

**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**

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**GOVERNMENT OF CANADA**

**REPLY TO THE CLAIMANT'S POST-HEARING BRIEF**

**September 8, 2017**

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1. The Tribunal asked the parties to address two questions regarding the obligation of good faith in international law in post-hearing submissions.<sup>1</sup> The Claimant disregarded those instructions and addressed substantially different issues, in particular, the *ILC Articles on State Responsibility* and the Claimant's new claim that Canada has an obligation under Article 1106(1) to cease applying the Guidelines. Paragraph 2, Part II and Part III.B of the Claimant's submission are also beyond the scope of the Tribunal's request. Canada objects to the Tribunal considering these arguments, but in the interest of providing a complete response, addresses them below.

2. The Claimant's excessive post-hearing submission leaves no doubt that it is attempting to bypass the limitations period in the NAFTA and have a second opportunity to prove the damages it failed to prove with reasonable certainty in the Mobil/Murphy arbitration. The Tribunal should not allow this. Accepting the Claimant's argument would effectively extend the limitations period in Articles 1116 and 1117 well beyond what the NAFTA Parties intended. Contrary to the Claimant's assertion, the principle of good faith cannot be used to override the ordinary meaning of the treaty itself or to create obligations where none would otherwise exist.

### **I. An Allegation of a Breach of the Obligation to Perform in Good Faith is Not Properly Before this Tribunal**

3. The Claimant relies on *Bilcon* to argue that the Board's July 9, 2012 letter is an "analytically distinct event" that occurred within three years of it filing its Request for Arbitration ("RFA") and, thus, that its claim regarding the letter is timely.<sup>2</sup> However, the Claimant confirmed that the sole breach it was alleging in its RFA was the imposition of the Guidelines in 2004.<sup>3</sup> Hence, the fact that the Board's letter was received by the Claimant within three years of the RFA is irrelevant.

4. Even accepting that the Claimant is correct in characterizing this letter as a distinct and actionable event, under Article 1116(2) and 1117(2) any such claim had to be made within three years – i.e. July 9, 2015. However, the Claimant's post-hearing submission of August 11, 2017 is the first time it articulated its claim that the Board's letter "is a distinct breach of [Canada's] NAFTA obligation to perform Article 1106(1) in good faith".<sup>4</sup> This is more than two years after the expiration of NAFTA's limitation period. Accordingly, any claim regarding this allegedly distinct breach is untimely and as a result, this Tribunal is without jurisdiction to consider it.

5. The Claimant cannot avoid this result by seeking to add this claim to an existing arbitration. A straightforward application of Article 46 of the ICSID Convention establishes why such a claim is not properly before this Tribunal. That Article provides:

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<sup>1</sup> See Canada's Post-Hearing Submission, ¶ 1.

<sup>2</sup> Claimant's Post-Hearing Brief, ¶ 7.

<sup>3</sup> See Canada's Rejoinder Memorial, ¶¶ 65-66; **R-287**, Letter from Martina Polasek, ICSID to Claimant (Feb. 2, 2015); **R-288**, Letter from David W. Rivkin, Debevoise & Plimpton LLP to Martina Polasek, ICSID (Feb. 6, 2015); Notice of Registration of the Claimant's Request for Arbitration.

<sup>4</sup> See Canada's Post-Hearing Submission, ¶ 6.

[E]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.<sup>5</sup>

6. As Canada has explained numerous times in this arbitration, Canada has not consented to arbitrate claims with the Claimant that occurred more than three years prior to the claim being brought.<sup>6</sup> As such, this claim cannot be considered by this Tribunal.

7. The same result would apply even if the Tribunal were to generously construe the Claimant's mention of the July 9, 2012 letter in its Reply as alleging a breach of Section A of Chapter Eleven of the NAFTA.<sup>7</sup> The Reply Memorial was filed on September 23, 2016 – more than a year after the expiration of the limitations period with respect to this measure. Therefore, even on the most liberal reading of the Claimant's allegations with respect to the July 9, 2012 letter in its Reply, the fact remains – Canada was not notified of any alleged breach until the limitations period in Article 1116(2) and 1117(2) had expired. As the allegation that the Board's letter constituted a breach of the NAFTA was not made within the time period required by Article 1116(2) and 1117(2), Canada has not consented to arbitrate such a claim, and thus, this Tribunal has no jurisdiction to consider it.

## **II. There is No Obligation Owed to an Investor under Chapter Eleven of the NAFTA to Cease the Application of the Guidelines**

8. The Claimant argues that the Board's July 9, 2012 letter is a breach of Canada's "obligation to cease ongoing breaches and apply Article 1106(1) in good faith."<sup>8</sup> The Claimant further argues that "Canada's failure to cease enforcement following the Mobil I Decision constituted a distinct breach of Article 1106(1) that retriggered the limitations period under Articles 1116(2) and 1117(2)."<sup>9</sup>

9. As explained above, such allegations are not properly before this Tribunal. However, in addition to this, Canada's alleged "failure" to withdraw the Guidelines does not give rise to a new claim that an investor can bring under Section B of Chapter Eleven of the NAFTA. As such,

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<sup>5</sup> Emphasis added. Arbitration Rule 40(2) further provides that: ("An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding."). The Claimant's arguments in its Post-Hearing Brief that Canada has breached the obligation to perform NAFTA in good faith are thus too late. Had they wanted to mount this argument they should have done so at the latest in their Reply Memorial. However, even if they had, as discussed above, they would be prevented by Article 46 of the ICSID Convention.

<sup>6</sup> See, for example, Canada's Counter-Memorial, section III.B; Canada's Rejoinder Memorial, section III.B; Hearing Transcript, July 24, 2017, p. 248:1-8, p. 270:2-9.

<sup>7</sup> The only prior semblance of this argument appeared in the Claimant's Reply Memorial where it argued that "the specific breach for the purposes of Articles 1116(2) and 1117(2) is the express failure of Canada to cease applying the Guidelines to Mobil on the basis of the findings in the Decision." Claimant's Reply Memorial, ¶ 77.

<sup>8</sup> Claimant's Post-Hearing Brief, ¶ 14.

<sup>9</sup> Claimant's Post-Hearing Brief, ¶ 14.

the Claimant's attempt to reset the limitation period in Article 1116(2) and 1117(2) by alleging such a breach must fail.

10. The only obligations owed to the Claimant that can be the subject of arbitration under Section B of Chapter Eleven of the NAFTA are those found in the text of Section A of Chapter Eleven of the NAFTA. Canada did not assume obligations under the NAFTA *vis-à-vis* an investor that depend on a tribunal finding a breach and conversely a NAFTA tribunal cannot through a decision alter the meaning of either Article 1106(1) or Articles 1116(2) and 1117(2). The obligation Canada owed to the Claimant under Article 1106(1) did not begin or change with the Decision of the Mobil/Murphy tribunal. Canada's decision to continue applying the Guidelines to the Claimant's investments did not put Canada in breach of Article 1106(1) – the promulgation of the Guidelines in 2004 did and the Mobil/Murphy tribunal's Decision does nothing to alter the timing of the breach or to reset the limitations period found in Articles 1116(2) and 1117(2).

11. The fact that Article 1106(1) refers to "impose or enforce" does not alter this conclusion. To accept the Claimant's argument would lead to a dangerous slippery slope: if there is an obligation in Article 1106 to cease an offending measure, then any measure which is continued by a Party would also give rise to an obligation to cease even if found to violate a different provision (for example, Articles 1102, 1103, 1105 or even 1110). The implications of such a finding would be untenable.

12. Indeed, the logical consequence of the Claimant's argument is absurd. Had the Mobil/Murphy tribunal ordered Canada to pay damages for the imposition and enforcement of the Guidelines for the life of the Terra Nova and Hibernia projects (which might have happened had the Claimant pled its damages case differently), would Canada still be required to cease the measure? Answering this question in the affirmative, as the Claimant's argument dictates one must, would result in Canada being penalized twice: once in the payment of damages and second by the Claimant not making R&D expenditures under the Guidelines. Article 1106 cannot be interpreted so as to create a regime that contemplates Canada paying damages into the future because a measure continues while at the same time requiring the cessation of that measure going forward. That the Mobil/Murphy tribunal decided the Claimant had failed to prove its entitlement to future damages with sufficient certainty is irrelevant. An obligation to cease the application of a measure found by a Chapter Eleven tribunal to be a breach of an obligation under Section A cannot arise or disappear depending on the quality and persuasiveness of the arguments and evidence adduced by a claimant.

13. The indisputable fact is that Canada has satisfied, in good faith, all obligations it owes to the Claimant under Sections A and B of Chapter Eleven of the NAFTA with respect to the Guidelines. In particular, under Section B of Chapter Eleven (which is the source of this Tribunal's jurisdiction), the Claimant had the right to initiate an arbitration challenging the Guidelines as a breach of the obligations accepted by Canada in Section A of Chapter Eleven. In 2007, it did so, alleging that the Guidelines violated Articles 1105 and 1106 and caused it to incur \$60 million in damages over the life of the Hibernia and Terra Nova Projects. The Mobil/Murphy tribunal seized jurisdiction over the entire claim (including over the claim for the exact same damages at issue in this arbitration), heard the Claimant's evidence, found it wanting with respect to future damages, and awarded only \$17.3 million. Canada paid the Award in

accordance with Article 1136(2). In short, Canada has done everything that the terms of Chapter Eleven require *vis-à-vis* the Claimant as concerns the Guidelines. The Claimant cannot now come back over a decade after the Guidelines were enacted and ask this Tribunal for more compensation. That is not what the NAFTA contemplates. As the Claimant itself noted in the Mobil/Murphy arbitration, filing “repeat claims in respect of the very same measure on the very same facts every three years...cannot have been intended by the NAFTA Parties.”<sup>10</sup> Canada and the other NAFTA parties agree.<sup>11</sup> In short, Canada fully satisfied all of the obligations it owes to the Claimant concerning the Guidelines when it paid the Award in the Mobil/Murphy arbitration.

14. To the extent that it exists, any obligation to cease application of the Guidelines following the decision of the Mobil/Murphy tribunal would be owed, at international law, only to the other NAFTA Parties. Similarly, any dispute arising out of the continued application of the Guidelines could only be brought by the other NAFTA Parties for failure to uphold the terms of the treaty itself. Given that Canada has fully satisfied, in good faith, all of the obligations it owes to the Claimant under Chapter Eleven of the NAFTA, it is not for this Tribunal to police Canada’s continued application of the Guidelines or Canada’s compliance with its international obligations.

### **III. Part 2 of the International Law Commission’s Articles on State Responsibility Do Not Apply to Disputes Brought under Section B of Chapter Eleven of the NAFTA**

15. The Claimant’s reliance on Part 2 of the International Law Commission’s Articles on State Responsibility (“ILC Articles”), particularly ILC Article 30(a), to argue that Canada has a duty to cease application of the Guidelines is misplaced. Not only does this argument impermissibly exceed the Tribunal’s instruction for post-hearing briefs, it is wrong.

16. NAFTA Article 1131(1) states that disputes shall be decided in accordance with the NAFTA and “applicable rules of international law” (emphasis added). The Claimant simply asserts that the obligation to cease an internationally wrongful act is an applicable rule of international law in NAFTA Chapter Eleven generally and to Article 1106(1) specifically, but provides no authority and/or explanation as to why this is true.<sup>12</sup> However, ILC Article 30(a) does not automatically apply in the investor-State context and the Claimant cannot rely on those Articles to impose an obligation of cessation on Canada in this arbitration.<sup>13</sup>

17. While Part Two of the ILC Articles applies in the context of State-to-State disputes, it does not apply in the context of investor-State arbitration. Article 33(1) stipulates that “the obligations

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<sup>10</sup> **R-74**, Mobil/Murphy – Transcript from the Hearing on the Merits, Day One, p. 129:21-130:11 (“Mobil/Murphy – Day One Merits Hearing Transcript”).

<sup>11</sup> See Canada’s Rejoinder Memorial, ¶ 88 and fn. 152 citing **RL-14**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) 1128 Submission of the United States, 14 July 2008, ¶ 7; **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, ¶ 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 in its entirety with the Submission of the United States of America); **RL-16**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Canada’s Reply to the NAFTA Article 1128 Submissions, 3 March 2014, fn. 42.

<sup>12</sup> Claimant’s Post-Hearing Brief, ¶ 10.

<sup>13</sup> Canada made this point during the hearing. See Hearing Transcript, July 28, 2017, p. 126:8-21.

of the responsible State set out in this part [Two] may be owed to another State, to several States, or to the international community as a whole, depending on the particular character and content of the international obligation and on the circumstances of the breach.” In other words, while an obligation of cessation may exist *vis-à-vis* another State(s) or the international community, no such obligation is owed to the Claimant under the ILC Articles. The Commentary makes this point,<sup>14</sup> as has Judge Crawford:

[I]n contrast to Part One,...Part Two is limited to cases of inter-State responsibility and the exceptional case of responsibility to the international community as a whole. As a consequence, the provisions of Part Two are, on their own terms, not directly applicable to questions of the content of the responsibility which may arise in the context of an investment arbitration as the result of the breach of the substantive obligations contained in an investment protection instrument (whether bilateral or multilateral).<sup>15</sup>

18. The inapplicability of Part 2 of the ILC Articles in this case is further reinforced by ILC Article 55, which provides that they “do not apply” to the content and implementation of a State’s international responsibility when governed by special rules of international law.<sup>16</sup> NAFTA Chapter Eleven is such a *lex specialis* regime which establishes the specific conditions and obligations of a breaching NAFTA Party *vis-à-vis* an investor.<sup>17</sup> It is only NAFTA Chapter Eleven to which this Tribunal must turn to determine Canada’s obligations *vis-à-vis* the Claimant, not ILC Article 30(a), and as Canada discussed above in Part II, there is no obligation of cessation owed to an investor in Chapter Eleven.

19. In this regard, the *Nicaragua* and *Tehran Hostages* judgments cited by the Claimant<sup>18</sup> do not help establish that ILC Article 30(a) applies *vis-à-vis* the Claimant. Both cases were inter-

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<sup>14</sup> See Commentary to Article 28(3): (“[W]hile Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.”). See also Article 33(2): (“This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”).

<sup>15</sup> **RL-114**, Crawford, James and Olleson, Simon, “The Application of the Rules of State Responsibility” in *International Investment Law*, Bungenberg et al., 2015, at pp. 417-418 (emphasis added). See also **RL-115**, Crawford, James, “Investment Arbitration and the ILC Articles on State Responsibility,” ICSID Review, p. 130: (“[I]t is true – as confirmed by Article 33(2) – that the ILC Articles make no attempt to regulate questions of breach between a state and a private party such as a foreign investor. These rules must be found elsewhere in the corpus of international law, to the extent that they exist at all.”). See also **RL-116**, *Wintershall Aktiengesellschaft v. Argentina* (ICSID Case No. ARB/04/14) Award, 8 December 2008, ¶ 113: (“The ILC Articles on State Responsibility is a detailed and official study on the subject but it contains no rules or regulations of State Responsibility vis-à-vis non-State actors. Tribunals are left to determine ‘the ways in which State Responsibility may be invoked by non-State entities from the provisions of the text of the particular Treaty under consideration.’”).

<sup>16</sup> ILC Article 55 states: (“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 the implementation of the international responsibility of the State are governed by special rules of international law.”).

<sup>17</sup> See **RL-25**, *United Parcel Service of America v. Canada* (UNCITRAL) Award on Merits, 24 May 2007, ¶¶ 62-63.

<sup>18</sup> Claimant’s Post-Hearing Brief, ¶ 12.

State disputes where the principles in Part Two of the ILC Articles would certainly apply. The legal frameworks under which the ICJ was acting when it ordered cessation in those two cases are not analogous here. The same can be said concerning the *Haya de la Torre* case and the U.S.-Iran Claims Tribunal Case No. A33.<sup>19</sup> Both were State-to-State disputes where the principles found in Part 2 of the ILC's Articles applied and neither involved a discussion of resetting a limitations period due to failure to cease an illegal act. Furthermore, both of those cases involved a prior ruling that required the offending state to cease the illegal measure (in the *Haya de la Torre* case, for Colombia to cease its illegal grant of asylum to Mr. de la Torre<sup>20</sup> and, in Case No. A33, for Iran to cease its failure to continuously replenish the Security Account).<sup>21</sup> These are inapposite scenarios here: the Mobil/Murphy tribunal did not, and could not, require Canada to cease applying the Guidelines.

20. Additionally, while the *LG&E* tribunal said Argentina was “obliged to cease the wrongful act,”<sup>22</sup> the case is also inapposite here because there was no issue with respect to a limitations period in that case, and nor was there an attempt by the claimant to resurrect an otherwise stale claim by importing a new primary obligation to cease an infringing measure into the treaty.

21. NAFTA Chapter Eleven imposes limitations periods on claims and permits an offending NAFTA Party to pay compensation to an investor in the event of a breach in order to allow the NAFTA Parties the flexibility to continue to regulate in the public sphere. The obligation of cessation imposed on States in Part 2 of the ILC's Articles does not apply in this legal regime. To declare otherwise is without merit, in excess of authority and would incorrectly import a legal concept into the text of the NAFTA.

#### **IV. The Claimant's Argument that the Application of the Guidelines Between 2012-2015 is “Distinct” from the Application of the Guidelines Between 2004-2011 is Outside the Scope of the Tribunal's Questions and is, in Any Event, Wrong**

22. The Claimant says the limitation period starts anew each time “loss is incurred – i.e. either when a ‘payment or expenditure has transpired,’ or when there is ‘a call for payment or expenditure’ and ‘a firm obligation to make a payment’.”<sup>23</sup> This disguised continuing breach argument remains without merit.

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<sup>19</sup> Claimant's Post-Hearing Brief, ¶¶ 15-16.

<sup>20</sup> Claimant's Post-Hearing Brief, ¶ 15 citing **CL-98**, *Haya de la Torre Case (Colombia v. Peru)*, I.C.J. 13 June 1951, p. 82.

<sup>21</sup> Claimant's Post-Hearing Brief, ¶ 16 citing **CL-99**, *United States of America v. The Islamic Republic of Iran*, Iran-U.S. Cl. Trib., 9 September 2004, ¶ 35.

<sup>22</sup> **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, ¶ 85 (“*LG&E – Award*”). It is important to note that, unlike NAFTA, the United States-Argentina BIT does not specifically limit a Tribunal's ability to award specific remedies. That BIT does not contain wording like NAFTA Article 1135(1) specifically limiting a Tribunal power to award only compensation.

<sup>23</sup> Claimant's Post-Hearing Brief, ¶ 2.

23. The Guidelines were promulgated on November 5, 2004 with effect as of April 1, 2004. As explained by counsel for the Claimant,<sup>24</sup> by Mr. Phelan,<sup>25</sup> by Canada,<sup>26</sup> and the Guidelines themselves,<sup>27</sup> the obligation created by the Guidelines is defined by total recoverable oil at the Hibernia and Terra Nova Projects. While the Board assesses compliance with the Guidelines in each OA period, this “is a form of true-up to ensure that operators are on track to make sufficient expenditures under the Guidelines by the end of the life of field.”<sup>28</sup> The “life of field” obligation created by the Guidelines came into effect when the Guidelines were promulgated in 2004.

24. The Claimant accepted long ago that “[a]n obligation to be met by future conduct or expenditure is a ‘loss incurred’ for the purposes of the NAFTA”<sup>29</sup> and that the total expenditure requirement under the Guidelines crystallized as an obligation when they were promulgated in 2004.<sup>30</sup> Citing *Grand River*, the Claimant argued repeatedly in the Mobil/Murphy arbitration that the limitation period starts to run even when “obligations are to be met through future conduct” and agreed that the spending requirements under the Guidelines through to the end of the lives of the Projects is an obligation that “already exists.”<sup>31</sup> The Claimant sought \$27.68 million in

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<sup>24</sup> Hearing Transcript, July 24, 2017, pp. 33:7-34:1 (Mr. O’Gorman: “And then everything changed, and that is the 2004 R&D Guidelines promulgated by the Board. They were issued on November 5th of 2004 and to be effective on April 1st, 2004. They provided--and I will tell you several salient aspects about the 2004 Guidelines here. First, the obligation under those Guidelines is life of field. And as mentioned earlier, that could be past 2040 for Hibernia and not quite as long but still very significant for Terra Nova. You can see in the formula provided in the Guidelines on Slide 20 from Paragraph 2.2, that the Guidelines took into account the total R&D expenditure, the total recoverable oil, and the long-term oil price to provide a formula for the calculation over the life of field of what the expenditure requirement was.”).

<sup>25</sup> **CW-9**, Phelan Statement II, Part V, A: (“The Guidelines Require Spending Over the Life of Field”), ¶ 33: (“These principles are set forth in the Guidelines themselves, which stipulate that the “Total R&D expenditure” required during the development and production phases of a project will be determined by the total recoverable oil at the relevant field (in addition to other variables). In addition, the Board assesses a project’s compliance over the course of the Operations Authorization (“OA”) period—which is a form of true-up to ensure that operators are on track to make sufficient expenditures under the Guidelines by the end of the life of field.”).

<sup>26</sup> Hearing Transcript, July 28, 2017, p. 161:13-19: (Douglas: “The obligation under the Guidelines is based on total recoverable oil. It’s the formula. It’s not based on an annual assessment. It’s a global requirement that the Board monitors on an annual basis. It’s the obligation under the Guidelines is one for the life of the Projects. It is not one that comes about every year.”). See also, Hearing Transcript, July 24, 2017, p. 233:2-10.

<sup>27</sup> **C-3**, Guidelines for Research and Development Expenditures (Oct. 2004), s. 2.2.

<sup>28</sup> **CW-9**, Phelan Statement II, ¶ 33.

<sup>29</sup> **R-72**, Mobil/Murphy – Claimants’ Reply Memorial, p. 140.

<sup>30</sup> **R-74**, Mobil/Murphy – Day One Merits Hearing Transcript, pp. 122:18-123:2: (Ms. Lamb: “The Claimants’ exposure under the Guidelines reaches back in time to April 2004 and extends throughout the finite lives of the projects; although, as Mr. Rosen confirms in his pre-hearing report, 80 percent of Claimants’ damages will be realized within the next five years, that’s 80 percent of the next five years, 90 percent by 2017.”). See also, **R-72**, Mobil/Murphy – Claimants’ Reply Memorial, ¶ 238: (Claimants’ loss and damage consist in the obligations created through the Board’s implementation of the Guidelines. Those obligations *already* exist.”), ¶ 247: (“...Claimants’ loss *has* already been incurred and consists of the obligations created through the Board’s implementation of the Guidelines.”); **R-65**, Mobil/Murphy – Claimants’ Memorial, ¶ 220: (“While these damages are calculated through the remaining lives of the projects...the vast majority of these damages have already occurred or will occur in the near future...Indeed, about 60% of Claimants total damages relate to expenditure obligations incurred through 2010, and by 2015 more than 80% of Claimants’ damages will have been realized.”).

<sup>31</sup> **R-72**, Mobil/Murphy – Claimants’ Reply Memorial, ¶¶ 238, 248; **R-74**, Mobil/Murphy – Day One Merits Hearing Transcript, pp. 125:5-130:11.

damages for the 2012-2015 period,<sup>32</sup> alleging in April 2010 that these damages have “already been incurred”<sup>33</sup> and “are actionable now.”<sup>34</sup> The Claimant’s expert confirmed the same when he testified that the total expenditure requirement through to the end of the lives of the Projects “has been crystallized as an obligation.”<sup>35</sup> The Mobil/Murphy tribunal also determined that “the introduction of the 2004 Guidelines triggered an obligation to make expenditures that would continue over the life of the projects.”<sup>36</sup>

25. The Claimant’s argument that the limitation period starts anew each time loss is “incurred”<sup>37</sup> must therefore be rejected.<sup>38</sup> The question of knowledge is a question of fact and there is no doubt that the Claimant factually acquired knowledge of breach and loss well before the time-bar cut-off date of January 15, 2012.<sup>39</sup> The Claimant’s knowledge cannot be re-invented through spurious argumentation.

26. Moreover, the Claimant’s interpretation renders the limitation period *inutile* because it would allow the Claimant to file NAFTA claims at its discretion whenever it “incurs” a loss. The Claimant’s approach could also open the door to further claims by other investors in the offshore region if the limitation period starts anew every time R&D expenditure is made. The Claimant’s argument is just its “continuing breach” argument but under a different name.<sup>40</sup>

27. It is also meritless to argue that each Production Operations Authorization (“OA”) is an unlawful “enforcement” of the Guidelines that is an “analytically and distinct event” that constitutes its own breach of Article 1106(1) with its own corresponding loss. First, it is impermissible to make such a claim for the first time in its post-hearing submission.<sup>41</sup> Second, it ignores that the obligation under Guidelines is “life of field” and that OAs are merely “a form of

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<sup>32</sup> **R-33**, Mobil/Murphy – Rosen III, Schedule 1; Canada’s Counter-Memorial, ¶¶ 183-184.

<sup>33</sup> **R-72**, Mobil/Murphy – Claimants’ Reply Memorial, ¶ 247.

<sup>34</sup> **R-72**, Mobil/Murphy – Claimants’ Reply Memorial, ¶ 248.

<sup>35</sup> **R-87**, Mobil/Murphy – Claimants’ Post-Hearing Brief (Dec. 3, 2010), p. 44: (“In cross examination Mr. Rosen also stressed that the Guidelines had already created an economic liability for the Claimants.”). See **R-285**, Mobil/Murphy – Day Three Hearing Transcript, p. 863:7-13 (Rosen). See also, pp. 865:15-21: (Rosen: “From my point of view they’ve suffered a loss. They will not feel the economic impact of the loss until they start spending the money, so they won’t be out of pocket, out of cash, incurring interest expense, other costs until they actually spend it, but they have a loss, certainly, that has been crystallized as an obligation.”).

<sup>36</sup> **C-1**, Mobil/Murphy – Decision, ¶ 429.

<sup>37</sup> Claimants’ Post-Hearing Brief, ¶ 2. The Claimant changes course and argues relying on principles of quantum elucidated by the Mobil/Murphy tribunal (**C-1**, Mobil/Murphy – Decision, ¶¶ 440, 469), the Claimant argues that loss is incurred “either when a ‘payment or expenditure has transpired,’ or when there is ‘a call for payment or expenditure’ and ‘a firm obligation to make a payment’.”

<sup>38</sup> Canada already explained in its Rejoinder why the Claimant’s argument is wrong (Canada’s Rejoinder Memorial, ¶¶ 74-79). For example, the Mobil & Murphy tribunal made clear that its elucidated principle was “for the purpose of determining the quantum of damages” (**C-1**, Mobil/Murphy – Decision, ¶ 439).

<sup>39</sup> See generally Canada’s Rejoinder Memorial, ¶¶ 56-80.

<sup>40</sup> As argued exhaustively in this arbitration, a continuing breach does not renew the Articles 1116(2) and 1117(2) limitations period.

<sup>41</sup> See Article 46 of the ICSID Convention and Article 40(2) of the ICSID Arbitration Rules.

true-up.”<sup>42</sup> Thus, the OAs cannot be a distinct breach because the obligation to spend on R&D for the duration of the lives of the Projects is found in the Guidelines regardless of the OAs. Third, the Claimant’s argument ignores that the Hibernia Benefits Plan was amended by HMDC in 2010 to incorporate the Guidelines;<sup>43</sup> thus, HMDC has undertaken to comply with the Guidelines for the duration of the life of that field regardless of any technical “condition” in the OAs.<sup>44</sup>

28. In fact, it is inaccurate to characterize the Guidelines as ever having been “enforced” against the Claimant contrary to Article 1106(1). The Board’s authority to enforce the Guidelines against the Projects is found within various provisions of the Accord Acts,<sup>45</sup> and the Board has never utilized any of them with respect to the Guidelines. The Mobil/Murphy tribunal certainly never determined that the Board had ever “enforced” the Guidelines contrary to Article 1106(1).<sup>46</sup> Moreover, the Claimant’s argument that the Guidelines are “enforced” in the OAs would mean that the Guidelines were “enforced” pending the domestic court challenges because the OAs during that period were conditioned on compliance with the Guidelines.<sup>47</sup> If the Claimant’s characterization is correct, then the Guidelines have been “enforced” against the Projects since their promulgation in 2004. Indeed, the “Hibernia 2012 OA” and the “Terra Nova 2014 OA” are not “distinct” from previous OAs because the previous OAs dating back to 2004 contain identical language with respect to the Guidelines.<sup>48</sup>

29. Finally, the Claimant’s new argument concedes that any damages incurred as a result of the Hibernia OA ending on October 31, 2012<sup>49</sup> and the Terra Nova OA ending on October 1, 2014<sup>50</sup> are barred by the limitation period (although that is not how the Claimant has pled its case).

30. Similar attempts to characterize an ongoing situation of facts as a distinct breach in order to avoid *rationae temporis* consequences have been rejected by tribunals.<sup>51</sup> This Tribunal should

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<sup>42</sup> **CW-9**, Phelan Statement II, ¶ 33.

<sup>43</sup> Canada’s Counter-Memorial, ¶ 40 citing **R-22**, Letter from Max Ruelokke, CNLOPB to Paul Leonard, HMDC (Nov. 19, 2010) and **C-54**, CNLOPB Decision Report 2010.02, Hibernia Development Plan Amendment Application 2010-09-02.

<sup>44</sup> As Canada explained in its Rejoinder Memorial at fn. 157: (“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.”).

<sup>45</sup> See <http://www.cnlopb.ca/enforcement/enforcement.php>.

<sup>46</sup> **C-1**, Mobil/Murphy – Decision, ¶¶ 211-212.

<sup>47</sup> **C-1**, Mobil/Murphy – Decision, ¶ 84; Claimant’s Memorial, ¶¶ 114-120, 250-251 (including footnotes and exhibits cited therein); See also **CW-2**, Witness Statement of Ted O’Keefe, ¶ 24; **CW-1**, Phelan Statement I, ¶ 25; **R-65**, Mobil/Murphy – Claimants’ Memorial, ¶¶ 116-121, 160.

<sup>48</sup> Claimant’s Memorial, ¶¶ 119-120.

<sup>49</sup> **C-145**, Letter from F. Smyth, H.L. Pike, CNLOPB, to P. Sacuta, HMDC, transmitting Hibernia OA (December 16, 2009 – October 31, 2012) (Dec. 15, 2009).

<sup>50</sup> **C-151**, Letter from M. Ruelokke, CNLOPB to S. Martin, Suncor Energy Inc., transmitting Terra Nova OA (October 1, 2011 – October 1, 2014) (Sep. 30, 2011).

<sup>51</sup> See, for example, **RL-117**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. Arb/14/14) Award, 18 August 2017, ¶¶ 453-459. Also, none of the cases cited by the Claimant regarding “separate and distinct

do the same. The relevant facts have been long established: the Claimant knew in 2004 (or, even giving the Claimant the benefit of the Board’s forbearance during the domestic court proceedings, at the very latest, 2009) and claimed in 2007 that it would be subject to the Guidelines at Hibernia and Terra Nova not only between 2012 and 2015 but for the life of the Projects. It pled long ago that it not only had knowledge of its loss between 2012 and 2015, but that it had in fact already incurred those losses and claimed for their recovery.<sup>52</sup> The Claimant cannot evade the limitations period through a disguised continuing breach argument.

September 8, 2017

Respectfully submitted on  
behalf of Canada,



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breaches at paragraph 6 of its Post-Hearing submission are analogous here because none dealt with the same measure, enacted outside the limitations period, being applied into the future. Instead, each case involved separate measures, some before the limitations period, some after, each separate and distinct. In *Bilcon*, the decision with respect to granting the Claimant a permit to develop a quarry and the subsequent referral of that decision to a Joint Review Panel were deemed separate and distinct actions from the subsequent decision of that panel. As the Tribunal noted, these were “distinct and completed events, specifically brought about by executive officials in relation to the project rather than of general application, and the Investors had actual or constructive knowledge that these breaches would cause significant loss or damage, even if the full extent of their ongoing adverse effects was not known.” (RL-6, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶ 281). In *Mondev*, the tribunal determined that loss or damage arising from the actions of the City of Boston and the Boston Redevelopment Authority was separate and distinct from decisions of the United States Courts. Since the latter was the only claim within the limitations period that was the only claim permitted to proceed in the arbitration (RL-4, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87). In *Apotex*, four separate actions were challenged by the claimant, each actionable in its own right (the FDA’s decision, the DC District Court’s denial of emergency injunctive relief, the DC Circuit court’s affirmation of the denial and the DC circuits denial of rehearing *en banc*) (RL-5, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 316). In *Grand River*, the tribunal took jurisdiction over legislation that was enacted within the three year limitations period under the NAFTA as it was separate and distinct from legislation enacted prior to this period, even though all legislation was intended to enforce a Master Settlement Agreement (RL-3, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶¶ 84-87). Finally, in *Rusoro*, the tribunal held that there was “no clear linkage between the 2009 Measures, the 2010 Measures and the Nationalization Decree” of 2011. Since only the latter fell within the limitations period it was the only claim allowed to proceed (CL-92, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016, ¶ 230).

<sup>52</sup> See, for example, 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.”).