IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES

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In the Matter of Arbitration Between:

MOBIL INVESTMENTS CANADA, INC., and MURPHY OIL CORPORATION,

Claimants,

and

GOVERNMENT OF CANADA,

Respondent.

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

- - - - - - - - - - - - - - - - - -x Volume 1

HEARING ON THE MERITS

Tuesday, October 19, 2010

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

The hearing in the above-entitled matter came on, pursuant to notice, at 9:12 a.m. before:

PROF. HANS van HOUTTE, President

PROF. MERIT E. JANOW, Arbitrator

PROF. PHILIPPE SANDS, Q.C., Arbitrator

Also Present:

MS. MARTINA POLASEK,
Secretary to the Tribunal

Court Reporter:

MR. DAVID A. KASDAN, RDR-CRR
B&B Reporters
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1 P R O C E E D I N G S
2 PRESIDENT van HOUTTE: Good morning, ladies
3 and gentlemen. My name is Hans von Houtte. I am
4 Chairman of this Tribunal. To my right is Professor
5 Merit Janow. To my left is Professor Philippe Sands,
6 and we are the Tribunal to hear this case, Mobil
7 Investments Canada and Murphy Oil Company versus the
8 Government of Canada.
9 Now, I realize that there are many, many
10 people in this room, but maybe it would be worthwhile
11 that I would say the key actors introduce themselves
12 to the Tribunal and to the other side so that we know
13 exactly who is who. I don't think that it's necessary
14 to present everyone. It will be too much
15 time-consuming, but let's say only the key actors.
16 Claimant, you have the floor.
17 MR. RIVKIN: Thank you very much,
18 Mr. President. I am David W. Rivkin, counsel for the
19 Claimants in this case, from Debevoise & Plimpton.
20 MS. LAMB: Good morning, sir. I'm Sophie
21 Lamb, also Debevoise & Plimpton.
22 MS. ROWE: Samantha Rowe, also Debevoise &

09:16:28 1 Plimpton.
2 MS. van BERG: And Jill van Berg, from
3 Debevoise & Plimpton.
4 MS. HENNIKE: Toni Hennike, Senior Counsel,
5 ExxonMobil.
6 MS. KNULL: Ms. Knull, Attorney, ExxonMobil.
7 MR. COMPTON: Walter Compton, Vice President,
8 Law, for Murphy Oil Corporation.
9 MR. BAINES: Nathan Baines, Counsel with
10 ExxonMobil Canada.
11 MR. RIVKIN: And the rest of our table are
12 Witnesses and Experts whom you will be meeting later.
13 PRESIDENT van HOUTTE: Thanks very much,
14 Mr. Rivkin.
15 Mr. Gallus?
16 MR. GALLUS: Good morning, Mr. President. I
17 am Nick Gallus, Counsel with the Tribal Bureau at the
18 Department of Foreign Affairs in International Trade.
19 I think all of our team believes that we are
20 key actors, but I will leave it up to them to decide.
21 MR. LUZ: Good morning, Mark Luz, also with
22 the Counsel for the Government of Canada.

09:17:24 1 MR. DOUGLAS: Good morning, I'm Adam Douglas,
2 Counsel for the Government of Canada.
3 MR. SAVOIE: Good morning. Pierre-Olivier
4 Savoie, Counsel for the Government of Canada.
5 MR. CHEATHAM: Hugh Cheetham, Director of the
6 Investments Services Division at the Trade Law Bureau,
7 Government of Canada.
8 MR. VOOGD: Gordon Voogd, Natural Resources,
9 Canada.
10 MR. SCOTT: Paul Scott with the Government of
11 Newfoundland and Labrador.
12 MS. GILLIES: Meg Gillies, also with the
13 Government of Newfoundland and Labrador.
14 PRESIDENT van HOUTTE: Thank you very much
15 for this introduction.
16 The Tribunal has read the many submissions,
17 Witness Statements, Expert Statements, and it wants to
18 convey to you the fact that we are familiar with the
19 case. The purpose of this day and the coming days, is
20 to get a better insight in some details. But, as I
21 said, you can rely on our knowledge of the documents
22 which have been submitted to us, and the Tribunal will

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09:18:47 1 ask the questions whenever it is necessary to get
2 clarifications.
3 There is an issue of what I would call the
4 "latest submissions," and I refer to the Claimants'
5 letter of the 14th of October and the reactions from
6 the Respondent. There, if the Tribunal understands it
7 well, there have been three categories of documents.
8 The first category of documents which were submitted
9 were documents which were related to the statements of
10 Ms. Emerson; and, there, if I am not mistaken, there
11 was no objection against the submission of those
12 documents.
13 Then there was a second category of documents
14 which were documents coming from the Petroleum Board,
15 and there, there was no objection either because those
16 documents were coming from Respondent's side.
17 Then there was a third category, and the
18 third category was a rather voluminous bundle of
19 documents, different types. But, if the Tribunal is
20 correct, they were all public documents, documents in
21 the public domain, even the two arbitral awards which
22 have been submitted have also been published.

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09:20:11 1 However, the problem there was that the
2 documents have been officially submitted last Friday,
3 and in view of the quantity of those documents, the
4 Tribunal is of the opinion that those documents should
5 be submitted, but at the end of the hearing, which
6 then may have as an implication that, for instance,
7 witnesses cannot be confronted with those documents
8 during their cross-examination.
9 Now, the documents should be part of the
10 bundle at the end of the hearing; and then, if the
11 Respondent wishes to do so, the Respondent may also
12 have the opportunity to submit similar documents of a
13 public nature within one week after the closing of the
14 hearing.
15 I do not know whether this solution is
16 satisfactory to both sides, but we thought that as the
17 documents are of the public domain, there can be no
18 objections to submit them. On the other hand, in view
19 of the volume of the documents, maybe it would be
20 unfair to confront witnesses with those documents
21 which have been submitted only a few days -- formally
22 submitted a few days before the start of the hearing.

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09:21:33 1 But I would like to hear both sides on this
2 issue.
3 MR. RIVKIN: Thank you very much,
4 Mr. President, and I understand the considerations
5 that you've described, and we apologize for the late
6 submission. As we mentioned, some of them we hadn't
7 found, and some of them, we frankly didn't think would
8 be necessary.
9 Just to clarify, there are only 17 documents
10 that had not--that are in question here, and seven of
11 those are really authorities and not evidence, and
12 the--we were certainly under the impression in the
13 minutes of the prior order was that all evidence
14 needed to be submitted at certain stages, but
15 authorities are authorities that parties can always
16 rely on. So, we do have five that are designated as
17 Claimants' Authorities, and we have two FTI exhibits
18 which are nothing more than other sections of the same
19 book on which Canada's Expert relied. And so I think
20 we would want to be able to refer those authorities
21 and those exhibits, the other portions of the book
22 that their Expert himself relied on during the

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09:22:48 1 hearing, and we don't really see any unfairness in
2 that. Authorities are authorities. They're always
3 there.
4 With respect to the--and the only other
5 exhibits really, as you said, they are public.
6 Frankly, we didn't think they would be necessary
7 because we expected that Mr. Davies, just as Mr. Walck
8 did in his last submission, would submit a--well,
9 Mr. Walck, as you will recall, said, his first time
10 around, "I can't submit a damages calculation." And
11 then in his last report he did just that. We were
12 frankly surprised that Mr. Davies said, "No, no, no,
13 it's impossible to forecast, impossible, impossible,
14 even though everybody does that," and that he wouldn't
15 be submitting his own forecast, in which case these
16 documents would not have been necessary. And that's
17 why we were surprised that in their last updated
18 submission, they were clinging to that position that
19 you can't look at any forecast at all, although they
20 ended up using Ms. Emerson's forecast.
21 So I just wanted to explain that difference.
22 We are happy to live with the suggestion you make with

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09:23:57 1 respect to those exhibits, but I would ask the
2 Tribunal to consider with respect to simply the other
3 portions of the book that they relied on and the
4 authorities, that that be something we should be able
5 to rely during the hearing and at closing.
6 PRESIDENT van HOUTTE: Then, if I understand
7 correctly, you are speaking about the excerpts of
8 Mr. Walck's book which could be used -- or should be
9 used, in your view, in cross-examining Mr. Walck.
10 MR. RIVKIN: Yes. It's actually -- it's the
11 book by Shannon Pratt et al., and it's been noted as
12 FTI H-2 and H-3. And they were referenced--the book
13 was referenced in Mr. Walck's First Report, and he
14 relies on that. So, we would ask for that, plus the
15 authorities we've designated as CA-189 through CA-193.
16 Again, those are tax regulations. They are
17 arbitration awards, and we wouldn't expect any
18 difficulty, certainly. And those will come up in
19 closing, a little bit in opening on the damages issue,
20 and they have plenty of time to deal with those.
21 MR. GALLUS: Just with regard to these
22 documents that Mr. Rivkin mentioned, first of all,

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09:25:14 1 Canada hasn't seen these excerpts either from the
2 document relied on by Mr. Walck or the other tax
3 regulations on which the Claimants would like to rely.
4 We haven't seen them. We won't have an opportunity to
5 see them this week. You will understand we will be
6 busy preparing for the cross-examination of the
7 Claimants' witnesses, together with the
8 cross-examination of our own witnesses and the
9 preparation of our closing.
10 Furthermore, as far as Canada understood, the
11 agreement between the Parties limited the submission
12 of authorities to the parties' pleadings so that the
13 parties were obliged to submit their authorities with,
14 on the Claimants' side, their Memorial and their
15 Reply, and that by trying to submit these authorities
16 at the last minute, the Claimants are indeed acting
17 inconsistent with that agreement.
18 It's also important to point out that the
19 Claimants have been aware of these issues since Canada
20 submitted its Counter-Memorial last year. In that
21 Counter-Memorial, Canada made it perfectly clear that
22 we believed it wasn't possible to forecast oil prices,

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09:26:14 1 and the Claimants had every opportunity to respond in
2 the year since that time and in innumerous pleadings
3 I've had since that time.
4 So, Canada would object to the submission of
5 these documents, specifically the excerpts from the
6 authority on which Mr. Walck relied, and the tax
7 regulations to which Mr. Rivkin referred.
8 Canada would also like to really write its
9 objection to the admission to these documents at any
10 point in this hearing, even after the end of the
11 hearing. However, we accept the Tribunal's decision
12 to admit them at the end of the hearing, and Canada
13 will take--will make use of the opportunity to submit
14 its own authorities and documents at that time.
15 However, I do have a final question, and that
16 is whether all of the documents on which the Claimants
17 seek to rely are indeed public documents. Just after
18 briefly looking at the index, I seem to recall that
19 there were e-mails, and I'm just wondering if they
20 are, in fact, public documents, and perhaps Mr. Rivkin
21 could clarify that for us.
22 MR. RIVKIN: The e-mails simply verify the

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09:27:09 1 contents of the two Reuters polls, which are available
2 through Reuters, so that's all they do.
3 MR. GALLUS: And are those polls available
4 publicly?
5 MR. RIVKIN: They can be obtained from
6 Reuters.
7 MR. GALLUS: For a fee or for free?
8 MR. RIVKIN: I'm not sure.
9 For free. It's for free. I'm told for free.
10 MR. GALLUS: Could we verify that?
11 PRESIDENT van HOUTTE: I suggest that the
12 Tribunal will consider all those arguments. In the
13 course of the day we will communicate our decision to
14 you.
15 MR. RIVKIN: I would just point out that the
16 portion of the minutes on which Mr. Gallus relied does
17 refer to evidence and not authorities in the case,
18 like the Rumeli Decision from earlier this year is not
19 evidence; it is an authority. And we would like to be
20 able to refer to that in the opening because it fits
21 in with our damages explanation.
22 PRESIDENT van HOUTTE: Good. The Tribunal

09:28:14 1 has understood your respective positions.
2 Another issue which I would like to discuss
3 is the fact that in the original time schedule, the
4 Parties have foreseen a rather substantial time for
5 Closing Statements, and the Tribunal wonders whether
6 there are not better ways to use the time than
7 extensive Closing Statements. The Tribunal is not
8 pushing for it, but maybe the Parties jointly would
9 want to make--to submit Post-Hearing Briefs. It
10 depends on the Parties. We have to discuss that later
11 on.
12 And in all events, the three hours put
13 Closing Statements is a rather substantial number --
14 or time which could be reduced. The reduction of
15 those Closing Statements would also have an additional
16 advantage that the Tribunal would also have additional
17 time to deliberate among themselves before departing
18 from Washington, which also has a clear advantage.
19 But anyway, we are, to some extent, in your
20 hands, but we want to convey the idea whether you
21 should not reconsider the length of the Closing
22 Statements.

09:29:40 1 Then a very small issue that, as you know, we
2 are not operating under the ICSID Convention as such
3 but under the Additional Facilities, and there is --
4 under the Additional Facilities, there is no set
5 formula which the Experts and factual witnesses have
6 to adhere when they have to make their statements;
7 know that they will tell the truth or that they will
8 give testimony as far as their knowledge goes and so
9 on. And maybe it would be a good idea where the two
10 Parties could suggest to the Tribunal a formula which
11 then each of the factual witnesses, Experts could
12 confirm before it starts its statement so that they
13 are aware that they have to tell the truth or they
14 have to share their knowledge and nothing more and, to
15 some extent, that they have to be a help to the
16 Tribunal.
17 And then the last issue is that the court
18 reporter, David Kasdan, may sometimes have some
19 problems when someone speaks too slowly or not loud
20 enough, and then there should be a way that he
21 indicates now that people have to slow down for the
22 record, but anyway we will be aware of that.

09:30:54 1 I guess those were my starting Opening
2 Statements. I do not know whether my colleagues have
3 to add something.
4 ARBITRATOR JANOW: Now, I think we will get
5 to the issue of confidentiality after the Opening
6 Statements. Is that--
7 MR. RIVKIN: Actually, I think it's important
8 for us to just confirm those arrangements now, and
9 because then there is one issue that I need to raise
10 with the feed-off after that.
11 With respect to the Closing Argument, we are
12 happy to speak to Canada's counsel. We understand
13 what you're saying. We certainly want the Tribunal to
14 have time to deliberate before you all leave
15 Washington. What we saw, the closings are principally
16 an opportunity for you to have a chance to ask us
17 questions that are troubling you from both sides or
18 where you simply want further elucidation. I think
19 both sides have a view that we would prefer not to do
20 Post-Hearing Briefs and think that, given the nature
21 of this case, it's been well briefed, and the facts
22 are not that complex. But we obviously would be happy

09:31:55 1 to do Post-Hearing Briefs, particularly on issues if
2 the Tribunal wants some further elucidation, which you
3 can let us know as the week goes on, if you want to
4 know more about, but that's where the proposal came
5 from, and we'll be happy to work with Nick and try to
6 see if we can compress the time to leave enough time
7 for whatever questions you have.
8 PRESIDENT van HOUTTE: But the shortening of
9 the Closing Statements is unrelated to the
10 Post-Hearing Briefs. I think we made that clear.
11 MR. RIVKIN: Okay.
12 On the confidentiality, the Parties sent you
13 a joint proposal as to how we would proceed and ask
14 that the feed be turned off at various times, and we
15 just want to make sure that that joint proposal was
16 fine with the Tribunal.
17 PRESIDENT van HOUTTE: Yes, that is fine.
18 And how will it work in practice?
19 MR. RIVKIN: I think in practice, when either
20 counsel is about to get into a section that should be
21 considered confidential, we will ask the Tribunal,
22 "cut off the feed," and then Martina can let us know

09:32:45 1 how it will actually work from there.
2 PRESIDENT van HOUTTE: Then we rely on
3 Martina for this very important part.
4 THE SECRETARY: There is a technician sitting
5 behind us, and so we will have to go on the record on
6 the microphone saying that the closed session now
7 starts, and they will cut off the stream to the public
8 hearing room.
9 MR. RIVKIN: Well, if we could test that
10 system now, we actually, unfortunately have one issue
11 that we need to raise, and it does fall within the
12 confidential topics, so, if we could cut off the feed
13 now for a few minutes--
14 PRESIDENT van HOUTTE: Before that, do we
15 have a feedback that it's really closed? Because now
16 many human accidents have happened in world history,
17 and many mikes have been opened when they should have
18 been closed.
19 THE SECRETARY: Well, I guess we can work out
20 the signal system with a technician back there.
21 MR. RIVKIN: I have a manner to check it
22 right now, actually, because my wife is in the hearing

09:33:45 1 room and I can call her on her cellphone to make sure
2 it's turned off when it's supposed to be turned off.
3 PRESIDENT van HOUTTE: Okay. Fine. But
4 that's not a methodology which this Tribunal will take
5 as a standard approach.
6 Canada has also a wife somewhere in the
7 hearing room that we have a contradictory statement.
8 Fine. Now, I really would like to have
9 feedback that things are, indeed, closed because many
10 actions may happen.
11 Now, co-Arbitrator Sands also has a remark.
12 ARBITRATOR SANDS: Just, I thought I heard
13 Mr. Rivkin say you want to refer to one or more of the
14 authorities that has been recently submitted in your
15 opening, in which case you need to steer from us on
16 that issue; is that correct?
17 MR. RIVKIN: Yes. The Rumeli Telecom case.
18 And the ICC Award--those two: CA-189 and 190.
19 PRESIDENT van HOUTTE: Okay. Let's say that
20 we will--the confidentiality issue which you would
21 like to raise is unrelated to this issue; therefore, I
22 would say that we continue, and then we can check

09:34:53 1 whether the system works but in an official way.
2 MR. RIVKIN: Okay. Good. So, at this point,
3 Claimants would like to request that a confidential
4 session be opened and the feed be turned off.
5 THE SECRETARY: I confirm that the session is
6 now closed.
7 (End of open session. Confidential business
8 information redacted.)
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09:35:11 1 CONFIDENTIAL SESSION
2 PRESIDENT van HOUTTE: Mr. Rivkin.
3 MR. RIVKIN: David, when we break to set up
4 for the opening argument, the LiveNote on our side is
5 not working so--but we can proceed.
6 As the Tribunal knows, there is a part of the
7 Hibernia Block called the Hibernia South Extension,
8 and you have seen some references to that in the
9 papers. The owners of Hibernia South who are
10 different from the owners of Hibernia in various--in
11 certain ways, including the fact that the Government
12 of Newfoundland is a part owner of Hibernia South,
13 have been working with the Board on the development
14 plans for Hibernia South for a couple of years. And
15 just last week, the Board issued its decision
16 approving the Hibernia Development Plan Amendment to
17 include the Hibernia South Extension.
18 The Proponents of Hibernia South had
19 previously agreed with the Board that the Guidelines
20 would apply to the Hibernia South Extension.

09:38:04 1

11 (Discussion off the record.)
12 MR. RIVKIN: We are told they are getting a
13 feed in the room.
14 (Discussion off the record.)
15 PRESIDENT van HOUTTE: Please continue.
16 MR. RIVKIN: I'll see if my phone rings, if
17 there is anything.
18

09:45:19 1

09:46:48 1
2 We accept that, as a matter of Canadian law,
3 the Guidelines apply. That's why our case is
4 structured as our complying with the Guidelines and
5 seeking the compensation for the additional amounts
6 that we are going to have to pay.
7

13 So, we will ask the Tribunal--we only found
14 out just before the hearing started this morning that
15 Canada would not agree to the waiver; and, again,
16 that's something the Federal Government can do without
17 impacting the authority of the Board here. We accept
18 that the Guidelines apply to Hibernia as a matter of
19 Canadian law; and we are, as you have seen, making
20 substantial efforts to comply with the Guidelines, but
21 we are entitled under the NAFTA to be reimbursed for
22 those differences.

09:48:04 1 So, we will ask the Tribunal for an
2 appropriate order, if need be, to that acceptance of
3 this condition would not waive our rights in this case
4 or in future cases.
5 And it's particularly surprising that Canada
6 has taken that position, given that they have also
7 argued to you that we are only entitled to three
8 years' worth of damages. Actually there were--we are
9 not entitled to any future damages at all. So, if
10 that were true, then we would have to bring a new
11 claim and every three years for the extra amounts that
12 we have spent under the Guidelines. And we could do
13 so presumably on the basis of your order. Again, this
14 all postulates that you agree with us that there is
15 liability here. We could do so and seek those
16 additional amounts, but we would have to bring
17 additional claims.

22 I simply want--as I say, we are not asking

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09:49:05 1 you for a decision now, but I think it's an important
2 enough issue that I wanted to raise it with you before
3 we get started. It's possible we can have further
4 conversations with Canada during the week and try to
5 work something out if they--but, as I said, we've made
6 what we thought was a very reasonable proposal; and
7 the Tribunal--and perhaps that we might seek the
8 Tribunal's guidance on it. But if we can't reach some
9 agreement, I just wanted to let the Tribunal know we
10 were going to need to seek an appropriate order.
11 PRESIDENT van HOUTTE: Mr. Rivkin, do you
12 happen to know the exact wording of the paragraph in
13 the Development Plan?
14 MR. RIVKIN: It's almost exactly what I read
15 to you, and it is now one of the new exhibits that has
16 been provided to you. It is Exhibit CE-242. It's one
17 of the new exhibits that has been provided to you.
18 And I will read it into the record. It's on Page 3 of
19 that document: The Board hereby approves the
20 amendment to the Hibernia Benefits Plan, Hibernia
21 Southern Extension Project, January 2010, subject to
22 the following condition," and then in bold face it

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09:50:17 1 says, "The amendment to the Hibernia Benefits Plan
2 addressing the Southern Extension to the Hibernia
3 Field is approved subject to confirmation by the
4 Proponent that the undertakings relating to compliance
5 with both the diversity as well as the R&D aspects of
6 the Board's Guidelines apply to the entire Hibernia
7 Project, including the Southern Extension."
8 And then there is a second condition which is
9 not at issue here, but that's the exact language. And
10 as I said, you now have it as one of your exhibits.
11 PRESIDENT van HOUTTE: Thank you.
12 Mr. Gallus, would you like to address this
13 issue?
14 MR. GALLUS: Thank you.
15 The condition to which the Claimants refer is
16 irrelevant to this dispute, and it's irrelevant for
17 three reasons. First of all, it's irrelevant because
18 it's completely innocuous. The Claimants have said
19 that the Board were trying to lever the condition.
20 They said that the Board were trying to force the
21 Claimants to waive their NAFTA rights. The Board were
22 doing no such thing. What the Board were doing was

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09:51:18 1 completely simple, and that is they--I should Step
2 back and give a bit of the background.
3 Like the Claimant said, the Operators have
4 asked for approval to develop a southern part of the
5 Hibernia field, the Hibernia South Extension, and the
6 decision to which the Claimants refer is the Board's
7 Decision with regard to that request.
8 As part of the operator's attempt to develop
9 the southern part of Hibernia, they reached an
10 agreement with the Provincial Government; and, under
11 that agreement, the Operators agreed to provide
12 benefits to the Province. This was a separate
13 agreement between the Operators and the Provincial
14 Government. It had nothing to do with the Board, and
15 it had nothing to do the operators' obligations under
16 the Guidelines.
17 So, in light of that separate agreement
18 between the Operators and the Provincial Government,
19 the Board thought that as part of their decision on
20 the Hibernia South Extension, I would make a
21 clarification. And all they were doing in the
22 condition to which the Claimants refer is clarifying

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09:52:20 1 that, despite this agreement that the Operators had
2 reached with the Provincial Government, despite this
3 agreement on separate benefits that the Operators had
4 to provide to the Provincial Government, the Operators
5 were still obliged to follow their obligation and the
6 Accord Implementation Acts under the coordination text
7 to provide expenditures on research and development
8 and education and training in the Province. In doing,
9 so the Board was simply confirming what had already
10 been confirmed by the Canadian courts, and that is a
11 matter of Canadian law, the operators were obliged to
12 provide these expenditures under the Guidelines.
13 So, the first reason that the condition to
14 which the Claimants refer is irrelevant is because
15 it's completely innocuous.
16 And the second reason it's irrelevant is
17 because Canada has no intention on relying on this
18 condition in this dispute this week. I will say that
19 again. Canada has no intention on relying on the
20 Claimants'' agreement with this condition this week.
21 And the third reason it's irrelevant is
22 because future disputes, future disputes to which the

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09:53:27 1 Claimants referred, are not before this Tribunal this
2 week.
3 So, for those three reasons, the condition to
4 which the Claimants refer is irrelevant. First, it's
5 innocuous; second, Canada does not intend to rely on
6 it; and thirdly, the future disputes to which the
7 Claimants refer are not before the Tribunal.
8 (Comment off microphone.)
9 MR. RIVKIN: As I said, I don't think we need
10 an order right now, but I thought it was important to
11 raise it with you.
12 I will just point out that there is some
13 contradiction in the position saying they're not
14 relying on it for this dispute, but at the same time
15 they're arguing we can't receive future damages. So,
16 if as a matter of Canadian law we have to comply with
17 the Guidelines going forward but we're not allowed to
18 seek damages beyond 2010, the we would, unless Canada
19 agrees that we are not waiving our NAFTA claims in
20 future disputes or going forward as well, then we
21 could find ourselves in a position where when we raise
22 our claims for the next three years' worth of damages,

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09:54:43 1 they say, no, sorry, you agreed to that, to this
2 condition that the Hibernia Guidelines apply--that the
3 Guidelines apply to all of Hibernia.
4 PRESIDENT van HOUTTE: But that surely will
5 be developed when you have arrived at that issue in
6 the course of your arguments.
7 MR. RIVKIN: Well, we will certainly be
8 talking about the future damages. But as I said,
9 there is some contradiction there and I just wanted to
10 point that out.
11 PRESIDENT van HOUTTE: Okay. Fine.
12 Question from Professor Sands.
13 ARBITRATOR SANDS: Just a question on
14 clarification. Mr. Gallus said, and if I've written
15 it down correctly, no intention of relying on this
16 condition this week. Are we right to understand that
17 by "this week" you mean in these proceedings at all?
18 Because I think that's what Mr. Rivkin understood;
19 and, to avoid any difficulty on this issue, it would
20 be helpful to have clarification.
21 MR. GALLUS: That's right. Canada has no
22 intention of relying on the Claimants' agreement with

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09:55:34 1 the condition in these proceedings.
2 MR. RIVKIN: That I understood. But, of
3 course, if they cut off--if they want to cut off our
4 damages at 2010, it leaves open future proceedings
5 where they could claim that we've waived.
6 PRESIDENT van HOUTTE: By "these
7 proceedings," you mean the proceedings in case 07/04?
8 MR. GALLUS: That is correct.
9 PRESIDENT van HOUTTE: Okay. I suggest we
10 now proceed on the record again.
11 MR. RIVKIN: Yes, thank you.
12 THE SECRETARY: I confirm that we now open
13 this session.
14 PRESIDENT van HOUTTE: And the respective
15 wives will confirm that it is opened.
16 Fine.
17 (End of confidential session.)
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09:56:23 1 OPEN SESSION
2 PRESIDENT van HOUTTE: Now, the Tribunal has
3 had the opportunity in the meantime to discuss on a
4 provisional basis already whether the Claimant could
5 rely on the two Awards which he mentioned in his
6 Opening Statement, and as those Awards relate to the
7 law, and as the Tribunal is supposed to know the law
8 as all of us know the law, or are supposed to know the
9 law, there is no objection that the Claimant should be
10 able to invoke those arguments which are also of the
11 public domain and which can only be to the benefit of
12 the discussions.
13 MR. RIVKIN: Thank you.
14 I hope this is balanced up here.
15 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS
16 MR. RIVKIN: Thank you very much, Members of
17 the Tribunal. I appreciate the opportunity to present
18 this opening argument to you. We know that you have
19 carefully reviewed the record, and our intention is
20 hopefully not to tell you what you already know but to
21 put the record in some context and to help provide
22 some guidance for what will come this week.

09:57:45 1 We also have not had an opportunity to
2 respond to some of the points in Canada's Rejoinder,
3 and think it's important for you to hear some of those
4 points as well.
5 And I will touch on the facts and our
6 arguments under Articles 1106 and 1105, and then my
7 colleague, Sophie Lamb, will talk about damages issues
8 after that.
9 And before doing that as well, I should make
10 two other comments. One is I certainly would invite
11 the Tribunal to ask any questions along the way. It's
12 helpful to us and both Parties to hear your thoughts
13 and considerations or to know where you have some
14 questions.
15 And, second, to give apologies, actually,
16 which I should have done when we went down the table,
17 for one member of our team, Bart Legum, who will be
18 arriving today. He had a cataract operation a couple
19 of weeks ago and had to wait until, as I understand
20 it, the final gas bubble left his eye before he was
21 allowed to fly. So he finally received clearance this
22 morning, and is on a plane and he will be here

09:58:51 1 tomorrow. But I wanted to give you his apologies for
2 not being here today.
3 So, Members of the Tribunal, as you are
4 aware, the very first listed objective of the North
5 American Free Trade Agreement is to eliminate barriers
6 to trade in the territories of the NAFTA Parties.
7 Article 1106 was an important piece in achieving that
8 aim. It prohibits the imposition of performance
9 requirements on investments in each parties'
10 territory. It is hard to think of a more blatant
11 performance requirement than a regulation that obliges
12 Investors to spend hundreds of millions of dollars on
13 local goods and services that they would not otherwise
14 spend. As a matter of fact and law, it cannot be
15 seriously disputed that the R&D Guidelines violate the
16 prohibition of Article 1106.
17 Canada has not contested, nor could it, that
18 the Guidelines have forced a major change in the way
19 Claimants have to conduct their R&D. They must now
20 spend an amount decreed by the Board, the amount of
21 which is often not determined until the year has
22 passed, regardless of whether the projects' need R&D.

10:00:04 1 They must also spend money on R&D in the
2 Province, regardless of whether the institutions and
3 companies in the Province are the ones that are best
4 suited and most competitively priced to do that work.
5 Canada has made some, frankly, weak attempts
6 to avoid these obvious facts. At first Canada
7 pretended, as you recall in their Counter-Memorial,
8 that R&D and education and training, E&T, are not
9 services. Now it employs the similarly baseless
10 argument that a regulation that requires Claimants to
11 spend a prescribed amount of money each year on local
12 R&D and E&T services in Newfoundland, about
13 $12 million a year from 2004 through 2015, with
14 continuing obligations through the ends of the
15 projects two decades later, that that regulation
16 somehow does not require Claimants to purchase, use,
17 or accord a preference to those local services. I
18 doubt that you will have to spend much time dealing
19 with those factual issues this week.
20 Canada has therefore tried to argue that the
21 Guidelines are covered by its Annex I Reservation
22 under the NAFTA. This argument raises some textual

10:01:16 1 interpretation issues for you which I will discuss a
2 little bit later. But in short, let me make a few
3 quick points.
4 Article 1108, which Annex I implements, only
5 refers to existing measures. Of course, the 2004
6 Guidelines did not exist in 1994.
7 Second, even if Article 1108 permits the
8 inclusion--oh, I've just realized we have not given
9 you your copies of the PowerPoint. We have hard
10 copies of the PowerPoint so you can make notes on
11 them.
12 (Pause.)
13 MR. RIVKIN: Second, even if Article 1108
14 permits the inclusion of later measures in Annex I--we
15 are now on Slide 2, I guess--even if Article 1108
16 permits that the inclusion of later measures in the
17 Annex, the Guidelines do not fall within Canada's
18 description there of the nonconforming aspect of the
19 Accord Acts, namely their requirement that Benefit
20 Plans ensure local R&D spending. The Guidelines do
21 not amend the Hibernia or Terra Nova Benefit Plans,
22 nor could they.

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10:02:30 1 The Guidelines also fail to meet the
2 condition in Annex I that they be consistent with the
3 Accord Acts or the Benefit Plans adopted pursuant to
4 the Accord Acts. We have presented substantial
5 evidence of the fundamental changes caused by the
6 Guidelines, and Canada has not seriously disputed that
7 evidence.
8 Because of these fundamental changes, the
9 application of the Guidelines to Claimants''
10 investments also violates Article 1105, the NAFTA's
11 Minimum Treatment Standard provision. To avoid this
12 result, Canada has advocated that the correct legal
13 standard under this provision is one formulated in the
14 early part of the 20th Century, in the radically
15 different context of a denial-of-justice case. This
16 legal argument is incorrect, but actually you do not
17 need to decide that controversial issue. Claimants
18 had explicit agreements with governmental entities in
19 the Benefits Plan and in later fiscal agreements on
20 which we relied in conducting our investments. The
21 Guidelines have repudiated those agreements and,
22 therefore, the Guidelines violate any minimum standard

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10:03:34 1 of treatment applicable under Article 1105.
2 This Tribunal has to decide whether
3 application of the Guidelines to Hibernia and Terra
4 Nova violates NAFTA's Article 1106 prohibition against
5 performance requirements and its Article 1105
6 guarantee of minimum standard of treatment, including
7 the protection of an investor's legitimate
8 expectations under customary international law.
9 Over the next four days, we will demonstrate,
10 first, that the Guidelines and the application of them
11 to Hibernia and Terra Nova violates both Articles 1106
12 and 1105; second, that the Guidelines are not covered
13 by Canada's Annex I Reservation to Article 1106 for
14 the Accord Acts; and, third, the Claimants are
15 entitled to past and future damages to compensate us
16 for our cost of compliance with the heightened
17 expenditures required by the Guidelines. And for
18 these reasons we ask the Tribunal to rule that the R&D
19 Guidelines violate the NAFTA and to award damages to
20 make the Claimants whole.
21 Before discussing these arguments in some
22 more detail, let me remind you briefly of the factual

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10:04:43 1 context of the dispute. As you know, this arbitration
2 concerns Claimants' investments in the Hibernia and
3 Terra Nova oilfields off the coast of Newfoundland.
4 Discovered in 1979, the Hibernia field was the first
5 offshore petroleum project in the Province of
6 Newfoundland and Labrador. From 1990 to 1997, the
7 Consortium of oil companies that own the project,
8 including Claimants, invested approximately
9 $5.8 billion in the development and construction of a
10 groundbreaking facility designed to withstand the
11 punishing conditions of the previously undeveloped
12 Canadian offshore environment.
13 Oil production commenced in 1997, and it is
14 expected to continue through 2039 in Hibernia. The
15 Hibernia Management and Development Company, HMDC,
16 which is an agent company, operates the project on
17 behalf of the owners.
18 The Terra Nova field was discovered in 1984.
19 It, too, is owned by a consortium of oil companies,
20 including Claimants. From 1999 to 2001, the project
21 owners invested nearly $3 billion in the design and
22 construction of the facility, including, again,

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10:05:54 1 innovative technologies to address challenges proposed
2 by the Canadian offshore environment. Oil production
3 at the facility began in 2002, and it is expected to
4 continue through 2027. Terra Nova is operated by its
5 largest working interest owner, Suncor, which used to
6 be called Petro-Canada, and on behalf of the project
7 owners.
8 The conduct of the Hibernia and Terra Nova
9 Projects is governed by the parallel Federal and
10 Provincial legislation known collectively as the
11 Accord Acts. These Acts implement a 1985 agreement
12 between the Federal and Provincial Governments, known
13 as the Atlantic Accord, which created a coordinated
14 legal regime for resource management and revenue
15 sharing in the Newfoundland offshore area. The Accord
16 Acts govern the development and operation of petroleum
17 development projects in Newfoundland and Labrador, and
18 they established the Board, the Canadian Newfoundland
19 and Labrador Offshore Petroleum Board, to regulate
20 those projects.
21 Among other requirements, the Accord Acts
22 obliged the Proponents of an offshore project to

10:06:57 1 obtain approval from the Board of a Benefits Plan.
2 That plan sets forth the preferences that the operator
3 will give to local goods, services, and workers. The
4 operator is also required to submit a Development
5 Plan, which sets out the operator's interpretation of
6 the geology and reservoir characteristics of the
7 proposed field, estimates hydrocarbon reserves and
8 describes the approach and facilities that the
9 Operators intend to use to recover the reserves.
10 Hibernia submitted its development plan and
11 its benefits plan and Development Plan to the Board in
12 1986, 24 years ago--1986--and the Board approved those
13 plans pursuant to its authority under the Accord Acts
14 that same year, 1986.
15 Terra Nova submitted its Development Plan and
16 Benefits Plan to the Board in 1996, and the Board
17 approved them in 1997, 13 years ago. The terms of
18 these Benefits Plans and the legislative framework
19 underpinning them constitute the legal regime that
20 governed Claimants' R&D and E&T expenditures from the
21 beginning of the investments until the enactment of
22 the Guidelines in 2004. So, this legal regime is

10:08:07 1 important.
2 And what's important for the Tribunal to
3 understand is that the Accord Acts do not contain, and
4 they do not create, an independent obligation on the
5 operator to make expenditures for R&D and E&T.
6 Rather, what they require is that a Benefits Plan
7 ensure that such expenditures shall be made. And this
8 is an important difference. It is clear that the
9 scope of the obligation is set forth in the operator's
10 been Benefits Plan, and that Benefits Plan is agreed
11 by the operator and the Board.
12 Here is the language of the Federal Accord
13 Act. As you can see, it says, in Section 45(3): A
14 Canada Newfoundland Benefits Plan should contain
15 provisions intended to ensure that," and then in
16 Subsection C it says, "expenditures shall be made for
17 research and development to be carried out in the
18 Province and for education and training to be provided
19 in the Province."
20 The Board understood that this was the proper
21 framework when it approved Terra Nova's Benefits Plan
22 in 1997. So now we are showing next to the Accord Act

10:09:18 1 section that I just read to you the Board's
2 Decision 97.02 which is its approval of the Terra Nova
3 Development Plan. And in that document, the Board
4 stated quite correctly, "This section describes the
5 Board's assessment of the Proponent's plans to
6 satisfy"--and now here is the key language--"the
7 requirement of the Accord Acts that the Benefits Plan
8 contain provisions for expenditures on research and
9 development and education and training in the
10 Province." In other words, the obligation doesn't
11 come from the Accord Act to spend; it comes from the
12 Benefits Plan, and that the benefit--what the Accord
13 Act requires is the Benefits Plan contain those
14 provisions for expenditures.
15 But when the Board adopted the Guidelines in
16 2004, it knew it was imposing requirements on Hibernia
17 and Terra Nova that were not set forth in their
18 Benefits Plans. Therefore, in the text of the
19 Guidelines themselves, it ignored the framework of the
20 Accord Acts and omitted the critical reference to the
21 Benefits Plan. As you can see, in the Guidelines, it
22 simply states, "The legislative requirement for

10:10:28 1 expenditures related to R&D in the Province is
2 contained in Section 45 of the Act and reads as
3 follows: 45(3)(c), expenditures shall be made for R&D
4 to be carried out in the Province." They admitted the
5 reference to the Benefits Plans.
6 And Canada has perpetuated that misreading
7 and misquoting of Section 45 in this very case. In
8 its Counter-Memorial, again, it stated--it dropped the
9 reference to the Benefits Plans, and it simply said
10 that, according to Section 45(3)(c) of the Acts,
11 "expenditures shall be made for research and
12 development."
13 Again, the coda, the introduction--sorry, not
14 the coda--the chapeau to Section 45(3) which refers to
15 a Benefits Plan containing provisions is important,
16 and Canada knows that they cannot win this case if the
17 Tribunal applies that standard, and that's why both in
18 the Guidelines, the Board, and in this case Canada's
19 lawyers, dropped that critical chapeau.
20 The framework of the Accord Acts also sets
21 the Board's authority to issue Guidelines with respect
22 to the application and the administration of

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10:11:45 1 Section 45. Because Section 45 provides that the
2 terms of the Benefits Plans will control, the Board
3 can issue Guidelines with respect to the content of
4 future Benefits Plans. But the wording of the
5 legislation does not permit the Board to revisit an
6 approved Benefits Plan or to impose unilateral
7 amendments at a later date. And in considering our
8 1105 claim, it is also important to note that the
9 provision granting the Board authority to issue
10 Guidelines, as they've done here, was not enacted
11 until 1992; in other words, six years after the
12 approval of the Hibernia Benefits Plan.
13 Mobil Canada submitted Hibernia's original
14 Benefits Plan to the Board in September 1985. The
15 Board reviewed the Plan. It held a series of
16 discussions with Mobil to clarify the various--and
17 refine various elements of it. Mobil then submitted a
18 supplemental Benefits Plan in May 1996.
19 So, the Benefits Plan was a carefully
20 negotiated document, enshrining an agreement between
21 Mobil, on behalf of the Hibernia owners, and the
22 Board. The Plan itself contained the relevant R&D

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10:12:56 1 commitments on the part of Hibernia, principally to
2 promote research and development in Canada for
3 problems unique to the Canadian offshore environment.
4 Similarly, Section 3.5.4 of the Plan said
5 that Mobil promotes local and Canadian research and
6 development by entrepreneurs and institutions who are
7 aware of our technical problems and who have the
8 interest and resources to develop commercial
9 applications.
10 That provision goes on to list potential
11 areas for research and development activities, and you
12 can see it includes, for example, iceberg management
13 and iceberg detection. Clearly these were problems
14 related to the project and the project's needs and the
15 particular problems unique to the Canadian offshore
16 environment.
17 In the supplemental Benefits Plan, Mobil
18 again stated the project-specific nature of the
19 anticipated R&D. As it referred again to solving
20 problems unique to the Canadian offshore environment.
21 In that supplemental plan, Mobil also stated a general
22 intention to report, said that the Hibernia owners are

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10:14:06 1 committed to the following principles for the Hibernia
2 Development Project, including carrying out a program
3 of timely reporting to the Board to enable the Board
4 to monitor the level of efforts and benefits achieved,
5 and to assist in promoting maximum benefits. Note
6 that this reporting requirement was quite general and
7 made no mention of R&D and E&T.
8 The Board approved the development's plan in
9 Decision 86.01 without imposing any further
10 substantive requirement on R&D and E&T. In the
11 Decision, the Board said that it felt that the
12 Proponent's strategy to achieve benefits represents an
13 excellent plan for significant participation by
14 Canadian industry and labor in the project, and it
15 said that the Board is generally satisfied with the
16 Proponent's stated commitment to a monitoring and
17 reporting process. And again, the Board accepted the
18 focus that R&D would be on solving the problems unique
19 to the Canadian offshore environment; in other words,
20 the R&D that would be necessary to make the project
21 work.
22 The Board did not require any other specific

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10:15:18 1 reporting of R&D. You will see at the bottom of the
2 segment shown you here from Section 2.05, the Board
3 said there were two areas of concern: Contracts
4 subject to Board review prior to the bid, and time
5 allowed for the Board to review, nothing having to do
6 with R&D or specific R&D monitoring and reporting, as
7 their witnesses have tried to say.
8 So, as you look at the approval of the
9 Hibernia Benefits Plan, it's important to keep in mind
10 the context in which the Benefits Plans were
11 negotiated and approved. Under fear of the Foreign
12 Investment Review Act, Canada would request Investors
13 to commit to certain undertakings similar to those
14 contained in the Benefits Plan; and as described in
15 the GATT case on the FIRA Act, a case brought under
16 GATT--that was a case brought under GATT by the U.S.,
17 Canada did not seek and investors did not commit to
18 undertakings that departed from ordinary commercial
19 practices that the Investor would follow in the
20 absence of its undertaking. Similarly, Hibernia
21 committed to R&D locally as required by the commercial
22 and technical needs of the project.

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10:16:38 1 Under FIRA, if an investor committed to a
2 specific undertaking, it was asked at regular
3 intervals for progress report, and Canada would review
4 the investor's undertaking every five years,
5 approximately. In a similar vein, Hibernia committed
6 to report on its Benefits Plans commitments, and these
7 reports were monitored by the Board.
8 Under FIRA, if an investor was unable to
9 fulfill an undertaking, that undertaking would be
10 postponed or waived. At most, new undertakings could
11 be negotiated instead. The consent of both Parties
12 was required before any change could be made as in any
13 contractual situation.
14 Similarly, Hibernia did not expect that the
15 Board could unilaterally amend the undertakings
16 contained in the Benefits Plan.
17 Mr. Fitzgerald's Witness Statement submitted
18 by Canada goes on for many pages about the Board's
19 intentions or expectations prior to 1986. While that
20 may be interesting historical information, the Board
21 had that knowledge and those expectations when it
22 negotiated and approved the Hibernia Benefits Plan in

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10:17:40 1 1986; therefore, the only true reflection of both
2 Parties' expectations and intentions is the Plan and
3 the Board's Decision approving it.
4 The Terra Nova Benefits Plan was submitted to
5 the Board in August 1996 and approved by the Board in
6 December 1997. The timing of the submission and the
7 approval again demonstrates the careful negotiations
8 that took place. The Plan committed to support
9 technically worthy R&D projects where the results of
10 such activities and programs have application to the
11 Terra Nova development. Again, project-specific R&D.
12 And the Terra Nova Proponents went on to
13 point out to the Board that the needs of the Terra
14 Nova Development can be met with existing products and
15 services. As a consequence, the Proponents expect the
16 expenditures for R&D studies relative to the
17 development and operation of Terra Nova will be
18 relatively small.
19 The Proponents went on to say that in some
20 cases, of course, they may wish to extend existing
21 knowledge and technology and, if so, they will develop
22 appropriate R&D programs but, again, in a way that

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10:18:56 1 supports the needs of Terra Nova. And again, it
2 identified specific research, and that was clearly
3 related to the conditions of Terra Nova, iceberg
4 detection, tracking and management; ice vessel
5 interactions; and ice-seafloor interaction.
6 The Board's Decision approving the Terra Nova
7 Benefits Plan did not include--impose any further
8 substantive requirements with respect to R&D and E&T
9 expenditures. Even though the Board expressed concern
10 that the Benefits Plan as submitted did not satisfy
11 the Accord Acts requirement that the Plan contained
12 provisions for expenditures on R&D and E&T. The Board
13 said--it is the Board's assessment that the
14 Proponent's commitments vis-à-vis its future support
15 of R&D are at best qualified. And then again, notice
16 how the Board then understood the Accord Acts. The
17 Board said, "while the relevant provisions of the
18 Accord Acts do not prescribe levels of expenditure,"
19 they do not prescribe specific levels of expenditure,
20 it goes on to say, "the Acts require that the Plan
21 contain provisions intended to ensure that
22 expenditures are made on research and development."

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10:20:28 1 And the Board said it's their overall
2 assessment the Plan doesn't fully satisfy the
3 statutory requirement that the Plan contain provisions
4 intended to ensure expenditures are made on R&D and
5 education and training in the Province. As a result,
6 the Board established, as a condition to its approval
7 of the Benefits Plan, Condition 7. The condition is
8 that the Proponent report to the Board by March 31st
9 of each year, commencing in 1998, its plans for the
10 conduct of R&D and E&T in the Province.
11 So, despite the Board's clear finding that
12 the Terra Nova Benefits Plan did not fully satisfy the
13 Accord Acts requirement, that the Plan ensure R&D
14 expending, it nevertheless approved the Plan and
15 imposed only slightly more onerous reporting
16 obligations on Petro-Canada than it had with respect
17 to the Hibernia Project. Again, the Board did not
18 seek to alter Terra Nova's substantive R&D obligations
19 until it enacted the Guidelines seven years later.
20 Consistent with the Benefits Plans, the
21 Hibernia and Terra Nova Project Operators have,
22 throughout the course of these investments, undertaken

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10:21:35 1 R&D and E&T to address challenges posed by the
2 location of the Projects in the Canadian offshore
3 environment. In so doing, they have accorded a
4 preference to local providers of R&D and E&T services
5 on a competitive basis. Through 2008, this resulted
6 in $226 million in expenditures from Hibernia,
7 $24 million of expenditures by Terra Nova, and that's
8 on R&D alone. It doesn't include over $1 million
9 annually spent on E&T for about 20 years, and it also
10 does not include contractor expenditures.
11 As is typical of petroleum development
12 projects, expenditures on R&D were highest in the
13 development phase, when the projects confronted design
14 challenges, and they became less during the operations
15 phase, once those challenges had been met and R&D was
16 no longer as necessary.
17 For the better part of two decades, the Board
18 was satisfied that Claimants' approach to R&D and E&T
19 spending and procurement comported with the Benefits
20 Plans and the Accord Acts provision that we've looked
21 at. Prior to the introduction of the Guidelines, the
22 Hibernia Development Plan was amended five times after

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10:22:52 1 its approval in 1986. As HMDC increased production or
2 expanded the outer boundaries of the production area.
3 The Terra Nova Development Plan was amended once, but
4 the Board did not request on any of those occasions to
5 amend either project's Benefits Plans, including their
6 R&D commitments, throughout this time.
7 Similarly, the Board approved production
8 operations authorizations, known as POAs. They are
9 the licenses to produce oil for these projects. These
10 POAs required an acknowledgment by the Board that the
11 projects were in compliance with their obligations,
12 including their Benefits Plans obligations.
13 Indeed, looking at the timeline on the
14 screen, we can see that for nearly two decades, the
15 Operators of these project had extensive contact with
16 the Board through the Development Plan Amendment
17 process, the POA process, and the reporting process
18 without the Board ever expressing a single word of
19 concern over R&D expenditures at the two projects.
20 Keep that in mind as you consider the Witness
21 Statements that have been submitted by Canada's
22 witnesses here.

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10:23:57 1 In 2004, however, the Board decided to
2 promulgate new Guidelines that fundamentally changed
3 the terms of Claimants's' investments. As you know,
4 the Guidelines require a minimum level of expenditures
5 on R&D and E&T, a level which is determined
6 unilaterally by the Board and which has absolutely
7 nothing to do with the needs of the project. The
8 Board has said it will not renew the project's POAs,
9 their licenses to produce, unless the Guidelines are
10 met, that it will pull these licenses, despite the
11 billions of dollars already invested in them by
12 Claimants and the other owners.
13 The Guidelines will cause Claimants to spend
14 millions more dollars per year on R&D and E&T than
15 they otherwise would have. For example, for the 2004
16 period alone, the Board has assessed the spending
17 shortfall--sorry--2004 to 2008 alone, historical
18 period, the Board has already assessed the spending
19 shortfall for Hibernia and Terra Nova Projects at ██
██████ combined, about ██████ for
21 Hibernia, the rest for Terra Nova, about ██████ for
22 Terra Nova.

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10:25:05 1 In total, Claimants estimate that Hibernia
2 will be forced to spend over $106 million and that
3 Terra Nova will be forced to spend over $41 million on
4 R&D and E&T as a result of the Guidelines between 2004
5 and 2023, a total of over $147 million for these
6 projects.
7 Remember, this is spending on top of
8 ██████ in R&D and E&T already forecast to be
9 spent by those two projects over the same period, even
10 though both are in the same--in the operations phase
11 at the time.
12 So, when you read their Expert, Mr. Norring,
13 talk about R&D that might be necessary or you hear
14 other arguments from them about how R&D might be
15 necessary in the course of the project, we've already
16 accounted for that: ██████ worth of R&D at a
17 time when the project is does not need much R&D. What
18 we are claiming is the additional $147 million for the
19 two projects on an undiscounted basis.
20 The Board has made clear the draconian
21 consequences of these substantial additional sums if
22 these sums are not met. Despite the billions already

10:26:19 1 invested, the Board has stated that if the Guidelines
2 are not met, further POAs will not be granted.
3 Without them, of course, the operations are shut down,
4 and the projects will lose all of their investments
5 and all of their revenues.
6 The need to spend down this gap and to ensure
7 compliance with the Guidelines on a going-forward
8 basis has forced a sea change in the manner in which
9 the projects approach R&D and E&T. Canada does not
10 really dispute that the Guidelines changed the
11 regulatory environment in the following ways. Before
12 the Guidelines, the project operator would undertake
13 some unspecified amount of R&D and E&T to address the
14 commercial and technical needs of the project, unique
15 to operating in the Canadian offshore environment--the
16 needs of the project--and they had to give priority
17 consideration to local providers on a competitive
18 basis in the procurement of those services. R&D
19 amounts as a result were not separately recorded or
20 even calculated except for the filings made to the
21 Canadian revenue authority for the shred, the
22 investment tax credits.

10:27:28 1 They were not reported to the Board until
2 1998, and then only on the basis of these shred
3 filings after the fact. After the Guidelines, the
4 project operator has to achieve a prescribed level of
5 expenditures on R&D and E&T, irrespective of the
6 commercial and technical needs of the project,
7 amounting in practice to millions more dollars per
8 year than would otherwise be spent, actually about an
9 average of about $12 million a year from 2004 to 2015
10 are required by the Guidelines.
11 The mandated amounts are not tied to the
12 commercial or technical needs of the project, nor are
13 they tied to the technical needs of the
14 Canadian--Newfoundland offshore environment.
15 Before the Guidelines, the project operator
16 periodically provided high-level reports on R&D and
17 E&T activity. These reports allowed the Board to
18 monitor the undertaking as contained in the Benefits
19 Plans. After the Guidelines, at the end of each POA,
20 the project operator has to provide a detailed
21 accounting of R&D and E&T expenditures during that POA
22 period. The Board assesses each claim expenditure and

10:28:38 1 determines whether it counts towards the guideline
2 requirement. In the event of a shortfall, the project
3 owners have to provide a plan and a financial
4 instrument to guarantee that shortfall, and an
5 agreement with sufficient triggers for the Board to
6 realize upon that instrument.
7 So, even after spending a significant amount
8 of money on R&D under the Guidelines, the Board could
9 still demand more at the end of each POA period.
10 Before the Guidelines, there was no Board
11 pre-approval of R&D. The Board did not pass judgment
12 on individual R&D and E&T expenditures. After the
13 Guidelines, the project operator has to seek Board's
14 pre-approval of each R&D and E&T expenditure that it
15 plans to undertake.
16 Before the Guidelines, there was no
17 relationship between the R&D spending and the POA
18 approval process.
19 After the Guidelines, the POA has been
20 conditioned on compliance with the Guidelines.
21 Before the Guidelines, the Operator spent the
22 amount required by the commercial and technical needs

10:29:43 1 of the project on R&D and E&T. There was no
2 retroactive effect.
3 Now, after the Guidelines, the Board
4 calculates expenditures at the end of each POA period.
5 Thus, an Operator does not know how much it's required
6 to spend during a POA period until that period is
7 over. Because the expenditure amount applicable to a
8 given period is calculated after the fact, the
9 Operators cannot effectively plan their R&D and E&T
10 activity to avoid a deficit or a surplus in spending.
11 And again, that is so because the R&D is not being
12 decided in the ordinary course for the project needs.
13 It's being decided to meet a false threshold that has
14 been created by the Guidelines.
15 The immediate reactions of Claimants and
16 other oil companies operating in the Newfoundland
17 offshore environment to the proposed enactment of the
18 Guidelines are telling in this regard, and we have a
19 slide that shows those; they're in the papers, and I
20 won't spend time on them, but I will spend a little
21 time on the language of the Newfoundland Court of
22 Appeals Decision which upheld the Guidelines, but it

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10:30:45 1 also makes clear--but even in upholding it, the Court
2 recognized that the Guidelines represented a
3 fundamental change to the Party's original bargain.
4 Justice Welsh, writing for the majority, said
5 the 2004 Guidelines are a departure from the approach
6 adopted in the initial stages of development of the
7 offshore petroleum industry. "The Guidelines alter
8 the basic earlier principles set out in the originally
9 approved Benefits Plan." You can't ask for a clearer
10 statement of the fundamental change coming from a
11 judge, a Canadian court judge.
12 Justice Rowe, who, as you recall, is the
13 judge who dissented, and no connection at all to our
14 Samantha Rowe, much to Sam's regret, Justice Rowe said
15 that it is beyond question that "the Guidelines impose
16 additional R&D requirements inconsistent with
17 97.02"--recall that's the decision approving the Terra
18 Nova Project's Benefits Plan--"and as such cannot be
19 valid as regards the Terra Nova Project." The same is
20 true regarding 86.01 in the Hibernia Project.
21 He went on to say that providing a stable and
22 fair offshore management regime for industry has been

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10:31:59 1 undermined by the Guidelines and fundamentally by the
2 authority asserted by the Board for its establishment
3 of the Guidelines, and said that such a stable
4 management regime has to mean that when Proponents
5 receive an approval, as they did in 86.01 and 97.02,
6 that they can have confidence that the decision will
7 not be reversed or, as here, fundamentally altered.
8 The fact is, as they said, at this stage of
9 both the Hibernia and Terra Nova Projects, very little
10 R&D is required going forward. Claimants' Expert
11 David Montgomery made that clear in his report
12 submitted with our Memorial in August 2009, and
13 neither Mr. Montgomery or Norring, Canada's Expert on
14 R&D, will be testifying before the Tribunal this week.
15 We are satisfied that Mr. Montgomery and Mr. Norring
16 are in essential agreement about Mr. Montgomery's
17 basic point that R&D needs for a project such as
18 Hibernia and Terra Nova vary according to a project's
19 phase, and that those needs typically decrease as a
20 project enters and continues through its production
21 phase.
22 I can save more for the closing description

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10:33:07 1 of why we felt Mr. Norring's testimony was
2 unnecessary. But if you read his report, as I know
3 you have, you will see that really what he is saying
4 is that the projects or owner companies should have
5 carried out the report the projects listed in the work
6 plans, even in the absence of the Guidelines and that
7 "major international oil companies such as ExxonMobil,
8 which planned to explore for and eventually develop
9 petroleum resources in Arctic waters have to be ready
10 for a sustained R&D effort to develop these
11 technologies."
12 These are, frankly, patronizing assertions
13 about what ExxonMobil, Murphy, and Hibernia and Terra
14 Nova should be doing. It misses the point completely.
15 Countries implement free trade agreements such as the
16 NAFTA precisely so the companies are free to decide
17 how best they pursue their business plans. That's the
18 point of Article 1106. Free trade requires that they
19 make those decisions on the basis of the technical and
20 commercial needs of their business and not on the
21 basis of regulatory imperatives.
22 If ExxonMobil or Murphy need to undertake

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10:34:12 1 more Arctic research, it's up to them to decide
2 whether to conduct that in Newfoundland, in Russia, in
3 Greenland, or elsewhere in the Arctic.
4 Mr. Norring fails to address that essential
5 point.
6 He also fails to take heed of the fact that
7 Hibernia and Terra Nova are owned by consortiums of
8 oil companies. It may be that some of this research,
9 which is now described in the work plans, could be
10 applicable in later projects by these owner companies.
11 But in those separate projects, they will have
12 different ownerships. They will have different
13 interests. They will have different economics. And
14 to say that these Guidelines are appropriate because
15 ExxonMobil needs to understand how to deal in the
16 Arctic because it may have to deal off the shore of
17 Greenland or Russia misses the point entirely. It's
18 up to ExxonMobil to decide where to conduct that
19 research and to base it on its ownership in those
20 projects, not its ownership in Hibernia and Terra
21 Nova.
22 And that's true, for example, of the Hibernia

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10:35:23 1 South Extension, which we already talked about earlier
2 today. HSE is owned in different Shares by the
3 Hibernia owners the Hibernia, the main block is
4 already in production. So, to the extent that any of
5 this may benefit the HSE owners, those owners are
6 different and includes Nalcorp, which is a vehicle
7 established by the Newfoundland Government.
8 Because there is no commercial need for the
9 level of expenditures mandated by the Guidelines, the
10 testimony of Mr. Ringvee, Mr. Phelan, and Mr. Graham
11 has shown how project operators have had to and will
12 continue to have to fabricate ways to spend enough
13 money to satisfy the Board's development objectives.
14 The artificial spending target imposed by the
15 Guidelines is so out of proportion with business
16 reality that the Operators of the four active projects
17 in the Province have been forced to launch a
18 coordinated effort to invent and carry out research
19 unnecessary for these projects, valued at nearly
20 [redacted] over the next five years, more than
21 [redacted] at Hibernia alone. Huge amounts of time
22 have been devoted to this process.

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10:36:25 1 Canada has put forth a series of
2 justifications, and we will just go through them
3 quickly because none of them make imperial sense or
4 find support in the evidentiary record. For example,
5 they argue that the monitoring requirements contained
6 in the Benefits Plans signaled an intent to impose
7 mandatory R&D expenditures at a later date. Well,
8 there are three reasons why this argument can't be
9 sustained. First, the wording of the Benefits Plans
10 don't support that argument. There is nothing that
11 says that there could be an imposition of later
12 requirements at that date or that the monitoring was
13 that purpose.
14 There is a complete absence of other
15 documentary evidence to support this agreement, and
16 the Board's practice under the first years of
17 operations was simply to ensure compliance with the
18 Benefit Plan commitments, not to ensure that they were
19 attaining some unexpressed, mandatory expenditure
20 threshold.
21 Second, Canada has argued that the adoption
22 of the Guidelines was motivated by inadequate R&D

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10:37:25 1 spending levels at Hibernia and Terra Nova in the
2 years leading to the Guidelines. Again, there is no
3 documentary evidence to support this argument--none.
4 Canada relies on witness testimony, but as a factual
5 matter, this makes no sense. Hibernia did not even
6 report R&D specific expenditures to the Board between
7 1990 and 1998. The notion that the Board not having
8 had any specific expenditure levels through 1997,
9 suddenly became dissatisfied in 1998 strains credulity
10 and it does not square with the record.
11 Canada's inadequate expenditures argument
12 also makes no empirical sense. Hibernia reported
13 average R&D expenditures from 1997 to 2000 of
14 approximately [redacted]. According to the
15 Board, this level of activity was sufficient
16 [redacted] because the Board
17 approved Hibernia's POA in 2000, and it could only do
18 that if we were in compliance. Under the Guidelines,
19 the Board is requiring Hibernia to spend an average of
20 $12 million per year on R&D and E&T from 2004 to 2010,
21 an equivalent annual average through 2015 and, of
22 course, more beyond.

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10:38:42 1 So, the Guidelines are not a curative
2 measure. They are not meant to make sure that we
3 spend the amount we were spending at the time they
4 approved the 2000 POA. They are a punitive measure to
5 increase [redacted] the amount of R&D that we spend.
6 Canada has also attempted to rewrite history,
7 arguing that Hibernia and Terra Nova have always been
8 under a broad obligation under the Accord Acts to make
9 expenditures on R&D beyond the commitments stated in
10 the Benefits Plans. Again, that doesn't square with
11 the language of the Accord Acts, and essentially what
12 they are trying to do here is to use good corporate
13 citizen spending, which they made to further local
14 institutions, to say, well, we understood that we were
15 obligated to make those. That just doesn't square.
16 Canada has also failed to address the utter
17 arbitrariness of the Stats Can factor which is used by
18 the Board to develop the project's Guidelines
19 obligations. We have fully laid out all the various
20 issues with that benchmarking in our Memorial and
21 Mr. Montgomery's Expert Report and Mr. Hutchings's
22 Witness Statement.

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10:39:51 1 In short, that factor has nothing to do with
2 the type of project or the phase of the project that
3 Hibernia or Terra Nova is in at the time, so it's
4 entirely arbitrary.
5 So, let's turn to Article 1106.
6 PRESIDENT van HOUTTE: I wonder, because we
7 need to have a break sometime, whether this is a good
8 time.
9 MR. RIVKIN: Now would be fine. I think we
10 are about halfway through. So now is--
11 PRESIDENT van HOUTTE: I would say a
12 15-minute break?
13 MR. RIVKIN: That would be fine. Thank you.
14 PRESIDENT van HOUTTE: Thank you.
15 (Brief recess.)
16 THE SECRETARY: Please open the session.
17 PRESIDENT van HOUTTE: Mr. Rivkin, you have
18 the floor again.
19 MR. RIVKIN: Thank you.
20 Mr. President, Members of the Tribunal, that
21 the Guidelines violate Article 1106 is obvious. The
22 obligation they impose to make expenditures on R&D and

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11:00:34 1 E&T services in the territory is precisely the kind of
2 performance requirement that the Treaty stands to
3 guard against.
4 The Tribunal may find it useful to keep the
5 following questions in mind when analyzing the
6 Guidelines and their conformity to Article 1106.
7 First, are the guidelines a requirement? Second, do
8 the Guidelines require the Claimants to purchase, use,
9 or accord a preference to local goods and services?
10 And this has some subparts. Do the Guidelines require
11 Claimants to spend on R&D and E&T in the Territory of
12 Canada? Does R&D and E&T, do they constitute
13 services, and do those required expenditures purchase,
14 use, or accord a preference to R&D and E&T services?
15 And, finally, since we think all the answers
16 to those questions are quite obvious, are the
17 guidelines covered by Canada's Annex I Reservation as
18 a subordinate measure adopted under the authority of
19 and consistent with the Accord Acts? And there are a
20 number of subparts within that: It has to be covered
21 by the reservation, and it has to be subordinate
22 measure, it has to be adopted under the authority, and

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11:01:45 1 it has to be consistent. They have to meet all of
2 those hurdles.
3 The plain language of the Treaty,
4 Article 1106, makes clear that there is a violation
5 here. The Article prohibits any requirement to
6 purchase, use, or accord a preference to goods
7 produced or services provided in Canada or to purchase
8 goods or services from persons in Canada.
9 It is undisputed that the Guidelines
10 constitute a requirement. Indeed, there is no dispute
11 between the Parties regarding any element of the
12 chapeau of Article 1106(1).
13 It is also undisputed that the Guidelines
14 require Claimants to make expenditures on R&D and E&T
15 in the territory of Canada, specifically in
16 Newfoundland. As the Guidelines say, an expenditure
17 has to occur in the Province of Newfoundland and
18 Labrador.
19 We demonstrated in our are Reply Memorial
20 that R&D and E&T are services within the ordinary
21 meaning of Article 1106(1)(c), and Canada now appears
22 to accept that interpretation, as it said in its

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11:02:51 1 Rejoinder, which is up on the screen now.
2 The dispute between the Parties as to
3 Article 1106, therefore, centers on the issue of
4 whether the Guidelines compel Claimants to purchase,
5 use, or accord a preference to local goods and
6 services: Of course, it is impossible to comply with
7 the Guidelines without doing just that.
8 Canada has consistently failed to grapple
9 with the fact that requiring Claimants to spend more
10 than $10 million annually on R&D and E&T in the
11 Province necessarily accords a preference to local R&D
12 and E&T services. Canada's sole answer is to claim
13 that an expenditure only violates Article 1106(1)(c)
14 when a service is provided from a third Party to
15 Claimants in return for payment. There is absolutely
16 no support on the face of NAFTA for that contention.
17 The provision, on its face, is clearly broader than
18 that, and Mexico's Article 1128 submission in this
19 case confirms that to be the case.
20 Canada also attempts to evade the obvious by
21 pointing to a very few means of complying with the
22 Guidelines that, in its view, do not require the

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11:04:01 1 purchase, use, or accordance of a preference to
2 services in Newfoundland, yet each of the examples
3 they put forth in their Rejoinder would in fact
4 violate Article 1106(1)(c), and the very attempt to
5 come up with this end run around the pure obvious
6 requirements of the Guidelines shows how weak their
7 position is.
8 First, they talk about establishing an
9 in-house R&D facility. Well, for a start, we would
10 have to build the physical facility, requiring the
11 purchase and use of local labor, goods, and services.
12 Once established, such a facility would provide R&D
13 services in the Province. We would therefore have to
14 use funds to establish and operate the facility, funds
15 that would otherwise be spent elsewhere or on
16 different priorities. Therefore, establishing the
17 facility to the Province would necessarily accord a
18 preference to R&D services provided in the Province.
19 In addition, Claimants would surely use the services
20 provided at that facility, another clear breach of
21 Article 1106(1)(c).
22 The same arguments apply with respect to

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11:05:12 1 in-house provision of E&T services, which is also
2 mentioned by Canada.
3 Then, they mention making donations to
4 educational institutions, but of course making those
5 donations would require Claimants to spend funds in
6 the Province that would otherwise be spent elsewhere.
7 As the educational institutions provide E&T and
8 possibly R&D, services in the Province, the donations
9 would without a doubt necessarily accord a preference
10 to E&T services provided in the Province.
11 Then they mentioned study and work abroad
12 programs. So, anyway, just think about it:
13 $12 million a year in study and work abroad programs.
14 That's what they're saying we should do in order to
15 comply with the guidelines in a way that doesn't
16 violate the Article. But even looking at it makes no
17 sense. Funding those terms also violates because
18 Claimants are purchasing E&T services from persons in
19 the Province because the expenditures have to be made
20 in the Province, even if those services are to be
21 provided elsewhere. This is clearly prohibited on the
22 face of Article 1106(1)(c).

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11:06:16 1 The Accord Acts themselves which the Board
2 relies on as the authorizing statute for the
3 Guidelines, clearly tie E&T expenditures to "education
4 and training to be provided in the Province." Indeed,
5 the wording of the Guidelines themselves makes clear
6 that such expenditures accord a preference to E&T
7 services provided in the Province. The Guidelines
8 state that the definition of E&T in the Province
9 "Shall include expenditures for scholarships and work
10 terms including provincial residents who may study or
11 work outside the Province." So, even in the case of a
12 study abroad program, we are according a preference to
13 services in the Province because we are paying those
14 funds to students in the Province.
15 And as I said, it would be virtually
16 impossible to spend the tens of millions of dollars
17 every year required by the Guidelines on university
18 chairs or on study abroad programs.
19 I know all three of you are Professors, and
20 I'm sure you would love to have an annual $12 million
21 grants forced on some local company by your local
22 Government, but that is not what NAFTA allows.

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11:07:27 1 Canada's argument that the Guidelines pass
2 muster by this narrow and contrived means of
3 compliance, even if one exists, would create an end
4 run around the clear purpose and object of the
5 Article.
6 To understand how contrived the proposed
7 means of compliance really are, one need only recall
8 that the Guidelines issue at base research and
9 development Expenditure Guidelines, calibrated to an
10 approximation of R&D spending calculated by Stats Can,
11 but virtually all of Canada's means of compliance are
12 strictly E&T.
13 Canada's contorted arguments should not
14 distract the Tribunal from the clear wording of the
15 NAFTA. The Guidelines violate 1106(c) because they
16 require Claimants to purchase, use, or accord a
17 preference to R&D and E&T services in Newfoundland or
18 because they require to us purchase goods and services
19 from persons in Newfoundland.
20 The fact that the Guidelines constitute an
21 obvious violation of Article 1106 is confirmed by
22 Canada's Annex I Reservation for the Accord Acts. In

11:08:33 1 that reservation, Canada admitted that a requirement
2 to provide for R&D and E&T spending, even in an agreed
3 Benefits Plan, is a violation of Article 1106.
4 Recall that Article 1108 provides that the
5 NAFTA Parties can reserve an existing measure that is
6 nonconforming with certain Chapter 11 Provisions,
7 including Article 1106, so long as that measure is
8 listed in the parties' Annex I Schedule.
9 The headnote to Annex I further requires each
10 Party to provide a description of each measure listed
11 in the schedule, and set out the "nonconforming
12 aspects" of that measure.
13 Canada included a reservation for the Accord
14 Acts in its Annex I Schedule, specifying that the
15 legislation does not conform to Article 1106. In its
16 description of the Accord Acts, in other words, its
17 elaboration of the nonconforming aspects of the
18 legislation, it listed a small number of requirements,
19 including the requirement that a Benefits Plan ensure
20 that expenditures be made for R&D and E&T in the
21 Province, and including that first consideration be
22 given to goods produced or services provided from

11:09:51 1 within the Province, where those goods or services are
2 competitive in terms of fair market price, quality,
3 and delivery.
4 R&D, of course, are services within the scope
5 of that provision as well, on first consideration.
6 If Section 45(3)(c) of the Act, which does
7 not impose a mandatory expenditure requirement on R&D
8 and E&T, itself violates Article 1106, and so must the
9 Guidelines which do impose such a mandatory spending
10 threshold, irrespective of the terms of the benefits
11 plan.
12 Canada's response to this obvious point again
13 reveals the weakness of its case. For example, Canada
14 argues in its Counter-Memorial that it included in
15 Section 45(3)(c) of the Accord Acts in its schedule
16 because of "other nonconforming elements in the
17 legislation." Alternatively, they argue that it was
18 included as an abundance of caution as part of a belts
19 and suspenders approach to reservation drafting. If
20 this was the case, why didn't Canada just reserve the
21 entire statute?
22 The Federal Accord Act is over 140 pages

11:11:02 1 long, it contains over 200 provision, but Canada's
2 description of the nonconforming elements of the
3 statute is limited to the few iterations that you just
4 saw, including that a Benefits Plan has to be in place
5 and that Benefits Plan has to include commitments to
6 conduct R&D. The fact is that Canada had to know that
7 this Section was a nonconforming element of the
8 legislation, and that's why it was listed in Annex I
9 because it did not conform to Article 1106.
10 In addition, the Board's authority to issue
11 Guidelines is nowhere mentioned in the description of
12 nonconforming elements.
13 It also bears repeating that Canada has
14 provided absolutely no contemporaneous evidence that
15 these were the reasons for--including Section 45(3)(c)
16 in its scheduled Annex I--no contemporaneous evidence.
17 It's all an after-the-fact justification.
18 Because it's beyond doubt that the Guidelines
19 themselves violate Article 1106, the only real issue
20 for the Tribunal to determine is whether or not the
21 Guidelines may be saved as a subordinate measure under
22 Canada's Annex I Reservation. As Claimants have

11:12:17 1 demonstrated extensively in our written pleadings,
2 they are not covered.
3 PRESIDENT van HOUTTE: Mr. Rivkin, Arbitrator
4 Sands wants a question.
5 MR. RIVKIN: Sure.
6 ARBITRATOR SANDS: Can I just ask--just in
7 relation to Article 1108(1)(a), any existing
8 nonconforming measure, just to be clear about this,
9 what specifically is the measure that are you
10 referring to, and what is the meaning of the word
11 "measure" in relation to this case? Is it the whole
12 of the Accord Acts? Is it Article 45(3)(c) of the
13 Accord Acts? Is it the development which--all the
14 above or all others were you saying it is?
15 MR. RIVKIN: I was actually about to get to
16 that, but I think the first quick answer is that
17 Article 1108 refers to existing nonconforming
18 measures. It was clearly only the Article 1108
19 existed--sorry, the Accord Acts existed in 1994, the
20 later plans did not--if you can, as Canada wishes,
21 bring in measures that were--so, that would make the
22 Accord Acts the measure.

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11:13:28 1 Now, what Canada has said in the Annex I
2 Schedule is what's nonconforming about the measure is
3 the requirement that a Benefits Plan ensure R&D.
4 ARBITRATOR SANDS: We will come on to that,
5 I'm sure, in due course, but I just wanted--okay, for
6 you, the existing nonconforming measure is the Accord
7 Acts or Article 45(3)(c)?
8 MR. RIVKIN: As part of the--well, the
9 measure is the Accord Acts. What Canada says is
10 nonconforming is, among other things--is Article
11 45(3)(c).
12 And if, as Canada argues, you can use the
13 adopted or maintained language to include subsequently
14 enacted measures within the mean of "existing," then
15 the measure also includes the two decisions approving
16 the Benefits Plan because those are provided for in
17 Section 45(c), and the Guidelines, as we pointed out,
18 violate--are not consistent with those measures
19 either.
20 ARBITRATOR SANDS: And, of course, what the
21 United States has said, and I think Mexico has more or
22 less made the same point, at Paragraph 5 of its

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11:14:42 1 intervention, is that so long as the subordinate
2 measures are adopted or maintained under the authority
3 of and consistent with the measure that we are talking
4 about.
5 MR. RIVKIN: Exactly.
6 ARBITRATOR SANDS: In their view, I don't
7 want to pre-judge, they make it clear they are not
8 applying that to the facts in this case, but there may
9 not be a problem.
10 MR. RIVKIN: Exactly. And I'm going to get
11 to that, but for many reasons--
12 ARBITRATOR SANDS: You are going to tell us
13 why the U.S. and Mexico are wrong?
14 MR. RIVKIN: Well, we think, as we did in our
15 Response, we think it puts priority to the language in
16 the Annex I chapeau over 1108 which is the only
17 operative provision which refers to existing measures.
18 But as we pointed out, and as I will say, even if they
19 are right and you can bring in later measures, as the
20 U.S. and Mexico pointed out, you have to still be--it
21 has to be--the later measure has to be enacted under
22 the authority of the existing measure and consistent

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11:15:45 1 with it, and there is no way you could say that you
2 can say that the Guidelines are, for example,
3 consistent with the pre-Guidelines measures, and U.S.
4 and Mexico were careful not to draw any factual
5 conclusions here.
6 ARBITRATOR SANDS: You would say the test for
7 authority and consistency is one governed by NAFTA
8 law, not by Canadian law?
9 MR. RIVKIN: That--well, again, I will get to
10 that. The Canadian court--yes, I would say that is a
11 question of international law, because--and NAFTA so
12 provides; second, the Canadian Court Decision did not
13 say that the Guidelines were issued under the
14 authority of. What they said was they looked at the
15 pure--it was a purely administrative law argument
16 about whether or not the--it fell within their
17 discretion. It was a different issue that they were
18 deciding. But in any event, you have to decide as a
19 matter of international law, and also the consistency
20 point. But you will hear a little bit more from me
21 over the next few minutes.
22 And that is why, as we said, I think once you

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11:16:56 1 start with the conclusion that the Guidelines violate
2 1106(1)(c), then the question is, does it fall within
3 the exception. And it is undisputed that Canada bears
4 the burden of proving the Guidelines fall within its
5 Annex I Reservation, and it has failed to do so.
6 First, as I mentioned, Article 1108 requires
7 that the measure has to be existing at the time of
8 entry into force in order to be covered by the
9 Guideline, and Article 1108 is the portion of NAFTA
10 that deals with these exceptions. And it makes clear
11 that it extends only so far as measures existing at
12 the time of entry, and then it also--and it
13 specifically says in Article 201, existing means in
14 effect on the date of entry into force of this
15 agreement, in other words, 1994.
16 Now, the wording of this provision is clear
17 on its face, for a measure to be reserved, it had to
18 be an existing nonconforming measure, and it's clear
19 that the 2004 Guidelines did not exist in 1994 and are
20 not an amendment to the Accord Acts. Canada has
21 agreed that the Guidelines are not an amendment to the
22 Accord Acts.

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11:18:11 1 So, Canada then relies on the headnote which
2 you were just raising, Professor Sands. And again,
3 it's important to keep in mind that the headnote to
4 Annex I is the context. They try to create a contrary
5 Rule to the plain language of 1108. The chapeau does
6 not contain any operative provisions; that's in
7 Article 1108.
8 And that headnote says that an existing
9 nonconforming measure also includes subordinate any
10 measure adopted or maintained under the authority of
11 or consistent with the measure listed in the Parties'
12 schedule.
13 So, again, there are a number of hurdles that
14 Canada has to get passed. First, it has to be proved
15 that it is a subordinate measure; second, it has to
16 prove that it was issued under the authority of the
17 Accord Acts; and, third, it has to be consistent with
18 that measure. And that doesn't work at all.
19 Even if the language adopted and maintained
20 includes some later measures, the reservation can only
21 include within its scope future measures that are
22 specifically contemplated by the reservation.

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11:19:24 1 For example, a future subordinate measure
2 that would be covered by Article 1108(1) under this
3 interpretation would be the Board's Decision 9702
4 approving the Benefits Plan. Canada's Annex I
5 Reservation makes specific reference to the adoption
6 of Benefits Plans. The Guidelines, by contrast, are
7 not at all this kind of measure. They constitute an
8 enactment of a new rule of general application, sets
9 forth a general legal regime that did not previously
10 exist. Therefore, the Guidelines cannot be deemed an
11 existing measure or a subordinate measure within that
12 meaning.
13 Second, the interpretation is not consistent
14 with the object and purpose of NAFTA. It would allow
15 Canada to adopt a more restrictive subordinate measure
16 after the entry into the force of NAFTA. Canada
17 should not be allowed to achieve the same result by
18 way of an amendment--achieve the same result--sorry.
19 Let me restate that. Canada would not be allowed to
20 achieve the same result by way of an amendment to a
21 measure listed in its Annex I Reservation.
22 Article 1108(3) provides that an amendment

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11:20:38 1 falls within the reservation to the extent that the
2 amendment does not decrease the conformity of the
3 measure, as is it existed immediately before the
4 amendment, with Articles 1106, among others. And it
5 is clear that the Guidelines increase the
6 nonconformity of the measure from the Accord Acts and
7 the Decisions approving the Benefits Plan.
8 Even if Canada could overcome all of those
9 hurdles, and the Tribunal agreed with Canada on the
10 meaning of "adopted and maintained," the Guidelines
11 are still not covered by the reservation because they
12 were not adopted under the authority of or consistent
13 with the measure.
14 First, the authority issue. Canada's
15 reservation extends only to subordinate measure,
16 consistent with and adopted under the authority of the
17 nonconforming aspect of the existing measure, and this
18 is Canada's own language in its Rejoinder.
19 Under Headnote 2(f) of Annex I, the measure
20 includes the qualification as it is described, the
21 description element, for which the reservation is
22 taken. As we already noted, the Guidelines were

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11:21:47 1 adopted under the authority of Section 151.1, and
2 Canada's description of the nonconforming aspects of
3 the Accord Acts does not extend to Section 151, so as
4 a matter of an international law, it simply does not
5 fit within the terms of the Annex.
6 ARBITRATOR SANDS: While you're reflecting on
7 it, I'm just puzzling, just if you can help.
8 I don't at all have a view on this, but
9 what's the relationship between the meaning of the
10 words "consistent with" on the one hand, and as you
11 rightly point out in relation to an amendment, the
12 test is decreasing the conformity with? And I'm
13 trying to think through what, if any, is the
14 difference of meaning in effect of "consistent with"
15 and "in conformity with"?
16 MR. RIVKIN: I think in order to interpret
17 the Treaty in good faith, one has to interpret them
18 similarly, that a consistency would require that the
19 subordinate measure not decrease the conformity of the
20 measure; otherwise, it would be very odd for the NAFTA
21 Parties to have decided that they can, through a
22 subordinate regulation, such as this, issued by a

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11:23:15 1 Provincial Board, create a measure that is less
2 consistent with the goals and purposes of NAFTA and
3 the requirements of NAFTA, than they could through a
4 formal amendment to the Federal Accord Act.
5 ARBITRATOR SANDS: Presumably, the drafters
6 could, if they had wanted to--could have put in the
7 words "under the authority of" and not "decreasing the
8 conformity of," and they chose not to. We don't yet
9 know why they did that or perhaps what they intended
10 to do, but the starting point for the interpreting of
11 a treaty is the drafters choose a form of words
12 presumably because they want to adopt a particular
13 direction. They at least haven't chosen the same
14 words, when they could have done so.
15 MR. RIVKIN: That's true. And again, this is
16 Canada's burden, and Canada has not put in any
17 evidence on that. But I think if you just look at the
18 way the two different sections are written, the way
19 the language about an amendment, it wouldn't make--it
20 would be less clear to say an amendment is okay so
21 long as it's consistent with the existing measure.
22 The Parties want to make clear that it had to be--it

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11:24:24 1 couldn't decrease the conformity.
2 And perhaps when you talk about "authority
3 of" and "consistent with," the formulation you just
4 gave is a little bit more cumbersome, but I think it
5 has to be seen with the same meaning. If you read it
6 any differently, as I said, then it would create an
7 odd situation where a Provincial regulation could
8 decrease the conformity with NAFTA in a way that the
9 Federal Government could not, through an amendment to
10 a listed measure.
11 ARBITRATOR SANDS: Just to play devil's
12 advocate, you could see some scenarios--I'm not saying
13 it is this one or any one that i have in mind, in
14 which an amendment would be subject to a more rigorous
15 standard of not decreasing conformity because you
16 would not wish to impose some degree of higher burden,
17 let us say. But for a subordinate measure, provided
18 it is consistent with, even though it may impose a
19 higher burden, it could still be said, playing devil's
20 advocate, that it is consistent with; could is it not?
21 MR. RIVKIN: I don't think so, because if the
22 nonconforming aspect of the measures laid out in Annex

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11:25:38 1 I, if it is--if it is not consistent with the prior
2 existing measure, if it is more burdensome, if it
3 makes the--if it goes against what the NAFTA was
4 trying to achieve in Article 1106 or the other Chapter
5 11 Articles that are mentioned there, I don't see how
6 one could say that it was consistent with that
7 measure.
8 And I think the consistency with the measure,
9 Decision 97.02, under this interpretation that it can
10 include anything after 1994, Decision 97.02 is a
11 measure that was adopted under the authority of the
12 Accord Acts and, indeed, the nonconforming aspect of
13 the Accord Act, the 45(3)(c) provision; and it is
14 consistent with that provision of 45(3)(c) because it
15 is the Government's granting of a Benefits Plan
16 exactly as 45(3)(c) lays out. That is what is meant
17 by consistency, but to say that the goals of Article
18 1106 could be undermined by a regulation but not by a
19 formal amendment seems to me, actually, backwards.
20 And again, it's also important to note that.
21 When you're looking at the question of authority, as I
22 said, Section 151.1 is nowhere mentioned in the

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11:27:13 1 schedule and nowhere described as a nonconforming
2 aspect.
3 Looking at it in terms of consistency, we
4 have already pointed out, and I won't spend more time
5 with it--you've looked at the language--we have
6 already shown you the slide once, and I can promise
7 you you will see it again, that all of the many ways
8 in which the Guidelines are not consistent with the
9 Accord Acts and the Benefits Plans, all the many ways
10 in which operation and production had to change after
11 the Guidelines were enacted, there is no way that one
12 could view this as being consistent with the legal
13 regime governing our expenditure obligations prior to
14 the adoption of the Guidelines.
15 Canada does try, as you pointed out,
16 Professor Sands, to rely upon the Canadian Court
17 Decisions, and there are two responses to that. The
18 first, as I said to you, two of the justices did not
19 actually consider whether the Board was actually
20 authorized by the prior legislation. What they looked
21 at was on the administrative law justice, the two
22 justices voted in the majority, said that the Board's

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11:28:29 1 interpretation of permitting application of the
2 Guidelines was reasonable and that it fell within the
3 range of possible, acceptable outcomes which are
4 defensible in respect of the facts. That is an
5 administrative law standard; it does not say that they
6 were made with authority.
7 The one judge who did address specifically
8 the question of authority, Justice Rowe, specifically
9 found that the Guidelines were made without authority.
10 And in any event, as you point pointed out,
11 Professor Sands, the NAFTA requires that a subordinate
12 measure, that this issue be decided in accordance with
13 the NAFTA and applicable rules of international law,
14 and that's Article 1131 of the NAFTA. So, the
15 Canadian Court Decisions, even if they supported
16 Canada's argument, would be irrelevant here.
17 And I have already talked about the
18 obligation of good faith and how it fits in. It's
19 clear that the 2004 Guidelines substantially increased
20 the local content obligations on Claimants that had
21 previously existed under the Accord Acts and the
22 Benefits Plans. The Guidelines are--if they were an

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11:29:45 1 amendment would therefore fail the ratchet Rule that
2 we were just discussing as an amendment and it cannot
3 achieve a different result by calling them a
4 subordinate measure.
5 So, to sum up, the Guidelines are not covered
6 by Canada's Annex I Reservation for the following
7 reasons: The Guidelines were not an existing measure
8 in 1994 under Article 1108. They were not included in
9 nor contemplated by Canada's Annex I Reservation.
10 They are not a valid subordinate measure and cannot
11 achieve what is prohibited by amendment. They were
12 not adopted under the authority of a nonconforming
13 aspect of the Accord Acts, and they are not consistent
14 with the Accord Acts or the Board's Decision approving
15 the Guidelines. And, finally, they would fail any
16 good-faith interpretation and objective--and
17 interpretation of the object and purpose of the NAFTA.
18 So, let's turn to Article 1105, and given the
19 time we just took, let me try to do that quickly so I
20 can turn the Mike over to Sophie.
21 The Board's promulgation of the Guidelines
22 and its decision to apply this new legal regime to

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11:30:53 1 Hibernia and Terra Nova, despite the project's
2 approved Benefits Plans, violate Canada's obligation
3 to accord fair and equitable treatment to Canada's
4 investments under Article 1105. A brief recap of the
5 facts shows just how uncontroversial this conclusion
6 really is.
7 Again, we start with the understanding of the
8 environment in the context in which the Benefits Plans
9 were negotiated as set out in FIRA and as described in
10 the GATT case about FIRA.
11 Negotiation, specific agreement, progress
12 reports. Hibernia and Terra Nova both engaged in
13 individual and careful negotiations with the Board
14 with regard to the benefits that they would bestow on
15 Canada and the Province in return for the right to
16 exploit oil reserves. The result of this negotiation
17 and subsequent agreement are reflected in the
18 project's Benefits Plans, and that's where the
19 agreement is to which Newfoundland should be held.
20 Hibernia entered into subsequent fiscal
21 agreements with the Federal and Provincial
22 Governments, which augmented their benefits

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11:32:04 1 commitments in return for financial assistance. But
2 as Canada rightly noted, these two agreements, which
3 are on the screen now, made no representation of R&D
4 and E&T and as Canada agrees, "did not affect the
5 Claimants' R&D and E&T expenditure obligations arising
6 from the Acts in Decision 86.01."
7 The Operators of Hibernia and Terra Nova
8 relied upon the terms agreed in their Benefits Plans
9 to inform the conduct of their operations.
10 With regard to R&D and E&T, this meant that
11 the projects undertook R&D in the Province that, in
12 the case of Hibernia, reflected the challenges of
13 operating in difficult North Atlantic environment and,
14 for Terra Nova, were project-specific, and where in
15 both--were commercially and technically reasonable to
16 do so. They legitimately and reasonably expected that
17 this would continue to be the case through the life of
18 the projects.
19 When the Guidelines were adopted in 2004, and
20 here is the slide again, they caused fundamental and
21 unilateral changes in the rules of the game. Canada
22 does not dispute these underlying facts, although it

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11:33:09 1 may contest their characterization. The real dispute
2 between the Parties in relation to 1105 revolves
3 around one question: Did the enactment of the
4 Guidelines constitute a failure on Canada's part to
5 accord fair and equitable treatment to Hibernia and
6 Terra Nova? As we have stated, we believe the answer
7 is yes.
8 The written pleadings make clear that
9 Claimants and Canada do agree on certain salient
10 points: First, NAFTA Article 1105 mandates the
11 application of customary international law minimum
12 standard of treatment. This has been the case at
13 least since the NAFTA Free Trade Commission adopted
14 its Notes of Interpretation in 2001. As you can see,
15 it so states right there.
16 The Parties also agree that the customary
17 international law minimum standard is not static, but
18 evolves over time. Again, I'm showing you Canada's
19 statements about these points.
20 The Parties also agree that, in order to
21 prove that customary international law rule exists, a
22 Party has to demo straight State practice and opinio

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11:34:17 1 juris supporting the existence of such a Rule.
2 The Parties also agree that the Tribunal can
3 look to arbitral awards for valuable analysis of State
4 practice and opinio juris in regard to a particular
5 Rule of custom. In particular, arbitral awards that
6 apply to customary international law minimum standard
7 of treatment can provide a useful analysis of that
8 standard. And, of course, any NAFTA award rendered
9 since the adoption of the FTC Notes of Interpretation
10 in 2001 will contain analysis of the customary
11 international law standard.
12 Starting again from the clear wording of
13 Article 1105, it is clear that the Article and
14 customary international law require Canada to accord
15 fair and equitable treatment to investments in its
16 territory, such as Hibernia and Terra Nova. Numerous
17 statements made by Chapter Eleven Tribunal support
18 this indisputable proposition. Again, I'm showing--I
19 won't go into these cases now, but I'm showing you the
20 in the slides cases that have so held.
21 Relevant State practice includes the
22 conclusion of over a thousand bilateral investment

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11:35:29 1 treaties mandating a State Party to accord the
2 investments of another State Party fair and equitable
3 treatment, as has been routinely held by tribunals.
4 Tribunals have also pointed out that arbitral
5 awards can provide valuable analysis of State practice
6 and opinio juris. Therefore, awards analyzing the
7 fair and equitable treatment provisions of the many
8 BITs are relevant to the Tribunal's analysis of the
9 standard applicable under Article 1105.
10 General principles of law such as
11 availability of a secure legal environment are also
12 relevant to the Tribunal's analysis of the applicable
13 standard under Article 1105, as stated in the Merrill
14 and Ring case.
15 A survey of these sources reveals that
16 Article 1105, and the customary international law
17 minimum standard of treatment, protect alien investors
18 against all acts and behavior that infringe a sense of
19 fairness, equity, and reasonableness and that are
20 arbitrary. This standard pays particular attention to
21 an investor's legitimate expectations and to the
22 stability of the regulatory regime governing the

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11:36:30 1 investment.
2 Numerous BIT awards makes clear that the fair
3 and equitable treatment standard protects an
4 Investor's legitimate expectations and obligates the
5 State to provide a stable framework for the
6 investment. Again, I'm showing you those cases.
7 And Chapter Eleven awards interpret the fair
8 and equitable treatment requirement as providing a
9 flexible standard, the application of which
10 necessarily depends on the facts of the case.
11 Chapter Eleven tribunals have also stated
12 that the application of the this standard requires an
13 analysis of the Investor's legitimate expectations and
14 an investigation into whether those expectations have
15 been repudiated.
16 The judgments in of Newfoundland Court of
17 Appeal expressed considerable concern with regard to
18 the impact of the Guidelines of cause to the stability
19 of the legal environment. Judge Welsh, even while
20 upholding the Guidelines, said that they are a
21 departure from the approach adopted, and the
22 Guidelines alter the earlier basic principles set out

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11:37:30 1 in the approved Benefits Plan. Justice Rowe similarly
2 referred to the need for a fair and stable offshore
3 management regime and said that they have been
4 fundamentally altered by the authority asserted by the
5 Board.
6 A brief recap shows how we meet those
7 standards. The Board has specific agreement swith
8 Hibernia and Terra Nova regarding their commitment to
9 spend on R&D and E&T in the Province, enshrined in the
10 project's Benefits Plans. Hibernia entered into
11 further agreements with the Provincial and Federal
12 Governments, which made no mention of R&D and E&T and
13 did not affect their obligations arising from the Acts
14 and Decision 8601. The context of the negotiation of
15 the Benefits Plans provided by Canada's practice of
16 Investor undertakings under FIRA and the wording of
17 the Accord Acts informed our expectations.
18 Hibernia and Terra Nova relied on the terms
19 of the Benefits Plans which formed the basis of a
20 stable legal regime for the Newfoundland offshore for
21 nearly 20 years. Despite constant communication with
22 the Board, the Board expressed no dissatisfaction with

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11:38:41 1 the R&D levels spending levels until after the
2 Guidelines were enacted. The Board continued to renew
3 their POAs, which it can only do if the projects were
4 in compliance with the Benefits Plans, without
5 imposing any additional conditions until after the
6 Guidelines were enacted.
7 It was entirely reasonable, therefore, for
8 the Claimants to expect this legal regime, stable for
9 nearly 20 years, to continue through the remaining
10 life of the project. But instead, with no warning,
11 the Board unilaterally amended and fundamentally
12 repudiated its agreements with the two projects by
13 enacting the Guidelines.
14 Today, instead of undertaking R&D in the
15 Province as commercially reasonable and necessary, the
16 Claimants are required to spend a mandatory amount
17 every period on local R&D and E&T. The amount we have
18 to spend is completely arbitrary. The expenditure
19 target claims to represent average R&D spending. In
20 reality--in Canada, rather--in reality, due to many
21 statistical deficiencies in the Stats Can factor, it
22 does nothing of the sort.

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11:39:43 1 But I want to conclude where I started the
2 1105 discussion. No matter which standard the
3 Tribunal decides is the correct one under Article
4 1105, these facts clearly demonstrate that Canada has
5 failed to accord fair and equitable treatment under
6 customary international law to Hibernia and Terra
7 Nova, and for that reason we believe there is a
8 violation of Article 1105 as well.
9 And if there are no further questions right
10 now from the Tribunal, I will turn the microphone over
11 to Sophie Lamb to talk about our damages case.
12 ARBITRATOR JANOW: If I may, I just have a
13 couple of questions.
14 I mean, one question is the extent to which
15 you, Claimant, believes that it can self-judge the
16 question of legitimate expectations and stable
17 regulatory environment and the extent to which you are
18 looking to other sources to determine customary
19 international law standards in that regard.
20 MR. RIVKIN: Well, with respect to our
21 expectation, we think the expectations--it's not a
22 question of self-judging. They are set out in the

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11:40:44 1 Benefits Plans which were negotiated and agreed with
2 Canada and the Province, and there were subsequent
3 agreements., so the Parties' mutual expectations and
4 intention, the legitimate expectations of both
5 Parties, are set out in those agreed plans. And even
6 the cases on which Canada relies point out repeatedly
7 that violation of that kind of agreement violates the
8 minimum standard of treatment under Article 1105. So,
9 we think--we don't think it's a question of
10 self-judging our intention, and we have not submitted
11 self-serving evidence, frankly, on what the
12 expectations and intentions were as Canada does. We
13 rely on the contemporaneous documents and the agreed
14 documents. Canada has made, as we point out in our
15 Memorials--they presented witnesses who said, well, we
16 always intended maybe to require a prescribed
17 expenditure level or we always intended to do this, we
18 just never told anybody. I don't know if you remember
19 the old movie Animal House where the Dean told the
20 students they had been on double secret probation.
21 These supposed intentions of the Board and the
22 Government were never stated at the time, and run

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11:41:59 1 contrary to what was stated in the agreed documents.
2 ARBITRATOR JANOW: Yes. No, I mean, I used
3 the term because it's one the Respondent advance, and
4 so I wanted to hear your comment on that.
5 Let me ask you another factual question, I
6 guess, but relevant to the legal inquiry, could the
7 expenditure requirements have been contained in the
8 Benefits Plans? I mean, why is it that they came to
9 be contained only in the Guidelines?
10 MR. RIVKIN: They perhaps could have been
11 part of a negotiated agreement beforehand, as the
12 Benefits Plans are, then our clients and the other
13 owners of the projects would have had the ability to
14 determine whether the project was financially viable.
15 They would have known going into the project what was
16 available.
17 Instead, Canada recognized that what the
18 Benefits Plan--what the Accord Acts require is that
19 the Benefits Plans contain some measure to assure that
20 there will be some R&D spending, and the Benefits
21 Plans put forward by the Proponents made sufficient
22 promises that the Board felt were able to meet that

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11:43:15 1 requirement.
2 What the Guidelines have done is to
3 unilaterally amend the Benefits Plans, although they
4 don't call it an amendment to the Benefits Plans, but
5 they unilaterally changed the obligations, and that
6 can't be done.
7 ARBITRATOR JANOW: Can I make just one
8 comment. I think it's very helpful, since the purpose
9 of a hearing is to narrow the issues, to identify, as
10 you have, the areas where you think you are in
11 agreement with Respondent, and so whether it's in the
12 course of the hearing or in the summation later, I
13 think it's very helpful for both sides to comment on
14 what each has said to be areas of agreement so we do,
15 in fact, narrow the areas of dispute by the end of
16 this hearing. So I thank you for that, and it's
17 really a comment to both sides.
18 PRESIDENT van HOUTTE: Mr. Rivkin, two
19 questions with regard to the question of the legal
20 expectation.
21 Is it more a question what the objective
22 reasonable person should expect from the documents

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11:44:22 1 before him than what the documents themselves say?
2 MR. RIVKIN: Well, I think in this case
3 that's the not a question even to face because the
4 documents themselves laid out what R&D was going to be
5 conducted in these projects, and I think you any
6 reasonable person would read that as project-specific
7 R&D that is focused on the particular needs of the
8 Canadian offshore environment. That's what the terms
9 of the documents say. There is no other--there are no
10 other documents that would indicate any other
11 intention and certainly not have a prescribed minimum
12 threshold, which wasn't imposed for nearly 20 year pf
13 performance.
14 PRESIDENT van HOUTTE: My second question is,
15 the Benefits Plan, to which extent was it negotiable?
16 Because you mentioned, let's say, especially when you
17 were speaking about it being for 2004, there were
18 strong negotiations, but to which extent could one
19 really negotiate the Benefits Plan or to which extent
20 was it just take?
21 MR. RIVKIN: It was--in both cases they were
22 negotiated. There is evidence in the record of that,

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11:45:38 1 and in both cases, for Hibernia and Terra Nova, an
2 original Benefits Plan was proposed, there were
3 discussions, a supplemental Benefits Plan then came
4 forward, so that shows the negotiations. And then,
5 the Board's approval imposed certain additional
6 conditions.
7 For example, in Terra Nova, a certain promise
8 was made to report benefits to the Board, and the
9 Board said, well, that really isn't quite enough. So
10 we want you to be more specific about the R&D
11 expenditures that you have each year and your
12 forward-looking three years. So, they imposed some
13 additional requirement, which Claimants--well, the
14 Proponents of Terra Nova accepted.
15 So, I think when you look at the three
16 documents together, the original Benefits Plan, the
17 supplement, and the Board's Decision, it reflects a
18 negotiated agreement.
19 PRESIDENT van HOUTTE: But to which extent
20 did the Operators have much leeway or better they
21 remained within the small framework which was
22 suggested to them?

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11:46:48 1 MR. RIVKIN: Well, both sides needed and
2 wanted these projects to move forward. These were the
3 first projects to exploit the resources off the
4 Newfoundland cost. Newfoundland has obviously reaped
5 some very substantial benefits from these projects.
6 They have made a lot of money in taxes, royalties,
7 employment of people and so forth. They wanted it to
8 happen. The Proponents of the two projects wanted it
9 to happen because they thought they could be, but at
10 some point, for example, the later fiscal agreements
11 that were entered into with the Federal and Provincial
12 Governments after the Hibernia Development Plan was
13 approved in 1986 showed that they occurred because the
14 price of oil changed between 1986 and 1990; it went
15 down. The project was no longer as profitable as it
16 thought. And so, the Canadian Government provided
17 certain additional benefits to the oil companies in
18 order to make that--encourage them to go forward. The
19 oil companies agreed to certain additional benefits to
20 the Province that they would go forward, so it was
21 clearly negotiated.
22 But this didn't have to happen. This was

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11:47:58 1 only going to happen if the Development Plan, the
2 Benefits Plan came to a conclusion that both sides
3 felt comfortable with.
4 PRESIDENT van HOUTTE: Would you say that
5 both had equal bargaining power?
6 MR. RIVKIN: In many ways, at the beginning
7 of a project, yes. When you're faced with a situation
8 as we are now, where the Claimants have already
9 invested billions of dollars, and the Board says,
10 well, we are only going to allow you to extend your
11 project if you agree--you effectively waive your
12 rights over the remaining Hibernia field. There is a
13 different bargaining power there because we have
14 already invested billions of dollars.
15 At the beginning of a project, there was a
16 balance, and it didn't--and there was a gap in
17 Hibernia from 1986 to 1990, when there was planning
18 going on, but again, the price was oil was fluctuating
19 a bit and things didn't move forward. So, I think
20 that helps show that both sides needed the other.
21 PRESIDENT van HOUTTE: Thank you.
22 ARBITRATOR SANDS: A quick question, actually

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11:49:12 1 more of a request, actually, than a question.
2 I mean, assuming that the Tribunal has to
3 have regard to the FTC Note of Interpretation
4 indicating that 1105 prescribes the customary
5 international law minimum standards, it seems that
6 what we need to do as a Tribunal is look at--you put
7 it to State practice and opinio juris, but I'm not
8 aware that we've actually got any State practice on
9 the legitimate expectation component of fair and
10 equitable treatment. We've got arbitral awards, and
11 it may be that in those arbitral awards there's
12 evidence of State practice and opinio juris, but would
13 it be possible to provide us, not in a hasty time
14 frame, with some help on acts of Governments
15 confirming that they treat legitimate expectation as
16 part of a rule of customary international law in
17 relation to fair and equitable treatment? Because
18 ultimately, if there is that State practice, then your
19 argument is significantly assisted.
20 And what I mean by that, it would include
21 material relating to arguments that might have been
22 made in these cases by the State as an example of

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11:50:38 1 State practice or arguments made by states in
2 negotiations instruments or, for example, in
3 elaboration of new instruments. But I think what I'm
4 looking for is some help on the State practice
5 element, and then, to the extent you can find it, and
6 I appreciate this is very difficult, the opinio juris
7 element, the mental element, that States act in that
8 way because they believe that they are required to do
9 so as a matter of legal obligation rather than policy
10 or other things. Anything on that would be really
11 helpful.
12 MR. RIVKIN: Sure. I would be happy to do
13 so. I would say that, in addition to pointing to both
14 sides agreeing that arbitral awards can be viewed as
15 examples of State practice or help in understanding
16 State practice, again, both sides also have said in
17 their papers, and we showed you Canada's, that the
18 bilateral investment treaties are--that's certainly
19 State practice, the fact that legitimate expectations
20 have become a part of bilateral investment treaties
21 entered into by states around the world is certainly,
22 we believe, part of that. But we could provide you

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11:51:43 1 with a fuller response.
2 ARBITRATOR SANDS: It would be really helpful
3 to see those treaties, and also to get a sense of how
4 much this was argued in, in particular, Slide 88, you
5 referred to four cases, Biwater in Tanzania, Tecmed in
6 Mexico,Enron in Argentina, and Duke Energy in Mexico.
7 I would find it helpful to know on what
8 evidential basis and record, for example, did the
9 Tribunal in Tecmed versus Mexico conclude, if it did
10 conclude, that legitimate expectation was part of the
11 customary international expectation. And I appreciate
12 this is--Paragraph 154 that you've given us is just
13 one extract from a longer Award.
14 MR. RIVKIN: Right.
15 ARBITRATOR SANDS: Maybe it's dealt with
16 elsewhere, but this does something slightly different
17 than affirm a conclusion by an Arbitral Tribunal that
18 legitimate expectation is part of the customary
19 international law standard, so it would be helpful.
20 Representative receive sure.
21 MR. RIVKIN: Sure. I will point out that
22 those awards that we pointed are certainly awards--in

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11:52:52 1 the Tecmed case, for example, it is a NAFTA Award and
2 it is after the Note of Interpretation, so they
3 clearly had the standard in mind that you were just
4 describing. But we will take care of that.
5 Thank you.
6 PRESIDENT van HOUTTE: How much time will the
7 second part take? Because I'm--I tried to arrange
8 things in the most efficient way, damage part.
9 MR. RIVKIN: Half an hour or less.
10 PRESIDENT van HOUTTE: Half an hour?
11 MR. RIVKIN: Half an hour or less. Mine was
12 originally planned with the questions extended a bit
13 beyond, but it would be half an hour.
14 PRESIDENT van HOUTTE: Please. Thank you.
15 MS. LAMB: Members of the Tribunal, if you
16 agree that Canada has introduced the Guidelines in
17 violation of the NAFTA, then Claimants are entitled to
18 full compensation under the NAFTA and international
19 law. Article 1135 of the NAFTA restricts the final
20 relief that a NAFTA Tribunal can award to monetary
21 damages. Other than in expropriation cases, the NAFTA
22 does not stipulate how compensation is to be

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11:54:11 1 addressed.
2 Several NAFTA Tribunals, including S.D.
3 Myers, have confirmed this silence as a clear
4 intention on the part of the NAFTA Parties to leave it
5 open to Tribunals to determine a measure of
6 compensation appropriate to the specific circumstances
7 of the case.
8 The Feldman Tribunal observed that this
9 discretion is unsurprising, given the limitations
10 imposed by the NAFTA, specifically the inability of
11 NAFTA Tribunals to enjoin the operation of a contested
12 measure.
13 And it noted that prior NAFTA Tribunals
14 dealing with nonexpropriation cases have, indeed,
15 exercised considerable discretion in fashioning what
16 they believed to be reasonable approaches to damages
17 consistent with the requirements of NAFTA.
18 That a violation of international law entails
19 full compensation is universally acknowledged. The
20 standard was articulated more than 80 years ago by the
21 Permanent Court in the Chorzów Factory Case, and there
22 can be no doubt as to its present vitality.

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11:55:17 1 The standard entails that reparation must, so
2 far as possible, wipe out all the consequences of the
3 illegal act and re-establish the situation which
4 would, in all probability, have existed if that act
5 had not been committed.
6 So, consistent with this standard, Claimants
7 seek damages to offset all financial consequences of
8 their compliance with the Guidelines. Because of the
9 Guidelines, Claimants are required to make R&D and E&T
10 expenditures far in excess of their actual business
11 needs. To make them whole, Claimants must receive
12 compensation representing the additional financial
13 burden created by the Guidelines, expenditures that
14 would not have been incurred in the usual course of
15 project operations.
16 To calculate the substantial additional costs
17 imposed by the Guidelines, we look at the R&D that
18 Claimants have actually undertaken at Hibernia and
19 Terra Nova over many years, and compare that to what
20 the Board now requires through its application of the
21 Guidelines formula. The percentage of annual
22 revenues, production times price, to be spent on R&D

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11:56:36 1 each year as determined by application of the
2 benchmark, and the benchmark is the most recent
3 five-year average of R&D expenditure data published by
4 Statistics Canada; this is what we call the Stats Can
5 factor.
6 These costs have been calculated by
7 Claimants' quantum Expert, Mr. Howard Rosen, the
8 senior Managing Director at FTI Consulting in Toronto,
9 and leader of FTI's international arbitration
10 practice. Mr. Rosen is an economic consultant. He
11 has been involved in business valuation, damages
12 quantification, and corporate finance matters for
13 almost 30 years. He has provided Expert witness
14 testimony in many cases in many arbitrations, and he's
15 also the co-author of two texts on quantification of
16 economic damages.
17 So, let's look first at the time frame with
18 which we are concerned with. The Claimants' exposure
19 under the Guidelines reaches back in time to April
20 2004 and extends throughout the finite lives of the
21 projects; although, as Mr. Rosen confirms in his
22 pre-hearing report, 80 percent of Claimants' damages

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11:57:40 1 will be realized within the next five years, that's
2 80 percent of the next five years, 90 percent by 2017.
3 There are certain distinct phases over this
4 period that the Tribunal might like to have in mind
5 when approaching the issue of compensation, starting
6 with 2004 to 2008, then 2009, 2010, and finally 2011
7 through 2023, although virtually all damage, as I've
8 said, is realized by 2017.
9 So, let's look at 2004 to 2008. Well, we
10 know what the Claimants' damages are for this period
11 because the Board has quantified Hibernia's gross
12 liability for those years. It decided what credits to
13 apply as against that liability, and it arrived at a
14 net shortfall of [redacted] and the same is true
15 for Terra Nova, where the net shortfall has been
16 determined at [redacted] So, both of those numbers
17 are certain.
18 For 2009, for Terra Nova, the Board has
19 completed a similar exercise. The shortfall is known,
20 and it has been fixed at [redacted].
21 Hibernia is still awaiting the Board's
22 decision, the owners having submitted their

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11:59:02 1 expenditures to the Board some seven months ago. But
2 we do know what the Stats Can factor is for '09. We
3 know what oil production was for that year, we know
4 what the average price of oil was in 2009, and we know
5 what the exchange rates were in that year.
6 So, assuming that the Board's Decision is
7 broadly consistent with prior practice, damages for
8 that period can reasonably be assessed at
9 $7.38 million.
10 For 2010, the Stats Can factor has been
11 updated by Mr. Rosen to incorporate the most recent
12 benchmarks released by Statistics Canada. Oil
13 production is based on actual data for January through
14 May, and then June through December is based on
15 up-to-date production forecasts. And the same is true
16 for oil prices. Actual data is used for the first
17 five months of the year and projections are used
18 beyond that pointed.
19 So, going back, then, to the charts, the
20 Tribunal will be able to appreciate that just over
21 half of Claimants' damages essentially rely on known
22 historical data.

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12:00:13 1 Looking at the losses that had been incurred
2 for '04 to 2010, the Guidelines have created an
3 additional financial burden for the Claimants of over
4 [redacted].
5 Turning to the future, if the NAFTA allowed
6 it, the Tribunal could order Canada not to enforce the
7 Guidelines going forward, or it could require that an
8 indemnity or a reconciliation take place either at the
9 end of each year or at the end of each POA period.
10 Now, Claimants could then be compensated to the extent
11 of their actual net shortfall.
12 But a NAFTA Tribunal can only award monetary
13 compensation. In order to bring finality to the
14 dispute, the Claimants are asking the Tribunal to fix
15 compensation at this point in time.
16 Before describing Claimants' future damage
17 methodology, I do want to take the Tribunal back to
18 first principles, and you might very well question why
19 that should be necessary, but I think, as the Tribunal
20 will see when Canada comes to present its position on
21 damage, Canada's approach cannot be reconciled with
22 applicable legal standards. Principles, in our view,

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12:01:25 1 are either misstated, conflated, or just ignored
2 altogether.
3 So, what is the first proposition I want to
4 put forward? Well, the Tribunal can make an award to
5 compensate Claimants for their exposure in future
6 years, opening any text on investment dispute damages
7 renders this a self-evident proposition. In
8 principle, international law allows recovery of both
9 past and future losses, future losses encompassing
10 losses that lie in the future both in relation to the
11 breach of the violation and in relation to the Award.
12 The availability of looking forward compensation is
13 confirmed in the Draft Articles: Compensation shall
14 cover any financially assessable damage including loss
15 of profits, insofar as it's established. The
16 principles similarly confirm that compensation is due
17 for harm, including future harm, established with a
18 reasonable degree of certainty.
19 Now, in its Counter-Memorial, Canada argued
20 that Claimants could not recover compensation because
21 they had yet to incur any loss or damage in connection
22 with the Guidelines, and support was said to be found

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12:02:40 1 in Article 1116(2) of the NAFTA. Now, that Article
2 provides that an investor may not make a claim if more
3 than three years have elapsed from the date on which
4 the Investor first acquired or should have acquired
5 knowledge of the alleged breach and knowledge that the
6 Investor had incurred loss or damage. So,
7 Article 1116(2) establishes the three-year limitation
8 period; it's irrelevant to the question of
9 compensation.
10 Moreover, in our Reply, we stress any attempt
11 to argue that Claimants had yet to incur loss or
12 damage was effectively foreclosed by the Decision of
13 the NAFTA Tribunal in Grand River. Now, in Grand
14 River, the United States argued for an interpretation
15 of Article 1116(2) that directly contradicts the
16 reading Canada seeks to place on it in this case. The
17 U.S. argued that, for limitation purposes, because
18 that is all that Article 1116(2) speaks to--for
19 limitation purposes, time starts to run because a loss
20 is incurred from the date on which the relevant act or
21 measure takes effect or the date of the Investor's
22 knowledge, even if the Investor is not required to

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12:03:55 1 make a financial outlay at that point, and the
2 Tribunal agreed.
3 So, choosing from among the various
4 definitions of the word "incurred" that the Parties
5 have put it forward, the Tribunal resolved as follows:
6 "a Party said to incur losses, debts, expenses or
7 obligations, all of which may significantly damage the
8 Party's interests, even if there is no immediate
9 outlay of funds or if the obligations are to be met
10 through future conduct. Moreover, damage or injury
11 may be incurred, even though the amount or extent may
12 not become known until some future time."
13 So, in our case, Claimants' loss in damage
14 consists in the obligations created through the
15 Board's implementations of the Guidelines, and those
16 obligations, of course, already exist. The fact that
17 some of their effects will not be felt until later
18 years or indeed that Claimants' obligations are met in
19 part through future conduct, through future
20 expenditure, is irrelevant.
21 So, Grand River confirms that Claimants have
22 incurred loss or damage. In fact, if you take

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12:05:05 1 Canada's flawed logic through to its ultimate
2 conclusion, had Claimants actually waited until the
3 Board had finally determined their net shortfall for
4 the 04-08 period, a decision that was not communicated
5 to them until January of this year, then, according to
6 Grand River, their claim would already have been
7 time-barred.
8 So, in light of Grand River, Canada was
9 forced to change tact in its Rejoinder, and this time
10 it sought somewhat sheepishly to frame the issue as a
11 jurisdictional objection, a development obviously
12 inadmissible by reason of Paragraph 45(2) of the ICSID
13 Additional Facility Rules. But, nonetheless, still
14 clinging to Article 1116(2), Canada this time sought
15 to argue that the Tribunal's jurisdiction is limited
16 to those losses arising in the three years before a
17 claim is brought, and the Tribunal's jurisdiction ends
18 on the date on which the claim is filed.
19 Now, the Tribunal might very well wonder how
20 it is that its jurisdiction can end at the very same
21 moment that it truly I begins, particularly when the
22 contested measure is still in force at the date of the

12:06:18 1 hearing; it will still be in force on the date of the
2 Award; and it will still be in force in the future
3 years to come.
4 So, according to Canada's novel and, in our
5 view, illogical argument, the NAFTA Parties intended
6 that, where a contested measure remains in effect over
7 the long term, an investor must bring repeat claims in
8 respect of the very same measure on the very same
9 facts every three years, and in our case that would
10 mean until 2023. That cannot have been intended by
11 the NAFTA Parties.
12 And in any event, this 11th-hour objection
13 was contrived by Canada years into the proceedings,
14 and I would suggest that that reveals Canada's lack of
15 confidence in it. Certainly, there is no authority
16 for it, and neither of the other NAFTA Parties
17 supported it in their 1128 submissions.
18 Canada also ventures a more, shall we say,
19 principled objection to a claim for future damage.
20 Canada suggests that an award in respect to future
21 losses system precluded because it involves
22 assumptions as to the future and, therefore, it

12:07:29 1 requires speculation. Well, in seeking wrongly to
2 characterize the Claimants' position as speculative,
3 Canada, in our view, misstates the law, and it ignores
4 the practice of numerous investment treaty tribunals.
5 And certainly, Canada's position finds no support in
6 the NAFTA.
7 If you look at NAFTA case law, none of the
8 tribunals in even Metalclad, S.D. Myers, Feldman, or
9 Pope & Talbot expressed concern about the availability
10 of future losses from a principled perspective.
11 Indeed, the Myers Tribunal rightly observed that,
12 although quantification of future losses can present
13 challenges to ensure fairness to the Claimant, a
14 tribunal should approach the task both realistically
15 and rationally. And, of course, the Myers Tribunal
16 went on to assess damages based on a net income stream
17 that reflected future profitability.
18 The fact is that tribunals frequently award
19 damages based upon future projections. It's inherent
20 in a lost-profits analysis. It's inherent in a asset
21 business or fair market valuation. As the Himpurna
22 Tribunal confirmed in the context of its DCF analysis,

12:08:49 1 making decisions on the basis of future projections is
2 something that commercial actors do each and every
3 day. The Tribunal excess stressed, "There is no
4 reason to apologize for the fact that this approach
5 involves approximations: They are inherent and
6 inevitable. Nor can it be criticized as unrealistic
7 or unbusiness-like; it is precisely how business
8 executives must and do proceed when they evaluate a
9 going concern. The fact that they use ranges and
10 estimates does not imply abandonment of the discipline
11 of economic analysis; and nor, when applied by the
12 arbitrators, does this method imply abandonment of the
13 discipline of assessing the evidence before them.
14 The legal standard is reasonable certainty,
15 and numerous texts and awards have confirmed that this
16 is the case, and reasonable certainty is required only
17 as to the fact of damage. Once this level of
18 certainty is established, less certainty is required,
19 perhaps none at all, in proof of the amount of
20 damages. While the proof of the fact of damage must
21 be certain, proof of the amount may be an estimate,
22 uncertain, or inexact.

12:10:04 1 And upholding $125 million expropriation
2 Board based on future projections and estimations, the
3 Annulment Committee in Rumeli confirmed a dissimilar
4 distinction between the fact of loss, which is for the
5 Claimant to prove and for the amount of loss, which it
6 is for the Tribunal to determine, has been accepted in
7 the practice of international courts and tribunals.
8 And, in fact, the Rumeli Annulment Committee cited
9 Chorzów Factory in that regard, and then Vivendi and
10 Argentina where the Tribunal had also confirmed that
11 compensation for lost profits is generally awarded
12 only where future profitability can be established,
13 the fact of profitability as opposed to the amount for
14 some level of certainty.
15 Quantification of damages is rarely an exact
16 science, but absence of certainty is no answer to a
17 claim for compensation, and that proposition has
18 certainly been confirmed by a number of arbitral
19 tribunals.
20 Moreover, the fact that some forward
21 projection is required does not render the exercise
22 speculative, which is what Canada suggests. Future

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12:11:25 1 damage projection are only dismissed as speculative
2 when based on immature or demonstrably unprofitable
3 activities or on business plans that went no further
4 than anticipation.
5 Now, if we look at Claimants' loss, they
6 arise in connection with long-term, mature activities.
7 Oil production at Hibernia began 13 years ago in 1997.
8 It has already peaked in 2005, at which Point 200,000
9 barrels of oil a day were being produced. As of the
10 date of the Claimants' First Memorial, 642 million
11 barrels of oil had already been produced. Production
12 is expected to continue for another three decades.
13 The Board's current estimate--the Board's current
14 estimate--of reserves is almost 1.4 billion barrels of
15 oil.
16 The standards and principles that I have
17 explained, regrettably, at some length reflect notions
18 of basic fairness. Because valuation is in essence a
19 prophecy as to the future, a requirement of absolute
20 certainty would place an almost insurmountable burden
21 on the Claimant while benefiting the Party who caused
22 the damage. Now, in this case, such a standard would

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12:12:38 1 be punitive, not least because any uncertainty really
2 arises from the arbitrary formula that the Province
3 has itself chosen to impose in violation of the NAFTA.
4 So, let me now talk you through the
5 methodology that we employ for Claimants' future
6 losses, and I want to highlight two factors in
7 particular. The first, as I have already mentioned,
8 is that we are only dealing with half, or just under
9 half, of Claimants' damages when we are talking about
10 future projections because 50 percent, 51 percent, has
11 already been incurred.
12 The second is that the majority of Claimants'
13 damages would be realized over the short term. Within
14 the next five year, 80 percent, within the next seven
15 years, 90 percent. So Canada's persistent references
16 to the long term are, in our view, greatly
17 exaggerated.
18 So, what do we know, then, with reasonable
19 certainty? Well, Claimants know what their R&D
20 expenditures at Hibernia and Terra Nova likely would
21 have been. For Hibernia, where production began in
22 1997, Claimants can reasonably predict their annual

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12:13:52 1 future spend by looking back at their typical spend
2 over the part 13 years. Mr. Rosen has arrived at a
3 statistically correct figure, which is fully
4 consistent with typical annual expenditures over that
5 period.
6 Now, we also note that the Guidelines are
7 going to remain in force. We certainly know that
8 there is oil. The Board itself currently estimates
9 reserves at almost 1.4 billion barrels. There is no
10 evidence at all that operations at Hibernia are going
11 to cease in the next 20 year, still less in the period
12 with which our damages quantification is concerned.
13 Indeed, Hibernia is one of the most prolific oilfields
14 in Canada.
15 Turning to oil prices, Claimants have relied
16 upon a forecast prepared by Sarah Emerson.
17 Ms. Emerson has worked with ESAI, Energy Security
18 Analysis Inc., which is an energy research and
19 forecasting firm for over 25 year, and she is actually
20 the Managing Director and President of that firm which
21 provides research analysis and forecasting services to
22 corporate clients in the oil, power, natural gas

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12:15:01 1 markets all over the world. And Ms. Emerson herself
2 has developed the proprietary tools, or most of the
3 proprietary tools, that are used to forecast oil
4 prices and analyze the oil market.
5 Now, the purpose of the forecast is not to
6 suggest that Ms. Emerson can accurately predict the
7 price of any oil on any given day 5 years from now, 10
8 years from now. Instead, it's to confirm a price
9 path, a trend, that companies themselves rely on for
10 business planning purposes. And Canada's economist,
11 Mr. Davies, has suggested that no one relies on price
12 forecasts and that businesses instead use scenarios.
13 The Tribunal can safely ignore these semantic
14 niceties. In the real world, decisions are made on
15 the basis of assumptions as to the future each and
16 every day. To avoid loaded words, we speak about
17 projections.
18 Ms. Emerson has been compiling oil
19 projections for 25 years and they continue to be
20 purchased by her clients in Government and industry
21 who rely on her experience, her expertise, and her
22 judgment, and her projections are actually

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12:16:14 1 conservative, as this chart demonstrates, when
2 compared to each of the closing prices on the Brent
3 futures curve at the time of her report, the reference
4 case of the U.S. Energy Information Administration
5 (the EIA) and the EIA World Energy Outlook.
6 Significantly, her projections are also more
7 conservative than the Canadian Government's own
8 reference case forecast.
9 Contrary to the impression Canada seeks to
10 create, Arbitral Tribunals also rely on oil price
11 projections. In ICC Award 11073, the Tribunal was
12 willing to rely on the futures market as the best
13 predictor of future oil prices. The Tribunal held
14 that because these prices are obtainable in the market
15 today, they satisfied the real probability test for
16 damages. So, such prices were available for five
17 years. Beyond that, for a subsequent and further 15
18 years, the Tribunal used the U.S. EIA's reference case
19 price, describing it as reasonably conservative
20 compared to the average price forecasts.
21 So, for the purposes of quantifying losses
22 some 20 years into the future, the Tribunal was

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12:17:34 1 prepared to assume that there was a real
2 probability--real probability--that the oil price
3 would be on average at least as high as the reference
4 case in the EIA Report. No different, in principle,
5 to the exercise that we're asking to you perform.
6 Canada's real objection to oil price
7 forecasts is that we cannot know today whether any
8 future forecast is going to be completely accurate.
9 That misses the point, because in the real world these
10 tools are used each and every day as the basis for
11 investment decisions. Billions of dollars are traded
12 annually on the commodities futures exchange.
13 In any event, as Ms. Emerson will explain,
14 her forecasting methodology is a considered,
15 meaningful, and analytically sound way of projecting
16 trends based upon what we know today. The Tribunal
17 can be satisfied with the quality and pedigree of the
18 information upon which its assumptions will need to be
19 made. In fact, Canada's quantum Expert, Mr. Walck,
20 used Ms. Emerson's forecasts in his damages report,
21 because it was the only way he was able to quantify
22 the Claimants' future exposure under Guidelines.

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12:18:46 1 PRESIDENT van HOUTTE: Ms. Lamb, can you give
2 me one-minute break, please.
3 MS. LAMB: Yes, of course.
4 (Pause.)
5 PRESIDENT van HOUTTE: Please continue.
6 MS. LAMB: Thank you, sir.
7 So, again, looking at the methodology, the
8 Claimants need a liquid fund that can be drawn from
9 over time to offset the financial impact of the
10 Guidelines. Now, in cases of expropriation and lost
11 profits with which this Tribunal would be very
12 familiar, it's frequently the case that a discount
13 rate based on the Claimants' Weighted Average Cost of
14 Capital, WACC, is used to discount the stream of lost
15 earnings or profits to determine a lump-sum of
16 damages. The use of the WACC is based on the premise
17 that cash flows that have been expropriated are
18 exposed to that amount of risk, although the
19 compensation for lost profits can be reinvested in the
20 business to produce an annual sum to replace those
21 lost profits.
22 Now, those cases are completely different to

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12:22:20 1 the case before you because in this case the Claimants
2 still have the exact same assets, and they are still
3 exposed to the exact same risks. They haven't
4 transferred or sold any risk; they are incapable of
5 investing more capital into the projects to produce
6 additional return.
7 So, to properly compensate the
8 Claimants--that is, to put them in the position that
9 they would have enjoyed in the absence of the
10 Guidelines--they require a lump-sum that can be
11 invested in a safe, liquid investment and drawn upon
12 as required to fund future obligations.
13 The only investment vehicles that allow for
14 safety of capital and the ability to draw from the
15 fund as needed on a liquid basis are Canadian
16 risk-free bonds; that is, Government of Canada bonds.
17 That is why in this case it is entirely appropriate
18 that Mr. Rosen has used the Canadian risk-free rate of
19 return as his discount rate. To use a higher rate
20 than this would require the Claimants to assume
21 additional investment risk, and it would
22 undercompensate them.

12:23:27 1 Now, in addition to that, the fund needs to
2 be grossed up to offset the impact of taxation of an
3 Award in a claimant's hands. If an Award of damages
4 is made it will be received by the U.S. Investor and
5 taxed in the U.S. at a rate of 38 percent. This
6 represents a decrease in the amount of the Award. The
7 payments made on account of the Guidelines by the
8 Canadian operating entity will receive the benefit of
9 deducting the expenditures from their Canadian Income
10 Tax obligations, but that is at a rate of, at most,
11 30 percent.
12 So, due to the disparity between these two
13 tax rates, the cost of tax in the U.S. exceeds the
14 benefit of the deduction in Canada, and so to place
15 the Claimants in the position they would have enjoyed
16 but for the Guidelines, the Award must include a
17 component to recognize this difference in taxes.
18 Mr. Walck acknowledges this in principle in
19 his report, but he assumes that the tax benefit would
20 be enjoyed by the U.S. Investors, and that is
21 incorrect. Simply put, compensation without a
22 gross-up cannot make the Claimants economically whole.

12:24:43 1 So, let me just say a few words before
2 closing on Canada's position on future damages. Now,
3 even in the run-up to this hearing, Canada has still
4 failed to offer an alternative damages model.
5 Instead, it tries to chip away at the Claimants'
6 projections through a variety of either
7 unsubstantiated or, in our view, legally irrelevant or
8 exaggerated propositions, each one obviously intended
9 to create uncertainty in the eyes of the Tribunal. It
10 will become very clear to the Tribunal over the course
11 of the next few days that those uncertainties are
12 largely of Canada's making, beginning with the
13 Guidelines formula itself.
14 Now, the Claimants have to make very
15 considerable expenditures in the profits that they
16 would not have made in the absence of the Guidelines.
17 Canada boldly asserts that they should receive no
18 compensation whatsoever in case they benefit from this
19 enforced spending, and Canada has stubbornly clung to
20 this position throughout the proceeding, despite
21 having failed to attribute any economic significance
22 to these proposed benefits.

12:25:52 1 Indeed, Mr. Walck's, in part,
2 self-contradictory report, at once asserts that
3 although these benefits are too uncertain, to be
4 quantified, he is nonetheless satisfied they could
5 reduce the Claimants' damages to nil.
6 The record shows that the Claimants have had
7 to contrive spending opportunities in the Province,
8 some of which have no direct collaboration to the
9 projects whatsoever. Moreover, although Mr. Walck
10 claims that tax and royalty credits might in the
11 future arise enforced spending, Canada itself refuses
12 to provide any such assurances. It is an uncertainty
13 that Canada could resolve but has chosen not to; and
14 in the circumstances, Canada should not be entitled to
15 a damages deduction in respect of potential benefits
16 that it controls and that it could but will not
17 confirm.
18 Finally, Mr. Walck suggests that these
19 billion dollar assets are so risk on and so
20 speculative that the Tribunal needs to employ a
21 discount rate of 15 percent, even though the
22 marketplaces that risk at nearer to 6. As the

12:27:03 1 Tribunal will see in due course, not only is
2 Mr. Walck's approach exaggerated and it's unsupported,
3 but it suffers from some very basic but fatal flaws.
4 And even having made an unwarranted and unsupported
5 discount Claimants' damages, ultimately, Canada's
6 Expert could not contrive a model that failed to
7 attribute any value to the Claimants' claims. On the
8 contrary, Mr. Walck has been forced to concede an
9 upper limit of $27.5 million, even after employing
10 what we say is an incorrect discount rate.
11 Now, Mr. Walck's error in calculating the
12 discount rate and his misunderstanding of the
13 Claimants' tax position could, in our view, have been
14 corrected before the hearing, had Canada accepted our
15 proposal that the two Experts should meet and attempt
16 to find some common ground because correction of these
17 two factual mistakes, not differences of opinion, just
18 factual mistakes alone would increase Mr. Walck's
19 figure from 27-and-a-half million to almost
20 $36 million.
21 So, given Mr. Rosen's total figure of around
22 the $60 million mark, these two corrections alone

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12:28:15 1 already narrow the difference between the Parties'
2 position to about $24 million.
3 To conclude, if the Tribunal finds that the
4 Guidelines involve Canada in a violation of its NAFTA
5 obligations, it can either approximate Claimants'
6 damages now and put an end to the dispute, or it can
7 assess Claimants' past damage and effectively require
8 the Parties to present themselves before successive
9 Arbitral Tribunals periodically throughout the
10 anticipated life of these projects. The NAFTA Parties
11 cannot have intended an approach to remedies that will
12 perpetuate an investment controversy and result in
13 further funds being expended on the same issues time
14 and time again.
15 Members of the Tribunal, you have the power
16 and the tools to make the Claimants whole in one set
17 of proceedings, and in our view that outcome must be
18 the right one.
19 Thank you.
20 PRESIDENT van HOUTTE: Thank you, Ms. Lamb.
21 MS. LAMB: Thank you.
22 PRESIDENT van HOUTTE: Let's see, I guess

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12:29:16 1 that we will the full opportunity to discuss
2 methodology with the Experts, Mr. Walck and Mr. Rosen,
3 and therefore maybe we will not enter into all the
4 details, but I personally have another issue.
5 In the assumption that compensation is due,
6 did your client envisage that the Tribunal would
7 render a Decision which would grant compensation for
8 what has already been established, at this moment
9 2004-2008, and then would establish a formula which
10 would allow the Parties to calculate the compensation
11 whenever the data for that specific year would be
12 available? Now, a mathematical formula which could
13 then be filled in as such, would that be possible, and
14 would that be legal as an award which would be
15 enforceable for long time, over the whole period of
16 time?
17 I don't know whether you understand my
18 question.
19 MS. LAMB: I do.
20 PRESIDENT van HOUTTE: Instead of going to
21 the numbers and allow the Parties in a clear way to
22 establish the amounts due whenever there is some

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12:30:49 1 certainty about the different data.
2 MS. LAMB: I do understand the question, sir,
3 and you may have seen actually a reference to a
4 pragmatic solution at the end of our Reply Memorial,
5 but I think our first proposition is that you can
6 reasonably estimate damages now, and that puts
7 complete end to the controversy, and that must be the
8 better way for these two Parties to proceed.
9 But if that's not possible, the line should
10 be drawn in the sand at the end of 2010, because
11 essentially you can make historical decisions. You
12 will be making a discussion based on known facts and
13 historical data.
14 Going forward, we could try to contrive a
15 formula. There Would need to be some factual findings
16 in there, for example, what R&D would the Claimants
17 have undertaken in the ordinary course of their
18 projects? Because that would set the floor and the
19 rest of the ingredients of the formula would then be
20 essentially arriving at the surplus, the what we call
21 the incremental spend.
22 Whether we can do that, achieve that in a way

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12:31:55 1 that truly limits the scope for future disputes and
2 controversy is unclear. Whether we could do that in a
3 way that will render--that will result in a truly
4 enforceable Award--what happens, fore example, if
5 there is a dispute going forward is how to apply the
6 criteria. What does the criteria mean? Who is going
7 to decide if the Claimants and the Respondent can't
8 agree, who is going to decide what the numbers should
9 be? It seems to me we should be revisiting a tribunal
10 very much like this one many, many times in the
11 future.
12 PRESIDENT van HOUTTE: It could be possible
13 in some ways--for instance, this Tribunal should issue
14 a Partial Award and then either it could resign, and
15 then, if ever there is ever a problem, new
16 arbitrators--
17 MS. LAMB: You could come back.
18 PRESIDENT van HOUTTE: -- for the same case
19 can be appointed or the same arbitrator, or we could
20 have a standing commitment until 2036--2040, I guess,
21 will be the case.
22 MS. LAMB: No, no, because our damages model

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12:32:58 1 expires, the latest, 2023.
2 PRESIDENT van HOUTTE: Okay. Good, good.
3 MS. LAMB: And in reality--
4 PRESIDENT van HOUTTE: That's good news.
5 MS. LAMB: 2017.
6 PRESIDENT van HOUTTE: That's good news,
7 then, yes. But anyway, now, there are different
8 formulae which could be possible.
9 MS. LAMB: It could be possible, sir, and I
10 don't doubt at all your ability to come up with any
11 such formula, some more thought. I think that is
12 something we would want to give some more thought to,
13 together with our clients.
14 PRESIDENT van HOUTTE: But we would like to
15 get the Parties' views on both sides on this, let's
16 say, sooner or later.
17 MS. LAMB: Yes, understood.
18 ARBITRATOR JANOW: Please, I would like to
19 ask a question about the damages methodology, but
20 please don't make any assumptions from this question
21 whatsoever, but you've suggested that the choices
22 before this Tribunal are to order Canada not to

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12:33:49 1 enforce the Guidelines; did you not say that?
2 MS. LAMB: No. No, that--unfortunately,
3 that's a choice--that's a remedy that's not available.
4 They're limited--
5 ARBITRATOR JANOW: Yes, indeed. I thought I
6 heard you to say that. Okay.
7 So, I wanted to clarify on that question.
8 But I'm pretty sure you did say that.
9 But the other point you made is that there
10 could be a reconciliation at the end of each year or
11 some other period.
12 MS. LAMB: No. Perhaps it's what LiveNote is
13 reflecting. What I said or at least what I hope I
14 said was that if it weren't for the limitations in the
15 NAFTA, the Tribunal could make an award, for example,
16 that envisaged an indemnity once a year or a
17 reconciliation, or whatever you call it, and that
18 could be in order, and that would be fully consistent
19 with a Tribunal's powers in many, many different cases
20 but not in this one--
21 ARBITRATOR JANOW: Right.
22 MS. LAMB: -- because NAFTA just does not

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12:34:52 1 allow it.
2 ARBITRATOR JANOW: Right.
3 MS. LAMB: So, it's money or nothing.
4 ARBITRATOR JANOW: Right. Okay. So, that's
5 helpful because I thought those were two things that
6 were stated which were not clearly accurate to me.
7 MS. LAMB: Canada could agree, of course. We
8 could agree on that as a way forward, but at this
9 point in the proceedings they haven't done so.
10 ARBITRATOR JANOW: So, then the question I
11 have is a methodological one, which is, it seems that
12 all of the data points for 2004 through 2008 are
13 clear.
14 MS. LAMB: Yes.
15 ARBITRATOR JANOW: When you come to 2009,
16 what is not clear is the ordinary course of spending
17 because the Board has not decided--
18 MS. LAMB: That's right.
19 ARBITRATOR JANOW: -- that at the time of
20 Mr. Rosen's updated calculations.
21 MS. LAMB: And now--and still now.
22 ARBITRATOR JANOW: And still now.

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12:35:52 1 So, your proposition is, if one had clarity
2 as to what was in the ordinary course of spending, one
3 could get through 2009 and 2010, because you have just
4 said one should draw a line in the sand with respect
5 to 2010. So, could you just clarify.
6 MS. LAMB: Yes, of course.
7 Just to be clear, 2009, we have all the
8 Decisions we need for Terra Nova, so that's one part
9 of the assessment done.
10 Hibernia, the expenditures in, we are waiting
11 for the Board's Decision, and what the Board's
12 Decision will do is reduce a gross requirement to a
13 net requirement because what they will do is they will
14 select which of the expenditures we put forward that
15 they accept.
16 So, what our methodology does is look back in
17 time and say, okay, on average, how much of our
18 expenditures does the Board accept? Let's assume the
19 Board is broadly consistent this year with the
20 Decisions that has made for '04, '05, '06, '07, '08,
21 and then, broadly speaking, we apply that figure.
22 Actually what happened in Mr. Rosen's First

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12:37:05 1 Report is that--actually, the updated report for Terra
2 Nova. Now, at the time of his updated report, we did
3 not have in our hands the Terra Nova Decision, and
4 Mr. Rosen's methodology predicted how the Board might
5 behave based on past experience, and his figure was
6 out by only [redacted] in the scheme of a [redacted]
7 [redacted] liability. So, broadly speaking, not
8 an exact science, broadly speaking, it comes to a
9 result which is consistent with what the Board did.
10 I'm sorry, I haven't answered your question
11 in full, but is there anything else that I can help
12 you with on that?
13 ARBITRATOR JANOW: Yes, I guess I'm trying to
14 ask with respect to the overall methodology as to when
15 one could identify with certainty actual monies
16 associated with different categories or actual
17 pricing, and that was the thrust of the question, and
18 I think you haven't answered what period of time after
19 the year has passed one would have actual numbers.
20 MS. LAMB: So, going forward into the future,
21 if we do have a formula, at what point in time would
22 we look back over historical data?

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12:38:23 1 ARBITRATOR JANOW: Yes.
2 PRESIDENT van HOUTTE: You can take your time
3 because maybe those questions ask for some reflection,
4 if we could get an answer sooner or later, that would
5 be fine.
6 MS. LAMB: Yes.
7 MR. RIVKIN: What we know now is for 2009
8 what we are missing is the Board's Decision on what
9 expenditures they are missing.
10 ARBITRATOR JANOW: Ordinary expenditures?
11 MR. RIVKIN: Well, our ordinary expenditures
12 have already been made. What we don't know is what
13 percentage of them they accept.
14 ARBITRATOR JANOW: Yes.
15 MR. RIVKIN: And that's what gets plugged
16 into the formula.
17 ARBITRATOR JANOW: Yes.
18 MR. RIVKIN: And so, however long it takes
19 the Board to decide, we now know it's potentially
20 about a year after that.
21 The Stats Can factor is also historical, so
22 they also won't decide that, and there is some time

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12:39:15 1 lag in the way Stats Can factor is calculated, as
2 well.
3 ARBITRATOR JANOW: Thank you.
4 MR. RIVKIN: Perhaps what we could do is try
5 to come up with a chart to show when decisions are
6 made for year A and year A plus, however much time one
7 can expect the various components to be known.
8 PRESIDENT van HOUTTE: The Tribunal has no
9 questions. Thank you, Ms. Lamb.
10 And I suggest now that we have a break and
11 that we reconvene at 2:00, if that's convenient.
12 Thank you.
13 THE SECRETARY: Please close the session.
14 (Whereupon, at 12:39 p.m., the hearing was
15 adjourned until 2:00 p.m., the same day.)
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21
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1 AFTERNOON SESSION
2 PRESIDENT van HOUTTE: Good afternoon. Are
3 we on record?
4 THE SECRETARY: Please open the session.
5 PRESIDENT van HOUTTE: Good afternoon,
6 Mr. Gallus, you have the floor.
7 OPENING STATEMENT BY COUNSEL FOR RESPONDENT
8 MR. GALLUS: Thank you.
9 Hopefully the Tribunal will have before it a
10 copy of the slides on which Canada intends to rely in
11 its opening; is that correct?
12 I should add, at the moment, we are not only
13 distributing the slides on which we hope to rely, but
14 also full copies of documents on which we will be
15 relying.
16 PRESIDENT van HOUTTE: Is it the tendency
17 that after each session the volume of documents
18 triples?
19 (Laughter.)
20 MR. RIVKIN: Mr. Chair, just while Canada is
21 apparently doing a binder for each phase, we have
22 provided a set of common exhibits and common

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02:07:54 1 authorities that we intend to use. They're in the
2 boxes behind you now. If you see the Barrister boxes,
3 the top box is two volumes of exhibits, which is the
4 Core Bundle you requested, and then the bottom box is
5 two volumes of core common authorities, and we hope
6 those will be the only exhibits we'll use; and if
7 there are any others, we will provide them to you
8 loosely, but those are our documents. They have been
9 provided to Canada as well as to you.
10 PRESIDENT van HOUTTE: Thank you.
11 ARBITRATOR SANDS: I'm sorry for the
12 confusion. On the Core Bundle, is there just one
13 agreed set of basic documents on which we can note up
14 and mark up because that's what I had originally
15 understood by a Core Bundle, or have we got two sets
16 of the same thing now?
17 MR. RIVKIN: What we understood from the
18 Secretariat was that each side should provide the
19 documents that it intends to focus you on during the
20 hearing, and that that included authorities as well.
21 ARBITRATOR SANDS: Okay. I think the hope
22 from some at least was that the Parties would get

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02:08:58 1 together and identify a single set, and if we've been
2 responsible for that error of communication, our
3 apologies because then it means you've got one bundle
4 of the key documents and both sides can refer to the
5 same documents and you mark up on both sides. It may
6 have been a slight miscommunication.
7 MR. RIVKIN: I understand. We just gave you
8 one set of documents that we'll be using throughout
9 the hearing for all of the witnesses rather than
10 separate ones for each one so...
11 PRESIDENT van HOUTTE: Okay. Thank you very
12 much for this clarification.
13 Then I'm afraid that ICSID will have to ship
14 a few boxes to our respective homes. Thank you.
15 MR. GALLUS: During this opening, hopefully
16 you will not need to refer to the big binder of
17 documents. All the documents to which I will
18 referring you are in the opening slides.
19 PRESIDENT van HOUTTE: I misunderstood you.
20 I thought that this was for this afternoon session.
21 MR. GALLUS: So hopefully you can put aside
22 the big bundle of documents now and just focus on the

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02:09:59 1 slides we have just distributed.
2 You will see that the slides that Canada
3 intends to rely on in its opening are not as
4 voluminous as the slides from which the Claimants
5 relied; however, we hope that they will do the job,
6 nonetheless.
7 In their opening this morning, the Claimants
8 achieved two remarkable things.
9 The first remarkable thing that they had
10 achieved, and by far the more remarkable of the two,
11 was that they, for the first time in an ICSID case,
12 indeed probably for the first time in a NAFTA case,
13 relied on the film "Animal House." I'm confident that
14 that is unprecedented.
15 But the second remarkable thing that the
16 Claimants did this morning was that they never
17 addressed the real issue between the Parties. The
18 Claimants spoke a lot about Canada's NAFTA
19 obligations, but they never addressed the real issue
20 today. They never addressed the real issue this week,
21 and that is that this case is not about Canada's
22 obligations under the NAFTA, but this case is about

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02:11:12 1 the Claimants seeking to avoid their obligations.
2 This case is about the Claimants seeking to avoid
3 their obligation to expand on research and development
4 and education and training in the Province of
5 Newfoundland and Labrador. This is an obligation
6 created by the Accord Implementation Acts, an
7 obligation that is perfectly consistent with the
8 Hibernia and the Terra Nova Benefits Decisions, an
9 obligation that was consumed by three levels of
10 Canadian courts, an obligation which is merely
11 enforced by the Guidelines which are the subject of
12 this arbitration.
13 The Claimants allege that the Guidelines
14 breach Article 1106. Specifically they argue that the
15 Guidelines breach Article 1106 because they require
16 the purchase use for accordance with a preference for
17 domestic services. But the fact is that the Claimants
18 can fulfill their obligation under the Guidelines
19 without consuming any local services; and,
20 consequently, the Guidelines are not inconsistent with
21 Article 1106. Even if they are inconsistent with this
22 Article, the Guidelines are reserved. Canada reserved

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02:12:26 1 the Accord Implementation Acts under Annex I of the
2 NAFTA. They also reserved measures that are
3 subordinate to the Accord Implementation Acts because
4 the Guidelines are subordinate to the Accord
5 Implementation Acts. They are also reserved.
6 The Claimants also allege that the Guidelines
7 breach Article 1105. They claim that the Guidelines
8 are inconsistent with their legitimate expectations.
9 However, the Claimants have still failed to establish
10 that the protection of legitimate expectations is
11 parts of the customary international law standard of
12 treatment that Canada is obliged to provide under
13 Article 1105. Even if the protection of those
14 expectations is part of the standard, the Claimants
15 have still failed to prove that Canada has failed to
16 fulfill any expectations that they should have had.
17 After all, the Guidelines merely enforce their
18 obligation to expand on research and development and
19 education and training in the Province of Newfoundland
20 and Labrador.
21 This morning, I hope to do four things--I
22 should say this afternoon I hope to do four things:

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02:13:27 1 First of all, I hope to explain for this Tribunal the
2 obligation that the Claimants are seeking to avoid
3 this week; secondly, I will explain how it is that the
4 Guidelines are entirely consistent with this
5 obligation; third, I will explain how consequently the
6 Guidelines cannot breach Articles 1106 or 1105; and,
7 finally, I'll say a few words on damages.
8 But let's start with the obligation that the
9 Claimants are seeking to avoid this week, their
10 obligation to expend on research and development and
11 education and training in the Province of Newfoundland
12 and Labrador. And to understand this obligation, it's
13 necessary to go back a little bit further in time than
14 the Claimants took you this morning. Specifically,
15 it's necessary to go back to the 1960s and the 1970s,
16 when oil was discovered off the coast of Newfoundland.
17 At that time, unemployment in the Province
18 was around 15 percent. At that time, the Province had
19 an income about half the national average in Canada.
20 Consequently, when oil was discovered off the coast,
21 the Province immediately realized the potential for
22 the revenues from that oil to provide for the

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02:14:34 1 sustainable development of the Province. But they
2 realized that that revenue would not automatically
3 provide for their sustainable development. They
4 realized it would only provide for their sustainable
5 development if those revenues from the oil were used
6 to build the knowledge base in the Province. And so,
7 they expressly recognized that the revenue from the
8 oil could only be used to promote the sustainable
9 development of the Province if that revenue was used
10 to fund expenditures on research and development and
11 education and training in the Province.
12 This realization of the Province was
13 reflected in the Atlantic Accord, which you heard the
14 Claimants mention briefly this morning. This is the
15 agreement between the Provincial and the Federal
16 Governments with regard to the use of the oil off
17 their coast. And you will see in the Section 55 of
18 the Atlantic Accord, which if you could bring up as
19 the first slide, the Province and the Federal
20 Government agreed that the Benefits Plans to which the
21 Claimants referred you this morning shall provide for
22 expenditures to be made on research and development

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02:15:38 1 and education and training to be conducted within the
2 Province.
3 However, the Accord went further than that.
4 You will see in the highlighted line there that the
5 Atlantic Accord also states that expenditures made by
6 companies active in the offshore pursuant to this
7 requirement shall be approved by the Board.
8 And it's important to dwell on these words,
9 because they contrast sharply with the story that
10 you've heard earlier this morning from the Claimants.
11 According to the Claimants this morning, they approved
12 their own expenditures. They decide how much should
13 be spent. Yet here we have in the Atlantic Accord,
14 the document that was signed in 1985 and which sets
15 out the Regulatory Framework under which the Operators
16 operated in the Province of Newfoundland and Labrador,
17 but it's not the Operators who approve their
18 expenditures on research and development and education
19 and training but it's the Board.
20 This requirement or this obligation was
21 immediately incorporated into the Atlantic Accord
22 Implementation Act, the parallel legislation of the

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02:16:42 1 Federal and Provincial Government which does create
2 the regulatory environment for the Operators operating
3 off the coast of Newfoundland and Labrador. And you
4 will see in the next slide, Section 17 of those Acts,
5 which states that the Board shall perform such duties
6 and functions as are conferred or imposed on the Board
7 by or pursuant to the Atlantic Accord or this Act.
8 Through this provision, through Section 17(1) this
9 requirement that the Board approves expenditures on
10 research and development and education and training is
11 expressly incorporated into the Atlantic Accord
12 Implementation Act, and therefore expressly
13 incorporated into the regulatory environment under
14 which the Operators operated.
15 However, the Atlantic Accord Implementation
16 Act went further than that, and you will see on the
17 next slide, Section 45(3)(c) to which the Claimants
18 referred earlier this morning, that provision provides
19 that a Canada Newfoundland Benefits Plans--this is
20 part of the provision you can't see--shall contain
21 provisions intended to ensure that expenditures shall
22 be made for research and development to be carried out

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02:17:46 1 and for education and training to be provided in the
2 Province.
3 A couple of points on this: First of all,
4 the provision is unequivocal. It doesn't state that
5 the Operators shall spend on research and development
6 and education and training, what they deemed to be
7 important. It doesn't state that the Operators shall
8 determine themselves how much to spend on research and
9 development and education and training. It states
10 that expenditures shall be made for research and
11 development to be carried out in the Province and for
12 education and training to be provided in the Province.
13 This morning, the Claimants accused Canada of
14 ignoring the chapeau to this provision, of ignoring
15 the fact that the provision states that Benefits Plans
16 shall ensure expenditures on research and development
17 and education and training in the Province. But just
18 because this requirement must be reflected in a
19 Benefits Plan doesn't mean it's any less of a
20 requirement. Indeed, the Board has consistently, when
21 speaking of Section 45(3)(c), has spoken not only to
22 the fact that the Benefits Plans must ensure

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02:18:51 1 expenditures, but there must be such expenditures in
2 the Province. And I just want to refer you briefly to
3 two documents which illustrate that this is how the
4 Board discussed Section 45(3)(c). The first
5 document--and this is not part of your slides--is
6 Document C-199. If we could just bring that up.
7 Thanks, Thomas.
8 This is a 1988 document under which the Board
9 is explaining to members of the Province its
10 understanding of the Hibernia Benefits Plan. And
11 you'll see at Page 2 of that document, if we could
12 just highlight the reference to--there we go, just
13 there--you see that the Board states: "The Acts
14 further require developers to provide for research and
15 development and also for education and training in the
16 Province." So, immediately from 1988, straight after
17 the Hibernia Benefits Decision is given, the Board is
18 explaining to locals that, on their understanding of
19 the Atlantic Accord Implementation Acts, there is a
20 requirement to expend on research and development and
21 education and training in the Province. And just
22 because that requirement must be reflected in the

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02:20:02 1 Benefits Plans doesn't make it any less of a
2 requirement.
3 And the Board consistently referred to
4 Section 45(3)(c) in the same way. We can see this
5 from a document from 1999, about 11 years later, which
6 is Document RA-18. Again, this is not a document you
7 will see in the slides, but if we could just--thanks.
8 This is a letter from February 1999 to
9 Petro-Canada, and in the third paragraph you will see
10 that the Board refers to Section 45(3)(c), and you'll
11 see that the Board states that "Section 45(3)(c) of
12 the Atlantic Accord legislation specifically requires
13 that expenditures for research and development to be
14 carried out in the Province."
15 So, again, when the Board is discussing
16 Section 45(3)(c) with the Operators, it is explaining
17 that it expects expenditures on research and
18 development and education and training. And just
19 because that requirement must be reflected in the
20 Benefits Plans doesn't make it any less of a
21 requirement.
22 Let's go back to the Atlantic Accord

02:21:12 1 Implementation Acts in Section 151.1, which is the
2 next slide. In addition to requiring these
3 expenditures on research and development and education
4 and training, the Acts also gave the Board express
5 authority to issue Guidelines with regard to this
6 requirement. You can see there in the highlighted
7 part that it says, "The Board may issue Guidelines
8 with respect to the application and administration of
9 Section 45." Consequently, the Board is given express
10 authority to issue Guidelines with respect to this
11 requirement to expand on research and development and
12 education and training.
13 So, let's briefly recap. In the 1960s and
14 the 1970s when oil was discovered off the coast of
15 Newfoundland and Labrador, the Province immediately
16 recognizes that to ensure that the revenue from that
17 oil is used to promote the sustainable development of
18 the Province, that that revenue must be used on
19 research and development and education and training in
20 the Province.
21 Secondly, in the Atlantic Accord, the
22 Province and the Federal Government state that

02:22:14 1 Benefits Plans shall ensure expenditures on research
2 and development and education and training in the
3 Province.
4 The Atlantic Accord also states that those
5 expenditures shall be approved by the Board. These
6 requirements are incorporated into the Atlantic Accord
7 Implementation Act, which also adds the
8 requirement--also gives authority to the Board to
9 issue Guidelines with respect to this requirement.
10 At the time that the Atlantic Accord
11 Implementation Acts had been finalized, the Board
12 considered the first Benefits Plan, the Hibernia
13 Benefits Plan that the Claimants discussed extensively
14 this morning. And the Claimants referred you to
15 specific parts of those Benefits Plans, and I will be
16 referring you to parts of those Benefits Plans also,
17 including parts to which the Claimants did not refer
18 you.
19 But before we discuss the specific aspects of
20 the Hibernia Benefits Plan and the decision that arose
21 from it, it is important to understand the context in
22 which the decision was given, and that context is,

02:23:19 1 first of all, that it was the first Benefits Plan that
2 was considered by the Board. Not only that, but they
3 considered the Benefits Plan at a point when the
4 Operators had not even committed to the projects.
5 They wouldn't do that for another four years.
6 They also considered this Benefits Plan 10
7 years before there was first production of oil off the
8 coast of Newfoundland and Labrador. And finally they
9 considered this Benefits Plan at a point when the
10 Atlantic Accord Implementation Acts, the Acts creating
11 the regulatory environment for the Operators had not
12 yet even been finalized.
13 Consequently, when the Board considered the
14 Hibernia Benefits Plan, the offshore oil industry in
15 Newfoundland and Labrador was at a very preliminary
16 stage.
17 There is another key aspect to the context of
18 the Hibernia Benefits Plan, and that is the report of
19 the Hibernia Environmental Assessment Panel. This is
20 a report to which the Claimants did not refer you this
21 morning. This panel considered the environmental
22 impact of the Hibernia Project, but despite the name

02:24:17 1 of the panel, it went further, and it considered the
2 benefits that the Province expected from the Hibernia
3 Project.
4 Indeed, I should say when considering the
5 Hibernia Benefits Plan, the Board expressly stated
6 that the recommendations of the panel form the basis
7 for much of the Board's Decision and that you can see
8 that in the next slide where it's part of their
9 Decision. The Board states that "These
10 recommendations form the basis for much of the Board's
11 Benefits Plan Decision."
12 So what were these recommendations of the
13 Hibernia Environmental Assessment Panel which formed
14 the basis of much of the decision of the Board with
15 regard to Hibernia?
16 Let's look first at Recommendation 24, which
17 is the next slide. Here we see the panel recommending
18 research and development to improve the ability to
19 detect and manage ice under adverse weather conditions
20 should be undertaken.
21 The next slide you will see their
22 recommendation that research develop effective

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02:25:16 1 countermeasures--they're referring to countermeasures
2 to offshore oil spills--should be accelerated by
3 industry and Government.
4 So, here we have the Hibernia Environmental
5 Assessment Panel, a panel struck to consider the
6 benefits expected by the Province, recommending
7 research and development that they believe is
8 important to Newfoundland and Labrador. They're not
9 recommending research and development they believe is
10 important to the Operators. They're recommending
11 research and development that is important to the
12 Province of Newfoundland and Labrador, and the Board
13 expressly states in its Hibernia Benefits Decision
14 that these recommendations form the basis for much of
15 the Board's Benefits Plan Decision.
16 Consequently when considering the wording of
17 the Hibernia Benefits Decision, it's vital to consider
18 the context, including this Decision of the Hibernia
19 Environmental Assessment Panel.
20 So, having considered the context, let's look
21 at the wording of the Benefits Decision. Let's look
22 at the next slide where the Board states that--and

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02:26:20 1 partly because of the early stage of the industry at
2 which the Board considered this Hibernia
3 Environment--this Hibernia Benefits Plan, the Board
4 states that it is its decision that the most effective
5 approach would be to encourage the commitment of the
6 Proponent to a series of Basic Principles. The Board
7 will monitor the project as it proceeds to ensure that
8 the Proponent complies with the commitments.
9 The Board went on, as you will see on the
10 next slide, to state that the development and
11 implementation of a Benefits Plan is, because of the
12 nature of the subject matter, an evolutionary process.
13 And the Board goes on to say that the Board
14 has found a Proponent willing to amend its positions
15 to comply with regulatory requirements and to respond
16 positively to issues of concern. It is the Board's
17 expectation the Proponent's demonstrated
18 responsiveness in this area of benefits will continue
19 through the duration of the project.
20 The Proponents commit to a series of
21 principles. One of those principles, as we will see
22 on the next slide, is the principle of technology

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02:27:23 1 transfer. The Proponents also explain their strategy
2 to provides benefits to the Province. And you will
3 see from the next slide the Proponents state, as
4 acknowledged by the Board in their Decision, that this
5 is a strategy to achieve benefits to Newfoundland and
6 the rest of Canada throughout the Hibernia Project.
7 Again, let's dwell on those words. We are not talking
8 about benefits to the Province just in the Exploration
9 Phase. We are not talking about benefits to the
10 Province just in the production phase. We are talking
11 about benefits to the Province throughout the entire
12 Hibernia Project.
13 The Board goes on to acknowledge some of the
14 strategy that the Proponents proposed to provide these
15 benefits to the Province, and you will see on the next
16 slide that one of these--one part of this strategy--
17 ARBITRATOR SANDS: Sorry, just, as we are
18 going through this, and I have got your slides in
19 front of me, and I'm also going back to the Act
20 implementing implementation of the Accord, and I'm
21 just going over 45 and 138 and 139, and I just think
22 it might be helpful if you could explain to us your

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02:28:28 1 understanding--and we very much hope that the
2 Claimants would then have an opportunity to do the
3 same thing and to respond in due course--of the
4 mechanics of the adoption of the Benefit Plan, adopt
5 it pursuant to Section 45 of the Act, and you have
6 given us at Slide 9 a slide which shows the following
7 words: The Board has found a Proponent willing to
8 amend its positions to comply with regulatory
9 requirements."
10 And I suppose the question I have is: What
11 if the Proponent had not been willing to amend its
12 positions?
13 And putting it another way, does the Board
14 have the right to impose a Development Plan pursuant
15 to Section 45, taking into account also the language
16 of Article 138(1) and 139(4) which deals not with the
17 Benefits Plan but with a Development Plan and which
18 appears to establish a right--you may correct me if
19 I've got this wrong--on the Board to adopt a
20 Development Plan--or for a Development Plan to be
21 adopted and imposed, if you like.
22 So, I'm looking for a little bit of help on

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02:29:47 1 the extent to which the Board has a power to impose a
2 Development Plan as opposed to merely react to
3 suggestions made by the Proponent and then a
4 negotiation takes place.
5 MR. GALLUS: Much as I understand the regime
6 under which the Operators operated and as much as I
7 think I understand the nature of the Benefits Plan and
8 the Development's Plan, I think this is one issue on
9 which we should probably defer to the Experts rather
10 than lay evidence on this myself. I suggest this is
11 something that we should ask the Board members.
12 They'll be appearing tomorrow and Thursday, including
13 Board members drafted the Hibernia Benefits Decision,
14 who drafted the term of the Benefits Decision, and I
15 proposed we ask them the very question you've asked me
16 now which is how do the mechanics actually work.
17 ARBITRATOR SANDS: Very happy to do that, but
18 I'd still like to know what the position of Canada is
19 in relation to the case that it's arguing. Is it
20 Canada's position that the Board is entitled to impose
21 a plan pursuant to Section 45(3)(c) or not?
22 MR. GALLUS: Again, I understand the

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02:31:03 1 Tribunal's desire to get an answer immediately, but I
2 would prefer to defer to the Board on that issue.
3 On the slide that you see before you, the
4 Proponents are outlining their strategy to provide
5 benefits to the Province, and one part of that
6 strategy is to continue to support local research
7 institutions and to continue to promote further
8 research and development in Canada to solve problems
9 unique to the Canadian offshore environment.
10 And it's important to dwell on these words
11 because here the Operators not committing to support
12 research and development necessary for their projects.
13 Here the Operators are committing in the 1985
14 Benefits Plan, which as they explained this morning,
15 sets out their expectations, here they are committing
16 continue to support research and development to solve
17 problems unique to the Canadian offshore environment.
18 And the Board went further and stated that it
19 would monitor the Operators' fulfillment of these
20 commitments to ensure that they were being met.
21 You will see on the next slide, the Board
22 states that--the Board believes that effective

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02:32:19 1 monitoring and reporting will be necessary to ensure
2 that the Benefits Plans' objectives are accomplished
3 during the execution of the project.
4 This morning, the Claimants referred to, I
5 believe, this very passage, and they stated--or they
6 tried to rely on the fact that within this passage the
7 Board does not state explicitly that it will be
8 monitoring research and development expenditures. But
9 the important point is that the Board does not state
10 here that it will not monitor research and development
11 expenditures because the Board is stating here that it
12 will monitor reports of benefits to the Province. And
13 since those benefits necessarily include benefits from
14 expenditures on research and development and education
15 and training, by stating that they will monitor those
16 benefits, the Board is stating that it will monitor
17 expenditures on research and development and education
18 and training.
19 So, let's recap the Hibernia Benefits
20 Decision. First of all, it's a decision that was
21 issued at an early stage in the development of the
22 offshore industry and, consequently, the Board

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02:33:25 1 obtained the commitment of the Operators to a series
2 of principles. These principles included the
3 principle of technology transfer.
4 Moreover, the Operators committed to a
5 strategy that included commitment to continue to
6 support research and development to solve problems
7 unique to the Canadian offshore environment.
8 The Operators also committed to respond to
9 areas of concern, and they also committed to report
10 their fulfillment--or their--the benefits that they
11 were providing to the Province to ensure that their
12 commitments were being met.
13 The Board's understanding of the Hibernia
14 Benefits Decision is explained in the Witness
15 Statement of Mr. John Fitzgerald. You will hear from
16 Mr. Fitzgerald tomorrow, encouraging you to not only
17 ask him the questions that you may have with regard to
18 the mechanics of the Benefits Plans and the regime
19 affecting the Operators, but also to ask him about
20 this Hibernia Benefits Plan because he's one of the
21 people that drafted the Decision.
22 Not only was he a member of the original

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02:34:40 1 Board that drafted the Hibernia Benefits Decision, but
2 he's also a member of the Provincial Government that
3 helped negotiate the Atlantic Accord. Consequently,
4 he helped negotiate these provisions that stated that
5 there shall be expenditures on research and
6 development and education and training in the
7 Province, as well as this requirement that those
8 expenditures shall be approved by the Board.
9 In his First Witness Statement,
10 Mr. Fitzgerald talks about the Board's understanding
11 of this Hibernia Benefits Decision. And you will see
12 on the next slide he states that while the Board was
13 confident it had the authority to decide whether the
14 Proponent's plans for expenditures for these purposes
15 was acceptable, it did not consider that it would be
16 appropriate to exercise that authority by stipulating
17 the amount that should be expended at an early stage
18 of development in the offshore area. It was conscious
19 that it set an explicit expenditure level early on
20 that later proved to be too low, would be difficult to
21 increase it later.
22 And it goes on, as you will see in the next

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02:35:41 1 slide, to state that therefore it elected to monitor
2 both the Proponent's performance and the capacity in
3 the local scientific and engineering community to do
4 other work and the development of education and
5 training programs, and would reserve judgment on the
6 effectiveness of the Proponent's initiatives until
7 experiential evidence was available. It felt it could
8 then consider whether the Proponent was acting in good
9 faith and whether a more explicit undertaking,
10 including setting an amount that should be spent for
11 these purposes should be required.
12 So Mr. Fitzgerald, one of the members of the
13 Board that drafted this Hibernia Decision states that
14 he felt at the time, along with others members of the
15 Board, at the time of the Hibernia Decision, it was
16 simply too early to set an expenditure target.
17 However, he states that that does not mean that the
18 Board was forever giving away its authority to issue
19 such targets. The Board said that it would monitor
20 expenditures and reserve its judgment.
21 And initially, the Board's approach was
22 vindicated because initially expenditures on research

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02:36:37 1 and development were good, and you saw that in the
2 figures that the Claimants cited to you this morning.
3 However, around the mid 1990s, expenditures on
4 research and development started to fall away, and
5 that coincided with the Board's consideration of the
6 second project off the coast of Newfoundland and
7 Labrador, the Terra Nova Project.
8 So the Board decided to use its decision
9 considering the Terra Nova Benefits Plan to impose
10 more stringent reporting requirements. The Claimants
11 quoted for you this morning an aspect of that Terra
12 Nova Benefits Plan. I can't recall the specific Slide
13 Number, but the s Claimants referred to passages in
14 that Benefits Plan where the Operator stated that we
15 believe we will only spend what is necessary for the
16 projects and we believe that's not going to be very
17 much.
18 That Benefits Plan was rejected by the Board,
19 and it's important to dwell on that for a moment
20 because what this means is that, in 1997 or 1996,
21 Terra Nova said to the Board exactly what the Claimant
22 said to you this morning. Terra Nova said to the

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02:37:43 1 Board, we are just going to spend on what's necessary
2 for the projects, and we don't think we are going to
3 spend very much. In response to Terra Nova telling
4 the Board that that was their plan, the Board told
5 Terra Nova that plan is unacceptable.
6 So, let's see what they did say in the Terra
7 Nova Benefits Decision.
8 On the next slide you will see an extract
9 from the Terra Nova Benefits Decision where the Board
10 states clearly that the Benefits Plan does not fully
11 satisfy the statutory requirement that the Benefits
12 Plan contain provisions intended to ensure that
13 expenditures are made on research and development and
14 education and training in the Province.
15 They go, as you will see in the next slide,
16 to set this requirement of reporting, and they require
17 the Operators to report their exact expenditures on
18 research and development in the previous year as well
19 as their proposed expenditures in the following three
20 years.
21 On the next slide, you will see that the
22 Board states that it will monitor the reports of

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02:38:45 1 expenditures, and it says it will monitor those
2 reports of expenditures not for monitoring's sake, but
3 because the Board has an obligation as a regulator to
4 ensure that the Proponent's commitments are met.
5 The Board goes on, as you will see in the
6 next slide, to state that it believes the Proponent
7 will undertake significant training and research in
8 the Province. In its Benefits Decision, the Board
9 also considered the report of the Terra Nova
10 Environmental Assessment Panel, just as the Board
11 considered previously the report of the Hibernia
12 Environmental Assessment Panel. The Terra Nova
13 Environmental Assessment Panel which expressed the
14 Province's expectations--or I should say the
15 Provincial and Federal Government expectations from
16 the Terra Nova Project, stated unequivocally, as you
17 will see on the next slide, the bottom in the
18 highlighted passage, that funding basic research from
19 revenues generated from offshore petroleum resources
20 is a requirement for the Atlantic Accord, that funding
21 basic research from revenues generated from offshore
22 petroleum resources is a requirement of the Atlantic

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02:39:53 1 Accord. They didn't say that spending what is
2 necessary for the project is a requirement. They
3 didn't say that spending what the Operators deemed
4 sufficient is a requirement. They stated
5 unequivocally that funding basic research from
6 revenues generated from offshore petroleum is a
7 requirement of the Atlantic Accord.
8 And they went on in the next recommendation,
9 as you will see on the next slide, the panel
10 recommends that the Board require Operators of
11 offshore oil projects to fund basic research, and they
12 go on to identify two examples of such basic research
13 that the Board should require the Operators to fund.
14 Again, the Board stated that these
15 recommendations form a basis for its decision with
16 regard to the Terra Nova Benefits Plan.
17 And the Board went further, as you'll see on
18 the next slide, and stated in this highlighted passage
19 that you see at bottom: "In the Board's opinion, the
20 Panel's Recommendation 51, related to funding basic
21 research, is consistent with the thrust of the
22 legislative requirement."

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02:41:00 1 So, here we have the Board in 1997 stating
2 that a requirement to fund basic research, not a
3 requirement to fund research that is necessary for the
4 projects but a requirement to fund basic research, is
5 consistent with the thrust of the Atlantic Accord
6 Implementation Acts.
7 Again, the Board's understanding of this
8 Terra Nova Decision is represented in the First
9 Witness Statement of John Fitzgerald, and you will see
10 an extract from that statement in the next slide where
11 Mr. Fitzgerald states, through this Terra Nova
12 Benefits Decision, the Board signaled that it would
13 assess whether the past expenditures and future plans
14 for research and development and education and
15 training by any holder of a Board authorization were
16 adequate and whether improvements were necessary.
17 He goes on in the next slide to state that,
18 the Board accepted that if experience showed it to be
19 necessary, it might need to be--to more explicitly
20 describe the quantum and kind of the expenditures it
21 would judge acceptable.
22 So, John Fitzgerald, who drafted the Terra

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02:41:59 1 Nova Benefits Decision--or, I should say, partly
2 drafted the Terra Nova Benefits Decision, states that
3 his understanding of the Decision was that the Board
4 would require the Operators to report their
5 expenditures on research and development and education
6 and training, and that if those reports indicated that
7 expenditures were inadequate, the Board reserved the
8 right to intervene.
9 Mr. Fitzgerald's understanding is echoed by
10 that of Mr. Way. Mr. Way was not a member of the
11 Board that drafted the Terra Nova Decision but he did
12 join the Board shortly after. More importantly, he
13 was Vice-Chair of the Board at the time that the Board
14 issued the Guidelines that are the subject to this
15 arbitration. You will hear from Mr. Way later this
16 week, and I encourage you to ask him about his
17 understanding of the Terra Nova Decision, because
18 Mr. Way explained in his First Witness Statement that
19 his understanding of the Terra Nova Decision was the
20 same as that of Mr. Fitzgerald, and you can see that
21 in the next slide, where in his Witness Statement
22 Mr. Way states that the Board reviewed Benefits

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02:43:07 1 Reports for compliance with Benefits Plans and the
2 legislation. He states that by monitoring such plans,
3 the Board is conveying that it will require a
4 corrective action if the Operator were not in
5 compliance. In the absence of such a process, there
6 would be no reason to monitor and the Board could not
7 ensure that the Proponent's commitments were being
8 met.
9 So let's recap again, starting with the 1960s
10 and 1970s in Newfoundland, where the Province
11 immediately recognizes that as soon as its oil is
12 discovered, that it will use the revenue from this oil
13 to fund research and development and education and
14 training in the Province because that is the only way
15 that that revenue can ensure sustainable development
16 in the Province.
17 In the Atlantic Accord of 1985, the
18 Provincial and Federal Governments immediately
19 recognized that these Benefits Plans shall ensure such
20 expenditures on research and development and education
21 and training in the Province, and not only that, but
22 these expenditures shall be approved by the Board.

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02:44:06 1 This requirement is incorporated into the Atlantic
2 Accord Implementation Acts, and the Board is also
3 given the authority to issue Guidelines with regard to
4 this requirement.
5 In 1986, the Board issues its Decision
6 concerning the Hibernia Benefits Plan. In that
7 Decision, the Board obtains the commitment of the
8 Operators to fulfill a series of principles,
9 principles including technology transfer.
10 The Operators also commit to continue to
11 support research and development for the Canadian
12 offshore environment.
13 And the Operators also state the benefits
14 they give to the Province to ensure that their
15 commitments are met. In the 1997 Terra Nova Decision,
16 the Board increases this reporting requirement and
17 says that the Operators must report their exact
18 expenditures in the previous year and provide a
19 forecast of their expenditures on research and
20 development and education and training in the
21 following three years. The Board states that it will
22 monitor these expenditures to ensure that the

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02:45:07 1 Operators' commitments are met, and the Board also
2 states that funding basic research is consistent with
3 their understanding of the obligation in the Atlantic
4 Accord Implementation Act.
5 Again, the approach of the Board was
6 initially vindicated because expenditures on research
7 and development from both the Terra Nova and the
8 Hibernia Project after 1997 were good, and you saw
9 that again from the figures that were presented by the
10 Claimants this morning.
11 Not only were expenditures on research and
12 development and education and training good after
13 1997, but the Operators were spending beyond what was
14 necessary for the projects. In their reports on
15 spending, they were reporting expenditures which are
16 obviously not necessary for the projects; and, not
17 only that, but they are expressly recognizing this,
18 and you can see that from the next slide.
19 This is a report from Terra Nova from 1999
20 concerning its research and development expenditures.
21 And you will see there that the Proponents state that
22 they will continue to support technically worthy

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02:46:06 1 research and development activities and programs in
2 the Province where the results of such activities and
3 programs have application to the Terra Nova
4 development and/or to the development of an offshore
5 oil industry in the Province.
6 So, here we have the Operators in 1999 saying
7 that they are not only spending on what is necessary
8 for the projects, but they are also spending on the
9 development of an offshore oil industry in the
10 Province.
11 And I are remind you again of the language in
12 the Hibernia Benefits Decision from 1985, where the
13 Operators again do not talk about spending on what is
14 necessary for the projects. They talk about spending
15 for the development of an offshore oil industry in the
16 Province.
17 So, following the Terra Nova Decision,
18 expenditures on research and development and education
19 and training are initially good; and not only that
20 they are spending beyond what it necessary for the
21 project. However, expenditures soon fell away, and
22 expenditures fell away dramatically.

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02:47:08 1 You can see that in the next slide, which is
2 a table of expenditures on research and development
3 for the Hibernia Project. You will see that in 1997
4 Hibernia spent [redacted] on research and
5 development, representing [redacted] of their
6 revenue.
7 In 1998, this had fallen to [redacted]
8 falling to [redacted] of their revenue.
9 In 1999, it fell again to [redacted]
10 representing just [redacted] of their revenue.
11 By 2000, it had fallen to [redacted]
12 representing just [redacted] of the revenues that
13 Hibernia earned in that year.
14 This dramatic fall in expenditure was matched
15 at Terra Nova, and you'll see that from the next slide
16 where in 1997, Terra Nova reported expenditures of [redacted]
17 [redacted] but by 2001, they were projecting that they
18 would only be spending around [redacted] a
19 year.
20 The Claimants alleged this morning that this
21 fall in expenditures pre-dated--or I should say that
22 the Guidelines pre-dated the Board's knowledge of this

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02:48:12 1 fall in expenditures. That is not correct. The
2 figures that you see in these two tables are taken
3 from benefits reports that were issued in early 2001.
4 The Board declared that it would issue Guidelines with
5 regard to research and development, education and
6 training expenditures in late 2001. Consequently the
7 Board was well aware of this fall in expenditures when
8 it stated it would issue the Guidelines, and indeed
9 I'm sure you will hear as much when we hear from the
10 Board later this week.
11 So, faced with this decline in expenditure on
12 research and development and education and training,
13 being faced with this dramatic decline in
14 expenditures, the Board states--or the Board
15 intervenes, and the Board declares in late 2001 that
16 it expects expenditures consistent with norms in the
17 industry. It also states that it will issue
18 Guidelines to this effect.
19 So, for the next three years, the Board
20 consults with regard to the development of these
21 Guidelines. It consults with the Federal and
22 Provincial Governments who approve this idea of the

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02:49:13 1 Guidelines and ultimately approve the Guidelines that
2 are issued.
3 PRESIDENT van HOUTTE: Mr. Gallus, before you
4 move to the Guidelines, I think which is your idea, I
5 have a few questions, and probably my colleagues have
6 also questions. The first one is a rather practical,
7 small question. Why did you, on Page 28, not indicate
8 a percentage of revenue for Terra Nova, which was done
9 for Hibernia? Is there a specific reason for that?
10 MR. GALLUS: The reason there is no
11 percentage of revenue on that slide is because over
12 that period of time, there wasn't any revenue.
13 PRESIDENT van HOUTTE: But a more substantial
14 question is, the argument related to the Benefits
15 Plan, is this an argument which is related to 1105, or
16 1106? And/or?
17 MR. GALLUS: It's related to both 1105 and
18 1106, which I will explain in a few moments.
19 PRESIDENT van HOUTTE: Because to some
20 extent, couldn't one say that 1106 concerns the global
21 regulation for the whole territory of the Province,
22 the Accord Acts and the Guidelines which are also

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02:50:33 1 applicable in the whole Province, offshore drilling,
2 but for everyone, while the development plans also
3 Benefits Plans or bilateral may be in the beginning
4 contractual arrangements, so that maybe we are
5 speaking about two different types of animals.
6 MR. GALLUS: Sir, I'm not sure I understood
7 the question. Would you repeat it for me.
8 PRESIDENT van HOUTTE: Well, if one considers
9 the Benefits Plan as something which has been
10 established in some common agreement between the
11 Operator and the authorities, the Board, with a very
12 limited territorial application to which extent has
13 this an impact on the interpretation of the Accord Act
14 or the Guidelines which are applicable for, I would
15 say, the whole territory of Newfoundland or offshore
16 drilling in Newfoundland, regardless which specific
17 area offshore is concerned. Couldn't we say that the
18 Benefits Plans are some private arrangements between
19 Operators and the authorities, while the Guidelines
20 and the Accord Act are much more general?
21 You see my question?
22 MR. GALLUS: I'm not sure I do, but let me

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02:51:56 1 try and answer it nonetheless, and perhaps after I
2 fail, you can tell me where I've gone wrong.
3 First of all, let me clarify that the
4 Benefits Plan or the Benefits Decision is not in an
5 agreement between the Operators and the Board. The
6 Benefits Decision is the Board's decision as to
7 whether the Operators have satisfied their legislative
8 requirements. That is important.
9 Second, with regard to the application of
10 these Benefits Plans to the claim for a breach of 1105
11 and Article 1106, the content of the Benefits Plan is
12 directly important for the Claim For Breach of 1105 as
13 I will explain shortly. It's also directly important
14 for the Claim For Breach of 1108 as I will explain
15 shortly. It is less important for the claim for
16 specifically that the Guidelines are inconsistent with
17 Article 1106, but it is important, as I said, for the
18 application of 1108.
19 Like I said, I suspect I've failed in
20 answering your questions, and I invite Professor van
21 Houtte to explain how.
22 PRESIDENT van HOUTTE: Yes, maybe my...

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02:52:55 1 No, no. My thing is whether the Benefits
2 Plan is not a completely different type of regime than
3 the Guidelines and the Accord Act because the Benefits
4 Plan is something which is made "sub major" for a
5 specific area, and where the Operator has at least
6 some impact in determining the--in discussing the
7 terms of it or to accept it or not to accept it and
8 whatever, while the Guidelines are much more general
9 and automatically applicable in the whole area.
10 MR. GALLUS: I think perhaps your question is
11 based on a wrong assumption, and that is that the
12 Benefits Decision is a result of a negotiation between
13 the Operators and the Board and it is some form of
14 agreement.
15 Before continuing, I should state up front
16 that I encourage you to put this same question to
17 Mr. Fitzgerald and Mr. Way later in the week, who are
18 in a far better position to explain the nature of
19 Benefits Decision than I am.
20 However, I think I have it right to state
21 that the Benefits Decision is the Board's decision as
22 to whether or not the Operators have satisfied the

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02:54:02 1 requirements in the legislation. It is not an
2 agreement. It is not the result of a negotiation. It
3 is simply the Board's Decision as to whether they have
4 satisfied the legislative requirements.
5 PRESIDENT van HOUTTE: But have the Operators
6 some inputs in the genesis of the Benefits Plan? Is
7 it something in which they have some say, or is in
8 something which you have nothing to say now in the
9 drafting the terms of the Benefits Plan? Is this
10 something which is drafted outside of them, beyond
11 them, or is it something in which they have some
12 input, even a small input?
13 MR. GALLUS: With again the caveat of
14 pointing out that the Benefits Decision is not an
15 agreement, that it is just the Board's decision as to
16 whether they have satisfied the regulatory
17 requirement.
18 As to the precise input that the Operators
19 have to the Benefits Decision, that goes beyond my
20 knowledge, and I'd encourage you to ask Mr. Way and
21 Mr. Fitzgerald that question as they appear later this
22 week. Thank you.

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02:55:08 1 PRESIDENT van HOUTTE: Please go on.
2 MR. GALLUS: So, after declaring in 2001 that
3 they would issue Guidelines, the Board spent the next
4 three years consulting to determine the content of
5 those Guidelines, and those consultations included
6 consultations with the Federal and Provincial
7 Government who not only supported the concept of
8 Guidelines but ultimately endorsed the Guidelines that
9 were adopted.
10 The Board also consulted with the Operators
11 over this three-year period. They gave the Operators
12 a number of opportunities to respond to Draft
13 Guidelines that were presented to them, and the Board
14 gave the Operators the opportunity to present ways
15 that they could fulfill their obligation under the
16 Accord Implementation Acts to expend on research and
17 development and education and training.
18 One of the key members of the Board's staff
19 that developed the Guidelines over this period was
20 Mr. Frank Smyth. He was the manager of industrial
21 benefits over this period, and you will hear from
22 Mr. Smyth later this week.

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02:56:15 1 At the end of these consultations, the Board
2 issued the final Guidelines in late 2004, and let's
3 take a moment to have a look at some of the key parts
4 of those Guidelines. It should be on the next slide.
5 First of all, in the first part of the
6 Guidelines, they mention the authority under which
7 they were issued and, first of all, they mentioned
8 Section 45(3)(c), this requirement that the Operators
9 spend on research and development and education and
10 training in the Province.
11 Secondly, they mentioned Section 151.1(1),
12 which gives them the express authority to issue
13 guidelines with respect to this requirement to expend
14 on research and development and education and
15 training.
16 On the next slide, you will see that the
17 Board goes on to state that this document is intended
18 to provide an Operator engaged in petroleum
19 exploration and development and production activities
20 in the Newfoundland offshore area with guidance
21 parameters and criteria for research and development
22 expenditures in the Province, which are required under

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02:57:07 1 Section 45 of the legislation. And they go on in the
2 next slide to state that research and development
3 represent one avenue whereby the exploration for and
4 development and production of the petroleum resources
5 in the Newfoundland offshore area can make a
6 contribution to the sustainable development for the
7 Province.
8 And I remind you again of the Province's
9 recognition at the time that oil was discovered off
10 its coast, that if it was going to ensure sustainable
11 development from these revenues, that the Operators
12 had to expend on research and development and
13 education and training in the Province.
14 The Board goes on to state, this was the
15 vision or intent of the legislators at the time when
16 they inserted the requirement for research and
17 development and education and training in the Province
18 into the Atlantic Accord legislation.
19 The Board goes on to state that the petroleum
20 resources are finite and exhaustible, and it's the
21 intent of this provision that this exploitation create
22 a lasting economic legacy for the people of the

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02:58:02 1 Province. They state this is best achieved by
2 building on the intellectual capital and human
3 resources of the Province. Achievement of this
4 legislative intent is a key reason why some parameters
5 or guidance are required in respect of the requirement
6 in the Act that there be expenditures in the Province
7 for research and development. These Guidelines seek
8 to establish such parameters.
9 But the Board did not impose arbitrary
10 parameters. They did not invent the target that the
11 Operators had to meet. They simply stated that they
12 expected expenditures consistent with the norms in the
13 industry. They just stated that we expect you to
14 spend what everyone else spends, except the Board
15 didn't even require that because the benchmark that
16 the Board uses in the Guidelines is the average
17 spending on research and development in Canada by oil
18 companies. Yet to meet this benchmark, the Operators
19 can include their spending on education and training.
20 Not only that, but the benchmark is created through
21 average expenditures on research and development by
22 oil companies that is in-house, and yet the Operators

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02:59:15 1 can meet their obligation under the Guidelines through
2 expenditures on subcontractors.
3 So, after stating that the Operators only
4 need to spend what everyone else is spending, the
5 Board didn't even require that. Consequently, the
6 Board explains in the Guidelines that through these
7 Guidelines, it is merely enforcing the obligation of
8 the Claimants to expend on research and development
9 and education and training in the Province. As they
10 say in the Guidelines, this is an obligation created
11 by the Accord Implementation Acts, and also an
12 obligation completely consistent with the Hibernia and
13 Terra Nova Benefits Plans Decisions.
14 So much was confirmed immediately by the
15 Canadian courts.
16 ARBITRATOR SANDS: Can I just ask, and I
17 don't think this is a question for the witness because
18 it seems to be it's more a legal question.
19 What's the juridical--what's the legal
20 relationship between the document we have got at
21 Tab 18, which has Appendix II--we don't seem to have
22 Appendix I or the primary document, so to speak--what

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03:00:18 1 is the relationship between these Guidelines and a
2 Benefits Plan as a matter of local law?
3 MR. GALLUS: The key part of local law to
4 understand the relationship between the Benefits Plans
5 and the Guidelines is the Accord Implementation Acts.
6 And in the Accord Implementation Acts, it states that
7 the Operators must provide Benefits Plans, and those
8 Benefits Plans must ensure benefits for the Province.
9 It also states that those Benefits Plans must ensure
10 expenditures on research and development and education
11 and training in the Province.
12 The same Act gives the Board authority to
13 issue Guidelines with respect to this requirement. As
14 I explained before in Section 151.1(1), the Board is
15 given the authority to issue Guidelines with regard to
16 Section 45.
17 Consequently, both the Benefits Plans and the
18 Guidelines derive their authority under domestic law
19 from the Accord Implementation Acts.
20 ARBITRATOR SANDS: Is there anything--I'm
21 sorry, I don't recall having seen either Appendix I or
22 the primary document to which this is an Appendix, but

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03:01:52 1 do either of those two documents indicate the
2 relationship in this sense? Is there something in
3 that document which says "and for the future as with
4 regards new Benefits Plans and those existing, these
5 shall supplement or replace or clarify" or whatever
6 the formulation might be, "existing Benefits Plans?"
7 I'm trying to get my mind around the relationship
8 between Guidelines adopted in October 2004 with
9 respect to a) future Benefits Plans and, secondly,
10 existing Benefits Plans because presumably those
11 charged with adopting these plans will have turned
12 their minds to that question, and this document
13 doesn't seem to give us an answer to that question.
14 MR. GALLUS: First of all, the Guidelines do
15 not amend the Benefits Decisions. The Guidelines do
16 not state anywhere that they amend the Benefits
17 Decisions because they do not amend the Benefits
18 Decisions. All the Guidelines do is enforce its
19 obligation under the Acts to expend--the Benefits
20 Plans ensure expenditures on research and development
21 and education and training.
22 Consequently, the Guidelines also don't

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03:03:19 1 mention their relationship to future Benefits Plans,
2 because again what the Board is doing through
3 Guidelines is simply clarifying this obligation to
4 expend on research and development and education and
5 training. And given both old Benefits Plans and new
6 Benefits Plans have to ensure these expenditures,
7 there is no need for the Guidelines to amend those old
8 Benefits Plans or even to expressly state that they
9 are affecting the new Benefits Plans.
10 ARBITRATOR SANDS: It is assumed, if not
11 expressed explicitly, in this document, that there was
12 a relationship between these Guidelines and existing
13 Benefits Plans, even though that is not actually
14 stated. Is that the argument you are making?
15 MR. GALLUS: Sorry, you're asking if there is
16 a relationship between the Guidelines and the existing
17 Benefits Plans?
18 ARBITRATOR SANDS: I'm asking whether it is
19 assumed that there is--in your answer--that there is a
20 relationship between these Guidelines and an existing
21 Benefits Plan, whether it be one of administrative law
22 or policy or local Canadian law. I'm trying to tease

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03:04:27 1 out, this paragraph you've directed us to, which is
2 after section--at the top of Section 1.0, where it
3 says it is intended to provide an Operator engaged in
4 petroleum exploration development. It's interesting;
5 it's directed apparently to an Operator. And then
6 there is a reference to expenditures which are
7 required under Section 45 of the legislation. So, a
8 general link is made, but it doesn't, on its face,
9 explicitly address the question of the relationship
10 with the Benefits Plan.
11 Maybe there is a very simple answer and I've
12 missed it, and maybe Mr. Rivkin is about to give it to
13 us.
14 MR. RIVKIN: I don't want to interject, but I
15 can answer your question. You reference the fact that
16 this is Appendix II to some document. The document to
17 which it is Appendix II is the Canada, Newfoundland
18 and Labrador Benefits Plan Guidelines dated February
19 2006. That is Claimants's' Exhibit 34.
20 ARBITRATOR SANDS: It can't--how can you have
21 an Appendix in October 2004 to a document--
22 MR. RIVKIN: I think the copy that both sides

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03:05:37 1 are using of the 2004 Guidelines was the copy that was
2 attached to that. But the 2006 plan--Guidelines makes
3 clear what the purpose was. It says in the very--
4 ARBITRATOR SANDS: Just before we get to
5 that, if this is the October 2004 version Appendix II,
6 there must be an Appendix I which is contemporaneous
7 to that, and there must then be a sort of--
8 MR. RIVKIN: I think what both sides are
9 using as their copy of the Guidelines was Appendix II
10 to the 2006 Guidelines.
11 And I think--is CE-34 in our Core Bundle?
12 Yes.
13 If you take a look at CE-34, you can see, and
14 it's in our Core Bundle, which is now behind you, you
15 can see it's the February 2006 Guidelines. You can
16 see the very first--
17 ARBITRATOR SANDS: Before you get to
18 substance, thank you for directing us to that.
19 MR. RIVKIN: Okay.
20 And if you look at this document, you will
21 see that Appendix I is towards the back. It's Bates
22 stamped EMM 388. And that's the Exploration Benefits

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03:07:37 1 Plan Guidance, and you can see that the introduction
2 to that, which is on its Page 1 of Appendix I, says
3 the document is designed to provide an Operator
4 engaged in petroleum exploration activities with
5 guidance for the preparation of a Benefits Plan which
6 is required under Section 45. So, those Guidelines
7 are forward-looking.
8 Then, if you take a look at the Development
9 Plan, the principle Guidelines, the Benefits Plan
10 Guidelines to which this is--well, then actually,
11 sorry, if you look at the back, you will see
12 Appendix II is Guidelines for Research and Development
13 Expenditures, and that is--and we noted that that was
14 provided separately as CE-1, so it was Appendix II to
15 that document.
16 And then you will see that the principle
17 Guidelines to which this was an Appendix focuses on
18 Development Plan--Development Plan and the--again the
19 focus is forward-looking. It focuses, for example, on
20 the bottom of Page 2--
21 ARBITRATOR SANDS: I think maybe we can get
22 on to the--I'm sure you are going to come back to

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03:09:10 1 this, and I'm very grateful for having directed us to
2 the source because all I'm trying to sort out at this
3 point is what the relationship is, and I think you
4 have provided an answer to that. I think perhaps it's
5 probably best not yet to get into legal arguments as
6 to whether it's forward-looking, backwards-looking;
7 there will be different views about that, but thank
8 you for directing us to the primary document.
9 MR. RIVKIN: You're welcome.
10 PRESIDENT van HOUTTE: To come back to this
11 different aspect because I really am struggling there,
12 and I would like to get some clarifications. I got
13 the Benefits Plan of '85, your Document 1 in the new
14 bundle. When you look at the fixed, I guess--I agree
15 with you that the final word and the final formulation
16 has been the Board's formulation, but there is an
17 immense input from Mobil just to know exactly what the
18 parameters are. That's what I meant.
19 When you look at the text itself, it starts
20 with the fact that Mobil is intending to do this and
21 that and that, and even when you go through the Plan,
22 you find here and there also some input of Mobil, and

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03:10:26 1 that's what I meant with this quasi-contractual thing.
2 It's not something which is coming from Heaven and
3 being imposed without previous context. That's one
4 thing.
5 And it also applies, of course, for the area
6 at stake, while the Guidelines and the Accord Act are
7 more general and apply to the whole Operators within
8 the area and that's, I think, a rather substantial
9 difference.
10 MR. GALLUS: You are right that the Benefits
11 Decisions and the Accord Implementation Acts are
12 different in the sense that the Operators have input
13 into the content of their Benefits Plans. They have
14 an obligation under the Act to submit these plans, and
15 they have obligation to meet certain criteria in these
16 plans. So they submit a plan to the Board, and as had
17 happened with both Hibernia and Terra Nova, the Board
18 stated that we do not think that this Benefits Plan
19 satisfied the requirements of the Act. Go back and
20 try again.
21 So, in both Hibernia and Terra Nova, the
22 Operators come back with a Supplemental Benefits Plan,

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03:11:36 1 and then the Board says okay, we think you satisfy the
2 requirements in the legislation on the condition that
3 you fulfill the following criteria. So you're right,
4 the Operators do have some input, but ultimately the
5 Board is deciding whether or not the Operators have
6 satisfied the requirement in the legislation.
7 PRESIDENT van HOUTTE: But there is a greater
8 impact from the Operators at stake.
9 MR. GALLUS: They have input in the sense
10 that they're ones that proposed the Benefits Plan.
11 PRESIDENT van HOUTTE: And I always
12 understood that the authorities were trying to get as
13 much benefits as possible within the possibilities
14 offered by the Operators. They try to get the most
15 out of it, where the Guidelines are completely
16 different. The Guidelines have another point of
17 departure. The Guidelines say that's what is and you
18 better comply with it.
19 MR. GALLUS: I think it's important not to
20 overstate the flexibility that the Board has with
21 regard to Benefits Plans. Section 45 of the Act is
22 very explicit as to what is required for a Benefits

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03:12:30 1 Plan. Not only does it require expenditures on
2 research and development and education and training in
3 the Province, but it also requires all sorts of other
4 things, such as preference is given for local goods or
5 services.
6 And so when the Board considers a Benefits
7 Plan, it is just considering whether that plan
8 satisfies those requirements as set out in Section 45.
9 That is very different to a situation where a country
10 negotiates a benefits agreement with an Operator.
11 It's very different, for example, to the agreement
12 that was negotiated with regard to Hibernia in 1990.
13 It's very different to the agreement with regard to
14 Hibernia South that we mentioned this morning.
15 In those situations, you're right. We have
16 an Operator proposing benefits. We have the
17 Government coming back with ideas, and eventually we
18 have an agreement. That is not what is happening
19 here. Here we have the Board looking at Section 45,
20 looking at what has to be satisfied under Section 45,
21 and telling the Operators whether they satisfy it.
22 PRESIDENT van HOUTTE: I was speaking about

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03:13:26 1 the Benefits Plan of '85. That's also there in that
2 Benefits Plan of '85? That was the case there?
3 MR. GALLUS: Exactly. The Accord
4 Implementation Acts had not been finalized at the time
5 but the drafts were certainly there. And as the Board
6 was considering the Hibernia Benefits Plan, it was
7 considering them against the draft of the Atlantic
8 Accord Implementation Act. When the Board was
9 deciding whether the Hibernia Benefits Plan was
10 satisfactory, it was deciding whether or not the
11 Benefits Plan satisfied these requirement under
12 Section 45.
13 PRESIDENT van HOUTTE: Thank you.
14 ARBITRATOR JANOW: Could you just clarify,
15 you have cited Mr. Fitzgerald's statement, and of
16 course we will hear from him later, but in that
17 statement the Board is--he cites the Board as saying
18 that it is confident that it had the authority to
19 decide, but it was conscious that if they set the
20 explicit level early on and it proved to be too low,
21 it would be difficult to increase it later. Why would
22 it be difficult to increase it later if they had the

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03:14:26 1 authority to do so?
2 MR. GALLUS: Again, for fear of deferring too
3 much to Mr. Fitzgerald and Mr. Way tomorrow, this is a
4 question that's best put to Mr. Fitzgerald to ask him
5 what he meant by those words. My understanding of
6 those words from Mr. Fitzgerald is that simply if the
7 Board stated the Operators in 1995 you must spend
8 0.01 percent of your revenues on research and
9 development, that you must spend a search percentage
10 of your capital costs on research and development,
11 that it would be difficult to change that later on.
12 As to why that would be difficult later on,
13 Mr. Fitzgerald could have been referring to practical
14 reasons. He could have been referring to legal
15 reasons. Again, I believe it's best asked of
16 Mr. Fitzgerald.
17 PRESIDENT van HOUTTE: You may proceed.
18 MR. GALLUS: After the Guidelines were issued
19 in late 2004, the first thing that the Operators did
20 was challenge those Guidelines before the Canadian
21 courts, and they challenged them for very much for the
22 same reasons that the Claimants are challenging the

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03:15:34 1 Guidelines this week. They argued, first of all, that
2 the Guidelines were not authorized by the Accord
3 Implementation Acts, and the Operators also argued
4 that the Guidelines were inconsistent with the
5 Hibernia and the Terra Nova Benefits Decisions. These
6 are similar to the arguments that you heard from the
7 Claimants this morning.
8 The Canadian courts rejected these arguments.
9 First of all, the trial court in Newfoundland and
10 Labrador rejected these arguments. Then a majority of
11 the Court of Appeal of Newfoundland and Labrador
12 rejected these arguments. And, finally, the Supreme
13 Court of Canada, the highest court in Canada, refused
14 leave to appeal from the decision of the Court of
15 Appeal.
16 We will be referring to these decisions in a
17 bit more detail later in the week, but as part of this
18 opening, I think it's important to look at a couple of
19 passages from the decisions just to understand how
20 much it is--or how the courts did reject the arguments
21 that were put forward by the Operators.
22 First of all, on the next slide you will see

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03:16:35 1 an extract of the decision from Justice Welsh.
2 Justice Welsh is part of the majority of the Court of
3 Appeal, and you can see that he says on Paragraph 66
4 that there is nothing in the Acts, meaning the
5 Atlantic Accord Implementation Acts, or the Benefits
6 Plans, referring to the Hibernia and Terra Nova
7 Benefits Plans, supporting the conclusion that the
8 company may unilaterally determine the level of
9 expenditure on research and development.
10 Justice Welsh was joined in the majority by
11 Justice Barry, and you can see an extract from Justice
12 Barry's decision on the next slide.
13 Here you see Justice Barry stating that
14 Section 45(3) of the Federal Act provides that a
15 Canada Newfoundland Benefits Plan shall contain
16 provision intended to ensure that expenditures shall
17 be made for research and development to be carried out
18 in the Province. These mandatory provisions contain
19 no qualification entitling oil companies to refuse to
20 expend on research and development because they are of
21 the opinion the needs of their projects can be met
22 with existing knowledge and technology.

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03:17:37 1 Let's just contrast this language from the
2 argument you heard from the Claimants this morning,
3 because according to the Claimants this morning, they
4 can decide how much to expend on research and
5 development, and they can decide that if there is no
6 more research and development that needs to be done,
7 they will not do it. Yet here we see Justice Barry as
8 part of the majority of the Court of Appeal rejecting
9 that argument, stating that these mandatory provisions
10 contain no qualification entitling oil companies to
11 refuse to expend on research and development because
12 they are of the opinion the needs of their project can
13 be met with existing knowledge and technology.
14 Justice Barry went on at Paragraph 135, which
15 you will see on the next slide, to state that the
16 Board approved the Hibernia and Terra Nova Projects on
17 condition that the Board had the authority to
18 continuously monitor research and development
19 expenditures and intervene by issuing Guidelines
20 requiring higher expenditures should the Appellants'
21 level of expenditures fall below that which the Board
22 considered appropriate. He says that these were the

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03:18:35 1 rules of the game when development approvals were
2 issued, and the same rules apply today.
3 This morning the Claimants referred to the
4 decisions of the Canadian courts, and effectively they
5 made three points with regard to them. First of all,
6 they refer to a passage from the decision of Justice
7 Welsh, where he says that the Guidelines are a
8 departure from the previous regime.
9 This is true, but it does not assist the
10 Claimants because the Guidelines are a departure from
11 the previous regime, whereas before the Claimants had
12 their obligation to expand on research development and
13 education and training in the Province. In the
14 Guidelines, the Board for the first time is providing
15 guidance as to what that means.
16 However, just because Justice Welsh stated
17 that the Guidelines are a departure from the previous
18 regime does did not mean that he did not decide that
19 the Guidelines were not authorized by the Accord
20 Implementation Acts, it does not mean that he did not
21 decide that the Guidelines are consistent with the
22 Hibernia and Terra Nova Benefits Decisions.

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03:19:38 1 So much is evident. First of all, from the
2 paragraph to which I just referred you, where Justice
3 Welsh states there is nothing in the Act or the
4 Benefits Plans supporting the conclusion that the
5 company may unilaterally determine the level of
6 expenditure on research and development. But it's
7 also evident from other parts of Justice Welsh's
8 decision--Thomas, if we could bring up Paragraph 67
9 and 68 of the decision.
10 You will see here at Paragraph 67, Justice
11 Welsh, the same judge that the Claimants were quoting
12 this morning, states that a reasonable inference
13 flowing from the monitoring function is that the Board
14 may determine that the expenditures of a company do
15 not meet the requirements of the Benefits Plan.
16 At 68, he says that this is consistent with
17 both the Hibernia and the Terra Nova Benefits
18 Decisions.
19 Justice Welsh also talks about the authority
20 of the Board and the consistency with the previous
21 decisions at Paragraph 105, which if we could just
22 pull up for a second.

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03:20:50 1 ARBITRATOR SANDS: This is Tab 19?
2 MR. GALLUS: It is Tab 19. That's right.
3 And you will see that Justice Welsh states
4 that the submissions of the Operators failed to
5 recognize that application of the Guidelines to the
6 Hibernia and Terra Nova Projects does not involve an
7 amendment to the Benefits Plans. Rather, the
8 Guidelines set parameters consistent with the Board's
9 responsibility to monitor expenditures for research
10 and development required under the Benefits Plans.
11 Thus, there is no dispute or there should be no
12 dispute that Justice Welsh firmly concluded that the
13 Guidelines were authorized by the Accord
14 Implementation Acts and that they were consistent with
15 the Hibernia and Terra Nova Benefits Decisions.
16 The second point that the Claimants made this
17 morning was based on the dissent of Justice Rowe
18 because in the Court of Appeal, Justice Rowe disagreed
19 with some aspects of the decisions of Justice Welsh
20 and Justice Barry.
21 However, Justice Rowe's dissent provides no
22 support to the Claimants, and it provides no support

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03:21:58 1 because his opinion was expressly rejected by Justice
2 Barry who addressed the reasoning of Justice Barry
3 Rowe and it sounded unpersuasive and it was also
4 implicitly rejected by Justice Welsh, who, as we can
5 see from the passages that were put before you now,
6 expressly found that the Guidelines were authorized by
7 the Accord Implementation Acts, and the Guidelines are
8 consistent with the Hibernia Terra and Nova Benefits
9 Decisions.
10 The third point that the Claimants made this
11 morning with regard to the decisions of the Canadian
12 courts was that the majority of the Court of Appeal as
13 well as the trial court applied a test of
14 reasonableness, that they just asked themselves
15 whether it was reasonable to decide the Guidelines
16 were authorized by the Accord Implementation Acts and
17 consistent with the Hibernia and Terra Nova decisions.
18 It is true that the majority of the Court of
19 Appeal as well as the trial court did apply this test
20 of reasonableness, but the courts went well beyond
21 this test. As is clear from the passages that I just
22 referred you to now, the court went beyond this test

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03:23:05 1 of reasonableness and did find that the Guidelines are
2 authorized by the Accord Implementation Act and that
3 they are consistent with the Hibernia and Terra Nova
4 Benefits Decisions.
5 Consequently, the Claimants can take no
6 support from the test that was applied by the majority
7 or by the trial court because the Canadian courts did
8 hold that by challenging the Guidelines, the Claimants
9 were merely trying to avoid their obligation to expend
10 on research and development and education and training
11 in the Province, and this was an obligation created by
12 the Accord Implementation Acts and perfectly
13 consistent with the Hibernia and Terra Nova Benefits
14 Decisions.
15 After failing to avoid their obligation
16 before the Canadian courts, the Claimants come to the
17 ICSID this week and try to avoid their obligation yet
18 again.
19 ARBITRATOR SANDS: Just before you come to
20 that, can you tell us what is the position of Canada,
21 and it would be helpful at some point to hear also
22 from the Claimants the same question, the

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03:24:06 1 answer--their answer to the same question in due
2 course, not right now, but for you right now: To the
3 extent that the Canadian courts have made Findings of
4 Fact--first point--and, secondly, findings of law on
5 domestic Canadian law, what degree of deference, if
6 any, is a NAFTA Tribunal to pay to such findings? I
7 mean, it's a very delicate matter for any
8 international tribunal to second-guess what a domestic
9 court has done, for obvious reasons. It doesn't mean
10 it won't be done, but I find it very helpful to hear
11 from both sides--from Canada now--what authority
12 should we pay to this judgment or to, indeed, to other
13 judgments on Findings of Fact and domestic law?
14 MR. GALLUS: Certainly.
15 ARBITRATOR JANOW: I would like to add just
16 to it because it's directly on point is the extent to
17 which this NAFTA Tribunal is looking at the same or
18 different questions than that looked at by the
19 domestic court, and thus the extent to which the
20 national courts' findings which, of course, are
21 factual findings for our purposes, should be weighed.
22 MR. GALLUS: It's Canada's position that the

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03:25:42 1 Tribunal should defer to the decisions of the Canadian
2 courts in this instance, unless they're tainted by
3 denial of justice. Since there has been no allegation
4 they are tainted by denial of justice, the Tribunal
5 should refer defer to them, and they should defer to
6 them for these reasons:
7 First of all, they should defer to them
8 because the issues that were addressed by the Canadian
9 courts are precisely the issues that this Tribunal has
10 to address this week. First of all, with regard to
11 the application of Article 1108 and the issue of
12 whether or not the Guidelines are subordinate to the
13 Accord Implementation Acts, the NAFTA sets out a test
14 to determine whether or not a measure is subordinate
15 to another measure, and this Tribunal is obliged to
16 apply that test. That test is that a measure of
17 subordinate to a measures that is listed, the
18 Guidelines are subordinate to the Accord
19 Implementation Acts if the Guidelines are authorized
20 by or consistent--and consistent with the Accord
21 Implementation Acts as well as the Hibernia and Terra
22 Nova Benefits Decisions.

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03:26:45 1 So, this is the test that the Tribunal is
2 required to apply under Article 1108 and Annex I of
3 the NAFTA. These are precisely the issues that were
4 addressed by the Canadian courts. As you saw from the
5 extracts that we showed you before, Canadian courts
6 decided that the Guidelines are authorized by the
7 Accord Implementation Acts, but the Guidelines are
8 consistent with the Hibernia and Terra Nova Decisions.
9 Consequently, since Canadian courts addressed
10 precisely the issues that you need to address to
11 determine whether or not the Guidelines are
12 subordinate to the Accord Implementation Acts, that
13 the Tribunal should defer to those decisions unless
14 they're tainted by denial of justice.
15 I will come back to that point in a moment,
16 but I first want to address Article 1105, because I'm
17 mindful of your question, Professor Janow. Because
18 not only are these decisions important for the
19 application of Article 1108, but they're also
20 important to the application of Article 1105.
21 The Claimants have alleged that Canada's
22 actions are inconsistent with their legitimate

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03:27:41 1 expectations. They argued that the Guidelines were
2 inconsistent with their legitimate expectations. Yet
3 the Canadian courts determined that the Guidelines
4 were consistent with the regulatory regime that
5 applied before. If the Guidelines are consistent with
6 the regulatory regime that applied before, they cannot
7 be possibly be inconsistent with any legitimate
8 expectations that the Claimants had.
9 So, with regard to 1105, whilst the Canadian
10 courts did not expressly address the legitimate
11 expectations of the Operators, unlike 1108, the
12 Tribunal--the courts did not expressly address the
13 elements of the test that have to be applied by the
14 Tribunal this week. It came very close. And by
15 deciding that the Guidelines are consistent with the
16 previous regime, they effectively concluded that the
17 Guidelines cannot possibly be inconsistent with any
18 legitimate expectations generated by that regime.
19 So, that is how the decisions of the Canadian
20 courts are important for both the application of
21 Article 1108 and Article 1105, but there remains the
22 question of what the Tribunal should do with these

03:28:46 1 decisions. And it's the position of Canada that this
2 court--this Tribunal should refer to those decisions,
3 unless they are tainted by denial of justice, and they
4 should affirm those decisions for four reasons.
5 First of all, the Tribunal should defer to
6 the Canadian courts on this position--on these points
7 because the Canadian courts are best qualified to
8 address them. These are ultimately issues of domestic
9 law. We are comparing a domestic measure, the
10 Guidelines, with a domestic Act, the Accord
11 Implementation Acts. Since these are ultimately
12 issues of domestic law, domestic courts are best
13 qualified to address them. Since they have been
14 addressed by the domestic courts, the courts should
15 defer to their decision.
16 The second reason that the Tribunal should
17 defer to these decisions is an issue of sovereignty,
18 that when a court has addressed an issue affecting
19 domestic law, that should not be the position of an
20 international tribunal to reach a different conclusion
21 unless the decisions of domestic courts are tainted by
22 denial of justice.

03:29:59 1 The third reason that the Tribunal should
2 defer to the decisions of the Canadian courts is an
3 issue of consistency, that if we have international
4 tribunals and domestic courts addressing exactly the
5 same issue and coming to different conclusions, this
6 does not promote consistency.
7 And the fourth reason that the Tribunal
8 should defer to the Canadian courts is because this is
9 what every single previous international tribunal and
10 international commentator has told the Tribunal it has
11 to do.
12 Let me refer you to a couple of those
13 authorities.
14 PRESIDENT van HOUTTE: Mr. Gallus.
15 MR. GALLUS: Sure.
16 PRESIDENT van HOUTTE: Maybe we have some
17 questions there, but let's now go--let's now move to a
18 completely different area and speak in abstract terms.
19 Let's assume an expropriation where a local court says
20 that everything is all right. Would that mean that an
21 international tribunal has no right to scrutinize that
22 and to have its own judgments?

03:31:03 1 MR. GALLUS: No, that's not right. The
2 Tribunal has to apply the test that it's required to
3 apply, and if the Tribunal is faced with a test that
4 it's described in the Treaty or if the Tribunal is
5 faced with a test that's described under customary
6 international law, then the Tribunal is obliged to
7 apply that test. If that test is different to a test
8 applied by domestic court, then the Tribunal should
9 apply the test that's required to apply.
10 PRESIDENT van HOUTTE: The test is exactly
11 the same, but the outcome of the Tribunal, and I speak
12 about--in abstract terms, let's take expropriation as
13 an issue. When the same criteria have to be applied,
14 do the Tribunal--an international tribunal has another
15 view than a--domestic courts, wouldn't that allow the
16 Tribunal to decide differently?
17 MR. GALLUS: I'm wondering if your question
18 is now in the realm of sort of hypothetical that is
19 difficult to answer. I think as a matter of principle
20 we can state that the Tribunal has to apply the test
21 it has before it, and if that test is different than
22 that applied by a domestic court, then the Tribunal

03:32:09 1 applies its own test. However, if there are elements
2 of that test that have been addressed by a domestic
3 court and if those elements are not tainted by denial
4 of justice, then the Tribunal should defer to the
5 domestic courts on that issue.
6 PRESIDENT van HOUTTE: You used the term
7 "denial of justice." What type of cases are you
8 thinking about for denial of justice? You can have a
9 decision which is a little different than what other
10 people would decide, but that's not denial of justice.
11 Denial of justice is a far-reaching breach of the
12 rights of defense.
13 MR. GALLUS: When I refer to denial of
14 justice, I refer to denial of justice as it's
15 understood under customary international law.
16 ARBITRATOR SANDS: I may just be coming on to
17 this, but it would be very helpful in due course
18 from--well, not right now if it's not appropriate but
19 from both Parties, any authorities you got from NAFTA
20 jurisprudence in particular on this relationship
21 between a NAFTA Tribunal and--because, of course, we
22 are aware of numerous cases that come to

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03:33:06 1 mind--Metalclad is one, I think Waste Management is
2 another one--in which there have been arguments on
3 these issues, and tribunals have gone in different
4 directions. It would be very helpful not to have a
5 lengthy excursion on that, but if you can point us to
6 specific decisions, specific paragraphs, that would be
7 very helpful for our process of reflection.
8 MR. GALLUS: And I'm happy to refer the
9 Tribunal to those decisions now. I will refer the
10 Tribunal to several NAFTA decisions. But before I do
11 that, I would like to refer them to two decisions of
12 the Permanent Court of International Justice because I
13 think the Permanent Court expresses the issue very
14 succinctly.
15 (Pause.)
16 MR. GALLUS: For the first decision I want to
17 refer you to is the Decision of the Permanent Court of
18 International Justice in Serbian Loans, which
19 hopefully we will be able to show you on the screen,
20 but for the moment, let me just quote from Page 46 of
21 the Decision, and you will find this Decision at
22 RA-45. And the Court there at Page 46 states that for

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03:34:20 1 the Court itself to undertake its own construction of
2 municipal law, leaving on one side existing judicial
3 decisions with the ensuing danger of contradicting the
4 construction which has been placed on such law by the
5 highest national Tribunal and which in its results
6 seems to the Court reasonable, would not be in
7 conformity with the task for which the Court has been
8 established and would not be compatible with the
9 principles governing the selection of its members.
10 So the second sentence of that final
11 paragraph there, beginning for the quote, repeat again
12 the quote that says: For the court itself to
13 undertake its own construction of municipal law,
14 leaving on one side existing judicial decisions, with
15 the ensuing danger of contradicting the construction
16 which has been placed on such law by the highest
17 national Tribunal and which, in its result, seems to
18 the Court reasonable, would not be in conformity with
19 the task for which the Court has been established and
20 would not be compatible with the principles governing
21 the selection of its members.
22 ARBITRATOR SANDS: That's not dealing, as I

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03:35:34 1 recall, with the issue of the construction of the
2 compatibility of a domestic law with an international
3 law. That's a different issue, isn't it? I mean it
4 may be pertinent, but it's subject to the point that
5 at the end of the day, we have to apply 1106, 1105,
6 and 1108. So, it's not saying we can't look at a
7 domestic law interpretation. We may then find that
8 it's inconsistent with the international obligation,
9 but it's more narrow than that, and it's a point that
10 I think a number of us have made earlier: It's the
11 process of interpreting and applying a domestic law
12 qua domestic law.
13 MR. GALLUS: I think the Decision of Serbian
14 Loans on this point is relevant because here the
15 Permanent Court of International Justice was
16 considering an international obligation; and, as part
17 of its consideration of that international obligation,
18 it had to consider the municipal law with regard to
19 whether or not bonds could be fulfilled in gold or
20 French francs.
21 And the Court ultimately was deciding the
22 issue based on international law and based on the

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03:36:46 1 international obligation it had to apply. But part of
2 applying that international obligation, it recognized
3 that one of the elements of the test it had to apply
4 referred it to domestic law. It recognized that the
5 local French courts had already addressed that issue,
6 and it decided to defer to those courts unless they
7 were tainted by a denial of justice.
8 Perhaps the issue is clearer in the NAFTA
9 decisions. Before I leave the Permanent Court, I
10 should point out that they echo these comments in
11 Serbian Loans in the Brazilian Loans Case. We don't
12 need to bring this up, but you will see that quote at
13 Document RA-5 and Page 124.
14 But let's look at the NAFTA decisions, and
15 first of all let's look at the Decision in Waste
16 Management II, which you will find at RA-132, and I'm
17 specifically referring to Paragraph 47 of that
18 Decision.
19 So if we can get Paragraph 47?
20 So I'm referring to this final sentence in
21 which the NAFTA Tribunal endorses the view of Azinian,
22 that a NAFTA Tribunal does not have plenary appellate

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03:38:34 1 jurisdiction in respect to decisions of national
2 courts, and whatever may have been decided by those
3 courts as to national law will stand unless shown to
4 be contrary to NAFTA itself.
5 I guess we should have referred to the
6 Decision in Azinian beforehand, but let's refer to it
7 now.
8 And the Decision in Azinian, which you will
9 find at RA-3, you see Paragraph 99--and it's the first
10 sentence there: The NAFTA Tribunal stated that the
11 possibility of holding a State internationally liable
12 for judicial decisions does not, however, entitle the
13 Claimant to seek international review of the national
14 Court Decisions as though the international
15 jurisdiction seized has plenary appellate
16 jurisdiction.
17 ARBITRATOR SANDS: Can you read all that?
18 MR. GALLUS: From Paragraph 99? This is not
19 true generally, and it is not true for NAFTA. What
20 must be shown is that the Court Decision itself
21 constitutes a violation of the Treaty. I guess this
22 relates to my point before that the Tribunal should

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03:40:11 1 defer the domestic court decision unless that domestic
2 court decision is tainted by a denial of justice as
3 recognized by the NAFTA Tribunal here.
4 ARBITRATOR JANOW: Could I ask you my
5 question again, I guess, because it is often the case
6 in international proceedings, and I experienced this
7 numerous times at the WTO, where a domestic court's
8 measure is brought in as evidence. But the question
9 is whether the legal question put before the national
10 court is the same legal question put before the
11 international tribunal because our task is not to
12 interpret domestic law for domestic law purposes, but
13 only domestic law for NAFTA purposes.
14 So, I guess I'd like you to just say again
15 clearly the manner in which you think the national
16 court was looking at the identical or different legal
17 question that is before this Tribunal.
18 MR. GALLUS: Certainly. Let's start with the
19 application of Article 1108 and the fact that the
20 Guidelines cannot not breach Article 1106 because they
21 fall in the reservation in Article 1108. As Canada
22 explained, the Guidelines are reserved because they

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03:41:23 1 are subordinate to the Accord Implementation Acts.
2 And in the Interpretive Note to Annex I, it defines
3 what is a subordinate measure, and it defines a
4 subordinate measure as a measure that is adopted under
5 the authority of and consistent with a list of
6 measures.
7 Consequently, to determine whether the
8 Guidelines are subordinate to the Atlantic Accord
9 Implementation Acts and therefore to determine whether
10 or not the Guidelines are reserved, the Tribunal has
11 to determine whether the Guidelines are authorized by
12 the Accord Implementation Acts and whether they're
13 consistent with the Accord Implementation Acts,
14 together with subsequent subordinate measures
15 including the Hibernia and Terra Nova Benefits
16 Decisions.
17 So I will say that again. To determine
18 whether or not the Guidelines are subordinate and
19 therefore whether they're reserved, the Tribunal has
20 to determine whether the Guidelines are authorized by
21 the Accord Implementation Act and whether they are
22 consistent with that Act as well as the Hibernia and

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03:42:22 1 the Terra Nova Benefits Decisions. That's the test
2 the Tribunal has to apply to determine whether the
3 Guidelines are subordinate and whether they are
4 reserved.
5 But these two elements of the test were
6 addressed by the Canadian courts. You saw in the
7 extracts that we showed you before, and you can see in
8 other aspects of the decisions, that the courts stated
9 plainly that the Guidelines are authorized by the
10 Accord Implementation Acts, and the court stated
11 clearly and plainly that the Guidelines are consistent
12 with the Acts as well as the Hibernia and the Terra
13 Nova Benefits Decisions.
14 Consequently, the Canadian courts have
15 addressed these two elements of the tests that the
16 Tribunal is required to apply to determine whether the
17 Guidelines are subordinate to the Accord
18 Implementation Acts. That's with regard to 1108; and
19 the reservation, from 1106.
20 With regard to Article 1105, it's a little
21 bit different. Because the test that the Claimants
22 are asking to you apply is not exactly the same test

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03:43:34 1 that was applied by the courts. The test that the
2 Claimants are asking you to apply is that Canada
3 breached Article 1105, that the Guidelines breached
4 this Article because they failed to fulfill the
5 legitimate expectations of the Claimants, and Canada
6 acknowledges that the courts did not expressly use
7 these words of legitimate expectations. Canada
8 acknowledges that the Canadian courts did not state
9 expressly that the Guidelines are inconsistent or that
10 the Guidelines were consistent with legitimate
11 expectations generated by the Act in the Hibernia and
12 Terra Nova decisions, but the courts came very close
13 to that. And the decision of the courts effectively
14 means that the Guidelines cannot be inconsistent with
15 any legitimate expectations generated by that Act in
16 the Hibernia and Terra Nova Decisions because the
17 courts in holding the Guidelines were consistent with
18 that previous regime. In holding that they are
19 authorized by it, they were consistent with the Act,
20 consistent with the Benefits Plans decisions; in
21 holding that the Guidelines were consistent with the
22 previous regime and they effectively held that the

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03:44:43 1 Guidelines cannot be inconsistent with any other
2 legitimate expectations that the Claimants should have
3 taken from that regime because if a measure is
4 consistent with the previous regime, you can't
5 possibly be inconsistent with any expectations
6 generated from that regime.
7 So, in sum, with regard to Article 1108, the
8 Canadian courts applied precisely the elements of the
9 test that you have to apply to determine whether or
10 not the Guidelines are subordinate to the Accord
11 Implementation Acts. With regard to 1105, the
12 Canadian courts reached a decision which effectively
13 ensures that the Guidelines cannot be inconsistent
14 with any legitimate expectations that the Claimants
15 had.
16 ARBITRATOR SANDS: It's not just the
17 Guidelines, is it? It's the Guidelines and the
18 application of the Guidelines to the facts of this
19 case that becomes pertinent, and it will be helpful,
20 if in due course you can direct us to where in the
21 relevant judgments the Canadian courts have expressed
22 a view on the authorization point and on the

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03:45:47 1 consistency point, both of the Guidelines and their
2 application to the pre-existing Benefits Plans,
3 because it seems to me that it could be said that
4 that's the crucial point. I mean guidelines in
5 abstracto is not really the issue. It's the
6 application of the Guidelines that becomes the crucial
7 point, and it would be helpful--these Guidelines to
8 these Benefits Plans that pre-dated Guidelines, we
9 will obviously all be reading tonight the judgment
10 very carefully, so you don't need to do it for us now,
11 but--and we would like very much also I suspect to
12 hear from the Claimant on exactly these points when in
13 due course you come back.
14 MR. GALLUS: We are happy to refer you to
15 these aspects of these decisions now. It will just
16 take a moment.
17 First of all, let's refer you to
18 Paragraph 105 of the--actually, let's start with
19 Paragraph 105 of the decision of Justice Welsh.
20 Is it possible to bring that back up, Thomas?
21 And you will see here that Justice Welsh is
22 part of the majority, expressly addresses the Hibernia

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03:47:09 1 and Terra Nova Projects and addresses the consistency
2 of the Guidelines with those Benefits Plans and the
3 Benefits Decisions.
4 He says that the submissions of the Operators
5 failed to recognize that, application of the
6 Guidelines to the Hibernia and Terra Nova Projects
7 does not involve an amendment to the Benefits Plans.
8 Rather, the Guidelines set parameters consistent with
9 the Board's responsibility to monitor expenditures for
10 research and development required under the Benefits
11 Plans." So, here we have Justice Welsh as part of the
12 majority expressly addressing the Hibernia and Terra
13 Nova Benefits Decisions and expressly stating that the
14 Guidelines are consistent with them.
15 ARBITRATOR JANOW: You have framed this in
16 terms of subordinate measures. Is that stated in
17 these opinions specifically?
18 MR. GALLUS: I do not believe that the courts
19 use the specific word "subordinate." However, we will
20 check that and get back to you on that. However, the
21 important point is that they address these two key
22 elements, the authority and the consistency.

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03:48:20 1 I referred you to the decision of Justice
2 Welsh. I can also refer you--
3 ARBITRATOR SANDS: I mean it's really the
4 next paragraph that's the more pertinent one because
5 the end of Paragraph 105, he just raises a question.
6 The question, then, is whether the Board has authority
7 to refuse a production authorization, blah blah blah,
8 in this case expenditure on research and development.
9 And he then goes on at Para 106. I think it
10 gets closer to the question that I was answering: The
11 Board's authority to issue a production authorization
12 is specifically subject to Section 45, which not only
13 establishes the requirement for Benefits Plan, but
14 also specifies in 45(3)(c) that expenditure shall be
15 made blah blah blah. The Benefits Plans provides the
16 manner in which this requirement is to be satisfied.
17 Accordingly, I do not accept the proposition that the
18 sole purpose of the reference to Section 45 in Section
19 138 is to ensure that a Benefits Plan is in place. If
20 that had been the intention, the reference would have
21 been to Section 45(2), which sets out the requirement
22 for a Benefits Plan to be approved by a Board. The

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03:49:23 1 general reference to Section 45 encompasses all the
2 subsections.
3 Now, I don't want to propose a conclusion to
4 what he's saying there, but it would be very helpful
5 to hear in due course from the Claimant, also, on how
6 far this goes on this issue.
7 MR. GALLUS: I've just referred you to the
8 aspects of Justice Welsh's decision where he expressly
9 state that the Guidelines are consistent with the
10 Hibernia and the Terra Nova Benefits Decisions. There
11 are also aspects of Justice Barry's decision as part
12 of the majority where he also concludes that the
13 Guidelines are consistent with the Hibernia and Terra
14 Nova Decisions. Would it be helpful for the Tribunal
15 if we briefly touched on those paragraphs now?
16 Certainly.
17 All right. Let's go to Paragraph 130 of
18 Justice Barry's decision.
19 Sorry, let's try Paragraph 125. Thanks,
20 Thomas.
21 And the key sentence here is the last
22 sentence in Paragraph 125, where Justice Barry states

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03:50:36 1 that, "I agree with Justice Welsh that the Board in
2 its Decision 86.01, that is the Hibernia Decision, and
3 its Decision 97.02, reserve for itself authority to
4 determine on a continuing basis by its monitoring
5 process whether the companies were making adequate
6 expenditures on research and development.
7 And if we could also refer to Paragraph 135.
8 Thanks, Thomas.
9 Let's start from the sentence: "They
10 approved the Hibernia and Terra Nova Projects." About
11 half-way through.
12 It says: "The Board approved the Hibernia
13 and Terra Nova Projects on the condition that the
14 Board have the authority to continuously monitor
15 research and development expenditures and intervene by
16 issuing Guidelines requiring higher expenditures
17 should the Appellants' level of expenditures fall
18 below that which the Board considered appropriate."
19 And then in the key parts he says, these are
20 the rules of the game when development approvals were
21 issued, and he's referring to Hibernia and Terra Nova,
22 and he concludes that the same rules apply today.

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03:52:13 1 PRESIDENT van HOUTTE: We will have a break.
2 15 minutes.
3 (Brief recess.)
4 THE SECRETARY: Please open the session.
5 MR. GALLUS: I would like to begin by
6 finishing my answer to a question that was posed by
7 Professor Sands earlier. Professor Sands said he was
8 interested in the NAFTA Decisions which have addressed
9 the role of the NAFTA Tribunal when it comes to
10 decisions of domestic courts. I refer the Tribunal to
11 the Decision in Waste Management II as well as the
12 Decision in Azinian. There are two other decisions
13 which have addressed this issue. We won't bring these
14 up on the screen so that we could move on with our
15 opening presentation, but I will refer to the
16 authorities and the paragraph numbers.
17 The first authority is Mondev, which you will
18 find at CA-36, and the paragraph there is 136.
19 The final authority is Thunderbird against
20 Mexico, which you will find at CA-33, and the
21 paragraph there is Paragraph 125.
22 So, before the break, we were addressing the

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04:18:00 1 decision of the Canadian courts, and Canada was
2 explaining what the decisions of the Canada courts
3 effectively found that the Claimants, by challenging
4 the Guidelines, were seeking to avoid their
5 obligation, their obligation to expend on research and
6 development and education and training in the Province
7 of Newfoundland and Labrador. The courts held that
8 the Guidelines were authorized by the Atlantic Accord
9 Implementation Acts, that they were consistent with
10 those Acts as well as the Hibernia and Terra Nova
11 Decisions.
12 Canada also explained that after the
13 Claimants failed before Canadian courts to avoid their
14 obligation to expend on research and development and
15 education and training, they come here to the ICSID to
16 once again seek to avoid this obligation, and they try
17 to avoid this obligation by alleging that the
18 Guidelines breach Articles 1106 and 1105 of the NAFTA.
19 Neither are these claims have merit.
20 With regard to Article 1106, the Claimants
21 allege that the Guidelines are inconsistent with
22 Article 1106(1)(c). I think we could put up

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04:19:10 1 1101(6)(c) as the next slide for you. The Claimants
2 allege that the Guidelines are inconsistent with this
3 Article because they say the Guidelines require the
4 purchase, use, or accordance of a preference for local
5 services.
6 However, Article 1106(1)(c) must be read with
7 Article 1106(5) of the NAFTA, and you will see that on
8 the next slide. Article 1106(5) says that
9 Paragraphs 1 and 3 do not apply to any requirement
10 other than the requirement set out in those
11 paragraphs.
12 NAFTA Tribunals have consistently held that
13 this paragraph must be given effect, and the effect
14 they have given to this part of Article 1106 is that
15 the obligations in Article 1106(1) and Article
16 1106(3), including the obligation in Article
17 1106(1)(c), do not prohibit anything beyond what is
18 prohibited by the terms of those provisions. The fact
19 is that Article 1106(1)(c) does not prohibit what is
20 required by the Guidelines because the terms of
21 Article 1106(1)(c) do not prohibit a requirement to
22 carry out research and development in the country or

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04:20:36 1 to provide education and training in that country.
2 The fact that Article 1106(1)(c) does not
3 include such a prohibition is confirmed by other
4 treaties other than the NAFTA. Later this week, we
5 will refer the Tribunal to several of those treaties,
6 but for the moment we want to refer the Tribunal to
7 one of them, and that is the 1994 Model United States
8 Bilateral Investment Treaty.
9 And you will see the aspects of that Treaty
10 on the next slide. You will see Article 6, which is
11 the prohibition on certain kinds of performance
12 requirements. You will see that Article 6(a) of the
13 1994 Model U.S. Bilateral Investment Treaty mirrors
14 Article 1106(1)(c) of the NAFTA. You will see that it
15 states that neither Party shall mandate or enforce any
16 requirement to achieve a particular level or
17 percentage of local content or to purchase, use, or
18 otherwise give a preference to products or services of
19 domestic origin or from any domestic source.
20 Consequently, Article 6(a) of the 1994 Model
21 U.S. Bilateral Investment Treaty mirrors Article
22 1106(1)(c) of the NAFTA. It prohibits what is

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04:21:55 1 prohibited by that Article. Yet, you will also see on
2 the screen Article 6(f). That's a prohibition you
3 don't see in Article 1106(1) of the NAFTA. That is a
4 prohibition on a requirement to carry out a particular
5 type, level, or percentage of research and development
6 in the Party's territory.
7 The Claimants have failed to explain this
8 morning, and they have failed to explain in their
9 written pleadings up to this point, why it is that the
10 United States would include the prohibition in
11 Article 6(f) if requirements to carry out research and
12 development were prohibited in Article 6(a). And the
13 Claimants have not provided this explanation because
14 there is only one explanation, and that is that the
15 requirement to carry out research and development in
16 the territory of a Party is not prohibited by
17 Article 6(a) of the U.S. bilateral--of the Model U.S.
18 Bilateral Investment Treaty just as it is not
19 prohibited by Article 1106(1)(c) of the NAFTA.
20 So much is also confirmed when we look at
21 what the Guidelines actually require because the
22 Guidelines do not require what is prohibited by

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04:23:12 1 Article 1106(1)(c). Later in the week, we will give
2 you a series of examples of expenditures that can be
3 made by the Claimants which do not involve the
4 consumption of any local services at all. Since
5 Claimants can fulfill their obligations under the
6 Guidelines without consuming local services, without
7 consuming local goods, then the Guidelines cannot
8 possibly involve a requirement to purchase, use or
9 accord a reference to local goods or services.
10 One of the examples I would like to give the
11 Tribunal now is the fact that the Operators can
12 fulfill their obligation under the Guidelines by
13 conducting in-house research and development.
14 Conducting in-house research and development does not
15 necessarily involve the consumption of any local
16 services; and, therefore, it does not necessarily
17 involve the purchase--the use, purchase, or accordance
18 for preference for local goods or services.
19 Similarly, the Operators can fulfill their
20 obligation under the Guidelines by funding
21 scholarships. Again, funding a scholarship does not
22 involve the consumption of the local service.

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04:24:27 1 Consequently, the Claimants can fulfill their
2 obligations under the Guidelines without purchasing,
3 using or according a preference to local services.
4 ARBITRATOR JANOW: Could I ask you a question
5 about that. So, let's say that a Party wanted to fund
6 a scholarship and they had a competitive bid on that
7 scholarship and there were no Canadian recipients.
8 Would that be recognized under the Benefits Plans or
9 the Guidelines as an action consistent with those
10 requirements?
11 MR. GALLUS: So, your question is whether the
12 Operators fund a scholarship and there is no Canadian
13 recipient for the scholarship, does that fulfill the
14 satis--
15 (Comment off microphone.)
16 MR. GALLUS: You are talking about a
17 situation where the Operator would fund the
18 scholarship that was taken up by someone outside of
19 Newfoundland?
20 ARBITRATOR JANOW: Say they're funding a
21 scholarship to the most qualified applicant in certain
22 expertise relevant to their business and they open it

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04:25:46 1 on a competitive bidding--you know, competitive basis,
2 anyone can apply, and the recipients turned out to be
3 individuals outside of the Province, or even outside
4 of Canada, would that be consistent with the
5 requirements?
6 MR. GALLUS: I would like to answer your
7 question in two parts.
8 First of all, and I'm conscious of the number
9 of times that I have deferred to the Board, but you
10 will hear from the Board later on this week, and they
11 will be able to tell you exactly what satisfies the
12 requirements under the Guidelines, and I don't want to
13 speak now and to decide a decision that ultimately has
14 to be decided by the Board. But let me say now that
15 it would be unlikely that a scholarship that is taken
16 up by a resident outside the Province is--satisfies
17 the Guidelines and amounts to a provision of education
18 and training in the Province.
19 PRESIDENT van HOUTTE: Mr. Gallus, to some
20 extent, if I understand correctly, the scholarship has
21 to be located in Newfoundland, whether Memorial
22 University or another institution there.

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04:27:08 1 MR. GALLUS: I don't think that's necessarily
2 a limitation.
3 PRESIDENT van HOUTTE: On the other hand,
4 when you have in-house research teams, you have people
5 imported from wherever, they have to live in
6 Newfoundland to do their research. In other words,
7 they have to live there, they have to rent houses,
8 they have to use services.
9 Couldn't you say that this requirement is
10 absolutely unrelated to any service at all when you
11 know you are obliged to operate with whoever, maybe
12 even students from abroad, but they have to be located
13 in Newfoundland, to have their meals there and so on?
14 It's also services, isn't it?
15 MR. GALLUS: Two parts--let me respond to
16 your question in two parts.
17 First of all with your question with regard
18 to the scholarship, again you should put this question
19 to the Board that could tell you definitively, but
20 it's my understanding that a scholarship to a
21 university outside the Province, as long as it's taken
22 up by residents of the Province, would satisfy the

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04:28:06 1 requirements under the Guidelines. If the Operator
2 funded a scholarship to, for example, Columbia
3 University and if a resident of Newfoundland won that
4 scholarship, that that would be the provision of
5 education and training within the Province because it
6 would be a Provincial resident that received that
7 education; and, consequently, that would satisfy the
8 Guidelines. In that situation, there is no
9 consumption of services in Newfoundland. If there are
10 any services, they have been provided in New York.
11 However, again I encourage you to put the
12 questions to the Board who could answer them
13 definitively.
14 The second part of your question with regard
15 to, I guess, incidental effects, that if you are
16 conducting research and development in-house,
17 necessarily their people there that are going to
18 consume local food and consume local services, there
19 are incidental effects of every local investment
20 whenever a foreign investor comes into a
21 domestic--into another country, there is going to be
22 an incident as a result of the consumption of local

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04:28:59 1 goods or services; for example, the Investor has to
2 comply with local law. Consequently, the Investor has
3 to employ a local law firm to tell us what is local
4 law. Similarly, the firm has to pay local taxes, and
5 it has to employ a local tax accountant to help it pay
6 those taxes.
7 Consequently, there are incidental
8 consumption of goods or services from any foreign
9 investment, but such incidental consumption of goods
10 or services does not amount to a performance
11 requirement in breach of Article 1106(1)(c). If that
12 was the case, then every foreign investor, any
13 requirement of a foreign investor, whether they comply
14 with local law will pay local taxes or set up a local
15 phone line would necessarily involve some consumption
16 of goods or services and, therefore, would breach
17 Article 1106(1)(c) of the NAFTA. That is not what
18 Article 1106(1)(c) proscribes. What Article
19 1106(1)(c) prohibits is where there is a requirement
20 to purchase, use, or accord a preference to local
21 services, and there is no such requirement through the
22 Guidelines.

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04:30:08 1 PRESIDENT van HOUTTE: There is a difference
2 because you could hire a Toronto or New York lawyer to
3 give you an opinion on some legal aspects of your
4 contact in Newfoundland, while here explicitly you
5 have to have your research within the territory of the
6 Province?
7 MR. GALLUS: Similarly, if you're setting up
8 in-house research and development, you could fly in
9 your food from outside of Newfoundland, and you could
10 fly in other services that you want to provide.
11 Perhaps because they're conducting in-house research
12 and development, there will be incidental consumption
13 of goods or services. But just because there is an
14 incidental consumption does not mean there is a
15 requirement to purchase, use or accord a preference
16 for those goods or services.
17 PRESIDENT van HOUTTE: Thank you.
18 MR. GALLUS: Consequently, since the
19 Guidelines do not require what is prohibited by
20 Article 1106(1)(c), and the Guidelines are not
21 inconsistent with that provision and do not breach
22 that provision, but even if the Guidelines are

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04:31:07 1 inconsistent with Article 1106(1)(c), if they do not
2 breach that provision because they reserved and they
3 are reserved under Article 1108.
4 ARBITRATOR JANOW: May I ask you one more
5 question, I'm sorry. It's taking us back, but I think
6 you might be moving on to a new subject, are you?
7 Because I guess--I wanted to just ask one more
8 question about the reservation, and I think you have
9 argued that the Guidelines have been authorized by the
10 Accord Acts and they're consistent with the Act and
11 the Benefits Plans, and so my question about the
12 Guidelines is: How should we think about the limits
13 of what could be in Guidelines that would be
14 consistent with the Accord Act and with the Benefits
15 Plans? How do we think about what the
16 parameters--would any R&D expenditure requirement
17 contained in the Guidelines be viewed, under Canadian
18 law and under NAFTA, as consistent with the Accord
19 Acts and the Benefits Plans in light of the
20 reservation, or is there some parameters to what would
21 be viewed as consistent? How should we think about
22 that question?

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04:32:37 1 MR. GALLUS: There could well be parameters
2 as to what sort of Guidelines are consistent with the
3 previous regime and authorized by the Atlantic Accord
4 Implementation Acts. For example, if the Board,
5 instead of setting a benchmark for expenditures on
6 research and development by companies in Canada
7 decided that companies had to spend 99 percent of
8 their revenues on research and development and
9 education and training in Canada or in the Province,
10 that could very well be beyond what is considered
11 consistent with and authorized by the Atlantic Accord
12 Implementation Acts.
13 However, I don't want to get into
14 definitively or definitively opine on these
15 hypotheticals because the situation we have here is
16 here we have a situation where the Board really
17 required the Operators to spend what everyone else was
18 spending. It merely required them to spend the
19 average expenditures of oil companies in Canada, and
20 therefore, as concluded by the Canadian courts, this
21 is consistent and authorized by the Atlantic Accord
22 Implementation Acts.

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04:33:39 1 PRESIDENT van HOUTTE: Please proceed.
2 MR. GALLUS: If the Guidelines are consistent
3 with Article 1106(1)(c), then they do not breach that
4 Article because they are reserved, and they are
5 reserved, as we've discussed earlier today, because
6 they Guidelines are subordinate to the Atlantic Accord
7 Implementation Acts.
8 Until six weeks ago, the Claimants only
9 raised one argument in response to the submission of
10 Canada, and this is the argument that the Guidelines
11 cannot be reserved under the reservation for
12 subordinate measures because they were adopted after
13 the NAFTA entered into force. According to the
14 Claimants, the reservation for subordinate measures is
15 restricted to those subordinate measures adopted
16 before the NAFTA entered into force. Until six weeks
17 ago, this was the only argument that the Claimants
18 made.
19 Canada will explain later in the week how
20 this argument is inconsistent with the ordinary
21 meaning of the text, how it's inconsistent with the
22 context of the provisions, and how it's also

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04:34:46 1 inconsistent with the object and purpose of the NAFTA.
2 But mindful of my time, this afternoon I just want to
3 refer the Tribunal to one issue on this point, and
4 that is the fact that now all three NAFTA Parties
5 agree that the Claimants' interpretation on this point
6 is incorrect. In fact, Canada pointed out in its
7 submissions that there is no restriction on
8 subordinate measures to those adopted after the NAFTA
9 entered into force, but the United States and Mexico
10 submitted Article 1128 submissions supporting Canada's
11 interpretation on this point.
12 And we have extracts from those Article 1128
13 submissions on the next couple of slides, if we could
14 skip forward. There you go. We have an extract from
15 the submission of Mexico, and you will see that Mexico
16 states clearly in the highlighted passage that
17 subordinate measures that are adopted after the NAFTA
18 entered into force are covered by the reservations in
19 Article the 1108(1)(a)(i) and (ii). The United States
20 mirrored the submission, as you will see in the next
21 slide, where the United States stated that each
22 measure listed on a Party's schedule pursuant to

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04:35:55 1 Article 1108(1) includes any new subordinate
2 measure--that is, subordinate measures that come into
3 effect after entry into force that are adopted by a
4 Party. So, we have all three NAFTA Parties agreeing
5 that subordinate measures are reserved, even if
6 they're adopted after the NAFTA entered into force.
7 Until six weeks ago, that should have been
8 the end of the matter; however, upon receiving the
9 Article 1128 submissions of the United States and
10 Mexico, the Claimants evidently realized that they had
11 a problem. Consequently, in their response to the
12 Article 1128 submissions of the United States and
13 Mexico, the Claimants included two brand new
14 arguments, two arguments that we hadn't seen before.
15 The first is the argument that the reservation for
16 subordinate measures is restricted to those
17 subordinate measures that are expressly authorized in
18 the description of the measure within Annex I, so that
19 the first new argument included by the claimants in
20 their response to the Article 1128 submissions is this
21 reservation for subordinate measures is restricted to
22 those subordinate measures expressly authorized by the

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04:37:17 1 description of the measure listed in Annex I.
2 And the second new argument they included for
3 the first time in their response to the Article 1128
4 submission is that, as a matter of fact, the
5 Guidelines are not subordinate to the Atlantic Accord
6 Implementation Acts.
7 Before addressing these issues, I do want to
8 state briefly that the timing of the Claimants'
9 submissions on these issues does raise issues of due
10 process, that the Claimants included these arguments
11 in their response to the Article 1128 submissions of
12 the United States and Mexico, but neither the United
13 States nor Mexico addressed these specific issues in
14 their submissions. Indeed, neither the United States
15 nor Mexico address anywhere whether the Guidelines are
16 actually subordinate to the Atlantic Accord
17 Implementation Acts. Consequently, the Claimants'
18 response to these submissions were not a response at
19 all.
20 And the second issue with regard to due
21 process is that we only saw this argument for the
22 first time six weeks ago. Canada has not had an

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04:38:26 1 opportunity to address this argument in its written
2 pleadings, and nor has the U.S. nor Mexico had an
3 opportunity to address the issue in their Article 1128
4 submissions.
5 However, regardless of these due-process
6 issues, the arguments could be easily dealt with this
7 way because they have no merit. And let me deal first
8 with their argument that the reservation for
9 subordinate measures is restricted to those measures
10 that are expressly authorized within a description of
11 a listed measure.
12 First of all, this argument has no support in
13 the text of the NAFTA because the text of the NAFTA,
14 and we might be able to bring this up, if we go back
15 to two slides--thanks, Thomas--yeah, you will see in
16 the highlighted portion that says "measure cited in
17 the measures element includes any subordinate measure
18 adopted or maintained under the authority of and
19 consistent with the measures." It doesn't state that
20 the reservation is limited to those subordinate
21 measures expressly identified in the description of
22 the measure.

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04:39:37 1 The Claimants' argument also finds no support
2 in the submissions of the United States and Mexico
3 because, in their submissions, the United States and
4 Mexico confirmed that the reservation for subordinate
5 measures is a reservation for any subordinate measure
6 adopted on the authority of and consistent with the
7 measure. And again, neither the United States nor
8 Mexico recognized this reservation was limited to
9 those subordinate measures expressly authorized in the
10 description of the measure.
11 But the third reason that the limitation
12 imposed by the Claimants is wrong is because it just
13 doesn't make any sense, and it doesn't make any sense
14 because the only reservations in Annex I of the NAFTA
15 that included a description are those measures of the
16 Federal Government. Measures of the Provincial
17 Governments did not include a description. Provincial
18 Government measures that existed at the time the NAFTA
19 entered into force are all reserved in one single
20 reservation that does not include a description of
21 those measures.
22 Under the Claimants' interpretation, this

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04:40:56 1 would mean that no measures subordinate to the
2 existing Provincial or State measures could be
3 reserve. I will say it again: Under the Claimants'
4 interpretation, no measures subordinate to existing
5 Provincial or State measures could be reserved. This
6 would mean that when the Provinces of Canada and the
7 States of the United States agreed to the NAFTA, they
8 agreed to a system under which future subordinate
9 measures of the Federal Government could be reserved,
10 but no future subordinate measures of the Provinces or
11 the States could be reserved. There is simply no way
12 that the Canadian Provinces or the United States would
13 agree to such an interpretation.
14 The interpretation of the Claimants not only
15 has no basis in the NAFTA and not only does not make
16 sense, but it is actually wrong in fact because even
17 if we are just confined to the description of the
18 Atlantic Accord Implementation Acts in Annex I of the
19 NAFTA, then the Guidelines are still reserved under
20 that interpretation because the description of the
21 Atlantic Accord Implementation Acts includes a
22 description of the requirement that Benefits Plans

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04:42:18 1 ensuring benefits on research and development and
2 education and training in the Province.
3 Consequently, the issuance of Guidelines
4 concerning that obligation must also be reserved. It
5 makes no sense that the drafters of the NAFTA would
6 reserve the requirement to expend on research and
7 development and education and training in the Province
8 but not reserve the means to implement that
9 obligation.
10 Consequently, even if we accept the
11 interpretation put forward by the Claimants, the
12 Guidelines are still subordinate to the Atlantic
13 Accord Implementation Acts and may ask to reserve from
14 Article 1106.
15 So, that brings us to the second new argument
16 raised by the Claimants in their response to the
17 Article 1128 submissions of the United States and
18 Mexico, and this is the argument we heard for the
19 first time that the Guidelines are not actually, as a
20 matter of fact, subordinate to the Atlantic Accord
21 Implementation Act. And this argument could be easily
22 dismissed because the Guidelines are subject to the

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04:43:37 1 Atlantic Accord Implementation Acts. As we have
2 explained earlier this afternoon, the Guidelines are
3 authorized, by the Atlantic Accord Implementation
4 Acts, they are consistent with those Acts, and they
5 are consistent with the Hibernia and Terra Nova
6 Decisions.
7 In the Atlantic Accord Implementation Acts to
8 which the Operators were subject from the beginning,
9 they were required to submit Benefits Plans; and, in
10 those Benefits Plans, the Operators made commitments.
11 The Board decided whether those commitments in those
12 plans satisfied the requirements of the Act. For both
13 Hibernia and Terra Nova, the Board decided that those
14 commitments did not satisfy the requirements of the
15 Act, and they required the Operators to come back with
16 Supplemental Benefits Plans which both Hibernia and
17 Terra Nova made additional commitments.
18 It's at that point that the Board decided
19 that the Benefits Plans, including the Supplemental
20 Benefits Plans, satisfied the requirements of
21 Section 45 of the Act; and, consequently, the Board
22 issued its Benefits Plans Decisions approving those

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04:44:40 1 plans.
2 However, at that time the Board still had
3 this authority under Section 151.1(1) to issue
4 Guidelines with regard to the obligation. The Board
5 did not use that authority in the Hibernia Decision,
6 but it did not give away that authority. It was
7 satisfied with the commitment to those principles and
8 the promise that the Board would monitor the
9 satisfaction of these principles to ensure that the
10 Operators' commitments were met.
11 Again, in the Terra Nova Decision, the Board
12 had the authority to issue these Guidelines. It
13 didn't use its authority, but it does not mean it gave
14 away that authority. In the Terra Nova Decision, the
15 Board decided that it would require specific reporting
16 of expenditures on research and development and
17 education and training. It stated expressly that it
18 would monitor those expenditures, and it stated it
19 would do this because, again, it had an obligation to
20 ensure that the Operators' commitment were met.
21 In 2001, when the Operators decided the--the
22 Board decided that the Operators were not fulfilling

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04:45:59 1 their commitments, the Board then turned to the
2 authority under Section 151.1(1) of the Act and issued
3 the Guidelines. These Guidelines applied to the
4 existing Benefits Decisions because those existing
5 Benefits Decisions are subject to the Act. Those
6 existing Benefits Decisions on Hibernia and Terra Nova
7 must ensure expenditures on research and development
8 and education and training. Consequently, when the
9 Board issued these Guidelines clarifying this
10 obligation, that clarification applied to both
11 Hibernia and Terra Nova Benefits Decisions which had
12 to be consistent with this requirement under
13 Section 45.
14 Consequently, the Guidelines are consistent
15 with the previous regime, they are authorized by the
16 Atlantic Accord Implementation Act, they are
17 subordinate to the Atlantic Accord Implementation Act,
18 and they are reserved under Article 1108. Indeed, so
19 much was confirmed by the Canadian courts, as we
20 discussed extensively before.
21 The decisions of the Canadian courts on the
22 authority of the Board and the consistency with the

04:47:04 1 previous regime are decisions for this Tribunal; the
2 decisions on fact, which helped it apply the
3 international law test which is required to apply.
4 Indeed, their decisions on fact resolve the
5 application of the international law test because the
6 courts decided that the Guidelines were authorized by
7 the Atlantic Accord Implementation Act, and they were
8 consistent with the previous regime. Consequently,
9 the courts have decided the very elements that the
10 Tribunal has to apply to determine whether the
11 Guidelines are subordinate.
12 Consequently, even if the Guidelines are
13 inconsistent with Article 1106(1)(c), which they are
14 not, then they are reserved because they fall within
15 the reservation in Article 1108. The Claimants not
16 only address Article 1106, they do not only claim that
17 the Guidelines are inconsistent with Article 1106, but
18 they also argued that the Guidelines are consistent
19 with 1105. There is no dispute between the Parties
20 that the obligation in Article 1105 is an obligation
21 to provide the customary international law minimum
22 standard of treatment. There is also no dispute

04:48:19 1 between the Parties that it is the Claimants that have
2 the burden of proving the content of that customary
3 international law standard. Claimants allege--
4 ARBITRATOR SANDS: I was just looking again
5 for the Vienna Convention on the Law of Treaties. I
6 just have a question in relation to the U.S.
7 submission. This is on the meaning of the words
8 "adopt and maintain."
9 Can we take it from the absence of reference
10 to any arbitral authority that there is no decision of
11 any other NAFTA Arbitral Tribunal on the meaning of
12 the words "adopted or maintained," with regards to the
13 question their prospective effect; and, secondly and
14 separately, the reliance of the United States on a
15 document that they've annexed to their submission,
16 which is a document of the 9th of July 1992 entitled
17 "Conventions To Be Used in the NAFTA Text," what is
18 the status of that document, and what authority does
19 it have? I mean, is it an agreement between the
20 Parties that is contemporaneous to the negotiations?
21 Is it part of the travaux préparatoires? What is it?
22 What authority does it have, and why should we pay any

04:49:55 1 deference to it?
2 MR. GALLUS: On your first question, as far
3 as Canada is aware, there are no NAFTA Decisions which
4 have addressed the prospective nature of the words
5 "adopt or maintain." However, as you have noted,
6 Professor Sands, we do have this Drafting Note that
7 was drafted at the time the NAFTA was being drafted
8 and was drafted at the time the specific provision
9 before us now is being drafted. That Drafting Note
10 does state clearly that "adopt" means "adopting new
11 measure"," adopting measures adopted after the NAFTA
12 entered into force.
13 As to the status of that Drafting Note, it is
14 a note that was circulated between the three NAFTA
15 Parties and it was agreed by the three NAFTA Parties
16 to guide the drafting of the agreement.
17 So, to use your phrase, Professor Sands, it
18 would be in agreement between the Parties that is
19 contemporaneous with the drafting of the agreement and
20 is also part of the travaux préparatoires.
21 I should also point out in regard to this
22 issue that the Drafting Note is reflected in the use

04:51:00 1 of the words "adopted or maintained" throughout the
2 NAFTA. As Canada explained in its proceeding, the
3 phrase "adopt or maintain" or the variations used over
4 a hundred times in the agreement, in every single one
5 of those occasions "adopt" means adopted after the
6 NAFTA entered into force, given over a hundred
7 occasions "adopt" means adopted after the NAFTA
8 entered into force. It can't possibly mean something
9 different in the provision that we were looking at
10 this afternoon.
11 With regard to Article 1105, the Claimants
12 have alleged that Canada has failed to provide the
13 customary international law minimum standard of
14 treatment because Canada had failed to protect the
15 legitimate expectations of the Claimants. First of
16 all, the Claimants have failed to carry their burden
17 of establishing the projection of legitimate
18 expectations is part of the customary international
19 law standard.
20 I want to make three quick points on this.
21 First of all, the Claimants have not relied upon State
22 practice or opinio juris, as was pointed out by

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04:52:03 1 Professor Sands before. Instead, the Claimants have
2 relied on awards. The Claimants referred in their
3 opening to a passage of Canada's pleadings in which
4 they said that Canada agreed that awards can provide
5 proof of customary international law. However, what
6 the Claimants did not recognize with regard to that
7 passage is, as Canada stated in that passage, as
8 Canada reiterates now, that awards can only be helpful
9 if they discuss the customary international law
10 standard of treatment, and the awards to which the
11 Claimants refer the Tribunal do not address that
12 standard. Instead, they address a stand-alone
13 obligation to provide fair and equitable treatment.
14 In the NAFTA Tribunals, which are obliged to
15 provide the customary international law standard of
16 treatment have not once held that the NAFTA Parties
17 are obliged under Article 1105 to protect the
18 legitimate expectations of the Claimants, and this is
19 despite the fact that every single claimant that comes
20 before a NAFTA tribunal argues, just as the Claimants
21 have argued today, that Article 1105 does require the
22 NAFTA Parties to protect such expectations.

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04:53:20 1 Indeed, the most recent NAFTA awards state
2 that there is no evidence that the customary
3 international law standard of treatment requires
4 States to provide any standard above a standard that
5 states--that states, well, above the egregious or
6 shocking standard, that actions of a State will only
7 breach the standard if the actions of that State are
8 egregious or shocking. The failure to fulfill the
9 legitimate expectations comes nowhere near something
10 that is egregious or shocking.
11 However, even if the customary international
12 law standard of treatment does require Canada to
13 protect the legitimate expectations of the claimants,
14 then Canada has fulfilled that standard because it is
15 protected, it fulfilled any expectations that the
16 Claimant should have had. We addressed this point
17 largely earlier when we talked about the Canadian
18 Court Decisions. Canadian Court Decisions held that
19 the Guidelines are consistent with the previous
20 regime, and they held that they are consistent with
21 the Atlantic Accord Implementation Acts and consistent
22 with the Hibernia and Terra Nova Benefits Decisions.

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04:54:27 1 Most Decisions of the Canadian courts are perfectly
2 consistent with that Act and with those Benefits
3 Decisions as I described at the start of my opening.
4 So, if the Guidelines are consistent with the previous
5 regime, then they cannot possibly be consistent with
6 any expectations generated by that regime.
7 The Claimants have not challenged that those
8 tribunals that have found that States have an
9 obligation to protect legitimate expectations have
10 stated that those expectations, in order to be
11 protected, must be based on specific assurances to the
12 Investor. They must be based on specific assurances
13 to the Investor used to induce the investment.
14 Yet, despite the fact that the Claimants have
15 not challenged this fact, they have identified no
16 relevant assurances in this case. They have
17 identified no assurance from the Board that it would
18 not issue the Guidelines, no assurance from the Board
19 that it would not use the authority it had under
20 Section 151.1(1), no assurance from the Board that it
21 would not enforce the obligation of the Claimants to
22 expend on research and development and education and

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04:55:40 1 training in the Province.
2 So, instead of relying on assurances, what
3 have the Claimants relied on? You heard from them
4 this morning, they relied on two things: First of
5 all, they rely on the framework agreement concluded
6 with regard to Hibernia in 1990. This is an agreement
7 between the Operators and the Provincial Government.
8 It is an agreement with regard to the benefits that
9 the Provincial Government expected in return for
10 commitments from the Operators. It expressly stated,
11 as the Claimants acknowledge, that it had nothing to
12 do with the obligations of the Claimants under
13 Section 45 of the Atlantic Accord Implementation Acts.
14 And, indeed, the agreement--well, the Board was not
15 even a party to the agreement; and, therefore, the
16 Board in that agreement did not effect the obligation
17 that it had to enforce the obligation under Article
18 45(3)(c) to expend on research and development and
19 education and training.
20 Consequently, the framework agreement with
21 regard to Hibernia in 1990 is irrelevant to any
22 expectations the Claimants should have had with regard

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04:56:52 1 to Section 45(3)(c) of the Act and their obligation to
2 expend on research and development and education and
3 training.
4 The second thing that the Claimants relied on
5 this morning was the Foreign Investment Review Act,
6 and I can dispose of this in three quick points.
7 First of all, it is hardly worth stating that
8 the Claimants cannot derive legitimate expectations
9 for their investments from an act to which their
10 investments were not even subject. Neither Hibernia
11 not Terra Nova were subject to the Foreign Investment
12 Review Act and, consequently, could not have generated
13 any expectations with regard to Hibernia or Terra
14 Nova. Indeed, the Claimants have failed to provide a
15 single document linking the Foreign Investment Review
16 Act with their expectations with regard to Hibernia
17 and Terra Nova.
18 Indeed, the Claimants only mentioned the
19 Foreign Investment Review Act with regard to the
20 legitimate expectations in their Reply for the first
21 time. They made no mention of it in their Memorial
22 with regard to the legitimate expectations. It's hard

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04:57:59 1 to conceive that the Foreign Investment Review Act was
2 so fundamental to their legitimate expectations with
3 regards to the Hibernia and Terra Nova Projects that
4 when it came to drafting their Memorial they forgot
5 about it.
6 Consequently, even if we accept that Canada
7 is obliged t fulfill their legitimate expectations of
8 the Claimants, then Canada has fulfilled any
9 expectations that they should have had. Consequently,
10 the claimants have failed to prove there is a breach
11 of Article 1105 just as they failed to prove there is
12 any breach of Article 1106.
13 I'm mindful of the time I have used so far,
14 and I will try and wrap up quickly, but before I do
15 wrap up, I do want to say a couple of very quick
16 things with regard to damages.
17 Before I do that, I will point out that we
18 will address damages in more detail during the week
19 and in our closing after we've heard the evidence of
20 the relative Experts. But just to sum up my closing,
21 I would like to address five issues that were raised
22 from the Claimants' opening this morning:

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04:59:11 1 First of all is the Claimants' reliance on
2 authorities concerning future profits or losses of
3 future profits. The Claimants again put forward
4 before you this morning courts from cases that have
5 considered loss of future profits just as they put
6 those quotes before you in their written pleadings.
7 Yet, these case for loss of future profits is entirely
8 differently from the case we have today, because the
9 case we have today, completely unlike any cases to
10 which the Claimants referred you, is a case where all
11 of the damages claimed by the Claimants have not yet
12 been incurred. This is not a situation where damages
13 incurred through an expropriation that occurred in the
14 past. This is not a situation where damages were
15 incurred through a breach of contract that occurred in
16 the past.
17 Consequently, this is not a situation where a
18 tribunal considers an Act in the past and considers
19 what the Fair Market Value of some investment would
20 have been in the past. This is not a situation where
21 a tribunal considers what would someone consider this
22 Fair Market Value to be at this time in the past.

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05:00:17 1 Instead, today we are looking at a situation where the
2 Claimants have not yet incurred their damages. It's a
3 situation where they will not incur their damages in
4 the future until they produce oil in a particular year
5 in the future. The Claimants did not refer you to any
6 cases this morning that have held that a tribunal can
7 award damages that have not yet been incurred, just as
8 they did not refer you to any such authorities during
9 their written pleadings. In contrast, Canada will
10 refer you to these in its closing submissions. Canada
11 has referred the Tribunal to several authorities in
12 which tribunals have categorically stated they cannot
13 Award damages that have not yet been incurred.
14 Second point I want to make is that the claim
15 for damages is entirely speculative. The Claimants,
16 as you'd heard this morning, claiming damages until
17 2023, and the calculation of damages, as you heard
18 this morning, relies on a combination of uncertain
19 elements. It relies on the combination of uncertain
20 oil prices, uncertain oil production, uncertain
21 exchange rates and other uncertain factors.
22 To understand the uncertainty of these

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05:01:29 1 elements and how they combine to make the entire
2 damages claim uncertain, one only needs to compare the
3 damages calculation of the Claimants between the time
4 of their Memorial and the time of their damages update
5 before the hearing. This was a period of just over a
6 year. Yet, in this period of just over a year, the
7 Claimants' calculation of damages fell by [redacted]
8 [redacted]. So, if events in just over a year can
9 change their calculation of damages by [redacted]
10 [redacted], imagine what would happen until 2023.
11 The Claimants allege this morning that the
12 claim for damages is not speculative because they said
13 that just over half or almost half of the damages
14 based on data that we already know. They pointed out,
15 argued that half or just over half of the damages will
16 be incurred before 2010. However, this does not mean
17 that this depends on data that we already know.
18 First of all, as pointed out by Professor
19 Janow, we did not know of the ordinary course of
20 expenditures in 2009 and 2010. Secondly, we do not
21 know the production of oil in 2009 and 2010. Indeed,
22 as you will hear from Canada later this week, the

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05:02:47 1 Claimants' prediction of production in 2009 and 2010
2 is highly suspect.
3 But the third reason that we don't have all
4 the data points to determine damages until 2009 and
5 2010 is because the Claimants haven't spent yet on
6 research and development and education and training.
7 They know their obligation under the guidelines for
8 2004 to 2008 and for 2009, but they haven't spent yet
9 to fulfill that obligation. Until they spend to
10 fulfill that obligation, until they spend on this
11 incremental spending that they're required to spend
12 under the Guidelines, then we do not have information
13 we need to determine what their damages until 2010
14 will be. For example, until they spend this money, we
15 do not know the benefits that they will receive from
16 it. We do not know the tax credits that they will
17 receive from it. Canada, like other countries,
18 provides a tax credit for expenditures on research and
19 development, tax credits of when you combine the
20 Provincial and Federal law is over 30 percent.
21 Until the Claimants spend for their
22 obligation from 2004, we don't know the tax credits

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05:03:56 1 they're going to receive. Yet their own documents,
2 the documents which identify how they propose to
3 fulfill this obligation, their own documents identify
4 that they will receive tax credits. And until we know
5 what those tax credits are, then the claim for damages
6 until 2010 is uncertain, just as the claim for damages
7 beyond that is uncertain.
8 Not only do we not know the tax credits that
9 they're going to receive, we don't know the benefits
10 they're going to receive with regard to their
11 royalties, the Claimants, like many oil companies, are
12 obliged to provide royalties to the Government, yet
13 they receive a credit for these royalties for
14 expenditures on research and development to satisfy
15 certain criteria. With those expenditures in mind, we
16 do not know what that credit will be. Consequently,
17 we have another aspect of the damages until 2010,
18 which is entirely uncertain.
19 Finally, until that money is spent, we don't
20 know what their operational benefits are going to be.
21 We don't know the cost savings they're going to make
22 from this research and development. We don't know the

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05:04:55 1 increases in production that they're going to make
2 from this research and development. Their own
3 documents which identify the expenditures they're
4 going to make to fulfill their shortfall puts specific
5 dollar figures on the benefits that they think they
6 are going to obtain from these expenditures. And
7 until we know what these expenditures are and until we
8 know how much these dollar figures are, the damages
9 until 2010 are uncertain, just as the damages beyond
10 that time until 2023.
11 A third point that I want to make is that the
12 Claimants have failed to properly discount their
13 damages. They argued this morning for a risk-free
14 discount rate. Yet, the Claimants have acknowledged
15 that their calculation of damages involves risk. They
16 have acknowledged that the Claimants' actual damages
17 until 2003 will be different to what they predict they
18 are today. They acknowledge that oil factors will be
19 different, oil production will be different, all these
20 other factors will be different. They acknowledge
21 there is a risk that their calculation of damages
22 today will be different to the actual damages they

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05:06:07 1 suffer until 2036.
2 By claiming their damages now as a lump-sum,
3 the Claimants avoid that risk. Yet, despite the fact
4 that they avoid the risk that their calculation is
5 wrong, they refuse to pay to avoid that risk by using
6 a proper discount rate.
7 The final point I want to make with regard to
8 damages is again with regard to the benefits that the
9 Operators will make from research and development
10 expenditures. As I mentioned before, the Claimants's
11 own documents which identify the spending they intend
12 to undertake to fulfill their obligation under the
13 Guidelines, recognize that they will obtain benefits.
14 They recognize they will obtain tax credits. They
15 recognize through actual dollar amounts the actual
16 operational benefits that they will receive from
17 expending on research and development to fulfill their
18 obligation under the Guidelines. Yet, despite
19 acknowledging themselves that they will receive these
20 benefits, the Claimants have refused to deduct these
21 benefits from their damages. Yet, these benefits from
22 the research and development expenditures they will

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05:07:15 1 undertake can be so significant that they render their
2 damages zero.
3 Thus, even if there has been a breach of the
4 NAFTA through the Guidelines, the Claimants have
5 failed to establish that those Guidelines have
6 actually caused them any damages. However, there is
7 no need for the Tribunal to consider damages because
8 the Claimants have failed to prove a breach of the
9 NAFTA. Indeed, this case is not really about Canada's
10 obligations under the NAFTA. It's about the
11 Claimants' obligations. It's about the Claimants
12 seeking to avoid their obligations, so that with the
13 Claimants are seeking to avoid their obligation to
14 expend on research and development and education and
15 training in the Province of Newfoundland and Labrador,
16 an obligation created by the they are authorized by
17 the Atlantic Accord Implementation Act, perfectly
18 consistent with Hibernia and Terra Nova Benefits
19 Decisions, confirmed by three levels of Canadian
20 courts and merely enforced by the Guidelines which are
21 the subject of this arbitration, and after failing to
22 avoid that obligation before three levels of Canadian

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05:08:21 1 courts, the Claimants come to the ICSID this week and
2 seek to do exactly the same thing.
3 Unless the Tribunal has any further questions
4 for Canada, that concludes our opening.
5 PRESIDENT van HOUTTE: Thank you, Mr. Gallus.
6 Any questions?
7 ARBITRATOR SANDS: Just again for both
8 Parties, would it be possible to have a look at the
9 pleadings of the Parties in relation to the case
10 before the Canadian courts to inform ourselves through
11 side reading on arguments that may or may not have
12 been made in the course of those proceedings? I'd
13 find that quite helpful, if it's readily accessible.
14 It's a huge and complex issue and absolutely no mad
15 rush, but it would be quite useful.
16 (Comment off microphone.)
17 ARBITRATOR SANDS: Well, I don't know if they
18 need to be in the public domain for us to have access
19 to them. It seems both Parties have got them.
20 Mr. Rivkin, do you have access to those
21 pleadings?
22 MR. RIVKIN: We weren't involved in that case

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05:09:35 1 ourselves, so I could check with our client.
2 MR. GALLUS: We will also check if we could
3 get access to those pleadings and hopefully let the
4 Tribunal know tomorrow.
5 PRESIDENT van HOUTTE: We have the choice to
6 hear the first witness or not, but I have understood
7 from the court reporter that he prefers to start
8 tomorrow with the first witness, and probably will
9 also be more than 50 minutes' examination. What do
10 you think?
11 MR. RIVKIN: I think the examination would be
12 more than 50 minutes, and probably makes sense, rather
13 than start a witness at this hour.
14 MR. GALLUS: Canada agrees.
15 PRESIDENT van HOUTTE: I'm very pleased that
16 both Parties agree. Thank you.
17 See you tomorrow at 9:00.
18 MR. RIVKIN: Could we ask Martina just to let
19 the Parties know how much time we have used today,
20 since we are working on a chess clock.
21 THE SECRETARY: Certainly.
22 Claimants have used one hour and 50 minutes,

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05:10:58 1 and the Respondents one hour and 43 minutes. That
2 excludes breaks and Tribunal questions and responses,
3 both sides.
4 MR. RIVKIN: I didn't think our arrangement
5 was that it excluded Tribunal questions since we are
6 in the--tend to balance out. Otherwise, we will never
7 get to the time limits that we've talked about.
8 PRESIDENT van HOUTTE: Yes, indeed. We have
9 to take the Tribunal's questions into account, to some
10 extent, but we will decide--I would say--I suggest
11 that Martina puts them apart in a specific category so
12 we know the pure parties' time and then the time the
13 Tribunal uses to address.
14 THE SECRETARY: Sure, that's no problem to
15 count since we know when the breaks were, and we know
16 the total time.
17 MR. GALLUS: If Canada could make a comment
18 on this, I believe the instructions from the ICSID
19 were fairly clear, that the opening time would exclude
20 time spent asking questions as well as time spent
21 answering questions, and I think it would only be fair
22 that we stay consistent with what the ICSID

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05:12:10 1 represented before.
2 PRESIDENT van HOUTTE: Thank you.
3 See you tomorrow. 9:00.
4 (Whereupon, at 5:11 p.m., the hearing was
5 adjourned until 9:00 a.m. the following day.)
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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.

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DAVID A. KASDAN