse its position now.

80. For all of the foregoing reasons, it cannot be disputed that the Claimant "first acquired" knowledge of breach and loss when the Board adopted the 2004 Guidelines on November 5, 2004. Further, this issue is *res judicata* and the Claimant's attempt to revisit the issue is legally impermissible.

D. Whether the 2004 Guidelines Are a "Continuing Breach" is Irrelevant Because a Continuing Course of Conduct Does Not Toll the Three-Year Limitations Period in NAFTA Articles 1116(2) and 1117(2)

81. The Claimant argues in its Reply Memorial that the adoption of the 2004 Guidelines constitutes a continuing breach in contrast to a "one-off" breach of the NAFTA that merely has continuing effects.[138] Putting aside the fact that the Claimant previously argued that the adoption of the 2004 Guidelines was a one-time event with continuing effects that started the limitations clock,[139] it ultimately does not matter if there is a "continuing breach" because a continuing

[135] Canada's Counter-Memorial, ¶¶ 183-184.

[136] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 232.

[137] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 248.

[138] Claimant's Reply Memorial, ¶¶ 43-44, 61.

[139] **R-74**, Mobil/Murphy – Day One Hearing Transcript, pp. 127:18-128:20. ("[F]or limitation purposes, time starts to run because a loss is incurred from the date on which the relevant act or measure takes effect or the date of the Investor's knowledge, even if the Investor is not required to make a financial outlay at that point … So, in our case, Claimants' loss in damage consists in the obligations created through the Board's implementation of the Guidelines, and those obligations, of course, already exist. The fact that some of their effects will not be felt until later years or indeed that Claimants' obligations are met in part through future conduct, through future expenditure, is irrelevant."). This reflects the distinction drawn by the *Mondev* Tribunal "between an act of a continuing character and an act, already completed, which continues to cause loss or damage" (**RL-4**, *Mondev – Award*, ¶ 58), which reflects Article 14(1) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles"): "[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue." (**CL-74**, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 14(1)). Furthermore, the Claimant's argument that the 2004 Guidelines are a continuing breach because Canada "has refused to cease applying the 2004 Guidelines to Mobil" is an oversimplification of the facts. As explained in the footnotes above, the Board does not regulate individual owners in the projects (such as the Claimant) and in any

course of conduct does not extend the limitations period under Article 1116(2) or Article 1117(2). Regardless of whether the breach at issue is a one-time instantaneous event with continuing effects, or a continuing course of conduct, there is no extension of NAFTA Chapter Eleven's limitation period. The Claimant's argument that time-bar is "inapplicable" to this arbitration is directly contradicted by the text of the NAFTA, the overwhelming weight of jurisprudence and the long-standing and consistent views of all three NAFTA Parties.

82. Interpreting Articles 1116(2) and 1117(2) in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties* makes it clear that regardless of whether a measure is continuing or not, a NAFTA claim must be brought within three years of the claimant having first acquired knowledge of breach and loss. A NAFTA claim filed later than that is untimely and whether the impugned measure is still in place is irrelevant.

83. Canada's Counter-Memorial explained that Articles 1116(2) and 1117(2) deliberately use the phrase "first acquired knowledge" to place a specific marker on when the three-year limitations period for commencing arbitration must begin.[140] The Claimant's interpretation defies the ordinary meaning of this text – what is critical for the analysis is the actual or constructive knowledge held by the claimant or its enterprise and on what precise date this knowledge was *first* acquired.[141]

84. The Claimant's interpretation also defies the context, object and purpose of the NAFTA. Articles 1116 and 1117 provide the extraordinary right for an investor to claim against a NAFTA Party for a breach of a treaty obligation that is alleged to have caused loss to that investor, or in the case of Article 1117, to the enterprise on whose behalf the investor has filed a claim. Articles 1116(1) and 1117(1) carefully define the circumstances under which such a right accrues to a claimant investor. It is no accident that Articles 1116(2) and 1117(2) follow directly after the conferral of the right to initiate investor-State arbitration. Read together with sub-paragraph 1,

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event the operator of Hibernia, HMDC, agreed to amend the Hibernia Benefits Plan in November 2010 so as to commit to compliance with the 2004 Guidelines for the duration of the project.

[140] Canada's Counter-Memorial, ¶¶ 154-156.

[141] **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 54, 58-59. The *Grand River* tribunal characterized knowledge of breach and loss as "foremost a question of fact" whereas constructive knowledge may be imputed to an investor if it can be shown that the investor would have known that fact had it exercised reasonable care or diligence.

Article 1116(2) defines the scope of the right by prescribing when it may be exercised. The same reasoning applies to Articles 1117(1) and (2).

85. A comparison of Articles 1116(2) and 1117(2) with other timing provisions in the NAFTA further evidences the Parties' clear intention to convey a specific meaning. Chapter Eleven's other timing provisions include establishing times within which investor-State dispute settlement must be commenced and when a particular step in dispute settlement must be taken. Generally, the NAFTA Parties inserted temporal conditions with phrases such as "within", "at least" or "no later than".[142] No other article in NAFTA Chapter Eleven adopts the formula found in Articles 1116(2) and 1117(2) of counting time from the date on which an investor "first" acquired knowledge. Nor does any dispute settlement provision in the other chapters of the NAFTA impose a time limit in the same manner as Articles 1116(2) and 1117(2). Articles 1116(2) and 1117(2) thus clearly were intended to pinpoint the moment in time at which knowledge of an alleged breach or loss was first acquired and to bar claims commenced more than three years after that point. Canada advanced this argument in its Counter-Memorial,[143] and the Claimant did not contest or address it in its Reply Memorial.

86. Canada's interpretation of Articles 1116(2) and 1117(2) is also consistent with one of the NAFTA's objectives: to create effective procedures for the resolution of disputes.[144] The limitations provisions enhance effective resolution of disputes by requiring that claims be brought forward once an investor has the requisite knowledge. These provisions ensure that any allegation of a breach of a NAFTA obligation will be addressed promptly rather than allowed to linger. This, in turn, creates certainty and stability for both NAFTA Parties and their investors.[145]

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[142] See, for example, Article 1119(1) requiring delivery of a notice of intent "at least 90 days" before submitting a claim; Article 1120 allowing submission of a claim (provided six months have elapsed"; Article 1124 allowing Secretary-General appointments of tribunal members if a tribunal has not been constituted "within 90 days" of submission of a claim; Article 1126(5) and (11) requiring steps to be taken "within" 15 or 60 days of a prior step in consolidation; Article 1127(1) requiring notice of a claim to be given "no later than 30 days after" submission of a claim. See also, Articles 1132, 1136(a)(1) and 1137.

[143] Canada's Counter-Memorial, ¶ 156.

[144] NAFTA, Article 102(1)(e).

[145] Professor Sarooshi argues that the Claimant's interpretation of Articles 1116(2) and 1117(2) is "mandated on the facts in the present case by application of the objectives (objects and purposes) of the NAFTA" (**CE-1**, Sarooshi Report I, ¶ 8(3)). The accompanying analysis by Professor Sarooshi is unhelpful because the NAFTA's time-bar provisions need to be interpreted and applied consistently to all investors irrespective of the particular facts underpinning investors' claims. The objects and purposes underlying the NAFTA cannot be considered vis-à-vis a

Arbitrating claims repeatedly every three years is certainly not an efficient process for resolution of disputes and it could not have been the intention of the NAFTA Parties to allow that. This is why a "clear and rigid" limitation period "not subject to any suspension, prolongation or other qualification" was adopted.[146]

87. Arguments similar to those advanced by the Claimant in support of its continuing breach theory have been heard and rejected numerous times by NAFTA tribunals (and others).[147] The Claimant argues that this Tribunal should ignore the long line of cases because they "all relate[d] to one-off breaches" and not continuing breaches.[148] The Claimant is wrong.

88. In *Grand River*, the claimant commenced its NAFTA claim on March 12, 2004, alleging NAFTA violations arising from a 1998 tobacco litigation Master Settlement Agreement ("MSA") and numerous pieces of legislation enacted by states pursuant to the MSA. The United States argued that the claimant's claim was time-barred because the MSA came into effect prior to the time-bar cut-off date of March 12, 2001.[149] The claimant argued that the limitations periods under Articles 1116(2) and 1117(2) is renewed with every contested measure taken by each state implementing the MSA; hence, there were not one limitations period, but many.[150] The *Grand River* tribunal rejected this proposition, holding that it would "render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."[151] All three NAFTA Parties have endorsed this reasoning.[152]

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single investor – it would be hazardous to interpret a rule that needs to apply consistently to all investors by focusing narrowly on the alleged impacts on a single investor, in this case, the Claimant.

[146] **RL-8**, *Feldman – Award*, ¶ 63. See also, **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 29.

[147] Canada's Counter-Memorial, ¶¶ 152-167.

[148] Claimant's Reply Memorial, ¶ 44.

[149] **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 51.

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

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

[152] **RL-14**, *Merrill & Ring – U.S. 1128 Submission*, ¶ 7; **RL-19**, *Mercer – U.S. 1128 Submission*, ¶ 6; **RL-15**, *Merrill & Ring v. Government of Canada* (UNCITRAL) 1128 Submission of Mexico Pursuant to Article 1128 of NAFTA, 2 April 2009, p. 4 (noting that Mexico concurs with in its entirety the Submission of the United States of America) ("*Merrill & Ring – Mexico 1128 Submission*"); **RL-16**, *DIBC – Canada's Reply to 1128 Submissions*, fn. 42.

89. The Claimant's argument that *Grand River* "involved a series of 'one off' acts"[153] and is thus not relevant to this arbitration conflicts with its argument that "[t]he paradigm example of a continuing breach…involves the continued 'maintenance in effect' by a State of legislative or regulatory provisions"[154] because the measures at issue in *Grand River* were statutes.[155] The *Grand River* tribunal heard and understood the Claimant's argument and rejected it on the basis that it had no jurisdiction to hear claims concerning these allegedly continuing measures because they were time-barred under Articles 1116(2) and 1117(2).

90. It is difficult to distinguish *Grand River* factually from the current arbitration. In *Grand River*, the MSA was followed by "escrow statutes", "related measures" and "enforcement actions".[156] Like the MSA in that case, the 2004 Guidelines were adopted only once and then, like the statutes enacted by individual states enforcing the MSA, have been enforced against Hibernia and Terra Nova as part of their POAs.[157] Allowing the Claimant to file a NAFTA claim against the most recent enforcement action of a measure adopted in November 2004 would, in the words of the *Grand River* tribunal, "render the limitations provisions ineffective."[158]

91. In *Apotex*, the claimant challenged a decision of the FDA that was made on April 11, 2006 pertaining to the issue of 180-day exclusivity for pravastatin sodium tablets when the relevant time-bar cut-off date was June 5, 2006.[159] The claimant argued that it was not possible to divorce the FDA's April 11, 2016 decision from a later decision of the D.C. Circuit Court because it was "part of the same single, continuous action"[160] and thus it argued it had met its burden under NAFTA Articles 1116(2) and 1117(2). In response, the United States argued that "Apotex cannot write the three-year limitations period out of the NAFTA…Here, Apotex acquired knowledge of

[153] Claimant's Reply Memorial, ¶ 61.

[154] **CE-1**, Sarooshi Report I, ¶ 52.

[155] **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 24.

[156] **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 83.

[157] Claimant's Memorial, ¶¶ 119-120. Canada disputes however that the 2004 Guidelines are enforced on a continuing basis at the Hibernia project because the operator of that project, HMDC, amended the Hibernia Benefits Plan in November 2010 so as to commit that project to the 2004 Guidelines for its lifetime.

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

[159] **RL-5**, *Apotex – Award on Jurisdiction*, ¶ 124.

[160] **RL-62**, *Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Counter-Memorial on Respondent's Objections to Jurisdiction, 1 August 2011, ¶ 86.

the alleged breach and loss arising from the FDA measure in April 2006, which was more than three years before it finally brought its Pravastatin Claim in June 2009. Thus, Apotex's Pravastatin Claim is plainly time-barred."[161] The *Apotex* tribunal agreed with the United States:

> [B]y reason of NAFTA Article 1116(2), all claims based exclusively upon the FDA decision of 11 April 2006 are time-barred, and so must be dismissed.
>
> Apotex cannot avoid this conclusion by asserting that the FDA measure is part of a "*continuing breach*" by the United States, or "*part of the same single, continuous action*"…
>
> As the Respondent has forcefully argued, nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA's limitation period in this way.
>
> On the contrary, the rule in NAFTA Article 1116(2) has been described as a: "clear and rigid limitation defense, which…is not subject to any suspension, prolongation or other qualification."[162]

92. The Claimant's argument that the reasoning of the *Apotex* tribunal is inapplicable because "a continuing breach did not exist on the facts of that case"[163] is spurious – the claimant argued that the FDA and court decisions constituted a continuing breach and the NAFTA tribunal determined that claimants cannot "evade NAFTA's limitation period in this way."[164]

93. In *Mondev*, the issue was whether liability for certain state actions attributable to the United States was barred because the actions had occurred prior to the entering into force of NAFTA in 1994. The tribunal excluded from eligibility various actions that had taken place prior to the NAFTA's entering into force, and considered on the merits a court decision that had been rendered after that date. With respect to the pre-1994 actions, the claimant argued they were "continuing breaches" over which the tribunal had jurisdiction. The tribunal disagreed:

> A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear. It must have been known to Mondev, at the latest by 1 January 1994, that not all its losses would be met by

[161] **RL-63**, *Apotex Inc. v. United States of America* (UNCITRAL) Transcript from First Session of the Arbitral Tribunal, 15 February 2012, pp. 33:14-34:5.

[162] **RL-5**, *Apotex – Award on Jurisdiction*, ¶¶ 324-327.

[163] **CE-1**, Sarooshi Report I, ¶ 68.

[164] **RL-5**, *Apotex – Award on Jurisdiction*, ¶ 326.

> the proceedings LPA had commenced in Massachusetts. In any event, the words 'loss or damage' refer to the loss or damage suffered by the investor as a result of the breach. Courts award compensation because loss or damage has been suffered, and this is the normal sense of the term 'loss or damage' in Articles 1116 and 1117. Thus if Mondev's claims concerning the conduct of the City and BRA had been continuing NAFTA claims as at 1 January 1994, they would now be time-barred. This is a further reason for limiting the Tribunal's consideration of the substantive claims to those concerning the decisions of the United States' courts.[165]

94. The Claimant's argument that the *Mondev* tribunal did not consider the relationship between the NAFTA's limitation period and an allegation of a continuing breach is thus incorrect.

95. In *Corona Materials*, the claimant filed its claim on June 10, 2014 alleging that it had been deprived of the value of its mining project following the passage of Environmental Resolutions in 2008 and 2010 and argued that the Dominican Republic's failure to react to a Motion of Reconsideration concerning the regulations amounted to an "arbitrary omission" that constituted a continuing act that tolled the CAFTA limitation period.[166] The *Corona* tribunal confirmed that the limitation period could not be evaded by alleging continuing acts:

> [A]ssuming that the DR administration's silence in reply to the Motion for Reconsideration would amount to a denial of justice, …as rightly pointed out by the United States in their submissions on questions of interpretation of the DR-CAFTA, that:
>
> > *Where a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series'. To allow an investor to do so would, as the tribunal in Grand River recognized, 'render the limitations provisions ineffective'.*[167]

96. The *Corona* tribunal stated that its primary role was to "determine the earliest possible date on which the Claimant would be permitted to have acquired actual or constructive knowledge of the alleged breach of the Treaty and of the incurred loss or damage"[168] and that as "the three-year

[165] **RL-4**, *Mondev – Award*, ¶ 87 (emphasis added).

[166] **RL-9**, *Corona Materials – Award on Preliminary Objections*, ¶¶ 123, 241. The wording of the limitation period under CAFTA is nearly identical to the wording of the limitation period under NAFTA.

[167] **RL-9**, *Corona Materials – Award on Preliminary Objections*, ¶ 215 (emphasis in original).

[168] **RL-9**, *Corona Materials – Award on Preliminary Objections*, ¶ 196.

period is a strict one, no suspension or 'tolling' of the three-year period is contemplated by the Treaty."[169] The Claimant's argument that the tribunal's reasoning in *Corona* is irrelevant because the tribunal did not "consider that there was a continuing breach" is wrong. The tribunal addressed the continuing breach argument presented by the claimant and dismissed it on the basis of the applicable limitation period.

97. In *Bilcon*, the claimant submitted a claim to arbitration on June 17, 2008 challenging several government measures from both before and after the relevant time-bar cut-off date of June 17, 2005. The claimant argued that the measures before that cut-off date were "continuing breaches" that tolled the limitation period under Articles 1116(2) and 1117(2).[170] The tribunal disagreed, noting that the breaches alleged by the claimant that arose prior to the three year period, but that had continuing effects after that date, were nonetheless time-barred.[171]

98. Ultimately, the Claimant cites only two NAFTA cases as authority for its position that Articles 1116(2) and 1117(2) are "inapplicable" where there is a "continuing breach" – *Feldman* and *UPS*.

99. *Feldman* is irrelevant here. The time-bar issue considered in that case had nothing to do with the meaning of "first acquired" as used in Articles 1116(2) and 1117(2) in the context of a continuing course of conduct. The *Feldman* tribunal had to determine whether state action short of "formal and authorized recognition" of a claim could "either bring about interruption of the running of limitation or estop the respondent State from presenting a regular limitation defense."[172] Even Professor Sarooshi acknowledges that the tribunal in *Feldman* "did not directly consider the application of a continuing breach."[173]

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[169] **RL-9**, *Corona Materials – Award on Preliminary Objections*, ¶ 199.

[170] **RL-6**, *Bilcon – Award*, ¶ 251.

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

[172] **RL-8**, *Feldman – Award*, ¶ 63.

[173] **CE-1**, Sarooshi Report I, ¶ 58. Professor Sarooshi's suggestion that *Feldman* stood for the proposition that "continuing actions may become breaches of NAFTA after the entry into force of the treaty" confuses a different aspect of jurisdiction *ratione temporis*, that is, whether an act that existed prior to a treaty coming into force is actionable if it continues to existed thereafter.

100. As for *UPS*, Canada explained in its Counter-Memorial why that case was wrongly decided with respect to "continuing breaches" and NAFTA Chapter Eleven's limitations period.[174] The *UPS* tribunal's application of a "continuing violation" theory to Article 1116(2) has never been followed by another tribunal. Indeed, the *Spence v. Costa Rica* tribunal (interpreting the CAFTA's identical time-bar provision) is the latest of many to have rejected the Claimant's position and reliance on *UPS*:

> The Tribunal disagrees with the analysis in the UPS Award that 'continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.' While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty. While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.[175]

101. The Claimant seeks to rely on irrelevant case law from the European Court of Human Rights, academic articles and ILC Article 14(2) to justify its argument that a continuing breach neutralizes Articles 1116(2) and 1117(2).[176] But the Claimant completely avoids Canada's core argument: whatever general international law may have to say about continuing breaches, the clear and explicit text of this treaty must prevail. So while ILC Article 14(2) might describe the general rule regarding continuing violations, Articles 1116(2) and 1117(2) are *lex specialis* and thus Article 55 (Lex specialis) of the ILC Articles is dispositive here:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of

[174] Canada's Counter-Memorial, ¶ 166.

[175] **RL-61**, *Spence – Interim Award*, ¶ 208 (emphasis added).

[176] **CE-1**, Sarooshi Report I, ¶¶ 50-51, 59.

> the internal responsibility of a State are governed by special rules of international law.[177]

102. The tribunal in *Bilcon* confirmed this point precisely:

> The Tribunal agrees that the general rules of international law on time-limits and their consequences are applicable to the question before it, but is also aware that specific terms of NAFTA might enjoy priority as leges speciales. Thus, case law must be viewed in the context of the particulars of the laws at play and the factual situations in each case.[178]

103. The Claimant cannot ask this Tribunal to endorse an interpretation of Articles 1116(2) and 1117(2) which would circumvent the plain meaning of the text, would run contrary to the views of virtually every tribunal that has considered the question and would directly contradict the NAFTA Parties' long-standing concordant interpretation of what these provisions mean and how they are intended to operate.

E. The Claimant's Self-Serving Attack on the Concordant and Long-Standing Interpretation of Articles 1116(2) and 1117(2) by the Three NAFTA Parties Is Not Credible

104. The Claimant cannot dispute the fact that all three NAFTA Parties have a concordant and long-standing position on how Articles 1116(2) and 1117(2) should be interpreted: a continuing

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[177] **CL-69**, Responsibility of States for Internationally Wrongful Acts 2001, Report of the ILC, Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supp. No. (A/56/49, Corr.4.), United Nations, New York, Article 14(1), Article 55 at p. 140 ("ILC Articles"). This is apposite the general principle "that a special rule prevails over a general rule (lex specialis derogate legi generali), so that, for example, treaty rules between states as lex specialis would have priority as against general rules of customary international law between the same states." See **RL-64**, Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 116. Even the Claimant understands and accepts the principle of *lex specialis* – See **R-65**, Mobil/Murphy – Claimants' Memorial, ¶ 215. This has been affirmed by numerous NAFTA tribunals: **RL-6**, *Bilcon – Award*, ¶ 258; **RL-65**, *Corn Products International, Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01) Decision on Responsibility, 15 January 2008, ¶ 76: ("In accordance with Article 1131(1) of the NAFTA, the Tribunal 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. The Tribunal considers the applicable rules of international law to include the rules relating to the interpretation of treaties (which it is generally accepted have been authoritatively codified in the Vienna Convention on the Law of Treaties, 1969). The rules on State responsibility (of which, it is accepted, the most authoritative statement is to be found in the ILC Articles) are in principle applicable under the NAFTA save to the extent that they are excluded by provisions of the NAFTA as *lex specialis*.") ("*Corn Products – Decision on Responsibility*"); **CL-36**, *Archer Daniel Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States* (ICSID Case No. ARB(AF)04/05) Award, 21 November 2007, ¶ 118: ("The customary international law that the ILC Articles codify do not apply to matters which are specifically governed by lex specialis – i.e., Chapter Eleven of the NAFTA in the present case.").

[178] **RL-6**, *Bilcon – Award*, ¶ 258. See also, **RL-61**, *Spence – Interim Award*, ¶ 208.

course of action does not renew the limitations period.[179] The positions of the NAFTA Parties are perfectly consistent with interpretations by NAFTA tribunals and other tribunals interpreting identical time-bar provisions. The Claimant has attempted to discredit the relevance of the NAFTA Parties' agreement and practice and submits that it should be given "minimal, if any, weight."[180] The Tribunal should see this argument for what it is: wrong at international law and directly contrary to the position the Claimant held during the Mobil/Murphy arbitration.

105. Articles 1116(2) and 1117(2) are to be interpreted in accordance with Article 31 of the *Vienna Convention of the Law of Treaties* ("VCLT").[181] Article 31(1) sets out the primary rule of treaty interpretation and Article 31(2) describes what comprises the context for the purpose of treaty interpretation.[182] Article 31(3) states:

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

106. The use of the word "shall" in VCLT Article 31(3) indicates the mandatory nature of this rule of treaty interpretation. In other words, subsequent agreements and practice of the treaty parties must be taken into consideration by the Tribunal.[183] The existence of such an "agreement" for the purposes of VCLT Article 31(3)(a) turns not on form but rather from the treaty parties' intention that their understanding constitute an agreed basis for interpretation.[184] As for Article

[179] Canada's Counter-Memorial, ¶¶ 157-160.

[180] Claimant's Reply Memorial, ¶ 68.

[181] **CL-35**, *Vienna Convention on the Law of Treaties* (1969) ("VCLT").

[182] **CL-35**, VCLT, Article 31(1): ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."), Article 31(2): ("The context, for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preambles and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.").

[183] Canada's position here is perfectly consistent with the position it took in the Mobil/Murphy arbitration. See **R-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, ¶¶ 6-12.

[184] See, e.g., **RL-66**, Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2011), at 217: ("It is not a question of whether that provision [article 31(3)(a) of the Vienna Convention, which addresses the meaning of "agreement"] adds to the assessment that any given instrument was intended to be a binding treaty, but whether the parties to a treaty have, subsequent to its conclusion, reached a firm agreement on what one of its provisions

31(3)(b), the tribunal in *Cattlemen* noted that a finding of "subsequent practice" can be based on the same evidence as that needed to demonstrate a "subsequent agreement," namely "a sequence of facts and acts that amounts to a practice that is concordant, common and consistent."[185]

107. The consistent and oft-repeated interpretation by all three NAFTA Parties that (i) compliance with Articles 1116(2) and 1117(2) is necessary to engage consent to arbitrate and establish the tribunal's jurisdiction, and (ii) a continuing course of conduct does not renew the three-year limitations period, can be considered both a subsequent agreement and subsequent practice under VCLT Article 31(3). This stems not just from the fact that the same interpretation has been expressed multiple times in different arbitrations, but from the nature of NAFTA Article 1128 submissions themselves.

108. First, Article 1128 provides NAFTA Parties with a legal right to "communicate their views to tribunals on treaty interpretation" in the course of a dispute, distinct from the other non-disputing party submissions that must first be granted permission by the tribunal to be filed.[186] Article 1128 submissions are a means by which the NAFTA Parties that are not involved in the dispute, including the home country of the claimant investor, can express their official views on an issue of treaty interpretation.[187] The fact that non-disputing NAFTA Parties do not need permission from the tribunal or consent from either disputing party conveys the importance the NAFTA Parties ascribed to Article 1128 as a formal mechanism of treaty interpretation. To suggest that such submissions should be given "minimal, if any" weight implies that Professor Sarooshi's opinion, provided on behalf of the Claimant in this arbitration, should be given more

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means."); **RL-67**, Sir Robert Jennings QC & Sir Arthur Watts QC, *Oppenheim's International Law*, 9th ed. (Harlow: Longman Group UK Limited, 1992), at 1268, § 630: ("[Parties can] agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure"); **RL-68**, Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation*, p. 199 ("*Roberts*"); **RL-69**, J. Romesh Weeramantry, *Treaty Interpretation In Investment Arbitration* (Oxford: Oxford University Press, 2012), at pp. 84-85, s. 3.116: ("[I]t may be arguable that a coordinated or joint submission by all parties to a treaty expressing the same interpretation may satisfy Article 31(3)(a) or (b).").

[185] **RL-23**, *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶ 189 ("*Canadian Cattlemen – Award on Jurisdiction*").

[186] **RL-70**, *Resolute Forest Products Inc. v. Canada* (UNCITRAL) Procedural Order No. 3 on Scheduling Issues, 3 November 2016,¶ 4.7.

[187] NAFTA Article 1128 states the Parties may only make submissions "on a question of interpretation of this Agreement" – the facts of the dispute may not be addressed.

weight by the Tribunal than the Article 1128 submissions of the United States or Mexico filed in past arbitrations.

109. Second, where the concordant views of the NAFTA Parties are publically known and have been established for a long period of time on the same question of treaty interpretation, they should be given significant weight by a tribunal as a subsequent agreement by the Parties.[188] For the purposes of VCLT Article 31(3)(a), agreements on treaty interpretation "need not be in binding or treaty form but must demonstrate that the parties intended their understanding to constitute an agreed basis for interpretation."[189] The fact that a concordant interpretation is not only reasonable on its face but accords with the views of multiple NAFTA and other tribunals on the same issue lends all the more credence to their value and demonstrates the important role that Article 1128 submissions play in creating greater certainty for investors under the NAFTA framework.[190]

110. In the instant case, all three NAFTA Parties have consistently agreed for many years that time-bar is a question of jurisdiction under the NAFTA and that a continuing measure does not toll the limitations period under Articles 1116(2) and 1117(2).[191] This is more than sufficient for the Tribunal to conclude that there is a subsequent agreement of the NAFTA Parties on the interpretation of these provisions and that it "shall be taken into account" by this Tribunal.[192] Likewise, subsequent practice for the purposes of VCLT 31(3)(b) is evidenced by the consistent expression of the same interpretation for a long period of time through official means in publically available documents. Indeed, the fact that the United States took the position that

[188] See **RL-23**, *Canadian Cattlemen – Award on Jurisdiction*, ¶¶ 181-189.

[189] **RL-68**, *Roberts*, p. 199 *citing* Mustafa Yasseen, drafting commission chairman for the VCLT. As Anthea Roberts notes: ("[I]nternational law does not draw strict distinctions between informal interpretations and formal amendments, the logical starting presumption should be that if treaty parties are entitled to modify and revoke investor rights through amendment and withdrawal, subject to some limitations, they should also be entitled to do so through interpretation, subject to certain constraints."). See also *id*., p. 211.

[190] **RL-68**, *Roberts*, p. 209.

[191] **RL-14**, *Merrill & Ring – U.S. 1128 Submission*, ¶¶ 6, 17; **RL-17**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 19 April 2013, ¶ 12; **RL-11**, *DIBC – U.S. 1128 Submission*, ¶ 3; **RL-21**, *Eli Lilly – U.S. 1128 Submission*, ¶¶ 2-4; **RL-15**, *Merrill & Ring – Mexico 1128 Submission*; **RL-12**, *DIBC – Mexico 1128 Submission*, ¶ 21; **RL-57**, *Mesa – Mexico 1128 Submission*, ¶ 4; **RL-10**, *Eli Lilly – Mexico 1128 Submission*, ¶¶ 4-8.

[192] **RL-65**, *Corn Products – Decision on Responsibility*, ¶ 179: ("It is essential, however, to consider precisely what agreement is said to be deduced from the practice of the Parties.").

continuing breaches do not extend the three-year limitations period in its non-disputing party submissions in the *Spence* and *Corona Materials* arbitrations, which involved the identical time-bar provisions in the CAFTA, corroborates its NAFTA practice.[193]

111. Third, as the drafters of NAFTA, Canada, Mexico and the United States have submitted consistent, timely and reasonable Article 1128 interpretations of Articles 1116(2) and 1117(2). Article 1128 submissions were envisioned by the Parties to provide views on the proper interpretation of the treaty and can reasonably be expected to have provided investors with advanced notice of the Parties' view of the time-bar in NAFTA Chapter Eleven.[194] Even Article 1128 submissions submitted after an alleged breach or claim carry significant weight as they endorse reasonable interpretations that claimants should have predicted as likely or at least possible.[195] This demonstrates the role of the Parties in "acting legitimately as…trying to create an appropriate regulatory balance between investment rights and sovereign prerogatives"[196] under the NAFTA.

112. The Claimant makes several arguments in an attempt to undermine the probative value of the NAFTA Parties' concurrent interpretation that continuing violations do not render Articles 1116(2) and 1117(2) inapplicable. None of them are convincing.

113. The Claimant argues that a subsequent agreement under the VCLT cannot be formed from Article 1128 submissions because they are "pleadings."[197] Article 1128 submissions are not, however, pleadings, and rather a treaty mechanism that confers an absolute right on non-disputing parties to intervene in NAFTA arbitral claims in which they are not the respondent.

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[193] **RL-55**, *Spence – U.S. Submission*, ¶ 7; **RL-22**, *Corona Materials – U.S. Submission*, ¶ 5. Such submissions may not technically qualify under Article 31(3)(b) for the purposes of this arbitration because the treaties in question are not the same (CAFTA and NAFTA). But the fact that the treaty provisions in question are exactly the same further legitimizes the argument that the NAFTA Parties have a common agreement and have demonstrated that agreement through extensive practice.

[194] **RL-68**, *Roberts*, pp. 212-213: ("the earlier and more reasonable the interpretation, the more likely it is to be consistent with or have molded reasonable investor expectations.").

[195] **RL-68**, *Roberts*, p. 213: ("when it endorses one of any number of reasonable interpretations that an investor could have predicted as likely or possible.").

[196] **RL-68**, *Roberts*, p. 212.

[197] Claimant's Reply Memorial, ¶¶ 41, 64-71.

Article 1128 was intentionally designed to recognize the "systemic interest of each NAFTA Party in the interpretation of the agreement."[198]

114. The Claimant also argues that the concordant views of the NAFTA Parties in Article 1128 submissions should be given no weight because those positions were not formalized in a FTC Note of Interpretation.[199] This is misguided. The two mechanisms are intentionally different and the weight to be ascribed to each is also different. An interpretation by the Free Trade Commission issued under Article 1131(2) (which requires the signatures of the United States Trade Representative, Canada's Minister of International Trade and Mexico's Secretary of the Economy) is legally binding on a tribunal.[200] Article 1128 submissions are not binding, but that does not mean they have no value to a Chapter Eleven tribunal, as the Claimant argues. It is nonsensical to suggest that the NAFTA Parties included a mechanism by which they would have the legal right to make submissions on the interpretation of their own treaty but intended that such submissions be given no weight by a tribunal. Not only would this render Article 1128 *inutile*, it would deprive the NAFTA Parties of an effective tool of treaty interpretation that exists alongside the FTC interpretation mechanism.[201]

115. Notably, the Mobil/Murphy tribunal cited the Article 1128 submissions submitted by the United States and Mexico 43 times in its Decision and took seriously their views on key issues, including with respect to the minimum standard of treatment guaranteed by Article 1105, the proper approach to be taken in the interpretation and application of reservations under Article 1108, and how paragraph 2(f) of Annex I of the NAFTA is to be read and applied.[202] The Mobil/Murphy tribunal even asked the United States and Mexico to make an additional

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[198] **RL-72**, Meg Kinnear, Andrea K. Bjorklund et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supp. No. 1, March 2008 (Kluwer Law International: 2006), pp. 1128-1-1128-5.

[199] Claimant's Reply Memorial, ¶ 66; **CE-1**, Sarooshi Report I, ¶ 78.

[200] Only one Note of Interpretation has ever been issued by the FTC, which reflects the level of formality that is required to convene a trilateral meeting of government ministers to consider and issue a binding treaty interpretation.

[201] See **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, pp. 152-153 (reviewing the various reasons for which States may chose not to conclude formal interpretations and rather adopt informal interpretive methods, such as Article 1128 Submissions: "States may choose to have recourse to less formal methods available under customary international law—that is, Articles 31(3)(a) and (b) of the VCLT.").

[202] **C-1**, Mobil/Murphy – Decision, ¶¶ 135, 249, 302-303, 321.

submission on their interpretation of the NAFTA regarding Annex I paragraph 2(f) outside the confines of the procedural schedule.

116. The Claimant itself also heavily relied on the submissions of the United States and Mexico to bolster its own arguments before the Mobil/Murphy tribunal.[203] In fact, when conceding to the Mobil/Murphy tribunal that the three NAFTA Parties had agreed on a particular interpretation of the headnote to NAFTA Annex I and its reference to subordinate measures,[204] the Claimant took exactly the opposite position to what Professor Sarooshi now advocates, agreeing that "a subsequent practice on the interpretation of a treaty is something to be taken into account along with the other context for the text and its object and purpose."[205] The willingness of the Claimant to disavow the position it held in the Mobil/Murphy arbitration once again speaks to the weakness of its argument.

117. The Claimant argues that the *Cattlemen*, *Telefonica*, *Gas Natural SDG*, *Bayview* and *Pope & Talbot* decisions support its assertion that Article 1128 submissions cannot amount to subsequent agreement or subsequent practice and should be given little weight. The Claimant has misconstrued all of these decisions.

118. The *Cattlemen* tribunal explicitly agreed with the United States in that arbitration that "the formal process of interpretation under Article 1131(2) is not the only means available to the

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[203] **R-81**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions dated September 1, 2010, s. II.A.: ("Claimants Agree with the Interpretation of Article 1106(1)(c) Advanced by Mexico in Its Article 1128 Submission") ("Mobil/Murphy – Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submission"); **R-289**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Response to the Second NAFTA Article 1128 Submissions of Mexico and the United States of America dated February 7, 2011, ¶ 2: ("Mexico's submission is only partly correct"), ¶ 3: ("It is clear that the United States agrees with Claimants…"), ¶ 4: ("Applying the VCLT principles leads the United States and Claimants to the same conclusion…"); ¶ 7: ("The factors considered by the United States as part of its VCLT analysis also underline the correctness of Claimants' arguments."); **R-74**, Mobil/Murphy – Day One Hearing Transcript, p. 77:18-19: ("Mexico's Article 1128 submission in this case confirms that to be the case") (Rivkin), p. 130:15-17: ("Certainly, there is no authority for it, and neither of the other NAFTA Parties supported it in their 1128 submissions.") (Lamb).

[204] **R-81**, Mobil/Murphy – Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶ 22: ("Review of the Article 1128 Submissions thus reveals a single, limited point common to the views expressed by the NAFTA Parties: the reference to subordinate measures in the headnote to Annex I can encompass future subordinate measures, provided that they are adopted or maintained under the authority of and consistent with the listed measure.").

[205] **R-81**, Mobil/Murphy – Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶ 23.

NAFTA Parties of reaching a 'subsequent agreement.'"[206] On the evidence before it, however, the tribunal concluded that although there was something approaching an agreement, there was not quite enough to rise to the level of an agreement.[207] In reaching this conclusion, the tribunal found specifically relevant the "absence of any Article 1128 submission by Canada" on the matter.[208]

119. Still, on the matter of "subsequent practice", the *Cattlemen* tribunal found the United States' statements before that tribunal and others, Mexico's 1128 submission before that tribunal, and Canada's statements in implementing the NAFTA and in one of its Counter-Memorial's filed in a different arbitration were sufficient, and ultimately concluded there was subsequent practice establishing agreement.[209] The Claimant suggests that *Cattlemen* is not relevant to this arbitration as far as "subsequent practice" goes because that tribunal was not considering any limitation period issue.[210] However, Canada is not citing *Cattlemen* in support of any limitation period argument, but rather to elucidate how tribunals engage in an analysis to determine whether there is subsequent practice or agreement among the NAFTA Parties.

120. The Claimant's reliance on the *Telefonica* and *Gas Natural SDG* decisions is also inapposite because those cases were not decided pursuant to the NAFTA and nothing akin to Article 1128 submissions were put before these tribunals by the Respondent Argentina as evidence of subsequent practice or subsequent agreement. Indeed, in *Telefonica*, Argentina cited only to three defensive briefs – two filed by Argentina itself as a respondent, and one filed by Spain as a respondent.[211] The tribunal was not persuaded that this was enough to amount to subsequent practice or subsequent agreement.[212] Even less evidence was before the *Gas Natural* tribunal, where Argentina relied on a single pleading filed by Spain in one other dispute under

[206] **RL-23**, *Canadian Cattlemen – Award on Jurisdiction*, ¶ 185.

[207] **RL-23**, *Canadian Cattlemen – Award on Jurisdiction*, ¶¶ 186-187.

[208] **RL-23**, *Canadian Cattlemen – Award on Jurisdiction*, ¶ 187.

[209] **RL-23**, *Canadian Cattlemen – Award on Jurisdiction*, ¶ 188.

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

[211] **CL-82**, *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Objections to Jurisdiction, 25 May 2006, ¶ 109 ("*Telefónica – Decision on Objections to Jurisdiction*").

[212] **CL-82**, *Telefónica – Decision on Objections to Jurisdiction*, ¶¶ 111-112.

the Spain-Argentina BIT to argue that a subsequent practice had been formed.[213] It is unsurprising that the *Gas Natural* tribunal did not make a determination in support of subsequent practice on the basis of only one other defensive pleading.[214] The evidence before this Tribunal of a concordant view between all three NAFTA Parties with respect to Articles 1116(2) and 1117(2) is far more vast.

121. The Claimant has also cited the *Bayview* tribunal's observation that although the NAFTA Parties agreed with the tribunal's interpretation of "investor", it would have reached that conclusion even if the United States had not made a submission on that point in the proceeding.[215] This in no way means that the *Bayview* tribunal disregarded the submission of the United States as having no value, as the Claimant suggests. To the contrary, the reference reflects the straightforward nature of the analysis the tribunal had to undertake, that is, whether an "investor" had to be an investor from the territory of *another* NAFTA Party.[216] Indeed, the *Bayview* tribunal's reference to the submission of the United States confirms that tribunals consider the views of the NAFTA Parties on issues of treaty interpretation to be important.

122. Finally, the Claimant's reliance on *Pope & Talbot* is also misguided. The tribunal found that "notwithstanding the position espoused by the United States, there are very strong reasons for interpreting the language of Article 1105" in a different way.[217] The tribunal recognized that generally "deference [is] accorded to representations by parties to an international agreement as to the intentions of the drafters with respect to particular provisions in that agreement."[218] Thus, it

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[213] **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, 17 June 2005, fn. 12 citing *Maffezini* ("*Gas Natural SDG – Decision on Preliminary Questions of Jurisdiction*").

[214] **CL-81**, *Gas Natural SDG – Decision on Preliminary Questions of Jurisdiction*, fn. 12: ("The Tribunal notes Argentina's argument that Spain's position in the *Maffezini* case reflects understanding of the Spain-Argentina BIT consistent with that of Argentina in this case. We do not believe, however, 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.").

[215] **CE-1**, Sarooshi Report I, ¶ 86.

[216] **RL-24**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007, ¶ 107 ("*Bayview – Award*").

[217] **CL-80**, *Pope & Talbot Inc. v. Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001, ¶ 115 ("*Pope & Talbot – Award on the Merits of Phase 2*").

[218] **CL-80**, *Pope & Talbot – Award on the Merits of Phase 2*, ¶ 114.

is not correct to say that the tribunal did not take into account the submissions of the United States – it simply reached a different interpretation.[219]

123. In sum, it is indisputable that all three NAFTA Parties already have a concordant and long-standing position on how Articles 1116(2) and 1117(2) should be interpreted: they are provisions with which compliance is necessary to engage the tribunal's jurisdiction and a continuing course of conduct does not renew the three-year limitation period. This interpretation cannot be given "little, if any, weight" as the Claimant contends, but should be given significant weight pursuant to VCLT Article 31(3)(a) and (b).

F. The Application of Articles 1116(2) and 1117(2) is not an "*Abus de Droit*"

124. The Claimant argues that the application of the limitation periods under Articles 1116(2) and 1117(2) would constitute an "*abus de droit*".[220] This argument should be rejected.

125. As the tribunal in *Chevron* noted:

> [I]n all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the *Oil Platforms* case, there is 'a general agreement that the graver the charge the more confidence must there be in the evidence relied on.'[221]

126. The Claimant has no basis for alleging that Canada is acting in bad faith in exercising its right to contest the jurisdiction of the Tribunal on the basis of Articles 1116(2) and 1117(2), especially when the Claimant itself had the prior expectation that it would be time-barred from making this and other future claims.[222]

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[219] **CL-80**, *Pope & Talbot – Award on the Merits of Phase 2*, ¶¶ 114, 116.

[220] Claimant's Reply Memorial, ¶¶ 90-94.

[221] **CL-86**, *The Renco Group Inc. v. Republic of Peru* (UNCITRAL) Partial Award on Jurisdiction, 15 July 2016, ¶ 177 ("*Renco – Partial Award*") citing **RL-73**, *Chevron Corp v Republic of Ecuador* PCA Case No. AA 277, Interim Award, 1 December 2008 ¶ 143 ("*Chevron – Interim Award*"). There is a heavy burden of proof to establish an *abus de droit* **RL-73**, *Chevron – Interim Award*, ¶ 138.

[222] **R-87**, Mobil/Murphy – Claimants' Post-Hearing Brief I, ¶ 67.

127. First, the Claimant's suggestion that Canada invokes Articles 1116 and 1117 to override the application of international law and undermine the decision of the Mobil/Murphy tribunal is absurd.[223] Canada is relying on the plain wording of the NAFTA text, the consistent view of NAFTA tribunals and agreement of all three NAFTA Parties that a "continuing breach" does not toll the limitation period under Articles 1116(2) and 1117(2). As explained in Part II.B, there is no obligation on the part of a NAFTA Party to revoke or change a measure which violates the treaty. A continuing course of conduct does not render time-bar inapplicable.

128. Second, the complaint that Canada argued the Claimant's claim for damages was "too early" in the Mobil/Murphy arbitration and now argues it is "too late" is absolutely untrue.[224] As explained in Part II.A above, Canada opposed the Claimant's damages model in the Mobil/Murphy arbitration but never once argued that the claim itself was "too soon". The Claimant had ample opportunity to present its damages case in that arbitration and failed to prove its future damages with reasonable certainty. That is not Canada's fault.

129. Third, the Claimant's attempt to draw parallels to the *Renco* decision falls flat.[225] In *Renco*, the tribunal voiced concern about Peru's three-year delay in filing its waiver objection to Renco's arbitral claim, but in any event rejected the claimant's assertion that Peru's conduct amounted to an abuse of rights.[226] The Tribunal recognized that Peru's waiver objection "[was] not tainted by any ulterior motive to evade its duty to arbitrate Renco's claim" and that Renco only sought to "vindicate its right."[227] That the tribunal mused that it "might" be abusive for Peru to make a timeliness objection in a second arbitral proceeding (which has never happened) is irrelevant.[228] The question is whether the Claimant has satisfied the heavy burden to prove an *abus de droit* in this case. It has not.

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[223] Claimant's Reply Memorial, ¶ 94.

[224] Claimant's Reply Memorial, ¶ 94.

[225] Claimant's Reply Memorial, ¶¶ 91-93.

[226] **CL-86**, *Renco – Partial Award*, ¶ 186. See also *id.*, ¶ 123: ("Clearly, it would have been preferable for all concerned if Peru had raised its waiver objection in a clear and coherent manner at the very outset of these proceedings.").

[227] **RL-74**, *The Renco Group, Inc. v. Republic of Peru* (UNCITRAL Case No. UNCT/13/1) Final Award, 9 November 2016, ¶ 49.

[228] Claimant's Reply Memorial, ¶ 93.

130. The Claimant has only itself to blame for presenting only a single damages model to the Mobil/Murphy tribunal which was ultimately rejected. The fact that the Mobil/Murphy Majority speculated, without foundation, that the Claimant could come back in perpetuity in the face of Chapter Eleven's three-year limitations period to claim damages that it failed to prove the first time is irrelevant. Canada is legitimately relying on its legal rights in exactly the way the NAFTA intended. This is not an "*abus de droit*".

G. Conclusion

131. The Claimant's attempt to argue that Articles 1116(2) and 1117(2) must be interpreted in a way that defies their ordinary meaning in their context and in light of the NAFTA Chapter Eleven's object and purpose, contradicts the interpretation given to these provisions by virtually all NAFTA and other tribunals, and disregards the long-standing and united view of all three NAFTA Parties should be rejected by this Tribunal. The Claimant's newly contrived arguments not only contradict the positions it took in the Mobil/Murphy arbitration, but are intended to mask its own failings with respect to how it argued damages the first time.

132. The notion that a NAFTA Party would consent to arbitrate a measure more than a decade old under Chapter Eleven, especially when a full and complete opportunity to claim damages has already been afforded, is illogical. The NAFTA Parties could not have intended for that to happen, which is why the limitations period in Chapter Eleven is clear as to its wording and decisive as to its outcome. Canada respectfully submits that, pursuant to Articles 1116(2), 1117(2) and 1121(1), this Tribunal has no jurisdiction over this claim.

IV. THE CLAIMANT'S ARGUMENT THAT THIS CLAIM IS NOT PRECLUDED BY *RES JUDICATA* IS WRONG

A. Summary of Canada's Position

133. The Claimant makes three critical errors in its treatment of the *res judicata* doctrine in its Reply Memorial.

134. First, despite having admitted in its Memorial that the principle of *res judicata* has preclusive effects, that is, it has the effect of "preventing the re-litigation of the subject-matter of

the judgment or award"[229] when the "triple identity" test is satisfied,[230] the Claimant ignores the actual implications of that rule. The Claimant's Reply Memorial overlooks entirely the key legal differences between the "cause of action estoppel" and "issue estoppel" branches of the *res judicata* doctrine. While the latter prevents re-litigation of specific issues that were decided upon by a previous tribunal, cause of action estoppel has the broader effect of barring a second claim based on an identical cause of action or subject-matter as was previously adjudicated. The claim before this Tribunal is completely identical to the claim that was before the Mobil/Murphy tribunal and founded on the same injury. Hence, cause of action estoppel precludes the Claimant's case in its entirety.

135. Second, the Claimant incorrectly reasons that a claim based on evidence that is not "ripe" may be raised in subsequent proceedings once the evidence has become ripe.[231] The Claimant makes this assertion without reference to a single judgment or decision in support of its proposition. Public international law jurisprudence confirms that there is no such bar to the operation of *res judicata.* The Mobil/Murphy tribunal decided both that it had jurisdiction to award the Claimant damages for 2012-2015 and that such a claim was admissible. In other words, the claim before the Mobil/Murphy tribunal, including for the period 2012-2015, was apt for adjudication. The reason the Claimant was not awarded damages for this period was not because of lack of jurisdiction or admissibility (indeed, both questions were decided by the tribunal in favour of the Claimant) – it failed because the solitary damages model presented to the tribunal did not satisfy the legal standard for what is compensable nor reach the reasonable certainty evidentiary threshold.

136. Third, although it is cause of action estoppel which is fatal to this claim, the Claimant's facile analysis of issue estoppel (the only branch of *res judicata* addressed by the Claimant) is also defective. The Claimant focuses solely on whether the Mobil/Murphy tribunal made a decision on the specific R&D and E&T expenditures at issue in this arbitration. However, this ignores the fact that the Mobil/Murphy tribunal made a decision on future damages, including for the 2012-2015 time period. The Majority's decision not to award any damages for this time

[229] Claimant's Memorial, ¶ 184 (emphasis added).

[230] Claimant's Memorial, ¶ 188.

[231] Claimant's Reply Memorial, ¶ 107.

period carries issue estoppel effect in this arbitration and makes irrelevant to this Tribunal the consequent issue of quantification of damages. While the Tribunal need not even consider the narrow question of issue estoppel, even if it does, the Claimant's claim still fails because the specific issue of damages for the 2012-2015 period was determined by the Mobil/Murphy tribunal.

137. The Claimant's unsupported assertion that a "ripeness" exception to *res judicata* exists and the Mobil/Murphy Majority's *obiter dictum* speculation concerning re-arbitrations before other tribunals do not absolve this Tribunal from its responsibility to apply the doctrine of *res judicata*. To give the Claimant a second chance at proving the same damages based on the same cause of action when it failed the first time, or to allow the Claimant to re-argue issues already once determined simply because it now has better evidence, not only disregards the most basic rule of *res judicata*, it would overstep the restricted mandate of NAFTA Chapter Eleven tribunals. Applying the legal principle of *res judicata* to the particularities of this claim requires its dismissal.

B. The Claimant Ignores the Fact that *Res Judicata* Encompasses Both Claim or Cause of Action Estoppel and Issue Estoppel

138. The rationale for the *res judicata* doctrine is founded on the Latin maxim, *nemo debet bis vexari pro una et eadem causa* ("no one should be proceeded against twice for the same cause").[232] The Claimant agrees that parties must not be "twice vexed in the same matter" and that the doctrine has the effect of "preventing the re-litigation of the subject-matter of the judgment or award."[233] However, while it argues that Canada cannot re-arbitrate the Mobil/Murphy Majority's decision that the 2004 Guidelines were not covered by Canada's Annex I reservation to Article 1106 (which Canada accepts), the Claimant denies that the doctrine also precludes it from resubmitting its same claim for the same damages for the same period of time in front of a new tribunal. This double standard should be rejected.

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

[233] Claimant's Memorial, ¶ 184.

139. Canada and the Claimant agree that *res judicata* is a general principle of law that is applicable to this arbitration.[234] The "doctrine undoubtedly applies in all principal legal systems to prevent the same claimant bringing the same claim against the exact same respondent."[235] The International Law Association has observed that *res judicata* is "generally applied defensively, to stop a claimant bringing the same claim or seeking further relief."[236] In other words, the rule acts to ensure "that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."[237] This prohibition on repeated litigation for identical claims is one of the most basic rules of adjudication and has deep roots in public international law.

140. This "absolute bar" to subsequent litigation involving the same claim, demand or cause of action applies whenever the "triple identity" test that was formulated by Judge Anzilotti in his dissent in the *Chorzow Factory* case[238] (cited with approval by the Claimant[239]) is satisfied. The test requires identity of parties, object and grounds of the claim.[240] As the Claimant

[234] Claimant's Memorial, ¶¶ 184-185. If a sufficient number of a variety of domestic legal systems discloses a rule or institute with broadly similar underlying policies and principles, those underlying policies and principles constitute a "general principle of law". **RL-75**, John H. Currie, *Public International Law* (Irwin Law Inc.: May 2008) 2nd ed., p. 105. See also **RL-76**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge University Press: 2006), pp. 24-25. Sir Arnold McNair stated the following in the *South West Africa* case before the International Court of Justice with respect to the "general principles of law" source of international law: "The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of 'the general principles of law'. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions." **RL-77**, *International Status of South West Africa Case*, Separate Opinion by Sir Arnold McNair (I.C.J. Reports 1950), p. 148.

[235] **RL-34**, *ILA Report – Res Judicata,* p. 3.

[236] **RL-34**, *ILA Report – Res Judicata,* p. 3.

[237] **RL-78**, August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes* (The Law and Practice of International Courts and Tribunals 3:37-77, 2004), p. 43 (emphasis added), citing to *Black's Law Dictionary* (6th ed., 1990), 1305.

[238] **CL-15**, *Case Concerning the Factory at Chorzów*, 1928 P.C.I.J. (ser. A) No. 13, Interpretation of Judgments Nos. 7 and 8, Dissenting Opinion of Judge Anzilotti, 16 December 1927, p. 23 ("*Chorzow – Dissent of Judge Anzilotti*").

[239] Claimant's Memorial, ¶ 188.

[240] **CL-15**, *Chorzow – Dissent of Judge Anzilotti*, p. 23; **RL-79**, William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, p. 366

acknowledged in its Memorial, the test can also be more simply understood as requiring "identity of the parties and of the question at issue."[241] In practice, international arbitral tribunals have not required exact identity and "have barred claimants from raising closely related claims that they could have raised in an earlier arbitration."[242]

141. The *Vivendi* tribunal noted that "a later tribunal is bound by the decision of an earlier one if the two actions involve the same parties and the same cause of action."[243] It confirmed that the requisite degree of identity exists when parties are the same, when reparation in the form of damages is sought in both arbitrations, and when breaches of the same treaty provisions are relied upon in both arbitrations.[244] Similarly, in *Malicorp*, the tribunal explained the effect of *res judicata* by stating that "[t]he authority as *res judicata* of a decision given by another competent jurisdiction between the same parties, concerning the same claims and the same factual and legal bases, prohibits a party from introducing a new action that is similar on all points."[245]

142. In other words, when a second arbitration is initiated relying on the same cause of action as was at issue in a prior dispute, the second arbitral tribunal cannot evaluate the merits of the dispute and is entirely bound by the decision of the previous tribunal. This is commonly referred to as claim or cause of action estoppel/preclusion (hereinafter referred to as "cause of action estoppel") and is understood as the negative or preclusive effect of *res judicata*.

143. This branch of the *res judicata* doctrine was applied by the Appellate Body of the World Trade Organization in the 2003 *EC-India* case. India first initiated proceedings challenging the consistency of a European Council Regulation that imposed anti-dumping duties on imports of

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("*Dodge*"); **CL-8**, Christoph Schreuer & August Reinisch, Legal Opinion in *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Quantum Proceedings, 20 June 2002, ¶ 16.

[241] Claimant's Memorial, ¶ 189 *citing* **CL-24**, *China Navigation Co., Ltd. (Great Britain) v. United States (Newchwang case)*, Arbitral Tribunal (Great Britain-United States) constituted under the Special Agreement of August 18, 1910 (18 June 1913 – 22 January 1926), in Reports of International Arbitral Awards, vol. 6 (2006) at 64.

[242] **RL-79**, *Dodge*, p. 366; **CL-22**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶ 7.16 ("*Apotex – Award*") .

[243] **RL-36**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Jurisdiction, 14 November 2005, ¶ 72 ("*Vivendi – Decision on Jurisdiction*").

[244] **RL-36**, *Vivendi – Decision on Jurisdiction*, ¶¶ 71-74.

[245] **RL-29**, *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18) Award, 7 February 2011, ¶ 103.

cotton-type bed linen from India with certain provisions of the *Anti-Dumping Agreement* in 1998.[246] A Panel (in 2000) and the Appellate Body (in 2001) of the World Trade Organization issued final decisions on the matter.[247] India succeeded on certain claims and failed on others.

144. Subsequently, India initiated compliance proceedings in 2002 challenging the European Communities' efforts to modify its regulations in order to comply with the 1997 and 2001 decisions. In these proceedings, India attempted to pursue a claim that had been previously presented to the first Panel, namely that "the European Communities failed to properly consider "other factors" which might have been causing injury to the domestic industry, as required by Article 3.5 of the AD [Anti-Dumping] Agreement.[248] The previous Panel had concluded that India had "failed to present a *prima facie* case" with respect to this claim.[249]

145. In response to India's attempt to pursue the claim again, the European Communities argued: "[T]he decision of the original panel rejecting India's claim "has *res judicata* effects" between the parties. Therefore, in the view of the European Committees, India is precluded from reasserting the same claim before another panel."[250]

146. In 2003, the Appellate Body issued its decision in the compliance proceedings. On the issue of *res judicata*, the Appellate Body agreed with the European Communities:

> [I]n our view, an unappealed finding included in a panel report that is adopted by the DSB must be treated as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of that claim. …
>
> [T]he original panel ruled that India had failed to present a prima facie case in respect of its claim under Article 3.5 relating to "other factors". In our view, the effect, for the parties, of findings adopted by the DSB as part of a panel report is the same, regardless of whether a panel found that the complainant

[246] **RL-80**, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* (WT/DS141/AB/RW) AB-2003-1, Report of the Appellate Body, 8 April 2003, ¶¶ 2-3 ("*European Communities – Appellate Body Report*").

[247] **RL-80**, *European Communities – Appellate Body Report*, ¶¶ 2-3.

[248] **RL-81**, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (WT/DS141/R), Report of the Panel, 30 October 200, ¶ 6.144 ("*European Communities – Panel Report*").

[249] **RL-81**, *European Communities – Panel Report*, ¶ 6.144.

[250] **RL-80**, *European Communities – Appellate Body Report*, ¶ 35.

> failed to establish a prima facie case that the measure is inconsistent with WTO obligations, that the Panel found that the measure is fully consistent with WTO obligations, or that the Panel found that the measure is not consistent with WTO obligations. A complainant that, in an original proceeding, fails to establish a prima facie case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a prima facie case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a prima facie case, as opposed to failing ultimately to persuade the original panel. Once adopted by the DSB, both findings amount to a final resolution to the issue between the parties with respect to the particular claim and the specific aspects of the measure that are the subject of the claim.[251]

147. The Panel and the Appellate Body reached this conclusion even though "[n]either the Panel nor the Appellate Body in the original dispute had the opportunity to consider arguments with respect to [this] claim."[252] The finding by the previous bodies that a *prima facie* case was not presented was enough and India was "precluded from reasserting in [the] proceeding and presenting arguments in support of" its claim.[253]

148. Cause of action estoppel is also illustrated by the *Machado*[254] and *Delgado*[255] arbitrations before the Spain-U.S Claims Commission. In both cases, *res judicata* acted to bar the entirety of claims even when the second proceeding raised issues that had not previously been decided.

149. In the *Machado* arbitration, the claimant first sought damages in 1871 ("claim No. 3") for the embargo of a house by Spanish authorities in Cuba. The claim was dismissed for want of prosecution on December 20, 1873. In 1879, the same claimant commenced a second arbitration ("claim No. 129") to claim restoration of the same property and rent and damages for the duration of the detention that had passed thus far.

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[251] **RL-80**, *European Communities – Appellate Body Report*, ¶¶ 93-96 (emphasis added).

[252] **RL-80**, *European Communities – Appellate Body Report*, fn. 114.

[253] **RL-80**, *European Communities – Appellate Body Report*, ¶ 97.

[254] **RL-37**, *Machado Case*, 3 Moore, International Arbitrations to Which the United States Has Been a Party (Spain-U.S. Claims Commission 1880), at p. 2193 ("*Machado*").

[255] **RL-38**, *Delgado Case*, 3 Moore, International Arbitrations to Which the United States Has Been a Party (Spain-U.S. Claims Commission 1880), at p. 2196 ("*Delgado*").

150. In dismissing the case and refusing to award damages, the second tribunal observed the following:

> The test is whether both claims [were] founded on the same injury, [and] the only injury on which claim No. 129 [was] founded [was] the seizure of a certain house; [and that] same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being part of an old claim, cannot be presented as a new claim under a new number. For these reasons the umpire decides that this case, No. 129, be stricken from the docket.[256]

151. In the *Delgado* arbitration, the claimant first sought damages in 1869 ("claim No. 12") for the embargo of a real estate property in the form of lost income from the time of the embargo to the date of the arbitration. The tribunal dismissed the case on December 18, 1875 having determined that "[t]he papers on record in the case [did] not furnish sufficient basis to estimate to make a fair evaluation of the claimant's property at the time it was seized, and [concluded that] as long as satisfactory evidence on this point [was] not furnished to the umpire, he must abstain from answering [the question on damages]."[257] Subsequently, on January 15, 1876, the claimant applied to reopen the case to present additional evidence, but the request was denied because the "question [at issue as to damages] was [already previously] referred to him and by him accepted", and the only "question that [could] arise [now was] whether the umpire had the legal authority to solve the point."[258] As there was no doubt that the umpire had the legal authority to address the issue of damages, the decision could not be reopened.

152. The same claimant commenced a new arbitration in 1878 ("claim No. 125") for the value of land seized instead of lost income. The respondent Spain moved to dismiss the case on the ground that it was the same as claim No. 12. In response, the claimant argued:

> [T]he cases were not the same for the reasons (1) that, while in [claim] No. 12 a claim was made for 'the seizure and detention of Mr. Delgado's property and the damages consequent thereto, a claim was made in [claim] No. 125 for 'the value' of the property and the 'value of net annual revenues for ten years;' (2) that new injuries were alleged in [claim] No. 125, viz, (a) the failure of the Spanish authorities to execute an order of disembargo of the real estate, and (b)

[256] **RL-37**, *Machado*, at p. 2194 .

[257] **RL-38**, *Delgado*, at p. 2197 (emphasis added).

[258] **RL-38**, *Delgado*, at p. 2198.

> an alleged collusive sale of the real estate on a mortgage, by which claimant's title was divested, after the proceedings in [claim] No. 12 were begun [and] (3) that the fact that the Government of the United States had sent the claim to the commission 'must be received as conclusive proof that the claim was regarded as a new unadjudicated, open, and valid claim, to be decided on the merits.'[259]

153. Claim No. 125 (i.e., the second proceeding) was dismissed by the tribunal because the underlying injury in the second arbitration was identical to that in the first arbitration. The umpire determined that:

> [T]he question whether this claim, No. 125, is new one or the same as No. 12 depends upon whether new rights are asserted in this claim. … In case No. 12 the claimant appealed to the commission for indemnification and compensation on account of the seizure and detention of a certain estate and the destruction or loss while in the hands of Spanish authorities of the personal property upon the same estate. This case was decided on its merits … It is now contended that, although the injury complained of in the present case, No. 125, is the same seizure of the same property, the claimant's right to recover indemnity on account of this seizure ought to be examined again by the commission, inasmuch as the claimant in the former case only asked for the rents, issues, profits, and income of the land, and that in this he demands the value of the land, but this conclusion cannot be accepted. Even if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new umpire.[260]

154. The *EC-India*, *Machado* and *Delgado* decisions stand for the rule that *res judicata* is an absolute bar to re-litigation of claims or causes of action on the merits. The mere fact that an arbitral tribunal did not make a decision on a specific issue or sub-issue relating to a claim or cause of action does not impair the operation of *res judicata* such that a claimant can commence another arbitration relying on the same underlying injury or cause of action and undecided issues. In *EC-India*, although the first Panel and Appellate Body dismissed the claim on a *prima facie* basis and not because India failed "ultimately to persuade the original [P]anel," India could not reassert its claim in subsequent proceedings. In *Delgado*, despite the fact that the first arbitration had been dismissed before a finding could be made on the underlying substantive issues and despite there having been neither a damages award nor an explicit finding of lack of

[259] **RL-38**, *Delgado*, at pp. 2198-2199 (emphasis added).

[260] **RL-38**, *Delgado*, at p. 2199 (emphasis added).

liability, the second tribunal dismissed the second arbitration on the basis of *res judicata*. In *Machado*, even though damages were initially sought only for a specific time period, and subsequently, the claimant sought damages that were representative of a more permanent and wholesome loss, the second attempt to attain damages was barred.

155. By barring re-arbitration not only of those claims or causes of action that were actually raised in a prior arbitration, but also of all claims that could have been raised by the claimant in the prior arbitration, cause of action estoppel operates in harmony with the obligation of concentration, pursuant to which "where a given matter becomes the subject of litigation the parties are required to bring forward their whole case in the proceedings which ensue."[261] Parties "cannot pursue the same subject of litigation in later proceedings in respect of a matter which could and should have been brought forward in the earlier proceedings."[262] This reflects the basic principle that legal actions cannot be commenced repeatedly in relation to the same factual scenario.

156. The doctrine of *res judicata* in international law has only recently been accepted as encompassing a related but distinct concept referred to as "issue estoppel/preclusion"

[261] **RL-82**, David A.R. Williams and Mark Tushingham, *The Application of the Henderson v Henderson Rule in International Arbitration*, 26 SAcLJ 1036 2014, p. 1036 ("*Williams and Tushingham*").

[262] **RL-82**, *Williams and Tushingham*, p. 1036. This obligation constitutes a key legal principle that is contained in a variety of domestic legal systems. The English Court of Chancery noted in *Henderson v. Henderson* the following: ("[T]he Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The pleas of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time.") (**RL-83**, *Henderson v. Henderson*, High Court of Chancery, (1843) 3 Hare 100, p. 319). This quote has since been cited with approval by both Canada's Supreme Court (see **RL-84**, *Maynard v. Maynard*, [1951] S.C.R. 346, pp. 358-359) and the High Court of Australia (see **RL-85**, *Port of Melbourne Authority v. Anshun Pty. Ltd.*, [1981] HCA 45, ¶ 22). Similarly, the United States Supreme Court noted in *Allen v. McCurry*: ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.") (**RL-86**, *Allen v. McCurry*, [1980] 449 U.S. 90, p. 94). The Supreme Court of France also: ("widened the scope of the res judicata effect of arbitral awards by precluding plaintiffs from raising new legal issues which they could have relied upon in the initial arbitration proceedings but which they failed to raise in a timely manner.") (**RL-87**, Elie Kleiman, *Supreme Court Broadens Scope of Res Judicata* (Oct. 2, 2008), p. 4. The Supreme Court of Sweden has confirmed that the preclusive effect of *res judicata* also "affects alternative and economically equivalent legal grounds and objections." (**RL-88**, Kaj Hober, *Res Judicata and Lis Pendens in National Law (366)* in *Collected Courses of the Hague Academy of International Law*, Volume 366 (Brill | Nijhoff, Leiden: Boston, 2014), p. 137. The principle also exists in Singapore, Hong Kong, Malaysia, and New Zealand. See, **RL-82**, *Williams and Tushingham*, p. 1037.

(hereinafter referred to as "issue estoppel"). While the core *res judicata* doctrine of cause of action estoppel has deep roots in public international law, the International Law Association noted even as recently as 2004 that there was still "debate as to whether arbitral tribunals can and should apply issue or collateral estoppel."[263] In the *Apotex* arbitration, while there was no dispute between the parties as to the applicability of the core principle of *res judicata*, there was dispute about whether the doctrine included "the broader concept of or akin to issue estoppel."[264]

157. Issue estoppel is generally recognized as a subset of the international law doctrine of *res judicata*.[265] However, rather than using distinct terms to refer to cause of action estoppel and issue estoppel as is commonplace across domestic legal systems,[266] "[i]nternational courts and

[263] **RL-34**, *ILA Report – Res Judicata*, p. 25.

[264] **CL-22**, *Apotex – Award*, ¶ 7.17.

[265] **CL-18**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada* (ICSID Case No. ARB/10/6) Award, 10 December 2010, ¶¶ 7.1.8, 7.21 ("*Grynberg*"); **CL-22**, *Apotex – Award*, ¶¶ 7.23-7.32; **RL-89**, Silja Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals* (Oxford International Arbitration Series: March 2016), at ¶ 2.102 ("*Schaffstein*"); **RL-35**, Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 Afr. J. Int'l & Comp. L. 38 (1996), pp. 41-42 ("*Lowe*").

[266] The United States Supreme Court noted in *Allen v. McCurry* the following: ("Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude religitation of the issue in a suit on a different cause of action involving a party to the first case.") (**RL-86**, *Allen v. McCurry*, 449 U.S. 90 (1980), p. 94). Similarly, the Canadian Supreme Court noted in *Angle v. M.N.R.*: ("The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction…The second species of estoppel per *rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoy stead v. Federal Commissioner of Taxation*…: ('I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it 'issue-estoppel')'). Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd*...defined the requirements of issue estoppel as: ("…(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised their privies…."") (**RL-90**, *Angle v. M.N.R.*, [1975] 2 SCR 248, p. 254). The United Kingdom Supreme Court said in *Virgin Atlantic Limited v. Zodiac Seats UK Limited*: ("[T]here is the principle…that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages. …[T]he doctrine of merger…treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. …[I]t is in reality a substantive rule about the legal effect of an English cause of action, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action. …[T]here is [another] principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: …'Issue estoppel' was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation…and adopted by Diplock LJ in Thoday v Thoday…" (**RL-91**, *Virgin Atlantic Airways Limited v. Zodiac Seats UK Limited*, [2013] UKSC 46, ¶ 17). The Australian Supreme Court noted in *Port of Melbourne Auth. v. Anshun Pty Ltd.*: ("The distinction between res judicata (in England called "cause of action estoppel") and issue estoppel was expressed by Dixon J. in Blair v. Curran…in these terms: 'in the first the very right or cause of action

tribunals [have] not ordinarily deal[t] with issue preclusion explicitly, using only the terminology of *res judicata*."[267]

158. Issue estoppel stands for the distinct proposition that when "a right, question, or fact [is] distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery[, it] cannot be disputed in a subsequent suit between the same parties…even if the second suit is for a different cause of action."[268] In other words, unlike cause of action estoppel which bars re-arbitration of whole causes of actions and associated injuries, issue estoppel only bars re-arbitration of discrete issues or findings/determinations. The *Grynberg* tribunal stated the test for issue estoppel: "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."[269] Issue estoppel "applies only with regard to issues that were actually determined by

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claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.'…The distinction was restated by Fullagar J. in his dissenting judgment in Jackson v. Goldsmith…His Honour expressed the rule as to res judicata by saying: "where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action. This rule is not, to my mind, correctly classified under the heading of estoppel at all. It is a broad rule of public policy based on the principles expressed in the maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro eadem cause.'" His Honour went on to discuss issue estoppel, citing the comment of Dixon J. in *Blair v. Curran*…: ("A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies.") (**RL-85**, *Port of Melbournce Authority v. Anshun Pty Ltd*, [1981] HCA 45, ¶¶ 17-18). In France, *res judicata* is understood to leading to positive and to negative effects. Negative *res judicata* "precludes either party from relitigating a claim decided" and arises where "the parties, the cause and the object are identical in both proceedings" (**RL-89**, *Schaffstein*, ¶¶ 1.105, 1.110), while positive *res judicata* to the extent it exists "provides that the prior determination of a particular matter positively imposes itself in other proceedings, even though they involve a different claim" (**RL-89**, *Schaffstein*, ¶ 1.106). Likewise, in Switzerland, *res judicata* is recognized as carrying both a negative and a positive effect – "the same claim cannot be brought again in other proceedings (negative *res judicata* effect)…[which] includes contradictory claims or claims contained in the claim decided in the prior proceedings" and "[i]f the court in further proceedings has to decide a preliminary issue that has already been decided in the dispositif of a prior judgment, the court is bound by that prior judgment and must implement it in its judgment (positive ers judicata effect)" (**RL-89**, *Schaffstein*, ¶ 1.147).

[267] **RL-89**, *Schaffstein*, ¶ 2.101.

[268] **CL-18**, *Grynberg*, ¶ 7.1.3.

[269] Claimant's Reply Memorial, ¶ 100 *citing* **CL-18**, *Grynberg*, ¶ 7.1.1.

the international court or tribunal [and] [n]o preclusive effect attaches to issues raised in the proceedings but glossed over by the decision."[270]

159. Thus, prior arbitrations have preclusive effects on new arbitrations in two distinct ways: (i) the "triple identity" test is satisfied, which triggers cause of action estoppel, and (ii) the "triple identity" test is not satisfied, but one or more issues relevant to the claim was determined in a previous arbitration, which may trigger issue estoppel. The latter scenario ordinary arises in parallel or subsequent arbitrations between different parties or in subsequent arbitrations between the same parties but concerning different causes of action. In such scenarios, assuming that the second claim is not founded on the same injury as the previous claim, issue estoppel may restrict what issues a second tribunal can revisit depending on whether they pass the issue estoppel test.

160. In other words, while cause of action estoppel has preclusive effects at the level of the cause of action or injury, issue estoppel has preclusive effects at the level of issues. In line with their different breadths, the test for cause of action estoppel is different from the test for issue estoppel. While cause of action estoppel requires identity of the cause of action or underlying injury and for a decision to have already been made on the cause of action or underlying injury, issue estoppel only requires identity of a specific issue and for a decision to have been made on that issue.[271]

161. In its Reply Memorial, the Claimant has limited its arguments exclusively to issue estoppel. The Claimant contends that the "real question that this tribunal faces" on the matter of *res judicata* is whether there was a "determination of the quantum of losses suffered by [the Claimant] from 2012 through 2015" by the Mobil/Murphy tribunal.[272] The Claimant has fashioned this question relying upon the above-mentioned three-part test for issue estoppel that was articulated by the *Grynberg* tribunal.

162. But the *Grynberg* tribunal's statement and test is only relevant to issue estoppel. In fact, <u>all</u> of the arbitral decisions the Claimant relies on – *Apotex*, *Orinoco*, *Amco*, and *Grynberg* – to support its argument that the current claim is not barred by *res judicata* because damages for the

[270] **RL-89**, *Schaffstein*, ¶ 2.101.

[271] **RL-35**, *Lowe*, p. 42.

[272] Claimant's Reply Memorial, ¶ 96.

2012-2015 time period were not "distinctly" quantified or "decided" by the Mobil/Murphy tribunal are inapposite because they concerned only issue estoppel, not cause of action estoppel. The *Apotex* tribunal stated this explicitly when discussing the *Orinoco*, *Amco*, and *Grynberg* awards:

> It is clear that past international tribunals have applied forms of issue estoppel, without necessarily using the term. Umpire Plumley's award in Orinoco Steamship found that every matter and point distinctly in issue ... and which was directly passed upon and determined in said decree, and which was its ground and basis, is confirmed by said judgment, and the claimants ... are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in the said decree.
>
> […]
>
> In Professor Lowe's opinion, the tribunal in the resubmitted Amco case "clearly applied the principle of issue estoppel to the determination of specific facts and of the legal characterisations of facts by the previous tribunal." Most recently, the ICSID tribunal in Grynberg v. Grenada applied issue estoppel (albeit describing it as "collateral estoppel") to foreclose the claimants' efforts to re-open issues decided in an award made in a prior ICSID arbitration.
>
> […]
>
> Applying the doctrine to all four claimants as "privies" as a general principle of law recognised in Amco v Indonesia and the Orinoco case, the second ICSID tribunal [in the Grynberg investor-state arbitration] accepted that "a finding 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."[273]

163. Indeed, the *Orinoco* award itself describes precisely Canada's point regarding the distinction between cause of action estoppel and issue estoppel and explains both the alternate scenarios in which each applies and the different effects of each:

> The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which may have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand, or claim,

[273] **CL-22**, *Apotex – Award*, ¶¶ 7.18, 7.20 (emphasis added).

> having passed into judgment, can not again be brought into litigation between the parties in proceedings at law, upon any ground whatever.
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel for a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.[274]

164. The Claimant's propositions that (i) because "no tribunal has ever ruled on the quantum of loss suffered by Mobil from 2012 through 2015" *res judicata* does not arise with respect to this claim, and that (ii) Canada has mistaken the Mobil/Murphy's Decision for a "definitive decision on the individual incremental expenditures comprising [the Claimant's] claim in this arbitration"[275] are based on the flawed assumption that only issue estoppel is relevant to this arbitration. This is plainly wrong and disregards an entirely distinct rule of *res judicata*.

165. This arbitration does not simply share a few elements or issues with the previous Mobil/Murphy arbitration. It is exactly the same claim for the same cause of action. The Claimant itself admitted that *res judicata* has the effect of "preventing the re-litigation of the subject-matter of the judgment or award"[276] when the "triple identity" test[277] is satisfied, but it refuses to accept the logical application of this rule to this arbitration: "the public international law doctrine of *res judicata* prevents the re-litigation of claims."[278]

C. The Claimant has Raised an Exception to *Res Judicata* that has No Foundation in International Law

166. The Claimant makes the bald assertion in its Reply Memorial that "[a] claim that has been asserted in prior proceedings but initially determined not to be ripe may be raised in subsequent

[274] **CL-88**, *Orinoco*, pp. 278-279 (emphasis added).

[275] Claimant's Reply Memorial, ¶¶ 98-99, 101.

[276] Claimant's Memorial, ¶ 184 (emphasis added).

[277] Claimant's Memorial, ¶ 188.

[278] **RL-89**, *Schaffstein*, ¶ 2.101.

proceedings once it has become ripe."[279] The Claimant has not cited a single authority in support of this statement. Although there is support in public international law for the notion that claims and causes of action are not barred from re-arbitration by *res judicata* when previously dismissed on the basis of jurisdiction or admissibility, it is entirely novel for the Claimant to argue that *res judicata* does not bar re-arbitration when a previous tribunal decided it had jurisdiction over the parties and the subject matter and also found the specific claim to be admissible.

167. The Claimant suggests that three international law decisions support its argument on this point: *Waste Management II*, *Amco*, and the *South West Africa Cases*.[280] But each of these decisions was only concerned with issues of jurisdiction and/or admissibility and only support the proposition that cause of action estoppel may not apply to bar re-arbitration of the merits when a claim was wholly dismissed because of lack of jurisdiction or because the claim was inadmissible. That is plainly not the situation before this Tribunal.

168. In *Waste Management II*, the tribunal determined that "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"[281] and the "same is true of decisions concerning inadmissibility."[282] Similarly, the *Amco* decision is of no assistance to the Claimant because it only concerned dismissals for lack of jurisdiction.[283] Likewise, all four of the preliminary objections that were at issue in the *South West Africa Cases* were "argued by the Respondent and treated by the Court as objections to its jurisdiction."[284] These awards are inapposite to the situation before this Tribunal. The Mobil/Murphy tribunal made a positive finding of jurisdiction and admissibility over the entire claim submitted to it.[285]

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[279] Claimant's Reply Memorial, ¶ 107.

[280] Claimant's Reply Memorial, ¶¶ 109-111.

[281] **CL-23**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 43 (see generally ¶¶ 38-47) ("*Waste Management II – Decision on Preliminary Objections*").

[282] **CL-23**, *Waste Management II – Decision on Preliminary Objections*, ¶ 43 (see generally ¶¶ 38-47).

[283] **CL-87**, *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) Decision on Jurisdiction (Resubmitted Case), 10 May 1988, ¶ 35.

[284] **CL-90**, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* Second Phase, I.C.J. Reports 1966, p. 6, Judgment of 18 July 1966, p. 17.

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

169. The word "ripe" has been used by some tribunals in discussions surrounding jurisdiction and admissibility to explain findings.[286] When linked directly to jurisdiction or admissibility of a claim, "ripeness" may be relevant to a *res judicata* analysis. However, "ripeness" issues relating to evidentiary matters are unrelated to the suitability of a claim for arbitration and have not been regarded as a distinct legal term that acts as a stand-alone or separate bar to the operation of *res judicata* by any international law court or tribunal.

170. This is not surprising because when an adjudicative body has jurisdiction over the parties and the subject matter, and finds the specific claims before it admissible, decisions on the merits naturally follow.[287] Indeed, the Claimant's own expert in this arbitration Professor Sarooshi observes that "admissibility" answers the "question of whether it is appropriate for a tribunal to exercise its adjudicative power to hear the specific claims in a particular case or arbitration"[288] and the Claimant relies on Professor Paulsson's statement that when a "claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility."[289]

171. As only one tribunal can rightly make a decision on the merits in relation to a matter, any time a second tribunal makes a substantive decision on the merits with respect to a previously decided matter, it is necessarily contesting the authority the first tribunal had to make the

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[286] For example, the *Ickale Insaat Limited Sirketi* Award states: ("A claim that has not been first submitted to local courts may be said to be inadmissible before an international tribunal on grounds that it is not yet ripe for such submission as all the required procedural steps have not yet been taken.") (**RL-31**, *Ickale Insaat Limited Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/24) Award, 8 March 2016, ¶ 242) Further, the *Mr. Franck Charles Arif* Award states: ("[T]he Tribunal finds that Mr. Arif's claims for complete expropriation and breach of specific undertakings regarding the border duty free stores are jurisdictionally ripe for arbitration") (**RL-92**, *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, ¶ 348). See also, **CL-83**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Final Award, 8 June 2009, ¶ 328; and **RL-93**, *Achmea B.V. v. The Slovak Republic [II]* (UNCITRAL) Award on Jurisdiction and Admissibility, 20 May 2014, ¶¶ 235-236, where tribunals used the term ripeness in relation to the question of jurisdiction; and **RL-94**, *Hochtief AG v. Argentine Republic* (ICSID Case No. ARB/07/31) Decision on Liability, 29 December 2014, ¶ 206, where a tribunal used the term ripeness in relation the question of admissibility.

[287] As stated by the *Vivendi* annulment tribunal: "[i]t is settled…that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments. …[T]he failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers." See, **RL-95**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, ¶ 86.

[288] **CE-1**, Sarooshi Report I, ¶ 31.

[289] Claimant's Reply Memorial, ¶ 36.

previous decision on the merits. Thus, if this Tribunal were to proceed to make a substantive decision on the merits, it is implicitly challenging the decision by the Mobil/Murphy tribunal that it had jurisdiction to award the Claimant's future damages and the claim was admissible, including the claim for damages at issue in this case (Hibernia and Terra Nova damages for 2012-2015). Just as the Mobil/Murphy tribunal could not confer jurisdiction on this Tribunal, which has *competence-competence*, this Tribunal cannot go back and question the exercise of jurisdiction by the Mobil/Murphy tribunal over this claim.[290]

172. In sum, when a previous tribunal decided it had jurisdiction over the parties and the subject matter and also found the specific claim before the second tribunal to be admissible, cause of action estoppel fully operates and the second tribunal is not permitted to make yet another decision on the merits.

D. Cause of Action Estoppel Wholly Bars This Claim

173. The Claimant and Canada agree that the "triple identity" test for *res judicata* is satisfied by the claim before this tribunal.[291] It is uncontestable (and the Claimant does not deny) that the parties, the object, and the grounds before this Tribunal are identical to the claim that was before the Mobil/Murphy tribunal.[292] In the Mobil/Murphy arbitration, the Claimant sought damages of $23.11 million for the Hibernia project and $4.55 million for the Terra Nova project for breach of Article 1106 of the NAFTA by application of the 2004 Guidelines to the projects from the years 2012 to 2015.[293] In this arbitration, the Claimant is seeking damages of $19.88 million for both Projects for breach of Article 1106 of the NAFTA by application of the 2004 Guidelines to the projects from the years 2012-2015.[294] The claims or causes of actions are not even facially

[290] Subsequent tribunals are not the appropriate forum to review the jurisdiction of a first tribunal. Rather, any party "contest[ing] the jurisdiction of the first tribunal, …should do so before the supervisory courts of the first arbitral seat or in recognition and enforcement proceedings." **RL-89**, *Schaffstein*, ¶ 6.165. In other words, a claimant that is of the view that a second tribunal should rightly take jurisdiction over a dispute or part of a dispute must take steps to alter the first tribunal's finding of jurisdiction through revision, set-aside or annulment, which would have been through NAFTA Article 1136(3)(b) and the ICSID (Additional Facility) Arbitration Rules, which governed the Mobil/Murphy arbitration.

[291] Claimant's Memorial, ¶¶ 188-190; Canada's Counter-Memorial, ¶ 180.

[292] Canada's Counter-Memorial, ¶¶ 181-184.

[293] Canada's Counter-Memorial, ¶ 183.

[294] Claimant's Reply Memorial, ¶ 177.

distinct (as was arguably the case in *Delgado* and *Machado*). This arbitration is the archetypical case to which cause of action estoppel applies.

174. The Claimant is transparently pursuing exactly the same claim a second time in an attempt to attain exactly the same remedy it previously sought despite a final and binding decision on the merits having been issued by a competent tribunal. This frustrates the very essence of the doctrine of *res judicata* in international law, which aims to protect respondents from this type of duplicative proceeding so as not to be vexed recurrently on the same matter.

E. Even if the Tribunal Applies the Issue Estoppel Rule of *Res Judicata*, The Claim is Still Barred

175. Because the "triple identity" test is satisfied by the claim before this Tribunal, cause of action estoppel controls and issue estoppel does not arise. But even if this claim is considered only at the level of discrete issues, it must still fail. The Claimant's success in this arbitration is entirely dependent on this Tribunal's re-determination of issues that have been fully and fairly arbitrated, and issue estoppel bars such re-determination.

176. Whether a specific issue or question can be re-arbitrated by operation of issue estoppel depends on whether in a prior proceeding that question was distinctly put in issue, decided by a court or tribunal, and resolution of the question was necessary to resolve the claim before the court or tribunal.[295] In applying this test to the question of damages arising from the Hibernia and Terra Nova projects for the 2012-2015 time period, there is no dispute it was put at issue before the Mobil/Murphy tribunal.[296] Where Canada and the Claimant part ways is on the remaining two parts of the test, namely whether a decision was made on the issue of damages for the 2012-2015 time period and whether resolution of the issue was necessary to resolve the claim before the Mobil/Murphy tribunal. The Claimant erroneously argues that the Mobil/Murphy tribunal did not make any decision on the question of damages for the 2012-2015 time period and that it was not necessary for the Mobil/Murphy tribunal to decide the question to resolve the claim before it.[297] This is incorrect.

[295] Claimant's Reply Memorial, ¶ 100.

[296] Claimant's Reply Memorial, ¶ 102.

[297] Claimant's Reply Memorial, ¶¶ 104, 106.

177. The preliminary question of whether the Mobil/Murphy tribunal had the authority to decide on the Claimant's claim for future damages was squarely placed before the Mobil/Murphy tribunal. Canada argued that the tribunal could not award the damages the Claimant sought as they were premised on harm not yet incurred rather than the harm already incurred from the future obligation to comply with the 2004 Guidelines.[298] On the other hand, the Claimant argued that, unlike the situation in some other cases, the harm stemming from the 2004 Guidelines arose from a loss that already existed and that they were "already 'exposed' to," that is, ongoing operation of the 2004 Guidelines.[299] The Claimant asserted that the 2004 Guidelines had "created a legal obligation for HMDC and Suncor to undertake additional expenditures over the life of the projects" such that the "fact that no *actual* payment ha[d] been made [was] not relevant."[300]

178. The Mobil/Murphy Majority decided: "[NAFTA] Article 1116(1) does not, in our view, as a jurisdictional matter, preclude the Tribunal from deciding on appropriate compensation for future damages. However, this conclusion only determines *whether* a claim for damages is admissible."[301] The Mobil/Murphy tribunal found that "the 2004 Guidelines triggered an obligation to make expenditures that would continue over the life of the projects"[302] and it concluded there was no jurisdictional barrier with respect "to damages that [were] the result of a breach which began in the past (the adoption of the 2004 Guidelines) and continue[d] (the implementation of the 2004 Guidelines) resulting in the incurring of losses which crystallize[d] (i.e. become quantifiable) and must be paid sometime in the future (hereafter "future damages")."[303]

179. Accordingly, issue estoppel bars reconsideration of the Mobil/Murphy tribunal's determination that the requisite criteria of jurisdiction and admissibility were satisfied with respect to future damages, including for the 2012-2015 time period. All three parts of the test are satisfied: (i) there was a dispute between the parties as to whether the tribunal had the requisite

[298] **C-1**, Mobil/Murphy – Decision, ¶¶ 416-417.

[299] **C-1**, Mobil/Murphy – Decision, ¶ 425.

[300] **C-1**, Mobil/Murphy – Decision, ¶ 421 (emphasis in original).

[301] **C-1**, Mobil/Murphy – Decision, ¶ 429 (emphasis in original).

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

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

authority, (ii) a positive determination was made by the tribunal, and (iii) a decision was necessary to resolve the claim before the Mobil/Murphy tribunal because the Claimant specifically sought damages for future time periods, including the 2012-2015 time period.

180. As both jurisdiction and admissibility were found, *ipso facto*, the Mobil/Murphy tribunal made a determination on the merits on the issue of future damages. It was bound to do so, not only because the arbitration rules so require,[304] but also because if a claim is not dismissed on the basis of jurisdiction or admissibility, a final and binding decision on the merits necessarily follows.[305]

181. A dismissal of a claim on the merits is distinct and cannot be conflated with a dismissal on the basis of jurisdiction or admissibility. The International Court of Justice explained in the *South West Africa Cases* decision that "[i]t is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between on the one hand, the right to activate a court and the right of the court to examine the merits of their claim – and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims."[306] In other words, questions of entitlement to what is claimed do not relate to the preliminary questions of jurisdiction (that is, the right to activate a court) or admissibility (that is, the right to have the court examine the merits), but rather relates to merits.

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[304] See ICSID Additional Facility Rules, Article 52 (an award "shall contain: …the decision of the Tribunal on every question submitted to it.").

[305] The principle of *ludex decidere debet* requires a "judicial or arbitral tribunal charged with resolving a dispute should decide all questions raised in the claim that are within its jurisdiction" (**RL-96**, Aaron X. Fellmeth, Maurice Horowitz, *Guide to Latin in International Law* (Oxford University Press, 2001), p. 145). See also, **RL-97**, Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd ed.) (Cambridge: Cambridge University Press, 2009), pp. 816-817: ("The requirement that the award must deal exhaustively with the dispute, as submitted by the parties, is one of the general principles underlying arbitration. A tribunal may not hand down a partial award leaving questions submitted to it undecided. This principle is mandated by the parties' will underlying the arbitration as well as by requirements of procedural economy. An award that is not comprehensive and exhaustive of the parties' question is the obverse of an excess of powers committed through a decision on questions that have not been submitted to the tribunal."). Similarly, the International Court of Justice stated in Request for Interpretation of the Judgment in the *Asylum* Case: ("[O]ne must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.") **RL-98**, *Request for Interpretation of the Judgment of November 20, 1950, in the Asylum Case (Colombia/Peru)*, Judgment of November 27, 1950, I.C.J. Reports 1950, p. 402.

[306] **CL-90**, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* Second Phase, I.C.J. Reports 1966, p. 6, Judgment of 18 July 1966, p. 39.

182. Moreover, lack of evidence or evidentiary uncertainty cannot make an otherwise admissible claim inadmissible. In the *Military and Paramilitary Activities in and against Nicaragua* case before the International Court of Justice, Nicaragua argued that "the judicial function, being governed by the principle of *res judicata*, is "inherently retrospective," and therefore inapplicable to a fluid situation."[307] The International Court of Justice disagreed, stating:

> [A]ny judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this. Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof.[308]

183. The same reasoning applies here. Immediately following the Mobil/Murphy Majority's positive determination on jurisdiction and admissibility, the Majority stated the following:

> However, this conclusion only determines *whether* a claim for damages is admissible. It does not determine *how* compensation for future damage is to be assessed or whether it is appropriate for this [t]ribunal to consider damages or make an award of compensation with regard to the future damages claimed in this particular case. These matters remain to be addressed.[309]

184. The Mobil/Murphy Majority highlighted this distinction in another statement in their Decision as well: "[T]he issue of whether the damages are *incurred* so as to allow the Tribunal to exercise jurisdiction under [the NAFTA] and grant compensation is different from the issue of whether the amount of these damages can be established with sufficient certainty to be compensated."[310] In other words, the tribunal recognized that although there was no jurisdictional or admissibility barrier to the claim for future damages (including those for 2012-2015), an

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[307] **RL-99**, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application*, I.C.J. Reports 1984, p. 392, Judgment of 26 November 1984, ¶ 100 ("*Case Concerning Military and Paramilitary Activities*").

[308] **RL-99**, *Case Concerning Military and Paramilitary Activities*, ¶ 101 (emphasis added).

[309] **C-1**, Mobil/Murphy – Decision, ¶ 429 (emphasis in original).

[310] **C-1**, Mobil/Murphy – Decision, ¶ 431 (emphasis in original).

exercise to quantify damages may still be unavailing if the Claimant is unable to prove with reasonable certainty its legal right to the object or remedy sought.

185. The manner in which the Mobil/Murphy tribunal organized its decision on damages also confirms that it was at the evidentiary stage of the analysis that the Claimant's claim for damages for 2012-2015 was dismissed.

186. The Mobil/Murphy Majority stated in its introductory paragraph under the "Damages" heading that "preliminary issues associated with damages [would] be addressed before turning to the substance of the damages claimed."[311] Following this introductory paragraph, the tribunal's 25-page analysis on entitlement to damages is set out under three sub-headings: "Jurisdiction under Article 1116(1)", "Proof of Damages Incurred", and "Evidence of Damages Presented." The decision not to award damages for the 2012-2015 time period, along with accompanying reasons, is found under the last heading – "Evidence of Damages Presented" – in the final six pages of the 25-page analysis. Even facially, it is clear that the Mobil/Murphy Majority's decision not to quantify and award damages for 2012-2015 related not to "preliminary" issues but rather to the "substance of the damages claimed," and more specifically, the evidentiary record before it.

187. In other words, while the Claimant succeeded on the issue of the tribunal's authority to award damages for the 2012-2015 time period, when the analysis moved on to the stage where the specific model, arguments and evidence put forward by the disputing parties had to be evaluated to determine whether the Claimant had a legal right to the particular remedy sought and whether the Claimant had met the requisite evidentiary threshold, the Claimant failed and Canada succeeded.

188. A number of other statements in the Decision confirm that the Claimant failed specifically at the evidentiary stage and that the failure stemmed from the specific damages model presented by the Claimant. The Mobil/Murphy Majority's analysis of future damages under the heading "Evidence of Damages Presented", begins with this acknowledgement: "[The Claimant] calculate[s] this future compensation in the same manner as the other damages: i.e. the difference

[311] **C-1**, Mobil/Murphy – Decision, ¶ 414 (emphasis added).

between the total R&D and E&T expenditures required by the 2004 Guidelines and the amount that they would have spent on R&D and E&T in the usual course of project operations."[312] Thus, at this stage, the Mobil/Murphy tribunal's analysis narrowed in on the specific and single damages model presented to it.

189. This is immediately followed by the observation that the same model was offered by the Claimant for future damages as was used for past damages despite the nature of available evidence being very different with respect to future and past damages. The Decision states: "However, from 2010 onwards, the yearly amounts of actual R&D and E&T expenses and required incremental expenses for each of the next 27 years are not yet known."[313] Next, the Majority notes that while the Claimant is of the view that this still provides "reasonable certainty,"[314] Canada is of the view that "the assumptions upon which the Claimants base their forecasts are unproven, unsupported and uncertain."[315] This was the substance of the dispute between Canada and the Claimant at this stage of the analysis.

190. After these introductory statements, the Mobil/Murphy tribunal evaluates the parties' respective arguments "with regard to the elements on which the Claimants have based their forecasted shortfall."[316] The full list of the elements or variables the tribunal considers are "production volume", "oil revenue", "R&D and E&T expenditures in the ordinary course of business", "the qualification of R&D expenses [that is, "whether some of them were expenditures which the Claimants would have made anyway in the ordinary course of business]", "Statistic[s] Canada benchmark factor", and amount of "deductible R&D expenditures."[317]

[312] **C-1**, Mobil/Murphy – Decision, ¶ 449.

[313] **C-1**, Mobil/Murphy – Decision, ¶ 450.

[314] **C-1**, Mobil/Murphy – Decision, ¶ 450.

[315] **C-1**, Mobil/Murphy – Decision, ¶ 451.

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

[317] **C-1**, Mobil/Murphy – Decision, ¶¶ 453-463.

191. Following a thorough analysis of these factors on the merits, the Mobil/Murphy tribunal concluded:

> While some variables in the current case may be more amenable to assessment than others …, looking at the totality of relevant and necessary variables that would comprise the calculation of damages, we are simply unable to have confidence that the estimation of the entire picture is one that meets a test of "reasonable certainty."[318]

192. The Claimant's claim for future damages was hence rejected. With this conclusion, the tribunal did not need to take any further steps to quantify damages for future time periods. Until this conclusion was reached, the matter of future damages was within the bounds of the Mobil/Murphy tribunal's consideration and was undoubtedly fully considered.

193. As described in Part II.A above, the Claimant's error in arguing its damages claim was two-fold, either of which would have been sufficient on its own for the Claimant to have lost its claim for damages for the 2012-2015 time period. First, the Claimant opted for a damages model that quantified speculative future damages rather than selecting a damages model that quantified damages already incurred by the Claimant or the projects, including from anticipation that the 2004 Guidelines would apply throughout the lifetimes of the Hibernia and Terra Nova projects. Second, the model selected by the Claimant depended on variables that were highly uncertain. For these reasons, the Mobil/Murphy Majority called the estimation it was being asked to make "extremely hazardous" and "not, on balance, … more probable than not."[319] Both ways in which the claim failed – that is, (i) the inappropriateness of the damages sought from a legal standpoint and (ii) the unacceptability of the level of uncertainty from an evidentiary standpoint – relate to the merits or substance of the claim. This was one (and a critical) consequence of the Claimant's unusual decision to present only one damages model to the Mobil/Murphy tribunal.

194. The above analysis demonstrates that the Mobil/Murphy tribunal did not decline to make a decision on future damages owing to jurisdictional or admissibility barriers. Rather, the tribunal used statements such as "we are not inclined to compensate for expenditures not paid or

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

[319] **C-1**, Mobil/Murphy – Decision, ¶ 477 (emphasis added).

levied"[320] and "we have also highlighted the uncertainty of the evidence pertaining to the amount of incremental expenditures in this largely future period"[321] to summarize its conclusions with respect to future damages. As the Claimant admits in its Reply Memorial, the Mobil/Murphy Majority "decided that, as a matter of principle, it would only award past losses."[322] Had the Claimant selected a different damages model, or otherwise persuaded the Mobil/Murphy tribunal as to the legal acceptability and factual reliability of the method it selected, the Claimant may have been successful.

195. The Claimant argues in its Reply Memorial that it was not its damages model that was a problem but rather inherent uncertainty stemming from "the Board and its regulatory decisions."[323] This is incorrect. There is no suggestion in either the Mobil/Murphy Decision or Award that the Majority was hesitant to award future damages because of uncertainty as to whether the Board would continue to apply the Guidelines or whether the manner of its application would change subsequent to the tribunal's decision. To the contrary, as the Claimant states, the "Mobil[/Murphy] Majority understood that the Guidelines were intended to apply for the life of the Projects."[324]

196. As per the above discussion, the second and third parts of the three-part test for issue estoppel are satisfied: the Mobil/Murphy tribunal made a determination on the specific issue of future damages, including for the 2012-2015 time period, and that decision was necessary for the Mobil/Murphy tribunal to address the claim in front of it for damages for that time period.

197. The Claimant is taking the position before this Tribunal that all this is inconsequential because there was no "quantification of the damages suffered by [the Claimant] from 2012 through 2015",[325] and no "definitive decision on the individual incremental expenditures comprising [the Claimant's] claim in this arbitration."[326] The Claimant's singular focus on

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

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

[322] Claimant's Reply Memorial, ¶ 102 (emphasis added).

[323] Claimant's Reply Memorial, ¶ 23.

[324] Claimant's Reply Memorial, ¶ 18.

[325] Claimant's Reply Memorial, ¶ 106.

[326] Claimant's Reply Memorial, ¶ 101.

quantification and on individual expenditures misses the point – the Mobil/Murphy tribunal's decision not to award damages for the 2012-2015 time period has issue estoppel effect in this arbitration, and hence, no subsequent questions on damages for this time period need to be addressed in this arbitration, just as no subsequent questions needed to be addressed in the Mobil/Murphy arbitration with respect to future damages. A determination that no damages are to be awarded is dispositive on the question of damages, obviating further analysis or discussion.

198. What is clear for the purposes of this Tribunal is that (i) the question of damages for the 2012-2015 time period was put in issue by the parties; (ii) the Mobil/Murphy tribunal made the determination on the merits that the Claimant would not be awarded any damages for the 2012-2015 time period; and (iii) this determination was necessary to dispose of the Claimant's claim as the claim presented to the tribunal spanned the entire length of the Hibernia and Terra Nova projects, including the 2012-2015 time period. Thus, the Mobil/Murphy tribunal's determination that the Claimant is not to be awarded damages for the 2012-2015 time period carries issue estoppel effect in this arbitration.

F. The Mobil/Murphy Tribunal's Reference to "Ripeness" Does Not Limit the Scope of Operation of *Res Judicata*

199. The Claimant imputes weight to two statements by the Mobil/Murphy Majority regarding future damages: (i) "the claim for such losses is not yet ripe for determination,"[327] and (ii) the Mobil/Murphy Majority is "not yet able to properly assess the Claimants' claim for future damages."[328] But the Claimant ignores the context in which these statements were made in order to coax from them support for its proposition that the Mobil/Murphy tribunal made no merits-based decision on the issue of the Claimant's entitlement to damages for the 2012-2015 time period.

200. As Canada has already explained, the Claimant's proposition fails because (i) this issue was placed before the Mobil/Murphy tribunal by the parties, (ii) the tribunal was bound to make a decision on it pursuant to their obligations under the NAFTA and the ICSID Arbitration (Additional Facility) Rules, (iii) the tribunal made a positive finding on both jurisdiction and

[327] **C-1**, Mobil/Murphy – Decision, ¶ 473.

[328] **C-1**, Mobil/Murphy – Decision, ¶ 473.

admissibility with respect to this issue, and (iv) the tribunal engaged in a thorough analysis of the law and evidence before it vis-à-vis this issue in its Decision. But to clear up the confusion the Claimant promotes, it is useful to consider the manner in which the Mobil/Murphy tribunal used the terms "ripe" and "not yet" elsewhere in the Decision and Award.

201. The Mobil/Murphy Majority made findings of lack of "ripeness" not just with respect to future time periods, but also the 2004-2008 time period and the 2009 time period, which the Claimant does not discuss. These other uses of the term "ripe" illuminate the manner in which the tribunal used the term. Specifically, the Mobil/Murphy Majority stated in its discussion on damages for the 2004-2008 time period that "[u]ntil the Claimants submit evidence of actual damage, the claim for the cost of compliance with the 2004 Guidelines for the 2004-2008 period is not ripe for compensation by this Tribunal."[329] Then, the Majority stated in its discussion on damages for the 2009 time period that "we have been presented with no evidence of actual damages [and] [c]onsequently, we are again of the view that the claim for the cost of compliance with the 2004 Guidelines for the 2009 period is either not yet ripe for determination by this Tribunal or we do not have the information before us."[330]

202. Despite the use of nearly identical language by the Mobil/Murphy tribunal with respect to all three of the time periods that were at issue, the Claimant proposes a specialized reading of the phrase with respect to just one of those time periods. Canada and the Claimant agree that the tribunal made a final decision on the issue of damages for the first two time periods. The Claimant explicitly states there was a "final determination of actual damages incurred by the Claimants between 2004 and 2012," by the Mobil/Murphy tribunal.[331] Further, the Claimant has not suggested that cause of action estoppel or issue estoppel would not bar re-arbitration of these parts of the case before the Mobil/Murphy tribunal.

203. These other appearances of the term "ripe" confirm that the Mobil/Murphy Majority's use of the term was directed toward the question of whether appropriate and sufficient evidence had been presented to it and not a question of the essential readiness of claims or issues for

[329] **C-1**, Mobil/Murphy – Decision, ¶ 470.

[330] **C-1**, Mobil/Murphy – Decision, ¶ 472.

[331] Claimant's Reply Memorial, ¶¶ 104-105.

adjudication. This is further affirmed by the fact that all three references to "ripeness" were made in the section of the Decision entitled, "Evidence of Damages Presented."[332]

204. The Claimant's reliance on the phrase "not yet" is also misplaced. The Claimant notes that the Mobil/Murphy Majority stated that they were "not yet able to properly assess the Claimants' claim for future damages."[333] The Claimant neglects to mention that the Mobil/Murphy Majority used very similar language in their analysis of whether any deduction should be made to the Claimant's damages award to account for the royalty taxation credits the Claimant benefits from. Canada argued that deductions ought to be made. However, the Mobil/Murphy Majority stated in its analysis that "[h]aving taken into account all of the evidence, the Tribunal has ultimately found that there is not yet sufficient certainty regarding the royalty deductions for any deduction to compensation to be warranted."[334] Ultimately, Canada was denied its request for deductions.

205. As there was "not yet sufficient certainty" on the subject of royalties for the 2009-2012 time period, Canada (that is, the party seeking an affirmative finding on the issue of royalty taxation credits deductions) failed, and the Claimant succeeded. Thus, the phrases "not yet able to properly assess" or "not yet sufficient certainty" were used by the Mobil/Murphy Majority to convey their determination that the requisite burden of proof was not carried by the party seeking an affirmative finding. The Claimant benefitted from the Mobil/Murphy Majority's finding that there was insufficient or unpersuasive evidence before it on the issue of royalty deductions for the 2004-2012 time period, and Canada benefitted from their finding that there was insufficient or unpersuasive evidence before it on the issue of damages for all post-2012 time periods.

206. If the Claimant's interpretation of the Decision is accepted, the necessary consequence would be that Canada can now (or anytime in future arbitrations) marshal new or better evidence on the topic of royalty deductions and re-arbitrate the issue of royalty taxation credits for the 2004-2012 time period before this Tribunal (Canada sought a reduction of approximately 30% in the damages awarded to the Claimant owing to royalty taxation credits).[335] The impact such re-

[332] **C-1**, Mobil/Murphy – Decision, ¶¶ 441-485.

[333] **C-1**, Mobil/Murphy – Decision, ¶ 473.

[334] **C-2**, Mobil/Murphy – Award, fn. 199 (emphasis added).

[335] **C-2**, Mobil/Murphy – Award, ¶ 141.

arbitrating would have on certainty and finality for both parties demonstrates the problem with the Claimant's reading of the Decision and Award, and underscores the policy interests underlying the doctrine of *res judicata* and why it should be applied by the Tribunal in this case.

207. In sum, a reasonable reading of the Decision and Award leads to the conclusion that the tribunal, when faced with law and evidence it deemed unpersuasive on the balance of probabilities, made a determination against the party seeking an affirmative finding on both the issue of damages for the 2012-2015 time period (and all future time periods), just as it did with respect to the issue of royalty taxation credits for the 2004-2012 time period.

G. The Claimant Mischaracterizes the Mobil/Murphy Majority's Obiter Statement Concerning Re-arbitrating Before Other NAFTA Arbitral Tribunals

208. The Claimant also places undue reliance on the conclusory sentence in the Majority's discussion on 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 [Mobil/Murphy] proceedings."[336] The Claimant views this lone statement as "expressly direct[ing] Mobil to file further arbitrations"[337] and as indicating that further arbitral proceedings (or re-arbitrations) were "fundamental"[338] to the decision on future damages. These are strained interpretations. Neither the statements that precede it nor those which follow concern prospective re-arbitrations.

209. The Mobil/Murphy Majority did not direct the Claimant to commence further arbitral proceedings. Only the dispositive or the operative portion of a decision is relevant to a determination of what has been directed by a tribunal. As stated by the Permanent Court of Arbitration in the *Police Postal Service* judgment, "it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned."[339] More recently, the International Court of Justice confirmed in the *Temple of Preah Vihear* judgment that the Court's authority to construe the

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

[337] Claimants' Reply Memorial, ¶ 4.

[338] Claimants' Reply Memorial, ¶ 87.

[339] **RL-100**, *Polish Postal Service in Danzig* (P.C.A. Series B – No. 11) Advisory Opinion of 16 May 1925, pp. 29-30.

meaning or scope of a judgment "must relate to the operative clause of the judgment in question and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative clause."[340]

210. It is obvious that no reference to the Claimant bringing further claims can be found in the dispositive or operative part of the Decision.[341] This is unsurprising because the tribunal did not have jurisdictional authority to "direct" re-arbitrations (any such direction would have been *ultra vires*).

211. The Claimant cannot even suggest that the Majority's speculative statement carries issue estoppel effect. None of the three requisites for issue estoppel to apply is satisfied – the issue of re-arbitrations (i) was not distinctly put at issue by the parties; (ii) was not decided upon by the Mobil/Murphy tribunal; and (iii) did not need to be decided to resolve the claim that was before the tribunal.

212. First, the claim before the Mobil/Murphy tribunal concerned compensation in the form of damages for the Hibernia and Terra Nova projects across their respective lifetimes. The separate issue of whether further arbitrations could be commenced was not raised as an issue for determination by either party. The parties did not engage in any adversarial proceedings on this issue.

213. Second, no determination on this issue was made by the Mobil/Murphy tribunal. The Mobil/Murphy Majority did not undertake any analysis on prospects of re-arbitrations. This is notable because had it done so, the serious problems posed by the NAFTA limitations period and *res judicata* would have become apparent. In fact, the Claimant noted in its Reply Memorial in the Mobil/Murphy arbitration in an attempt to persuade the Mobil/Murphy tribunal to award it future damages, that presenting themselves before future arbitral tribunals may be "a prospect fraught with practical obstacles."[342] In addition, the Mobil/Murphy Majority did not provide any

[340] **RL-101**, *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 11 November 2013, (I.C.J. Reports 2013, p. 281), ¶ 34.

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

[342] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 298.

guidance or direction with respect to how or when (at what times and with what frequency) the Claimant could commence further arbitrations.

214. Third, resolution of this issue was not necessary for the tribunal to resolve the claim before it. The Mobil/Murphy Majority explained in the Decision that their decision not to award compensation for future time periods was based on its determination that the damages model presented to it relied on variables (i) that were not ascertainable in the present and rather only in the future, and (ii) that were speculative and uncertain.[343] Further, as already demonstrated in Canada's Counter-Memorial,[344] no causal connection can be drawn between the Mobil/Murphy Majority's assumption that damages may be claimed in future NAFTA arbitrations and their decision not to grant compensation for future losses.

215. For all of these reasons, and as explained by Canada in its Counter-Memorial, the Mobil/Murphy Majority's statement that "the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the [Mobil/Murphy] proceedings" can at best only be described as a casual assumption.

H. Conclusion

216. The doctrine of *res judicata* in public international law intends for respondents to not have to respond to the same claim or issues recurrently. The doctrine ensures in the interest of efficiency, fairness and finality that respondents are not compelled to respond to a claim every time a claimant takes the position that it has marshalled better evidence or constructed different arguments.

217. The entirety of the Claimant's claim before this Tribunal is barred by *res judicata* and its cause of action estoppel effect. This claim is founded on the same alleged injury and cause of action as the Mobil/Murphy arbitration, namely breach of Article 1106 of the NAFTA by application of the 2004 Guidelines to the Hibernia and Terra Nova projects across the projects' lifetimes. Additionally, the Claimant raised the specific issue of its entitlement to damages for the 2012-2015 time period before the Mobil/Murphy tribunal and it decided not to award any

[343] **C-1**, Mobil/Murphy – Decision, ¶¶ 474-477.

[344] Canada's Counter-Memorial, ¶¶ 198-199.

damages for this time period. This determination cannot be reconsidered. As the Claimant's claim depends on this issue being re-arbitrated and re-determined, the Claimant's claim, again, automatically fails.

218. This outcome is wholly in line with the policy interests underlying the NAFTA. Final NAFTA awards cannot be reopened once a tribunal becomes *functus officio*.[345] This means that claimants and respondents have only a limited opportunity to persuade a tribunal, and places NAFTA tribunals in a different position relative to adjudicative bodies that have institutional or ongoing authority over parties and their disputes. Even the Claimant recognizes this difference and affirmed in the Mobil/Murphy arbitration that NAFTA tribunals face different constraints relative to domestic courts:

> In practice, because national courts have the power in appropriate cases to award injunctive relief, [or to] permit future recourse to the courts to recover damages over time…national courts do not frequently confront the kinds of constraints with regard to remedies that bind a specially-constituted NAFTA tribunal.[346]

219. Allowing the Claimant to simply re-arbitrate portions of a previously arbitrated claim before a new tribunal would not only be contrary to public international law, but also defeat the goals that underlie NAFTA Chapter Eleven. The result would be that Canada is vexed twice with respect to the same matter, while the Claimant entirely dodges the legal consequences of having arbitrated claims and sought damages that were unsupported in law and lacking in evidence.

V. THE CLAIMANT SEEKS COMPENSATION TO WHICH IT IS NOT ENTITLED

A. Summary of Canada's Position

220. While Canada maintains that the Claimant has no legal basis upon which it can bring a claim for damages, if the Tribunal finds otherwise, it should award far less than what the Claimant demands.

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[345] There are certain limited exceptions to tribunals becoming *functus officio*. They are found in the "governing procedural law or in institutional arbitration rules which allow arbitrators to correct errors, clarify ambiguities or complete an award by deciding any questions that it has omitted to decide … [such as] is the case of Articles 55, 56 and 57 [with] the ICSID Arbitration (Additional Facility) Rules", which applied to the Mobil/Murphy arbitration. **RL-102**, *Gold Reserve, Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Decision Regarding the Claimant's and the Respondent's Requests for Corrections, 15 December 2014, ¶ 36.

[346] **R-87**, Mobil/Murphy – Claimants' Post-Hearing Brief I, ¶ 62.

221. There are three main defects in the way the Claimant has approached its claim for compensation. First, it seeks to recover more than what it is entitled to under principles of international law. The Claimant's demand for [redacted] more than what it was required to spend under the 2004 Guidelines is at odds with how it and the Mobil/Murphy tribunal approached the question previously, as well as contrary to the basic "but for" approach to compensation. The Claimant was not required to spend as much as it did, it chose to spend more. That excess amount is not recoverable and the explanations offered by the Claimant to the contrary are unconvincing.

222. Second, at the individual expenditure level, there is ample evidence to confirm that the Claimant is leveraging the Hibernia project to carry-out R&D in Newfoundland and Labrador that would have otherwise been done at its Upstream Research Center in Houston, Texas or by other affiliates in order to have its co-partners share the cost and, potentially, Canada pay its share. While the Claimant might be entitled to recoup the difference in cost for having to undertake an R&D expenditure in the Province as opposed to elsewhere, it should not be awarded the full amount claimed when it cannot be fairly said that the 2004 Guidelines caused the expenditure. Furthermore, the Claimant is seeking over [redacted] in compensation for the Gas Utilization Study (WAG Pilot) which, according to the witness statement of Mr. Jeff O'Keefe of the C-NLOPB, the Claimant would have done regardless of the 2004 Guidelines because "it was good oil field practice, required under the regulations and made economic sense."[347] For these and other expenditures that fail to meet the basic standard of causation, compensation should be denied.

223. Finally, the Claimant has failed to account for all of the financial benefits accruing from its Provincial royalty deductions. While the Claimant did pay royalties on the amount of the Mobil/Murphy Award, which it says has made Canada "whole", the Claimant has not disclosed the amount of its royalty payment savings, and it is likely that these savings are greater than the royalties it paid on the Award. Moreover, the Claimant does not account for the financial benefit it receives during the time between when the deduction accrues to it and the payment of royalties on an arbitral award. As Mr. Walck explains in his second report, there is a calculable time-value

[347] **RW-1**, O'Keefe Statement I, ¶ 25.

of money benefit that should be accounted for in any assessment of quantum. Similarly, to the extent that the Claimant is compensated for R&D and E&T expenditures but also retains financial, operational or other value-added gains from these expenditures, those savings and benefits should be reflected as an offset to the amount of compensation.

B. The Claimant Wrongly Seeks to Recoup its Overspending Despite the Mobil/Murphy Tribunal's Contrary Approach to Damages

224. The Claimant does not deny that its current damages model is based on its total R&D and E&T spending at Hibernia and Terra Nova for 2012-2015, rather than what it was required to spend under the 2004 Guidelines. The Claimant also does not deny that it spent [redacted] more on R&D and E&T than what it was required to spend under the 2004 Guidelines during that period,[348] and that it seeks to recover this non-obligatory surplus spending as damages from Canada in this arbitration. The Claimant's approach to damages in this case is fundamentally different than the model it presented to the Mobil/Murphy tribunal, which used the Claimant's total required spending as the starting point.[349] This approach was explained by the Mobil/Murphy tribunal in its Decision:

> The Claimants are also seeking compensation for the future incremental spending requirements under the 2004 Guidelines from 2010 until 2018 for the Terra Nova Project and until 2036 for the Hibernia Project. They calculate this future compensation in the same manner as the other damages: i.e. the difference between the total R&D and E&T expenditures required by the 2004 Guidelines and the amount that they would have spent on R&D and E&T in the usual course of project operations from 2009 until 2036 if the 2004 Guidelines had not been issued.[350]

225. A damages model based on "total spending" is significantly different than one based on the "total R&D and E&T expenditures required by the 2004 Guidelines."[351] As Canada's damages expert Mr. Walck explains, if the Claimant adhered to the same formula as was applied by the

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

[349] **R-68**, Mobil/Murphy – Rosen I, ¶ 28; **R-268**, Mobil/Murphy – Rosen II, ¶ 22; **R-33**, Mobil/Murphy – Rosen III, Schedule 2 and 3.

[350] **C-1**, Mobil/Murphy – Decision, ¶ 449.

[351] **C-1**, Mobil/Murphy – Decision, ¶ 449.

Mobil/Murphy Majority, it would be entitled to zero damages for Terra Nova and its damages claim for Hibernia could be no higher than [redacted].[352]

226. The damages the Claimant seeks for surplus R&D and E&T expenditures is not compensable because these expenditures were not caused by the Guidelines. Indeed, the Claimant could have avoided its surplus spending entirely had it simply deposited money into an R&D Fund managed by the Board, pursuant to section 4.2 of the 2004 Guidelines.[353] Under this option, the Claimant would simply have to pay the difference between its required spending and its ordinary course spending into an R&D Fund administered by the Board, erasing the risk of surplus spending entirely. In fact, the Claimant repeatedly raised the R&D Fund as an option throughout the Mobil/Murphy arbitration,[354] which led the tribunal to write the following:

> The Tribunal notes that the situation is further complicated by the fact that the Claimants themselves have created uncertainty by not simply paying the amount of required spending into a fund, as is permissible under the Guidelines.[355]

[352] **RE-2**, Walck Report II, ¶ 74, Table 13. As Mr. Walck explains, this number is higher than what it was previously [redacted], see Canada's Counter-Memorial, ¶¶ 14, 243) because of Mr. Phelan's SRED tax credit adjustments.

[353] Paragraph 4.2 of the 2004 Guidelines states: ("[F]or any POA period in which there are no sufficient projects to absorb the required level of expenditure, the balance may be placed in a R&D fund. The fund will be managed by the Board in conjunction with the operator consistent with these guidelines"). **C-3**, CNLOPB, Guidelines for Research and Development Expenditures (Oct. 2004), ¶ 4.2.

[354] **R-65**, Mobil/Murphy – Claimants' Memorial, ¶ 221: ("There appear to be four different scenarios by which the project owners could engage in additional R&D spending to comply with the Guidelines. First, they could undertake a higher level of project-specific R&D. Second, they could participate in industry-wide R&D efforts that are not project-specific. Third, they could undertake R&D at the individual owner level that is not project-specific. Fourth, they could deposit any shortfall in spending into an R&D fund to be administered by the Board in accordance with the Guidelines." (emphasis added)). See also, ¶ 181: ("Where projects are unable to meet the inflated expenditure targets imposed by the Board — an eventuality likely to result for Hibernia and Terra Nova, as upstream, offshore projects in fairly advanced stages of production — operators are required to place the shortfall into a fund to be administered by the Board. That is, they are required to give money away.") and ¶¶ 126, 158; **R-245**, Mobil/Murphy – Ringvee Statement I, ¶ 12; **R-248**, Mobil/Murphy – Phelan Statement I, ¶ 29(d); R-72, Mobil/Murphy – Claimants' Reply Memorial, Annex A, ¶ 17: ("any potential benefit to the projects of the incremental spending mandated by the Guidelines will be diminished if, for example, they are compelled as a results of limited capacity to meet their Guidelines requirement by depositing money into a Board-administered fund or underwriting a capital infrastructure project rather than funding research with some practical application for Hibernia or Terra Nova."); **R-290**, Mobil/Murphy – Damages Hearing Transcript (Apr. 23, 2013), p. 26:15-19.

[355] **C-2**, Mobil/Murphy – Award, fn. 47.

227. The Claimant now argues that "no Board-managed R&D fund ever existed into which any operator could have paid."[356] That is misleading. In 2010, the Claimant approached the Board to propose a mechanism in lieu of the R&D Fund, one that would establish letters of credit that could be drawn by the Board if the required spending threshold was not met in a given period.[357] The Board agreed to adopt the Claimant's proposal. There is no practical difference between the R&D Fund and the letter of credit scheme;[358] had the Claimant exercised either option it would not have incurred any surplus spending. On this basis alone, Canada is not liable to compensate the Claimant for its surplus damages.

228. The Claimant advances a number of reasons why it should be paid its surplus damages. None have merit.

229. First, the Claimant argues that it should be compensated for its surplus damages because the model it presents in this arbitration (based on total spending undertaken rather than total required spending) is consistent with the principles of compensation established by the Mobil/Murphy tribunal. This is false. The principle of quantum the Mobil/Murphy Majority applied to determine the damages caused by the breach was "the difference between the total R&D and E&T expenditures required by the 2004 Guidelines and the amount that they would have spent on R&D and E&T in the usual course of project operations from 2009 until 2036 if the 2004 Guidelines had not been issued."[359] The Claimant cannot extrapolate from the tribunal's statement that "compensation is due" when "a payment or expenditure related to the implementation of the 2004 Guidelines has been made"[360] as an unrestricted right to spend as

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[356] Claimant's Reply Memorial, ¶ 172.

[357] **R-291**, Memorandum from Jeff Bugden, CNLOPB to Audit Committee re: Financial Instruments – R&D Shortfalls (Aug. 31, 2011), p. 1: ("At its March 23, 2010 meeting, the Board determined that an irrevocable letter of credit was required to address shortfalls in R&D/E&T expenditure obligations. This decision followed from a proposal made to the Board at the initiative of the operators that in lieu of placing any shortfalls into a fund to be jointly managed by Industry and the Board as contemplated by section 4.2 of the Guidelines, a financial instrument instead be considered. The Board accepted this proposal and determined that the financial instrument be in the form of an irrevocable letter of credit.") (emphasis added).

[358] As Mr. Walck explains, allowing the Board to draw on the letter of credit to meet its outstanding 2004 Guidelines obligations would have the same effect as depositing money into a fund because it removes all the subjectivity and uncertainties inherent in the way the Claimant has chosen to proceed with its damages claim. (**RE-2**, Walck Report II, ¶ 26).

[359] **C-1**, Mobil/Murphy – Decision, ¶ 449 (emphasis added).

[360] Claimant's Reply Memorial, ¶ 128, citing to **C-1**, Mobil/Murphy Decision, ¶ 469.

much as it wants and then seek to recoup the amount spent as damages from Canada. The Claimant argues that applying the damages model it presented in the Mobil/Murphy arbitration would create a "ceiling" on the damages it can recover, but that is precisely the point – there *should* be a ceiling on the Claimant's damages as otherwise they could elect to spend any amount regardless of whether the expenditures are caused by the underlying requirement that has been found to be a breach of NAFTA.

230. Second, the Claimant argues that it should be compensated for its surplus spending because "it is virtually impossible for the operators to forecast their expenditure obligations under the Guidelines with exactitude."[361] This a remarkable comment on the part of the Claimant which argued during the Mobil/Murphy arbitration that it could predict with reasonable certainty its spending obligations under the 2004 Guidelines for the next 27 years.[362] While this speaks to just how extreme its damages case was during the Mobil/Murphy arbitration, it is also unconvincing with respect to millions of dollars of overspending in 2015. The Claimant suggests that it could not have known it would overspend in that year[363] but it did know in June 2014 that the price of oil had dropped significantly and that its upcoming R&D expenditure obligations would be lower.[364] It had this information well in advance of the submission of the 2015 R&D and E&T budget to the Hibernia Owners in September 2015 and the Owners' approval in December 2015,[365] and the Claimant has offered no evidence to show that it could not have adjusted its spending for 2015 to better align with what it should have known would be a lower spending requirement under the 2004 Guidelines. The fact that the Claimants' own damages assessment has remained consistent since it filed its NAFTA NOI in October 2014 demonstrates that it must have had advance knowledge of its likely overspending in 2015.[366]

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[361] Claimant's Reply Memorial, ¶ 144.

[362] **R-33**, Mobil/Murphy – Rosen III, Schedule 2 and 3.

[363] **CW-9**, Phelan Statement II, ¶ 55.

[364] **CW-9**, Phelan Statement II, ¶ 55.

[365] **R-248**, Mobil/Murphy – Phelan Statement I, ¶¶ 7-8.

[366] Notice of Intent, p. 3; Request for Arbitration, ¶¶ 7, 55; Claimant's Memorial, ¶¶ 4, 322; Claimant's Reply Memorial, ¶¶ 5, 179.

231. Third, Mr. Phelan testifies that the Claimant does not have "unilateral control" over how the Hibernia and Terra Nova operators comply with the Guidelines,[367] and thus it could not control the surplus R&D and E&T spending. However, the Claimant has the option of meeting its obligations under the 2004 Guidelines with its own company-level spending, a fact that Mr. Phelan agrees to elsewhere in his witness statement.[368] In fact, as a minority-owner in the Projects, the Claimant already files letters of credit with the Board for its *pro rata* spending shortfalls under the 2004 Guidelines.[369] It is therefore misleading to suggest that there are no options available to the Claimant to avoid spending more than required.

232. Fourth, the Claimant argues that it should be compensated for its surplus spending because "[t]he 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."[370] But the evidence shows that at least five new "incremental" R&D and E&T projects were commenced in 2015 that need not have been undertaken to meet its obligations under the 2004 Guidelines.[371] This is not about stopping and starting research spending, but rather about whether the spending was actually caused by the Guidelines.

233. Finally, the Claimant argues that "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."[372] Whether that is true or not (the Board has not yet received or assessed the Claimant's Guidelines obligations for 2016), the Claimant has already confirmed that the authority of this Tribunal extends only with respect to "damages caused by the [2004 Guidelines] from those dates through the end of 2015."[373] The Claimant's argument also contradicts its own position that, following the

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[367] **CW-1**, Phelan Statement I, ¶ 91: ("The Board has required that the owners of any project for which a R&D/E&T shortfall is assessed make a promissory note in the amount of its *pro rata* share of the shortfall secured by a letter of credit.").

[368] **CW-9**, Phelan Statement II, ¶ 52; **CW-1**, Phelan Statement I, ¶¶ 60-61.

[369] **R-275**, Mobil/Murphy – Phelan Statement II, ¶ 91.

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

[371] See Canada's Rejoinder Appendix A and **RE-2**, Walck Report II, Annex 1: Drift and Divergence of Ice Floes ($763,518); Dynamic Monitoring of Shallow Water Wells ( ); Environmental Genomics ( ); ( ); Ice Radar Enhancement Project ( ). The gross total of these expenditures is .

[372] Claimant's Reply Memorial, ¶ 126.

[373] Claimant's Memorial, ¶ 1.

decision in *UPS*, it is only seeking compensation for damages incurred in the three years prior to the date on which it filed its Request for Arbitration.[374] The Claimant cannot claim as damages expenditures incurred after January 16, 2015, the date it filed its Request for Arbitration, by consequence of its own argument.

234. In sum, if the damages approach originally followed by the Claimant and as was adopted by the Mobil/Murphy Majority is applied by this Tribunal, as it should, the Claimant suffered zero damages at Terra Nova because its [redacted] in ordinary course spending was more than sufficient to meet its $5.541 million spending requirement under the 2004 Guidelines. At Hibernia, based on Mr. Phelan's figures, the maximum damages the Claimant can claim after extracting its surplus spending is [redacted]. It is from these starting points that the Tribunal should begin its inquiry – just as the Mobil/Murphy tribunal did – into what portion of the claim is compensable. As Canada argues below, most of the Claimant's claim for damages does not meet the evidentiary standard of reasonable certainty as having been caused by the 2004 Guidelines.

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

1. The Claimant's Approach to Damages is Flawed

235. The Claimant's damages model is based on its total R&D and E&T spending, which it divides into two categories: R&D and E&T expenditures that were undertaken in the "ordinary course of business" and R&D and E&T expenditures that it claims were "incremental." The Claimant alleges that it should be compensated for 67 individual R&D and E&T expenditures that it places into the latter category.[375]

236. The Claimant agrees that it has the burden of establishing its damages to the standard of reasonable certainty,[376] but the manner in which the Claimant attempts to meet that burden has several methodological defects that undermine the credibility of its claims.

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[374] Claimant's Reply Memorial, ¶¶ 72-73; **CW-9**, Phelan Statement II, ¶ 12.

[375] See Canada's Rejoinder Appendix A, which contains all the relevant arguments and citations by both parties with respect to the 67 expenditures claimed as compensation in this case.

[376] Claimant's Memorial, ¶ 285 citing to **C-1**, Mobil/Murphy – Decision, ¶ 437.

237. First, the Claimant ignores the fundamental requirement under international principles of compensation that it is only entitled to the damages that were *caused* by the 2004 Guidelines.[377] The Claimant does not address the question of causation in its Reply Memorial, but merely assumes that the 2004 Guidelines caused as damages the full amount of whatever expenditures it puts into the "incremental" camp. The task of this Tribunal, in Canada's view, is not to split expenditures into "ordinary course" and "incremental" camps, but to assess the evidence and determine whether the 2004 Guidelines caused as damages the amounts being claimed. By way of example, the defect in the Claimant's approach can be seen in the 17 R&D expenditures that the Claimant moved from its global research facility in Houston into the Province.[378] The Claimant alleges that it should be compensated in full for its share of these expenditures because they would not have been undertaken in the Province in the absence of the 2004 Guidelines.[379] That is not, however, an accurate reflection of the damages actually incurred by the Claimant, which should reflect only any additional cost (if any) incurred from moving the expenditures to the Province rather than the full cost of the expenditures. This is not how the Claimant has presented its damages. The Claimant is legally required to do more: it has the burden of proving the actual losses caused by the 2004 Guidelines.

238. Second, the Claimant's damages case is undermined by the dearth of documentary evidence establishing that the claimed expenditures would not have been undertaken in the absence of the 2004 Guidelines. The Claimant provides no contemporaneous documents, reports or other independent analysis of the claimed expenditures indicating that the expenditures were

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[377] **CL-74**, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 31. See also, **RL-40**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶ 739; **RL-103**, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24) Award, 17 December 2015, ¶¶ 362-363; **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, 25 July 2007, ¶¶ 29, 45.

[378] See Part V.2(a) below, **RE-2**, Walck Report II, Annex 1 and Canada's Rejoinder Appendix A: Arctic Offshore and Pipeline Engineering Course ( ); Drift and Divergence of Ice Floes ($763,518); Dual Polarized Radar ( ); Dynamic Monitoring of Shallow Water Wells ( ); Environmental Genomics ( ); Gas Utilization Study ( ); Ice Loads on Floating Structures ( ); ( ); Ice Management JIP ( ); Ice Radar Enhancement Project ( ); ( ); Nuclear Magnetic Resonance to Detect Oil in and Under Ice ( ); ( ); R&D Applications of Iceberg Profiling ( ); ( ); Subsea Sentry System ( ); Wave Impact Study ( ). The gross total of these expenditures is .

[379] See for example, **CW-10**, Sampath Statement II, ¶¶ 32-38.

"contrived" and "unnecessary".[380] Instead, the Claimant relies exclusively on the testimony of its own employees who decide for themselves which R&D and E&T expenditures are "incremental" and compensable. As Mr. Walck points out, this subjective approach to damages makes independent verification extremely difficult.[381]

239. The hazard of relying solely on the Claimant's employee witnesses is confirmed by hindsight. In the Mobil/Murphy arbitration, based on the testimony of its witnesses, the Claimant argued that its R&D and E&T spending in the ordinary course of business between 2004 and 2015 would total only [redacted].[382] The Claimant's witnesses now confirm, however, that the amount was actually [redacted].[383] In the Mobil/Murphy arbitration, Mr. Phelan was confident that the Claimant had "little need"[384] for R&D in the ordinary course of business and he predicted that the Claimant's ordinary course spending at Hibernia in 2010 would be no more than [redacted].[385] We now know, however, that the Claimant's ordinary course spending that year was actually [redacted].[386] In fact, contrary to Mr. Phelan's testimony during the Mobil/Murphy arbitration, the Claimant's R&D and E&T spending in the "ordinary course of business" – based on their own figures – has *increased* during the production phase of the Projects.[387] The inaccurate predictions by the Claimant's witnesses during the Mobil/Murphy arbitration highlight the risks of relying solely on the subjective opinions of its own employees.

240. The Claimant's witnesses have also reversed their positions on the nature of R&D and E&T expenditures on several occasions, asserting at the outset that a given expenditure was incremental, but later conceding that it should be categorized as 'ordinary course'. In the

[380] The Claimant consistently referred to its "incremental spending" in the Mobil/Murphy arbitration as expenditures that are "contrived" and "unnecessary" (see for example, **R-75**, Mobil/Murphy – Claimants' Damages Submission, 23 July 2012, ¶¶ 20, 24: ("We have already presented to the Tribunal conclusive documentary and witness evidence demonstrating the very significant efforts undertaken by the Projects to contrive unnecessary and incremental spending opportunities.").

[381] **RE-2**, Walck Report II, ¶¶ 22, 40.

[382] See Canada's Counter-Memorial, ¶ 74 (Terra Nova Total: [redacted] + Hibernia Total: [redacted] = [redacted]).

[383] Canada's Counter-Memorial, ¶ 133.

[384] **R-248**, Mobil/Murphy – Phelan Statement I, ¶ 25. See also **R-245**, Mobil/Murphy – Ringvee Statement I, ¶ 10.

[385] **R-248**, Mobil/Murphy – Phelan Statement I, ¶ 25.

[386] Canada's Counter-Memorial, fn. 272.

[387] Canada's Counter-Memorial, ¶¶ 72-77.

Mobil/Murphy arbitration the Claimant's witnesses changed their minds several times. For example, Mr. Phelan testified at the Mobil/Murphy hearing in 2010 that an R&D project called the "[redacted]" was incremental and compensable because "we wouldn't expect, any owner to endorse a [redacted] expenditure to save [redacted] when there is the degree of uncertainty associated with this."[388] However, he later changed his mind and agreed that this expenditure was not compensable because it was undertaken in the ordinary course of business.[389] In the current arbitration, the Claimant's witnesses have changed their minds in a matter of only six months over two expenditures: the Seabird Activity and Aviation Operations Study (the study of Nocturnal Migratory Bird Behaviour), and two studies that were part of the H2S Project[390] (the NRB-SRB Interaction and System Optimization, and a study on Reservoir Souring: Sulphur Chemistry in Reservoir).[391] These were all originally claimed as "incremental" but then later completely or partially "reclassified" as "ordinary course." The Claimant attempts to portray these reversals as innocuous, but they actually demonstrate the extreme subjectivity of the exercise that the Claimant asks this Tribunal to accept. This Tribunal must be skeptical of any witness opinion that is not corroborated by documentary evidence.

241. As described in Appendix A, many of the available documents cast doubt on the Claimant's assertion that all of its claimed 67 expenditures are "incremental." In its Reply Memorial, the Claimant accuses Canada of identifying only "cherry-picked snippets" from the documents.[392] This is incorrect. Nearly all of the contemporaneous documents concerning the expenditures the Claimant argues are "incremental" make explicit statements about their value to the Claimant's current and future operations.[393] Contemporaneous documents are a more reliable

[388] **R-284**, Mobil/Murphy – Day Two Hearing Transcript, p. 331:4-7.

[389] **R-69**, Mobil/Murphy – Phelan Statement IV, Annex F, p. 2.

[390] **CW-9**, Phelan Statement II, ¶ 7.

[391] **CW-10**, Sampath Statement II, ¶¶ 116-117.

[392] Claimant's Reply Memorial, ¶ 160.

[393] See Canada's Rejoinder Appendix A for more detail.

source of evidence than post-facto witness statements from the Claimant's employees in the context of its own lawsuit.[394]

242. Third, for the Terra Nova expenditures for which compensation is sought, the Claimant does not even provide a witness from Suncor, the operator of the Terra Nova project, let alone any documents that might establish the compensatory nature of the claimed expenditures. Instead, Mr. Sampath provides his opinions based on conversations with a Suncor employee that Canada will have no opportunity to cross-examine. Having never worked at Suncor and with no oral or written corroboration from Suncor, Mr. Sampath's views as to what Suncor would or would not have done in the ordinary course of business is mere speculation.[395]

243. Fourth, any uncertainties in the evidence is entirely of the Claimant's own creation because, as explained above, the Claimant elected not to use the Board's R&D Fund or to allow the Board to draw on letters of credit. The Claimant has created a significant amount of uncertainty by not adopting this approach. The evidence suggests that the Claimant has avoided the Board's Fund because it would rather spend on R&D and E&T that has value for its global operations.[396] That may be its preferred approach, but it cannot then claim damages from Canada as if it had merely put the monies into the Board's Fund. That would over-compensate the Claimant. In actuality, the expenditures for which the Claimant seeks compensation are either not "incremental", as the Claimant alleges, or are not fully compensable because the Claimant derives value from making the expenditures. The Claimant provides no assessment of the actual losses caused by the 2004 Guidelines and instead assumes that it should be compensated as if it had simply given money away.

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[394] See **RL-104**, Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International: Wolters Kluwer, 2008), p. 280, citing Geoffrey Senogles, *Business Interruption Claims*: ("Documents are *better* than verbal assertions/confirmations.").

[395] In the Mobil/Murphy proceedings, that tribunal rejected the Claimant's claim for the [redacted] expenditure because it found that the Claimant's witness Mr. Durdle was "unable to point to any specific features of this spending which distinguish it from ordinary course spending" and he "appears relatively unfamiliar with this project." (**C-2**, Mobil/Murphy – Award, ¶ 87). This Tribunal should be similarly guided and deny the Claimant's request for Terra Nova compensation. See also, **R-292**, Mobil/Murphy – Durdle Statement I, ¶¶ 36-38.

[396] **R-248**, Mobil/Murphy – Phelan Statement I, ¶ 29(d); Claimant's Reply Memorial, ¶ 49. See for example, the Work Expenditure Application form for the Dynamic Monitoring of Shallow Water Wells project, where, Mr. Sampath stated that "future worldwide floating drilling projects can use learnings from [this project]." **C-264**, Letter from K. Sampath, HMDC to Colin Dyer, CNLOPB attaching Dynamic Monitoring of Shallow Water Wells Project R&D Work Expenditure Application Form (Oct. 14, 2014), p. MICI 0002197. See also Claimant's Reply Memorial, ¶ 149.

244. This Tribunal has no option but to carefully scrutinize each of the Claimant's claimed expenditures at issue and reject as damages any amount that is not sufficiently corroborated with evidence as having been caused by the 2004 Guidelines.

2. The Claimant Wrongly Seeks Compensation for R&D and E&T it Would Have Undertaken in the Absence of the 2004 Guidelines

245. The R&D and E&T expenditures for which the Claimant seeks compensation in this arbitration generally fall into the following categories: (i) expenditures the Claimant moved to the Province from its research facility in Houston; (ii) expenditures that support the Claimant's ongoing and future operations in the Arctic and elsewhere; (iii) expenditures that are directly related to the operations of the Hibernia project; and (iv) expenditures the Claimant undertook in cooperation with offshore partners to address industry-wide issues on a cost shared basis.[397] The Claimant has failed to prove that the 2004 Guidelines caused as damages the full (or any) amount of each of these expenditures. While some expenditures are highlighted as examples below, Canada provides a detailed argument against compensation for each expenditure in its Appendix A to this Rejoinder Memorial.

(a) Projects which originated at the Claimant's Houston Upstream Research Facility

246. The Claimant seeks compensation for its share of 17 R&D expenditures that were moved from the Upstream Research Facility in Houston ("URC") to the Province and in most cases were paid for out of the joint account of the Hibernia project and then submitted as qualifying R&D under the 2004 Guidelines.[398] For example, as Canada explained in its Counter-

[397] Other categories like community contributions and expenditures needed for the projects are addressed in Canada's Rejoinder Appendix A. These categories are used for convenience. Canada submits that each of the claimed expenditures must be examined individually in order to determine if there is reasonable certainty that the expenditure was caused by the 2004 Guidelines.

[398] See Canada's Rejoinder Appendix A and **RE-2**, Walck Report II, Annex 1: Arctic Offshore and Pipeline Engineering Course ( ); Drift and Divergence of Ice Floes ($763,518); Dual Polarized Radar ( ); Dynamic Monitoring of Shallow Water Wells ( ); Environmental Genomics ( ); Gas Utilization Study ( ); Ice Loads on Floating Structures ( ); Ice Loads on Towed Structures and Ridge Testing Capability Assessment ( ); Ice Management JIP ( ); Ice Radar Enhancement Project ( ); ( ); Nuclear Magnetic Resonance to Detect Oil in and Under Ice ( ); ( ); R&D Applications of Iceberg Profiling ( ); ( ); Subsea Sentry System ( ); Wave Impact Study ( ). The gross total of these expenditures is .

Memorial,[399] the Claimant seeks compensation for its share of a $763,518 R&D expenditure called the "Drift and Divergence of Ice Floes Project," which URC designed and even funded in part to get data that is of "direct value".[400] It is not surprising that the Claimant would want to move this type of ice management R&D into the Province, as the Claimant itself has recognized that the facilities and offshore environment in Newfoundland & Labrador are well-suited to undertake this type of research:

> URC develops technology to support ExxonMobil's worldwide exploration, development and production operations. By leveraging learnings globally, it often can provide superior technical support and solutions compared to other potential providers. The kinds of expertise more commonly available on a competitive basis in Newfoundland relate to the particular features of the North Atlantic environment where the Hibernia and Terra Nova projects are located, such as ice management.[401]

247. The most obvious economic incentive the Claimant has to move research from URC in Houston to the Province is that the other interest owners in the Hibernia project cover 66.875% of costs through the Hibernia joint account.[402] As Mr. Sampath explains, "for any R&D activity funded by HMDC through the Hibernia project joint account, Mobil's indirect subsidiaries would have contributed 33.125%, which is in proportion to their combined ownership share."[403]

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[399] Canada's Counter-Memorial, ¶¶ 227-228.

[400] **CW-10**, Sampath Statement II, ¶ 135; **C-291**, Letter from K. Sampath, HMDC to C. Dyer, CNLOPB, attaching Drift and Divergence of Ice Floes R&D Work Expenditure Application Form, pp. MOB0005425 and MOB0005427: ("This is an opportunity for ExxonMobil to test/validate [redacted] to gain experience/skill at [redacted] and to gain familiarity with [redacted] proposes leveraging the opportunity by [redacted]).

[401] **R-232**, Mobil/Murphy – Graham Statement I, ¶ 10.

[402] The R&D budget at Hibernia is controlled by the Claimant, ExxonMobil Investments Canada Inc. The projects at issue in this arbitration were undertaken through the HMDC joint accounts. Not only is the Claimant in control of the R&D budget at Hibernia, but it controls R&D to the exclusion of its co-venturers. For example, in the Mobil/Murphy arbitration, the Claimants' witness Mr. Cal Buchanan of Murphy Oil stated that "Murphy therefore has minimal information in its possession about R&D activities undertaken in connection with the Hibernia and Terra Nova Projects" (**R-272**, Mobil/Murphy – Buchanan Statement I, ¶¶ 8-10). The Claimant made similar statements with respect to Terra Nova in those proceedings. In September of each year, the Claimant provides the other owners with the R&D budget, which they approve by December. There appears to be no meeting minutes or other documents indicating that the co-venturers have challenged the use of the Hibernia Joint Account to further the Claimant's URC research. See also **R-248**, Mobil/Murphy – Phelan Statement I, ¶¶ 7-8; **R-290**, Mobil/Murphy – Damages Hearing Transcript, pp. 153:15-157:17-18.

[403] **CW-10**, Sampath Statement II, ¶ 31.

To illustrate, the total value of the "Drift and Divergence of Ice Floes Project" is $763,518.[404] By moving the expenditure into the Province, the Claimant is only required to pay 33.125% of the cost ($252,915), as the R&D project was undertaken through the joint account. Moreover, by adding the 32% SR&ED tax credit savings the Claimant receives in Canada on this amount ($80,933) and the 30% savings on their royalty payment to the Province ($75,875), the Claimant is able to realize further economic incentives. Suddenly, an R&D project that "has significant value to ExxonMobil and can be used to further the Corporation's future Arctic business needs"[405] and that may have cost $763,518 to conduct at URC, is completed for only $95,107.[406] Moreover, if its claim for compensation from Canada for this expenditure before this Tribunal is successful, the Claimant will receive free R&D.

248. Despite such significant savings on the R&D that it moves into the Province, the Claimant argues that Canada should be liable to pay its entire share of the expenditure. None of the Claimant's arguments have merit.

249. First, the Claimant's witness Mr. Sampath states that the expenditures it moved from URC into the Province were "low-priority" to URC and as such are fully compensable.[407] The documents, however, state the opposite. For example: the Dual Polarized Radar project ([redacted]) is anticipated to have a "high benefit";[408] and the data from the Subsea Sentry System ([redacted]) will "be extremely useful for underwater assets deployed in extreme environments."[409] The documents do not corroborate the suggestion that the research that is moved is considered by URC to be unimportant.

250. Second, the Claimant argues that moving the expenditures to the Province is a detriment because it will have to share the results of the R&D with the other interest owners in the Hibernia

[404] Canada's Rejoinder Appendix A, p. 42.

[405] **C-291**, Letter from K. Sampath, HMDC to C. Dyer, CNLOPB, attaching Drift and Divergence of Ice Floes R&D Work Expenditure Application Form, p. MOB0005427.

[406] $252,915 - $80,933 - $75,875.

[407] **CW-10**, Sampath Statement II, ¶ 38.

[408] **R-99**, PRAC, Ice Management Program SME Workshop Report, pp. MICI 0003205-3206.

[409] **R-220**, Presentation, [redacted]: Procurement and Integration (2013), slide 6 (p. MICI 0004374).

project.[410] However, it is not unusual for the Claimant to engage in R&D projects with other companies and share the findings in the ordinary course of business. For example, as explained further below, the Claimant has participated in numerous joint industry projects (JIPs) to undertake research with other companies in the ordinary course of its business operations.[411] If an R&D project demands that the Claimant maintain a proprietary interest over the research, the Claimant always has the option of meeting its obligations under the 2004 Guidelines by undertaking R&D at the individual owner level such that it would not be required to share the research findings with the other owners.[412]

251. Third, the Claimant argues that the URC expenditures are compensable because "[t]here were always more ideas for R&D work than URC's research budget could afford" and the R&D projects moved to the Province were the ones that "did not make the cut" because their cost outweighed "the potential value of the results."[413] But as explained above, by moving these expenditures through the Hibernia joint account, the "cost" to the Claimant of engaging the expenditures is 66.875% less. The Claimant has failed to offer any evidence to show that the expenditure would not have been done even at a reduced cost absent the Guidelines.

252. As a matter of law, the Claimant can only be awarded as damages the difference in cost of performing the R&D in the Province as opposed to in Houston at URC. But the Claimant has provided no such costing details. In fact, given that its Hibernia partners pay for 66.875% of the cost, it likely that it has been cheaper for the Claimant to carry out the R&D in Newfoundland. In either case, the Claimant is not entitled to compensation for any of the R&D expenditures it has moved from URC to the Province. Accordingly, the Claimant's damages should not include compensation for any of the 17 projects moved by URC to the Province.

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[410] **CW-10**, Sampath Statement II, ¶ 35.

[411] **RE-2**, Walck Report II, ¶ 47 (for example, the [redacted] (2009, Terra Nova), the [redacted] g (2011, Hibernia), the [redacted], C-CORE (2011, Terra Nova), and the [redacted], C-CORE (2011, Terra Nova).

[412] **R-290**, Mobil/Murphy – Damages Hearing Transcript, p. 105:9-106:18; **R-275**, Mobil/Murphy – Phelan Statement II, ¶ 3.

[413] **CW-10**, Sampath Statement II, ¶ 33.

(b) R&D Expenditures to support its Ongoing and Future Operations in the Arctic and Elsewhere

253. The Claimant seeks compensation for its share of 32 R&D expenditures that it engaged under the 2004 Guidelines in support of its operations in Newfoundland & Labrador and/or elsewhere in the world.[414] During the Mobil/Murphy arbitration, the Claimant's witness Mr. Ringvee confirmed the Claimant's intent to make expenditures on R&D and E&T in support of its operations under the 2004 Guidelines:

> [W]e are making every effort to identify investment opportunities that provide value to the project participants. As an example, one area we are considering is ice measurement studies, because learnings in that area could be of some benefit to the Hebron project and the Hibernia Southern Extension as they move into their development phases.[415]

254. In its R&D documents, the Claimant states that the Arctic is "[redacted]"[416] and that there is a "[redacted]" for Arctic-specific R&D as exploration moves from the Grand Banks to more northern regions[417] because the Arctic could hold about 22% of the world's remaining undiscovered hydrocarbons.[418] One problem identified by the Claimant with such exploration is that the climate, and icebergs in particular,

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[414] Note that totals will exceed the total claimed, since some items fall into more than one category of defense. See Canada's Rejoinder Appendix A and **RE-2**, Walck Report II, Annex 1: Alternative Subsea Protection Systems for Ice Scour Regions ([redacted]); Arctic Offshore Pipeline Engineering Course ([redacted]); CARD Annual Contributions ([redacted]); CARD SME ([redacted]); Cold Climate Oil Spill Response Research Facility ([redacted]); Development of Ice Ridge Keel Strengths Enhancement Project ($586,000); Drift and Divergence of Ice Floes ($763,518); Dual Polarized Radar ([redacted]); Dynamic Monitoring of Shallow Water Wells ([redacted]); Dynamic Positioning in Ice ([redacted]); Enhanced Iceberg and Sea Ice Draft Forecasting ($255,300); Enhanced Satellite Radar ([redacted]); Environmental Genomics ([redacted]); Escape-Evacuation-Rescue in Ice JIP ([redacted]); Ice Gouge Study ([redacted]); Ice Loads on Floating Structures ([redacted]); [redacted] ([redacted]); Ice Management JIP ([redacted]); Ice Ocean Sentinel System ($300,000); Ice Radar Enhancement Project ([redacted]); [redacted] ([redacted]); Large-Scale Iceberg Impact Experiment ([redacted]); Marine Dredge Disposal ([redacted]); Nuclear Magnetic Resonance to Detect Oil in and under Ice ([redacted]); [redacted] ([redacted]); R&D Applications of Iceberg Profiling ([redacted]); [redacted] ([redacted]); Subsea Leak Detection ([redacted]); Subsea Sentry System ([redacted]); Synthetic Aperture Radar ([redacted]); Towing Icebergs ([redacted]); Wave Impact Study: [redacted]. The gross total of these expenditures is [redacted].

[415] **R-245**, Mobil/Murphy – Ringvee Statement I, ¶ 10.

[416] **R-99**, PRAC, Ice Management Program SME Workshop Report (Aug. 17, 2011), p. MICI 0003215.

[417] Canada's Counter-Memorial Appendix A, p. A-28 citing **C-209**, [redacted], Next Generation EER System for Ice Covered Regions (Jun. 17, 2009) p. MOB0003575.

[418] **R-99**, PRAC, Ice Management Program SME Workshop Report (Aug. 17, 2011), p. MICI 0003215.

could limit its drilling abilities, and accordingly it has sought to improve its capabilities in dealing with ice-related issues.[419]

255. The Claimant has thus engaged R&D expenditures like the "[redacted]" ([redacted]) expenditure, which is designed to assess ice conditions and reduce uncertainty around design loads for structures in ice. In 2014, Mr. Sampath wrote:

> It is anticipated that this technology will be [redacted] Currently between the [redacted][420]

256. Despite its confirmation that it intends to apply this technology to its future projects in the Arctic and elsewhere, the Claimant demands full compensation from Canada for this and other like expenditures. Canada is not liable to reimburse the Claimant for the full value of R&D expenditures directed at improving capacity for operations in the Arctic. None of the Claimant's arguments to the contrary should be accepted.

257. First, the Claimant argues that all such expenditures are compensable because "none of them would have been funded by HMDC or Suncor in the absence of the Guidelines."[421] Thus, the Claimant argues that, even if it would have undertaken the expenditure in the absence of the 2004 Guidelines, the expenditure is nonetheless compensable because HMDC or Suncor would not have done them in the absence of the 2004 Guidelines. This is untenable. As Canada explained in its Counter-Memorial, "[i]t is objectionable for the Claimant to 'leverage' R&D and E&T through the Hibernia project for use at its other projects and then claim full compensation against Canada for such expenditures under the pretence that they are not "necessary" for either the Hibernia or Terra Nova project."[422]

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[419] **C-253**, Letter from K. Sampath, HMDC to J. Bugden, CNLOPB, attaching [redacted] R&D Work Expenditure Application Form, p. MOB0004923.

[420] **C-253**, Letter from K. Sampath, HMDC to J. Bugden, CNLOPB, attaching [redacted] R&D Work Expenditure Application Form, p. MOB0004925.

[421] **CW-10**, Sampath Statement II, ¶ 22.

[422] Canada's Counter-Memorial, ¶ 228.

258. Second, the Claimant argues that even if the "relevant test" is whether it (rather than just HMDC or Suncor) would have undertaken the expenditures in the ordinary course, the claimed expenditures are nonetheless compensable because the Claimant is a different legal entity than its affiliates who will benefit from the R&D.[423] This also is untenable – the Claimant cannot on the one hand engage R&D expenditures for the benefit of its affiliates and then hide behind its corporate identity as a means to justify having Canada pay for its R&D.

259. Third, Mr. Sampath opines that these expenditures should be compensable because he is not aware of any projects where the results of the research have been applied.[424] However, the Arctic exploration projects at issue in this arbitration are multi-year, multi-phase projects that were mostly initiated in 2012 or 2013, so while the research may not yet have been applied to new projects, Mr. Sampath cannot mean that these R&D expenditures will have no value to the Claimant's future operations because that is not what the documents state. For example, documents concerning the "[redacted]" project state that the results will be used for exploration wells that "[redacted]."[425] It is not credible to argue that the results of these expenditures will have no application.

260. Finally, Mr. Sampath argues that statements in documents concerning the benefits to the Claimant's projects elsewhere should be disregarded because the Claimant was "trying to convince the Board of the potential benefits of the proposed project[s]" in order to get them pre-approved under the 2004 Guidelines.[426] Contemporaneous documents that explain a R&D expenditure's value-added must be accepted at face value. Mr. Sampath appears to be suggesting that the Claimant has misrepresented the value of its R&D projects to the Board, but such self-serving testimony should be scrutinized accordingly. For example, there was certainly no requirement under the 2004 Guidelines to extol the [redacted] project[427] by explaining that "[redacted]

[423] Claimant's Reply Memorial, ¶¶ 153-154.

[424] **CW-10**, Sampath Statement II, ¶¶ 26, 53, 55, 58, 138.

[425] **C-253**, Letter from K. Sampath, HMDC to J. Bugden, CNLOPB, attaching [redacted] R&D Work Expenditure Application Form, p. MOB0004925.

[426] **CW-10**, Sampath Statement II, ¶ 24.

[427] Canada's Rejoinder Appendix A, pp. 170-171.

[redacted]."[428] Nor was there a requirement to explain that the "project drivers" for the "Enhanced Iceberg and Sea Ice Drift Forecasting" expenditure include [redacted][429] The Claimant cannot extol the benefits and utility of its R&D projects to the Board in documents and then denigrate them before this Tribunal.

261. For all of the foregoing reasons, the Claimant should not be compensated for the 32 R&D expenditures it engaged in support of its other projects or for Arctic exploration and development.

(c) R&D expenditures that are directly related to the operations of the Hibernia project

262. The Claimant also seeks compensation for several R&D expenditures that are directly related to the operations of the Hibernia and Terra Nova Projects. While Canada provides a fulsome response for each of these expenditures in its Appendix A, the Gas Utilization Study (also known as the Water-Alternating Gas Pilot or "WAG Pilot") in particular is highly relevant to the operations of the Hibernia project. This expenditure alone comprises approximately [redacted] of the Claimant's damages case in this arbitration [redacted]) and is addressed in detail in this section.[430]

263. The Claimant suggests that because the Mobil/Murphy tribunal awarded it damages for its contributions toward establishing an enhanced oil recovery ("EOR") laboratory at Memorial University ("MUN")[431] that will undertake studies concerning the WAG Pilot, its current claim for damages concerning the WAG Pilot is *res judicata* between the parties.[432] The Tribunal should not accept this assertion because the expenditures concerning the WAG Pilot at issue in

[428] **R-166**, Letter from K. Sampath, HMDC, to Jeff Bugden, CNLOPB attaching [redacted] R&D Work Expenditure Application Form (Nov. 19, 2013), p. 2 of Project Abstract.

[429] **R-125**, Letter from [redacted], HMDC to Jeff Bugden, CNLOPB attaching Ice Management Program R&D Work Expenditure Application Form (Dec. 15, 2010), p. MICI 0003004.

[430] See also Canada's Rejoinder Appendix A, pp. 96-123.

[431] **C-2**, Mobil/Murphy – Award, ¶¶ 58-63.

[432] Canada's Rejoinder Appendix A, p. 102.

this arbitration are significantly different.[433] As described below and in the witness statement of Mr. Jeff O'Keefe, C-NLOPB Director of Resource Management and Chief Conservation Officer, the operator of Hibernia, HMDC, is required by Provincial regulation to study EOR techniques such as WAG at the Hibernia project. The 2004 Guidelines did not cause the Claimant to incur the WAG related expenditures at issue in this arbitration and they are not recoverable as damages from Canada.

264. The Gas Utilization Study investigates alternative uses of gas and water to enhance oil recovery at the Hibernia field.[434] As Mr. O'Keefe explains, HMDC has targeted this particular area of research since 1986 because the Board's Decision 86.01 required HMDC to undertake studies to enhance oil recovery.[435] For example, in 2008, [redacted] conducted a comprehensive study on EOR using gas at the Hibernia field[436] that concluded that "WAG could lead to additional

[433] The Claimant confirms same when it argues that "HMDC contributed an additional [redacted] to MUN to set up the EOR laboratory" during the 2012-2015 period and that the Claimant should be compensated for its [redacted] share of this amount because the Mobil/Murphy tribunal determined that expenditures to set up the Memorial University ("MUN") EOR laboratory are "incremental" (Canada's Rejoinder Appendix, p. 103; **C-2**, Mobil I Award ¶¶ 62-63). The remaining amount claimed as damages by the Claimant in this arbitration for the WAG Pilot (approximately [redacted]) are thus different than the expenditures that were at issue in the Mobil/Murphy arbitration by the Claimant's own admission. Canada also notes that none of the three documents cited by the Claimant indicate that HMDC's [redacted] in spending concerned setting up the MUN EOR laboratory (**C-386**, HMDC, 2012 Project Timesheet for Gas Utilization Study; **C-387**, HMDC, 2013 Project Timesheet for Gas Utilization Study; **C-388**, HMDC, 2015 Project Timesheet for Gas Utilization Study). While the documents state that MUN incurred expenses related to the Gas Utilization Study, they do not state the nature of that expense. HMDC has in fact been relying on research conducted by MUN since 2010 leading it to conclude in 2016 "that water-alternating-gas (WAG) injection [redacted]" (**R-256**, Hibernia Management & Development Company Ltd., [redacted], p. 1). It is possible that HMDC's [redacted] expense is related to this research and not the establishment of the EOR laboratory. Moreover, even if the Claimant is correct that [redacted] was spent "to set up the EOR laboratory" it does not explain the precise nature of the expenditures or how they constitute an "incremental" expense. Given that HDMC is required by Provincial regulation to study enhanced oil recovery at the Hibernia field (**RW-1**, Witness Statement of Jeff O'Keefe, ¶ 5 ("O'Keefe Statement I")) and that the MUN EOR laboratory "is designed and calibrated specifically for research in relation to reservoirs in the Jeanne d' Arc Basin, like Hibernia" (**RW-1**, O'Keefe Statement I, ¶ 24), it is likely that these new expenditures are different than the expenditures that were at issue in the Mobil/Murphy arbitration and are not "incremental" at all.

[434] **R-293**, Hibernia Development Plan Amendment, Part I (Jan. 2010), pp. 45-46: ("[WAG is] [a]n enhanced oil recovery process whereby water injection and gas injection are alternatively injected for period of time to provide better sweep efficiency.").

[435] **RW-1**, O'Keefe Statement I, ¶ 6; **C-37**, CNLOPB, Hibernia Decision 86.01: Application for Approval: Hibernia Benefits Plan and Development Plan (Jun. 18, 1986), Condition 1(ii), p. 50 ("Hibernia Decision 86.01").

[436] **R-294**, [redacted] Study of Recovery by Double Displacement Process (DDP) for the R Fault Block in Hibernia Field, Newfoundland and Labrador, Canada (Feb. 2008).

recovery."[437] HMDC later appended this study to its 2010 Development Plan Amendment Application to the Board, and wrote:

> The overall development strategy [at Hibernia] remains essentially unchanged since inception; that is, pressure maintenance by water or gas injection remains the preferred mechanism to maximize economically recoverable reserves. Four different recovery methods may be considered for any fault block, including waterflooding, gasflooding, pressure depletion/gas cap expansion drive, and WAG (Water Injection Alternating Gas Injection). These strategies may be applied to any reservoir in the field.[438]

265. In addition to the requirement to comply with the Board's Decision 86.01, HMDC also has a longstanding legal obligation to explore ways to maximize recovery from the Hibernia reservoirs. Section 65 of the *Newfoundland Offshore Petroleum Drilling and Production Regulations* ("*Petroleum Drilling and Production Regulations*") requires the proponent of Hibernia to ensure that:

> (a) maximum recovery from a pool or zone is achieved in accordance with good oilfield practices;…
>
> […]
>
> (c) if there is reason to believe that infill drilling or implementation of an enhanced recovery scheme might result in increased recovery from a pool or field, studies on these methods are carried out and submitted to the Board.[439]

266. As Mr. O'Keefe explains:

> Based upon Decision 86.01 (and subsequent amendments to the Hibernia Development Plan, discussed below) and the Drilling and Production Regulations, the operator of Hibernia, Hibernia Management and Development Company Ltd. ("HMDC"), has an obligation to study EOR at the Hibernia

[437] **C-343**, CNLOPB, Staff Analysis: Hibernia Development Plan (Sep. 2, 2010), p. 35 (MOB0006108): ("*Study of Recovery by Double Displacement Process (DDP) for the R Fault Block in the Hibernia Field, Newfoundland and Labrador, Canada*"). The "ordinary course" nature of the Gas Utilization Study is supported by the fact that a portion of it was undertaken at the Claimant's research facility in Houston (which does not apply toward their obligations under the Guidelines).

[438] **R-293**, Hibernia Development Plan Amendment, Part I (Jan. 2010), p. 6-11 (emphasis added).

[439] **R-249**, *Newfoundland Offshore Petroleum Drilling and Production Regulations*, SOR/2009-316, (Dec. 10, 2012), s. 65.

> field, and an obligation to implement EOR at the Hibernia field where to do so would be in accordance with good oil field practice.[440]

267. Under section 86 of the *Petroleum Drilling and Production Regulations*, HMDC is required to file Annual Production Reports that detail its "efforts to maximize recovery."[441] From 2010 to 2015, HMDC has relied on its development of the WAG Pilot in its Annual Production Reports to fulfill this legal requirement.[442]

268. [redacted].[443] [redacted]

> HMDC is committed to the efficient recovery of the Hibernia reservoir, and believes that [redacted] To date, all experimental and numerical analyses conducted by HMDC and in collaboration with Memorial University of Newfoundland, support a conclusion that [redacted].[444]

269. HMDC estimates that running the WAG Pilot [redacted][445] As Mr. O'Keefe explains:

> According to HMDC's simulation model, running the WAG Pilot [redacted] In fact, HMDC anticipates [redacted]

[440] **RW-1**, O'Keefe Statement I, ¶ 6.

[441] **R-249**, *Newfoundland Offshore Petroleum Drilling and Production Regulations*, SOR/2009-316, (Dec. 10, 2012), s. 86.

[442] **RW-1**, O'Keefe Statement I, ¶ 7.

[443] **R-256**, Hibernia Management & Development Company Ltd., [redacted]; **R-258**, Hibernia Management and Development Company Ltd., Memorandum to the Board re: Hibernia Water-Alternating-Gas Injection Pilot (Dec. 19, 2016), p. 2; **R-259**, CNLOPB Presentation, [redacted], p. 12. A "block" is an isolated, faulted geological section of a reservoir. The "[redacted] Block" is one of 36 blocks at Hibernia.

[444] **R-256**, Hibernia Management & Development Company Ltd., [redacted], p. 19 (emphasis added).

[445] **R-258**, Hibernia Management and Development Company Ltd., Memorandum to the Board re: Hibernia Water-Alternating-Gas Injection Pilot (Dec. 19, 2016), p. 3; **R-259**, CNLOPB Presentation, [redacted], p. 5.

[redacted] hould the WAG pilot be successful, [redacted][446]

270. Canada notes that HMDC's [redacted] was filed with the Board four days before the Claimant filed its Reply Memorial in this arbitration and one day before the Claimant's witness, Mr. Noseworthy (who concludes that the WAG Pilot is an "incremental" expenditure[447]), signed his statement. Neither the Claimant nor Mr. Noseworthy mention HMDC's [redacted] None of the reasons advanced by Mr. Noseworthy in support of his conclusion that the WAG Pilot is an "incremental" expenditure have merit.

271. First, Mr. Noseworthy asserts that the WAG Pilot "was conceived and carried out for purposes of generating expenditures that satisfy the requirements of the Guidelines."[448] This is not true. As Mr. O'Keefe explains, research directed at enhancing oil recovery at Hibernia has been an ongoing obligation since 1986.[449] It was for this reason that [redacted] conducted research on WAG in Houston in 2008,[450] and why HMDC applied to amend its development plan to include a WAG Pilot,[451] both *before* any Board pre-approval of the initiative under the 2004 Guidelines.[452] Mr. Noseworthy also fails to mention the *Petroleum Drilling and Production Regulations*, HMDC's legal requirement to study EOR at Hibernia, and the fact that "HMDC has relied on the

[446] **RW-1**, O'Keefe Statement I, ¶ 14.

[447] **CW-11**, Noseworthy Statement II, ¶ 1.

[448] **CW-11**, Noseworthy Statement II, ¶ 10.

[449] **RW-1**, O'Keefe Statement I, ¶ 4.

[450] **RW-1**, O'Keefe Statement I, ¶ 9. **R-294**, [redacted] Study of Recovery by Double Displacement Process (DDP) for the R Fault Block in Hibernia Field, Newfoundland and Labrador, Canada (Feb. 2008).

[451] **R-293**, Hibernia Development Plan Amendment, Part I (Jan. 2010), pp. 6-11.

[452] The Board pre-approved the research under the 2004 Guidelines on October 25, 2010 (**R-258**, Hibernia Management and Development Company Ltd., Memorandum to the Board re: Hibernia Water-Alternating-Gas Injection Pilot (Dec. 19, 2016), p. 1; **R-256**, Hibernia Management & Development Company Ltd., [redacted], p. 2. Moreover, given that work was undertaken by [redacted] in February 2008, it could not have been undertaken in response to the 2004 Guidelines, since the Claimant only began to fulfill its obligations under the 2004 Guidelines in 2009.

WAG Pilot to fulfill its statutory obligation to explore ways to maximize recovery from the Hibernia reservoir."[453]

272. Second, Mr. Noseworthy states that "HMDC ordinarily would not have funded any enhanced oil recovery ("EOR") pilot at this stage in the productive life of the field."[454] According to the Board, however, acquiring WAG data now at the Hibernia project is "critical."[455] As Mr. O'Keefe explains:

> Once a block is abandoned, the ability to come back and conduct EOR in an economically efficient manner would not likely be possible. EOR is being evaluated by HMDC now because now is the time to do it and not four years from now. Hibernia's 64 slots are currently being fully utilized and decisions about future use of the blocks for EOR are now being made.[456]

273. Moreover, Mr. Noseworthy's admission that the Claimant may have adopted WAG in the "ordinary course" but at a later time confirms the Claimant is not entitled to the full [redacted] it seeks as compensation for this expenditure, as it was admittedly not caused by the 2004 Guidelines.

274. Third, Mr. Noseworthy asserts that "it is unlikely that WAG or any other EOR technique will be used field wide at Hibernia."[457] However, Mr. O'Keefe explains:

> While the results of the WAG Pilot will not be known until the pilot is run, based on the documents provided to the Board by HMDC I see no reason not to believe field-wide EOR is not possible. Moreover, as I have already explained, HMDC has an obligation to pursue EOR at the Hibernia field and according to HMDC WAG is the 'preferred EOR pilot scheme.'[458]

275. Fourth, and finally, Mr. Noseworthy's assertion that the Claimant has received no benefit from the Gas Utilization Study "because the Hibernia WAG Pilot has not been implemented in

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[453] **RW-1**, O'Keefe Statement I, ¶ 7.

[454] **CW-11**, Noseworthy Statement II, ¶ 5.

[455] **R-259**, CNLOPB Presentation, [redacted], slide 4 ("[redacted]").

[456] **RW-1**, O'Keefe Statement I, ¶ 20.

[457] **CW-11**, Noseworthy Statement II, ¶ 18.

[458] **RW-1**, O'Keefe Statement I, ¶ 23.

the field"[459] is misleading. The WAG Pilot is proposed to "startup in [redacted]"[460] and HMDC's current estimate is that it will produce an additional [redacted] barrels of oil over [redacted] out of the single [redacted] Block.[461]

276. In sum, it is not credible for Mr. Noseworhty to conclude that the Gas Utilization Study / WAG Pilot is an "incremental" expenditure that was caused by the 2004 Guidelines. As Mr. O'Keefe explains:

> Based on the information in Decision 1986, the Drilling and Production Regulations, HMDC's Development Plan Amendments, Annual Reports, and [redacted], especially the statement "*HMDC is committed to the efficient recovery of the Hibernia reservoir, and believes that* [redacted] I believe that HMDC would have undertaken the Gas Utilization study regardless of the 2004 Guidelines because it was good oil field practice, required under the regulations and made economic sense.[462]

277. For these reasons, Canada is not liable to pay the Claimant for this R&D, which reduces the Claimant's damages claim by [redacted] plus any claimed interest.

(d) R&D projects with partners in the offshore area to tackle problems of common interest

278. The Claimant seeks compensation for its share of 21 R&D expenditures that it undertook with other companies in the offshore area to address problems of industry-wide interest.[463] The

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[459] **CW-11**, Noseworthy Statement II, ¶ 11.

[460] **R-256**, Hibernia Management & Development Company Ltd., [redacted], p. 15.

[461] **R-258**, Hibernia Management and Development Company Ltd., Memorandum to the Board re: Hibernia Water-Alternating-Gas Injection Pilot (Dec. 19, 2016), p. 3; **R-259**, CNLOPB Presentation, [redacted], slide 5.

[462] **RW-1**, O'Keefe Statement I, ¶ 25 (emphasis in original).

[463] See Canada's Rejoinder Appendix A and **RE-2**, Walck Report II, Annex 1: Bioindicators ([redacted]), CARD Annual Contributions ([redacted]), Cold Climate Oil Spill Response Research Facility ([redacted]), Dual Polarized Radar ([redacted]), Dynamic Positioning in Ice ([redacted]), [redacted] ([redacted]), Enhanced Iceberg and Sea Drift Forecasting ([redacted]), Enhanced Satellite Radar ([redacted]), Enhancing the Operability of Offshore Personnel Transfer ([redacted]), Environmental Impact of Seismic Activity on Shrimp Behavior ([redacted]), Escape-Evacuation-Rescue (EER) in Ice JIP ([redacted]), Ice Gouge Study ([redacted]), Ice Loads on Floating Structures ([redacted]), [redacted] ([redacted]), Ice Management JIP ([redacted]), [redacted] ([redacted]), Large Scale Iceberg Impact Experiment ([redacted]), Marine Dredge Disposal ([redacted]), Subsea Leak Detection

Claimant argues that a project that was performed as a Joint Industry Project ("JIP") by its very nature would not have been undertaken in the "ordinary course of business."[464] In Appendix A to its Reply Memorial, the Claimant repeats the same argument:

> In relation to another JIP, the Mobil I Majority recognized the fact that the expenditure was conducted jointly by multiple operators 'supports the Claimants' assertion that the project was not specifically needed at Hibernia' given 'that this type of joint approach is unusual and was a novel initiative that was a response to the Guidelines.'[465]

279. The Claimant's argument is misleading. First, the Claimant implies that the Mobil/Murphy tribunal found that all JIPs were compensable.[466] This, however, is not correct because that tribunal rejected the Claimant's argument that the [redacted] would not have been undertaken in the ordinary course of business.[467] The Mobil/Murphy tribunal did not apply a blanket rule that all JIPs are compensable, as the Claimant suggests.

280. Second, the Claimant participated in at least four JIPs between 2009 and 2011 that the Claimant itself agrees were "ordinary course" expenditures.[468] This contradicts Mr. Sampath's assertion that JIPs are not undertaken in the "ordinary course" because results must be shared between companies. In fact, the Claimant frequently shares the expenses and results of ordinary course R&D.[469]

([redacted]), Towing Icebergs ([redacted]), Towing, Sheltering and Recovery of TEMPSC Lifeboats/Life Rafts ([redacted]). The gross total of these expenditures is [redacted].

[464] See, for example, **CW-3**, Sampath Statement I, ¶¶ 27, 69, 121; **CW-5**, Noseworthy Statement I, ¶ 27; **CW-10**, Sampath Statement II, ¶¶ 63, 65, 75, 124, 130.

[465] Claimant's Reply Memorial, Appendix A, p. 14 (footnote omitted). The identical language is repeated at pp. 38, 49, 57, 60, 71, 74, 82, 148, 152, 169, 190, 198, 261 and 265. Nearly identical language is repeated at p. 67.

[466] See, for example, Claimant's Reply Memorial, Appendix A, pp. 14, 38, 47, 49, 55, 57, 58, 60, 67-68, 71-72, 74, 80, 82, 145, 147, 152, 161, 169, 190, 198, 261, 265.

[467] **C-2**, Mobil/Murphy – Award, ¶ 109.

[468] **RE-2**, Walck Report II, ¶ 47 ([redacted] (2009, Terra Nova), [redacted] (2011, Hibernia), [redacted], C-CORE (2011, Terra Nova), and [redacted], C-CORE (2011, Terra Nova)); **R-69**, Mobil/Murphy – Phelan Statement IV, Annex C, p. 2.

[469] See Canada's Rejoinder Appendix A and **RE-2**, Walck Report II, Annex 1: Bioindicators ([redacted]); CARD Annual Contributions ([redacted]); Cold Climate Oil Spill Response Research Facility ([redacted]); Dual Polarized Radar ([redacted]); Dynamic Positioning in Ice ([redacted]); [redacted]: [redacted]; Enhanced Iceberg and Sea Ice Drift Forecasting ([redacted]); Enhanced Satellite Radar ([redacted]); Enhancing the Operability of Offshore Personnel Transfer ([redacted]); Environmental Impact of

281. This ties into the third and final point – the economic incentive to jointly research projects of common interest are high, especially when they are expensive. By sharing expenses with other companies, including the other interest holders at the Hibernia and Terra Nova projects, an R&D project that may be cost prohibitive for a single company or project can become possible.

282. For these reasons, the Claimant has failed to prove that the 2004 Guidelines caused it to incur any actual losses relating to the JIPs it has undertaken with other companies in the offshore area. Canada should not be liable to pay the Claimant for its share of these expenditures.

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

1. The Claimant Fails to Fully Account for the Financial Benefits Resulting from its Royalty Deductions

283. Even if any R&D or E&T expenditures are determined to be compensable by the Tribunal, the financial savings the Claimant receives by submitting the cost of these expenditures into the Province's royalty regime must be deducted.

284. As Canada explained in its Counter-Memorial,[470] the Claimant is entitled to reductions in royalties payable to the Province for all R&D and E&T expenditures. The royalty payment savings earned by the Claimant are significant – expenditures of $1.0 million could save the Claimant more than $300,000 in royalty payments at Hibernia (i.e., 30%) and $425,000 at Terra Nova (i.e., 42.5%).[471] It is for this reason that the Claimant has focused its spending under the 2004 Guidelines on expenditures that are eligible for royalty deductions. As Mr. Ringvee testified in the Mobil/Murphy arbitration:

> [T]o the extent that the additional R&D projects are not eligible for royalty deductions or income tax credits through the SR&ED program, it may be preferable from a financial efficiency standpoint simply to deposit the money

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Seismic Activity on Shrimp ([redacted]); Escape-Evacuation-Rescue in Ice JIP ([redacted]); Ice Gouge Study ([redacted]); Ice Loads on Floating Structures ([redacted]).

[470] Canada's Counter-Memorial, ¶ 235.

[471] The amount of savings actually enjoyed by the Claimant is unknown as the Claimant self-assesses its royalty payment savings on a monthly basis, rather than pre gross expenditure.

> into a fund to be administered by the Board in accordance with the Guidelines.[472]

285. The Claimant has submitted 100% of its R&D and E&T expenditures under the 2004 Guidelines for royalty deductions.[473] It is therefore likely that the Claimant is currently enjoying around [redacted] in savings on its royalty payments to the Province as a result of the R&D and E&T expenditures at issue in this arbitration.[474]

286. The Claimant argues that a damages award should not account for these savings because the Claimant will "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."[475] This statement is only partially correct. The Claimant does not "repay" the Province for its savings, but may be required under the Hibernia and Terra Nova royalty regimes to pay to the Province royalties on any "incidental revenue," which could include a NAFTA damages award. As Mr. Phelan explains with respect to the damages award from the Mobil/Murphy arbitration: "In May 2016, the royalties payable to the Province for the previous month of April were recalculated based on the receipt of Canada's April 30, 2016 payment in satisfaction of the Mobil[/Murphy] Award."[476]

287. It is uncertain whether the amount of savings enjoyed by the Claimant on its royalty payments as a result of its incremental spending under the 2004 Guidelines is identical to the amount of royalties it might pay on a damages award qua "incidental revenue." If the Claimant's savings are greater than the royalties it may pay, then the Claimant will still receive a financial benefit it would not have received in the absence of the 2004 Guidelines.

288. The Claimant has not provided the Tribunal with (a) the amount of royalty payment savings the Claimant enjoys as a result of its incremental spending, or (b) the amount of royalties

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[472] **R-245**, Mobil/Murphy – Ringvee Statement I, ¶ 12.

[473] The Claimant acknowledges that it includes all of its R&D and E&T expenditures under the 2004 Guidelines in its self-assessment under the royalty regimes. **R-93**, Letter from Sophie J. Lamb, Debevoise & Plimpton, LLP to Adam Douglas, Government of Canada (Sep. 5, 2012); **R-94**, Letter from David W. Rivkin, Debevoise & Plimpton, LLP to the Mobil/Murphy Tribunal (Sep. 17, 2012).

[474] Canada's Counter-Memorial, ¶ 236.

[475] Claimant's Reply Memorial, ¶ 166.

[476] **CW-9**, Phelan Statement II, ¶ 27.

it may be required to pay on any damages award.[477] It is the Claimant's burden to prove that these amounts are the same. If the Claimant refuses to disclose this information, then the tribunal should deduct from the Claimant's damages claim accordingly.

289. The Claimant also fails to address the interest it receives on its royalty payment savings. At a minimum, as there is a time delay between when the Claimant receives royalty savings and when the Claimant may pay royalties on "incidental revenue," the Claimant receives the time value of money from the date of its savings to the time an award payment is received. As Canada's expert Mr. Walck explains:

> To illustrate, consider a hypothetical $10 million award for incremental costs that were deducted from Hibernia's royalty calculations when spent, and assume 5% interest from the date the costs were incurred until the payment of the award five years later. Using Hibernia's 30% royalty rate, Hibernia would pay $3 million less in royalties when the incremental spending occurred. Hibernia would have the use of that $3 million for the ensuing five years. Once the award is paid, with $2.5 million of added interest ($10 million x 5 years x 5%), Hibernia includes only the $10 million of principal in its royalty filing. At that time, it pays the $3 million of royalties that it saved five years earlier, but it has had both the use of the money and the interest on that money, neither of which is remitted to the Province in the royalty calculation.[478]

290. The Claimant does not make any deductions to its damages claim for the interest it earns on its royalty payment savings. This interest, however, would not exist in the absence of the 2004 Guidelines and must be assessed as part of any damages award by this Tribunal. As Mr. Walck explains, the damages award in the Mobil/Murphy arbitration over-compensated the Claimant because it did not address this interest.[479] In fact, because the Mobil/Murphy Award provided the Claimant pre-Award interest, the Claimant reaped the benefit of interest twice – once on its royalty payment savings, and once from the grant of pre-Award interest. This Tribunal should not grant the Claimant the same benefit in this arbitration.

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[477] The documents produced by the Claimant pursuant to Document Request No. 2 under Procedural Order No. 7 indicate that the Claimant paid royalties on the principal amount of the Mobil/Murphy damages award, but not interest (**R-247**, Summary of Royalty, NPI Payable by Project (Undated), p. MICI 0005367; **RE-2**, Walck Report II, ¶ 54; **R-296**, *Royalty Regulations, 2003* under the *Petroleum and Natural Gas Act,* N.L.R. 71/03, s. 5). The Claimant has not disclosed the amount of royalty payment savings it enjoyed as a result of the incremental spending at issue in the Mobil/Murphy arbitration.

[478] **RE-2**, Walck Report II, ¶ 55.

[479] **RE-2**, Walck Report II, ¶ 54.

291. In an effort to remove from consideration the Claimant's savings resulting from its royalty payment deductions, the Claimant perpetuates a narrative that there is "ongoing uncertainty of the Province's treatment of incremental R&D and E&T."[480] The Claimant argues that any savings on its royalty payment deductions should be ignored because the Province may as a matter of policy "disallow deductions taken for the incremental R&D and E&T."[481] The Claimant proffers no evidence to support its assertion and this has never happened before. The lack of foundation of the Claimant's "uncertainty" assertion is explained by the Province:

292. The Claimant does not deny that it successfully used 100% of its R&D and E&T costs between 2004 and 2009 (all years for which audits have been completed thus far) to offset its royalty payments to the Province.[483] There is no reason to conclude that this trend will not continue into the future.

293. For all of the foregoing reasons, the savings the Claimant enjoys from its royalty payment deductions to the Province must be assessed as part of any damages award.

[480] **CW-9**, Phelan Statement II, ¶¶ 17-23.

[481] **CW-9**, Phelan Statement II, ¶ 17.

[482] **R-297**, Letter from Lynn Sullivan, Province of Newfoundland and Labrador to Adam Douglas, Trade Law Bureau (Dec. 16, 2016), p. 2.

[483] Mr. Phelan's statement that "[t]he Province has not delivered the results of its royalty audits of any years in which incremental R&D and E&T expenditures were at issue in the Mobil I Arbitration" (**CW-9**, Phelan Statement II, ¶ 18) while possibly true at the time is now false. It is, however, in any event, irrelevant as the Province does not distinguish between "incremental" and "ordinary course" R&D and E&T under the Hibernia and Terra Nova royalty regimes.

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

294. The Claimant has devoted its spending under the 2004 Guidelines to R&D and E&T expenditures that will create value. As Mr. Phelan testified in the Mobil/Murphy arbitration:

> If the Hibernia owners determine that there is insufficient opportunity to undertake value-added and cost-effective R&D in the Province, a final option would be simply to deposit HMDC's unspent expenditure commitments into a fund as contemplated by the Guidelines.[484]

295. The Claimant has never deposited any monies into the Board's Fund and has never allowed the Board to draw on any letter of credit. As Mr. Sampath explains, "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."[485]

296. The Claimant's damages assessment, however, does not account for the value it has or will receive as a result of its incremental spending under the 2004 Guidelines. Instead, the Claimant models its damages case as if it had merely put the monies into the Board's Fund. Assessing the Claimant's damages on this basis would give it a windfall.

297. For example, the Claimant seeks [redacted] in damages for its expenditure on the Gas Utilization Study (the "WAG Pilot"). As noted, the Claimant recently filed [redacted], estimating that the Pilot "[redacted]."[486] Assuming the current price of oil which is approximately USD $55 per barrel, the WAG Pilot applied to just a single Hibernia block could provide the Claimant with [redacted] in gross revenue.

[484] **R-248**, Mobil/Murphy – Phelan Statement I, ¶ 29(d).

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

[486] **R-258**, Hibernia Management and Development Company Ltd., Memorandum to the Board re: Hibernia Water-Alternating-Gas Injection Pilot (Dec. 19, 2016), p. 3.

298. If the Claimant is right in stating that the Gas Utilization Study is an "incremental" and compensable expenditure that would not have been undertaken in the absence of the 2004 Guidelines, then the increased amount of oil production at the Hibernia field as a result of the expenditure would also not have existed in the absence of the 2004 Guidelines. In other words, if an otherwise compensable R&D or E&T expenditure provides the Claimant with financial or other value-added gains, these rewards must be factored into the assessment of damages. The gains the Claimant predicts it will receive from the Gas Utilization Study alone are sufficient to completely wipe out its damages in this arbitration completely.

E. The Damages Recoverable in this Arbitration Must be Capped to Those Incurred by January 16, 2015

299. The Claimant concedes that, under the principles espoused by the NAFTA tribunal in *UPS*, Articles 1116(2) and 1117(2) provide a temporal limitation on the recovery of losses. The Claimant states:

> [I]n 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.[487]

300. As discussed above, the overwhelming weight of authority considers *UPS* to be wrongly decided with respect to time-bar. However, if the reasoning of *UPS* is adopted with respect to the three-year limitations period, the Claimant must also be held to that tribunal's finding that Articles 1116(2) and 1117(2) establish a temporal limitation on the recovery of losses. As explained by the tribunal in *UPS*: "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."[488]

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[487] Claimant's Reply Memorial, ¶ 72.

[488] **RL-25**, *United Parcel Service of America v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 30 cited by the Claimant in its Reply Memorial at ¶ 72. See also **RL-61**, *Spence – Interim Award*, ¶ 218: ("[T]he Tribunal considers that its jurisdiction to award damages will be necessarily linked to and constrained by the breach of which it is seised and over which it has jurisdiction. In this respect, the Tribunal agrees with the obiter comment of the tribunal in UPS (even if not with the premise from which it flowed concerning the effect of continuing conduct on limitation periods), namely, that "[i]t 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

301. The Claimant has represented to this Tribunal "that all losses sought by Mobil in this arbitration were suffered by Mobil in the three year period predating its Request for Arbitration."[489] This is not true – it is seeking compensation for its R&D and E&T spending after the date of its Request for Arbitration (January 16, 2015). Applying the rule in *UPS* and holding the Claimant to its own standards, the Tribunal must exclude [redacted] of the claim, all of which concerns spending after January 16, 2012.[490]

F. Interest

302. Unless the Claimant discloses the amount of savings accrued from its royalty deductions, Canada objects to the Claimant being awarded pre-Award interest on compensable damages in order to account for the financial benefit arising from such deductions. As discussed above, the Claimant is already receiving a financial benefit from the interest on its royalty deductions, accruing from the month after it undertakes an expenditure to the date that it pays royalties on an Award from a NAFTA tribunal.[491] A grant of pre-Award interest in addition to that financial benefit would over-compensate the Claimant. If this Tribunal declines to award pre-Award interest, there is no risk that the Claimant will be undercompensated, given that it has been accruing interest on the expenditures at issue in this arbitration since 2012 and will continue to do so until the date of a final Award. On the other hand, it is reasonably certain that the Claimant will be overcompensated if it obtains interest on its royalty deductions and this Tribunal awards pre-Award interest.

303. While Canada agrees that the Claimant may request post-Award interest commencing on the date on which the Award is enforceable pursuant to Article 1136(3)(a),[492] a grant of post-Award interest prior to the expiry of the grace period provided for in Article 1136(3)(a) would be

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inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2).").

[489] Claimant's Reply Memorial, ¶ 73.

[490] Based on a review of the documentary evidence, no expenditures appear to have been undertaken in the first 16 days of 2015. As a result, the damages from Phelan II, Appendix A ($19,993,897) less the sum of all the damages excluding 2015 ([redacted]) reduces the Claimant's damages claim by [redacted].

[491] **RE-2**, Walck Report II, ¶¶ 75-78.

[492] NAFTA, Article 1136 – Finality and Enforcement of an Award: ("3. A disputing party may not seek enforcement of a final award until: (a) in the case of a final award made under the ICSID Convention (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or (ii) revision or annulment proceedings have been completed").

inappropriate and would unnecessarily undermine the intent of that provision (by punishing a disputing party for exercising its rights of review), and cannot be justified as a punitive mechanism under the NAFTA.[493] Canada submits that interest should accrue at the lower of the Claimant's proposed rate or the 12-month Canadian Dealer Offered Rate + 4%, compounded monthly, from the expiry of the NAFTA Article 1136(3)(a) grace period until payment.

G. Conclusion

304. If the Tribunal determines that the Claimant has a legal basis to bring a claim for damages, then it should award far less than what the Claimant demands. The Claimant altered the damages model it presented in the Mobil/Murphy arbitration in order to seek compensation for surplus R&D and E&T spending beyond what the 2004 Guidelines required. These damages are not compensable because they were not caused by the 2004 Guidelines. Moreover, the Claimant could have avoided these damages completely by utilizing the Board's R&D Fund or allowing the Board to draw on a letter of credit. This means that Canada is not liable to pay any compensation to the Claimant for its investment in the Terra Nova project because that project's "ordinary course" spending was sufficient to meet the requirements of the 2004 Guidelines. For its investment in the Hibernia project, eliminating the Claimant's surplus spending means that the ceiling of damages is [redacted].

305. From there, the Tribunal must inspect closely the Claimant's assertion that the 2004 Guidelines caused it to incur as damages the full amount of its spending on 67 R&D and E&T expenditures in the Province. On a close examination of the documents, it is apparent that the Claimant seeks compensation for R&D and E&T that it moved to the Province from its research facility in Houston, that it made to support its ongoing and future operations in the Arctic and elsewhere, that it made to directly benefit the operations of the Hibernia project, and that it engaged with other partners in the offshore area to address industry-wide issues in that region. In particular, the Claimant's assertion that it should be compensated more than [redacted] for its research on enhanced oil recovery techniques at Hibernia that it was legally required to undertake must be rejected.

[493] NAFTA, Article 1135(3): ("A Tribunal may not order a Party to pay punitive damages.").

306. On close scrutiny, it is apparent that the Claimant has failed to meet its burden to prove that its actual losses equal the full amount of its value-added R&D and E&T. To the extent that the Claimant is compensated for individual R&D and E&T expenditures but also retains financial, operational or other value-added gains from these expenditures, these savings should be reflected as an offset to the amount of compensation claimed.

VI. ORDER REQUESTED

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

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

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

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

(iv) Award Canada its costs; and

(v) Grant any further relief that is just.

December 16, 2016

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