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

In the Matter of Arbitration Between:	
MOBIL INVESTMENTS CANADA, INC., Claimant,	ICSID Case No. ARB/15/6
and	
GOVERNMENT OF CANADA, Respondent.	
	Volume 1

HEARING ON JURISDICTION, MERITS AND QUANTUM

Monday, July 24, 2017

The World Bank
1818 H Street, N.W.
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter came on at 9:56 a.m. before:

PROF. CHRISTOPHER GREENWOOD, Q.C., President

DR. GAVAN GRIFFITH, Co-Arbitrator

MR. J. WILLIAM ROWLEY, Q.C., Co-Arbitrator

ALSO PRESENT:

MS. LINDSAY GASTRELL
Secretary to the Tribunal

MR. ALEX KAPLAN
Legal Counsel

Court Reporter:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT GREENWOOD: Well, good morning, ladies and gentlemen. I think this is perhaps as good a time as any for us to make a start.

Let me begin by introducing you to the Members of the Tribunal and those are who here from the Centre. Now, to my right is Mr. Bill Rowley QC, and to my left is Dr. Gavan Griffith QC, and my name is Christopher Greenwood.

We also have Lindsey Gastrell who is the Secretary of the Tribunal, and he was here a minute ago, he is at the back, yes, Alex Kaplan also from ICSID legal counsel. Phoebe Ngan, who is the paralegal who's been working on the case, and whom we have to thank for a great many of the practical arrangements here, including the--it's not quite a window on the outside world, but we can pretend that it is and it's better than being in the basement room.

And there are also two paralegals--sorry, two interns from ICSID sitting at the back of the room, Sarah Rajguru and Supritha Suresh. Welcome, very

nice to see you here.

And last, and definitely not least, David Kasdan, the Court Reporter who we will all get to know well during the course of these hearings.

Now, perhaps I could ask Mr. O'Gorman to introduce the Claimants' team, and then I will do the same with the team from the Respondent.

MR. O'GORMAN: It's my pleasure, Mr. President.

To my immediate left is Denton Nichols of Norton Rose Fulbright, to his left is Tom Sikora, the International Arbitration Counsel at ExxonMobil. Immediately to his left is Alice Brown, who is Chief Litigation Counsel at ExxonMobil. To her left is Stacey O'Dea of ExxonMobil Canada, Senior Counsel. To her left is Mr. Paul Phelan, our client representative. To his left is Paul Neufeld of Norton Rose Fulbright, Katie Connolly from Norton Rose Fulbright, Rafic Bittar from Norton Rose Fulbright and Lawri Lynch, our paralegal from Norton Rose Fulbright.

That rounds out our team, Mr. President.

PRESIDENT GREENWOOD: Thank you very much, Mr. O'Gorman.

Mr. Luz, can we hear from you.

MR. LUZ: Thank you, Mr. President.

To my right is Adam Douglas, and I will go on down the line with Heather Squires and seated next to her is Melissa Perrault, and Darian Parsons--Darian and Melissa are, quite frankly, the most important people; they are our paralegals that keeping us all surviving and running.

We have further on down the line my co-counsel Michelle Hoffmann, Valantina Amalraj, from the Government of Canada. Party representatives, Ms. Julie Boisvert is not here right now, but she will be joining later this week. Ray Froklage and Lisa Mullins. And from the Province of Newfoundland and Labrador, we have Ms. Meaghan McConnell and Mr. Gerard Collins. We have Chris Reynolds, who is going to be helping us with our presentation today.

And I believe we have--oh, and Rory Walck and Carolyn Witthoft, our damages experts in this case.

And I think that's it. I believe that's

everyone.

PRESIDENT GREENWOOD: I think you've got a couple more people beyond that.

From the Government of Newfoundland?

MR. LUZ: As I already mentioned, yes, Meaghan and Gerard from the Government of Newfoundland.

Thank you.

PRESIDENT GREENWOOD: Very good. Thank you very much.

I won't ask them to introduce themselves, but can I also welcome the representatives of the United States, Ms. Nicole Thornton and Mr. J. Benton Heath, and there should be somebody from the United Mexican States as well, but I don't think he's here just yet.

Right. Well, let's move on.

A few points I would like to make by way of housekeeping about the forthcoming hearing. The first is that we are, of course, having a single hearing, which is dealing with a number of discrete issues, and the Tribunal is well-aware from having read the pleadings that Canada's position is that

there is no jurisdiction. If there were jurisdiction, then the case is inadmissible on grounds of res judicata. I hope I don't misstate your res judicata point. And it's only if the Tribunal finds against the Respondent on both of those points that we get to the questions of quantum and liability.

I make this point because I don't think it is necessary for counsel to keep, as it were, reserving their position on those issues. If you make a submission in relation to liability or quantum, we will take it for granted that that is on the basis that the Respondent's principal position is that we should never reach those questions.

Similarly, if Members of the Tribunal ask questions about issues of liability or quantum, please do not take that as in any way indicative of the view we might have formed upon the preliminary matters. We only have this one opportunity to put those questions.

The next point, to help David Kasdan, please don't speak too quickly. Now, there are no

Interpreters in this case. Which makes it a great deal easier. But, although David Kasdan is world famous for being able to keep pace with just about any counsel, even he is human and has his limitations, so please bear those in mind when you're making a speech. It's all too easy to rattle things off very quickly, especially if you're reading from a text, and you're under time pressure. It's much better if you take your time with your advocacy.

Please make sure that when you are discussing the case you make clear which point it is you're addressing. There are two in particular I would like to highlight. There are two quite different res judicata arguments: There is Canada's res judicata argument, and there is Mobil's. They are completely separate, and it's important that they're not confused in the Transcript.

Similarly, we are blessed with two O'Keefe witnesses, one called by the Claimant and one called by the Respondent. Please make it clear, if you're referring to their evidence, which Mr. O'Keefe you're taking about. Otherwise, this is the kind of thing

that can make the Transcript much less helpful than it would otherwise be.

We would be particularly grateful if you would be scrupulous about correcting the Transcripts when you get them. Now, "correcting the Transcript" means ensuring that it accurately reflects what you actually said, not that it is changed to reflect what you now wish you could say with the benefit of hindsight and after conversation with your senior partner or head of department. Obviously, if counsel has misspoken or made a mistake, then you should correct that but you should do it either in a letter to the Tribunal or in oral argument. It's not a matter for a change to the Transcript. It's a further piece of the Transcript. But it is important that you go through the Transcript and look out for things like the confusion with one witness with another, the confusion of one category of Project expenditure with another. This is a complicated case by any standards. Mistakes are perfectly understandable, but the sooner we put them right, whether they're simple mistakes of transcription or a

mistake by counsel, the sooner we put them right, the better.

Now, we have approximately three-and-a-half hours each for the Parties today. That is, after deduction of an hour for lunch and a quarter of an hour for coffee breaks in the morning and in the afternoon. But because I'm British, a quarter of an hour for coffee in the morning and a quarter of an hour for tea in the afternoon.

Does either Party wish to reserve part of its three-and-a-half hours for a supplementary statement at the end of the day under Procedural Order 8, Paragraph 18? You have that right.

Could I have an indication from the Claimant first whether it wishes to exercise it.

MR. O'GORMAN: Thank you, Mr. President.

The Claimant does not wish to exercise its right of rebuttal today.

PRESIDENT GREENWOOD: Thank you. That's very helpful.

And I imagine in that case, it doesn't arise for the Respondent?

MR. LUZ: It does not, Mr. President.

PRESIDENT GREENWOOD: Now, that means we're going to be breaking quite late for lunch. I hope that you've made arrangements appropriately and that there is some food left in the buffet downstairs. We will ensure that the Claimant gets the whole of its speeches in before lunchtime. I will only break when you have finished. But perhaps you could indicate a suitable moment for a break mid-morning; and, similarly, if the Respondent could do that for a break in the middle of the afternoon. If not, I shall use my Chairman's privilege to do so, but clearly if one of your counsel is about to come the end of a speech, it would be useful to know that there is only another five minutes to go.

Do bear in mind this evidence that suggests as a result of some studies in Israel that judges become less tolerant, more grumpy and less likely to be receptive to argument the longer they are kept from their food.

(Laughter.)

PRESIDENT GREENWOOD: Right. Are there any

other matters of a housekeeping nature that either Party would like to raise?

MR. O'GORMAN: Yes, Mr. President. We would like to briefly discuss with you the notion of confidentiality of the Hearing today. We do not anticipate in our opening that any confidential issues will arise such that the video link needs to be shut off. It's possible that they might come up, but at the present we do not anticipate that they will.

We're not sure what will occur in Canada's openings, so there is the possibility that we will request that certain portions of that be shut off from the video link. But we will just have to play that by ear.

PRESIDENT GREENWOOD: Right.

Thank you. Does Canada have anything to say about that?

MR. LUZ: Thank you, Mr. President.

We don't anticipate at this point, but we will consider it; and, if there is a need to request that the video link be temporarily suspended if

there's any confidential information, then we will indicate it at that time. We are cognizant of that, but I don't anticipate that there will be. And if there will be, it will not be for very long.

PRESIDENT GREENWOOD: Thank you.

I think it might be helpful if the two leading counsel were to speak briefly over lunch about this because I imagine there are certain matters that you're particularly concerned about, Mr. O'Gorman, and once you finished your speech, then you could discuss this with Canada's representatives without it prejudicing Canada's position at all.

Can I just say that I think it is important that these hearings are as transparent as possible; and, for that reason, I would prefer not to interrupt the video link, unless it is really necessary to do so, and then only for the shortest time that is absolutely necessary.

So, if you request an interruption, I would be grateful if you would immediately draw to my attention when the reasons for that interruption have come to an end and the link can be restored. I think

everyone has to be sensitive today of the importance of justice being seen to be done in these arbitrations.

Any other matters of housekeeping?

MR. O'GORMAN: None from the Claimant, Mr. President.

MR. LUZ: None from Canada. Thank you.

PRESIDENT GREENWOOD: The only other thing in that case for me to say is, well, two things, first of all, please make sure your mobile phone is switched off or is switched to silent. Silent can be a problem because it sometimes interferes--if it rings on silent, it sometimes interferes with the loud-speaker system and the microphones.

Secondly, I should have said this at the beginning, but the thanks of the Tribunal to both Parties for having produced a very helpful Core Bundle and also having produced the A4 copies of the Report of Mr. Walck and the witness statements of Mr. Phelan, as a result of which the spreadsheets now make a lot more sense than they did in A5 or on my laptop beforehand.

Very good. Well, in that case, we can make a start. We are nearly 15 minutes ahead of schedule, if you would like. Unless either Party wishes to have a short break before we move to counsel for the Claimant.

MR. O'GORMAN: We are prepared to proceed, Mr. President.

PRESIDENT GREENWOOD: Thank you very much, Mr. O'Gorman. Right. Well, we are looking forward to hearing from you, and also to seeing copies of your slides of your bundles.

MR. O'GORMAN: Yes, Mr. President, we will hand out a copy of the PowerPoint to you all. And to the Secretariat as well.

PRESIDENT GREENWOOD: Can I remind the Parties that in Procedural Order Number 8 we provided that electronic copies of these should be provided as soon as possible in addition to the hard copy so that we have them with us when we're traveling.

MR. O'GORMAN: Yes. We should be able to send that to you today, Mr. President.

PRESIDENT GREENWOOD: Thank you very much.

Just give us a moment, and then we look forward to hearing from you.

The artwork on the opening slide is very beautiful. I hope you are going to show us exactly where it is.

Very good. Mr. O'Gorman, we are entirely in your hands.

OPENING STATEMENT BY COUNSEL FOR CLAIMANT

MR. O'GORMAN: Thank you very much, Mr. President.

Mr. President, Dr. Griffith, Mr. Rowley, I am Kevin O'Gorman and it's my pleasure to represent Mobil Investments Canada, Inc. in this case.

The 2004 Research and Development Guidelines imposed by the Canada-Newfoundland Offshore Petroleum Board required Operators to spend millions of dollars of unneeded Research and Development and Educational and Training expenditures in the Province of Newfoundland and Labrador. Throughout this time, Mobil has acted as a reasonable and diligent investor.

Within three years of the Guidelines'

promulgation, Mobil timely made a claim under NAFTA in Mobil I, the Mobil I Case. An imminent Tribunal was constituted and found Canada in continuing breach of its NAFTA obligations.

After receipt of the Mobil I Decision in which the Tribunal found these continuing violations of NAFTA, Mobil asked the Board to stop applying the offending Guidelines. The Board refused.

At the First Tribunal's direction, Mobil then went on to prove its damages actually incurred up to that point in time. Ultimately, the First Tribunal awarded all but three out of 38 claimed expenditures and expressly left unprejudiced claims for future expenditures.

And let me add, before the Final Award in Mobil I, this case was actually submitted so that really, since 2007, there has been both the Mobil I Case and eventually a Mobil II Case pending.

The First Tribunal ultimately found a continuing breach and decided that Mobil can file a new arbitration for its future damages. Now, in accordance with the First Tribunal's Decision, Mobil

seeks damages it has since incurred.

Now, Canada's breach of the NAFTA is conceded. Canada accepts that the Mobil I liability findings are binding. In fact, it says in its Counter-Memorial the "final ruling by the Mobil/Murphy Majority that the 2004 Guidelines violate NAFTA Article 1106(1)(c) and are not covered by Canada's Annex I Accord Act reservation is binding as between the Claimant and Canada." Yet, Canada in this case seeks to escape liability for the continuing breach, which remains unabated.

Canada's attempts are supported by neither the law nor fact. On res judicata, Canada paints a false portrait of the First Tribunal's Decision on future damages, twisting the Tribunal's Decision on ripeness into a decision on the merits. If Canada were to succeed on its res judicata defense, the results would be grave.

First, the Mobil I Decision and their unmistakable decision that Mobil would be allowed to recover future damages incurred after the First Tribunal and bring new NAFTA proceedings would

literally be turned on its head.

Second, Mobil would evade its duty of full reparation directly contrary to the First Tribunal's Decision and international law.

PRESIDENT GREENWOOD: Mr. O'Gorman, I think you mean Canada would evade its duty of full reparation rather than Mobil.

MR. O'GORMAN: Yes, thank you very much, Mr. President.

PRESIDENT GREENWOOD: But my real reason for interrupting is rather different from that.

I trust at some stage you or one of your colleagues will explain precisely how you see the "Decision," as you called it, by the First Mobil Tribunal that Mobil will be allowed to bring new NAFTA proceedings, whether that is binding, whether it's binding on Canada, whether it's binding on us, whether it affects our jurisdiction. I think those are important questions which we would like to hear from you on.

MR. O'GORMAN: Yes, we will cover those in detail, Mr. President.

And thank you for the correction.

On Canada's res judicata claim, Canada paints a false portrait of the Tribunal's decision on future damages--excuse me.

Next slide.

On limitations, on the limitations argument, the statute of limitations argument. Canada, arguing the claim was too early, convinced the First Tribunal to award compensation only for losses incurred up to that point. Now it argues in this claim, for losses actually incurred since then, that Mobil is too late. If Canada were to succeed on its limitations defense, Canada would essentially be given carte blanche to continue its admitted breach of the NAFTA with impunity.

Now, the critical issue of that, of course, Members of the Tribunal, is that the Hibernia life-of-field runs past the Year 2040. So these breaches could continue on for many, many years. And the result of Canada's argument is those breaches would go uncompensated.

As noted, Mobil would continue to incur

uncompensated and uncompensable losses if the limitations defense succeeded through 2040 and beyond.

With respect to Canada's damages defense, Canada indiscriminately challenges each and every expenditure as driven by somehow operational needs or otherwise required by law. Canada has invented a ceiling on damages that has no basis in law or fact. If Canada were to succeed on its damages defenses, Canada would be unjustly rewarded for the Board having required the Operator to get approval for the Projects to justify the potential value in those approvals in order to obtain approval under the Guidelines. In other words, whenever the Operator, HMDC or Terra Nova, seeks to spend money under the Guidelines which it is required to spend, it must actually seek permission from the Board to do so. Moreover, Mobil would be left severely undercompensated for losses that are caused by the Guidelines.

The entire point of the Guidelines is that the Operators, Terra Nova and Hibernia (HMDC), are

required to make expenditures that they would not have done in the ordinary course of business for their business. Let's look at some of the examples of what HMDC and Terra Nova ended up spending to meet their requirements to make these expenditures under the Guidelines.

The first example is the CA-E helicopter training facility. This was a $7.5 million expenditure. The Operators provided capital cost to construct a helicopter training simulator in St. John's within the Province. The payments were made to one of the world's largest for-profit pilot training companies. HMDC does not own or operate a single helicopter. It was simply an expenditure approved by the Board to allow the Projects to spend money within the Province. What's the benefit? Completely uncertain: None.

Another example, but for the Guidelines, the Operators would never have paid for the drift and divergence of Ice Floes Project, $763,000 expenditure. This was a basic study of ice floes off the coast of Labrador. Now, I'm not an expert on

geography, but Labrador, of course, is a long way away from Newfoundland and especially where this was studied.

(Comment off microphone.)

MR. O'GORMAN: It's a long, long way.

These studies had absolutely no relevance to the operations of any offshore Project, including Hibernia, nor did they have any commercial application.

But for the Guidelines, the Operators would never have paid for the shrimp study; environmental impact of seismic activity on shrimp behavior. Now, Hibernia and Terra Nova are located over a hundred kilometers away from the shrimp fields offshore of the coast of Newfoundland, and Hibernia and Terra Nova are not even engaged in seismic activity, nor have there been any legal claims asserted or even threatened by the seafood industry. But this is another example of a project that was authorized under the Guidelines and satisfied the Guidelines' requirements that never would have been done in the ordinary course of business.

Let me give you a bit of a roadmap here for the Opening Statement today:

First, I'm going to give you an overview of the investments themselves of Hibernia and Terra Nova.

Then we will talk about the pre-Guidelines regime in force before the 2004 R&D Guidelines.

Then I will go on and talk about the new requirements instituted by these 2004 Research and Development Guidelines promulgated by the Canada-Newfoundland Offshore Petroleum Board which we will refer to oftentimes as "the Board."

Then we will talk about the uncertain early days of the Guidelines.

We will go on to talk about Hibernia Project expenditures and overview from 2004, which was the date of the imposition of the Guidelines, through 2015, which will roughly track the Mobil I Case and the claims in the current case roughly from 2012 through 2015.

Then we will do the same thing for Terra Nova to give you an overview of the expenditures and how

the Projects worked to catch up with their spending Shortfall given that the ordinary course of business Research and Development did not come close to meeting the Guidelines' required expenditure requirement.

Then I will give you a brief procedural timeline of the Mobil I Case to put it in context.

And then we will take on Canada's res judicata defense, followed by Canada's limitations defense.

Then a separate section for Canada's discretionary spending argument, which I mentioned earlier, was the notion that there is an artificial ceiling or cap on the amount of damages Mobil can recover.

And then, finally, we will talk about Mobil's damages themselves.

Okay, so, let me give you now an overview of these investments to put this in context.

The Hibernia Project was a $5.8 billion capital-cost project as of 1997. It is located 315 kilometers southeast of St. John's, Newfoundland,

and you can place it there on the map on Slide 12. It is a Gravity Base Structure constructed in 1990 to 1997. An enormous structure. The first oil from the field occurred in November of 1997, and it is--both of these fields are oilfields. They do not commercially produce gas.

The field life of Hibernia is estimated to be 2040 and beyond.

As you can see, there is a picture of the Hibernia Platform and the Gravity Base Structure that it is.

The Operator, to be clear, is not Mobil. The Operator is Hibernia Management and Development Company Limited. The owners of Hibernia--

PRESIDENT GREENWOOD: I'm sorry for interrupting you, forgive me, I'm missing something, but I'm having some difficulty seeing how the Hibernia Field, if it's 315 kilometers southeast of St. John's is 7,000 kilometers away from the nearest point on Labrador.

MR. O'GORMAN: We might check the 7,000-kilometer figure.

PRESIDENT GREENWOOD: My geography is pretty rough and ready, but I have difficulty adding that up.

ARBITRATOR GRIFFITH: I think it says 750.

MR. O'GORMAN: Thank you very much, Dr. Griffith. So, the Labrador Ice Floe Project was only 700 kilometer away.

(Comment off microphone.)

MR. O'GORMAN: Okay. Thank you very much.

So, the Hibernia Project is operated by a flow-through company called Hibernia Management and Development Company, HMDC. HMDC is owned by the Shareholders, according to their participating interests in the Hibernia Field, and you will see that Mobil has a 33.125 percent interest in the Hibernia Field, along with Chevron and several others.

I should note that the Canada Hibernia Holding Corporation is a Crown Corporation; and, therefore, Canada actually has an interest alongside Mobil in the Hibernia Field.

The Terra Nova Project is a bit different.

It was a $3 billion capital cost, and is located not terribly far from Hibernia, 350 kilometers southeast of St. John's, Newfoundland. It is an FPSO, floating production, storage and off-loading vessel constructed between 1991 and 2001. The interesting aspect of an FPSO, of course, is that, if there are any risks for ice or otherwise, it can simply disconnect and sail to safety.

First oil in Terra Nova was January of 2002. The field life is also very substantial, not quite as long as Hibernia, but currently estimated to be 2026 and beyond.

The Operator of Terra Nova is Suncor Energy, so Mobil has only a 19 percent stake in Terra Nova, with Suncor having a much greater stake. You will see from the slide the other interest-holders in Terra Nova.

The reason I describe these differences and the ownership interests both in Hibernia and Terra Nova is that in many cases, Canada is imprecise in their description of who is who. Both of these fields are not operated by Mobil. The Hibernia Field

is operated by HMDC and Terra Nova by Suncor. Oftentimes that fact is conflated in what Canada has submitted.

We turn now to the pre-Guidelines regime for the Hibernia and Terra Nova Fields.

Before the 2004 R&D Guidelines, there were Benefit Plans and Development Plans agreed between the investors and the Board for both Hibernia and Terra Nova. These Benefits Plans and Development Plans were so-called "cradle to grave plans," which would govern the entire investment. Of course, it is precisely these plans that facilitated the investment by Mobil in these projects. The agreed Benefits Plans, for instance, address things like providing to the citizens of Newfoundland and Labrador a full and fair opportunity to receive employment.

Both Projects were ultimately developed and are now in the oil Production Phase.

During the pre-2004 time period, the Operators made R&D expenditures within the Province or outside of the Province only on a normal as-needed basis. Nevertheless, the investment within the

Province was extremely substantial, with over $160 million being spent before the 2004 Guidelines.

Several key aspects of the pre-Guidelines scenario:

First, there was no requirement for R&D or E&T--R&D, of course, is Research and Development, E&T is Education and Training--no requirement for that type of spending above the needs of the Project. There is no minimum spending amount or percentage of required spending and no eligibility review process for these types of expenditures.

Now, Mr. Ted O'Keefe, who has not been called by Canada in this case, made it very clear in his Witness Statement that, during this pre-2004 period, the Board never once suggested that HMDC was not meeting the Benefits Plan nor did the Board ever once suggest in any way that Terra Nova was not meeting any R&D requirements in its approved Benefits Plan.

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.

Now, critically, the Guidelines were not voluntary. The Guidelines were absolutely mandatory. And in fact, the License for these projects to operate is expressly conditioned on compliance with the Guidelines.

So, for instance, on Slide 21, you can see the POA, which is called the "Production Operations Authorization," which allows the Projects to produce oil, the POA issued to HMDC was on condition that the

Operator shall comply with the Guidelines for Research and Development expenditures as issued by the Board. A provision in respect of the commitment to address a shortfall--and I will tell you a little bit about the Shortfall coming up--will be incorporated in the authorization's authorization. Sometimes these are called "POAs," and sometimes they're called "OAs." They're fairly interchangeable.

The requirements during the period of a new OA will be provided to HMDC on an annual basis by the Board.

Another critical aspect of the Guidelines is that it required that expenditures be made within the Province of Newfoundland and Labrador to be qualifying.

Now, the population of Newfoundland and Labrador is approximately 520,000. The Operators faced an enormous hurdle in finding sufficient R&D opportunities that could be done within the Province. The "incremental" spending at Hibernia and Terra Nova from 2012 through 2015, which is the time period at

issue in this arbitration, that spending requirement alone was $91.6 million. That works out from the 2012 to 2015 time period at over $62,000 a day that the Operators were required to find qualifying R&D investments and expenditures within the Province that could be undertaken.

PRESIDENT GREENWOOD: Mr. O'Gorman, forgive me for interrupting you again. In the Mobil I Award, I remember the Tribunal there commenting that Mobil could have avoided those problems, or rather HMDC and Suncor could have avoided those problems if they had simply paid the money over to the Board and the Board would then have paid it into a fund. I'm not sure I fully understood why that wasn't done. Could you explain it to me.

MR. O'GORMAN: Yes, it would be my pleasure, Mr. President.

The Guidelines provided that, at the end of an OA Period, if there remained a shortfall, the Guidelines on their face provided that one option would be for the Operator to pay into a Board fund. The Board fund was never established. It never

existed. The Board was not interested in administering an R&D fund. It did not have the resources to administer an R&D fund, and it was concerned that people would begin lobbying the Board to receive money as payouts for a fund that it ran.

Instead, the Board looked to the Operators who were most knowledgeable about potential R&D expenditures within the Province, and ultimately the Board and the Operators agreed that, instead of a fund, that to the extent of any Shortfall at the end of an OA Period, then that would be backed up by the Operators with--and their individual members--with Promissory Notes backed up by Letters of Credit.

So, the Board, although mentioned in the 2004 Guidelines, never existed. And in fact, the Draft Guidelines that Canada is now considering promulgating removes the notion of a Board altogether.

Another aspect of why even if Mobil wanted--

PRESIDENT GREENWOOD: You mean a fund administered by the Board?

MR. O'GORMAN: Yes.

PRESIDENT GREENWOOD: Thank you.

MR. O'GORMAN: Another aspect of why the fund could not operate in this case is that Mobil could not unilaterally decide to pay into a fund, and that there again is the distinction between HMDC of which Mobil is one of the constituent members with the minority percentage as well as the Suncor Project Terra Nova, Mobil could not unilaterally decide we should pay this into a fund. If it did, of course, that would reduce the overall--the overall expenditure requirement by the amount that Mobil paid into the fund, but then Mobil would be required to pay its pro rata share of the remaining amount that would be paid by the Project.

So, in other words, Mobil would be severely punished by attempting to unilaterally pay into a fund, even if a fund were to exist.

ARBITRATOR ROWLEY: Could you just help us, whether that argument applies equally or not to the granting of or putting in place of a Letter of Credit?

MR. O'GORMAN: The Letters of Credit are

slightly different, and the overall obligation is assessed to the Operator. But, because the Operators, especially HMDC, is not an entity with any assets, then ultimately what has happened is that the individual members are required by the Board to post Promissory Notes and Letters of Credit because of their creditworthiness.

ARBITRATOR ROWLEY: For their share?

MR. O'GORMAN: For their share.

Now, as it turns out, that's only in the event that there is a shortfall at the end of an OA Period when there's a squaring up that precedes the end of that period to determine if there is a shortfall. Although Letters of Credit had been posted by the Operators, they have never been drawn down because that would result in the same conundrum for the Board that they are not able to administer nor to spend nor to guide any type of fund with that money.

ARBITRATOR ROWLEY: But do I understand it that after, using your words, "squaring up," and that occurs annually; am I right?

MR. O'GORMAN: No, it does not occur annually. And it occurs once, approximately, every three years. The so-called "OA Period", on average, is three years, but that period can be extended by the Board, and it is within that period--that is the only operative period, not an annual basis but a three-year period or so in which the Board evaluates what the requirements were and what has been spent and qualifying and then determines if there is a shortfall or a surplus at the end of the OA Period. If there is a surplus, then, the surplus can be applied to the future OA Period, to the next OA Period. If there is a shortfall, on the other hand, that is when the Board requires the Operators and their individual members to post these Promissory Notes with Letters of Credit, which to date have not been drawn down.

ARBITRATOR ROWLEY: Now, this is theoretical, but let's see if you can answer it. Would it have been possible--and this doesn't apply only to Mobil--but for the participants in the Hibernia Project, to spend what they saw fit, ordinary course

expenditure on R&D and the other one and continue to do that year by year. And after each squaring up, saying, "all right, we are in surplus, we don't have to do anything. But, if we are in deficit"--that is, I say "we", the one member in question in the syndicate--"we are in deficit by 100 million, we will therefore provide a Letter of Credit for 100 million."

MR. O'GORMAN: In theory, that would be possible, but as you will hear from Mr. Sampath and our other witnesses, it was Mobil's effort, and HMDC and Terra Nova, to do their very best to comply with the law and the regulations, which are to enhance the R&D and expand the capabilities within the Province. And simply to sit on your hands and eventually pay cash to the Board was something that the Board didn't want and the Operators did not want either, because the Board was just not capable of facilitating and using a fund for the purposes as well as the Operators could.

The Operators, of course, had the know-how to pick the R&D Projects that would in some respects try

to help the Province advance its Intellectual Property and experience, so that is something that was never pursued.

ARBITRATOR ROWLEY: Well, one of the issues that we have to grapple with is whether there is an overspend, and at some stage, no doubt, we'll be helped as to why the participants in the Projects spent more than was required, why they didn't tailor their spending to what was required.

MR. O'GORMAN: Mr. Rowley, the evidence will be very clear that they did tailor the spending. This is not something that's like a faucet that can be turned on and off. This is something--these Projects are very difficult to find. The commitments are made in advance based on the best determinations of what the obligations will be which are only determined in hindsight by the Board.

And again, the other key is this is not determined, while there is a number provided on an annual basis, the operative time period for the squaring up is every three years or so in the squaring-up period.

PRESIDENT GREENWOOD: Sorry, as we are on to this, I would just like to clarify a few things.

So, what you're saying in effect is that the Mobil I Tribunal just got this point wrong?

MR. O'GORMAN: The Mobil I Tribunal conflated in that case the--Mobil with the HMDC, which is not the same thing. It would not be Mobil's unilateral choice, and I can understand the Tribunal's frustration in the first case of having to decide all these individual Incremental Expenditures when Canada, for instance, in the current case, has challenged every single one of those expenditures and made those a factual issue. But you will see from the evidence, Mr. President, that these expenditures would not have been done in the absence of the Guidelines, were very prudent under the circumstances, for which ExxonMobil received no benefit, and so they were doing their very best to comply with these Guidelines and their expenditure requirements.

PRESIDENT GREENWOOD: Yes, that's a slightly different point, but even if the Mobil I Tribunal had

not conflated Mobil with HMDC--we will leave Terra Nova, which I grant you is different, to one side for the moment--even if they had said HMDC could have made the choice to pay the money to the Board, and you would have had a one-third say, roughly, in any decision making in HMDC, they would still have been wrong? That's your point, isn't it? Because there was no fund to pay to?

MR. O'GORMAN: There was no fund to pay to.

PRESIDENT GREENWOOD: We look forward to hearing from the Respondent on that point, I think.

Now, can I just give one little thing. If there is a shortfall, at the end of a squaring-up period--and that was the position, as I understand it, in the Mobil I arbitration, there had been a significant underspend--that Shortfall has to be made good, first of all, by posting a Letter of Credit, each member of the Consortium would have to post a Letter of Credit for their share, but they would also be expected to spend--to cover the Shortfall of spending in the next three-year period?

MR. O'GORMAN: That is correct, and we will

show you, as we go forward, the links and efforts that the Operators went to meet those Shortfalls.

PRESIDENT GREENWOOD: And conversely, if there was an overspend on approved R&D and E&T Projects during a three-year period, that overspend could be carried forward to the benefit of HMDC or the Consortium and Terra Nova, as the case may be, for the next three-year period?

MR. O'GORMAN: That is correct. That is expressly provided for in the Guidelines.

PRESIDENT GREENWOOD: In principle, if you spent so much more than was required in the period 2012 to 2015, that that would cover the totality of the Guideline-required expenditures in 2015 to 2018. You needn't spend anything at all in that next three-year period.

MR. O'GORMAN: Actually, in the present case, the Hibernia temporary surplus that occurred at the end of 2015, which again, is completely irrelevant for purposes of the OA because the OA Period does not end at the end of 2015. But, if there were any surplus at the end of an OA Period, it could be

carried forward, that's correct.

PRESIDENT GREENWOOD: Right.

At some point I hope you will explain to us how you fit your claim for the surplus expenditures in the period we're looking at into the finding by the Mobil I Tribunal that there is liability only in respect of payments for which there has been a call. I'm having a little difficulty with that just to explain the point to you.

I don't want to interrupt the flow of your argument any further, but at some point I would like some clarification on that.

MR. O'GORMAN: Yes, absolutely.

Okay. Returning now to the Guidelines on Slide 24, the Guidelines impose an R&D formula, a set amount that is based on a formula. And that formula is the number of barrels of crude oil multiplied by the average Brent Crude spot price, multiplied by the U.S. dollar-Canadian dollar Exchange Rate, and discounted by ten percent for the quality of the crude from those projects, multiplied by a benchmark--we will come back to the benchmark--to

result in an overall expenditure obligation.

Now, the benchmark was based on what was called the "StatsCan" or Statistics Canada factor, which was a rolling five-year energy industry-wide average within Canada of R&D monies spent by a wide variety of energy companies regardless of phase of the Project within Canada based on surveys conducted by Statistics Canada.

Now, the obligations based on this formula were calculated retrospectively. So, for instance, in March 18, 2015, the Board was providing to Hibernia the Notice of what the expenditure requirement was for 2014.

Now, as I mentioned, the Board reviews compliance not annually but only at the end of three-year operations--excuse me, operations authorization periods. The Production Phase expenditure requirement will be distributed over each POA Period during the production life of the Project. At the end of each POA Period, there will be a recalculation based on actual production levels.

Now, once again, the true-up or squaring-up

process that is contemplated here does not happen on an annual basis, nor did it happen at the end of 2015.

Now, the requirements based on the Statistics Canada benchmark results in expenditures much higher than Project needs. And on this slide, you can see this was an industry slide, not just a Hibernia or Terra Nova slide, but an industry slide created in 2010, early days into the enforcement of the Guidelines for their meeting with the Board. And you can see several things in the observations.

The industry typically spends two to $3 million per year per Project on R&D that will qualify. The industry will be required to spend ten to $40 million a year on R&D over the next five years. And the potential cumulative industry R&D gap between what it would normally have spent and the Guidelines' requirements, range from 110 million to 270 million by 2015, according to this 2010 estimate.

You can see that graphically on the graph where the shaded parts are the amounts expected to actually be spent in the ordinary course versus the

lines at the top which is the gap between spending and what would be required under the Guidelines.

It is that gap that, for instance, Mr. Sampath, who will testify to you here, was hired for the express purpose by Hibernia to fill that gap with Projects that would not have normally been done by the Operator in the ordinary course.

Now, the Stats Canada benchmark in addition to requiring expenditures much higher than would have been done at Hibernia and Terra Nova, creates its own positive feedback loop, and that's provided by Rod Hutchings, our witness: "To comply with the Guidelines' elevated spending requirements, these projects increase their overall spending on R&D. The increased R&D expenditures are then, in turn reported to Statistics Canada." Statistics Canada then, of course, takes that into account in setting the benchmark for the next year. And so, the more that is spent, the more that is required to be spent in the positive feedback loop of the Stats Canada factors.

You can see this graphically of how the

benchmark has increased substantially over the period of time at issue. 2002, it was .2 percent, and it's risen in 2013 to .9 percent.

Now, you can see that these are the numbers, a five-year average of which are employed in determining the overall expenditure requirement under the Guidelines on an OA Period by OA Period basis.

Another salient aspect, and it's important for this arbitration, is that, under the Guidelines, the Operator is required to obtain pre-approval from the Board for R&D and E&T expenditures. As the Guidelines themselves provide, the Operator shall file an expenditure application form for each R&D and E&T activity it plans to undertake. The form will be submitted to and reviewed by the Board for approval. In other words, the Board has the choice not to approve it.

And so, in order to meet the spending requirements, you had to ask permission to the Board to spend your money on items that you would have never spent on anyway. Of course, to get Board approval, many times, the pitch documents were shown

to be optimistic because no one conducts R&D projects when they know they will be failures, and so the optimism is a technical form of optimism that the proponents of these particular studies were hoping to show could be possible from these projects to seek approval from the Board.

Mr. Sampath, who was the Hibernia R&D Manager--again, he was brought in specifically with the remit to spend money and to identify expenditures that could be undertaken to meet the Guidelines' spending requirements. He testifies that: "When submitting a given R&D project for Board pre-approval, it was incumbent on the operator to explain what benefits or utility might come out of the proposed R&D activity. In effect, the operator was trying to convince the Board on the potential benefits of the proposed project for the intellectual and human capacity of the Province at large, so that the Board would allow the operators to make the requisite expenditures."

In summary, the Guidelines were a substantial adjustment to the existing regulatory regime--to the

existing legal regime for Hibernia and Terra Nova, as was found by the Mobil I Majority.

Let me now turn to the early days of the Guidelines.

As you will recall, they were promulgated in 2004. The Operators challenged the Board's authority under Canada municipal law, challenged the Board's authority as to whether they had authority to actually issue the Guidelines, given the cradle-to-grave Benefits Plans that had previously been agreed and were conditioned on the investment of Mobil in these projects.

The Canadian courts applied a deferential standard of review, and clearly not before them were any international law claims nor NAFTA claims.

While those court challenges were pending, the Board suspended enforcement but not application of the Guidelines from 2004 through 2008. So, as you see, the Board acknowledges it will not take any steps to enforce the Guidelines, however, the expenditure requirements will be determined beginning on April 1st, 2004.

Now, eventually the Court challenges were denied as a matter of Canadian municipal law, and the Board began, once again, for the first time, to enforce the Guidelines.

In early 2009, the Board notified Hibernia and Terra Nova of their huge spending requirements under the Guidelines; and, on this slide on the left, we have the Board letter to HMDC and on the right, the Board letter to Suncor. And, at that time, there was a spending requirement, a so-called "Shortfall," for Hibernia in the amount of over [redacted]. There was also a shortfall for Terra Nova in the amount of [redacted].

So, of course, the Operators wanted to do their best to address the spending Shortfall, and find creative ways to develop projects any way they could that would be qualifying under the Guidelines. And so, Andrew Ringvee, who at the time was responsible for dealing with the spending shortfall at Hibernia, says they created an R&D task force, which was within the industry--other industry players, normally competitors. The R&D Task Force

sought to “identify a few large joint industry R&D projects as a key part of our plans to close the gap” between the spending requirement and the actual spending.

You can see they actually had instituted conferences in the Province and workshops to try to work together with other members of the industry to develop projects. And so, experts were flown in from around the world, and these people brainstormed R&D projects. And so, for instance, there was an Arctic workshop November 17th to 18th, where subject matter experts came in from around the world, and they identified 25 potential projects. There was a conference on subsurface workshop--same idea.

It was a very unusual situation. As Ryan Noseworthy, who will testify here with you, as the former Reservoir Manager of Hibernia: "I had never heard of an initiative like this before . . . Oil companies do not fly in experts from around the world to devise both potential problems and R&D solutions to those problems to be undertaken jointly with their competitors."

In other words, these were projects that were being made to satisfy the requirements of the Guidelines, not to address any operational needs.

(Slide 39.)

Precisely to your question, Mr. President, in December 2009, the Board required the Project to present formal Work Plans to spend down these Shortfalls. As Mr. Phelan testified: "Through the development of Work Plans approved by the respective project management committees, the . . . projects ramped up Guidelines-eligible expenditures . . . to 'spend down' these shortfalls."

Mr. Noseworthy says, again, "We find big R&D projects because such projects would maximize our R&D expenditures. . ." And, critically, in a way that echoes the concern about the Board of why they did not want to have a Board fund while diverting--for HMDC--"while diverting a minimal amount of personal and overhead resources from our usual business (and therefore minimize the operational and administrative costs that we incurred by complying with the Guidelines)."

So, let's turn now to the formal Work Plan that was submitted to the Board by HMDC to tell the Board: This is how we're going to make up the Shortfall; we are working on it. This was dated March 31st, 2010.

And you can see from Page 44 that the Shortfall assessed through year-end 2008, at that point was $[redacted] for Hibernia, with a potential to grow. The Hibernia, the OA, actually required these Proponents to set forth a Work Plan to address the Shortfall.

Critical, and a central item of that Work Plan, was the expenditure for the Gas Utilization Study, which is sometimes called the "WAG Pilot"--WAG being "Water Alternating Gas"--as a way to hopefully or consider possibly enhancing production at the end-of-field life instead of normal production.

As you see, it is estimated at that time to be approximately [redacted], and that Hibernia was willing to explore NL Study, Newfoundland and Labrador study execution options if--if--the pilot were deemed to qualify; in other words, qualify as an

approved R&D expenditure by the Board. No reason to do it otherwise.

As you can see from Page 46, the yellow boxes, from 2012 and 2013, the WAG Pilot was the centerpiece of the 2010 Work Plan devised by Hibernia to spend down the Shortfall.

Terra Nova also was required to submit a Work Plan--and as you can see, it did--to address the Shortfall in R&D and the E&T expenditures. And at that point, the Shortfall for Terra Nova was almost [redacted].

The next slide shows the many, many projects that were proposed in the Work Plan to the Board to show how the Shortfall would be met.

Now, critical for this is what's not on there. And what's not on there is the so-called "H2S Mitigation Project," which occurred later and, unexpectedly, there was a problem with the reservoir at Terra Nova which required a very substantial ordinary-course expenditure which eventually was approved under the Guidelines, and which was not known at this time.

Let me turn now--

ARBITRATOR GRIFFITH: The concept of automated iceberg towing, how does that work?

MR. O'GORMAN: I'd have to defer to my colleague Mr. Nichols. But the bottom line is it doesn't work very well at all, as many of these projects didn't work.

ARBITRATOR GRIFFITH: I thought the water was quite shallow, so the icebergs didn't come ashore where you were, anyway.

MR. O'GORMAN: That's precisely right. And that indicates why such a study is completely irrelevant for the Hibernia Project.

ARBITRATOR GRIFFITH: Thank you.

MR. O'GORMAN: Okay, so now--

PRESIDENT GREENWOOD: Could I explore that. It might be irrelevant to the Hibernia Project, but does that necessarily mean it would be irrelevant for Mobil? You know, just to go back to the helicopters example earlier, Hibernia doesn't own any helicopter, but does Mobil?

MR. O'GORMAN: No, not to my knowledge, sir.

So, that is the question I encourage you to pose to Mr. Sampath when he testifies. He has considered these projects, and to the best of his knowledge, neither Hibernia nor Terra Nova, nor any affiliate of ExxonMobil would devise any significant or even potential benefit from these projects.

But I do encourage you to keep asking that question.

PRESIDENT GREENWOOD: Thank you. We will certainly raise it with Mr. Sampath.

MR. O'GORMAN: Okay.

So, for the Hibernia Project, let's overview the expenditures from 2004 to 2015.

As you can see on the graph on 2000--excuse me, Slide 51, this shows for Hibernia the annual obligations and the annual expenditures at Hibernia.

What this illustrates very graphically is, from 2004 to 2009, in which the Board chose not to enforce the Guidelines during the Court challenge, there was no incremental expenditure made. So the requirements, the obligations and the annual expenditures show the gap, and the gap was what was

newly required by the Guidelines, which the projects would not have normally have spent in the ordinary course of business. That is the burden of the Guidelines.

Now, after 2009, you can see that the annual expenditures rose significantly, and that illustrates the efforts of the Operators in HMDC and Hibernia to meet those Shortfalls.

To show it another way, the Incremental Expenditures for Hibernia--and this is during the Mobil I time period, that is from 2004 through the end of April 2012--the Incremental Expenditures from 2004 to 2008 were zero because, as you recall, the enforcement of the Guidelines was stayed at that point; 2009, very little as well, for the same reason.

But, after the Guidelines were found as a matter of--in the municipal law to be legal, the Hibernia Project then ramped up its spending substantially to meet that Shortfall.

This is shown on the 2004 to 2012 period bounded by the green lines. This chart shows the

cumulative spending obligation in red; in purple, the cumulative expenditures.

And you can see that the gap continued throughout the 2004--there is some convergence at early 2004--but there is a gap throughout the end of the 2012 time period.

The Shortfall, the cumulative Shortfall, is illustrated by the orange stripe at the bottom of the chart, which again indicates there was a long-term Shortfall that Hibernia was trying to meet.

Now, despite the spending increases in expenditures, the Guidelines obligations were not being kept up with. The 2000--so, for instance, the Board letter, in the middle of July 2012, shows that while the 2004 to 2008 Shortfall had been eliminated, a new Shortfall now occurred, now existed, of over [redacted]. And this is very much where the case picks up now in Mobil II, with that Shortfall existing at the beginning of May 2012, through the 2015 time period that we're talking about in Mobil II.

So, Mr. Sampath: "At the beginning of my

tenure as R&D Manager in September 2013 . . . HMDC did not have sufficient Guidelines-eligible expenditures in the pipeline in order for the Hibernia Project to be on track to meet its expenditure obligation by the end of the then-current OA Period." As you will recall, the OA Period is critical for determining obligations under the Guidelines.

So, he was, of course, hired to fix this problem: "I realized that I needed to find several new R&D projects for HMDC to fund in order for the Hibernia Project to catch up . . . as well as to get on track . . ." As you will hear from Mr. Sampath, he takes this obligation very seriously; not just the letter of the law but to do his best to meet--excuse me, to meet the spirit of the law by increasing R&D capability in the Province.

So, for the Hibernia Project, from May 2012 through 2015, which is the time period at issue in this case, you can see the expenditures were large. And then, when Mr. Sampath became the HMDC R&D Manager--and again, he was hired precisely to remedy

the Shortfall--the expenditures were able to be increased substantially to meet the Guideline requirements.

Canada has been very clear in questioning the motives of Mr. Sampath in the projects that he was able to identify and get approved by the Board. But let there be no mistake about it: Mr. Sampath is an honorable man, and he was doing everything he could to meet the expenditure requirement of the Guidelines.

And he was successful. As you will see from Page 58, for the period of time from 2012 through 2015, through his tremendous efforts, he was actually able to get the Shortfall eliminated at Hibernia.

Now, you will recall from the formula in calculating the expenditure requirements, one of the components, in addition to the StatsCan benchmark factor, one of the components is the price of oil. And of course, in late 2014, there was a substantial slide in the price of oil. And this chart shows the sudden impact on lowering the expenditure requirement for Hibernia.

This is graphically illustrated in this document, which is a document from the Board. And if you look very closely, along the top line it includes the items taken into account in the formula, including the StatsCan factor, which is referred to as "benchmark," the production, and in particular, the price of oil. So, in January, with $108 price of oil, the expenditure obligation was 2.5 million. Later on, in December, the price had fallen to $62, the expenditure obligation was almost cut in half.

There has been a lot made, and will continue to be made, with respect to what was happening at the end of 2015 in Hibernia, and the artificial ceiling that Canada is creating. But the most important fact at this point, of course, is that in the part of the squaring-up process by the Board as the OA Period was coming to an end, on 30th of September, the Board notified HMDC that as late as that date, that there was still almost an [redacted] Shortfall for Hibernia.

Let's now turn to the Terra Nova Project expenditures, in a similar discussion to what we've

done about with Hibernia, to give you a feeling for what has occurred there.

So, from 2004 to 2011, the time period in the Mobil I case, again the Incremental Expenditures on the early days, when the Guidelines were not being enforced, during the court challenge, at Terra Nova were zero. Same with 2009 as they started to try to ramp up, when the Guidelines were beginning to be enforced. But, in 2010-2011, you can see the efforts at Suncor to ramp up their spending to meet the Guidelines requirements.

Now, in fact, at end of the OA Period, at the end of 2011, the Board indicated to Terra Nova that it still had a [redacted] Shortfall.

Now, let's talk about the time periods at issue in Mobil II in the present Case, from 2012 through 2015.

The expenditures for 2012 at Terra Nova were [redacted] for Incremental Expenditures. But then, as I mentioned, something unexpected happened, and that was this project required to mitigate the so-called "H2S souring" that occurred at Terra Nova,

which was an issue with respect to the reservoir.

The amount approved by the Board was very substantial, $71 million. When that happened, though, Suncor had many Projects, R&D projects, that were not needed but met the Guidelines requirements already in the pipeline. And so, as I mentioned, you can't just turn off the faucet, but they did what they could to slow things down. So, many of those were already committed to or in progress, and so you see the expenditure in 2013 was [redacted].

But then Suncor was able to substantially reduce the Incremental Expenditures for 2014 and 2015, given the very large amount approved for H2S Souring Project. Those efforts to slow down the expenditures are revealed on Page 66, with respect to the title of the slide, "Reservoir Souring R&D Program." In light of that, as you see, they were trying to reduce expenditures in other areas; projects will be determined based on the specific business case from now on, as possible; and external funding for E&T programs has been reduced in the new forecast.

To show graphically the impact of the H2S spending, without that Project, Terra Nova, to this day, would still be in Shortfall.

Let me turn now and talk about the Mobil I and II procedural timeline, with that background.

At mentioned, on the 5th of November of 2004, the Board promulgated the Guidelines effective 1 April 2004.

On the 1st of November 2007, Murphy and Mobil filed the Request for Arbitration in Mobil I timely and within three years.

There was a hearing on liability; and, ultimately, on the 22nd of May 2012, the Mobil I Decision was issued. Of course, that Decision found that Canada was violating the NAFTA. That Decision also--and we will discuss at greater length a little bit later--that Decision found that for damages already incurred to the Date of the Award could be reimbursed, but that future damages to be incurred later could be brought in a second arbitration, due to the continuing breach that the Tribunal found.

Now, the Hearing of Damages in Mobil I

occurred in April 2013; and, while that was still pending, this case was filed, the Mobil II Case, on the 16th of January 2015.

ARBITRATOR GRIFFITH: Mr. O'Gorman, are you inviting this Tribunal to make its decisions quicker than Mobil I?

MR. O'GORMAN: We would humbly request that, sir.

ARBITRATOR GRIFFITH: Thank you.

MR. O'GORMAN: Eventually, the Mobil I Award was issued on 20 of February 2015.

And I must confess there was an agreed suspension for the Mobil I case, so that was why the decisions took as long as they did.

Eventually, on the 16th of February--excuse me.

So, the Mobil I Award was issued. Canada sought to challenge that in the local courts. That was before--

PRESIDENT GREENWOOD: Sorry, Mr. O'Gorman, could you tell us when was the agreed suspension.

MR. O'GORMAN: I don't have that, but I will

get it for you later.

PRESIDENT GREENWOOD: If you could get that later, thank you.

MR. O'GORMAN: Canada sought to challenge the award in the local courts in Ontario; and, on the 16th of February, the Ontario court denied the set-aside action, and found in favor of Mobil that the Award was enforceable. As a result of that, on April 2016, Canada paid the Mobil I Award.

Now, what is graphically revealed in this chart is that, ever since 2007, Mobil has had claims against Canada with respect to the Guidelines.

Now, Mr. President, it's 11:15. Would this be a good time to take a break before we start talking about legal arguments?

PRESIDENT GREENWOOD: Yes, I think that would be a good time, indeed. We look forward to argument on res judicata.

MR. O'GORMAN: Thank you.

PRESIDENT GREENWOOD: Thank you very much.

We will break for 15 minutes and ask people to be prompt getting back here; otherwise, it's going

to make a long day even longer.

(Brief recess.)

PRESIDENT GREENWOOD: Mr. O'Gorman, are you ready to continue?

MR. O'GORMAN: Yes, Mr. President.

PRESIDENT GREENWOOD: Everybody in place?

Excellent, let's proceed, then.

Oh, I think I can see now the representative of the United Mexican States. May I welcome you to the Hearing.

MR. O'GORMAN: May I proceed? Thank you, Mr. President.

As mentioned earlier in the presentation, Canada does not contest that the Board's Guidelines and the implementation and enforcement of the Guidelines violate NAFTA. Instead, Canada raises several other legal defenses.

The first is res judicata, and review of those arguments reveal that it doesn't bar Mobil's claim. In fact, the doctrine of res judicata supports it.

Before the Mobil I Tribunal was the issue

both of future damages and the issue of limitations. Canada argued in its Counter-Memorial in Mobil I, Article 1116 is clear that "a tribunal may only Award compensation for damages already incurred."

Mobil responded: "Canada can't have it both ways and say we are not entitled to future damages and they're only waiving limitations period with respect to this proceeding," and this proceeding only.

Another thing before the Mobil I Tribunal was the Sergey Ripinsky Article, which is very important. It provides: "In cases involving a continuing breach . . . there is a choice between compensating for future losses to be incurred as a result of the continuing breach or awarding only past losses up to the time of the Award in the expectation that the respondent”--in this case Canada--”will cease its wrongful conduct. If the second course of action is chosen by the tribunal, the claimant should be entitled to subsequent compensation where the respondent fails to cease the breach."

With this in front of the Mobil I Tribunal,

what did it do? It provided: "We have discussed at length how estimated future losses caused by ‘one off’ breaches are compensable. However, this principle does not apply here," not a one-off breach case. The Majority said: We “will consider any loss which is incurred, i.e. which is actual as of the date of the Award." The Tribunal went on to note: "The regulatory regime from which the Claimants’ alleged losses flow continues to operate. Thus, the situation involves a continuing or ongoing breach as applied to these Claimants."

Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for those losses which have accrued but are not actual in the current proceedings.

Let's compare the Mobil I Majority Decision to the Ripinsky and Williams article that I showed you a minute ago. They track remarkably closely. As Ripinsky and Williams said, there is a choice of awarding past losses in the expectation that Respondent will cease its wrongful conduct, but

should it not, the Claimant should be entitled to subsequent compensation.

Turning to the left, the Mobil I Majority concluded that the implementation of the Guidelines is a continuing breach, and that the Claimants can claim compensation in new NAFTA arbitration proceedings for damages accrued and incurred in the future.

So, the res judicata doctrine serves to protect Mobil's claim, not undermine it. It's textbook law that res judicata may “be applied offensively to prevent a respondent”--Canada in this case—“from denying rulings made against it in earlier proceedings."

In Grynberg, which is a so-called "issue estoppel" case, it said that "a finding of a prior competent tribunal concerning a right, question or fact may not be re-litigated (and, thus, is binding on the subsequent tribunal), if, in a prior proceeding, it was distinctly put at issue, the court or tribunal actually decided it, and the resolution of the question was necessary to resolving the claims

. . ."

As set forth previously, the issue of continuing breach and whether Mobil could bring a claim to seek reparations for future damages, were distinctly before the Mobil I Tribunal. The Mobil I Decision decided those issues, and it was necessary to resolving the claims that were before the Tribunal in that Decision.

Accordingly, Canada is bound by the Mobil I Tribunal's finding of continuing breach and the right to bring subsequent NAFTA claims for damages incurred after the date of the Mobil I Award.

Now, that conclusion necessarily determines that Canada's issue-preclusion claim must fail. The issue of damages was not decided on the merits, as I will discuss very shortly. In fact, it was expressly preserved by the First Tribunal for future proceedings.

ARBITRATOR ROWLEY: Can you help us, what if they were wrong on that? You were asked by the Chairman at the start, some time ago, to consider the situation with whether we were bound by that finding,

that Canada, or at least your client, could bring a future NAFTA claim.

MR. O'GORMAN: Well, Mr. Rowley, I don't think they were wrong. I think they were absolutely right in finding what they did.

ARBITRATOR ROWLEY: No, no, I accept that that's your position, but if they were wrong on that, what does that--does that affect us?

MR. O'GORMAN: First, that would, of course, result in inconsistent--potential inconsistent awards between this Tribunal and that Tribunal.

Second, there is no question that this Tribunal has the jurisdiction to decide its own jurisdiction. But I think, from a reading of Apotex and the other authorities on issue preclusion, this issue was clearly in front of the First Tribunal of continuing breach and the necessarily related notion that, in the case of a continuing breach, future claims can be brought. This was squarely in front of the First Tribunal and decided.

Now, based on your own competence as a tribunal, is for you to decide the impact of that.

In Grynberg, which we just cited, it indicates that the Tribunal itself in this case is bound by that finding.

ARBITRATOR GRIFFITH: Mr. O'Gorman, can I follow up on that exchange?

MR. O'GORMAN: Yes, please.

ARBITRATOR GRIFFITH: As I read Tribunal I, they decided that the issue of whether or not the damages for the entire period could be awarded was before them. Would you agree with that?

MR. O'GORMAN: It was requested, but whether it was before them, I think, is a term of art, and I think it was not before them on the merits. The Tribunal in the First Decision decided that that issue was not yet ripe as a necessary consequential item of it finding that it would only--that it was only able to make reparations in that case for losses actually incurred or for which a claim for payment had been made.

ARBITRATOR GRIFFITH: It's possible to construe rather than the formal decision itself, but the reasoning, as saying that the Tribunal's views

were those future damages were speculative and refused on that basis of not being proven, would your answer be the same?

MR. O'GORMAN: The answer is the Tribunal was very clear that that was not the basis of their decision. While they noted that there was some uncertainty as to damages which, by the way, of course, is entirely baked into the Guidelines that the Board has promulgated. While the Tribunal noted there are some uncertainties, it says clearly and expressly, this is not strictly relevant because of our desire not to award, or our finding that we cannot Award or will not award future damages in this case.

And so, that was not decided by the Tribunal.

ARBITRATOR GRIFFITH: Do you agree this Tribunal can go to the reasons as expressed rather than the mere terms of the Award itself in considering this issue?

MR. O'GORMAN: Is your question whether you can review more than the dispositif?

ARBITRATOR GRIFFITH: Yes.

MR. O'GORMAN: The answer is yes, you may.

ARBITRATOR GRIFFITH: Thank you.

MR. O'GORMAN: Yes.

Canada next argues on--it's actually its primary argument on res judicata--that is a claim preclusion, and that the Mobil I Decision was a decision on the merits. Nothing could be further from the truth. In evaluating that claim, the point is simply that a decision which does not deal with the merits of the claim, even if it does= deal with some issues of substance, does not constitute res judicata.

And, Dr. Griffith, to your question, to determine what was decided on the merits for claim preclusion, it requires looking to the Tribunal's reasoning in the first case. "International courts and tribunals have regularly examined under international law a prior tribunal's reasoning and the arguments it considered, in determining the scope and, thus the preclusive effect of the prior award's operative part. The first international tribunal's analysis and reasoning thus often play a significant

role before the second international tribunal in determining the res judicata effect of the earlier award."

And that is entirely consistent with the long-standing case of Chorzów. Again, as the judge in that case said, it is certain that it almost always--it is almost always necessary to refer to the statement of reasons to understand clearly the operative part of the First Decision.

So, what was it that the Mobil I Decision did actually decide?

First, as it turned to future damages--I'm sorry, do you have a question, Mr. Rowley?

ARBITRATOR ROWLEY: It's a question of when to interrupt, but since you've recognized that I was fiddling with my button, I will do it now.

Let me see if I understand Claimant's position on claim exclusion by reason of res judicata.

MR. O'GORMAN: Mm-hmm.

ARBITRATOR ROWLEY: As I understand Canada's argument it is this: That, if an issue has been put

before a tribunal and that tribunal accepts that it has jurisdiction to deal with the issue and it accepts that the issue is admissible, then whether or not it actually comes to a definitive decision on the issue, it cannot be--that issue cannot be brought again by the same Claimant against the same Party. That's as--I think I understand the position to be that.

Let me tell you about the thing that I think I will need some help dealing with, not necessarily today--it can be later. I'm thinking about the Vivendi against Argentina First Decision where the Tribunal, you will recall, declined to deal with the-- what are considered to be contractual claims.

MR. O'GORMAN: Mm-hmm.

ARBITRATOR ROWLEY: It said Claimant is advancing in essence a contractual claim breach of contract, and that is . . . the jurisdiction belongs to the Argentinian courts.

On annulment, the ad hoc Committee said, no, that was wrong, that the Tribunal did have jurisdiction, did have jurisdiction, and ought to

have dealt with it, and so that matter can now be sent back to a new tribunal to deal with, and the new tribunal dealt with it on the basis that the First Tribunal had declined jurisdiction wrongly.

Now, what I think I would find I need help with is this: Here, the Mobil I Tribunal accepted that it had jurisdiction to deal with the future damages claim. A claim for future damages was made. The Tribunal found that that claim was admissible, but it declined to deal with it for reasons of what it described as ripeness. And the concern that I think needs to be addressed is what if that tribunal was wrong in doing that? What if it ought to have dealt with it, that it declined to deal with it, does that give another tribunal jurisdiction to deal with it, or does it suggest that the matter ought to have been dealt with on a review, a jurisdictional review, of the First Tribunal's Decision?

And that, I've said a lot, and deal with it whenever you see fit.

MR. O'GORMAN: Thank you, Mr. Rowley. If I may have your leave to study that case and return to

the Tribunal perhaps tomorrow on that issue.

ARBITRATOR ROWLEY: Whenever, but before we adjourn.

MR. O'GORMAN: Yes, of course.

PRESIDENT GREENWOOD: Mr. O'Gorman, you are going to get it from all three of us now.

Is this matter not dealt with at some length by the International Court of Justice in its judgment between Nicaragua and Colombia in March of 2016? I am going to put the same point to counsel for Canada, who by the looks of it, have actually thought about that case. I think it might be of relevance to the point you're making.

MR. O'GORMAN: Okay, thank you.

Mr. Rowley, what I can respond to at this point is that it is not at all accepted by Mobil that there was a finding of admissibility with respect to future damages by the Mobil I Decision. And we will cover that here shortly.

So, the First Tribunal held that the issue of future damages was not ripe for determination, so, as they say, “Turning to future damages . . . Although

the Majority recognizes that the Claimants are likely to incur a legal liability that would give rise to potentially compensable losses, the claim for such losses is not yet ripe . . ."

As Professor Paulsson has explained, "Tribunals often issue decisions . . . based on objections relating to preconditions to arbitration, like time limits or multi-tier dispute resolution clauses, mootness, and ripeness." Excuse me, this is the part that Paulsson has explained, "these objections raise questions of admissibility." So, in other words, this article ties ripeness to admissibility.

Waste Management goes on to make it clear what that means for purposes of this case: "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." Now, that's a jurisdictional question. But Waste Management goes on to say: and the “same is true of decisions concerning inadmissibility."

PRESIDENT GREENWOOD: Mr. O'Gorman, that's important, isn't it, because Paragraph 429 of the Mobil I Decision: “Thus, 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. It does not determine how compensation for future damage is to be assessed or whether it is appropriate for this Tribunal 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."

Now, it raises my hackles as a public international lawyer to see jurisdiction and admissibility alighted in this way. I would be chastised roundly by my civil-law colleagues for doing that in the Court, but it does look to me as though this is a finding both of jurisdiction and admissibility. Are you telling me otherwise?

MR. O'GORMAN: Yes, I am. And I'm very impressed with your preparation and that's actually

two slides from now.

PRESIDENT GREENWOOD: My preparation would have been better if I'd used the coffee break looking at your next set of slides.

MR. O'GORMAN: Exactly.

So, Canada argues that the claim in the present proceedings was determined to be admissible in Mobil I, and Canada says: "The Mobil/Murphy tribunal decided both that it had jurisdiction to award the Claimant damages and that such a claim was admissible." That is not correct. Canada's argument depends on taking a single word out of context in the Tribunal's jurisdictional-analysis section in the Mobil I Decision. In fact, let's look at where that word came up.

So, in Mobil I, Respondent, that is Canada, challenged--raised objections of a jurisdictional nature based on the requirement under NAFTA 1116(1) that the claim should cover incurred loss or damages. The Tribunal discusses this as a jurisdictional challenge, and that's Respondent's argument.

If you go on--and this is the paragraph, sir,

that you were citing--the Majority clearly was dealing with jurisdictional--jurisdiction, not admissibility in the paragraph cited 429. You see this is Paragraph 3 of the Majority's finding on the jurisdictional claim: "In the present case, the introduction of the 2004 Guidelines . . . amounts to a continuing breach resulting in ongoing damage to the Claimants' interests in the investment. Thus, 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. It does not determine how compensation for future damages is to be assessed or whether it is appropriate for this Tribunal to consider damages or make an award of compensation with regard to future damages claimed in this particular case. These matters remain to be addressed."

So, the word "admissible" is the one word in that paragraph, which I submit to you, there is no argument of admissibility. This was found in the

middle of a jurisdictional paragraph and jurisdictional discussion, and the rest--the remainder of the paragraph makes very clear that the word "admissible" was being used for whether there was jurisdiction in the present case.

Why is that? Well, having found jurisdiction, the Tribunal went on to address ripeness which, as Professor Paulsson indicates, is another concept of admissibility. In the 2010 to 2036 period, "Although the Majority recognizes that the Claimants are likely to incur a legal liability . . . the claim for such losses is not yet ripe for determination."

So the conclusion is, yes, that paragraph contains the word "admissible" once, and a word search of the Decision has revealed that the word "admissible" is in that once. There is no discussion of admissibility and it's buried in the middle of a jurisdictional finding.

So, the word "admissible" does absolutely not constitute a finding by the First Tribunal that there was admissibility with respect to future damages

claims.

ARBITRATOR ROWLEY: Can I just now add a little further description to my earlier issue. For present purposes assume you're right in what you're saying about admissibility. Parties often mistake admissibility or confuse admissibility with jurisdiction. In this case, however, a claim for future damages was advanced by your client. The Tribunal said it had jurisdiction over that claim. It then said, however, because of uncertainty about the future damages, we consider it not to be ripe, and we're not going to deal with it.

MR. O'GORMAN: Incorrect.

ARBITRATOR ROWLEY: All right. Correct me then, please.

MR. O'GORMAN: I will, if I may.

ARBITRATOR ROWLEY: No, no, please do. I don't take any offense of you saying I'm incorrect. I am often incorrect and need to be corrected.

MR. O'GORMAN: Canada has made precisely that argument; and, on Page 86, they have, they concede that, when linked directly to jurisdiction or

admissibility, a claim of ripeness “may be relevant for res judicata analysis,” but Canada takes the view that this is some kind of double secret probation version of ripeness which actually goes to the quality of the damages submitted. Canada goes on, and should, therefore, be treated differently than a normal ripeness determination. So, when Canada says --

PRESIDENT GREENWOOD: I'm sorry, Mr. O'Gorman, when you say the quality of the damages submitted, do you mean the quality of the evidence? Because it's not quite the same point, is it?

MR. O'GORMAN: That's correct. It's the quality of the proof submitted is what Canada is referring to.

PRESIDENT GREENWOOD: The quality of the evidence of the damages, not the quality of the damages in the sense that they are damages for future loss not yet quantifiable.

MR. O'GORMAN: That is Canada's argument.

PRESIDENT GREENWOOD: Yes.

MR. O'GORMAN: Yes.

So, Canada goes on to say: "Claimant failed specifically at the evidentiary stage and that the failure stemmed from the specific damages model presented by the Claimant." In other words, it was not a decision that there's something about future damages in and of themselves that can't be awarded. Instead, it was a failure of Mobil's damages model which drove the Tribunal's Decision.

Well, let's look and actually see what the Decision said. As noted, the Majority was driven--and a plain reading of the Decision is fairly clear, in my opinion--that any loss which is incurred as of the date of the Award can be awarded.

Now, the Decision does discuss uncertainty, but let's see what they say: Although ultimately it is not strictly relevant given that we are not inclined to compensate for expenditures not paid or levied (i.e. required to be paid)". So, what is not strictly relevant? The following: "we have also highlighted the uncertainty of the evidence pertaining to the amount of incremental expenditures in this largely future period." A fair reading of

that is the conclusion that the decision was based not on--and certainly created by the evidence but instead by the determination that future damages shall not be awarded.

Now, I should note as a sideline, the certainty with respect to future damages, of course, is baked into the Guidelines promulgated by the Board. We have taken a look at those charts with all the factors that have to be determined. And so, Canada--the Board, excuse me, for which Canada is responsible has come up with a measure of damages which is very complicated to predict in the future, but that was not what turned on the Tribunal--what the Tribunal's Decision turned on. Again, it said that issue is not strictly relevant.

And again, reading this paragraph in the context of the Decision, it is clear as well as in the context of the Ripinsky article that was before the Tribunal, was they were choosing to award damages current up to the date of the Award implicitly clearly hoping and expecting that a sovereign like Canada would cease its wrongful conduct, and that

would be the end of it. But the Tribunal expressly in the Decision indicated this is a continuing breach, and if there are actual damages in the future, further claims can be made.

That concludes that aspect of the notion--

PRESIDENT GREENWOOD: Before we leave it, I'm afraid the pain is not yet over.

What is the difference between "strictly relevant" and "relevant" in this context?

MR. O'GORMAN: I think to determine what the difference is you have to read the Decision as a whole; and, once you do so, it is clear that the driving force was the fact in Canada's argument before the Tribunal that future damages were not recoverable, and that was the driver of the Decision.

What the difference is between "relevant" and "strictly relevant" is ultimately for you to decide.

PRESIDENT GREENWOOD: So, I think if I had been writing the First Mobil Decision, and I had wanted it to say what you have just said, I don't think I would have said it's "not strictly relevant." I would have said it's "not relevant." Something

that is "not strictly relevant" is "non-strictly relevant." I think it's a serious problem that you have to get around.

MR. O'GORMAN: Again, I think that--I encourage--and I know you have already, but I encourage you to put a cold towel over your head and read that portion of the Decision, and it becomes very clear what the Tribunal intended and what the Tribunal meant, and Canada's res judicata argument really seeks to turn that on its head and frustrate the intention of--expressed by the Tribunal in the First Decision.

PRESIDENT GREENWOOD: Thank you.

ARBITRATOR GRIFFITH: Can I join the fray, please, counsel. The last sentence in Paragraph 477 of Mobil I, so you might have that. It's Tab 15 in the Joint Core Bundle Volume 4, Page 202. It would seem clear that Mobil I had before it a claim for future damages, and that sentence seems to say that the Tribunal in Mobil I said that “the evaluation is extremely hazardous and does not, on balance, seem to us the estimates are more probable than not.”

Is it possible to read that as a finding that future damages are found by the Tribunal to be not proven?

MR. O'GORMAN: I would encourage you to refer to the entire section beginning with Paragraph 473, and let me just take some of the parts out of context to give you a feel for the position of the Tribunal with respect to future damages.

As you see Paragraph 473, "we are not yet able to properly assess the claim for future damages." Later on in that same paragraph, "such losses are not yet ripe."

Paragraph 474, "at this stage," the Tribunal says.

Paragraph 475, it quotes a case that says damages have not yet—“has not crystallized."

Paragraph 476, again, the Tribunal referring to "continuing losses . . . unfolds over time."

And Paragraph 476 as well, it says: "It may be required by the Respondent to be paid at some point . . . and will at that point be fully ascertainable and ‘actual.’ . . . Damages in this

case will eventually be ‘actual,’ (thereby removing the necessity to forecast future losses. . .)"

And then those are all including the sentence that you just read at the end of 477, that is the lead-up for the "not strictly relevant" determination by the Tribunal. And so I think, on balance, when you read those paragraphs, it is clear that the Tribunal is turning on the notion that it should not award future damages at this point because they're not yet ripe, not because there is some failure of the evidence or the proof before the Tribunal on what those future damages could be. In fact, to review the Award that way, of course, would entirely frustrate the notion preserved in the Award that says, of course, future damages can then be claimed in future proceedings. If the Tribunal were somehow passing on future damages at that point, that notion would be completely at odds with that reasoning, and that would read--effectively read out that provision from the decision.

ARBITRATOR ROWLEY: One of the difficulties, it seems to me that Claimant has to cope with is

Mr. Griffith drew your attention to the last sentence in Paragraph 477, and there the last part of it, it reads: "On balance, it seemed to us that estimates are more probable than not. It does not, on balance, seem to us that the estimates are more probable than not."

And the estimates would seem to me to be referring to the estimates that are made in Paragraph 450, and the second sentence of 450 says: "The Claimants rely exclusively on estimates based on a number of variables which, in the Claimants' view, give reasonable certainty. In doing so, the Claimants estimated their incremental spending to be . . ."

And I think it is Respondent's position that the Tribunal-- that the Tribunal had jurisdiction to deal with future damages, your client put a case for future damages, and that Tribunal decided not to deal with future damages in its quantification because it determined that, on balance, the estimates were not more probable than otherwise and because it concluded that your client would have a chance to bring another

proceeding because of the continuing breach it concluded.

And as I said, the issue is, if it were wrong on that latter point, has it not, in fact, dealt with the damages? That's the issue.

MR. O'GORMAN: That's the issue.

And it's clear that the Tribunal is very affirmative in its statements that these are not yet ripe and are not ripe, and that is much more clear and without any ambiguity with respect--in comparison to speculations about damages, and so, that is ultimately the finding of the Tribunal is that it's not ripe. There is no finding of admissibility.

ARBITRATOR ROWLEY: Right. And this is what I think must be dealt with: When a Tribunal has jurisdiction, for it to say it's not ripe, I don't know what that means, and that's what we will need some help on eventually. Because if it has jurisdiction, is it open for it to say it's not ripe because we don't like the evidence in front of us? It's not good enough. And we could, if we waited have better evidence, you would have that chance.

MR. O'GORMAN: I don't think they were saying they don't like the evidence before them. I think they were concluding that the claims for future damages, which, under their reading of NAFTA, were not yet awardable at that point because they were not ripe. But I take the note, and I appreciate that.

PRESIDENT GREENWOOD: It's hardly a resounding endorsement of the evidence that was put before them. We have also highlighted the uncertainty of the evidence pertaining to the amount of Incremental Expenditures. It's Paragraph 478. I think if I had been the Party--if I had been counsel for Mobil in that case, I wouldn't have regarded that as sort of an endorsement I would want to put on my advertising literature.

MR. O'GORMAN: That raises a very important question; and, in my opinion, as I've submitted, this was not a decision on the quality of evidence submitted by Mobil, but again, let me underscore, the position that Mobil faced in that case; and, as the Tribunal said in its Decision, this was the unique and the only case that the Tribunal was familiar with

of an ongoing continuing breach where the Claimant brought a claim and the breach was continuing while that claim was brought.

And so, this is not a case of continuing breach where, ten years later, a claimant says, "Oh, well, there's been a continuing breach, so limitations is waived." No, instead, the breach was ongoing. At the time the Mobil I Case was filed, the Guidelines were not being enforced, and so there is no historic experience of what Incremental Expenditures would be required under the Guidelines. Instead, the damage model, which was the only limited information available to Mobil at that time as a diligent investor that brought a suit very quickly to challenge the imposition of the Guidelines, the damage modeling necessarily included the same uncertain criteria that were included in the Guidelines and those formulas that I showed you today.

And so, the notion of it is, is that Mobil would effectively have been punished by bringing a suit within three years during an ongoing continuing

breach by finding that, well, your damages aren't good enough, and that's clearly why the Tribunal was not making that Decision. Instead, they were saying, under these circumstances where there has been no history of the enforcement of the Guidelines, if you--if the sovereign continues with the breach, claims for future damages can be brought in the future. And again, that's entirely consistent with what was in front of the Mobil I Tribunal at that point.

PRESIDENT GREENWOOD: Now, Canada makes the point against you that Mobil could have put its claim for damages on a different basis. It could have claimed, if I understood Canada's point right, the loss in the value of the investment rather than the amount that would have to be spent on the Guideline--the Incremental Expenditure between 2012 and 2036. How do you respond to that argument?

MR. O'GORMAN: That is not at all supported by the Decision, and it's clear that, when the Tribunal is talking about damages incurred, in several points in the Decision I believe it uses the

word "paid" or "out of pocket." And the notion that at the time of the Guidelines there was some magic model that would have showed what was actually incurred was just simply not the case due to the uncertainty created by the Guidelines themselves.

And so, the notion that Mobil lost the first case effectively due to its damages model is not supported by the Decision, not supported by the facts, and is certainly not realistic under the circumstances, as we will talk about with some of our later witnesses.

PRESIDENT GREENWOOD: Okay. Thank you very much. We've really got to move on, until my colleague has asked his question.

ARBITRATOR GRIFFITH: Mr. O'Gorman, there is a very interesting topic, but quite apart from the issue of whether all claims had to be brought within three years, if Mobil had just claimed for actual damages at the time of its claim, then this issue wouldn't have arisen because that would be all the Tribunal would have had to decide. But if that had been the case, I suppose it's a possibility on the

second claim for damages after that date it might be put as an equivalent of what might be called "Henderson-Henderson action estoppel," you could and therefore you should have brought for future claims.

But it seems to me that the situation is far from simple. I think I understand how you put it, but is there a possibility of, I think the way Canada has pleaded, that it's put that all these claims could and should have been put in Mobil I, you weren't successful and that's the end of it, quite apart from the three-year limitation period more on an action estoppel or estoppel res judicata basis? Have I got it wrong?

MR. O'GORMAN: Let's look at the next slide.

ARBITRATOR GRIFFITH: We talked too early up here.

MR. O'GORMAN: Okay. I'm very impressed, but Canada also claims, as you say that, "Well, these claims, even if they weren't really brought, they could have been brought at the same time." Well, the answer is no, that's not the case. As the Mobil I Tribunal expressly held, the claims were not yet ripe

to be brought, so they could not have been brought.

And talking about the Henderson versus Henderson rule, we could look at the David Williams article on that which talks about claims that could have been brought, and interestingly let's see what he says: "An arbitral award has preclusive effects in the further arbitral proceedings as to a claim . . . which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim . . . amounts to procedural unfairness or abuse." Which, of course, is absolutely lacking here in this context when the Tribunal has said "your claims are not yet ripe." And certainly Canada cannot raise any kind of procedural unfairness or abuse claim with respect to the assertion of its claim for full reparation of the damages it has caused under the NAFTA in the present case.

So, in summary, the Mobil I Tribunal's finding of continuing breach and the ability to bring future damage claims are binding on Canada in this case. Canada's argument that claim preclusion or

issue preclusion provides a defense on the merits to Mobil's current cause of action for damages is unfounded. In fact, such a conclusion would, of course, work a significant injustice on Mobil and preclude it from full reparations for damages flowing from the continuing and notorious breach by Canada in this case, the breach of which continues to this day.

Let me turn now in the interest of time--

PRESIDENT GREENWOOD: Just before you do, can I just quickly raise one thing. It's more a matter of something which both Parties might like to keep in mind perhaps for their closing submissions. It's all very interesting to have all this detail about the common law of res judicata, although everybody here involved is a common lawyer, with the possible exception of one or two from Quebec, who I don't know, this Tribunal has to apply NAFTA and public international law, so I think it's important to have a look at what public international law says about res judicata rather than relying too extensively on case law that is derived entirely from a common law tradition. Now, that comment applies as much to

Canada as it does to Mobil.

Yes, Mr. O'Gorman, I'm sorry we've taken up so much of your time. Please do now continue with your next point.

MR. O'GORMAN: Okay. Thank you.

Let's turn now to Canada's limitations defense.

Canada's continuing breach of the NAFTA has the consequences that the limitations period under Articles 1116(2) and 1117(2) is satisfied.

First, the time-bar issue of those articles is one of admissibility, not of jurisdiction. Therefore, Canada, as the Respondent, bears the burden of proof on its limitations defense.

Let's look at what the Pope & Talbot Tribunal in a NAFTA case said on this precise issue against the same sovereign.

Canada has claimed that the "Harmac claim is time barred is in the nature of an affirmative defence, and, as such, Canada has the burden of proof of showing factual predicate to that defence. That is . . . it is for Canada to demonstrate that the

three-year period had elapsed prior to that date of filing."

That reasoning is followed by the Tecmed Award in the case against Mexico: "In the opinion of the Arbitral Tribunal, the defenses filed by the Respondent," which are equivalent in this case to the NAFTA defenses, "do not relate to the jurisdiction of the Arbitral Tribunal but rather to (non)compliance with certain requirements of the Agreement governing the admissibility of the investor's claims."

Now, on the issue of jurisdiction versus admissibility, Canada has cited four cases in its Counter-Memorial for the proposition that Mobil bears the burden of proof on limitations and that it is a jurisdictional issue. A review of those cases quickly reveals that they are completely inapposite.

The case in Apotex, the issue was not limitations but, instead, the establishment of a qualifying investment.

In Methanex, the Tribunal was dealing with Provision 1116(1), not the Limitations Provision of 1116(2).

In Bayview, once again, the issue was whether there was a qualifying investment, not whether there were limitations.

And finally, in Grand River, once again, the issue was whether the Tribunal--whether the Party had established an investment, not limitations.

Canada goes on to argue that, under the text of the NAFTA itself, these Articles are somehow conditioned and are requisite to the finding of their consent. Those Provisions do not support the argument. Instead, Article 1122(1) of the NAFTA is expressly referred to as "consent to arbitration," and provides that "each party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."

Now, Canada has taken the position that the Clause "in accordance with the procedures set out in this Agreement" are somehow a limitation on its consent. But, if you take that argument to the extreme, of course, and accept that the provision “in accordance with the procedures set out in this Agreement” actually is a jurisdictional limitation on

the consent, then, of course, every single procedural question in NAFTA would become a question of jurisdiction, and that cannot be the case.

Let's look at a treaty that actually knows how to condition consent on limitations, a different Treaty, and that is CAFTA.

In CAFTA, the title of the relevant clause, of course, says "conditions and limitations on consent of each party." What does it go on to say? "No claim may be submitted to arbitration if more than three years has elapsed." It's clearly the setting of consent and limitations together, which is sorely lacking in this case.

In sum, Canada's limitations defense is, in fact, a matter of admissibility.

So, let's go on now and talk about continuing breach.

A continuing breach occurs when the--

PRESIDENT GREENWOOD: Can I ask you, Mr. O'Gorman.

MR. O'GORMAN: Please.

PRESIDENT GREENWOOD: Does the question--in

your submission, does the question whether the limitations in 1116(2) and 1117(2) go to jurisdiction or to admissibility make a difference in any respect other than that of burden of proof?

MR. O'GORMAN: The answer is no, it does not.

PRESIDENT GREENWOOD: Because, since this is really a matter of legal argument rather than producing evidence, does the question of which Party bears the burden of argument rather than the burden of proof, really add up to very much?

MR. O'GORMAN: It depends on how you ultimately decide the case, of course, but to the extent that burdens of proof often are not directly relevant to those decisions, then it might not matter.

Okay, let me shift now to continuing breach, if I may, Mr. President.

A continuing breach occurs when acts of the State are in breach of the State's treaty obligation or other international law obligation: "The breach of an international obligation by an act of a State having a continuing character extends over the entire

period during which the act continues and remains not in conformity with the international obligation."

In the present case, the acts in breach continued to take place over a period of time, and they are not in contrast to be considered one-off breaches but continuing breaches.

The ILC Commentary is very impactful on this issue and provides "a continuing wrongful act . . . occupies the entire period during which the act continues and remains not in conformity with the international obligation."

And, critically, critically, as an example of a continuing breach, the ILC Commentary notes that the “maintenance in effect of legislative provisions incompatible with treaty obligations” are an example of a continuing breach. Of course, the maintenance of the Guidelines in force and effect is the paradigm example of a breach which continues and was so found by the First Tribunal.

So, accordingly, this Tribunal should take judicial notice of the prior finding of continuing breach, and Mr. President, I think this goes on to

your question that you asked before the break, this Tribunal should go on and determine for itself that Canada's continuing breach continues to exist within the 2012 through 2015 time period, and that during the 2012 through 2015 time period at issue in this case, this continuing breach has caused Mobil losses for which it should be compensated.

Of course, to state the obvious, the wrongful act by Canada in the present case is the continued application of the Guidelines in the 2012 to 2015 time period, and let's look at some examples of what the Board, for which Canada is responsible, is actively doing with respect to the enforcement of the Guidelines.

First, and most critically, within the 2012 to 2015 timeframe is that, after the Decision was issued, Mobil went to Canada and said--excuse me, went to the Board and said, "In light of the Decision, we ask that you no longer enforce the Guidelines." Canada--excuse me, the Board responded noting the Court Decision which had affirmed the Guidelines, the municipal Court Decision, but not

mentioning whatsoever the NAFTA Decision. The Board went on to say, and refused to suspend the Guidelines, notwithstanding the Decision in the Mobil I Case that those Guidelines violated NAFTA. Examples of other activities by the Board with respect to the Guidelines from 2012 to 2015 are many. The annual R&D and E&T expenditure obligations notices that are issued by the Board, the Board's continuing requirement to pre-approve expenditures during this time period, and the citations here are just two examples of these ongoing continuing actions and requirements.

The Board's determination of eligibility based on those pre-authorization requests, the Board's conditioning the Operations Authorization Renewal on compliance with the Guidelines. And finally, of course, the squaring-up review for the OA Periods as they fall during those time periods.

ARBITRATOR ROWLEY: Can I just ask a question here. One of the issues it seems to me about continuing breach is the wording of 1116(2), which is the first acquisition of knowledge; and, if a

continuing breach is a breach that starts on the day that the Guidelines are put in place and continues as long as they are enforced, then it may be said that one of the questions we have to address is when did Claimant first become aware of the breach. If the Decision of the Board to continue to enforce subsequent to the Mobil I Decision in addition to being a continuing breach was looked at as a separate breach, that might lead to a different result. Have you addressed the question of that in your pleadings?

MR. O'GORMAN: If I understand correctly, is there an argument that is being made by Mobil that there is effectively a separate breach for this time period?

ARBITRATOR ROWLEY: Yes.

MR. O'GORMAN: The answer is yes, that is our alternate case.

ARBITRATOR ROWLEY: And you will draw our attention to that appropriately?

MR. O'GORMAN: Yes.

With respect to continuing breach, there are at least seven investment treaty tribunals that have

expressly recognized or implied the continuing breach concept when considering both the question of the proposed application of a time bar or the question of whether a treaty applies retroactively to matters that occurred before the Treaty entered into force.

ARBITRATOR GRIFFITH: Do we have a reference in your Memorial to those seven cases?

MR. O'GORMAN: We're about to walk through them, Dr. Griffith.

ARBITRATOR GRIFFITH: I should shut up, shouldn't I?

MR. O'GORMAN: Of course, the most significant decision on continuing breach is the Mobil I Decision itself, which, of course, involves the same Parties: "In the present case, the introduction of the 2004 Guidelines triggered an obligation to make expenditures that would continue over the life of the Projects. It amounts to a continuing breach resulting in ongoing damage to the Claimants' interests in the investment." As we've discussed before, the Mobil I Tribunal went on to find that given the implementation of the Guidelines

is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not yet actual. And again, I submit to you that that statement would be wholly superfluous if in the mind of the Mobil I Tribunal they had decided in favor of Canada on future damages.

PRESIDENT GREENWOOD: Yes, I take that point that goes to your earlier res judicata argument.

MR. O'GORMAN: Yes, it does.

PRESIDENT GREENWOOD: But looking now at the limitations argument.

MR. O'GORMAN: Yes, indeed.

PRESIDENT GREENWOOD: I won't call it a defense or anything like that. Let's assume for the moment that Canada is right, this is an argument that goes to jurisdiction, not to admissibility, but the requirements in 1116(2) and 1117(2) are jurisdictional requirements: Can this passage in an award which I think it is now common ground between the Parties creates a res judicata between the Canada and Mobil, though there is great difference as to

what the extent of that res judicata is, can this passage in that Award give us a jurisdiction which we would not otherwise have?

In other words, suppose for the purpose of this hypothetical we were against you on your general continuing-breach argument. Could you fall back on the view that it's not open to us to take that view, that matter has already been decided by Mobil I?

MR. O'GORMAN: I think the question is whether the finding of the Mobil I Tribunal can create jurisdiction where it would not otherwise exist, in this case will not need to be reached by you because, in your interpretation of the time bars contained in 1116(2) and 1117(2), you can find that you have jurisdiction and that the limitations requirement has been satisfied entirely consistently with the Mobil I Decision; and, therefore, you would not need to reach the issue as to whether the Mobil I Decision standing alone would provide that authority to you. I submit that it would.

PRESIDENT GREENWOOD: Right. Well, that's what I want you to enlarge on. Because let's suppose

for purposes of this argument that we could reach that conclusion, we don't, so I want you to explain to me how Mobil I--I want you to explain to us, how, if we take the view that 1116(2) and 1117(2) are (a) jurisdictional and (b) cannot be overridden by the existence of a continuing breach. So, if we are against you on those two key points--I'm not suggesting for a moment that we are--but if we were to be against you on those two key points, explain to me, please, how the earlier decision can give us jurisdiction in those circumstances.

MR. O'GORMAN: As I set forth in the res judicata discussion, in Mobil's view, the issue was squarely before the Mobil I Tribunal on the effect of a continuing breach and what the consequences of a continuing breach were. The Ripinsky Article mentioning the choice between awarding future damages now or allowing the Claimant to come back was again squarely in front of this Tribunal.

PRESIDENT GREENWOOD: And it was squarely in front of that tribunal, and I know what--I've read what they said about it, and I'm assuming from that

that they intended that you should be able to bring a future claim. But how does that give us a jurisdiction we wouldn't otherwise possess?

Res judicata normally goes to issues of merits. I have never come across it being used in international law at least where jurisdiction is a much more difficult issue than in domestic law. I have never come across it being used as an argument that would confer on a tribunal a jurisdiction it would not otherwise possess.

MR. O'GORMAN: Another way to review it or to understand this, of course, is the operation of res judicata in this case with respect to that finding, should, in fact, prevent Canada and estop Canada from arguing otherwise. In fact, that is our assertion earlier on in the res judicata section, that that finding is binding on Canada.

Now, it is up to this Tribunal ultimately to determine the value of that finding. But, in deciding the limitations issue under Chapter Eleven, again, the focus--the primary focus of this Tribunal is to determine whether the limitations period has

been satisfied, aided by the Mobil I Decision on that fact or perhaps bound by that Decision or that Canada is bound by that Decision.

PRESIDENT GREENWOOD: Thank you. That's helpful, but you have to come off the fence with the word "perhaps," Mr. O'Gorman.

Assume that you've lost on the other points for purposes of this discussion, are we bound to find that we have jurisdiction under 1116(2)--notwithstanding 1116(2) and 1117(2)? Are we bound to find that the claim is admissible notwithstanding the language of those two provisions?

MR. O'GORMAN: Yes, I believe you are.

PRESIDENT GREENWOOD: It's yours to develop.

MR. O'GORMAN: Yes, of course. The results of a decision otherwise would result in a grave injustice to Mobil. In order words, if there is a decision that somehow the limitations bar the claim against Mobil, that would effectively not comply with the objects and purposes of NAFTA, it would not comply with the notions of international law, it would be a great frustration, given that Canada

continue breaching carte blanche for the next 25 years their obligations under the NAFTA. And, as a result of that, surely, no outcome like that should be countenanced by this Tribunal.

ARBITRATOR ROWLEY: Can you also deal with the issue which I believe Canada has raised as to the question of the bringing of a future claim, whether that was necessary for the Decision. And, indeed, was it an issue before the Tribunal, and was it argued by the Parties?

MR. O'GORMAN: Yes, Mr. Rowley, as I believe I covered earlier, that was squarely before the Mobil I Tribunal. You will recall that Canada argued no future damages are recoverable, and counsel for Mobil said, wait, they can't have it both ways. They can't say future damages are not recoverable, but only waive limitations for three years. Those issues, along with the Ripinsky Article talking about the choice the Tribunal could make, were squarely before the Tribunal and were decided and were necessary to that Decision.

Now, if I may continue on continuing breach.

So, we've talked about the findings of the Mobil I Award. Let's talk about the findings of the UPS Award, which itself was a NAFTA case against Canada.

The generally applicable ground for our decision is, as UPS urges: "Continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason not to adopt a different rule here."

That was picked up by a decision involving Judge Simma and Francisco Orrego Vicuña, in the very recent decision of the Rusoro Mining Case which was issued in August 2016. While it was a composite breach, that case, these issues were very squarely addressed by the Tribunal: "The continuing character of the Acts and the composite nature of the breach may justify that the totality of acts may be considered as a unity not affected by the time bar (citing UPS) this approach, although legally sound, is very fact-specific and depends on the

circumstances of the case." And I submit to you, Members of the Tribunal, as you review these cases, you will see that the jurisdictional determinations on limitations--excuse me--the admissibility determinations on limitations are extremely fact-specific. The tribunals often looked to and determine whether the investor was diligent, they look at the particular breaches alleged, were they breaches of general application or were they one-off expropriations that a Claimant is seeking to extend by adding on a non-operative and non-important event at the end of a one-off breach and arguing that that somehow continues the limitations period? We will see that as we go forward.

In the Mondev Award, it provides: "An act, initially committed before NAFTA entered into force," of course, over which there is no retroactivity, "might in certain circumstances continue to be of relevance after NAFTA's entry into force."

Indeed, the Feldman decision addressed the same issue: "If there has been a permanent course of conduct by Respondent which started before

January 1st, 1994"--which, parenthetically, is the entry into force after NAFTA--"and went on after that date, which therefore became breaches of NAFTA Chapter Eleven, that post-January 1, 1994 part of the Respondent's alleged activity is subject to the Tribunal's jurisdiction." Interestingly, the Notice of Arbitration in that case was not filed until the 30th of April 1999, more than five years later.

Now, LG&E, again versus Argentina: "This Tribunal agrees that the abrogation of the basic guarantees of the gas tariff regime constitutes a continuous breach that extends to the entire period during which such abrogation continues and remains not in conformity with the Treaty; that during this period, and provided the obligation is still in force, the State is under a duty to perform the obligation breached. It is also, notably, obliged to cease the wrongful conduct."

And the SGS versus Philippines Case: "The failure to pay sums due under a contract is an example of a continuing breach."

These seven cases affirm that the relevant

Treaty's time bar will not preclude the bringing of a claim for continuing breach. That means that the limitations period does not begin to run.

Now, these provisions of NAFTA must also be interpreted in light of international law, and the objects and purpose of the NAFTA itself. Article 1131(1) provides that the Tribunal should decide in accordance with this Agreement and the applicable rules of international law.

And let's see what the ILC Articles on State Responsibility has said--and I have to apologize for this slide: It refers to the Draft Articles. The correct citation to the Final Articles is CL-69, but these provisions are identical.

Article 14: "Extensions of time in the breach of an international obligation. The breach of an international obligation by an act of a State not having continuing character occurs when the act is performed, even if the effects continue." So, there is a category of cases where there is a one-off breach with continuing effects. Some of the cases cited by the Respondent are those so-called

"continuing effects with one-off breach" cases. That is not this case.

The Articles go on, in Paragraph 2: "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation . . ."

PRESIDENT GREENWOOD: Mr. O'Gorman, just a small point, but when you introduced this, you quoted Article 14's title slightly wrongly. You said "Extensions of time." It's actually "Extension in Time." That's not a trivial difference.

The ILC is not talking here about jurisdiction, is it? It's talking about the nature of responsibility. "Extension in time" means that the breach extends over a particular period; whereas, the way you read it suggests that it can be used as a means of curtailing a time limit, which is a different thing altogether.

MR. O'GORMAN: Mr. President, apologies--I apologize if I said "of" instead of "in", which

clearly is what that provides.

But let's look at what the ILC goes on to say on that same issue.

In the case of a continuing wrongful act, this dies can be established only after the end of the time of the commission of the wrongful act.

Professor Pauwelyn goes on, in an article expressly addressed to the notion of continuing violation of international obligations that, “The general principle is that a claim can only be inadmissible on the ground of lapse of time once the breach has ceased to exist, that being the earliest date from which any time limit can possibly start to run."

These provisions also need to be interpreted in light of Article 102(2) of the NAFTA, of the "Objects and Purpose." Those include “eliminating barriers to trade in, and facilitate the cross-border movement of, . . . services between the territories of the Parties." As you will recall, the Mobil I Decision found that these improper Performance Requirements related to services for the purchases of

R&D and E&T.

Another purpose: "creating effective procedures for the implementation and application of this Agreement . . . and for the resolution of disputes."

Of course, Canada's interpretation of the limitations provision would undermine the objects and purposes to eliminate barriers, to provide a method for the resolution of disputes, both retrospectively and prospectively; and, critically, for providing just compensation to an injured investor.

ARBITRATOR GRIFFITH: Mr. O'Gorman, would you invite the Tribunal to award against you on the pure construction point, to tilt the balance your way merely by reference to Article 102(2)? If, otherwise, you hadn't got up, would that tilt the balance to your favor, in your submission?

MR. O'GORMAN: The NAFTA suggests that you interpret the provisions on their own with respect to international law, as well as with respect to the objects and purposes.

ARBITRATOR GRIFFITH: Well, that might be an

unfair way to put the question, but I'm inquiring whether, in your view, all things being equal, if you hadn't got to your proposition without 102(2), it's your submission that that should tilt it?

MR. O'GORMAN: Yes, it is. It is.

Indeed, not to understand the objects, or not to take into account the objects and purposes of the Treaty would directly contradict the NAFTA itself.

So, Canada argues in its Rejoinder that the UPS Decision is an outlier, contrary to the overwhelming weight of authority. It's not correct.

Let's look first at the Spence Case, which is a fairly recent decision under CAFTA-DR. It was a property expropriation case in Costa Rica, where the Claimants alleged a continuing breach based on the continuing failure to compensate for the breach. This amounts to a breach with continuing effects, which I discussed earlier.

But what does Spence say that is also very important: “The jurisdictional aspects of this case are heavily fact-specific . . . The Tribunal thus cautions any reading this Award that would give it

wider precedential effects." In fact, the Tribunal noted that the UPS Decision itself turned on the facts.

Canada recently submitted into evidence the Ansung Case, which is a very unusual case because it involves the China-Korea BIT. The novel aspect of that BIT, and why this case is not applicable, is the three-year limitations period in that treaty is triggered solely by an investor's knowledge of loss or damage. It has nothing to do with knowledge of breach. In that case, the Tribunal found on the facts as pleaded by the Claimant--expressly by the Tribunal, based on the facts as pleaded by the Claimant, the Tribunal found that the investor had knowledge of the loss or damage, the one-off loss and damage, more than three years before. Compare that situation to the Mobil I Tribunal.

In the present case, the breach--that is the application and enforcement of the Guidelines--gives rise to continuing losses which are typically not known until well after the relevant year has passed.

Canada also relies on the Grand River

decision, but I was hard-pressed, after doing a search of that Decision, to find the term "continuing breach." What that breach involved, what that case involved, was a complaint against the United States with respect to the so-called "Tobacco Master Settlement Agreement," and the resulting State Escrow Statutes that issued as a result of that. According to the Tribunal, the case focused--the gravamen of the Complaint on that case was the issuance of the Master Settlement Agreement. It was only later, very late in the case, during the Hearing, that the Claimant argued that there was some kind of series of separate breaches that should be taken into account as a result of the different States doing things differently.

And, in fact, at the end of the day, in Apotex, they allowed claims for the separate breaches that fell within the time periods to go forward, but held that the original Master Settlement Agreement was beyond the three-year period.

The Mobil I Tribunal interpreted Grand River for us: “This decision dealt with the issue whether

claims for damages were time-barred under 1116(2) and allowed Grand River to claim compensation for the recurrent consequences of a statutory provision even after three years from when the statute was introduced."

Now, earlier on, I mentioned the notion of tribunals being very skeptical, as they should be, for claims which are one-off breaches for which the time period has passed, and for which the Claimant is seeking to bolt on some later act in order to make it a claim that it's a continuing breach. A good example of that case is the Apotex case.

In that case, the Tribunal didn't find a continuing breach, but a one-off breach--this is the Apotex I and II--the Tribunal did not find a continuing breach, but one-off breach in respect of an FDA decision denying a drug approval. All claims based excludes 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.’”

ARBITRATOR GRIFFITH: Remind me of the date. We don't have a date.

MR. O'GORMAN: Yes, sir. The date of the Decision, I do not have it.

Toby Landau, presiding arbitrator.

ARBITRATOR GRIFFITH: He's still alive.

MR. O'GORMAN: The Tribunal considered that the potential tolling effects of the subsequent court challenge--

PRESIDENT GREENWOOD: 14 June 2013; 14th of June 2013.

MR. O'GORMAN: The Tribunal considered the potential tolling effects of a subsequent court challenge to, as they say, "a discrete Government or administrative measure." In other words, the FDA had ruled, and Claimant was seeking to say that subsequent court litigation with respect to that administrative decision should somehow count for continuing breach or to extend the limitations period.

The Tribunal: The Claimant could not “assert that the FDA measure is part of a ‘continuing breach’ . . . or is ‘part of the same single continuous action’ . . . to use later court proceedings to toll the limitation period."

And this is the fact-specific reference: "nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA's limitation period in this way."

Bilcon--also cited by Canada--versus Canada: The Tribunal expressly did not pass on the persuasiveness of UPS because it had found, once again, a one-off breach with “continuing ongoing effects”, which “do not establish there were ongoing acts." Completely different case, and a completely non-remarkable holding of the notion of single breach with continuing effects.

Corona is very much along the lines of Apotex. The Tribunal found on the facts that there was not a continuing breach: "the alleged breaches relate to one central measure adopted by the Respondent: the Environmental Ministry's refusal to

grant the environmental license."

The Tribunal goes on to say: "the filing of a Motion for Reconsideration cannot be considered as a separate action . . . There is therefore no basis to consider that there was a continuing breach." Very much like the Decision in Apotex.

The limitations, as I've mentioned, is an entirely fact-specific inquiry, and tribunals are influenced by the actual breaches at issue, by the types of breaches, and the Claimant's diligence in pursuing the claims.

As Rusoro stated: Although the UPS approach is legally sound, it's “very fact-specific and depends on the circumstances.”

Bilcon: "UPS involved its own set of facts."

And let's recall what those facts were in UPS. The claims in UPS were that Canadian legislation provided a built-in advantage to Canada Post such that disadvantaged UPS. That was in the legislative framework of the country, much like the ongoing maintenance of a set of R&D guidelines that applies to all operators offshore the coast of

Newfoundland and Labrador.

Spence, once again: "The jurisdictional aspects of this case are heavily fact-specific." Do not give it any "wider 'precedential' effects." That's the Tribunal itself.

In Grand River, even in Grand River: "These facts are rooted in their specific facts."

That dovetails very nicely with the fact that the Mobil I case is perhaps one of your more unusual cases in the history of Investor-State arbitration because the regulatory regime from which the Claimant's alleged losses flow continues to operate. Thus, the situation involves a continuing ongoing breach and, to the Majority's knowledge, has not been litigated before a NAFTA arbitral tribunal previously.

Now, let's look at the text of NAFTA. Notwithstanding the Mobil I Decision, clear precedent, the objects and purposes of NAFTA, and consistent international law, Canada argues that the specific language of 1116(2) bars Mobil's claim. It provides: "An investor may not make a claim if more

than three years have elapsed from the date on which the investor first acquired, or should have first acquired knowledge of the alleged breach, and knowledge that the investor has incurred loss or damage."

To say that Articles 1116(2) and 1117(2) are, in the words of a leading commentator, Andrea Bjorklund, to effectively be a three-year limitation period, that is deceptively simple. In fact, the UPS Tribunal, when they were evaluating the continuing breach claim under NAFTA said: We've put aside for the moment the question of when it first had, or should have had, notice of the existence of conduct alleged in the breach, to breach NAFTA obligations, and of the losses flowing from it.

But, in any event, under the specific facts of the present case, the textual concept of "first" in 1116(2) is not inconsistent with the analysis of continuing breach, and conclusion that the limitations period is satisfied.

Let me tell you why.

For the purposes of 1116(2), the limitations

period runs from the latter of--the latter of--the first knowledge of breach, or knowledge of having incurred loss or damage--assuming that those don't happen simultaneously.

"Having incurred loss or damage" in this provision is in the past tense. A continuing course of conduct, as the UPS Tribunal says, might generate losses of a different dimension, at different times. Thus, "first knowledge" cannot occur in this continuing-breach context until the loss or damage is actual.

ARBITRATOR GRIFFITH: Sorry to interrupt you, but does that mean the loss or damage claimed in that matter or--does it mean the loss or damage claimed in the matter, or merely loss or damage of the type claimed?

MR. O'GORMAN: The provision that the statute--that the Article says is "incurred." And, in the present case, the Mobil I Tribunal--excuse me, in the present case, the damages sought in this action from the 2012 through 2015 time period were, in fact, actual or paid within less than three years

of when the Notice of Arbitration was brought in the present case.

PRESIDENT GREENWOOD: Mr. O'Gorman, the passage on this slide, "Thus, first knowledge cannot occur"--that's your observation, is it, it's not part of the quotation from UPS?

MR. O'GORMAN: Yes, that's correct.

PRESIDENT GREENWOOD: What do they mean by "dimension" in UPS?

MR. O'GORMAN: Because of the nature of continuing breaches, they are--in some respects, it is unknown what will occur in the future. It is unknown and unknowable by the investor if, for instance, the Board in this case would suddenly choose to abide by its international obligations to cease wrongful conduct, and the investor typically will only know in retrospect whether the Respondent or whether the State continues a breach; and, if it does continue, what the amount of damages caused by that breach will be.

And that is the point of UPS saying that it is within the hands, if you will, of the sovereign to

know if it is going to continue the breach, and what the results of those breaches will be as they continue it.

PRESIDENT GREENWOOD: I find it a little bit difficult to see how that's losses of a different "dimension". The problem you face here is that your client thought that it did know what the losses were going to be, because it asked the Mobil I Tribunal to compensate it for them. The Mobil I Tribunal held that it wasn't--the time wasn't right to do that.

MR. O'GORMAN: That's right, but we still do not know to this day if, for instance, Canada will choose to cease its wrongful conduct tomorrow; and if it does or if it doesn't, what the magnitude of the breaches will be and losses will be for this continuing and ongoing breach.

PRESIDENT GREENWOOD: You clearly didn't think it was going to cease because that's why you asked the Mobil I Tribunal for damages up to 2036?

MR. O'GORMAN: Of course, the Decision changes a lot of things. And the Decision, when there was actually--the difference is, there is

actually a finding by a competent international tribunal that there is an ongoing violation of NAFTA, is a very different situation once the Decision is made than before the Decision is--

PRESIDENT GREENWOOD: Yes, I take that point, but I'm troubled by this "different dimension" comment from UPS. I'll have to go back and read the Award in full again.

But I understood that as meaning a totally different type of loss, not simply that you haven't been able to quantify properly the losses that you were going to incur.

Now, your case is, as I understand it, is that from now until--well, not the end of time but at least the end of time for Hibernia and Terra Nova-- you're going to have to spend money on Research and Development, and Education and Training that gives you no tangible benefit, and which you wouldn't spend if it weren't for the Guidelines.

Now, you don't know how much money, but the dimension, you know, the character of what you're losing is known to you.

MR. O'GORMAN: Based on the formula, it includes the Stats Canada factor, which we discussed earlier. It can change substantially, and has been changing substantially.

So, the dimension of the loss of--under the Guidelines is of a continuing character, and difficult.

PRESIDENT GREENWOOD: That the breach is of a continuing character and that the losses continue and are difficult to quantify in advance, is it? Those are fairly straightforward points. Let's assume we're with you on that.

But it still doesn't necessarily get over the difficulty about 1116(2) and 1117(2), and I'm not sure that UPS gets you over it, either.

MR. O'GORMAN: Hmm. Well, we'll continue to brief you on that.

Let's go to the three-year damages.

The UPS Decision found that a continuing breach extends the limitation period for as long as the breach continues. But, very importantly--and that was a NAFTA Decision--very importantly, it

limited the State's exposure in the case of ongoing breaches to only allow recovery of damages which had been incurred within three years of the filing of the Notice of Arbitration.

PRESIDENT GREENWOOD: Mr. O'Gorman, sorry, just could you speak up a little bit, please. You're becoming difficult to hear. Get closer to the microphone.

MR. O'GORMAN: Sorry.

And that temporal limit on the amount of damages recoverable, of course, deals expressly with the arguments made by many States with respect to continuing or other breach-type situations, and the purpose of a three-year limitation period. Based on the reasoning of UPS that would limit recovery within three years of the filing of the Notice of Arbitration, pre-dating that Notice of Arbitration, prejudice to the host State by loss of institutional memory or documents is not an issue.

Another express ground from Bilcon that a delay resulting in the host State unknowingly carrying on acts or omissions is also not an issue.

UPS' interpretation of this gives finality and certainty to a State.

And, of course, these--no prejudice to the State in the present case can be shown because, of course, Canada has knowingly continued to enforce the Guidelines, in breach of international law, since at least 2012.

Now, Canada also relies on NAFTA party submissions from other cases to support its limitations defense. Let's take a look at that.

Well, first, NAFTA has a very express provision of how the NAFTA Parties may make a binding determination of treaty interpretation, and that is Article 1131(2), which provides that an interpretation by the Free Trade Commission of a provision of this Agreement "shall be binding on a tribunal established under this section." That Commission requires participation by Cabinet-level representatives of the Parties, or their designees, and, of course, it's expressly built into NAFTA for the Parties to be able to say, with binding force, what the Treaty means and how it should be

interpreted.

Critically, in the present case, there is no Free Trade Commission interpretation of the time-bar provisions.

PRESIDENT GREENWOOD: Just so I understood your position on this, I was unclear about this point from reading the pleadings--are you saying that, in the absence of a Free Trade Commission decision, there cannot be any subsequent practice which could assist in the interpretation of the Treaty?

MR. O'GORMAN: The absence of the Free Trade Commission decision is very strong evidence in this case that there is not agreement between the Parties on the issue of the interpretation of time bars in the event--in the case of a continuing breach.

PRESIDENT GREENWOOD: They've all said the same thing in arbitrations?

MR. O'GORMAN: Let me address that.

The next round, the next argument is Article 1128: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."

Well, what we know in the present case is that there were no submissions, 1128 submissions, in Mobil I on the issue of limitations. And, very substantially and critically, there have been no submissions, 1128 submissions, from Mexico or from the United States on the interpretation of the Treaty with respect to continuing breaches in this case. And that, I submit, is very significant.

Instead--instead--we have--we will see what Canadian Cattlemen said with respect to that notion. Canadian Cattlemen was a claim brought by Canadian ranchers with respect to mad-cow disease and the importation of meat into the United States. The Tribunal noted that Canada did not make an 1128 submission in that case: “This cannot be seen as evidence of Canadian support for the Claimant's position on this issue but” according to the Tribunal, "it also cannot be seen as evidence of Canadian opposition” to the issue.

Again, I submit, the failure of the United States and of Mexico to make submissions in this case is very significant and should be interpreted with

respect to whether there is, in fact, subsequent agreement or subsequent practice with respect to the sui generis case that we have in front of us, in which there has been an ongoing continuous breach, in which a first case was brought and was successful, and which a second case is pending.

PRESIDENT GREENWOOD: Yes, as you're short of time, I won't press this--but, having cited to this paragraph 187, I think in your next submissions, you might want to deal with paragraph 188 of the Canadian Cattlemen Decision.

MR. O'GORMAN: May I ask how much time I have remaining.

PRESIDENT GREENWOOD: Well, you have half an hour. I think we might stretch five minutes, but you have had a lot of questions.

And I would, obviously, allow the same leeway this afternoon to Canada.

MR. O'GORMAN: Okay. If I may, I will speed it up a little bit.

Okay. So, the third, then, argument about State submissions, since there is no Free Trade

Commission agreement and there is no contemporaneous 1128 submissions in this actual case, as Canada has pointed to the VCLT, the Vienna Convention on the Law of Treaties, Article 31(3), with respect to subsequent agreement between the Parties of treaty interpretation or subsequent practice; and, of course, 31(3), by its express terms, which Mr. President noted, refer to those aspects being taken into account by a Tribunal, not binding.

Kendra Magraw has written a very illuminating Article on the practice of State submissions in international arbitration in the ICSID Review--and I quote: "it is clear that investor-State tribunals are hesitant to find that the State Party pleadings of State Parties can contain a subsequent agreement on the interpretation of a treaty, or be subsequent practice in the application of a treaty establishing the agreement of the Parties regarding its interpretation for the purposes of Articles 31(3)(a) and (b) of the VCLT."

PRESIDENT GREENWOOD: This is the lady who was the Secretary of the Tribunal about six months

ago?

MR. O'GORMAN: Yes.

She goes on to say, critically, "tribunals have seemed especially concerned about combining State Party pleadings from different proceedings into an authoritative statement of interpretation." And that, I submit, is exactly what is happening in this case where we have 1128 and other State Party pleadings from a variety of other cases but, critically, not this case.

Canadian Cattlemen: "Has a ‘subsequent agreement’ been reached on this issue . . . ? The Respondent”, that is the U.S., “points to its own statements on the issue . . . Mexico's Article 1128 submission in this arbitration; and to Canada's statements . . . but to the Tribunal . . .this does not rise to the level of ‘subsequent agreement’.” Again, that's showing the skepticism of tribunals to the notion that you can amalgamate pleadings from other cases that were litigation positions of State Parties.

PRESIDENT GREENWOOD: I'm not sure,

Mr. O'Gorman, it's saying quite that. I think if you go back a couple of slides to Article 31(3) of the Vienna Convention, I think what that passage in Canadian Cattlemen is dealing with is Paragraph (a), whether there is a subsequent agreement between the Parties, and then the paragraph I drew your attention to, 188, they find that there was subsequent practice in the application of the Treaty which established the agreement of the Parties. They're two different matters. In one, there is a formal agreement. In Paragraph (b) you're looking at whether there is concordant practice, which shows that there is an implicit agreement between the Parties.

MR. O'GORMAN: Yes, indeed, but I think it continues to show the skepticism and a high level of proof required.

Gas Natural Tribunal: An argument made by a party in the context of arbitration should not reflect practice.

Telefónica: "the parallel positions taken by the two Contracting States . . ." Yes, that was Argentina's position in the subsequent acts.

The Telefónica Tribunal goes on to say: " . . . these statements . . . are not directed towards each other: they do not evidence therefore an 'agreement' or meeting of their minds or intent."

Now, Bayview, talking about what kind of state practice should be reviewed, importantly, Bayview put much emphasis on, not litigation or arbitration statements, but instead, formal Government statements adopted outside the context of arbitration proceedings. In that particular case, Bayview, once again, was a claim by investors against Mexico, very much like the Canadian Cattlemen case, as to whether they had a claim against Mexico even though they did not have an investment within Mexico.

The Tribunal took into account the formal Government statements submitted to the respective Parliaments and Congress in the enactment of NAFTA and found that those statements outside of the litigation context should be taken into account or could be taken into account. We have none of those here.

Now, let me turn, if I may, to the

alternative scenario for limitations.

In the present case, as we've argued, there has been a continuing breach such that the limitations period is satisfied. If, in the alternative scenario, there is not a continuing breach found, notwithstanding the Mobil I Decision and the clear continuing breaches occurring here between the 2012 and 2015 time period, then the Tribunal should nevertheless find that the time bar is satisfied.

Rusoro, the Rusoro case, for instance, with Judge Simma, held that the composite claim should “be broken down . . . into individual breaches, each referring to a certain governmental measure,” and then the time bar should “be applied to each of such breaches separately.” That is entirely consistent with the Mondev Case, the Apotex Case, and the Bilcon case. Here, the individual breach that occurred is evidenced by the Board's letter of 9 July, which I will show you here in a minute.

After the Decision was issued on May 22nd, 2012, ExxonMobil wrote to the Board: "In light of

the Tribunal's finding that the Guidelines violate the NAFTA, we ask that portions of both Hibernia and Terra Nova's outstanding shortfall under the Guidelines be waived through December 2011."

They go on to say: "We also seek the Board's assurance that the Guidelines will not be applied . . . for 2012 or any future period." That, of course, was entirely consistent with Article 30 of the Articles of State Responsibility with respect to cessation and non-repetition, and that is: A "State responsible for the international wrongful act is under an obligation to cease that act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition."

So, I alluded to it earlier, but let's actually take a look at the letter from the Board of 9 July 2012.

"In response to your correspondence . . . the validity of the Board's guidelines has been affirmed by the Courts . . ." Going on: "There is no intention to 'waive' in whole or in part any of the Operator's obligations . . ."

So, this, in effect, is a separate breach in the alternative case that satisfies the limitations period because this occurred within the three years preceding the filing of the arbitration, and the damages which flowed from this also were accrued--excuse me--incurred within three years of the Notice of Arbitration.

Let me close the issue of limitations with the notion of abuse of right, if I may, Mr. President.

Even if Canada's arguments were somehow technically correct, they should--and which they are not--they should be ignored and not accepted. It is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights.

Let's look at what a different tribunal did in a very analogous situation.

In the case of Renco versus Peru, almost three years after the case was brought, Peru argued for the first time that the form of waiver submitted

by the Claimant was ineffective. Of course, that created a serious problem with the three-year time bar. What is the Tribunal to do?

The Tribunal allowed the dismissal, but the Renco Tribunal cautioned that Peru's anticipated invocation of a time bar in the next case, in the refiled case, could be abusive.

What did they say?

"The Tribunal does not wish to rule out the possibility that an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco's claims were now time-barred."

Let's talk about that in the present case.

In Mobil I, Mobil timely brought its claim within three years. It's not contested. At the time, Canada argued no actual losses had been incurred and thus were not compensable; in other words, too early. Claimants observed: "Canada can't have it both ways and say that we are not entitled to future damages and they're only waiving the limitations period with respect to this proceeding."

As predicted by Mobil in that quote, Canada

now argues that the claim for incurred losses is too late and is, therefore, time-barred. Under the guise of the limitations argument, Canada now attempts to evade its duty to compensate for an internationally wrongful act. It would avoid its duty under Article 31, which is included by reference to international law and the NAFTA, to make full reparation for the injury caused by the internationally wrongful act.

In conclusion on limitations, if Canada's proposed application of Articles 1116(2) and 1117(2) were accepted, Canada will escape its obligation under an international law to make full reparation for a conceded breach. Following the initial three-year limitation period, Canada will continue to breach the NAFTA with impunity, without making reparations for the remaining lives of the Hibernia and Terra Nova Fields, which as mentioned, exceed the Year 2040.

Mobil, of course, would suffer a grave injustice as a result of the continuing breach, and such a decision, as Canada is requesting, would

severely undercut the effectiveness and compromise the NAFTA dispute-resolution framework.

Let me turn now, if I may, to Canada's discretionary-spending argument. This is what I referred to earlier as the "ceiling" argument on claims submitted by Mobil in this case.

So Canada argues that Mobil voluntarily spent more than was required under the Guidelines. Canada argues: "Claimants' surplus expenditures . . . were not caused by the 2004 Guidelines but were undertaken on the Claimant's own accord . . , Claimant was not required to spend as much as it did, it chose to spend more." "Chose."

Mr. Walck labels as "discretionary" the R&D and E&T expenditures as of the 31st of December 2015. That's the relevant timetable. You can see a graphic representation of Canada's argument on providing a ceiling on recoverable damages. This is a made-for-arbitration defense, and keys off of the date of 31st December 2015, arguing that magical date, anything that was spent in excess of the Guidelines is automatically not recoverable.

Well, the reality is there is no such thing as a discretionary surplus spending. The Guidelines, as I mentioned, incur a life-of-field obligation to make these expenditures. The date of 31 December 2015 is the cutoff only for purposes of the present claim period, not for purposes of the life of field obligation. The date holds no regulatory significance with the Board whatsoever. Both Terra Nova and Hibernia are in the midst, at the end of 2015, of three-year OA Periods. Compliance with the requirement to make expenditures is, as we discussed before, only enforced--or effectively enforced at the end of the three-year OA Period.

Further, as the Guidelines provide, at the end of a three-year OA Period, any excess surplus may then be applied against the requirements in subsequent POA Periods--or OA Periods.

Okay, in the Mobil I case--

PRESIDENT GREENWOOD: Mr. O'Gorman, does that not mean that the logic of your position on the limitations defense is surely that you can recover in these proceedings for the losses incurred during the

period for which you're claiming and you can then go out and file another claim so long as you're within the three-year--you will find a three-year period? You will be able to bring another claim and then another one and then another one?

So, wouldn't the overspend in the period for which you're claiming now be something that would be--you would be needing to recover that in the next set of proceedings, would you not?

MR. O'GORMAN: The answer is no.

PRESIDENT GREENWOOD: Why?

MR. O'GORMAN: And that is because these damages, as you will hear from the witnesses, incurred--are out-of-pocket damages incurred because of the Guidelines, caused by the Guidelines, and so the Party violating international law is not able to set the limit if damages actually flow from the imposition of the Guidelines.

You will hear from Mr. Sampath, Mr. Noseworthy, Mr. Durdle, and Mr. Dunphy of their efforts to be in compliance with the Guidelines during the relevant time period, and they will

uniformly testify that all these decisions for expenditures were caused by the Guidelines and flow from the imposition of the Guidelines. The mere fact that the surplus can be put forward does not alter Canada's obligation under international law to make whole the reparations for the damages that flow from and are caused by the Guidelines.

PRESIDENT GREENWOOD: But the Mobil I Tribunal decided that damages were only--loss was only actual if there had been a call for payment.

MR. O'GORMAN: That was one part of the Mobil I standard. Either there was a call for payment or expenditures actually incurred.

And so, the call-for-payment part is not at issue in this arbitration. These claims are based on damages actually incurred. And so, I can give you the citation for it.

PRESIDENT GREENWOOD: That's okay. I will look it up myself. Okay, thank you.

ARBITRATOR GRIFFITH: That's really a but-for argument, but for the Guidelines, these expenditures wouldn't be incurred. Is that a fair summary?

MR. O'GORMAN: These expenditures were directly incurred because of the Guidelines, yes.

ARBITRATOR GRIFFITH: The answer is yes?

MR. O'GORMAN: Yes.

ARBITRATOR GRIFFITH: Yes.

MR. O'GORMAN: Okay.

And so, kind of to follow up on that, Dr. Griffith, all surplus R&D and E&T spending meets the standard set forth by the Tribunal that is in Mobil I that compensation is due, as you can see, "when there is a firm obligation to make a payment and there is a call for payment or when a payment or expenditure related to the implementation of the Guidelines has been made." And, in this case. All of those have actually been made.

The argument that surplus E&T--all surplus, alleged surplus, spending meets this standard has actually been made, has been caused by the Guidelines. Thus, the alleged surplus spending is a loss to Mobil, is legally compensable, and by no means was discretionary. Again, as you will recall, the authorization to extract oil from these projects

is conditioned on compliance with the Guidelines.

Even if we needed to reach this argument, for Hibernia, any alleged surplus at the end of 2015 has already been incurred and absorbed in the Year 2016. As you can see, the letter from the Board in 2017 advising what the obligation expenditure was for 2016, and the obligation was 19.3 million. The alleged surplus at the end of 2015 was only [redacted].

Accordingly, this Tribunal should view as an artifice the notion that there is an artificial cap on the recoverability of Mobil's damages and should just not accept that argument.

Okay. Let me turn now to Mobil's claim for damages.

First, all claimed Incremental Expenditures meet the but-for test set forth by the Mobil I Tribunal. They would not have been made in the ordinary course of business in the absence of the Guidelines. To be clear, no claimed expenditure was required by any regulation or legal commitment apart from the Guidelines themselves. That will be an

issue that you will hear a lot about in this arbitration.

All claimed Incremental Expenditures meet the Mobil I standard for compensation. That is, the occurrence of payment or expenditure has transpired. Mr. Phelan uses the same method to calculate Incremental Expenditures that was accepted by the Mobil I majority and is followed here.

All claimed Incremental Expenditures were made by the Operators incurred by Mobil after the periods at issue in Mobil I; in other words, there is no overlap. To be more specific, the Mobil II claim period extends to the end of 2015. Hibernia, in particular, is from 1 May 2012 to 31 December 2015, and Terra Nova is from January 1st, 2012, to 31 December 2015.

Of course, these claims, as you know, Mr. President, are without prejudice to subsequent losses incurred later on, assuming as, unfortunately, we must at this point, that Canada will persist in its ongoing breach of its international obligations.

The witness testimony that you will hear will

submit the claimed losses. And just to give you an introduction to the cast of characters:

Paul Phelan was the Chief Financial Officer of HMDC from 2007 to 2015, and he is now our corporate representative.

Mr. Sampath was an expert in research and development, and served as HMDC's R&D Manager from 2013 to 2015.

Ryan Noseworthy was the Hibernia reservoir supervisor from 2011 through 2015 and now works as senior planning advisor for ExxonMobil in Houston.

Paul Durdle was HMDC's safety supervisor 2010 through 2014, and is now President of Newfoundland Transhipment Limited. Several of these witnesses testified in Mobil I, including Mr. Phelan, Mr. Noseworthy, Mr. Durdle.

Rob Dunphy was the former environmental regulator for Newfoundland and Labrador for a time, and then Hibernia's environmental lead for many years.

Let's talk briefly about Canada's strategies to escape full reparation.

Canada has indiscriminately, or in a blanket fashion, challenged each and every of the 67 Incremental Expenditures as being "ordinary course." Canada argues against awarding continuations of expenditures that were already decided as incremental in Mobil I, yet Canada has offered no witnesses on 66 of the 67 claimed expenditures.

Canada seizes upon out-of-context snippets from the pre-authorization documents that you will recall are necessary in order to seek the approval of the Board even to make the expenditures. Some of these documents that Canada seizes on were written by third-party service providers seeking to attract the Operators' interest. But one thing that is clear is that Canada is claiming potential benefits of these projects which were held by the Mobil I Tribunal not to be determinative.

And, for instance, you asked me about the Helicopter Project. This was the construction of a duplicate helicopter training facility that just happened to be in the Province. There is absolutely nothing wrong with the helicopter providers' other

facility. We were simply donating money to this third-party provider private company so a helicopter training facility could be a little bit closer.

Let's talk about the WAG Pilot, which Canada has spent a lot of time on in their pleadings, and, as you remember, the WAG is advanced production used potentially, although really never used anywhere else in the world, for a field at the end of its production to try to enhance some oil recovery from an almost-depleted field.

Canada inflates a regulatory requirement to carry out studies on enhanced oil recovery with an in-field implementation of a full-scale pilot on water-alternating-gas technique.

They also now argue, suddenly in this arbitration only, that the requirement to perform the WAG Pilot is somehow necessary in whether the Board would allow the Operators to abandon wells.

First, there is no regulatory requirement to perform the WAG Pilot. Canada and Jeff O'Keefe again take the obligation to perform enhanced-oil-recovery studies, which is something that can be done in the

room of an engineer, with the actual in-field implementation of the full-scale pilot in the field.

Before the filing of the Rejoinder Memorial, no Board Official ever indicated that a WAG Pilot might be a regulatory requirement. Even Canada did not make this argument in its Counter-Memorial.

Also, critically, no other project subject to the Board's purview, that is in the entire Newfoundland offshore petroleum space, has been required or has in fact implemented a WAG Pilot, again undercutting any notion that it is required of the Operators.

Moreover, contrary to Canada's argument, the WAG Pilot has nothing to do with well abandonment decisions. Before the filing of the Rejoinder by Canada, neither Canada nor the Board had made any connection between well abandonment decisions and the performance of the WAG Pilot. Canada can point to no letter or email or other document communicating to HMDC that abandonment decisions depend on the WAG Pilot. Nor can Canada cite any regulation or Board Decision requiring a WAG Pilot for abandonment.

But here is the critical fact: Since oil production began in 1997, the Board has permitted abandonment of dozens of wells at Hibernia without requiring EOR studies, much less a WAG Pilot.

As evidence that the WAG Pilot would never have been done in the ordinary course of business, it was initiated more than 30 years before the projected end-of-field life. Again, this is a study of potential secondary or tertiary recovery of oil wells in a field that is currently in its prime. No reason to study that.

As we discussed earlier, the WAG Pilot formed the centerpiece of Hibernia's 2010 Work Plan, which, as you recall, was prepared at the requirement of the Board for the Operators to show how they were going to spend down this Shortfall and spend money, as was indicated in that presentation. The WAG Pilot was conditioned on the Board's approval of it as an incremental expenditure.

Moreover, the Mobil I Majority found that some aspects of the WAG Pilot study from 2010 to 2012 were expenditures that were, in fact, incremental and

for which recovery was provided. Canada has provided no principal argument for ignoring the Mobil I Decision in that context.

What's more, the WAG Pilot is not required to maximize recovery in accordance with Good Oilfield Practices. Canada argues that running the WAG Pilot where it's located, on what's called the [redacted] will produce [redacted] additional barrels of oil. There are problems with that. The estimate assumes full success, which is entirely unknown and uncertain at this point. In fact, if the future success of WAG had the high degree of certainty implied by Canada, then WAG pilots would have already been done many times over in offshore Newfoundland. None has been done.

Canada also argues that running the WAG on Hibernia field-wide, not just on the [redacted] but the whole field, at some point in the future, could unlock [redacted] barrels of oil. Again, that assumes the success of the Project which has not by any means been shown. This figure was quoted from the R&D pre-approval application,

assuming full success and very unlikely field-wide application. This figure is only relevant, if ever, at the end-of-field life, which is when a WAG would actually be implemented, many, many years from now.

The alternative, of course, to spend money on the WAG Pilot to satisfy the Guidelines, would be an "ordinary course" expenditure by the Operator to drill a normal, traditional, highly productive well, and there are many prospects to do that right now.

For instance, just to be a little technical here, the WAG Pilot is currently being run on a well that is at [redacted] water cut; in other words, it is studying a well that is currently pumping [redacted] water, [redacted] oil. The WAG Pilot is to study whether there is some way with the water-alternating-gas flood that you can raise that production of the well from [redacted] water cut to maybe [redacted] water cut, so there is [redacted] oil instead of [redacted] oil.

What is happening, though, on the Hibernia platform is there are a limited number or drilling slots. There are 64. And if you use something for

one thing, you can't use it for another thing. But what the ordinary course of business would be at Hibernia is to use that well slot that is currently dedicated to the WAG Pilot study to drill a normal traditional well for which there are many, many prospects currently at Hibernia that would produce 100 percent oil with no water. That puts in stark relief the artificiality imposed by the Guidelines expenditure requirements.

Let me move on and talk about royalty deductions.

Mobil is able to make deductions for royalty payments to the Province based on expenditures it spends for its operations. The Province always audits those deductions, and the difficulty with that is the results of its audits take years and years to come out.

In the Mobil I case, Canada refused the invitation of the Tribunal to indicate whether the Provincial R&D--excuse me, whether Incremental R&D Expenditures would be allowed by the Province as deductions. Therefore, in Mobil I, the Tribunal

finally decided that there should be no deduction in that case for potential compensation to reflect deductions which had been taken. The reason for the Mobil I Majority's Decision remains true today. It remains uncertain, frankly, whether the Province will disallow deductions taken for incremental R&D and E&T.

Critically, in addition to the finding of the Mobil I Tribunal, why should you not deduct the Award for any potential royalty deduction? Well, first, there is no risk of overcompensation in following the Mobil I Majority's Decision because, upon being awarded these expenditures in this arbitration, Mobil has committed and undertaken to pay the Province the amount of the royalty deductions taken. And, in fact, it did this after the payment of the Mobil I Award.

On the other hand, there is an unacceptable risk of undercompensation if Mobil's compensation is reduced for oil--

PRESIDENT GREENWOOD: Sorry. What form does this undertaking take? Is it in writing, subject to

Canadian law?

MR. O'GORMAN: I don't know if it complies with the requirements of Canadian law, but it has certainly been done in writing, and Mr. Phelan's Witness Statement--it's required, it's required.

PRESIDENT GREENWOOD: So it's required by whom?

MR. O'GORMAN: Oh, excuse me. It's required by a reading of the Royalty Agreement--

PRESIDENT GREENWOOD: Thank you.

MR. O'GORMAN: --as I understand. And as mentioned, Mobil has done this with respect to the payment of the Mobil I Award.

So, there is an unacceptable risk of undercompensation if Mobil's compensation is reduced for royalty deductions and then what we don't know yet because of the long audit period, the Province subsequently disallows incremental R&D and E&T expenditure to be deducted. In other words, Mobil has the risk of losing both in the arbitration and with respect to the royalty deduction and would accordingly be undercompensated.

Additionally, there is an unacceptable risk of interest payments, interest penalties being asserted on Mobil, if the Tribunal allows for the reduction of the claim in this case.

Let me talk about benefits for a minute.

Canada has argued at great length that the Incremental Expenditures in this case somehow provided benefits to the Operators. Now, again, that issue was finally decided by the Mobil I Tribunal. We are unable to agree with the Respondent that incremental spending should be reduced because of the impact of benefits that flow to the Claimants.

But, critically, in this case, there is no proof of any benefits having been generated. As Mr. Sampath has testified, none of the results generated by the expenditures have been applied to any project in which Mobil or any of its affiliates has an interest.

Now remember, these expenditures are incurred in the first instance by HMDC, not by Mobil, but, nevertheless, there has not been apparently any benefit to anyone.

Canada has not even attempted to quantify a requested offset for benefits. Mr. Walck simply says savings should be reflected as an offset to the amount of compensation claimed.

Let me end on one last note.

The Mobil I Tribunal held and decided in response to Canada's claim that somehow the damages--the time period should be limited to the date of the filing of the Request for Arbitration, and Canada made that argument based on the UPS reasoning that, for continuing breaches, you can only recover claims up to three years before the filing of the Notice of Arbitration. Of course, the problem with Canada's argument is that is a retrospective issue, and UPS in no way meant to bar claims being made that were incurred after the filing of the arbitration.

And, critically, the Mobil I Tribunal rejected Canada's argument; and, in that case, as I mentioned, when that arbitration was filed, that no damages, no losses had actually been incurred at the time that arbitration was filed, and this UPS argument was not accepted with respect to limiting

claims to the filing of the date of arbitration.

In closing, Mobil has been diligent and reasonable at all times since the Board began imposing the Guidelines against its investments. Canada has erected roadblocks in an attempt to evade its obligation to full reparations. At times, it argues Mobil's claim was too early, at others too late, but always it is has argued no compensation. Justice demands that Canada be held to its full obligation under NAFTA and international law to make full reparation to Mobil for the continuing breach of Canada's NAFTA obligations.

Mr. President, thank you very much for your attention. I would be happy to answer any questions or to entertain a request for you that we all go to lunch.

PRESIDENT GREENWOOD: Thank you very much, Mr. O'Gorman. Thank you for sticking so scrupulously to your time limit and also answering such a large number of questions from my colleagues and myself.

Can I just ask if there are any questions now before we stop for lunch?

ARBITRATOR ROWLEY: No.

PRESIDENT GREENWOOD: Gavan?

ARBITRATOR GRIFFITH: No.

PRESIDENT GREENWOOD: In that case, I think we'll adjourn, and you certainly could do with something to repair your throat and everything else, and we will reconvene at half past 2:00 to hear Respondent's Reply. Thank you very much.

MR. O'GORMAN: Thank you.

(Whereupon, at 1:35 p.m., the Hearing was adjourned until 2:30 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT GREENWOOD: Very good. If everyone is ready, we will now hear submissions for the Respondent.

Thank you very much, Mr. Luz.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MR. LUZ: Thank you, good afternoon, Mr. President and Members of the Tribunal. It is an honor for me to appear before you today and represent the Government of Canada in this NAFTA arbitration. Thank you.

At the outset of this arbitration, more than a year ago, the Claimant told the Tribunal that it could resolve this dispute summarily. It portrayed this case as basically an open-and-shut collection case. Now, while it's evident from the presentation this morning that the Claimant realizes that it is on far more tenuous legal ground than what it once assumed, it still argues that the Mobil/Murphy Award essentially gives them automatic entitlement to what it demands now from this Tribunal.

Canada's demonstrated in its written

pleadings, and our goal is to demonstrate today and over the course of this week, that the Claimant's narrative is incorrect and the theories that it puts forward in support of its claim are legally unsound.

Now, Canada, as the Tribunal knows, respectfully submits that there are two legal barriers that restrict the Tribunal's ability to grant the relief requested for the claim that is before it today.

The first legal barrier is the limitations period set out in NAFTA Articles 1116(2) and 1117(2). This is a jurisdictional limitation which goes to Canada's consent to arbitrate. Now, this lex specialis treaty rule is a strict one, and it cannot be tolled, regardless of whether the offending measure is continuing or not.

The second legal barrier is based on the general principle of international law res judicata, and in particular what is referred to as "cause-of-action estoppel."

When the conditions for res judicata are met, as they are in this case, the rule is equally

unforgiving.

If these rules are applied objectively and dispassionately, Canada submits that each of these barriers compel a rejection of this claim, thereby negating the need to even consider the credibility of or lack of credibility of the Claimant's demand for compensation in this case.

But, Mr. President and Members of the Tribunal, Canada's goal this week is not just to show that you're legally required to reject this claim. Our goal is to show that it is fair and reasonable to deny the Claimant a second bite at the cherry.

Now, before I set out the structure of how Canada will present its Opening Statement this afternoon, I would like to ask the Tribunal just to step back for a moment and consider Canada's legal propositions in their most basic formulation.

The first proposition, NAFTA Chapter Eleven does not allow a claim in 2017 against an unchanged measure that was enacted in 2004.

That can't be an unreasonable proposition to contemplate that the NAFTA Parties wrote into their

Treaty that would prevent a party--that would preclude being sued for a measure more than 13 years old. Now, some treaties have no limit as to when a claim may or may not be filed, but NAFTA Chapter Eleven does, and the limitations period, on its face, does not allow a claim against a measure that has been unchanged for more than a decade.

Second basic proposition: If an investor challenges a measure but fails to carry its burden of proof on damages once the evidence has been thoroughly examined on the merits, the Claimant does not get a second chance to make exactly the same claim years later when it failed to prove their damages the first time. Surely, that cannot be controversial. That is very essence of non bis in idem: No one should be proceeded against twice for the same cause.

Now, those two legal propositions are at the very heart of Canada's defense in this case.

Now, we don't pretend that they exist in a vacuum. Obviously, the Tribunal will have to scrutinize the text of the NAFTA and the text of the

Mobil/Murphy Decision in order to make a fully informed decision. But, when you do, Mr. President and Members of the Tribunal, there are three critical facts to keep in mind:

First, the Claimant admitted long ago that it was November 5, 2004, the day the Guidelines were made applicable to the Hibernia and Terra Nova Projects, was the date that the Claimant first acquired knowledge of the alleged breach and that it had incurred damage for the years currently before this Tribunal, 2012 to 2015.

The Claimant may not have known the exact quantum of that damage, but the meeting the NAFTA limitations period back then was precisely why they filed on November 1st, 2007, and precisely why they claimed for damages for 2012 to 2015 back then.

The second key fact, the Claimant has already admitted that this is an "identical cause of action" that is seeking "precisely the same relief" as it did before. Those are two quotes from the Claimant's own Memorial. Everything is the same: The Parties, the challenged measure, the years for which it seeks

damages.

Third key fact, and this is where the crux of debate comes down to: The Mobil/Murphy Tribunal ruled that the claim for future damages, including 2012 to 2015, was within its jurisdiction and was legally admissible.

Now, contrary to what the Claimant argues, the Majority's use of the term "not ripe" was not used to reject the claim on admissibility grounds, it was an evidentiary determination on the merits that the Claimant had failed to prove its damages to the requisite standard of proof.

And those three key facts, in Canada's respectful submission, is why this Tribunal has clear legal justification for rejecting the claim on the basis of the NAFTA's limitation period and on the basis of the international rule of res judicata.

Now, Mr. President and Members of the Tribunal, Canada is going to organize its Opening Statement this afternoon as follows:

First, I'm going to explain the essence of what Canada is saying here today, our legal

arguments. I'd like to take a big-picture approach to NAFTA Chapter Eleven and the powers of an arbitral tribunal under the Treaty--and international law generally. This will set the stage for my brief review of the history of the dispute; the origins of The Accord Act, the Hibernia and Terra Nova Benefits Plans, the Guidelines and the legal challenges by the Claimants against the Guidelines, including the challenges before the Canadian courts and, of course, the Mobil/Murphy Arbitration.

I will then ask my colleague Mr. Adam Douglas to take the podium. Mr. Douglas is going to pick up the story from there and talk about how the Claimant argued its damages claim in the first arbitration. And that factual background is very important because understanding how the Claimant put forward its damages claim in the Mobil/Murphy Arbitration is essential to understanding why the Mobil/Murphy Majority did what it did and said what it said; and, in turn the legal implications for this Tribunal.

It's also important background because if this Tribunal allows this claim to go forward, it's

important background to show and support Canada's argument that the Claimant is not owed the damages that it seeks.

Once Mr. Douglas is finished explaining that aspect of the Mobil/Murphy Decision, we're going to launch right into our legal defenses. Mr. Douglas is going to stay at the podium to talk about Canada's limitations period defense on the basis of 1116(2) and 1117(2). By that time, if timing is well, we should be close to the break, and that's when I would propose that we take the break at that time before I return to the podium to present Canada's arguments on res judicata, and it's at that time that I will walk the Tribunal through the Decision to be able to exemplify what Canada is talking about with respect to res judicata.

Now, as for the $20 million in damages demanded in this arbitration, Mr. Douglas is going to close the day for Canada with an overview about how compensation should be assessed and why Mobil's claim is grossly exaggerated, but hopefully the Tribunal will find that it has no, in Canada's respectful

submission, that this is a point that should not even need to be addressed by the Tribunal.

PRESIDENT GREENWOOD: Mr. Luz, can I just confirm one point with you.

MR. LUZ: Yes, please.

PRESIDENT GREENWOOD: My impression from reading the pleadings is that Mobil is right in saying that assuming we find against Canada on the limitation period and against Canada on res judicata, because if we find for you on either of those, we don't get to damages, but if we were to find against you on both of those points, you are not then contesting that the Mobil I Decision and Award create a res judicata on the issue of liability, we would only be concerned with whether they had satisfied the evidential burden in respect of individual heads of damage; is that right?

MR. LUZ: That's right, Mr. President.

PRESIDENT GREENWOOD: Thank you.

MR. LUZ: Canada does not--Canada recognizes that, under the rule of res judicata, it cannot go back to revisit the Decision of the Majority that the

Annex I Reservation for the Accord Act does not cover the Guidelines. That is binding as between the Claimant and Canada in this case. Other aspects may or may not be--the impact of the Decision on other aspects of their damages claim could be in contention, depending on what it is.

PRESIDENT GREENWOOD: Well, thank you. I'm very grateful for that clarification, but it leads me on to my second question or rather my second request:

Speaking purely for myself, I would find it helpful to hear from you about the extent to which, if we ever get to the damages stage, the rulings of the Mobil I Tribunal on matters such as the deductibility of provincial royalty savings, allowance for benefits and so on, to the Claimant, how far they create a res judicata for us as well. But take that in whatever point in your argument you would like to do, but I would find it helpful to hear from you on those points.

MR. LUZ: I think what we'll do, because I think that our discussion of damages today is going to be more or less limited to general Principles of

Compensation. So, when it comes to specific items that the Tribunal would take into account when calculating quantum, we will discuss the res judicata effect or not of the Mobil/Murphy Decision. It might be something we get to more specifically in closing when we talk about specific expenditures, but your request is duly noted, and we will address it.

Thank you.

So, Mr. President, Members of the Tribunal, as I said, I would like to take some time just to set the stage for Canada's substantive legal arguments with respect to time bar and res judicata. To do that, it's really taking a big-picture approach and describe the legal parameters within which a NAFTA Chapter Eleven Tribunal operates.

It goes without saying that investment-treaty arbitration is very different than domestic court litigation. NAFTA Tribunals are ad hoc. They have no compulsory or inherent jurisdiction for simply any arbitration that is submitted for any dispute. There are conditions on the consent to arbitrate by a NAFTA Party; and, unless those conditions are met, consent

is not perfected, and the Tribunal has no authority to hear the case.

Nor do NAFTA tribunals have continuing jurisdiction. A properly seized NAFTA Tribunal has the obligation to rule on the questions which have been submitted to it. And once a decision on the merits has been rendered, the Tribunal is functus and has no ongoing power.

Thus, one NAFTA Chapter Eleven Tribunal cannot control the jurisdiction of a different tribunal and instruct it what it can and cannot do.

Those are some of the sort of general limitations on the power and authority of a NAFTA Tribunal, but there are some specific ones in the Treaty. For example, a NAFTA tribunal can only award monetary relief, it cannot enjoin the Measure or--which violates the Treaty-- or order the NAFTA Party to change the offending law. So, it really is a fallacy for the Claimant to assert that Canada is required to cease enforcing the Guidelines. Chapter Eleven doesn't require that. All a Chapter Eleven Tribunal can do is order monetary compensation for

damages that have been proven to a standard of reasonable certainty.

PRESIDENT GREENWOOD: Not quite right. I can see that a NAFTA tribunal cannot order Canada to cease applying the Guidelines, but the Mobil I Tribunal found though those Guidelines were incompatible with Article 1106 read in the light of Article 1108.

Now, on that basis, surely, Canada has an obligation under NAFTA, not an obligation derived from the Award, not to continue with the enforcement of legislation or a scheme, shall we call it, rather than legislation, which has been found to be in breach of the Agreement.

MR. LUZ: Mr. President, NAFTA Chapter Eleven doesn't require that precisely because the NAFTA Parties put in the provision that monetary compensation was the only remedy. It was found--and this is different than, say, for example, NAFTA Chapter Twenty, where there is a possibility--or one of the remedies is for the Party to change the Measure. That's not what NAFTA Chapter Eleven

requires. And in fact, the Mobil/Murphy Tribunal acknowledged that specifically, that they only have the power to award monetary damages.

PRESIDENT GREENWOOD: But what I'm concerned about is that that's confusing the right with the remedy.

If Article 1106 provides that you may not impose a performance requirement--and this has been held to be a performance requirement--then the NAFTA surely requires to you repeal this or to cease to enforce it. Granted that the Tribunal can't issue you an order to do that, but where there is an act by a State that is in violation of an obligation under a Treaty, the obligation is to cease that violation, is it not?

MR. LUZ: We would respectfully disagree. The obligation is to pay monetary compensation to the Claimant in order -- as the remedy. That is the remedy under NAFTA Chapter Eleven, is to pay monetary compensation.

PRESIDENT GREENWOOD: I'm sorry, I don't see that. Article 1106 says you mustn't impose a

performance requirement. It doesn't say you must impose--you can buy your way out of that obligation. It may be that the only remedy, if you enforce an unlawful performance requirement, is monetary compensation, but that doesn't surely remove the obligation under NAFTA.

ARBITRATOR ROWLEY: Could I just add to that, it also says "may not enforce." And if an obligation has been created which is wrongful, please help us with the injunction against enforcing it.

MR. LUZ: The breach would be in the enforcement and so, if there was a finding that a performance requirement had been imposed or enforced, then that would be the breach for which compensation could be owed--

ARBITRATOR ROWLEY: I'm stopping you there because--I don't mean--you can carry on, of course, but think about the question I asked Claimant's counsel this morning about whether the continuance to enforce after Mobil I had declared the measure unlawful--I will just use that--whether that, in fact, is a separate breach.

MR. LUZ: Canada would find--suggest that it's not a separate breach. It's simply that--and we will go through this a little bit later--when Canada had imposed the Guidelines in 2004, that was when the first acquired knowledge of the breach came up; and, at that point, there was the claim filed on behalf of the Claimant that it was going to be incurring loss or damage for the lifetimes of the Project, and that was the breach which was put to the Mobil/Murphy Tribunal.

The breach for the enforcement of a performance requirement once liability was found, what is the remedy for that breach? And the remedy in NAFTA Chapter Eleven is monetary compensation. Monetary compensation is the remedy. How much you get for that to wipe out the consequences of the breach, that's a question of quantum and quantification.

ARBITRATOR ROWLEY: Let me try it again: You say the remedy is damages. That's a remedy for a breach. If the breach is not the passing of the unlawful measure, but the breach is the enforcement

of it after it has been found to be unlawful, then is that not a separate breach?

MR. LUZ: It's not a separate breach because it is simply not changing anything that had occurred from before.

To create a separate breach simply by asking the Board to stop imposing the Measure does not, in and of itself, create a separate breach. It's just simply the same thing that had already been found to be binding in Canadian law and continuing forward.

PRESIDENT GREENWOOD: I can see the force of that, if you had a situation like this: Suppose that the facts are as they are in this case, with one important exception, that no Mobil I proceedings were commenced in 2007, for whatever reason, and you get to 2012 and Mobil thinks this is costing us a fortune, is there anything we can do about it, let's find the sharpest lawyer we've got and that lawyer says, well, write a letter to the Board asking them whether they mean to enforce the Guidelines. And when they say "yes," that creates a fresh breach, and we can go from that.

That's where you start--you're trying to manufacture something new in order to get out of a failing you've made to bring a timely action in the past. But isn't it different in a situation where you had taken your action within the three-year time limit imposed by Article 1116 and 1117, the Tribunal has ruled in your favor, so it's common ground as I understand it between the Parties that what Canada is doing is illegal. That's the essence of what you've just said; isn't it?

MR. LUZ: Yes, it is. Yes, illegal in the sense that there has been a finding with respect to Canada's reservation and that it is still being applied today.

PRESIDENT GREENWOOD: Yeah, well, it's in breach of Article 1106.

Surely in a situation like that, there is a different, isn't there, there is an entirely new fact in the form of the Mobil I Award?

MR. LUZ: There is a new fact, but legally, in Canada's submission, is that it doesn't make a difference with respect to how NAFTA Chapter Eleven

allows a remedy for that breach. And as we will go through later today, the idea was that you have to--a Claimant has to be able to put forward its claim within that period when a timely claim is filed, and the remedy for that breach is in the terms of monetary compensation.

Now, this wasn't just--that's not just Canada's position today. This was actually Mobil's position in the first arbitration. I can take you to--in fact, because the Claimant knew back then, when it demanded a lump sum--excuse me.

The Claimant asked the Mobil Tribunal to award all of its future damages in one lump sum then because it knew that it would not be able to bring claims going forward in the future.

You can see this here. This was the Claimant's Post-Hearing Memorial, talking about what the NAFTA Tribunal could and could not do, and it made the distinction, saying: "In practice, because national courts have the power in appropriate cases to award injunctive relief, they can simply order continuing wrongs like the imposition of the

Guidelines to cease. Alternatively, they can permit future recourse to the courts to recover damages over time. As a result, national courts do not frequently confront the kinds of constraints with regards to remedies that bind a specially constituted NAFTA Tribunal."

So, again, the Claimants recognize those kinds of constraints that, unlike a domestic court, they can't permit future recourse to recover damages over time.

And the Claimant went on to write the following: "Before considering how national courts have applied the foregoing principles to estimate future damages, it is useful to recall the particular features of the NAFTA that make such an exercise necessary in this case. Because the NAFTA permits only monetary relief, this Tribunal does not have the option of simply enjoining enforcement of the Guidelines against the Claimants. Further, the NAFTA provides a three-year statute of limitations, which may well prevent the 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 the Claimants can only receive full relief for the damages caused by the Guidelines through calculation of future damages on the principles and variables espoused by the Claimants." So, you can see what Canada is saying is reflected in exactly what the Claimants said in the first arbitration.

Claimant then makes another observation.

PRESIDENT GREENWOOD: Did you agree with that in the first arbitration? Did Canada accept that proposition that damages for the future losses could be compensated?

MR. LUZ: Well, it was--this gets into the problem with the way that the Claimants had formulated their damages claim. As a general matter, Canada would agree, yes, it's true, you can't order future tribunals to deal with future damages. A tribunal does have the power to award future damages. The problem was with the way the Claimant formulated their damages claim. So, that was really the issue, and we will come to that when we get to the decision

with respect to res judicata in their finding on jurisdiction and admissibility.

PRESIDENT GREENWOOD: So, can you take me to a passage in the pleadings, the Transcript, the Post-Hearing Briefs, whatever, from the first arbitration in which Canada accepted the principle that future damages could be recovered and said the only thing that's wrong is the way in which they have been formulated?

MR. LUZ: Well, this is something that we will have to get to with respect to the way Canada argued its jurisdictional defense, saying we had--the way Canada argued it was that the Tribunal does not have the jurisdiction to award damages not yet incurred. It doesn't mean that the Tribunal does not have the right to award future damages, and it was really a response by Canada to the way that the Claimant awarded a future damages claim.

PRESIDENT GREENWOOD: So, help me with this: What is a future damage that has been incurred already?

MR. LUZ: A future damage that has been

incurred now, for example, with the Guidelines, on the passage--on the day of the passage of the Guidelines, if they were considered to be as damaging as the Claimants have suggested, their investment has now been harmed. That is a damage that they have incurred today: Their investment is less valuable than it was.

That, by itself, is enough to fulfill the requirement that a Claimant has lost--has incurred a damage. It doesn't need to be a specific quantum, but the fact is, when you file a claim, if you have incurred damage at that time, even if it is going to be in the future, then the claim can go forward. The problem that became--the way that Canada argued it was the Claimants were not arguing for--they were not claiming for a damage that they had incurred at this time, if I were to move back to the future, they were arguing for something that they were going to incur in the future, which, in essence, the Tribunal, the Mobil/Murphy Tribunal rejected anyway. They said the Claimants had incurred a loss in 2004 for the entire duration of the Projects and seized jurisdiction over

the entire claim from that point until the future and said that it could award future damages.

ARBITRATOR ROWLEY: I don't understand how a damage that has now been incurred is a future damage.

MR. LUZ: Well, like any quantification in the situation--for example, as I was saying before, if the Guidelines reduced the value of the Hibernia and Terra Nova Projects because they were going to require them to do superfluous R&D and E&T for the length of the Projects, then, surely, a third-party buyer the day after the Guidelines would ask for a haircut on its Purchase Price of that. That would be a damage that is incurred now, but that's not the way that they were trying to quantify it.

So, really, there is no--

ARBITRATOR ROWLEY: No, no, my point is that's a present damage on account of some future obligation. It's not a future damage the way you're describing it.

MR. LUZ: The Tribunal--the Mobil/Murphy Tribunal considered there to be within their jurisdiction and having the ability to award the

future damages arising from the Guidelines starting in 2004 because they were applied and they would be causing a loss or a damage going forward into the future, and that was an incurred loss for the purposes of jurisdiction and admissibility.

How you quantify those damages becomes a different story, and that's where the debate really arises.

PRESIDENT GREENWOOD: All right. How would you quantify the loss--how would you assess the amount of the haircut?

MR. LUZ: Well, that's an interesting question that we never found out. In fact, that's something that Canada's expert later on this week might be able to address in further detail. But, in essence, that was not Canada's burden to show. That certainly is something that the Claimants could have put forward, and Canada said that during the Mobil/Murphy Arbitration, but they could have done that, they just didn't. They tried to put forward a single damages model that tried to quantify all of the damages that it was going to incur in specific

years all the way into the future and claim them all as a lump sum damage now.

They could have done something different. They could have alternatively provided a different valuation process, but they didn't. As a jurisdictional matter, it doesn't really matter how they decided to model their damages claim because the Tribunal, the Mobil/Murphy Tribunal, took jurisdiction, seized admissibility, and then evaluated their claim as presented on the merits.

PRESIDENT GREENWOOD: We will come to the question of whether they examined it on the merits when you get to your res judicata argument. We perhaps ought to let you get on there.

MR. LUZ: Yes.

PRESIDENT GREENWOOD: But I would just flag a certain difficulty I'm having with that line of argument. I think I could write Canada's argument about this was an entirely speculative approach to the value of the investment because nobody was to know how much the R&D and E&T expenditure required would be going forward.

MR. LUZ: I believe my colleague, Mr. Douglas, he's going to be addressing this specific issue, and he will be able to give further details on exactly what was argued and how it was argued, even though, from Canada's perspective, ultimately, it's not strictly relevant because once the Tribunal seized jurisdiction over it, it really became the Claimants' burden to prove.

PRESIDENT GREENWOOD: All right. I hope you surmised from the questions we asked this morning this is an issue we find difficult, and we are, therefore, looking for help from both Parties on it. Continue, please.

MR. LUZ: I understand, and that is why the Parties are here today because this is at the nub of the dispute.

But if I could go back to what the Claimant had said in the first arbitration, the Claimant said at Paragraph 68: "By contrast, the national courts of all three NAFTA Parties enjoy the power to order injunctive relief in appropriate cases. Alternatively, they may permit further recourse to

the courts with regard to future damages . . . Thus, it can be said that national courts have less of an imperative to arrive at a suitable measure of future damages than does a NAFTA tribunal."

So again, this is what Canada is saying is that the Claimant at that time recognized that a NAFTA tribunal-- not just simply punted the issue to some other NAFTA tribunal with regard to its damages.

So, what does this mean? It means that once a claim is admitted as being within the Tribunal's jurisdiction, the Claimant has to put its best foot forward to establish the truth of its allegations because it's only going to have one opportunity to advance the claim and prove their damages.

Now, as the Tribunal's questions just evidenced, sometimes proving damages can be difficult, sometimes it can be a straightforward task, but that's why Claimants are always well-advised to put forward alternative damages models that could either provide a second valuation or could provide a sanity check to establish the reasonable certainty of their primary damages model,

but that's not what the Claimant did.

Claimants have to do this because once a tribunal has jurisdiction and has admitted the claim, they're bound to dispose of the claim, and that's the essence of what Canada is arguing today. We don't pretend it's easy, but these are the key salient facts to follow, Mr. President and Members of the Tribunal.

The Claimant and Murphy Oil filed a timely claim in 2007 to challenge the Guidelines and recover past and future damages all the way to 2036. The Tribunal decided that the claim was in its jurisdiction and was admissible. They presented a single damages model and evidence that attempted to quantify their damages with reasonable certainty.

It proved, after a lot of debate, and as you will hear a little bit more with Mr. Douglas, that damages model proved to be deficient. They could not reach their burden of proof, and that's why the Majority decided that it could not Award the damages that were requested by the Claimant because it hadn't been proven to the requisite legal standard. That's

what the decisive legal consequence is for this Tribunal.

First, as the Claimant recognized in the Mobil/Murphy Arbitration, the limitations period puts a hard cap on when a claim can be filed, and it doesn't matter if the breach is continuing or not, and it's regardless of what the Majority thought was possible or might be possible with respect to filing future claims. This Tribunal is bound simply by the jurisdictional provisions in the Treaty.

The second consequence is that the claim is barred by res judicata. If the Claimant has the burden to prove certain facts, then a finding that the Claimant has failed to meet the evidentiary standard is a finding on the merits that is tantamount to a determination that you have no right to recover those damages. And that finding will extinguish the claim forever. And this Tribunal is bound by the res judicata consequences of that Decision, not what the Majority thought may have been possible.

The essence is that Canada and the Claimant

fully litigated the damages claim that is now before this Tribunal previously. It is not unfair to deny the Claimant a second chance to prove what it could not prove before.

So, with that brief introduction, it was longer than what I had hoped, because we want to obviously go straight to the legal argument, but I think it would be helpful at this point for the Tribunal if I step back just a little bit with some background and some context to see how we got to this point. So this is the history of the dispute, which the Claimant covered a little bit this morning, but, in fact, there's not a lot of overlap between what I'm going to say and what the Claimant is going to say because the Claimant left out a lot of key details.

Now, when oil was discovered in Newfoundland--in Newfoundland offshore in the 1970s, the Government wanted to ensure that its oil resources were not just extracted and carted away without leaving behind some real and sustainable economic development for its citizens then and for

future generations. And so, the Government enacted policies that would require oil companies involved in oil exploration to carry out Research and Development in the Province, as well as Education and Training. That was reflected in numerous government documents, white papers and so on. We've got a couple of them on the slides here, 1977, and they really just emphasize the economic legacy that they really wanted to leave behind long after oil has been extracted completely.

So, it was in 1985, there was the Atlantic Accord between Newfoundland and Labrador and the Canadian Federal Government and it enshrined the requirement that R&D and E&T be done in the Province. The Atlantic Accord stipulated that you had to submit Benefits Plans that would set out the commitments and the obligations to be able to do Research and Development in the Province for the--throughout the life of the Project.

Now, it was the 1985 Accord Act which implemented into legislation the Atlantic Accord.

Now, Mr. President, Members of the Tribunal,

I don't want to take a long time here to give a lesson in Canadian history, but it really is difficult to overstate the importance of the Atlantic Accord for the Province of Newfoundland and Labrador. It was a seminal moment. It was a once-in-a-lifetime chance to be able to secure a sustainable development economic model that would promote the Research and Development in the Province and Education and Training, so they really tried to be able to ensure that the Atlantic Accord was going to be a legacy, and it was going to be incredibly important for the Province. And it was that reason why it became so important that it was put to a NAFTA Reservation, which I will get to in a moment.

The Accord Act stipulated at Section 45(3)(c) that "expenditure shall be made for Research and Development to be carried out in the Province and for Education and Training to be provided in the Province." As I said, the Accord Act was reserved in the NAFTA because Canada and Newfoundland wanted to preserve the core bargain between it and the oil companies to ensure that this provision was protected

from the Performance Requirements and national-treatment provisions of the NAFTA.

Now, as the Tribunal heard, the Hibernia Project was the first oil Project offshore in Newfoundland and the first Benefits Plans to be approved by the Board, and that was called Decision 86.01. That's Exhibit C-37, and it's at Tab 2 of your Core Bundle.

In the Benefits Plan, the Board affirmed that it was going to monitor the Hibernia Project for its duration to ensure the Benefits Plans commitments were being honored by the Claimants, as you can see there.

And as you can see, the Board said that it expected the Claimant to amend its positions over the lifetime of the Project to respond to areas of concern of the Board.

And Claimant also committed that, throughout the Hibernia Project, it would continue to support local research institutions to promote further Research and Development in Canada to solve problems unique to the Canadian offshore environment.

Now, Hibernia has been a massive success for the Claimant. The Project recently produced its 1 billionth barrel of oil and has generated almost $100 billion in revenues.

Now, the Terra Nova Benefits Plan, that was the second one that was to be approved, that's Decision 97.02, that's at Exhibit C-41, it's Tab 4 of your Core Bundle.

Now, like the Hibernia Benefits Plan, the Terra Nova Benefits Plan also emphasized the Board's expectation that it would undertake significant Research and Development and Education and Training in the Province, and it was going to demand regular reporting from the Operator.

And like the Hibernia Benefits Plan, the Terra Nova Benefits Plan also contained numerous commitments with respect to the type of Research and Development, basic Research, Education and Training that they were expected to do. The Terra Nova Project has also been a very, very productive field.

So, as I said, there was a quid pro quo between Canada and the Claimant and other oil

companies for access to oil, do substantial amounts of R&D and E&T in the Province. And that was the whole point of the Atlantic Accord and the Benefits Plans. Because if you only needed to do that kind of research while -- prior to oil being produced and you simply stopped doing that kind of work while the Projects were actually producing oil, it would undermine the entire sustainable development of the Project the Atlantic Accord was built on.

PRESIDENT GREENWOOD: I mean no irony in this. This is very interesting, but it sounds like an argument as to why the Mobil I Tribunal got the merits of the case wrong, which I know Canada would like to be in a position to argue, but you just admitted it's not. So, where is it taking us?

MR. LUZ: It's important context to understand where this goes because it does show how we got to the Canadian Court Decisions, that found that many of the arguments that the Claimant has made with respect to the Benefits Plans and what it was obligated to do was incorrect.

And in fact, the Mobil/Murphy Tribunal

endorsed many of them.

So, it is important context, and I won't spend too much more time on it, because this was intended to be a much shorter part, but we got into the legal arguments at the very beginning, which I appreciate and enjoy, but it is something here that--it gives you the idea that the Guidelines were prompted by what we're going to see here.

Starting in 2000, Hibernia started to report that it was going--that its R&D expenditures were going to be dropping by more than 50 percent. So, as you can see here, their anticipated spending was about 1.5 million. And in Terra Nova, in 2001, it reported that it expected only to spend between $300-400,000, so that was what prompted the Board to adopt the Guidelines, and so the Guidelines were adopted in 2004 in response to this precipitous drop.

Now, I won't go into details of the Guidelines, but there is one thing that is important to say. The Guidelines were intended to be able to just ensure that the average amount of R&D spending that was happening in Canada was happening in the

Province. That was the metric. It was discussed, it was consulted with the Province. And, shortly after they were issued, the Claimant took the position that the Board just simply couldn't do this, and they challenged it in court.

But, after several years of litigation, they were upheld, and again, I'm not going to go through the Canadian Court Decisions, but they did reject all of the arguments that the Claimant has made with respect to the kinds of R&D that they were supposed to do, the minimum amount of expenditures, and so on.

So, this was something that the Claimant had put at issue and were rejected by the Court. That brings us to the NAFTA case.

The NAFTA case, as you know, was filed at the time that the--at the time within the three-year limitations period of the NAFTA, November 1st, 2007, because they had been sent to the Claimant as of November 5th, 2004. That was the time that the Guidelines started applying to the Hibernia Projects, and that's what triggered the NAFTA arbitration. Now, again, I'm not going to spend time talking about

that because the Tribunal knows what happened. So, let's just get straight to the nub of where the NAFTA Tribunal or where the Mobil/Murphy Tribunal started to find this debate to be difficult on the damages issue.

PRESIDENT GREENWOOD: This may be a matter for Mr. Douglas to take up.

MR. LUZ: Yes.

PRESIDENT GREENWOOD: But just a question that has troubled me, Article 1116(2) says "an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

Now, there was a point made this morning about that, but at what point do you say Mobil acquired knowledge that it had incurred loss? Because while the Canadian court proceedings were going on, it didn't know that it had incurred loss, did it? It might have won those cases. It's not until the case -- the appeal -- is dismissed. I

think the Supreme Court refused leave to appeal, didn't it?

MR. LUZ: It did.

PRESIDENT GREENWOOD: It's not until the Supreme Court refused leave to appeal that Mobil knows it's incurred loss, suspect it's going to, but didn't know it, does it?

MR. LUZ: Well, the filing of the Notice of Arbitration, because it is a NAFTA provision, required them to file within three years of first acquired knowledge of damage or loss, so at that point they had triggered it, they knew that the Guidelines and assumed that the Guidelines were going to be continued forward.

I will leave this argument and the implication for my colleague, Mr. Douglas, but that filing of the NAFTA arbitration is what triggers the limitations period, for the purposes of the NAFTA.

PRESIDENT GREENWOOD: I don't see that.

If you file a Request for Arbitration under NAFTA earlier than you need to, that doesn't obliterate the Article 1116(2) time limit, and mean

that you're now working to a completely different set of time limits.

What was to stop Mobil--suppose that Mobil had brought its claim three years after the day on which the Supreme Court of Canada refused leave to appeal? Would that have been outside the time limit of 1116(2), and if so, why?

MR. LUZ: It would have because 1116(2) is based on the Measure, so the fact that a Measure is undergoing court challenge does not extend the limitations period. You have to assume that the Measure is the breach and that you have incurred loss or damage as a result of that breach.

So, the fact that domestic litigation was still going on, does not change the Treaty's provision for incurring--for triggering the limitations period.

PRESIDENT GREENWOOD: I would agree with you entirely if what 1116(2) said was "the date on which the investor first acquired or should have first acquired knowledge of the alleged breach," and stopped there. But it goes on to say "and knowledge

that the investor has incurred loss or damage."

MR. LUZ: Arising from the breach.

PRESIDENT GREENWOOD: Arising from the breach, yes, but how do you know that you have incurred loss as a result of a measure that is under challenge in the courts and which the courts may strike down?

MR. LUZ: Well, if the Courts strike it down, then the NAFTA Arbitration becomes somewhat superfluous.

PRESIDENT GREENWOOD: Yes, but it also means that you haven't suffered loss.

MR. LUZ: I'm sorry?

PRESIDENT GREENWOOD: It also means you haven't suffered loss.

MR. LUZ: Right, but the filing of the court challenges cannot extend the time period because it's a measures-based provision. It is what is the Measure. It's not what does the Court say--

ARBITRATOR ROWLEY: It's measures and knowledge of loss.

And the point is this, let me give you a very

simple example. You have a measure imposed on Year 1, and the Party is required to pay something under the Measure, and it pays it, and it pays it on Year 2, but in Year 1 it also brings a challenge in the Court, and the Court resolves the matter five years later. In that period of zero or one to five, even though it's paid money out of pocket, it may not actually have lost that money. It may not have incurred damage because it may be found on Year 5 when the Court comes out to say that measure is unlawful, you get your money back.

So, until it knows that it actually has parted with money not to get it back, the argument that's being with the question that's being put to you is how do you know while that issue is live before the courts that you actually have suffered loss?

MR. LUZ: I don't want to preempt something because I think my colleague, Mr. Douglas, has the specific answers.

ARBITRATOR ROWLEY: You're lucky, Mr. Luz.

MR. LUZ: I mean, this is obviously one of

those issues, but what I can say--and hopefully this is a sufficient answer in the sense that this was never the Claimant's argument--they had made the claim on November 1st, 2007, that they had incurred a loss or damage for the entire future.

So, as we look forward to the debate-- speaking on behalf of my colleague--that you have on this, but ultimately the Claimant filed its NAFTA NOA on that date saying that it had incurred the loss and damage at that time.

PRESIDENT GREENWOOD: I see that, but your argument is 1116(2) and 1117(2) go to jurisdiction. If you're right about that--and I'm not taking a position about whether you are or not, but if you are right about that, we have to decide for ourselves at what point that limitation period kicks in. It doesn't make a difference what position the Claimant may have taken in the previous arbitration.

MR. LUZ: We will take that under advisement.

PRESIDENT GREENWOOD: Please do.

MR. LUZ: So, I think that now is the time I will hand over the podium to Mr. Douglas, and he'll

address the way the Claimant's damages claim was argued in the Mobil/Murphy Arbitration.

MR. DOUGLAS: Good afternoon, Mr. President and Members of the Tribunal. My name is Adam Douglas, on behalf of the Government of Canada.

This case is about the Claimant's failure to prove its damages case in the Mobil/Murphy Arbitration and its current attempt at a second chance. I would, thus, like to set the record straight and walk you through what, in fact, transpired during that arbitration on the issue of quantum.

After that, I will turn to the application of the NAFTA limitation period. After that, we can take a coffee break.

The Claimant's theory of the case in the Murphy and Mobil Arbitration was fairly straightforward: First, the Guidelines require a minimum level of R&D spending for the duration of the production phases for the Hibernia and Terra Nova Projects;

Second, during the Production Phase, the

Hibernia and Terra Nova Projects have little need for R&D in the ordinary course of business, and the Claimants alleged, as they do in this arbitration, that once the Production Phase kicks in, there is little need for R&D in the normal course of operations;

And, third, the Guidelines, thus, substantially expand the amount that Hibernia and Terra Nova would have to spend on R&D in the ordinary course. During the Mobil and Murphy Arbitration, the Claimants argued that the Guidelines would sometimes force them to spend five times more on Research and Development than they otherwise would in the ordinary course.

Finally, when it came to quantum, the Claimants argued they are entitled to damages equal to the difference between the forced Guidelines spending over the lives of the two Projects, less what they would spend on R&D in the ordinary course.

The Claimant assessed that, for the rest of the production life of the Hibernia and Terra Nova Fields, the Claimant would be forced to spend

$65 million more on R&D.

This figure was quantified by their Expert, Mr. Rosen, and the difference between what the Guidelines require and what the Claimant would spend in the ordinary course, Mr. Rosen called "incremental" spending, which you can see on the screen from Mr. Rosen's First Report.

Mr. Rosen did not model his damages case as one for future lost profits, nor as an impairment to the value of the business. As you can see from the slide, he said that his model was intended to represent all of the Claimant's future cash outlays under the Guidelines.

He proposed that the Claimant should receive a lump sum today that they could use to meet their future spending requirements under the Guidelines, or what they called a "self-liquidating annuity."

In order to quantify this lump sum, Mr. Rosen assessed the level of R&D spending that would be required under the Guidelines in each year and the level of R&D spending Claimants would undertake in the ordinary course. He did this to determine the

level of incremental spending in each year, including for the years 2012 and 2015, which are at issue in this arbitration. And given that the Guidelines would apply to the Projects for the next 30 years, he added up all of the annual "incremental" spending numbers to get his lump sum.

Moreover, Mr. Rosen argued that his lump sum damages model would be invested by the Claimants in a risk-free account and, thus, should only be discounted on a risk-free basis. And he proposed discount rates between 0.857 percent and 2.776 percent.

Now, Mr. Rosen's model was something unique. Canada could not find a single precedent for this kind of model under the NAFTA or investor-State cases. This was explained by Canada's Expert, Mr. Walck, at the Hearing in October 2010. He states that Mr. Rosen's approach is taken from personal injury law and that in his 33-plus years of experience, he had never seen damages quantified in this way. It was not a model that quantified an impairment to the Claimants' investment on the date

the Guidelines were promulgated. It was a model that attempted to predict a multitude of future cash payments, and this is what Canada called in that arbitration a claim for "damages not yet incurred."

And, Judge Greenwood, you asked my colleague whether there was a passage somewhere either in the Hearing or the Transcript from Canada that could identify something in the alternative, and here it is: Mr. O'Gorman in his Opening Statement suggests that we were arguing that the Claimant's damages were too soon. That is absolutely not the case. Nowhere in our pleadings will you find that kind of characterization. Our issue with the Claimants' damages case wasn't that it was too soon but was the way in which they were quantified.

In fact, you can see on the slide, as I mentioned, that we explained this during the arbitration that the Claimants could have claimed for a loss of value to their business as a result of the Guidelines, which would be a model for damages incurred, and this is more than a conceptual difference.

An analysis of the value of the business would introduce a plethora of corroborating evidence, such as the Claimant's internal cash flow analyses, which could have shown the impact of the Guidelines, third-party corroborating evidence from an auditor, or the Claimant's documents supporting their 10-K filings. Mr. O'Gorman today in his Opening said--I believe his words were "the uncertainty is baked in the Guidelines." Yes, there is uncertainty, but the Guidelines are oil production, oil prices, exchange rates, what the Claimant spends in the ordinary course. These are all risks that oil companies like ExxonMobil manage all the time.

The Claimant didn't want to produce any corroborating evidence. They simply didn't want it on the record. Through document production, Canada sought the Claimant's financial statements, cash-flow analyses, business plans, operating budgets, and other economic and financial analyses.

PRESIDENT GREENWOOD: If I may just interrupt you for a moment.

MR. DOUGLAS: Yes.

PRESIDENT GREENWOOD: What I'm having difficulty with about this is, if it's difficult in 2012 to quantify how much incremental spending on Research and Development and Education and Training is going to have to be made over the space of the next 24 years, then it must be equally difficult to assess how much damage this as-yet-unquantifiable expenditure is going to have on the value of the investment.

MR. DOUGLAS: It may be possible, but I would suggest that, under the model provided by the Claimant in that arbitration, it disallowed the filing of any corroborating evidence.

Let me give you an example.

During the Mobil and Murphy Arbitration, the Claimants' ownership interest at Terra Nova was undergoing a redetermination. Corroborating documents concerning the value of its interests in that investment surely should have existed, surely internal to ExxonMobil they would have analyses about their future oil production, what they think the oil prices--where they are going to go. Surely, from

their projects worldwide, they have an understanding of the types of R&D they undertake during the Production Phases of their projects, and surely they manage risks like exchange rates all of the time.

These are factors that oil companies like Exxon address, but there was no internal corroborating evidence to support their damages model. They suggest that that uncertainty is inherent in the Guidelines, but, really, the uncertainty lies in the fact they didn't provide sufficient evidence.

It is important to note that it is the Claimant who is in the driver's seat when it comes to proving its losses. It is the one who controls the process by deciding how many damages models to use, what damages models to use, and the evidence it needs to file in order to corroborate its assessment. It is not Canada's burden to prove the Claimant's losses.

Now, in the Mobil and Murphy Arbitration, as I mentioned, the Claimants chose to provide--

ARBITRATOR ROWLEY: Sorry, just before you

move on to that--I won't quote you properly, but I think a few moments ago--perhaps I misheard. I think I heard you to say that Canada never complained about a claim for future damage, just about the way it was qualified.

And did I hear you correctly, more or less?

MR. DOUGLAS: Well, with the way--yes, you heard me correct.

ARBITRATOR ROWLEY: So, that made me look at the Mobil I Award, and in Paragraph 416, it says: "The Respondent's principal objection concerns the question of whether the Tribunal has jurisdiction to compensate damages which, in its opinion, were incurred after the filing of the claim or will be incurred effectively"--no, I'm sorry, I'm reading the wrong bit.

Then it goes on: "Effectively the objection is to the Tribunal awarding future or prospective damages." And maybe this is wrong.

MR. DOUGLAS: Well, our view, which is the one way, the only way that Claimant attempted to quantify its losses was to--but this was--sorry, go

ahead.

ARBITRATOR ROWLEY: I understand that. We understand that. I guess the simple question is: Did Canada at the time, in its pleadings or oral submissions, say, "Tribunal, you have no jurisdiction to award damages for future loss?”

MR. DOUGLAS: Our submission was that the Tribunal had no jurisdiction to award damages not yet incurred.

ARBITRATOR ROWLEY: That's for future loss, isn't it?

MR. DOUGLAS: You could have a damage that's incurred today but has future elements, as my colleague--

ARBITRATOR ROWLEY: Right. I don't want to waste your time. If you could, at some stage during the course of this week, draw our attention to those aspects of your pleadings or submissions where you made those assertions, we would find it helpful.

MR. DOUGLAS: Yes. Well, we reviewed just one, which was about the impairment to the loss of the business. If there is an impairment to the

business on Day 1, the date the Guidelines are promulgated, it was our submission at the time that that would be a model for damages incurred. The way the Claimant's Damages Expert had quantified the damages was for a series of future cash payments out into the future, which we struggled with under the language of the NAFTA because the NAFTA allows the Claimant to have filed a claim for damages that it's incurred.

As my colleague, Mr. Luz, mentioned, some of this is moot because the Tribunal did not agree with us. It agreed that it had jurisdiction and admissibility over all of these claims. So, our arguments to the contrary at the time were rejected.

ARBITRATOR GRIFFITH: Counsel.

MR. DOUGLAS: Yes.

ARBITRATOR GRIFFITH: I would be assisted if you could look at the first two sentences of Paragraph 417 that Mr. Rowley took you to, and--perhaps not now, but at sometime--could you let us know whether that summary is a correct statement, particularly the second sentence saying "the losses

must have been actual, i.e., out-of-pocket expenses which have been paid to be incurred."

That's a yes-or-no question. Is that correct or incorrect? If it's incorrect, don't tell us now, but perhaps later let us know how it's incorrect.

MR. DOUGLAS: Sure. Maybe I will reserve on that point.

ARBITRATOR GRIFFITH: Please do.

MR. DOUGLAS: Now, Mr. Walck, Canada's Expert in this arbitration, explains some of these points at Paragraph 30 of his First Expert Report and Paragraphs 30 to 35 of his Second Expert Report. And he testifies that providing alternative models is, not only good practice, but necessary when engaging in claims about the future.

And he's here this week, and I invite you to ask him questions about it. He's been a damages expert for over 35 years, and he filed five Expert Reports in the Mobil and Murphy Arbitration.

So, Canada, in the Mobil and Murphy Arbitration, spent some 30-plus pages of its Counter-Memorial and 40-plus pages of its Rejoinder

criticizing the Claimants' damages model in the Mobil and Murphy Arbitration and arguing that it was highly speculative. And the Claimant responded in four ways:

First, it did not propose an alternative damages model, nor did it file as evidence any internal documents like the one I mentioned--like the ones I mentioned before that might corroborate its damages case.

You can see in the next slide, the Claimants in their Reply Memorial state that Mr. Walck's efforts to quantify damages on the basis of valuing the business or future lost profits is not appropriate. They state explicitly that this isn't a case for lost profits and that valuing the business is not how they want their damages to be quantified.

The second thing that Claimant did was argue that its damages model was not one for damages not yet incurred, as Canada had characterized it because they had incurred all the damages it was seeking. Thus, the Claimant argued that, on the date the Guidelines were promulgated, they incurred, as

damages, all of their future payments under the Guidelines.

I would like you to take note of something here: The Claimant never argued in any of its pleadings before the October 2010 Hearing that the Guidelines are a continuing breach of the NAFTA. To the contrary, the Claimant argued that the promulgation of the Guidelines was a one-off breach with continuing effects. It was precisely for this reason that the Claimants sought damages for the exact same period at issue in this arbitration, assuring the Mobil and Murphy Tribunal that it not only had knowledge of these losses, but it had already incurred them.

ARBITRATOR GRIFFITH: Pardon me for interrupting again.

Did Canada argue there was a continuing damage?

MR. DOUGLAS: The issue was never really put at issue between the Parties. It was after the October 2010 Hearing that there were a couple--I will come to this in a moment--a couple of insinuations

that the Guidelines constitute a continuing breach. Even the Tribunal's characterization of the Claimant's position on this issue surmised that maybe that was the case. It wasn't something that was actively discussed between the Parties.

ARBITRATOR GRIFFITH: If you could enlighten us as to whether there was any source in counsel's argument as to whether there was any issue of continuing loss--continuing breach, I'm sorry.

MR. DOUGLAS: I could take a look at the Transcript. I know sometimes those two go hand in hand.

ARBITRATOR GRIFFITH: That's easily answered. I mean, it's a question of whether or not there was something where the Parties joined issues before the Tribunal or whether the Tribunal somehow lit upon it in their Award.

MR. DOUGLAS: It was something that Canada was never given the opportunity to provide views on.

ARBITRATOR GRIFFITH: I understand you submitted that it wasn't the Claimant's case before the Tribunal.

MR. DOUGLAS: That's correct. Up until the October 2010 Hearing, the Claimant was explicit that it was a one-off breach with continuing effects but changed course after in Post-Hearing Submissions and whatnot.

PRESIDENT GREENWOOD: I think it's now common ground between the Parties, that it is a continuing breach? I can't really see how else--your colleague, Mr. Luz, has conceded the point that it's a breach of Article 1106.

MR. DOUGLAS: Let me make a couple of points on that.

First of all, I'd like to point out it doesn't matter. For the purpose of the limitation period, the question is when the Claimant first acquired knowledge, not whether the breach is continuing or not. We will come to that. But on whether the Guidelines are continuing, let me make three points:

First, the Guidelines formula, as Mr. O'Gorman stated this morning, is about total recoverable oil. It's about all of the oil during

the Production Phase at Hibernia and all of the oil at Terra Nova. That's how the formula works, and the Board monitors on an annual basis that obligation on an annual basis. But the obligation is a global one that came into effect on the date the Guidelines were promulgated.

And consistent with that formula, the Tribunal found that the Guidelines, as a whole, applied over the course of the life of the Projects fall outside the Reservation. Thus, for the purpose of liability, they certainly found that the promulgation of the Guidelines, the adoption and their application as a whole, made them fall outside the Reservation.

And, finally, we should point out that the HMDC in 2010, the Operator of the Hibernia Project, amended the Benefits Plan in that field and amended it to incorporate the Guidelines, thus committing that Project to the Guidelines for the duration of the life of that Project.

So, with these three facts in mind, there's--

PRESIDENT GREENWOOD: The question is, it

doesn't have any choice in the matter, does it?

MR. DOUGLAS: What's that?

PRESIDENT GREENWOOD: HMDC can't be said to have had a great deal of choice in the matter. Its operating authority would not have been renewed had it not changed its Benefits Plan to incorporate the requirements of the Guidelines.

MR. DOUGLAS: Well, the context for that was an application to develop an additional field associated with Hibernia. Hibernia itself contained several--I'm not an expert--but subfields, if you will, and did have a choice. The Board's requirement in order to develop that additional field was that the entire Project amend its Benefits Plans to comply with the Guidelines.

Now, whether it had a choice or not in that matter, still there was a commitment made in 2010 to comply with the Guidelines for the duration of the life of the Project.

PRESIDENT GREENWOOD: I couldn't put my finger on those letters at the moment--it would take me a little while to do so--but I'm fairly sure I

have seen letters in the file which say, in substance, either you comply with these Guidelines and adapt your Benefits Plan accordingly, or your operating authorization will not be renewed.

MR. DOUGLAS: Oh, that's a different matter altogether. I mean, that's with respect to--I mean, that's a conditioning of the production authorizations on compliance with the Guidelines. But that's when the Guidelines are, for lack of a better term, "outside the Benefits Plans."

The Benefits Plans are the rule in the agreement governing how the Project will provide benefits to the Province, and the Project in Hibernia incorporated the Guidelines into that Benefits Plans in 2010.

And, you're right, the production authorizations are still conditioned on--as they always have been since long before the Guidelines, have been conditioned on compliance with the Benefits Plans. The fact that the Benefits Plans themselves have incorporated the Guidelines is but, perhaps, another reason to suggest the Guidelines are not a

continuing breach.

PRESIDENT GREENWOOD: We will continue with this dialogue. Let's move on.

MR. DOUGLAS: Fair enough.

ARBITRATOR GRIFFITH: If I could say, I would regard it as Hobson's choice, but you come back on that, as you may.

MR. DOUGLAS: Very true.

So, I believe I was discussing how the Claimant had responded to Canada's arguments during the Mobil and Murphy Arbitration. And, first, I mentioned that it didn't provide a different damages model; and, second, it argued that it had incurred already all of its future payments under the Guidelines, and it was precisely for this reason--you can see on the screen--that it claimed the damages for overlapping periods in this case. In fact, it claimed $27 million during the Mobil and Murphy Arbitration and argued that those damages had already been incurred.

The third thing that Claimant did in response to Canada's argument was argue that it should receive

its entire damages claim because 81 percent of that claim was for the 2004-2015 period and then declined sharply from there. So, you can see up on the slide, if you add up the 59 percent in 2004 to 2010 and then the 22 percent from 2010 to 2015, you get 81 percent.

The Claimant, thus, made the point that its damages assessment was really not as far into the future as it seemed and should, thus, be awarded.

The fourth and final thing that Claimant argued was that it did not, in any event, have to prove its damages to a standard of reasonable certainty. It argued that, because it cannot be in doubt that the Guidelines will apply to the Projects for the remainder of the life of the Projects, the quantification of their damages can be an estimate, uncertain, or inexact. And that is a pretty bold approach to the quantification of damages, but make no mistake: There could have been any number of ways the Claimant could have modeled its damages case, and there certainly would have been documents internal to the Claimant that could have corroborated its forecasts. To suggest, as they do in this

arbitration, that their hands were tied behind a single model or a single set of evidence is simply not true.

Claimant had ample opportunity to present its damages case in the Mobil and Murphy Arbitration, and it was fully heard. The Claimant alone filed seven expert reports and 11 witness statements in advance of the October 2010 Hearing. At the Hearing, the Claimants' experts and witnesses were heard, and even after the Hearing, the Claimant filed pleadings with new international and domestic authorities in an effort to support its damages case.

In fact, it was only in Post-Hearing Briefs after the Hearing that the Claimant realized its damages case was on weak ground. And you can see on the slide that the Claimant now suggests that its damages case is similar to a lost-profits analysis or one that values the business. And this is a fairly remarkable statement because it confirms precisely the types of things the Claimant should have been doing to prove its damages case, but didn't, in any of its seven experts and three damages submissions

before the October 2010 Hearing.

Now, in its Post-Hearing Brief, the Claimant also wrote that the Mobil and Murphy Tribunal must award it its full damages because its model in evidence in light of the inherent limitations of NAFTA tribunals. As my colleague, Mr. Luz, explained, the Claimant argued that, because a NAFTA tribunal cannot enjoin Canada, its damages evidence must be accepted.

It also wrote that, because a NAFTA Arbitral Tribunal cannot order future recourse to other NAFTA Tribunals, its damages evidence must be accepted.

You can see on the next slide the Claimant also argued its damages evidence must be accepted because the NAFTA limitation period will prevent future claims. The Claimant, thus, conceded that it needed to prove all of its damages back then.

PRESIDENT GREENWOOD: Mr. Douglas, that's not quite what this passage says. I think it's important not to oversell the quotations. Now, it says, "Further, the NAFTA provides for three-year statute of limitations which may well prevent Claimants from

bringing future claims." There's a big difference between something that may well prevent you from doing something and something that will prevent you from doing something.

MR. DOUGLAS: You're right. They were careful in highlighting this.

I would argue, though, that all of these statements suggest, Judge Greenwood, that the Claimant knew back then that it needed to prove its full damages case, and it gave the Mobil and Murphy Tribunal an ultimatum: Award us our damages under our principles and our variables under our model and under our evidence because we can't come back.

But those weren't the Claimants' only two options. There was a third option: Provide corroborating evidence or an alternative damages model. It had three damages submissions before the October 2010 Hearing, and, thus, three chances to better substantiate its claim. It was the Claimants' choice not to do this, and it can hardly be surprised now that the NAFTA and international law bar its new claim for a second chance at proving what it failed

to prove the first time.

So, after significant pleadings, expert reports, and witness statements and a full hearing, the Mobil and Murphy Tribunal released its Decision on May 22nd, 2012. Let's turn to a few key findings by the Tribunal in that Decision.

First, the Tribunal unequivocally agreed that the Claimants' damages case was fully admissible and that it had jurisdiction to award the Claimant the future damages it sought.

Canada had made the argument to the contrary, as we talked a bit about before, and this is contrary to Mr. Rosen's damages model that the Tribunal lacked jurisdiction to hear a claim for damages not yet incurred because the language of Article 1116 is in the past tense. The Tribunal disagreed with Canada and expressly assumed jurisdiction and admissibility over the Claimants' entire damages case, and my colleague, Mr. Luz, will come back to this to discuss it under res judicata.

Second, the Mobil and Murphy Tribunal found that the Claimant had failed to prove the damages it

claimed. Thus, the Tribunal disagreed with the Claimant who argued that its damages case can be an uncertain estimate. More is required, and the Claimants' damages model and evidence presented failed to satisfy the requisite standard.

The third thing the Tribunal did was create a new damages phase to provide the Claimant with further opportunity to prove its losses.

The new damages phase was not part of the procedural schedule; and, while it was intended to be limited to one submission from each party, the Claimants' request to respond to Canada's submission was granted, and its request for another full damages hearing was also granted. Ultimately, the Claimant was awarded 13 million in damages.

And, finally, the Tribunal made the statement that the Guidelines constitute a continuing breach and that the Claimant can file new NAFTA claims. To put it mildly, this was a very surprising sentence to read. Whether or not the Guidelines constitute a continuing breach is not something that was really addressed by the disputing parties. As I mentioned

before, the Claimant never referred to the Guidelines this way until very late in the proceedings and characterized the Guidelines as a one-off breach up until that point.

In fact, even the Tribunal Decision states that it thinks the Claimants appear to characterize the situation as a continuing breach, and if a discussion of whether the Guidelines are a continuing breach was tenuous, at best, whether the Claimant is permitted to file additional NAFTA claims was certainly not discussed once.

As we move into a discussion of the NAFTA limitation period and application of res judicata, there are ten salient facts I would like you to keep in mind as we move forward:

First, the Claimant knew back then that the Guidelines would apply for the duration of the production lives of the Hibernia and Terra Nova Projects;

Second, the Claimant knew back then of the alleged damages it claims in this arbitration between 2012 and 2015;

Third, the Claimant knew that the Mobil and Murphy Tribunal had no power to enjoin Canada or order specific performance;

Fourth, the Claimant knew that the Mobil and Murphy Tribunal could not order future NAFTA tribunals to award damages;

Fifth, the Claimant knew that NAFTA's limitation period may prevent future claims;

Sixth, the Claimant conceded that it needed to prove its entire damages claim in the Mobil and Murphy Arbitration;

Seventh, despite knowing all of these facts, the Claimant, nonetheless, provided the Mobil and Murphy Tribunal with a single damages model and insufficient corroborating evidence;

Eighth, the Claimant was given a fair opportunity to be heard, and its damages case was fully heard by the Mobil and Murphy Tribunal;

And, ninth, the Mobil and Murphy Tribunal assumed jurisdiction and admissibility over the same breach and same losses at issue in this arbitration;

And, tenth, the Mobil and Murphy Tribunal

held that the Claimant failed to prove--pardon me, provide sufficient evidence to prove its damages case.

Now, unless there are any questions of what transpired on the issue of quantum in the Mobil and Murphy Arbitration, I can move on to the NAFTA limitation period.

PRESIDENT GREENWOOD: I am just wondering whether it would be sensible for us to take a tea break at this point actually. We have been going for an hour, nearly an hour and a half.

MR. DOUGLAS: It's always sensible for a tea break.

PRESIDENT GREENWOOD: Yes, you would be well at home in my country if you take that view.

MR. DOUGLAS: Absolutely.

PRESIDENT GREENWOOD: All right. Let's stop at this point because I think, once we get into the limitation period argument, there's going to be a fair amount of dialogue, so you will need to strengthen yourself with a cafe latte or something.

MR. DOUGLAS: Sounds good.

PRESIDENT GREENWOOD: All right. It's 5 to 4:00. Let's come back here at 10 past, and then we will continue with the argument.

MR. DOUGLAS: Thank you.

I'm sorry, it's 10 to. Let's come back at 5 minutes past. I haven't adjusted my watch properly.

(Brief recess.)

PRESIDENT GREENWOOD: Please continue.

MR. DOUGLAS: Well, thank you very much.

After a lovely tea, we are now all refreshed, I hope, and ready to discuss the NAFTA's limitation period.

If you like, I can start first. I believe I will begin my presentation with an interpretation of the NAFTA, limitation period under the Vienna Convention on the Law of Treaties, and then the role of the Mobil and Murphy Decision on Liability and the interpretation of that limitation period under the Vienna Convention, and how characterizing a breach as "continuing" does not toll the limitation period, that the Claimant's arguments concerning the Board's letter of July 9, 2012, are unfounded, and that the

application of the limitation period is a question of jurisdiction and not admissibility.

After this presentation, I will turn the podium back to my colleague Mr. Luz, who will discuss res judicata. But you will see me again when I come back and discuss some issues relating to quantum.

And, of course, if you want to discuss any questions at any point in time, this morning we have gone a little bit over our time, based on our schedule. So, I might push on a little bit, and if you wanted to have or engage in a discussion on any points rather than the presentation, that is absolutely fine, happy to do so.

But the starting point of any exercise must be the words of the text that require interpretation. You might not know it from this case, but an ordinary reading of NAFTA Articles 1116(2) and 1117(2) under the Vienna Convention is a straightforward task.

The limitation period provides that an investor cannot file a claim under Section B of the NAFTA--or NAFTA Chapter Eleven, rather, if more than three years have elapsed from the date of requisite

knowledge. In this case, the Claimant filed its claim under Section B on January 15, 2015. The limitation period cut-off date is thus January 15, 2012. And this is not in dispute between the parties.

From there, the Tribunal in Spence explained the next steps well. Although that dispute was under the CAFTADR Treaty, the limitation period language is identical to that of the NAFTA. The limitation period concerns the date on which the Claimant first acquired actual or constructive knowledge of breach and loss, and this requires the identification of a specific date on which knowledge was first acquired, and this Tribunal's task under the NAFTA limitation period is to determine that specific date.

And this approach to NAFTA was confirmed just last month by the United States in the Resolute Case, where they stated that knowledge under the limitation period happens on a specific date and cannot first be acquired repeatedly as that does not comport with the ordinary meaning of the text.

And the context surrounding the limitation

period supports this view. A comparison of Articles 1116(2) and 1117(2) with other timing provisions of the NAFTA demonstrates its very specific meaning. Generally, NAFTA Parties inserted temporal conditions with articles such as "within," "at least," or "no later than." And no other article in NAFTA adopts the formula in Articles 1116(2) or 1117(2) of starting time from a specific date when the Claimant first acquires knowledge. The formula is thus a precise one, which was the deliberate drafting decision by the NAFTA Parties.

And this interpretation of the limitation period is also consistent with the listed objectives of the NAFTA, which include creating effective procedures for the resolution of disputes. An interpretation that would allow the Claimant to file NAFTA claims at their discretion through to the end of the lives of the Hibernia and Terra Nova Projects cannot be said to comport with this NAFTA objective.

For these reasons, an ordinary reading of the limitation period mandates the identification of a specific date on which the Claimant was first--pardon

me, on which knowledge was first acquired by an investor. And once that date is determined, it must then be analyzed against the limitation period cut-off date, which in this case is January 15, 2012.

Now, I would like to discuss the role of the Decision on the interpretation under the Vienna Convention of the Law of Treaties, and I would like you to assume for a moment, if you could, that the first arbitration did not happen, that Mobil filed a claim, as they do in this case, on January 12, 2015--pardon me, January 15, 2015, alleging that the Guidelines adopted in 2004 are a continuing breach of the NAFTA and violate the NAFTA, and Canada is required to pay damages. Would we really have a difficult time dismissing that claim under the limitation period? I sincerely doubt we would.

The Claimant argues that the interpretation of the limitation period cannot be disassociated from the Decision on Liability, but it fails to explain how that Decision affects the interpretation under the Vienna Convention.

Now, this does not mean that the Decision is

irrelevant. To the contrary, the Decision confirms the specific date on which the Claimant first acquired knowledge of the alleged breach and loss.

It was the Claimant that put its knowledge at issue in the Mobil/Murphy Arbitration, and it stated unequivocally that it acquired knowledge of breach and loss when the Guidelines were adopted in 2004. With respect to all of its claims for future losses, it stated, and I quote, "these are actionable now and already involve Canada in NAFTA violations."

It was precisely for this reason the Claimant sought $27 million in damages from Canada for the 2012-2015 period. Moreover, the Tribunal agreed that the claim for $27 million was actionable under the NAFTA back then and it assumed jurisdiction and admissibility over those claims.

It is simply not conceivable that this Tribunal could exercise jurisdiction over the same breach and the same loss at issue in the Mobil and Murphy Arbitration and the current claim not be barred by the limitation period.

Now, the Claimant tries to get around these

facts when it argues that the Guidelines are a continuing breach and that continuing breaches toll the NAFTA's limitation period.

Characterizing a NAFTA breach as "continuing" does not toll the limitation period. The general problem with such an argument is that it takes the focal point off the investor's knowledge and puts it on a characterization of the breach. And, as a Respondent State, we've seen this argument time and time again, that omissions on behalf of the State constitute continuing breaches; that domestic court cases toll the limitation period; that the regular application of legislation that has been on the books for years can nonetheless be challenged because it is continuing. And, like any limitation period in domestic law or otherwise, the purpose is to specify a specific date on which the clock starts ticking. Shifting the focus to a characterization of the breach pushes that clock aside.

There now exists an overwhelming amount of jurisprudence that has rejected this approach. The Claimant argues that this case is sui generis, which

is false. I can understand why they would want to make this argument--they would like you to review this case in the absence of this jurisdiction. But make no mistake, a ruling that a continuing breach tolls the limitation period would run counter to a body of case law marching in the opposite direction, and let's look at some of those cases.

In Grand River, the Claimant challenged a Master Settlement Agreement that was subsequently implemented by legislation through numerous States. The MSA was implemented prior to the time bar cut-off date, but Grand River argued that the limitation period renewed with each one of the implementing legislations. The Grand River Tribunal rejected this principle, holding that adopting the position would erode the limitation period.

It is difficult to distinguish Grand River from the facts of this case. Like the MSA in that case, the Guidelines were adopted only once, in 2004, and like the implementing pieces of legislation enforcing the MSA, the Guidelines are enforced against Hibernia and Terra Nova on an annual basis.

Moreover, the Claimant argues in this case that such non-conforming legislation is the "paradigm example" of a continuing breach. And yet, despite all of the various pieces of legislation at issue in Grand River and all the arguments presented, the Tribunal did not toll the limitation period as a result of the alleged continuing breaches.

Similarly, the Spence Case, which again was under the CAFTA-DR but has identical language to that of the NAFTA, that case concerned multiple allegations with respect to several sets of properties. The Claimant in that case--and there were several--argued that properties were indirectly expropriated and suffered due-process violations. The breaches alleged by the Claimant spanned both the pre-time bar period and the post-time bar period.

When it came to assessing the claim that continuing courses of conduct can renew the limitation period, the Tribunal in that case could not have been more clear. This is not permissible under the ordinary reading of the text. The Tribunal in that case explicitly rejected the UPS Decision,

which the Claimant relies on in this case.

Ansung involved a case under the China-Korea BIT which has near-identical language to that of the limitation period under NAFTA, and this was an interesting case because it involved a claim that the--the claim was manifestly without legal merit under ICSID Arbitration Rule 41(5). And, in that context, the Tribunal had to assume that all of the facts as pled were true, including the claim that the breach was continuing. And, even assuming that were true in the case, the Tribunal expressly rejected the logic of UPS and held that continuing breaches do not change when an investor first acquires knowledge.

There are other cases that that Canada refers to in its pleadings, but I won't refer to or discuss now, such as the Apotex and Corona Materials and Mondev. All of those cases, however, concerned allegations of continuing breaches, and that continuing breaches toll the limitation period. And each one rejected the proposition.

The Claimant's assertion that this case is sui generis is therefore false. Numerous cases have

considered the relationship between continuing breaches and limitation periods, and the three NAFTA parties have also consistently held this concordant view for at least the past decade.

And you can see on the slide, and we just provide some examples. We tried to fit them all in but we couldn't. For example, the slide doesn't include Canada's position on the matter, which has been aligned with the United States and Mexico since Waste Management in 2005.

And the Claimant argues that this tribunal can summarily dismiss the consistent and concordant views of all three NAFTA Parties. This is an untenable proposal which would render Article 1128 of the NAFTA meaningless. That provision is designed to give the NAFTA Parties governance and control over the operation of the Treaty.

PRESIDENT GREENWOOD: Mr. Douglas, I hesitate to interrupt you because I know your time is--

MR. DOUGLAS: That's quite all right.

PRESIDENT GREENWOOD: But how do you respond to the argument raised by Mr. O'Gorman this morning

that submissions by each of the three NAFTA States, the three NAFTA Parties, the tribunals, whether in case where they are themselves Respondent or in a case where they made submissions under Article 1128, do not amount to subsequent practice which can establish an agreement?

MR. DOUGLAS: We disagree with that proposition.

PRESIDENT GREENWOOD: Could you show us, please, how, within Article 31(3), either subparagraph (a) or subparagraph (b) of the Vienna Convention, you make use of these authorities--this practice, rather; and, secondly, how you get over the argument that, if this is what the Parties thought, why didn't the Free Trade Commission simply adopt a decision to that effect?

MR. DOUGLAS: Yes, absolutely.

And Mr. O'Gorman is right. The FTC notes are binding, but that shouldn't erode the impact of the concordant views of the NAFTA Parties for the past decade, which would be Canada's submission under the Vienna Convention form both a subsequent agreement

and a subsequent practice.

The Vienna Convention doesn't specify the form in which an agreement can be formed. And, in light of the consistent views for the past ten years--and I know, Mr. Rowley, you were on the Merrill Ring case, so some of this will be familiar to you from a decade ago--the views between the Parties have not changed since then.

And, in light of that consistency and uniformity right up until last month in the Resolute Case where the United States and Mexico both confirmed that continuing breaches do not toll the limitation period and also confirmed that the question is one of jurisdiction and not admissibility, it would be our view that that weight forms a subsequent agreement, that doesn't bind this Tribunal. The words of the Vienna Convention are "shall be taken into account." But, in light of that consistency, our view is that that should be given significant weight by this Tribunal.

PRESIDENT GREENWOOD: Are you saying that there is an agreement between the three NAFTA Parties

or that there is concordant practice establishing an agreement? In other words, are you relying on 31(3)(a) or 31(3)(b) of the Vienna Convention?

MR. DOUGLAS: I'm relying on both. In light of the evidence and the weight of the evidence, because the Vienna Convention does not specify how an agreement is to be formed, Canada submits that there is sufficient evidence here to show that there has and is agreement between the NAFTA Parties on this issue. And if there is no agreement, then there is sufficient practice enough for this Tribunal to take these matters into account and give them significant weight when interpreting the NAFTA limitation period.

And, of course, this was confirmed by the Tribunal in Cattlemen, which we discussed this morning--or it was discussed this morning under Paragraph 189, I believe.

Next, I would like to turn to the Claimant's argument with respect to the Board's letter of July 9, 2012. Under this argument, the Claimant suggests that it first acquired the requisite knowledge under the NAFTA limitation period when it

wrote the Board after the Decision on Liability to confirm that the Guidelines would still be applied to the Hibernia and Terra Nova Projects.

The Claimant argues that this is a separate breach of the NAFTA, but it doesn't explain how this is a breach of the NAFTA, and the argument has no credibility.

The Claimant made no mention of this letter in its Request for Arbitration in this case. In fact, as you can see on the slide, the Claimant identifies the adoption of the Guidelines--

Sorry, we're skipping ahead slightly.

Anyways, the slide reproduces the Request for Arbitration, which identifies very clearly that the breach that is alleged and at issue here is the adoption of the Guidelines in 2004, and there is no mention of the July 9, 2012 letter.

The Claimant only suggested for the first time in its Reply Memorial that the letter constitutes a new breach that starts the limitation period anew. This argument, from Canada's perspective, was made only in the hopes of evading

the limitation period which has no credibility.

Moreover, the Claimant has repeatedly acknowledged that it is bound by Canadian law to comply with the Guidelines for the duration of the lives of the Projects. It acknowledged this during the Mobil and Murphy Arbitration, and it acknowledges it in this arbitration. And as my colleague Mr. Luz and I have discussed, it was also abundantly clear to the Claimant that the Mobil and Murphy Tribunal had no power under the NAFTA to award an injunctive relief or specific performance. And consistent with this--

PRESIDENT GREENWOOD: If I might explore that a bit further. Granted, it's common ground--and the Tribunal certainly takes it on board--that the Mobil I Tribunal, like any Chapter Eleven Tribunal, has no jurisdiction to award injunctive relief or specific performance or any remedy of that kind. But, nevertheless, if the Guidelines are contrary to Article 1106, and Canada has conceded that point, can't we do otherwise in the light of the effect of the Mobil Award, then as a matter of general

international law, there is a requirement to repeal them, is there not?

MR. DOUGLAS: It would be our position that the law that governs this matter is the NAFTA, itself. For example . . .

PRESIDENT GREENWOOD: We have to take account of both the terms of NAFTA and general international law, and only two minutes ago you were giving us an interesting argument about the Vienna Convention on the Law of Treaties, ILC Articles on State Responsibility generally considered to be the declaratory of customary international law: A State which is responsible for a breach of a rule of international law has an obligation to bring that breach to an end.

MR. DOUGLAS: But the lex specialis rule that Canada would put forward in this case is that it is only required to pay monetary damages.

For example, in Chapter 20 of the NAFTA--

PRESIDENT GREENWOOD: I'm finding that a little difficult.

MR. DOUGLAS: Well, there are specific

provisions within the NAFTA itself that mandate that the State is required to withdraw an offending measure. When the NAFTA Parties wanted that to be a part of the NAFTA text, it included such provisions explicitly within the text. In NAFTA Chapter Eleven, the NAFTA Parties intentionally omitted that because they want to maintain the ability to regulate. They don't want to be--have their hands tied, if you will--willing to pay damages for offending measures, and allow Claimants and investors to come in and file claims on that basis, but there is nothing that can be read into the text that would require the NAFTA Parties to withdraw an offending measure. That's simply not how the NAFTA was designed, or at least Chapter Eleven, and when it was, they did that specifically such as Chapter 20.

PRESIDENT GREENWOOD: I'm having some difficulty with that because you wouldn't need a specific provision in a treaty to that effect. Treaties don't normally contain specific provisions that, if they're broken, certain consequences follow from that. That's a matter of general international

law, and NAFTA was drafted against the background of general international law.

MR. DOUGLAS: I take reserve on this question, and we will think about it over the course of the week.

PRESIDENT GREENWOOD: Okay.

MR. DOUGLAS: And we'll come up with an answer either during the week or in closing. That way--

ARBITRATOR ROWLEY: When you're doing that--

PRESIDENT GREENWOOD: Can I just finish what I'm saying?

While I say I have difficulty with this, as I tried to make clear this morning, I was having difficulty with several aspects of the Claimant's argument.

MR. DOUGLAS: Oh, that's--

PRESIDENT GREENWOOD: I know you're much happier with the difficulties I have with the Claimant's argument. But I don't want you to get the impression that my mind is made up one way or the other; it certainly is not.

MR. DOUGLAS: No, I would like to provide a fulsome answer to your question. I think we'd like the time to reflect on it a bit more.

ARBITRATOR ROWLEY: And just add to that and have it dealt with it in the same place, the positive obligation in this Treaty, in 1106(1) where no party may (a) impose or (b) enforce any of the following requirements, following requirements being prohibitive requirements. And, as I said a bit earlier, once the Guidelines are found to be prohibited, there is an obligation not to enforce them, and please help us as to whether the decision to enforce them after they have been found to be unlawful constitutes a breach.

MR. DOUGLAS: I'll take that under advisement. Thank you.

ARBITRATOR ROWLEY: And tell us--obviously, it goes without saying, but if it's a breach only after it's been found to be unlawful, it's hard for me to envisage how it can be a continuing breach but rather a separate breach. So, if you could help us on that.

MR. DOUGLAS: Yes, absolutely. I'm happy to contemplate that.

I think, you know from my part at least, I have a conceptual difficulty with the breach at issue being in the first arbitration, the adoption of the Guidelines, and at least with the way the Claimant has presented its case, that is the focal point of what the alleged breach is at issue in this case. I can think about this--sure, I can think about this a little bit more, but in terms of the application of the Reservation, for example, of whether there is some sort of smaller subset of a breach and whether that would raise the question of having to revisit the context of the Reservation, for example.

Well, Canada isn't liable for every enforcement against 1106. It's only found in violation in the context of 1108 which encapsulates the Reservation. So, if there is a different idea or thought at issue, legally thinking, you have to follow the analysis all the way through. So, if there is a different question than the adoption--

ARBITRATOR ROWLEY: Well, yes, but, I mean,

if you bring that up, you are going to have to deal with timing because, as I understood it this morning, Claimant said they had advanced an alternative basis for their claim.

MR. DOUGLAS: Okay. I will contemplate that.

So, given the Claimant knows--and to this point of the July 9 letter, given that the Claimant knows it's bound by Canadian law to comply with the Guidelines for the duration of the lives of the Projects, and given that NAFTA Tribunals can only award monetary relief, and there is nothing in the Decision to suggest or order Canada to do anything otherwise. It would be our position it's not credible that there would be any uncertainty about the future application of the Guidelines to these Projects.

The Claimant may have hoped that the Guidelines would be amended or withdrawn, but "hope" is a much different question than "knowledge" under the limitation period. The question of knowledge is a question of fact, and the facts show conclusively that the Claimant knew that the Guidelines would

apply for the duration of the Projects, regardless of any NAFTA Decision.

If all an investor had to do was write a letter to the Government in order to renew their knowledge, the application of the limitation period would be eroded. Now, the Claimant also argues that if its July 9, 2012, letter argument is rejected, then the Tribunal should accept the Claimant--pardon me, should accept that the Claimant didn't acquire the requisite knowledge of loss until it actually spends under the Guidelines. And this is inconsistent with what it argued in the Mobil and Murphy Arbitration, where it clearly stated it had the requisite knowledge when the Guidelines were promulgated in 2004.

The Claimant's new argument to the contrary has also been rejected by numerous tribunals. For example, Ansung just recently stated: "The limitation period begins to run with an investor's first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage."

This principle has been repeated numerous times by NAFTA-- in the NAFTA context, and I refer you to Paragraph 75 of Canada's Rejoinder where we cite the Awards in Grand River, Mondev, Apotex, Bilcon, and Mesa, just to name a few. Even the Mobil and Murphy Tribunal at Paragraphs 428 and 431 of its Decision confirmed the same understanding.

And the Claimants stated unequivocally in the Mobil and Murphy Arbitration: "The fact that the Claimant will continue to suffer losses as a result of Canada's future application of the Guidelines cannot seriously be in doubt."

It is the fact of knowledge that matters, not the quantum, and the Claimant has already confirmed that it had knowledge well before the limitation period cutoff date.

The final topic I would like to discuss is the question of jurisdiction and admissibility; and, at the outset, it should be noted that whether the limitation period is a question of jurisdiction or admissibility, the outcome is the same. The ordinary meaning of Articles 1116(2) and 1117(2) bars the

progression of this case.

It's Canada's position that an agreement to arbitrate is formed by offer and acceptance. The offer to arbitrate made by the three NAFTA Parties under Chapter Eleven is not absolute. Article 1122 of the NAFTA is titled "Consent to Arbitration," and it states that the NAFTA Parties consent to arbitrate "in accordance with the procedures set out in the Agreement."

Canada's consent to arbitrate is conditioned upon the Claimant's compliance with the procedural requirements of Chapter Eleven, including Articles 1116(2) and 1117(2).

And this was well understood by the Claimant in the Mobil and Murphy Arbitration, who stated explicitly that the limitation period goes to the temporal jurisdiction of the Tribunal.

In its Request for Arbitration in this case, under the heading "Respondent's Consent," the Claimant states it complied with the temporal requirements of Articles 1119 and 1120(1). 1119 is the 90 days between the NOA and the Request for

Arbitration, and 1120(1) is the six-month cooling-off period. The Claimant, thus, agrees that it must comply with these timing provisions in order to establish Canada's consent to arbitrate. But contrary to its position in Mobil and Murphy Arbitration, it now argues that Articles 1116(2) and 1117(2) are something different. But there is no basis upon which to treat these provisions as something different. And this has been confirmed by the Tribunals in Methanex, Bilcon, Feldman, Grand River, and Apotex as Canada explains at Paragraphs 41 to 55 of its Rejoinder.

And, lastly, all three NAFTA Parties have also repeatedly confirmed that consent to arbitration under the NAFTA is conditioned by, among other things, compliance with the limitation period, and this has been a consistent view of all three NAFTA Parties for quite some time. In fact, just last month, as I mentioned, both the United States and Mexico confirmed their understanding that the limitation period is a question of jurisdiction.

The matter has, thus, been conclusively

determined by all three NAFTA Parties and by NAFTA Tribunals, and the Claimant cannot reopen a discussion that has already been closed.

For these reasons, the application of limitation period is a question that goes to the jurisdiction of this Tribunal.

Unless the Tribunal has any further questions, I'm happy to turn the podium back to my colleague, Mr. Luz, to discuss the issue of res judicata.

PRESIDENT GREENWOOD: I don't have any further questions at this stage.

Dr. Griffith?

ARBITRATOR GRIFFITH: No.

PRESIDENT GREENWOOD: Mr. Rowley? Any questions?

ARBITRATOR ROWLEY: No.

MR. DOUGLAS: Thank you very much.

PRESIDENT GREENWOOD: Thank you, Mr. Douglas.

MR. LUZ: Good afternoon again.

And I'm happy to be back to discuss the issue that, I think, right from the very moment we started

this morning, this Tribunal is keenly interested in, which is, what was the Majority talking about in various aspects of its Decision, starting at Page 180 of the Decision, Paragraph 414.

And so, Mr. President, Members of the Tribunal, I'm going to do something that is going to drive my colleagues crazy as they are attempting to keep up with the slides, but I'm going to change something, and I'm going to go straight to the argument. And so, there will be some time to come back to the slides, but I'm going to reverse. What I was planning on doing was to talk about the general law with respect to res judicata, and I'm going to go straight to the Decision because I think that's really where the whole case is going to turn.

Then, after I do that and as I walk through that Decision, then we can go back and spend a little bit of time on the case law to show that Canada is the only Party that has actually shown that, in international law, this claim cannot go forward. It's the Claimant that has not cited any international law that suggests that this claim is

admissible before this Tribunal.

So, what I would propose to the Tribunal is that I won't focus on the slides just yet but, rather, the Decision, and we can even do the Decision in the old-fashioned way, just in hard-copy papers, if you have it, at whatever copy that you have. Perhaps it's not as well-thumbed as mine is, but I'm sure--

PRESIDENT GREENWOOD: It's getting there.

MR. LUZ: It's getting there, and it will be by the end of the proceedings.

Before I do, I will just recap what it is that Canada's core submission is on this point.

Now, it's uncontroverted between the Parties--because the Claimant has already admitted that it is seeking precisely the same relief in this arbitration as it did before--that the causes of action are identical.

So, our core submission is this: The Mobil/Murphy Tribunal decided that it had jurisdiction over Mobil's entire claim for damages, including the period before this Tribunal, 2012 to

2015, and that the claim was admissible.

The evidence produced by the Claimant in support of quantification of its future damages was examined extensively on the merits. Both sides had full and fair opportunity to plead their case, but it was the Claimants' burden to prove quantification.

After extensive submissions, the Tribunal found and came to the conclusion that the Claimant simply did not reach its burden of proof to a standard of reasonable certainty. That finding has res judicata effect as a matter of international law. It is a substantive Decision on the merits that extinguishes the claim forever.

Now, the Claimant tries to escape this by simply referring to the word "ripe," and I believe the Tribunal had--I don't recall who specifically asked--perhaps Mr. Rowley said specifically "what does that word mean?"--but I'm sure that is the question, what it means. And it's very clear, as I'm going to walk through the Decision itself. What that means is unproven to a reasonable certainty.

The last thing I'm going to cover is, what do

we make of Paragraph 478 of the Decision and that single sentence at the very end that says they can claim for other losses in another NAFTA Tribunal. That, in Canada's respectful submission, has no legal consequence for this Tribunal.

So, let's just go straight to the Decision. I will ask you to turn to Page 180 of the Decision, starting at Paragraph 414 under the heading "Damages."

Again, certain paragraphs are in Canada's slide PowerPoint presentation, but I think this would be easier for the Tribunal to follow along.

It says that: "The Claimants seek compensation for incremental expenditures that will arise as a result of the introduction of the 2004 Guidelines and their application for the period from 2004 to 2036. The Parties do not dispute that the claim concerns purely monetary damages, which is permissible under NAFTA 1135. The dispute raises a number of preliminary issues associated with damages that will be addressed before turning to the substance of the damages claimed."

So, right there in that paragraph, the Tribunal says that it intends to deal with preliminary issues first and then go to the substance, the merits of the claim. Then the next heading is "Jurisdiction Under Article 1116(1)."

Now, there has been already some debate as to what the arguments of the Parties were, so I don't propose to spend much time going back and forth on what this is, and let's just go straight to what the Tribunal actually found, which is on Page 184, Paragraph 427, under the heading "A Finding."

This is what the Majority said: "For jurisdictional purposes, Article 1116(1) requires, inter alia, that the Investor must have incurred loss or damage by reason of or arising out of that breach of Chapter Eleven of the NAFTA. A breach giving rise to future and prospective damages may, in general terms, fall within Article 1116(1)."

Then we saw this, the remainder of Paragraph 427 later, where it says there is nothing in the language of Article 1116(1) that convinces us that the provision is directed only to damages that

occurred in the past and does not extend, in principle, to damages that are the result of a breach which began in the past, the adoption of the 2004 Guidelines, and continues the implementation resulting in the incurring of losses which crystallized, i.e., which become quantifiable, and must be paid sometime in the future, hereinafter future damages.

Then, skipping ahead, if I go through the entire--I trust the Tribunal will be able to read everything in between, but if there are any questions in between on something that I've skipped over, please don't hesitate to ask.

PRESIDENT GREENWOOD: I think you can assume we've already read the whole of this.

MR. LUZ: Yes. So, I just want to go straight to Paragraph 429 because, in Canada's respectful submission, the Tribunal really not need read past this. Everything that we'll read after this only reinforces the strengths of Canada's argument.

It says: "The present case, the introduction

of the 2004 Guidelines triggered an obligation to make expenditures that would continue over the life of the Projects, amounts to a continuing breach resulting in ongoing damage to the Claimant's interest in the investment. Thus, 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. It does not determine how compensation for future damage is to be assessed or whether it's appropriate for this Tribunal 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."

Now, Mr. President and Members of the Tribunal, this is the key paragraph of the Decision which puts an end to the claim. In that paragraph, the Majority says explicitly that the Guidelines triggered an obligation to make expenditures that will continue for the lifetime of the Projects. That

gave the Tribunal the power and authority to rule on the entire damages claim.

So, the Tribunal has accepted at that point that the Claimant has incurred loss or damage now for expenditures it will make in the future. That says--and that determined--that, as the Majority says, determines whether a claim for damages is admissible.

Then they make the distinction, even though that determines and puts aside jurisdiction and admissibility, determining how to quantify those future damages is a different issue. There is no other way to read this; how you calculate those future damages is necessarily a question on the merits. It is already determined it has jurisdiction, and it's an admissible claim for the purposes of hearing it and making them competent to do it. So, everything that comes after this is merits.

And that is really important because, as we're going to see, that helps clarify what the Majority meant by the word "ripe." It wasn't a word

of admissibility. It was a word of evidentiary--of evidentiary nature. It's a synonym for unproven to reasonable certainty, and that is what Canada's argument is: A finding that the Party has not carried its burden of proof is a determination. It is not entitled to those damages and has res judicata effect.

PRESIDENT GREENWOOD: Mr. Luz, you would accept, wouldn't you, that a Tribunal finding that it has jurisdiction over a particular head of claim--and that's common ground--I think that's what this paragraph says.

And, secondly, it's not common ground but is certainly arguable, given the language, a finding that that claim is, not only within its jurisdiction, but also admissible. That, in itself, does not create a res judicata as regards to the merits. There has to be a decision of the merits point that's being put to it.

That's why I referred this morning to the Nicaragua and Colombia judgment in the International Court of Justice because I think it's very clear in

that case that it's a certain Decision on the casting vote of the President. But what did the Court--what did the Tribunal here decide on the merits?

ARBITRATOR ROWLEY: Does he accept your proposition?

PRESIDENT GREENWOOD: Do you accept my proposition, first?

MR. LUZ: Yes, Mr. President. Yes, that's right.

What happens next, once a tribunal has decided that it has jurisdiction and admissibility, the next thing is to look at the merits and to make a decision, which is what I'm going to go to now. We're going to go through that process to show that this statement that it is not yet ripe for determination is a decision and is a determination on the merits. It simply means they did not carry the burden of proof. It's not a statement with respect to jurisdiction and admissibility.

ARBITRATOR ROWLEY: For clarity, I understand Canada to be agreeing that there must be a decision on the merits on quantification before there is res

judicata.

MR. LUZ: I don't think I would--the characterization, Mr. Rowley, of the question, I think, would go further than what Canada's position is. Our position is, once a tribunal has accepted jurisdiction and accepted that the claim is admissible, it is bound to make a determination on the merits. If a tribunal is equivocal about it, you simply have to look to see that there is no other--there is no such thing as non liquet. They make a decision, and if it is unproven, that is a decision on the merits.

We would not disagree with the proposition that a rejection on the basis of admissibility--of jurisdiction or admissibility necessarily has res judicata effects, but for our purposes, that's not really relevant, and that's why Canada would suggest that the Claimant's reliance on a case like Waste Management, for example, is irrelevant here. That was a rejection on the basis of jurisdiction. That did not prevent the subsequent Tribunal from hearing the merits.

But I think this will become clearer as we go through the Decision itself, and I should say--

ARBITRATOR ROWLEY: It may not. Let me just give you one other question.

MR. LUZ: Please.

ARBITRATOR ROWLEY: Let's assume a tribunal says yes, we have jurisdiction and the claim is admissible and it's for future damages, and we are now going to consider that; and then, after considering it, they say, "That's a damn complicated question, and we're just not going to make a determination on that. Another tribunal can do it."

What do we make of that kind of conclusion?

MR. LUZ: Canada's submission is that a NAFTA Party--a NAFTA tribunal cannot simply do that.

Under the NAFTA, a NAFTA tribunal is bound to decide the issues in accordance with international law. Under the ICSID Rules, a tribunal is bound to decide the issues. And once the--

ARBITRATOR ROWLEY: I'm sorry, let's accept that a tribunal is bound to exercise its jurisdiction. But if it declines to do so, where

does that leave us with respect to res judicata, if that is the case?

MR. LUZ: Well, I believe, Mr. Rowley, you brought up--one example that I can use to respond to that question is, if the Tribunal refused to issue--exercise its jurisdiction through--at least in the ICSID context if an annulment committee sends it back for a determination, then that might be one way of dealing with it.

But, in this case, the--and the next--the following steps--and I think the question really just comes down to, what does "not yet ripe" mean? As I'm going to go through and show, that is not a rejection in terms of admissibility. It simply means unproven to a standard of reasonable certainty.

PRESIDENT GREENWOOD: It may be the case that, if a tribunal has jurisdiction and the claim before it is admissible, then it should rule on the merits.

MR. LUZ: Yes.

PRESIDENT GREENWOOD: But res judicata--my Latin is not good enough to render this as a Latin

tag, but res judicata means the thing which has been decided. It doesn't mean the thing which you ought to have decided in the previous case.

That's why I keep coming back to the ICJ's case in Nicaragua and Colombia because the facts there are in many ways quite similar to what you have here. I say the "facts." The factual context is totally different, but the way in which the first case came before the ICJ and the way in which it dealt--the way in which it dealt with the res judicata argument four years later is really quite strikingly similar to what you have here.

MR. LUZ: Mr. President, I have to apologize for the collapse of my poker face this morning when you mentioned that case because that, obviously, is one Canada will put into the record and submit as an exhibit because it does demonstrate the difficulty of going back and reading, trying to read into the minds of a previous Decision. But in Canada's submission, it's much easier in this case because we know exactly what happened. The next step was that the Tribunal went through the merits. Everything subsequent to

Paragraph 429 or 430 really demonstrates that what happened was a view of the evidence on the merits, and the conclusion at the end is that the Claimants failed to carry their burden of proof to reasonable certainty.

So, that's where you start off right afterwards, is on Paragraph 185--sorry, Page 185, Paragraph 431: "Proof of damages incurred."

So, it says here that: "The issue of damages of whether the damages are incurred so as to allow the Tribunal to exercise jurisdiction under 1116(1) and grant compensation is different from whether the amount of damages can be established with sufficient certainty to be compensated. We now turn to the legal standards that apply to such assessment."

So, again, that indicates very clearly that the Tribunal has turned its mind past jurisdiction and admissibility to the question of whether the--and I quote--"whether the amount of damages can be established with sufficient certainty to be compensated." That is, of course, a legal question of evidence, merits question of evidence.

So, what's the legal standard to be met? As we saw before, at Paragraph 439--we skipped ahead under Majority's finding on page 188--"the Majority shall apply this standard of reasonable certainty to determine whether the Claimants have established their case with respect to the amount of damages incurred as a result of the 2004 Guidelines."

Right after that, I think, is important, and it shows we're not hiding from anything here because this is an important statement that the Tribunal had some questions on earlier. It says: "In addition, for the purposes of determining the quantum of damages, the Majority will consider any loss which is incurred, i.e., which is actual, as of the date of the Award."

Now, that is where the possibility of or the failure of the Claimants to put forward a different kind of damages model is important because, if the Claimants have tried to put forward a different kind of damages model, that kind of damages model, such as the haircut on the price that an investor would pay the day after the Guidelines--I brought that up

earlier--that's the kind of loss that is incurred, i.e., as of the date of the Award. That would be compensable under the Tribunal's logic, but the Claimants didn't put that kind of argument forward.

So, as in any international tribunal or court, once you've set out the legal standard that a claimant has to meet, then you go on to the evidence. And, coincidentally, on Page 189, Subsection C, is heading "Evidence of Damages Presented." And Paragraph 449 just establishes that they broke up the damages claim into various periods.

I would just ask the Tribunal to just skip ahead to--because, again, I know the Tribunal will read this. So, let's just skip right ahead to the future losses issue at Paragraph 450, Page 191.

So, Paragraph 450, it says: "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. The Claimants rely exclusively on estimates based on a number of variables, which, in the Claimant's view, give reasonable certainly. In so doing, the

Claimants estimated their incremental spending to be," and then it sets it out for the time periods for Hibernia and Terra Nova.

So, again, this is important: The Majority recognizes that the Claimant is basing its damages claim exclusively on one model that attempts to calculate all the way down the road what their expenditures are going to be.

So, it's important to keep in mind that, every time the Tribunal sees the word "expenditure" and whether or not it's an expenditure, that is a reaction based solely on the way Claimants tried to quantify their damages claim. It was an expenditure-based model. That was the Claimant's option to put forward that kind of model.

That's what it's stuck with.

Then, of course, if we skip ahead a little bit to 452, it emphasizes how extensive the evidence was, and for the next few pages, the Majority goes through all the variables: Oil revenue, production, ordinary course, StatsCan, and so on and so forth. So, there was full and fair opportunity to argue it.

Then we get to the Majority's finding on Page 196. And before I get to the finding with respect to the future damages claim, again, I want to turn to Paragraph 469 because the Tribunal--the Tribunal says there, "We now turn to the critical issue of whether there is actual loss in this case, which is relevant to all damages. As indicated in Paragraph 440"--and I will just skip right back--I should have asked you to put your thumb on Paragraph 440, but that was the paragraph that said "for the purposes of determining the quantum of damages, the Majority will consider any loss which is incurred as of the date of the Award."

So, back to 469, it's the same thing. Why are they doing this? It is for the purposes of determining whether any compensation is due to the Claimants.

So, then, this makes it--this makes the terms "not yet ripe" make a lot more sense. There are two other places that the Tribunal uses the word "ripe" in the Decision that will help clarify what they meant by this.

In Paragraph 470, the Tribunal's dealing with damages for the 2004 to 2008 period. And, at the very bottom, the last sentence of 470, it says: "Until the Claimants submit evidence of actual damage, the claim for the cost of compliance with the 2004 Guidelines for the 2004 to 2008 period is not ripe for compensation by this Tribunal."

Now, clearly, the word "ripe" cannot mean inadmissible. How could it be? These are damages that occurred in the past. So, this clearly means that ripe--"ripe" means that they had not given--the Claimant had not given the Tribunal enough evidence that it needed to determine the quantum. That's an evidence problem. It's not admissibility. It's not jurisdictional.

They used the word "ripe" again with respect to the 2009 period, which is in the past. On Page 199, at the bottom of Paragraph 472, the Majority notes again that it needs more information to quantify damages because "several critical pieces of data with respect to the 'incremental' spending amount are still missing." So, in the last sentence

of Paragraph 472, it says: "Consequently, we are again of the view that the claim for the cost of compliance with the 2004 Guidelines for 2009 period is either not yet ripe for determination by this Tribunal: We don't have the information before us."

So, again, this is not an admissibility issue. They're not using the term "ripe" for admissibility. This is in the past. It just simply means unproven to a reasonable certainly. Now, coincidentally--

PRESIDENT GREENWOOD: When I use the term "ripe," for example, if you picture an imaginary apple here, if I say, "This apple is not ripe," I mean it is not fit to eat now, but I'm also implying that it will be fit to eat at some stage in the future.

MR. LUZ: That is often the way that admissibility is seen--that ripeness is seen as admissibility, but, as we saw earlier, that's not what the Tribunal is doing here because they already had admitted that the claim for the future damages was ripe for determination.

PRESIDENT GREENWOOD: At Paragraph 473, they say the opposite, don't they, for the 2010 to 2036 period: "Although the Majority recognizes that the Claimants are likely to incur a legal liability that would give rise to potentially compensable losses, the claim for such losses is not yet ripe for determination."

Now, the use of the word "yet" is critical there, isn't it? It suggests that it will be ripe for determination, at some stage in the future; whereas, if it was a finding against the Claimants on the failure to discharge the burden of proof, then that's it forever, isn't it?

MR. LUZ: Well, and this is the point that Canada is making: It was a reaction to the type of damages model that the Claimants put forward. "Not yet ripe for determination" is an evidentiary one. They put forward an attempt to quantify all of their expenditures that they would incur many years from now.

And, yes, eventually, the exact quantification will be ripe, but that was an

expenditures-based approach that the Claimant took. They didn't need to take that. They could have presented something that showed an actual decision that--that demonstrated what they had actually incurred in order to activate the claim.

And in Paragraph 431, if we go back to Paragraph 431, they had already decided that you can't--that they have incurred damages for the purposes of activating the claim.

So, there is a determination that it is admissible. How you quantify "not yet ripe for determination" means they weren't able to decide with reasonable certainty based on the evidence that they were given. That is a failure in terms of evidence.

And I should correct that. I don't want to say they were not able to decide. They did make a decision, and the Decision was they were unable to meet their burden of proof.

PRESIDENT GREENWOOD: Well, the fact that you hesitated over the formulation is actually quite telling because I find it--I'm open to persuasion, but at the moment I'm having difficulty seeing how to

read 473, "The claim for such losses is not yet ripe for determination," and earlier in the same paragraph, "We are not yet able to properly assess the Claimant's claim for future damages."

I'm having difficulty seeing how that could be a decision on the merits to rule out the Claimants' case, especially when you then have in 478--I'm sorry, I need my reading glasses for this, but I can't see you if I'm wearing them, if I'm looking at you with them. "Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings."

Those two passages don't seem, to me, to bear the interpretation that we are finding against the Claimants, and that is it. Their case is now a hopeless one. It's extinguished, in effect.

MR. LUZ: Again--sorry, please.

ARBITRATOR ROWLEY: Well I'd just add to that, if you look at the last sentence of 474--and

think of this in regards to your argument that a determination has been made. There has been a finding that Claimants have not proved their damages because they haven't proved them, and there is only one standard.

Well, if you look at the last sentence of 474 and read it in conjunction with the last sentence of 473. 474 says: "The Tribunal has applied the reasonable certainty standard discussed above, which has not led to a conclusion per se, but rather, to a finding that there is too much uncertainty at this stage for the Tribunal to make a determination."

It strikes me that, if you read that in connection with the other sentences that the Chairman has drawn to your attention, it does rather seem to suggest that the Tribunal has said, "It's all too uncertain, we're not going to deal with it." And as I said colloquially earlier, it's a bit like a Tribunal saying, "Well, we have jurisdiction, but it's damned difficult, and we will put it over to some other tribunal."

And if that is the case, if that can be

summarized that way, then is that not a failure to exercise jurisdiction as opposed to exercising jurisdiction and determining something against Claimant?

MR. LUZ: Mr. Rowley, Canada admits that--I should say it is not for this Tribunal to try and read the minds of the Majority. It is to simply see what they did. They went through all the evidence.

And I'll go through it again. After Paragraph 473, when they say we're not yet able, it's "not yet ripe for determination," it's not a reversal on the previous finding that their claim for damages that are going to extend all the way to the life of the Project is not in admissible, it's not taking it outside of the Tribunal's jurisdiction. It's the way that the Claimant presented its argument. They were not able to--they were not able to quantify it to a reasonable certainty standard.

It is--it's a fact that, once the Tribunal has the evidence in front of it, it's an admissible claim. It's jurisdictional. They're bound to render a decision, and if it was a failure to exercise

jurisdiction, then that would be dealt with and set aside, for example, or some other mechanism.

PRESIDENT GREENWOOD: I can understand what you say, that maybe the Tribunal should not have dealt with this case as they appear to have done. Maybe they should have exercised jurisdiction, but res judicata only applies to what the Tribunal did decide, not to what it should have decided.

I agree we're not here to read the minds of the earlier Tribunal, and it's even more difficult in Nicaragua and Colombia because most of us who sat in 2016 also sat in the 2012 phase. But we do have to look at what the Tribunal said in order to establish what it decided. If one looks at the dispositif, there is no rejection of any claim in the dispositif at all. What there is-- is a finding of entitlement to recover for damages already incurred. To understand that, you have to go back to the reasoning in the section you have been very helpfully, if I may say so, taking us through.

But that reasoning suggests that the Tribunal, having found that it had jurisdiction and

maybe having found that the claim was admissible, decided, nevertheless, not to exercise its jurisdiction, and that wouldn't create a res judicata, would it?

MR. LUZ: With respect to a claim--causes of action are the same--if the claim is not rejected for jurisdictional or admissibility purposes, that deals with the claim in its entirety. So, when we look at what the Tribunal did here, and if you look at Paragraphs 474--and I know the Tribunal already looked to this, but what they had said was that there was--they are unable--sorry.

Ultimate undertaking--and this is the middle of Paragraph 474: "Ultimately, after undertaking a critical examination of these variables," i.e., the variables that the Claimants put forward--you will recall that from before, that was what they were looking at--"the Majority considers there is insufficient certainty and too many questions that still remain unanswered to allow it to assess with sufficient certainty the amounts of the damages incurred after the 2004 for the 2010 period." That

is a finding, a determination that you have not carried your burden of proof.

PRESIDENT GREENWOOD: Let me put it to you this way: You have agreed, I think, that, for res judicata, there has to have been a decision on the point. It's not enough that the Parties argued it and requested a decision. The Tribunal has to have accepted that invitation and given a decision.

Am I right in thinking you have accepted that?

MR. LUZ: There has to be--well, in the context of cause-of-action estoppel, the claim has been put forward, and if the triple-identity test of cause of action, that is something. If the Claimants are trying to argue that the difference is the issue decided, then there is some sort of--there is not an ability to say that the particular issue was decided.

But, unless the claim was dismissed on jurisdictional or admissibility grounds, it necessarily is a decision on the merits. That is the ultimate--because a tribunal is bound to make a decision. If it has an admissible claim in front of

it, if it has jurisdiction, it is a decision.

PRESIDENT GREENWOOD: Well, let me put it to you this way: Does the Tribunal make a decision on something if it tells you in its award that it's not deciding this question?

You said it's not our task to enter into the minds of the Tribunal in the Mobil I Arbitration or the minds of the Majority, but surely it's not our task to rewrite their Award, either.

MR. LUZ: I have to think about how that would impact with respect to--it would be a different story if it was a domestic court that had inherent and continuing jurisdiction. It might even be different in the context of the International Court of Justice. But, with the NAFTA Tribunal, it is bound to decide the issues in accordance with international law and the ICSID Convention Rules. That is a decision for the purposes that triggers the res judicata effect.

PRESIDENT GREENWOOD: Because the International Court of Justice likes to think that it also has to decide cases in accordance with

international law.

Can I just follow up with one last question? And I think we better let you move on to the damages issue, after Dr. Griffith has had his say. I would be grateful if, when you come to--when both Parties come to address this question in their Closing Submission, as you're going to clearly have to do, to hear something about whether the distinction between cause-of-action estoppel and issue estoppel is aspects of res judicata, which is very familiar to common-law lawyers, whether that has anyplace in international law. You might find some help from that in--there's a section on res judicata in the Max Planck Encyclopedia of Public International Law, the new edition, and there's also the article by the late Sir Derrick Bowett in the 1959 British Yearbook of International Law, which is, of course, pre-dating all of the Authorities you have looked at.

But I just worry a little bit about whether we're making an assumption that concepts which you cannot even translate the term "issue estoppel" into many languages, as I know from many of my colleagues

on the court.

MR. LUZ: In fact, Judge Greenwood, I just should ask how much time?

PRESIDENT GREENWOOD: Well, strictly speaking, you've got another quarter of an hour, but, I think, as we offered another five minutes or so this morning, we will give you a little bit of leeway.

I should say with both Parties we will read the slides that you didn't come to in the course of Post-Hearing Briefs.

MR. O'GORMAN: Mr. President, we actually did come to all of our slides. But thank you.

PRESIDENT GREENWOOD: It's not half past 5:00. It's a quarter to 6:00. You've got another half an hour. I miscalculated.

(Pause.)

PRESIDENT GREENWOOD: We started again at 2:30, did we not? You are entitled to 3 1/2 hours--yes, you have, in fact, got quite a bit longer to go. In the morning, we had 10:15 to--Ms. Gastrell will work it out and put a piece of paper with

arithmetic in front of me. If I'm having difficulty with this, you can imagine how much fun I'm having with the formula for calculating the R&D expenses.

MR. LUZ: We have half an hour left. Okay.

PRESIDENT GREENWOOD: Carry on and do the best you can.

MR. LUZ: I could take the full hour. This is a fun and interesting topic that we've lived with.

But I believe, Mr. President, we left off asking about public international law. And, in fact, it's the cases that Canada has cited that represent public international law in showing that the res judicata effect of a decision when the claim has already been put before a previous Tribunal extinguishes the claim. And I will get to that in a second, but I don't want to skip over the importance--

ARBITRATOR GRIFFITH: Don't skip over me. Can I ask a question?

MR. LUZ: No, please. Sorry.

ARBITRATOR GRIFFITH: You are still answering the question, or are you about to move on?

MR. LUZ: I will address some of the international law cases shortly, but I am happy to entertain your question right now.

ARBITRATOR GRIFFITH: Could I have just a couple of minutes time on, as it were?

May I pretend that I'm a civil lawyer rather than a common lawyer, and I just look at the orders made rather than the reasoning behind them. If you look at the Decision on Page 206, finding Decision 4 is by Majority of the Tribunal has jurisdiction to consider damages, and then, 5, by Majority, the Claimants are entitled to recover damages.

Do you follow that?

MR. LUZ: Yes.

PRESIDENT GREENWOOD: If you go, then, to the Final Award, page 57, very brief Award--

MR. LUZ: I apologize.

ARBITRATOR GRIFFITH: You know what it says. It's only three paragraphs, but it's quite plain on reading the Final Award that the Award's confined to damages incurred as at the time of the claim.

Now, on that basis, when you're a civil

lawyer looking at this, would you say that the Decision given that was accepted this jurisdiction to entertain a claim to deal with damages running through to 2036, when one looks at the Award itself, the Decision is to pay only damages to the date of the claim.

Do you have to go any further than that?

MR. LUZ: Well, there's actually a perfect explanation for that. If we go back to the Decision, Paragraph 490, in the dispositif, by a majority, the Tribunal has jurisdiction to consider damages in this case pursuant to Article 1116(1) of the NAFTA. What does that mean? Damages in this case. So the Tribunal reaffirms its finding from Paragraph 429 that it has jurisdiction for the entire claim. So it reaffirms that in this.

Now, what happened after this, that they submit evidence of such damages and that the Tribunal finds such evidence persuasive? What happened was that the Tribunal spontaneously gave the Claimants a second opportunity to prove its damages that were referred to earlier, specifically for the 2008-2009

period. So, after having gone through all of the evidence, there was a finding that they had jurisdiction to cover all of it. And then the Tribunal, as you, Dr. Griffith, pointed out, gave them the opportunity, and the damages evidence was reviewed in a second damages phase, and they were only awarded damages for which they were actually able to prove.

The damages, the future damages, had already been dispensed with in the Decision, that they were not--that they had not been proven to that level.

So, the Tribunal had already found that future damages had been incurred, because they had already been incurred, and that's what the Claimant had argued. The Tribunal found they that had the jurisdiction over the entire claim because they had been incurred. The whole process the Majority had gone through was simply how was it quantified. How do you figure out the calculations? How do you add up the numbers and there are different ways that you can do that? The Claimant chose one way. It chose an expenditure-based model. It's not the only way to

do it. But again, it's not strictly relevant because, once the Tribunal decided that they had jurisdiction over the claim to consider damages in this case, which included all the future damages, once they decided that it was admissible, simply saying that it's not yet ripe is a matter of evidence and admissibility.

And I would refer the Tribunal to paragraph--and this is on our slides, and you will see it later on, but the Glamis Gold Tribunal put this well when it referred to 1116(1). It said that the State Parties, the NAFTA Parties, conceived of a ripeness requirement in that the Claimant needs to have incurred loss or damage in order to bring a claim for compensation.

So, the ripeness requirement and the use of the word "ripeness"--oh, there it is, it just suddenly appeared here--that meant that the claim was ripe. It was ripe, and the Tribunal seized jurisdiction over it. They went through all the evidence, and they found, as we saw in the other paragraphs, they simply could not reach the standard

of reasonable certainty.

Now, I will just finish off here for just a moment to emphasize that the ICJ, the International Court of Justice, in the Nicaragua Case, really pointed out that it is the litigant that bears the--that 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 this is the key point: It may not be ruled out as inadmissible in limine on the basis of an anticipated lack of proof.

This just simply goes back to what Canada had said before. In some cases it is hard to prove your damages, your future damages. In other cases it's straightforward, but it doesn't mean the claim is inadmissible.

PRESIDENT GREENWOOD: That's a completely different point in the Military and Paramilitary Activities in Nicaragua from the Nicaragua and Colombian Maritime Boundary Delimitation. Paramilitary activities has nothing to do with res judicata. There was no earlier judgment. It's the

2016 judgment that you need to look at on this point.

MR. LUZ: Mr. President, the only point that Canada was making is that a claim can't simply be rejected on admissibility grounds because it's difficult to prove a fact, and that's what happened, and that's Canada's only point. I'm--

PRESIDENT GREENWOOD: Just to give you the timing.

MR. LUZ: Yes.

PRESIDENT GREENWOOD: This is entirely my fault because when I said at the beginning of today's session it was three-and-a-half hours for each party, I had forgotten to take off the time for coffee and also the time allowed for the Tribunal. It was three hours. Your three hours will come to an end at approximately 5:45.

MR. LUZ: Yes.

PRESIDENT GREENWOOD: I will allow you a little bit of leeway because you have taken a lot of questions, but not very much leeway beyond that.

MR. LUZ: Understood. And, in fact, what I'll do with, I think, because I don't want to short

change my colleague, Mr. Douglas, to talk about our damages case, but--and perhaps what we will do is we'll come back in closing with respect to some of the key international law precedents, Machado, Delgado, the India-EC Bed Linens Case, and a recent decision in Spence. Those are all demonstrative of what happens.

Even if a claimant has been found not to have made out a prima facie case, that if it's the same claim based on the same cause of action, it cannot be heard again, and that is how res judicata operates in international law. And I think the Tribunal will find some of the slides that we do have in the presentation with respect to those old--the Machado, Delgado other claims, that we have put forward international law precedent to show that res judicata is operating in a way that will bar the Claimant from having a second kick at the can.

So we will come back to that in our closing, but given the limited time and how exciting and active this part is, I think what I'll do is defer to my colleague, Mr. Douglas, who can now go through the

damages aspects of this case.

Unless the Tribunal has any other questions, thank you very much.

COURT REPORTER: Could we take a short break?

PRESIDENT GREENWOOD: Yes, of course we can take a short break. That's no problem at all.

Let's stop for ten minutes, and then I will give you 25 minutes when you come back.

(Brief recess.)

PRESIDENT GREENWOOD: Mr. Douglas, just so that you know, I will give you until 6:00. All right, so you've got 25 minutes.

MR. DOUGLAS: You are too kind.

PRESIDENT GREENWOOD: If we ask you a lot of questions, I'm going to let you run a little bit past that.

MR. DOUGLAS: That is just fine and feel free to ask all the questions you want.

(Discussion off the record.)

MR. DOUGLAS: So, let's turn, then, to the issue of quantum.

My presentation today will follow three

parts, and the first part will be relatively quick, but it involves the legal principles on the quantification of damages. As you mentioned, some of those details will be in the slides.

The second aspect will be how the Claimant's approach to damages is flawed in this case, and this will have three headings. So, the first is the Claimant's surplus spending is not compensable. And the second is that the Claimants cannot decide for themselves what is compensable.

And, lastly, that the Claimant's but-for test is skewed in their favor.

And then I will provide a conclusion on the issue of quantum.

So, turning first briefly to the legal principles, as far as damages go, the Claimant in a sense has a straightforward burden to prove, show the actual losses caused by the measure.

First, has the Claimant proven that the 2004 Guidelines caused it the specific losses that it seeks? And, second, if causation has been proven, what is the specific quantum of those damages based

on the standard of reasonable certainty?

And we will come back to these principles in our closing, so I wanted to highlight them now because it will be our submission in closing that their causation element is not established. And even if it is established, the damages the Claimants seeks are--well, the Claimant seeks too much in quantification.

Let us turn, then, to how the Claimant's approach to damages are flawed.

In the Mobil/Murphy Arbitration, the Claimant's method of quantifying damages was settled by their expert Mr. Rosen. As I mentioned before, his starting point was the requirement of the Guidelines from which he then subtracted "ordinary course" spending to get incremental spending and/or the Shortfall. In this arbitration, Mr. Phelan proposes a different model, one that starts not with what the Guidelines required in terms of spending but rather what the Claimant decided to spend.

The Claimant argues that it should be entitled to damages not up to the level that was

required by the Guidelines between 2012 and 2015, but all spending beyond what was required.

There are three reasons why the Claimant should not be entitled to receive its discretionary surplus spending as compensation in this arbitration. The first reason is that the surplus spending, assuming it is incremental is that we don't know whether it is going to be needed to meet future obligations. And, in Terra Nova, this point is acute. In every single year in this arbitration, it met its obligations under the Guidelines entirely with "ordinary course" spending. This is consistent with past years as well, and there is no reason to believe it won't happen in the future, particularly with the field aging, production dropping, and the required spending dropping as a result.

The discretionary surplus spending that it seeks as compensation in this arbitration was entirely unnecessary to meet its obligations.

In the context of Hibernia, the same is true. In 2015, the Claimant met its obligations under the Guidelines entirely with "ordinary course" spending.

It had no need to engage any of the spending that it claims as damages in this period. This evidence casts a shadow over the Claimant's assertion that its surplus "incremental" spending will be needed to meet its future obligations under the Guidelines. We simply do not know.

And this leads to the second reason why their surplus spending should not form the basis of compensation. It does not comport with their obligation to mitigate their damages. And this was explained well by Canada's expert, Mr. Walck, in the first arbitration. He explains that the best way for the Claimant to mitigate its damages is to allow Shortfalls to accrue and meet those Shortfalls with "ordinary course" spending in the future, which might be sufficient. And this is exactly what has transpired at Terra Nova. The Mobil and Murphy Tribunal refused to Award the Claimant any damages at Terra Nova concerning the Shortfall in spending that existed at that time because the Claimant was going to satisfy that Shortfall entirely with "ordinary course" spending.

The Tribunal refused to award the Claimant any Shortfall damages because doing so--it's up here on the slide--would pre-finance the Claimant's future "ordinary course" spending. And the Tribunal's concern in that case turned out to be true. Not only did Terra Nova meet that Shortfall entirely with "ordinary course" spending, but it met all of its 2012 and 2015 obligations under the Guidelines with "ordinary course" spending as well.

The Mobil and Murphy Tribunal didn't award Terra Nova any of its Shortfall because of its future "ordinary course" spending, and this Tribunal should not Award the Claimant any of its surplus spending precisely for the same reason: It was completely unnecessary to meet the obligation.

The third reason that Claimants should not be awarded its discretionary surplus spending is the existence of the Board's fund, which the Claimant can use to satisfy the requirement, and this is written right in the Guidelines. It allows the Claimant to place their obligations into a fund administered by the Board. It is entirely within the Claimant's

control to spend only on "ordinary course" R&D and then place their remaining obligations into that fund.

The Claimant argues, as it did this morning, that the fund doesn't exist. This is simply not true. The Claimant raised the fund at least 30 times in the Mobil and Murphy Arbitration as an option, and the quote on the right-hand slide there is from Mr. Phelan's Witness Statement in this arbitration, and he testifies to the existence of the Board's fund. So, the Board's fund does exist, and, of course, the Claimant doesn't want you to know about it because its existence completely undercuts their argument that they should be entitled to compensation for spending beyond what the Guidelines require.

The Claimant is, however, correct, when it states that it hasn't utilized the Board's fund, it has, instead, preferred a Letter of Credit scheme whereby the Claimant files a Letter of Credit with the Board for any Shortfall amounts under the Guidelines so that it can meet that Shortfall with future spending rather than paying money into the

Board's fund.

And it should be noted that this is a method that was proposed by the Claimant who turns around in this arbitration and claims the costs of Letters of Credit as damages.

Now, the amount is not significant. It's about [redacted], but the fact that the Claimant engages in conduct of its own accord and then turns around and claims it as compensation against Canada in this arbitration really encapsulates their approach to damages.

The Claimant has the option of spending only on "ordinary course" R&D and placing the rest into a fund administered by the Board or filing a Letter of Credit with the Board and allowing it to be drawn down. It's really the same thing.

Now, the Mobil and Murphy Tribunal criticized the Claimant for not utilizing the Board's fund. They stated that doing so would help provide certainty to damages. And rather than taking the Tribunal's advice, the Claimant has elected to spend on R&D. And they haven't just spent; they've spent

millions beyond what the Guidelines require.

It's remarkable that in the year the Claimant filed its Request for Arbitration, it spent [redacted] more than what was required under the Guidelines and then turned around and claimed it as damages in this arbitration and subsequent pleadings.

They didn't need to spend any of this [redacted] surplus amount. At both Hibernia and Terra Nova, they met their obligations entirely with "ordinary course" spending in 2015.

The Claimant has made one thing abundantly clear: It wants to spend on R&D. It doesn't want to use the Board's fund and it doesn't want to have the Board draw on its Letter of Credit. Why? Because spending brings them value. As Mr. Phelan testified in the Mobil and Murphy Arbitration, “it is not good business practice to simply cut a check to the Board.” They would much rather generate value by spending on R&D that is valuable to them as a company.

The critical failure of the Claimant's damages case is, however, that it doesn't account for

any of this mitigation. The Claimant seeks damages as if it had merely written a blank check to the Board. And this is not tenable. You cannot willfully spend beyond what the Guidelines require in order to pursue value-added R&D and then claim damages as if you had merely given that entire amount away.

And this week we will get into the individual R&D expenditures that Claimant has pursued and now claims as damages from Canada.

The second flaw in the Claimant's approach to damages that they are the ones who get to decide what expenditures require compensation without providing supporting evidence. It presents no contemporaneous reports or other analyses but relies entirely on the witness statements by its own employees who have simply decided for themselves which R&D should be paid for by Canada.

The precarious situation by the Claimant's approach was predicted by Professor Sands in the Mobil and Murphy Decision, where he states: "This may be a rare case in which a claimant is given such

a role in contributing in this way to the assessment of the level of damages that it might in future be able to claim."

That is precisely what has transpired here. Illustration of the difficulty imposed by the Claimant's approach is that it alleged some expenditures were incremental in its Memorial and then changed its mind and put them in the "ordinary course" camp in its Reply Memorial. Under its theory of damages, it can simply change its mind and an expenditure can become "ordinary course" or incremental.

Moreover, Mr. O'Gorman stated this morning--and we will see some of these documents during the pre-approval application process under the Guidelines--statements that this type of R&D is valuable to the Claimant. Mr. O'Gorman suggests that these types of statements are necessary in order to have the Projects approved by the Board. And this simply is not the case. There is no requirement in the Guidelines for the Claimant to explain why this R&D is valuable to it as a company. And let me give

you an example because Mr. O'Gorman also raised the divergent ice floes; and, in that application, at Claimant's Exhibit 291, Page 3, the Claimant states: "An impaired--pardon me, an improved understanding of ice drift and pressure dynamics has significant value to ExxonMobil and can be used to further the corporation's future Arctic business needs." That document was signed by Mr. Sampath.

The Claimants are pursuing value-added R&D. It says so in these documents. And then turning around and claiming it as compensation--as damages from Canada in this arbitration, and it's Canada's position that that should not be countenanced.

Moreover, what the Claimant has deemed to be incremental versus "ordinary course" has changed significantly with the passage of time. You can see here on the slide just how much the Claimant's "ordinary course" figures have changed from what was represented during the Mobil and Murphy Arbitration to what has, in fact, happened, and the difference is staggering.

Without supporting evidence to support its

claims, the Claimant's own assessment of what is "ordinary course" and what is incremental cannot be trusted. You must look to the documents.

Moreover, as you can see from the chart, the Claimant's "ordinary course" spending has, in fact, been increasing during the Production Phase of both the Hibernia and Terra Nova Projects.

This runs counter to what the Claimant alleged in the Mobil and Murphy Arbitration, that the R&D needs of the Projects decreased during the Production Phase.

The last point I would like to discuss on the issue of quantum is how the Claimant skews the but-for test in its favor.

First, the Claimant argues that but for the Guidelines, they only have to spend based on the needs of the Hibernia and Terra Nova Projects. They argue that nothing more than spending based on Project needs is required under the Accord Acts or their Benefits Plans.

My colleague, Mr. Luz, this morning walked through some of the history of the Accord Acts and

why that cannot be the case. The economic development in the Province was essential to that Accord.

And the Claimant's argument was rejected resoundingly by the Canadian courts. For example, the Newfoundland Court Trial Division stated unequivocally that, under the Accord Acts, the Claimant has a statutory obligation to spend more than just on what they need for the Projects, and this was affirmed by the Court of Appeal, which Canada explains at Paragraphs 67 to 71 of its Counter-Memorial.

Thus, absent the Guidelines, the Accord Acts still exist and there still is an obligation on the Claimants to spend beyond Project needs.

And we will see later this week that many of the expenditures for which the Claimant seeks as damages in this arbitration are fully consistent with the obligations they agreed to undertake prior to investing in the Province of Newfoundland and Labrador.

PRESIDENT GREENWOOD: Mr. Douglas, isn't this

a point you fought and lost in the Mobil I Case, that under the Accord Acts before the Guidelines there was a level of expenditure that was required?

MR. DOUGLAS: I think that is an assessment that needs to be undertaken per Project, meaning per R&D Project, and the set of R&D projects in this case are different than the ones that were at issue in the Mobil and Murphy Arbitration, and that there are some here that are still consistent with some of those obligations they undertook.

PRESIDENT GREENWOOD: Well, I can see that the question of whether this is required by the Guideline or would be "ordinary course" spending is something that has to be assessed case by case.

MR. DOUGLAS: Um-hmm.

PRESIDENT GREENWOOD: And also that if--and I will let you comment on that--the benefits to ExxonMobil is a factor to be taken into account in the compensation which, of course, was an argument rejected in Mobil I, but there is a quite different question, is there not, about whether the Accord Acts independently of the Guidelines required a certain

level of spending? I think that was a case that was put to the Mobil I Tribunal as the basis for saying that the expenditure requirement was covered by the Reservation, and it was rejected, was it not?

MR. DOUGLAS: My understanding of the argument we put forward is that there were some expenditures at issue in the Mobil and Murphy Case that were consistent with some of the language of the Benefits Plans and some of the commitments the Claimant had made at the time of making its investment in these projects. And I think we can find the same today with different sets of expenditures at issue here.

So, there is a bit of a frustration because the Guidelines were found outside of the Reservation primarily because the spending levels were too high, but absent the Guidelines, there still exists a requirement to expend on Research and Development in the Province. So, what is that level in there? It's not quite sure, but I think the expenditures we'll review over the course of the week that are different from the ones at issue in the Murphy and Mobil

Arbitration will tie into some of those commitments that were made.

PRESIDENT GREENWOOD: Well, perhaps, Mr. Douglas, because my mind is addled at this late stage or too filled with thoughts of res judicata. But I cannot recall. Do you, in your written arguments, show that individual items of expenditures that are claimed would have been required anyway under the Accord Acts?

MR. DOUGLAS: Yes, through our annex and details in some of the individual submissions.

PRESIDENT GREENWOOD: In the Annex, yes, thank you. Okay.

MR. DOUGLAS: The second way the Claimant skews the but-for test in its favor is that it argues that the analysis should be done at the project-level. It's the Claimant's argument that the test is "what would the Hibernia and Terra Nova Projects have done but for the Guidelines?" rather than "what would the Claimant have done but for the Guidelines?" The Claimant argues that it should be compensated for R&D that it would do and that is

beneficial to it as a company, even if--sorry, pardon me, on the basis that that is not what either Hibernia or Terra Nova would do.

Think about the divergent ice floes example. There's documents on the record that clearly indicate ExxonMobil stating it is going to be beneficial to them as a company. It's ExxonMobil's position, or the Claimant's position in this case, that it is nonetheless compensable because it's not an expenditure that Hibernia would do. For Canada's position, that is not the correct analysis. Legally, the question is what would the Claimant do but for the Guidelines. So, in summary, Canada's position on damages is as follows:

With respect to Hibernia, no surplus amounts are compensable and the Gas Utilization Study certainly is not an Incremental Expenditure.

And just quickly on the Gas Utilization Study, because the Claimant raised it in its opening, this expenditure alone counts for more than 30 percent of the Claimant's damages case in this arbitration, and it is not an incremental

expenditure. I believe Mr. O'Gorman's characterization was there was no need to do it otherwise. And keep those words in mind this week as we hear the testimony, because that is not the case. The expenditure is an enhanced oil recovery study that the Claimant is required to undertake, pursuant to Provincial legislation, and the Hibernia Development Plan.

The Guidelines did not cause the Claimant to undertake these studies. The Claimant was required to carry out these studies regardless of the Guidelines, and, indeed, has been studying EOR--that is enhanced oil recovery--at the Hibernia site as far back as 2005, long before the Claimant began complying with the Guidelines.

And if you take the surplus and the Gas Utilization Study into account, the Claimant's damages at Hibernia reduces to a maximum of [redacted]. And the remaining portion consists of other expenditures the Claimant argues are incremental, but which Canada disagrees. And I will update this table at the end of the week as we hear

more from Claimant's witnesses on cross-examination.

With respect to Terra Nova, there are no damages. Frankly, I'm surprised the Claimant even advanced a claim in this arbitration with respect to Terra Nova. "Ordinary course" spending at that Project has been significant and well above what the Guidelines require, and there is a real disconnect between the Mobil and Murphy Tribunal's Decision that the Guidelines constitute a substantial expansion of spending at Terra Nova with what has, in fact, transpired at that Project.

This concludes our presentation.

But Canada has one correction on the issue of damages to its Rejoinder that it would like to make. It's at Paragraph 303, and it involves the calculation of interest.

It's the last sentence there, where Canada states that the proposed rate should be a 12-month Canadian dealer rate. That should say 30-day Canadian dealer rate and compounded monthly. You need a 30-day rate to be compounded monthly and a 12-month rate to be compounded annually, and Canada

meant to propose a 30-day rate compounded monthly.

So, it's just that "12 month" should be changed to "30 days," please. And sorry about that.

ARBITRATOR GRIFFITH: Counsel, are you inviting us to read the parts of the PowerPoints that we weren't taken to?

MR. DOUGLAS: Oh, yes, absolutely, please do. There are some legal principles at the start of my presentation that I skipped over for the sake of time, knowing that it's pushing into dinner, which I invite you to read and which we will revisit in our Closing Arguments.

ARBITRATOR GRIFFITH: So, we are invited to read the entirety?

MR. DOUGLAS: Absolutely.

ARBITRATOR GRIFFITH: Okay.

MR. DOUGLAS: Okay. Thank you very much.

PRESIDENT GREENWOOD: Thank you very much.

Well, our thanks to both teams of counsel for having been so good with your timekeeping, despite having your toes held to the fire with such enthusiasm by the Members of the Tribunal.

I would just like to take stock of where we are for a few minutes. Tomorrow, Wednesday and Thursday are set aside for examination and cross-examination of witnesses, and the expert Mr. Walck; and, on each day, we're starting at 9:30 and finishing at 5:30. That means that, in practice, we have a quarter-of-an-hour's break for coffee.

Now my math has been corrected, there are 2 hours and 45 minutes in the morning session and 2 hours and 45 minutes in the afternoon session. Obviously, we are not going to hold you strictly to exactly when you finish at lunchtime because, if you're in the middle of a cross-examination and there is a likelihood of finishing it, I'm happy to run on past the 12:30 lunch break at least for a few minutes.

Likewise, I don't mind going a little bit late in the evening--a little bit--if you think you can finish a witness then or reach a point where it's a logical break. But, five-and-a-half hours for the day for three days, that is the allowance for witnesses. It can't be varied that much.

(Tribunal conferring.)

PRESIDENT GREENWOOD: Yes, you're absolutely right. No, it's 9:30 to 12:30. You are quite right. 9:30 to 1:00 and 2:00 to 5:30. That's right. Three-and-a-quarter hours. Forget what I said about 2 hours, 45 minutes. I'm trying to make up for the fact that I gave you an unexpected extra 15 minutes in my comments earlier today.

Three hours 15 minutes in the morning and again in the afternoon but with a certain amount of flexibility if a witness is about to be finished. I Take it that will be acceptable to both Parties.

And tomorrow we're expecting to start with Mr. Phelan, and then go on to Mr. Noseworthy, and hopefully to Mr. Sampath.

Wednesday, we will finish Mr. Sampath unless he's been finished on Tuesday. I think if we can avoid a witness being held overnight, it's better if we can do that. I think that applies both to cross-examination and re-examination there.

And then we go on to Mr. Dunphy, Mr. Durdle, and Mr. Jeff O'Keefe in that order, and then on

Thursday, finish Mr. Jeff O'Keefe, if necessary, and again, my preference would be to finish him on the Wednesday evening.

And then we have the examination and cross-examination of Mr. Walck, the Expert Witness.

All right? Everybody content about that?

And then on Friday, we have 9:00 until 4:00. This is the occasion when it works out that we go 9:00 until 12:00 and 1:00 until 4:00, so 2 hours and 45 minutes allowing for a 15-minute break for coffee, and a little bit of time at the end, if necessary, for Tribunal questions and matters of that kind.

I would be grateful if the Parties could indicate in an e-mail to the Secretary, not later than close of play on Thursday, whether you wish to make an application for a post-hearing brief and, if so, on what issue. I do not think the Tribunal will be terribly interested in open post-hearing briefs which go on for a long time. If we're going to allow post-hearing briefing, it must be on something specific and it must be with a relatively tight timetable.

(Tribunal conferring.)

PRESIDENT GREENWOOD: Yes, thank you.

Mr. Rowley has reminded me, that in relation to the Closing Statements, these should be responsive. They shouldn't be a repetition of the points that have already been made. You can assume that we were listening. I hope the number of questions we asked you indicated that we were listening, even if you may think we didn't get the right end of your argument. But responsive points, and in particular picking up the questions we have put to you, for example, about the Nicaragua and Colombia Case, about issue estoppel and cause-of-action estoppel and so forth, but there is no need just to rehearse what is already in writing and in the Opening Statement. All right?

One last point. You're going to provide us with the electronic versions of the Hearing bundles for today. On a couple of occasions, there were corrections to individual slides, for example, 750 kilometers instead of 7,000 kilometers. Please, could you correct those on the electronic version but

indicate that this is a corrected version as set out in the Transcript. And if you're able to give a transcript reference, that would be helpful.

All right, are there any points that either team would like to raise before we break for the day?

Mr. O'Gorman.

MR. O'GORMAN: None from the Claimant. Thank you, Mr. President.

PRESIDENT GREENWOOD: Mr. Douglas or Mr. Luz?

MR. DOUGLAS: None from the Respondent. Thank you.

PRESIDENT GREENWOOD: Very good. Thank you, all.

In that case, everybody can go away and get some rest for tomorrow. Thank you, all, very much.

(Whereupon, at 6:01 p.m., the Hearing was adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN