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

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HEARING ON THE MERITS

Friday, October 22, 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 8:34 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:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT van HOUTTE: Are we ready?

Good morning, everyone. We will continue with the examination of Mr. Walck.

FREDERICK E. WALCK, RESPONDENT'S WITNESS, RESUMED

PRESIDENT van HOUTTE: And if I'm not mistaken...

(Pause.)

PRESIDENT van HOUTTE: If I'm not mistaken, it's for Claimant now to cross-examine the witness.

MS. LAMB: Thank you.

PRESIDENT van HOUTTE: I just want to confirm that we are in closed session.

MS. LAMB: Thank you, Martina.

THE SECRETARY: Please close the session.

(End of open session. Confidential business information redacted.)

08:34:13 CONFIDENTIAL SESSION

CROSS-EXAMINATION

BY MS. LAMB:

Q. Mr. Walck, good morning. Did I pronounce that okay, Walck?

A. Just like "walk down the street."

Q. Okay. Thank you.

Mr. Walck, as I'm sure you know, your reports and those of Mr. Rosen will only become relevant if the Tribunal decides that the Guidelines violate the NAFTA, yeah?

A. Yes.

Q. So, if the Tribunal decides that they do, the next question is to what extent did they create an additional financial burden to the Claimants, to what extent; do you agree with that?

A. Yes.

Q. In the course of preparing your reports, you presumably gained some degree of familiarity with the history of Hibernia, its performance and so on?

A. I tried to gain the familiarity that I thought was needed, yes.

Q. So, you would know that Hibernia is the fifth largest oilfield in Canada?
A. I do know that it's a large field, yes.
Q. And that it's now one of Canada's most prolific oilfields?
A. I know that it has produced something on the order of 700 million barrels of oil to date.
Q. And it's now into its 12th year of production, or 13th year even; is that right?
A. I think that's correct.
Q. And it's a mature asset with a finite life; that's right, isn't it?
A. Well, it's certainly more mature than the other assets. As to finiteness of its life, I think--was that the right word? I think that's subject to whatever engineering data continues to be developed from the production of the well, whatever new technologies are developed and so forth.
Q. And that the Board currently estimates the reserves at Hibernia at about just under 1.4 billion barrels; is that right?
A. That is the Board's current estimate, yes.

Q. The Government of Canada itself committed very substantial public funds to this project in 1990; is that right?
A. I don't recall the year. I do recall that they committed a substantial amount of money, yes.
Q. And the price of oil had dropped quite considerably at that time to around $20 per barrel?
A. I recall that it had dropped. I don't recall the level.
Q. But you would agree with me, then, that Canada effectively committed billions of dollars of public funds at a time when the price of oil was much lower than it is today, for example?
A. Yes.
Q. And a few years later we know that the Government actually took a stake in Hibernia of around 8.5 percent?
A. I don't know exactly what their stake is.
Q. Mr. Walck, in light of the investment decision that both the Claimants and Canada have made with respect to Hibernia, doesn't your approach to damages advocate a level of risk that these Parties

clearly did not find overwhelming when they committed funds to this project?
A. I'm not sure I understood the question.
Q. The price of oil, when the Government made its investment commitment to Hibernia, was a lot lower than it is today; right?
A. In nominal terms, certainly, yes.
Q. And in your opinion, the outlook for Hibernia is so speculative that you are not comfortable expressing an opinion as to the level of damages in this case; is that about right?
A. No, I don't think so. The mechanics of the calculation of the potential additional spending that might be required in order to comply with the Guidelines is where I find speculation.
Q. And the Guidelines, the formula in the Guidelines, is obviously a mechanism of Canada's own creation, isn't it?
A. The Guidelines are, in fact, the creation of the Board.
Q. In your First Report and subsequent reports, I think you do criticize Mr. Rosen for making

assumptions as to the future, if I can put it that way. Do you stand by those criticisms?
A. I made observations in the First Report about the various variables that he had to make assumptions on and the number of them and the potential variability in them.
Q. Can I just ask you to take a look at Mr. Rosen's First Report, if you have it to hand. If you would like to turn to Paragraph 60, six-zero.
Just in terms of context, so Mr. Rosen has expressed his preliminary view and what he says in Paragraph 60 is, "I expect that I will be able to update the analysis in my subsequent submission as it becomes clearer how the Board will plan to administer the Guidelines," and so on.
So, you appreciate it when you read his report that it was his intention to update as more information from the Board became available; right?
A. Certainly, and with the knowledge that there would be a second round of reports and pleadings.
Q. In your First Report, you, in a sense, speculated as to how the Board would likely treat the

Claimants' R&D expenditures for Guidelines credit purposes.

A. In my First Report, I believe I was careful to disclose the uncertainty regarding the amount of SR&ED credits.

Q. Sorry, so we are not at cross-purposes, I was asking whether in your First Report you made any assumptions as to whether the Board would accept as eligible for Guidelines purposes the R&D that the Claimants had undertaken. If you recall, we didn't have the Board's Decision at that time.

A. As I recall in the First Report, I simply stated, and I may have gotten confused by your prior question and thought you were talking about SR&ED, if you're talking about the Board's treatment of the Proponents' submissions of their R&D and E&T expenditures under the Guidelines, what I knew at the time was the calculation of the required spending and the amount that had been submitted in response to that. And I said if the Board were to accept everything that has been submitted, there would be no shortfall for Hibernia. So I don't know at that point

in time, and I said so in my report, what the amount of shortfall, if any, will be.

Q. And in the event for Hibernia, the Board accepted just [redacted] of the expenditures that were submitted by the Project Proponents; that's right, isn't it?

A. I don't remember the percentage.

Q. As you well know, the Claimants have sought to quantify the cost differential between the R&D they say they likely would have done in the future in the absence of the Guidelines and what they now think they will have to do in light of the formula.

Can I ask you to take a look at Mr. Rosen's Third Report, and to Schedule 2 in particular.

A. All right.

Q. If we look at the future years, so you will see that there are years marked across the top of the axis there, maybe we will just start with 2011. So, if I ask you, in the column that's entitled "Formula," if you go down to Row J, we there have expenditures in the ordinary course. So, these are the numbers that Claimants have informed Mr. Rosen that they would

likely have spent on R&D in future years.

Can you see the line that I'm referring to?

A. Yes, I can.

Q. So, for 2011, it's [redacted] the next year [redacted], the next year [redacted] and so on and so on and so on throughout the life of the project.

And you see underneath that there is also a provision for E&T training in each and every subsequent year throughout the remaining life of the project.

So, I guess my first question is: You do acknowledge that there is already in the model provision for the R&D and E&T expenditures that Claimants say that they would likely have made in the absence of the Guidelines.

A. Yes, I see that.

Q. You cited Professor--not Professor--Mr. Noreng's opinion in your reports. Assuming for a moment that Mr. Noreng is in any position to know what the Claimants might have done in future years, there is effectively already a budget in place for any of the work that he references in his

opinion; correct?

A. There is a number in Mr. Rosen's model, but I don't know that it covers any, as you say, of the work that might be undertaken in the ordinary course. There is a figure in Mr. Rosen's report.

Q. Can I ask you to take up Exhibit C-233, and maybe Greg can help if you don't have it to hand.

I don't know if you--in the--it appears as an exhibit to Claimants' updated damages calculations. Because you haven't gotten the file there as such, you won't see the index which says "Hibernia Research and Development Expenditure Outlook."

So, if I ask you to just turn to the second page there, and if you look down to Row 18--I'm sorry, just looking at the top of the Page 2 there, it says: "Hibernia Research and Development Expenditure Outlook." Line 18 says, "previous," or "preeve"--I'm assuming "previous"--"budgeted projects and studies, and the first example that's give there that the previous budgeted project and study is [redacted] And if we look in the column 2010, we can see a provision of [redacted]

Do you see that?

A. Yes, I do.

Q. And if you go back to Column B, you'll also see " Provision already made for 2010 is And if you go down to the next one: The figure there is

So, I'm assuming that you were able to take a look at this document before you prepared your pre-hearing update; is that right?

A. I don't recall if I saw this one previously or not, prior to the report.

Q. Would you agree with me that this document appears to show that is already budgeted for at the project level for some of the R&D projects that Mr. Douglas referred to in his cross-examination of Mr. Rosen yesterday?

A. There appears to be money in the budget, according to this document, yes.

Q. Thank you.

And you have read the Work Plans. I can assume that, can I?

A. I have reviewed the Work Plans, yes.

Q. It's right, isn't it, that if the Project Proponents cannot spend the shortfall before 2015,

Q. And if and to the extent that Claimants have not spent their full shortfall that will not involve any benefit whatsoever to Claimant, will it? They're not going to get a--I'm sorry, let me be more specific.

the Claimants are not going to get a tax credit for that. They're not going to get royalty credits for that. There is no operational benefit to that. Do you agree?

A. I think that's probably correct. I would, I think, change in the formulation of your question, if the Claimants cannot spend, I would perhaps broaden

that to say if the Claimants do not spend, whether they can or not--if they don't.

Q. I accept the reformulation.

Let's just put it neutrally.

If it gets to 2015 and the Claimants have not spent all of the shortfall, do you accept that that will not involve any benefit for the Claimants?

In the course of preparing your report, I understand you to have spoken directly to CRA about SR&ED credit; is that right?

A. I spoke with an individual from CRA, yes.

Q. And in the course of those interactions, were you told that either the State or Federal Governments intend to change any aspect of the SR&ED tax credit program?

A. I was not.

Q. Can I ask you to pull up your First Report, please.

A. Of course.

Q. The paragraph I have in mind is 34.

And what you say there is, "I would be attempted to add to the list of Rosen's assumptions that he assumes no change in the tax structure regarding tax credits for R&D expenditures through 2036."

Now, in light of what you've just said, it seems to be perfectly fair that Mr. Rosen didn't make any assumptions that the SR&ED regime would change. Do you now agree?

A. Mr. Rosen did not include any credit whatsoever for SR&ED.

Q. No. My question is in relation to the

criticism that you have made that Mr. Rosen did not take account of the possibility that the SR&ED tax credit system might change, you now have spoken to CRA and you know that there is no plan to change that system.

So, what I'm asking you is: Will you now accept that that was an unfair criticism of Mr. Rosen's report?

A. I don't think it is.

If Mr. Rosen had addressed the prospect of SR&ED credits--he laid it out in his report that Claimants would likely receive SR&ED credits and royalty--

Q. Shall we look at the wording of Mr. Rosen's First Report--

A. Sure.

Q. --to make sure we characterize what he says accurately?

A. I think that's fair.

Q. So, first of all, if I just take you back to Paragraph 60, which we looked at already this morning. So what he says--

A. Bear with me one moment. I was in the wrong report. I apologize.

Q. I'm sorry.

So, what he says there is, "I expect that I will be able to update the analysis in my subsequent submission as it becomes clearer how the Board will plan to administer the Guidelines and what tax incentives and royalty treatment the Federal and Provincial Governments will accept under the four approaches."

I don't see the word "likely" in there.

A. I don't see the word "likely" in that paragraph, either.

Q. Okay. Can I ask just as a point of clarification, are you, yourself, qualified to provide SR&ED credit tax credit advice to Canadian entities?

A. I would not hold myself out in that capacity, no.

Q. And presumably that's why you made contact with CRA, to ask them to express an opinion on the likely SR&ED treatment of the Work Plans; is that fair?

A. With the caveat that I asked counsel for Canada to make contact.

Q. Sure.

And the CRA said that it could not make any determination as to the likely SR&ED treatment of the work anticipated in the Work Plan.

A. The CRA, in our discussion, was very cautious about what they could and could not say in writing, knowing it would be used in a proceeding where the Claimants would then have that letter. And to the extent that SR&ED-eligibility determination at some subsequent date might differ, there would be a prior record regarding that that might be something that caused difficulties for one Party or the other.

Q. So, CRA, for whatever reason, was not willing to commit in writing its opinion as to how SR&ED would likely be treated for the Work Plan expenditure.

A. CRA was willing to say what they said in their letter, which was that the expenses that they saw in the Work Plans were of the character that would normally receive SR&ED credit but that they did not have sufficient detail in the Work Plans to be able to

say specifically--or something to that effect.

Q. In fact, they don't give any indication at all of the expenditures that they might accept as SR&ED-eligible.

A. They give an indication that they are of the nature of expenditures that have historically been given SR&ED credit; but until they have the detail that supports it to be able to evaluate it, they cannot express an opinion.

Q. And just referring back to those letters again, what we don't see in those letters is a statement that Claimants can expect to receive broadly the same SR&ED credit treatment that they have received in previous years.

A. I don't believe they've made that statement, yes.

Q. CRA does not say prior years are a good proxy for the future; right?

A. They do not.

Q. And the CRA SR&ED treatment of future expenditures is something that's within CRA's control; right?

1045

08:58:46 A. I think it's within both CRA's and the Claimants' control. The Claimant will submit--will spend money in areas. As I understand their intent, to spend efficiently, they will try to spend in areas that will [redacted] So, they have some control because they control their spending.

And then CRA, of course, will have control to the extent that they have the tax regulations to follow and to implement.

Q. CRA controls the decision whether or not to accept the expenditures as SR&ED-eligible; right?

A. CRA ultimately has to make that determination, yes.

Q. And on a going-forward basis, you look at the Work Plans and you assume that all of the R&D component in the Work Plans will be accepted as SR&ED-eligible; is that right?

A. I have made a calculation that I believe I have provided sufficient caveat around so that it's clear that I am not opining that this amount of SR&ED credit will be received by the Claimants. It's a

1046

09:00:13 hypothetical. What I am trying to do is take an item for which I do have some historical data with which to work and say, "if the R&D component of the Work Plan project receives SR&ED credit in the same rough proportion, this is what the impact would be." The objective of that is to try to give the Tribunal a better sense of how material or immaterial a particular item may be.

Q. And you've expressed an opinion on that that CRA was not willing to endorse, if I could put it that way. That's not a methodology that CRA anticipated in the letters that you'd provided with your report; is that fair?

A. I can't speak for CRA as to what they anticipated. I can only tell you the question that we asked them was not whether past expenditures are a useful proxy for the future. The question we asked them was whether, from their review of the Work Plan project, they could determine a) whether the research and development components would be SR&ED-eligible, which they cannot say, b) whether they were of the general character of projects that have historically

1047

09:01:50 been SR&ED-eligible, which is what they were willing to say.

Q. And just focusing on one slightly different issue, when you look at the Work Plan and you make your assumption about likely SR&ED treatment, you assume that all of the R&D component will be accepted by the Board for Guidelines eligibility; is that right?

A. Again, I would have to reformulate your question because I am not suggesting likely SR&ED eligibility. I'm suggesting potential SR&ED eligibility under an assumption.

Q. Let me be clearer, then, with my question.

A. Thank you.

Q. You arrive at a suggested deduction of about [redacted] for Hibernia on the assumption that the Claimants will receive SR&ED benefit--SR&ED credit, I'm sorry--from the work to be performed under the Work Plan. So far, is that fair?

A. I arrive for Hibernia at a SR&ED credit of approximately [redacted] based on a review of the historical submissions of research and development

1048

09:03:06 activities without the [redacted] which is not research and development as I understand it, and the amount of SR&ED credit that was granted, and then I do some calculations from there based on the 32 percent combined Federal and Provincial SR&ED tax credits to arrive at the [redacted] figure.

Q. Sorry, I'm just reading LiveNote back on your answer there. You referred to the [redacted]. You, yourself, are not, as I've understood it, an engineer or an expert in drilling or any other aspect of petroleum operational matters; is that fair?

A. I am not an engineer, correct.

Q. Can we just talk about this prior CRA experience that you've used in your model. I want to ask you to have a look at Paragraph 79 of your Second Report, please. And if it's fair, can I ask you to have one other document to hand while we do this.

A. Sure.

Q. The exhibit I would like to look at is CE-144.

MS. LAMB: Greg, perhaps you could help with that.

1049

09:05:01 BY MS. LAMB:

Q. So, let's look first at your report, Paragraph 79, and you have the table there by year, "amount submitted to CRA," "amounts accepted by CRA."

[redacted]

A. Yes.

Q. But it doesn't appear in this table.

A. No. As I've indicated in the paragraph above the table.

Q. And if I've understood the exercise that you're completing here, you are looking at actual prior experience with CRA; is that right?

A. I am looking at the actual R&D expenditures submitted to CRA--

Q. [redacted]

1050

09:06:18 A. They were, yes.

[redacted]

1051

09:07:34 [redacted]

A. Yes. From my discussions with Mr. Muir, he indicated to me the way they address submissions of expenditures. Much like an auditor would go out to audit a company's Financial Statements, you use a particular audit scope, you have limited resources, you try to hit large-dollar items, and the sampling of smaller items, and that, when you have small items, [redacted]

A. At this point in time when this report was drafted.

1052

09:09:04 Q. Yes.

A. Right, which is why the footnote was there.

[redacted]

Q. Were you present when Mr. Phelan gave his evidence earlier this week?

A. I did hear Mr. Phelan testify, yes.

Q. And did you hear Mr. Phelan testify that, in HMDC's opinion, [redacted] does involve research and development?

A. I did.

Q. In your Final Report, you do not attribute

1053

09:10:30 1 any financial value to operational benefits as such;
2 is that fair?
3 A. I acknowledge that there will very likely be
4 value. I don't have a way to quantify that value.
5 Q. So, you haven't been able to attribute any
6 financial value to those benefits; is that fair?
7 A. I have not been able to determine how much
8 value to attribute.
9 Q. But yet, at the same time. You appear to
10 express a high degree of certainty that those benefits
11 could, in fact, outweigh the amount of any incremental
12 spending.
13 A. I expressed the opinion that they could. I
14 see, for example, in one of the projects. The
15 potential for an additional [redacted] barrels oil.
16 That's [redacted] revenue, and likely
17 [redacted] of income.
18 Q. Now, if revenue increases by that amount, the
19 Guidelines obligation will similarly increase; right?
20 A. If revenues increase, then you would have
21 another 4/10 was a percent--
22 Q. It-it--

1054

09:11:43 1 A. --going into the Guidelines, yes.
2 Q. I'm sorry to interrupt you.
3 If the Tribunal determines a compensation
4 figure at about this point in time and its later
5 reserves are untapped. The amount of compensation
6 they arrive at today will not cover the additional
7 Guidelines obligations that that revenue will involve;
8 right?
9 A. I think you have two sides to that, Ms. Lamb:
10 First of all, you would have the comparison between
11 the calculation of compensation today and whether that
12 has now been rendered inaccurate by the subsequent
13 development of additional reserves through projects
14 that were awarded as compensation.
15 On the other hand, you would have the
16 potential for future R&D spending requirements under
17 the Guidelines. So, you would have both pieces that
18 you would have to look at.
19 Q. And the work that's in the work program--the
20 projects that are outlined in the work program are
21 experimental in nature; that's right, isn't it?
22 That's what R&D is: It's experimental work.

1055

09:13:02 1 A. Well, I think some of it is. I don't know
2 that it all is.
3 Q. If it's not, the Board will not accept it as
4 eligible, will they? We heard Mr. Way effectively say
5 that yesterday.
6 A. I don't recall him saying exactly that.
7 Q. R&D needs to be experimental for the purposes
8 of the Guidelines; right?
9 A. I think you would have to ask the Board that
10 or go back to the testimony. I don't have to add to
11 their knowledge of that.
12 Q. Um-hmm. Can you open your Second Report,
13 please, at Paragraph 121.
14 And you've told us you were here when
15 Mr. Ringvee gave his testimony, and were you here also
16 when--I'm sorry, when Mr. Phelan gave his testimony.
17 Were you here also when Mr. Ringvee gave his
18 testimony?
19 A. Yes, I was.
20 Q. Now, at Paragraph 121, you've referred to the
21 [redacted], and you
22 referred to the [redacted] saving,

1056

09:14:30 1 potential saving.
2 And then, in the final sentence, you say,
3 with [redacted] on the Hibernia Platform alone, the
4 potential savings could be very significant and could
5 completely offset the impact of the incremental
6 spending.
7 So, what we know from Mr. Phelan is that
8 there are [redacted] on the Hibernia Platform;
9 right?
10 A. Well, [redacted] I think
11 Mr.--I forget whether it was Mr. Phelan--I think it
12 was Mr. Ringvee's testimony was that the application
13 they were looking at currently, and I have seen this
14 in one of the documents prepared since this report was
15 prepared, contemplates it was [redacted]
[redacted] and I think his
17 testimony was that if they achieved the [redacted]
[redacted] they could save as much as
19 [redacted] and my recollection is that that was, in
20 fact, more than the cost of the project.
21 Q. Now, I just want to come back to your report
22 because what you've done is that you have taken the [redacted]

1057

09:15:53 1 [redacted] on the Hibernia Platform, and it seems to
2 me that having referred to [redacted]
3 you were assuming [redacted]
4 So, the question I'm asking is. Were you
5 here when Mr. Phelan confirmed that [redacted]
[redacted]
7 A. Yes.
8 Q. Yeah. And you will have heard Mr. Phelan,
9 then, also describe the overall economics of that
10 project, and what he says was that the overall cost of
11 the project could be [redacted]
[redacted]
13 Now, just doing the basic math there, it
14 seems to me that the potential savings is [redacted]
15 That is not, in fact, sufficient to offset future
16 incremental spending, is it?
17 A. I don't think that's what I was saying.
18 I think what Mr. Ringvee said and, and I
19 believe it was Mr. Ringvee and not Mr. Phelan. I
20 think you said Mr. Phelan in your question.
21 Q. It was Mr. Phelan.
22 A. Was it? I stand corrected, then. My

1058

09:17:22 1 apologies.
2 As a cost, an estimated cost, of [redacted]
3 that is being included in incremental spending, if the
4 project returned benefits of [redacted] those
5 benefits, those savings, could completely offset that
6 [redacted] incremental spending.
7 Q. If they are able to--if the project succeeds,
8 and?
9 A. Yes.
10 Q. And if they are able to apply that technology
11 to anything?
12 A. Yes, absolutely.
13 Q. Thank you.
14 And to be clear, you would have heard
15 Mr. Phelan confirm and Mr. Ringvee--and Mr. Ringvee,
16 probably, that [redacted]
[redacted]
[redacted] Were you here for that?
19 A. I don't recall exactly what was said in that
20 regard.
21 Q. Can I ask you whether it's fair to say that
22 there is a requirement of your professional accounting

1059

09:18:43 1 conduct rules, ethical rules--I'm not sure quite what
2 the correct formulation is there--that you need to
3 have sufficient relevant evidentiary support to arrive
4 at an opinion of damages; is that a fair statement?
5 A. The rule to which you refer, which is Rule
6 202 of the AICPA Code of Professional Conduct requires
7 that an accountant obtain sufficient relevant data for
8 support of an opinion. It's not an opinion of
9 damages. It's written principally in an audit
10 context, but is broadly applied toward all conduct of
11 accountants.
12 Q. Now, yesterday, in response to a question
13 from Mr. Douglas, you said that--and I don't want put
14 words in your mouth here, so tell me if this is not
15 the correct formulation--you said that you didn't want
16 to express an opinion on damages, and I think your
17 words were that your client dragged it out of you,
18 kicking and screaming. Do you remember that?
19 A. I do.
20 Q. You don't actually qualify your opinion of
21 damages in that way in your report, do you? You don't
22 make reference to the fact that your client prevailed

1060

09:20:19 1 on you to perform this opinion of damages?
2 A. I do not use the words "kicking and
3 screaming" in the report, no.
4 Q. Thank you.
5 MS. LAMB: No further questions.
6 ARBITRATOR JANOW: Canada, do you have a
7 follow-up?
8 MR. DOUGLAS: Yes, I do. If I might have a
9 couple of moments, please.
10 (Pause.)
11 REDIRECT EXAMINATION
12 BY MR. DOUGLAS:
13 Q. I just have a couple of quick questions.
14 Ms. Lamb asked you questions about SR&ED
15 eligibility and questioned in terms of--and please
16 correct me if I'm not getting this right--in terms of
17 determining what a rate of acceptance in the past for
18 SR&ED eligibility and applying that to the future, she
19 criticized you [redacted]
[redacted] is that correct?
21 A. Yes, she had a few questions on that regard.
22 Q. Okay. I'm just going to refer to Claimants'

Memorial--it's Paragraph 218, but it goes on for some bullets, and it's actually Page 114. And this is--I know you may not have this in front of you, Mr. Walck, but you could read on the screen in front of you.

The Claimants are discussing their ordinary course figures going-forward in this paragraph; is that your understanding?

A. Could I see the prior page and just get some context.

Q. Absolutely.

The bullet heading is "R&D Expenditures in the Course of Business."

A. Okay.

Q. And then, the next page, Thomas.

[redacted]

Do you see that?

A. Yes.

Q. Okay. So, on the one hand, the Claimant's criticizing you for not referring--

MS. LAMB: I'm not sure you are actually asking him questions in relation to what I asked him questions about. You are asking him about what my Memorial says? It's not really a question.

MR. DOUGLAS: Okay. I can ask a question.

BY MR. DOUGLAS:

Q. Do the Claimants deduct the [redacted] in other contexts in their damages assessment?

A. Yes.

Q. In what context do they do that?

A. That's in the context of reaching the normal course, the normalized average of ordinary course expenditures.

MR. DOUGLAS: I think I have no further questions.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR JANOW: I have one or two, if you have the patience.

THE WITNESS: Certainly.

ARBITRATOR JANOW: I'm wondering if you had a

chance to look at that reconciliation table that Mr. Rosen prepared yesterday that characterized your own divergence with his numbers.

Did you have a chance to look at that? Because it's a kind of exercise that, of course, the Tribunal needs to do to understand alternative approaches. If you have any corrections, if you could share shows, that would be helpful.

THE WITNESS: I apologize, but I haven't had time to spend on that.

ARBITRATOR JANOW: Okay.

THE WITNESS: It would take more than an overnight.

ARBITRATOR JANOW: Okay. Thank you.

But no, I have another little question.

If this Tribunal gets to the point of focusing on damages, I think that you have proposed, and I think we had some questions along this line that there would need to be some additional quantification of benefits to accurately reflect the situation, but I don't think that you proposed upper or lower bounds on how to think about those certain kinds of benefits,

operational, royalty, and other benefits.

So, I'm just wondering what is the Tribunal to do if one is to take your point but not have some bounds. How would you speak to the methodological impact of that observation for trying to work out a formula or some numbers?

THE WITNESS: Professor, you have put your finger squarely on the biggest challenge that I face in trying to serve this Tribunal because at this point I have not been able to reach a conclusion as to how that might be done. If we can think conceptually now about the kinds of things we might look at, we have some history on the SR&ED credit, for example, just like we have history on what normal course expenditures are.

So, we can try to apply that, admittedly knowing that the true result will vary, just like the true result for what the revenues are, what the required spending is, what the ordinary course spending is will vary, but we at least have some documentary basis to use in coming up with a method of formulation.

09:28:37 For the royalty credit, we know the royalty amounts, [redacted]--but we need a method to determine how much of the incremental spending in the Work Plans would be likely to be royalty deductible. [redacted] I don't have any prior data to go back to and try to analyze and try to reach that conclusion myself, so it's not something where I can reach a conclusion. I would be violating Rule 202 that we just talked about a few minutes ago.

For the operational benefits, we have some indication in some of the Work Plans, but we still have uncertainty about whether those Work Plans are actually the ones that are implemented, whether they

09:30:12 succeed, and the degree to which those benefits are achieved, or exceeded, or not achieved.

So, there is a considerable degree of uncertainty as a professional accountant in how to evaluate that. Operational people may be better equipped to help you there. Certainly, you have had the benefit of reading--I don't know if "benefits" is the right word--maybe the drudgery of reading copious amount was information here, and you may have your own thoughts on that.

I'm not positioned here today, though, where I can express an opinion on how to do that.

ARBITRATOR JANOW: Thank you. Thank you.

THE WITNESS: And I apologize for that. I wish I could.

PRESIDENT van HOUTTE: Mr. Walck, yesterday we heard that you were very reluctant in even to putting the numbers because you said that you would have preferred to say that no numbers were possible, but when we examined Mr. Rosen at the end of his examination, I asked the question, what should this Tribunal do whenever we would reach the stage--I'm not

09:31:27 saying we have reached that stage and we are reaching that stage, but whenever the Tribunal thinks it would be proper to determine numbers, each of the Experts has his own--has developed its own argument, criticized the other, but what should the Tribunal then do when the Tribunal finds somewhere in the middle there could be a solution? I'm not saying that's the case.

Now, I asked the question to both counsel, and Mr. Rivkin said it would be possible. I would like to hear from the counsel in a formal or informal way how they would try to solve this problem.

I have no further questions.

THE WITNESS: Was that a question?

PRESIDENT van HOUTTE: No, it was not a question. It was just a comment which repeats my comment of yesterday, but before the end of the day, the Tribunal would like to get the input of both counsel on that issue. In a formal or informal way.

Shall we now have a break?

MR. RIVKIN: Yes.

PRESIDENT van HOUTTE: Then, Mr. Walck, you

09:32:56 are released, and then a short break, and then we will have the closing statements of 90 minutes each.

(Witness steps down.)

PRESIDENT van HOUTTE: 15 minutes is fine, thank you.

(Brief recess.)

MR. RIVKIN: 90 minutes.

PRESIDENT van HOUTTE: Mr. Rivkin, you have the floor.

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

MR. RIVKIN: Thank you very much.

THE SECRETARY: Mr. Rivkin, may we open the session?

MR. RIVKIN: Yes, we may open the session.

THE SECRETARY: Please open the session.

(End of confidential session.)

09:51:38 OPEN SESSION

MR. RIVKIN: Mr. President, Members of the Tribunal, first let me thank you for the attention that you've given to this case throughout. It's clear--it was clear when you arrived on Tuesday how closely you had analyzed and reviewed the record before you, the arguments of the Parties. The opening arguments, I think, were very helpful to both sides, and it was good to hear from you, and we hope that this closing will be helpful to you as well. And again we look forward to your questions.

I think the hearing has also been very helpful to you, certainly to us. We believe that the hearing has reinforced what we had to tell you in the opening, that our story has been consistently demonstrated through the evidence in this case in the various submissions.

And here we also think that this hearing has contradicted much of what Canada had to say in the opening and shown, really, what its story is based on.

It is--Canada's story is a classic after-the-fact justification for a measure which it is

09:52:57 aware violates the NAFTA. The story has been built on straw with no contemporaneous documentary evidence and with, as a result, inconsistencies in their story with those documents that do exist and changes in their positions throughout. That's what happens when you try to come up with the justification later on.

The hearing, we believe, has shown that what the Guidelines are is really nothing but a cash grab by the Provincial Board for more money from Operators no matter what the arrangements were with those Operators into which the Board and the Province and the Federal Government had willingly agreed when the project began. And the money grab was perhaps best demonstrated by Mr. Way's remark yesterday where he said, "It was a question of money," and by the memo in which the Board discussed the Guidelines in December 2003, Claimants' Exhibit 134, where it considered how much money it could receive from the Hibernia and Terra Nova Projects if it applied the Guidelines retroactively.

I want to also, in opening, make a point in referring to the way Canada began its case. Perhaps

09:54:18 for political reasons or otherwise, Canada began its case on Tuesday by saying that Claimants were trying to avoid our obligations. We think the hearing, the testimony, the documents in the record, Mr. Rosen's reports, make clear that we're doing nothing of the sort. We are spending and--and are not seeking compensation for our ordinary course of spending in the Hibernia and Terra Nova Projects of [redacted] over the next--well, from 2004 to 2023, over those 20 years. That is a lot of money on research and development for a project that is in its late phase, such as Hibernia, and where operations are going smoothly, where they already have iceberg protection--you remember all the testimony about, well, wouldn't this help you, you know, a lot with icebergs? Well, they haven't had an iceberg problem at Hibernia throughout this time.

So, we have spent, and this ordinary course spending, of course, is from 2004 on. It doesn't include the more than [redacted] that were spent in Hibernia on R&D prior to 2008.

So, when you hear Canada talk about projects

09:55:43 not being included or trying to pretend that Claimants were taking the position that it was a contrast between spending nothing and spending what the Guidelines require, that's not the issue before you. Claimants are meeting their obligations to spend money on research and development just as they have since the very beginning of the project, more than [redacted] worth, and more than--and [redacted] worth during the Guidelines phase of the project. And what we are seeking in damages is our share of that additional [redacted].

And along that line, one comment made yesterday cannot go unanswered, when Claimants' (sic) counsel referred to [redacted] We account for that money as ordinary course spending. That money was--that document was submitted to the Board not as incremental spending, but as part of the [redacted] of E&T that is spent every year and which you can see in Mr. Rosen's reports, for which no credit is being sought.

09:57:04 It was submitted to the Board because now they require that all those expenditures be pre-approved in order to get Guidelines credit. That's why it was submitted, not because it's incremental spending, not because Hibernia was seeking to get Canada to pay for [redacted] and it was an outrageous comment, and it can't go unanswered.

So, let me go back and talk about the--go back in history and then take you chronologically through what the hearing showed. First, the beginning. Let's look at the goals and statutory framework that existed at the time.

You heard a lot from Canada's counsel about the Atlantic Accord as opposed to the Atlantic--the Accord Acts, the Federal and the Provincial acts. And you heard about that because they love to rely upon the second sentence of Section 55 of the Atlantic Accord which says that expenditures made by companies active in the offshore shall be approved by the Board.

Now, and they say this is an important piece of the expectations that the Parties had at the time, that we should have known that the kind of

09:58:08 pre-approval that was later imposed on the project almost 20 years later would happen.

Well, how important was it to Canada and the Province? It was of so little importance that when they adopted the Accord Implementation Acts, they didn't include that measure. They did include, of course, the requirement that the Benefits Plans shall contain provisions to ensure that expenditures shall be made, but they didn't include this provision. It had no effect after the Accord Acts were put in place. It can't be said to impact the expectations. But Canada is so grasping for straws that it goes back to this sentence which they did--which Canada itself didn't feel was important enough to include in the Accord Implementation Acts.

Also part of that, unquestioned statutory framework at the time the investments were made was the fact that the Board--yes?

ARBITRATOR SANDS: Before you get on that, is it your submission, then, the Atlantic Accord is irrelevant to this case?

MR. RIVKIN: I believe it is, because Canada

09:59:22 superseded it through the passage of the Implementation Acts. They decided what was important from the Accord to implement. That's why those acts are called the Accord Implementation Acts.

ARBITRATOR SANDS: So is it your submission that we, as a tribunal, should not have regard to the Atlantic Accord in interpreting the Implementation Acts?

MR. RIVKIN: Where it's consistent, but where it's inconsistent--

ARBITRATOR SANDS: That wasn't my question.

MR. RIVKIN: Well, yes, it is.

ARBITRATOR SANDS: That's--no, no.

My question is: In interpreting the Implementation Acts, is it permissible to have regard to the terms of the Atlantic Accord? It's not a question of should we look at it, but are we allowed to look at it?

MR. RIVKIN: If there is a question about what a measure of the Atlantic--of the Accord Implementation Act might mean, then perhaps you could see a reason to go back to the Accord. When you're

10:00:08 talking about this provision on which they have put--Canada has put so much--

ARBITRATOR SANDS: We will come to that. I'm just dealing with a general issue of principle, as you will have gleaned from our questions. What is the proper approach to the interpretation of the measure that has been reserved?

MR. RIVKIN: It's--that's really--Canada has presented no basis for you to put any weight on the terms of the Atlantic Accord, particularly because Canada passed--Canada and its Province passed the Implementation Act. If they--

ARBITRATOR SANDS: That may well be, but I'm asking a purely legal question, not a question as to either Party has argued. As a purely legal matter, in interpreting the meaning of the measure that has been reserved by Canada, is it proper to have regard to the Atlantic Accord in interpreting the Accord Acts?

MR. RIVKIN: I think I have answered that. I don't believe--I don't believe that you need--I don't believe that it can be of any use to you, except perhaps if there is some provision which may be--may

10:01:16 be used--the probably provision of the Atlantic Accord to which Canada has pointed you is the second sentence of Section 55, and clearly you cannot put any weight on that when Canada chose not to put it into the Implementation Act.

ARBITRATOR SANDS: I hear you. That may well be. All I want to know--you've answered my question--is can we look at it.

MR. RIVKIN: The--so, then, let's also look at another important part of the statutory framework at the time, and that is the fact that the Parties agree that the--neither the Accord Acts nor the Benefits Plans prescribed any levels of expenditure for research and development. None. Decision 97.02 made that explicit statement about the Accord Acts, and it's clear from the text of the decisions adopting the Benefits Plans. Mr. Fitzgerald also agreed with that in his testimony, where he made that very clear on Page 489 and 490.

It was also clear and uncontested that at the time the two investments began, there were no pre-approvals. There was no requirement for a

10:02:40 financial instrument.

And of equal importance--and again this comes from Canada's own witnesses, as much from the documents--it made clear that the requirement to spend on research and development was covered by the overriding principle of first consideration for services. The Board itself made that clear just two years after the Hibernia Plan was adopted, just a year after the Federal Accord Act was adopted. In its presentation to suppliers, in a document on which Mr. Gallus liked to rely during his opening, the Board itself said that the provision requiring expenditures that the Accord Act provisions should not be misinterpreted as presiding preference for suppliers of noncompetitive goods or services.

And Mr. Fitzgerald readily agreed with that. He said, I don't think there is any question about that, on Page 514 of the transcript.

On Page 508, he made similar comments.

I'm going to go a bit quickly through some of the quotes in order to save some time, but they're there, and there are more in the transcript that

10:04:03 obviously support our positions than what we've said. But again, Mr. Fitzgerald made several comments along that line.

Actually, if you could go back to 508 a minute, Sam, that would be very helpful. His answer there is quite useful. When I asked him about 45(3)(c) and 45(3)(d), the former Chairman of the Board, who was responsible for the implementation of the Acts at the time said, "I think the whole thing reads together. The whole section reads together. What you say is, I think, what you agree with."

And what I said was that under the Accord Acts, the expenditures to be made were guided by the first consideration principle, including R&D services under 45(3)(c).

Canada has attempted to rely on other expectations regarding the Benefits Plan. Again, they pointed to the environmental impact studies that took place prior to the Benefits Plan. But as Mr. Fitzgerald admitted, the Board had that information in hand when it adopted the decision adopting the Benefits Plan.

10:05:10 So, again, that decision, to the extent it incorporates particular information or concerns from the environmental impact study, that's fine. It's there in the decision. To the extent the Board chose not to incorporate any comments or requirements from that plan, then, of course, it's not part of the decision that impacted these Parties' relationship.

Canada has loved to talk about sustainable development. Interestingly, again no reference to sustainable development at the time on research and development, no contemporaneous documents supporting this enormous theme of theirs, which they've presented since their first statement. All they have are unsupported statements by their witnesses.

And again, if you look at the Board's own statement from 1988 to its suppliers, in Section 2.2, it said, "here are the five commitments with the most significance to Canadian suppliers," and it did not mention research and development. It did mention technology transfer, but, of course, technology transfer takes place in many contexts outside of research and development. Technology is often known

10:06:30 technology, not research and development technology.
Again, if sustainable development was so important, wouldn't it have been in here? There is a sentence that Mr. Gallus pointed to in this document that refers to the commitment in the Hibernia Plan to spend money on research and development by the Hibernia owners. What's interesting is that statement does not say this is a really important goal of the Province because we want to make sure there is a legacy. We want to make sure there is sustainable development. None of that. If this was as important as their witnesses and Canada have pretended, wouldn't that have been in this document just from two years after the Plan in 1988? It's not there.
You also know that sustainable development was not truly a goal of theirs in 1986 because Canada did not require any--and the Board did not require any specific monitoring of research and development expenses until 1998. There was general monitoring. As Mr. Fitzgerald said, "They kind of knew what we were doing, they were out there in the community." We don't contest that. But if sustainable development

10:07:43 was so important to them, why did they not ask for specific information on research and development expenditures at the time? They did not. They didn't do so until 1998 in the Terra Nova Project.
And just to clear up, just to make sure there is no question about one other document on which they might try to rely, the 1986 Exploration Guidelines which did have a reference to the fact that the Board might issue some Guidelines on expenditures, again not at the Development Phase, not at the Operations Phase, but at the Exploration Phase. But even then, while there was some reference to it in 1986, Canada may try to rely on it again in some way, so we prepared this timeline to make it clear how little--how no such reliance can be placed. That document was issued in 1986 as a draft, as Mr. Fitzgerald said. In 1987 they considered it more, and they put out another version of the exploration plans--exploration Benefits Plan Guidelines. They contained no such reference.
In 1988, they came out with another one. It contained no such reference. And then they made no statements about Guidelines in any document until--and

10:09:04 in 1997, they still did not. When they approved the Terra Nova Project, which was their second major project, again no reference to Guidelines, no R&D expenditure threshold, no suggestion the Guidelines could be imposed in the future in the Terra Nova Decision, just a request that they provide information about specific R&D expenditures.
It wasn't until 2001, 15 years after that reference in 1986, that the Board indicated the Guidelines in a target expenditure might be appropriate for the White Rose Project and not for the others. So the expectations of the Parties with respect to all of these issues are quite clear.
Then let's turn to what the nature of the Benefits Plans were and their legal regime. You will remember that the Tribunal asked Canada's counsel many times on Tuesday, what is Canada's view about its own statutory framework with the Benefits Plans? How do those Benefits Plans and the decisions work together? And you remember Canada didn't state what its position was on its own law--really rather shocking for a nation in a case like this.

10:10:17 And the Tribunal must have been suspicious why that wasn't so. Well, we learned, once we heard from their Board witnesses, why it was so. Canada must have known that the real nature of the Benefits Plans and the Decisions adopting them was fatal to its case. When Canada did refer that question to its Board member, their answers confirmed the obvious. The testimony confirmed that the Benefits Plan and the decision adopting them were in agreement between the Board and the Proponents. They--and I'll refer you to Mr. Fitzgerald's testimony from Parge 488 through 496--too many pages to put up on slides. But he went through the process. He carefully described it as the Proponent setting out its proposal for benefits, including R&D, that there was some discussion and negotiation, in his words. In the case of Terra Nova, he pointed out there was even discussion and negotiation prior to the submission of the plan. Based on the Board's comments, the Proponent came back in Hibernia's place with a supplemental plan that responded to those. The Board then accepted the offer from the Proponents, imposed certain conditions which,

10:11:38 of course, the Proponents had the right to accept or reject. They chose to accept those conditions. That is classic offer and acceptance, classic formation of a contract, and that's exactly what Mr. Fitzgerald understood.

Now, I don't have to prove to you that it is a contract in the true legal sense. We are not suing for breach of contract here. But we are--the case law makes clear how important it is when a contractual or a quasi-contractual agreement has been reached between the Investor and the State, and that is clearly what happened here, and we'll come back to that when we talk about 1105. But the--what actually occurred for both Hibernia and Terra Nova Projects could not be clearer.

It's also clear that when the Board accepted the Plan, when it formed this agreement that it had--that it considered the requirements of the statutes, it considered the requirements of the environmental impact study, it had the discretion to make whatever determination or impose conditions it felt were necessary. The testimony of the Board

10:12:48 members, both here and in their written statements, make that clear.

The testimony this week also made clear that the deal was endorsed by the Federal and Provincial Governments. They told the Board to go ahead and accept it.

It's not surprising that in light of all of that, Mr. Fitzgerald testified in writing before coming here that it would be difficult to change that arrangement, once it was put in place. And Mr. Fitzgerald agreed with me in his questioning that, you know, once approved, the Board could not amend the Benefits Plan unilaterally. He said, no, the Board never amends the Benefits Plan. It can't. It cannot. But what did the Guidelines do except amend the Benefits Plans unilaterally.

Just to clear up one other mistake in fact, Mr. Gallus said in his opening that the Terra Nova Benefits Plan was not--was rejected. Well, of course it was not rejected. It was accepted with some conditions that did not impose any greater requirement of monitoring really than had occurred in Hibernia,

10:14:01 and it accepted the Terra Nova Proponent statements that they were not--that they did not need to undertake much R&D because of the nature of that project.

It's no wonder when you look at all of this evidence that Canada wanted to avoid the subject what you tried to question them about it on Tuesday.

It's also clear that the Benefits Plan formed the legal framework against which Canada's conduct is judged. Canada has tried to tell you that there is a separate obligation by the Proponents after the Benefits Plans are agreed under Accord Acts 45(3)(c). That is not true. And their testimony and their documents show that. Their testimony--and we show you just some of the statements, both in writing from Mr. Way, in testimony from Mr. Fitzgerald, and in CE-199, again the document the Board prepared describing the Benefits Plan.

The monitoring that took place, the oversight, the regulatory oversight that took place, by the Board of the Proponents and the projects were to make sure that the Proponents, the owners were

10:15:16 complying with their Benefits Plans. That is the structure. That is the legal structure in place. That was the purpose of monitoring. Not against some overarching obligations, certainly not against the Atlantic Accord, Professor Sands.

And what do the Benefits Plans and the Decisions require? We went through this in the opening and the testimony reconfirmed it, so I'll deal very quickly. Both in the Hibernia Benefits Plan and the Terra Nova Benefits Plan, those Proponents made clear that they were going to conduct local research and development dealing with technical problems relating to their projects, problems unique to the offshore environment, problems like iceberg management and detection. In the Terra Nova--and again, problems unique to the offshore environment. No mention of R&D specifically in their--in the supplemental plan.

The Terra Nova Project Proponent said that their project would be met with existing projects and needs, and that was--that was all confirmed. It was confirmed--go to Slide 25, if you could. That was confirmed again in the testimony this week that the

10:16:46 Board did not impose a particular spending threshold on research and development in the Benefits Plan. Again, that's what the Board said in Decision 97.02. That's what Mr. Fitzgerald confirmed, the former chairman. No pre-approval, no financial instrument, no set threshold.

And again, as I pointed out earlier, but the research and development was to be conducted on a competitive basis. If they could not--if Newfoundland was not the best place for reasons of cost, for reasons of experience, it would not--the Proponents were not under any obligation to spend useless money on research and development.

What they said was in the Plan, they would conduct research and development; and as I said, they did. They met that obligation. They spent more than $200 million on R&D before 2008. That is certainly compliance.

And when the Board had the opportunity to ask for more clarifications, both in 1986 and in 1997 with respect to the two projects, the clarifications they asked for in the Benefits Plans did not involve R&D.

10:17:58 Mr. Fitzgerald confirmed that. The text of the conditions imposed did not make--also make that clear.

And Mr. Fitzgerald confirmed that the conditions imposed by the Board reflected their current expectations at the time of approval. He confirmed that was true. And, of course, the Board had previously said that in its 1990 Decision accepting the amended Development Plan from Hibernia, where the Board made clear that the Benefits Plan was the best way of looking at the Proponent's expectations of what it was required to do.

The testimony confirmed that there was no--that targets would never--were never stated, they were never imposed at that time, and there was never any mention of targets. What I'm showing you here in Slide 28 are two statements from Mr. Fitzgerald's Witness Statement, where he said, oh, well, you know, our general statements about asking for information, monitoring, you know, that showed that we were reserving judgment as to the possibility of setting expenditure targets. You remember him saying that in his Witness Statements in Paragraphs 54 and 72.

10:19:25 Well, when you compare what he said the Board was thinking at the time to what the Board actually said in Decisions 86.01 and 97.02, they are completely different. There is no mention of the possibility of an expenditure target. There is no statement that they are reserving judgment. And when I asked Mr. Fitzgerald about that, he agreed. He said yes. What--he agreed with me that what was stated there as to the Board's approach is not stated in the Board's Decision. No, I'm telling you, you know, some of the--illuminating some of the discussion that took place internally at the time.

Again, you know, I know Mr. Gallus enjoyed it when I referred to double secret probation in Animal House in my opening, but, you know, that's certainly--sound like that's what this is. No, no, we were thinking about it, but we certainly didn't tell the Proponents that there was this possibility.

And again he said it was true with Terra Nova as well. When I asked him when you retired at the end of 1998, the Board never published a statement that said it might more explicitly describe the quantum and

10:20:28 the kind of expenditures it would judge acceptable or that it would require from Operators in terms of research and development, and he said no, we had never stated that publicly.

All of that testimony is damning for Canada's case.

And again, if those--if, as Mr. Fitzgerald said, well, we were thinking about it internally, even if that were so, couldn't Canada have come up with a single document that said that that was so at the time? Wouldn't there have been a single internal memo that referred to that in some way? No. Nothing. Never. When the Board said to the suppliers "here is the Plan Hibernia Benefits Plan, here are the benefits we're giving you" not only did they not mention R&D among those benefits, but when they did mention that the Benefits Plan would require some R&D, they didn't say, "oh, and by the way, we might impose targets later on." There is no contemporaneous mention of this, and it's not stated in the Board Decisions, and as Mr. Fitzgerald--and Mr. Fitzgerald confirmed that it was never told to the benefit--to the Project

Proponents.

So, it's clear from that point on that Hibernia and Terra Nova's performance satisfied its obligations under the Benefits Plans.

Between 1986 and 2004, the Board renewed POAs for the projects. It adopted amended development plans, and it never--and that's what's shown in this more simplified slide from the timeline that you saw in the opening--and it never raised the issue of targets to those Proponents.

Now, then we heard from Canada about how they had concerns about declines, and if you look at their testimony, declines in R&D spending, if you look at their testimony, it's rather vague. Sometimes it's put into the mid-Nineties. Sometimes it's in the late-Nineties. Sometimes it's in the early 2000s. There is a lot of inconsistency there, again which is not surprising when you're building an after-the-fact case.

But Mr. Gallus added to the falsity, I'm afraid, in the opening statement when he showed the Tribunal these two slides. He said, oh, my God, the

Board was so concerned about the decline of the percentage of revenue that Hibernia was spending on the project, look at these numbers from 1997 to 2000, went from [redacted]

Well, what Mr. Gallus didn't tell you, but which is in the record and is uncontested, is that operations, production at Hibernia began in November 1997. So, 1997 had a very small amount of revenue from operations.

So, of course, the percentage of reported R&D was significantly higher at that time. The Board knew that at the time. Again, this is an after-the-fact looking back, oh, how can we play with numbers to make it look like we were concerned.

The Board knew that both that there were significant expenditures because it was the--still the end of the Development Phase and that there was almost no revenue, so of course there was a high percentage. As soon as the oil started pumping in November 1997 and the oil started and there were significant revenues in future year, of course the percentage of R&D spending is going to go significantly down as a

percentage of revenue.

And Mr. van Houtte, you will recall you asked Mr. Gallus that question about the Terra Nova slide, which we see on the right, why didn't it include the percentage of revenue. And he said, oh, it's because there was no revenue in Terra Nova in those years, because they weren't producing yet. And, indeed, they weren't producing in until 2002 which includes that expenditure line at the bottom.

What he didn't tell you in his answer to that question was, well, you know, and actually now that you raise it, to be fair, the slide beforehand which showed a decline in the percentage of revenue, that reflects a change in--a substantial change in Hibernia's revenue from 1997 on. He didn't mention that.

So, with all of the inconsistent testimony about when this concern, this apprehension first came up, one thing we do know is that in 2000, Hibernia--sorry, the Board granted Hibernia a new POA. We also know from the testimony and from the documents in the record that the Board could not do so unless it

found in 2000 that Hibernia was fully in compliance with its requirements under its Benefits Plan.

So, when the Board made that decision, it knew that Hibernia's spending in 1998 was [redacted] It knew that its spending in 1999 was [redacted] It knew that the expenditure in 1997 would have been [redacted]

There is no document in the record, and there is no testimony in the record that when the Board renewed the POA, it even told Hibernia, oh, by the way, we are renewing it this time, but we're getting a little concerned about whether your meeting your Benefits Plan obligation to spend money on R&D; you better kick it up in the next period.

They never said that. They renewed, and they renewed on the basis of spending at this level.

It is uncontested that what the Guidelines require is spending in the range of $10- to $12 million annually. They say that's what the Benefits Plan requires now. They accepted spending in the [redacted] range as meeting the Benefits Plan requirements. That tells you whether the Benefits

Plan--whether the Guideline requirement is imposed by the Benefits Plan.

And we heard a little bit, by the way, at the end of Mr. Way's testimony, that the Board was--that the industry was crying out for a benchmark. Well, he kind of backtracked from that a little bit as the questioning went on. But again, there is no documentary record to support that, and I'm not going to say why Mr. Way said that, but there is no record. Do you think if industry was crying out, don't you think Canada in the several years this case has been going on would have produced a document that said that? We saw other Board, internal Board memos describing their meetings with the industry, where industry's position was taking place. Do you think if the Board--sorry, if industry was crying out for a benchmark, don't you think somebody would have recorded that somewhere within the Board?

We also know that the Guidelines presented a fundamental change for Hibernia and Terra Nova. The testimony has confirmed all of the changes we showed you in this slide, and I'm not going to take time with

it again. But we also know that--we also know that the framework for the White Rose Project, when they finally did mention targeted amounts, was very different. Remember the White Rose Decision said we're going to impose an appropriate expenditure target, and it said it would be not less than $12 million. This slide compares that language with the equivalent language and conditions in the Hibernia and Terra Nova Projects, so we knew it was in a different legal framework.

And Mr. Way's memo of the December 2003 meeting confirms that the Board knew it was a different framework, and that the only way they were going to be able to impose the Guidelines retroactively on Hibernia and Terra Nova, which had approved Development Plans, was to use the threat of not renewing the POAs. That's what Mr. Way's memo makes clear, and that they were in a different legal framework from Hebron and the White Rose Projects which were going forward.

And talking about going forward, we also know what the record also shows is that the other

Guidelines that the Board had put out were always prospective. It said we're putting out this document to provide guidance for--in the preparation of Benefits Plans. That language was in every one of those Benefits Plan Guidelines, including even in 2006 when it said that.

What's the one exception of the Guideline that applies to the Benefits Plan? The 2004 R&D Expenditure Guidelines, which were applied retroactively to the Hibernia and Terra Nova Project.

And we know that--and by the way, testimony also confirmed that the Guidelines were always forward-looking.

Let's keep going.

We know when they approved the POAs after issuing the Guidelines for both Hibernia and Terra Nova, and this is Hibernia's but it was true for both, they put in two different conditions: One, that the Operator had to comply with the Benefits Plan; and a separate one, that the Operator had to comply with the Research and Development Guidelines. That tells you also whether the Board believed that the Guidelines

fell within the requirements to comply with the Benefits Plan.

We also heard a lot more this week about the arbitrariness of the Guidelines, that they have no relationship to the competitiveness, that you have to spend money in the Province whether or not the suppliers are best suited. Mr. Way confirmed that yesterday.

We've presented the evidence about all of the arbitrariness of the benchmark, and won't--it's summarized in this slide. We won't spend much time on it.

Canada could have presented evidence to rebut this, but they chose not to. Stats Canada, of course, is a part of the Respondent over there. We raised these problems long ago. They never brought anybody from Stats Canada to say no, no, we're mistaken. They had--what did have was their Board members who confessed that they had no knowledge of how Stats Canada keeps them--talk about some second-hand information.

They also said that we had the nerve not to

explain about the benchmark before the Guidelines were imposed. Well, we were too busy complaining about the Guidelines. Mr. Phelan pointed out in his Second Witness Statement that that was the thrust of industry's position, but once we--and we didn't know anything about the Stats Can factor. But once we started having to use it, then we saw all the problems.

We also know that, for example, in terms of the arbitrariness, that the Guidelines have no relationship to the phase or need of the project. They have no--they give--Mr. Way admitted yesterday that the Board gave no consideration to the problems of sharing research among competitors when that research is going to be applied in a project other than the one they owned together. He confessed not to know that some of the research and development in the Hibernia work Plans was--has no application to Hibernia but only in the HSE Project with different owners.

And by the way, when Mr. Way said there was no research and development in the Exploration Phase,

I'd just ask you to go to ExxonMobil's Web site and look at their descriptions of their research into 3-D seismic drillings and other Exploration Phase work.

So, what the Guidelines said was spend the money, no matter what; and if you don't spend the money, we're going to take it in the financial instrument.

And worst of all, the Board makes the final decisions on whether R&D qualifies. So it's entirely in their control to determine how much money they will grab. By disallowing R&D expenditures, they will get a bigger check at the end of the POA period.

And this was best illustrated by Vice-Chairman's Way's testimony yesterday in which he refused to commit even that projects will receive credit for pre-approved R&D expenditures. The Proponent goes with the Work Plans you see and they say, "Will you approve this"? Will you pre-approve this? The Board says, "Yes." The Proponent goes and spends millions of dollars, and then the Board has left itself the discretion to say, "oh, no, no, no; actually, we're not going to give you credit against

the Guidelines," even though that was the sole purpose of the project was try to meet the Guidelines.

Frankly, what could be more shocking and egregious conduct by a sovereign than that?

And with that, let me turn--and finally the record showed--has shown a lot about the behavior since the Guidelines, the massive impact, massive efforts by Hibernia and Terra Nova and their project owners and the joint industry projects to come up with projects simply to meet the Guidelines.

We've also seen the standards that the Board applies. So, when you keep hearing from Canada about the benefits that could be received, just keep in mind their denial of Guidelines credit for projects that they didn't think were sufficiently experimental or didn't have sufficient technological uncertainty.

With that, Mr. President, Members of the Tribunal, let me turn to Article 1106.

The legal issues on 1106 before this Tribunal are, in many respect, ones of first impression. There have been other NAFTA Tribunals called upon to address performance requirements, but this is the first time

in which the performance requirements are at the heart of the case. In one case, frankly, the U.S. was challenged on performance requirements, and it did what Canada probably should have done in this case: It admitted that it was a performance requirement, but said that they were entitled to one of the exceptions under NAFTA. That's the ADF case, if I remember correctly. That's what Canada should have done. They shouldn't have fought us that this was even an improper performance requirement. They just have just said, "but we were entitled to do it under Annex I." But instead we've had to show you why the Guidelines violate Article 1106(1)(c), and I believe we've proven that.

The provision prohibits any requirement, as you know, to purchase, use, or accord a preference to goods produced or services provided in a Party's territory or to purchase goods or services from persons in its territory. We pointed out to you at the opening that there were a number of questions embedded in that. The first is: Are the Guidelines a requirement? We know that they are. They compel the

10:34:51 Claimants to spend millions of dollars on R&D and education and training, whether commercially needed or not, and whether or not the services available in the Province are competitive with those elsewhere. Are they requirements? Certainly. Messrs. Fitzgerald and Way made plain that the answer is yes. If we don't spend the money, they will take the money. And if we don't comply, they will take away our POAs. That's a requirement.

The second question is: Do they require Claimants to spend on R&D in the territory of Canada? Well, of course the answer to that is yes. The only expenditures for R&D and E&T in the territory of the Province are eligible to satisfy the Guidelines. As Section 3.1 makes clear, in order to be eligible, any R&D expenditure has to occur in the Province of Newfoundland and Labrador.

The third question was: Do they constitute services? Again, the testimony confirmed that. From the Board's perspective, they clearly are, and they're subject to the Accord Acts requirement of competitive bidding for those services. Mr. Fitzgerald said that

10:35:50 at Page 507. Mr. Way said that at Page 771. R&D is a service, and it also requires goods like lab equipment that have to be purchased.

The only way to meet the Guidelines is to use the services an R&D provider--of an R&D provider located in the province or to pay someone in the Province for services provided somewhere else. There's no other way around it. The Guidelines plainly violate Article 1106(1)(c), and it was precisely for that reason that Canada listed the Benefits Plan regime of the Accord Acts as a nonconforming measure in Annex I.

The Canadian Government's position on this issue actually still remains a bit unclear. Its main argument in its Counter-Memorial, based entirely on other treaties and instruments rather than the plain language of the NAFTA, was that R&D was a different kind of performance requirement and therefore was silently excluded from 1106(1)(c).

Sorry. Professor van Houtte, do you have a question?

PRESIDENT van HOUTTE: No, no.

10:36:57 MR. RIVKIN: Okay, sorry.

But in their Reply Memorial, the Claimants demonstrated that the term "services" in the NAFTA unequivocally included research and development and education and training services. We pointed to repeated instances in the NAFTA and contemporaneous statements by the Parties, NAFTA Parties, that showed beyond any doubt that R&D and E&T services were considered just that and covered by the term as used in the Treaty.

In its Rejoinder, Canada reversed position and abandoned this argument and conceded that R&D can be a service within the ordinary meaning of the term in Paragraph 14 of its Rejoinder. It conceded that required expenditures on R&D and E&T can breach Article 1106(1)(c). But then, in its Opening Statement, Canada again made reference to Article 1106(5) and treaties other than the NAFTA and argued again that R&D was a different kind of performance requirement. So frankly, I'm not sure where Canada stands on this issue, but it doesn't really matter because R&D clearly is a service, and

10:37:56 Canada's witnesses agreed with that, and we have already shown you that testimony. I have told you where it is.

So, the fourth question from the opening was, do those expenditures require the purchase, use, or accordance of a preference to R&D and E&T services. And the testimony we heard this week again was clear: Only expenditures made on local R&D and E&T services or goods for R&D and E&T purposes would count against the Guidelines.

So, now Canada's principal argument is that R&D can be carried out in the Province somehow without any goods or services being involved at all. This argument is without substance for several reasons.

First of all, Canada implies that Article 1106 is limited services purchased from a local third-party provider, and that's what they said in their Rejoinder. But a plain reading of Article 1106(1)(c) makes clear that's not so. The 1106(1)(c) talks about using or according a preference, a requirement of using or according a preference to goods or services provided in its

territory. There's no requirement that you have to purchase from a third party. It applies to goods produced or services provided in the territory no matter the identity, nationality, or residence of the person supplying or providing them.

By contrast, the second clause of 1106(1)(c) is explicitly limited to purchases of goods or services from local persons. The ordinary meaning cannot be reconciled with Canada's position, and it's notable that Canada has never responded to this point, which was made in our Reply.

In our Reply and our Opening Statement, we pointed out that the examples provided by Canada, like establishing an in-house R&D facility or in-house training fall within the plain terms of the Article. Canada has really never attempted to address that showing, either in its Rejoinder or in its Opening Statement. Its witnesses agreed, however, that, of course, to build and conduct an in-house R&D facility in the Province, one would have to spend substantial sums of money on local goods and services. So, I'm not going to go into their feeble attempts to get

around that anymore.

In any event, Canada's argument has it backwards. A measure that requires conduct contrary to the obligation Canada undertook violates the NAFTA. It's not the foreign--up to the foreign investor to come up with a way to read the measure that it doesn't really violate the Treaty. A NAFTA investment Tribunal has no authority to strike down part of a measure and rewrite the rest. The Tribunal's Award has to be based on the measure before it, not Canada's attempt to reimagine it.

The remainder of Canada's arguments on 1106(1)(c) are based on supplementary means of interpretation and the Vienna Convention. But the Vienna Convention makes clear that you can only rely on supplementary means of interpretation when--either to confirm the meaning resulting from Article 31 or to determine the meaning when Article--under the plain terms under Article 31 the meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. That clearly is not the case with the plain language of 1106(1(c), and Canada, in

fact, has conceded in its Rejoinder that the ordinary meaning of 1106(1)(c) prohibits requirements to purchase, use, or accord a preference to R&D and E&T services, and therefore, supplemental means are not carried out.

As I said, you know, thinking about the ADF case, we shouldn't have had to argue any of this. We should have started simply with the Annex I exception.

So the final question posed on opening was whether the Guidelines were covered under the Annex exception as a subordinate measure adopted under the authority of and consistent with the pre-existing legal regime that applied to Hibernia and Terra Nova. Canada does not dispute that it bears the burden of establishing the applicability of this exception, because it is an exception. The record in the case shows that it has not discharged and it cannot discharge that burden.

First, Canada's argument cannot be reconciled with the plain terms of Article 1108(1). That provision applies to three different categories of measures. It applies to all measures of a local

Government. It also applies to those measures of Federal and Provincial Governments that were to be specifically set out in Annex I or III within two years of the entry into force of NAFTA. All three categories of measure have to be existing in order to be covered.

For Provincial and Federal measures, like the Accord Act, there is an additional requirement. The measure also has to be listed in the annex. So, under the plain terms of Article 1108(1), a Federal or Provincial measure has to be both existing and listed in the annex.

The exception for the--yes.

ARBITRATOR SANDS: To be specific on this--thank you very much. Could I ask to take you to Article 1108(2), which I think you might have put it in here somewhere. It's your Slide 59. It's just a general question I've got here, just to help us.

MR. RIVKIN: Yes.

ARBITRATOR SANDS: You see there after 1108(2), each Party may set out in its schedule to Annex I, and I think you are coming on to this issue.

MR. RIVKIN: Yes.

ARBITRATOR SANDS: My question is this: What are the principles governing the interpretation of a measure that is scheduled in the annex?

Article 1108(2) said: "Each Party may set out in its schedule to Annex I."

So my first question is: What's the mechanics of putting a reservation in?

MR. RIVKIN: If you will let me describe what they did with respect to the Provincial measures, I will get to--

ARBITRATOR SANDS: Just before that, as a general question: Is it unilateral Act? Does the United States submit its--

MR. RIVKIN: Yes.

ARBITRATOR SANDS: So it's a unilateral Act.

MR. RIVKIN: Yes.

ARBITRATOR SANDS: Then the follow-up question, if it's a unilateral Act, what principles govern? Because, you see, the Vienna Convention on the Law of Treaties in principle doesn't govern the interpretation of "unilateral act" as opposed to

treaties, and that's what my question is getting to.

MR. RIVKIN: Because Article 1108(2) is allowing the Parties to make submissions based on--for the reservation in Article 1108(1) and because that happens under the Annex I headnote, what is submitted by the nations has to be interpreted according to the principles laid out in 1108 and in the headnote to Annex I.

ARBITRATOR SANDS: Because--

MR. RIVKIN: And Mr. Legum would like to add to that answer.

ARBITRATOR SANDS: Sure, sure, of course.

MR. LEGUM: My understanding actually is that the annexes were not unilateral acts, that they were negotiated among the Parties as to what annexes would be accepted by the other Parties in a specific form. So, it's not accurate to say that they're unilateral acts.

ARBITRATOR SANDS: I think it may be help--if this cannot be clarified now, I think it may be helpful in the post-hearing phase to have something on the mechanics of how it happens and the

characterization, because it goes to the question of interpretation, and that is related to another--if I could just take you to the Annex I introductory section.

PRESIDENT van HOUTTE: May I suggest that we have those questions after the closing?

(Simultaneous conversation.)

MR. RIVKIN: I have a way--it is done in a way that I think will answer your questions, if you will let me do that.

PRESIDENT van HOUTTE: But the methodology, we also have to discuss that--

MR. RIVKIN: Yeah.

PRESIDENT van HOUTTE: --because it implies also Post-Hearing Briefs, and, anyway, that's also a question mark.

MR. RIVKIN: Right. Okay. So, looking at Article 11081, it requires that an existing measure has to be listed in its schedule, and--in Annex I. And the exception for the Accord Act that was included in Canada's schedule specifically mentions--the exception for the Accord Act that Canada listed in its

scheduled Annex I specifically mentions Benefits Plans that must be approved by the Board. This provision undisputedly was both existing and listing in the annex, and the exception also clearly contemplated that future subordinate measures in the form of decisions adopting Benefits Plans were to be adopted by the Board. So, for the exception to have any effect, those future specifically contemplated measures had to be covered, and we have consistently acknowledged this category of specifically contemplated measures as covered.

We have never once in this arbitration suggested that the 1997 Decision approving the Terra Nova Benefits Plan fell outside this exception. To the contrary, the description of the Accord Act regime is one that required a decision on Benefits Plans necessarily encompasses decisions like that on Terra Nova made after the NAFTA went into effect. That is not at all the kind of measure the Guidelines represent.

The Guidelines are nowhere mentioned in the annex description of the nonconforming aspects of the

Accord Acts. They are not a decision approving a Benefits Plans in this case-specific context set out in the description.

As Mr. Way stated in a response to a question from Professor Sands, the Guidelines set out a new kind of requirement that existed alongside the decisions adopting the Hibernia and Terra Nova Benefits Plans, and we saw in their POA approval requirements that they viewed this as being separate from the Benefits Plan requirements.

This is not a requirement that could have been imposed through amending the Benefits Plans, as Mr. Fitzgerald testified. The Guidelines are an exercise in rule-making, enactment of new rules of general interpretation. They set out a general legal regime that did not previously exist. So, on their face, they do not fall within the Benefits Plan mechanism covered by the Accord Act exception.

Canada argument that the Guidelines were adopted under the authority of the reserved measure within the meaning of the headnote of Annex I is similarly baseless. The headnote in question, Note

2(f) states that measures identifies the laws, regulations, or other measures as qualified, where indicated, by the description element for which this reservation is taken. Canada's scheduled Annex I does, indeed, qualify the identification of the Accord Act in the description element, the provision described as 45(3)(c) and (d) of the Accord Act. There is no reference to the Accord Act exception to the Guidelines in particular or even the Board's authority to issue Guidelines under Section 151. The Guidelines were not adopted under the authority of the nonconforming Act of the Accord Act--aspect of the Accord Act listed in the exception; they therefore cannot fall within the headnote to Annex I.

On Tuesday, Canada argued that the ordinary meaning of these terms, as I have just laid out, makes no sense because the only reservations in Annex I of the NAFTA that included a description are the measures of the Federal Government--and Professor Sands, this is coming to your questions.

Measures of the Provincial Government, they said, did not include a description. Canada's

argument is wrong in several respects.

First of all, Canada rewrites its position from the past in this case. If you look at Paragraphs 109 through 114 of Canada's Rejoinder, they state over and over again--109 to 114. They state in 109, for example, "For example, if a NAFTA Party has described the nonconforming aspect of its measure under the description headings only subordinate which address that aspect of the measure will be reserved." That is directly contrary to what Mr. Gallus told you Tuesday.

They, in Paragraph 110--they talk about the narrow reservation for the listed measure.

Paragraph 111, they say reserving only those future measures authorized by and consistent with the nonconforming aspects of the Annex I listed measures is nothing like a reservation for all future measures in a particular sector. So, they're focusing on how narrow the ability is to make an exception.

They go on to say that--well, I'm just repeating.

So, they accused us of overlooking the limits

on the reservation for subordinate measures, which I have just described to you. So, keep that in mind when you re-read Mr. Gallus' opening argument and when you hear whatever he has to say today.

Second, Canada rewrites its own history outside of this case. In the form of the Treaty approved by the NAFTA Government, the NAFTA required a measure-by-measure annex for Provincial measures just like it did for Federal measures. Local Government measures were the only ones that were not required to be detailed in an annex. Recall that the NAFTA provided two years for the annex for state and Provincial measures to be put together.

The incomplete documents that Canada has tendered to this Tribunal consist of letter was of with some but not all of the mentioned attachments. We are showing you here RE-11, which is the annex page and that mentions Provincial measures.

These letters were signed by Trade Ministers of the three NAFTA Parties in March 1996, after expiration of the two-year period. The letters were not posted on Canada's website or otherwise made

10:52:27 public until some months after the Claimants put this out in their Memorial in the case. So, if an investor wanted to know what the scope of the exceptions were for Provincial measure, there was no way to know until we pointed it out in this case.

The letters purport to undo the NAFTA's requirement of a measure-by-measure listing of Provincial measures, which we looked at a minute ago.

They provided a set of single entries that applies the regime for local Governments to Provincial measures. A legitimate question exists whether this act is a modification of the terms of NAFTA because it was affected after the two-year period and because there is no measure by measure listing. If it is a modification, it would be ineffective for failure to receive legislative approval as required by NAFTA Article 2202. But the more immediate point is that Canada's reliance on headnote to Annex I to construe this annex is wildly out of context.

They cannot change the meaning of the headnote to Annex I by a document that does not comply with the terms of NAFTA that was submitted more than

10:53:31 two years later. That two-page headnote was written for the measure-by-measure annex that NAFTA requires. It was not designed to address a one-sentence document that Canada submitted years later in a different form than the text, indeed, requires.

A far better indication for how in fact as written treats blanket exceptions for all nonconforming measures is provided by the reference to local government measures in Article 1101. The headnote on its face does not apply on these measures because they appear in no annex.

So, how is that covered local measures are identified? You have to established what the measure was in 1994 and whether, as of that date, it had any nonconforming aspects.

Does this mean that limited future subordinate measures are not covered? No. If the nonconforming aspect of the measure that existed in 1994 explicitly contemplated future subordinate measures as part of that nonconforming aspect, those future subordinate measures would be covered.

In considering Canada's proposed rule, it's

10:54:35 worth bearing in mind the fact that the Mexican Constitution is the subject of multiple listings in Mexico's schedule to Annex 1.

Let's imagine for a moment that Canada's rule is accepted. That would mean--and that any future measure adopted under the authority of a listed measure without regard to whether it was adopted under the authority of the nonconforming provision of the reserve measure, just imagine--that rule would--that exception would completely swallow the rule. Every measure in Mexico is subordinate to its constitution.

So, under Canada's rule, every law, regulation, and ordinance in Mexico, past, present, and future would be exempt from Articles 1102, 3, 6, and 7 whether or not it's listed in an annex, whether or not it was contemplated by the nonconforming article in Mexico's constitution, this is a preposterous result and one that cannot be reconciled with the plain meaning of the treaty or its object.

The NAFTA is, after all, a free trade agreement that promotes free trade and disfavors preferences, as Article 1106 makes clear. The only

10:55:39 reading consistent with the terms of Article 1108(1) is that a future subordinate measure to be covered has to be specifically contemplated by the nonconforming provision of the reserve measure that existed in 1994.

So, let's now turn to Canada's argument that the Guidelines are consistent with the accepted measure and the Tribunal's questions on that topic. Before doing so, it's appropriate for me to address Question 4 of the Tribunal on what principles should it take into account in interpreting a reservation Article 1106.

The relevant principles, we submit, are those defined by the Vienna Convention on the Law of Treaties. The cardinal rule of treaty interpretation is that of Article 31(1) which is that it be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in its their context and in the light of its object and purpose. This rule applies to reservations as it does to other treaty provisions, but aspects are worth noting.

First, the terms should be considered in the

10:56:39 context. The specific context here is provided by the operative provision, Article 1108(1). That provision set a strict regime for reservations which are allowed to be maintained, continued or promptly renewed and amended only if the amendment does not decrease the conformity of the reserve measure.

The WTO Appellate Body in the cotton subsidies case, found that Article 10.2 of the agreement on agriculture has to be interpreted in a manner that is consistent with the aim of preventing circumvention of export subsidy commitments that pervades Article 10. A similar approach is called for mere in the context of this Free Trade Agreement.

Second, the terms of the terms of the reservation have to be considered in light of the object of the purpose of the Treaty. The object and purpose of a specific provision or clause in a treaty, if such a thing exists, is not a relevant consideration under the Vienna Convention. The objectives of NAFTA are those set out in Article 102, to eliminate barriers to trade and facilitate the cross-border movement of goods and services between

10:57:38 the territories.

So, that answers your question four. And with these principles of interpretation in mind, I would now like to turn to the Tribunal's Question 3.

ARBITRATOR SANDS: Brief question, can I take it from the fact that you have not provided any authorities in the NAFTA case law that there is no authority either way on the applicability of the Vienna Convention or the Law of Treaties to reservations?

PRESIDENT van HOUTTE: On the NAFTA.

ARBITRATOR SANDS: NAFTA.

Is there any NAFTA jurisprudence on the applicability of the Vienna Convention? One way or another. I'm not asking--

MR. RIVKIN: I will let Mr. Legum answer that question, and I may add to it.

MR. LEGUM: Article 2201 of the NAFTA states that the annexes are an integral part of the agreement, and other articles that we'll come to in a moment state unequivocally that the rule that this Tribunal should apply is that in the agreement and

10:58:38 that the agreement is to be construed in accordance with their national law.

So, regardless of whether it's unilateral, which it's not, or whether it is unilateral, the NAFTA itself subjects the annexes to the same rule as the rest of the Treaty because it's an integral part of the Treaty.

ARBITRATOR SANDS: So, on my question, can I take it that we don't--I'm just struggling to find out whether there is any authorities one way or another on this in the NAFTA jurisprudence, can I take it that there is none?

MR. LEGUM: I'm not aware of any.

ARBITRATOR SANDS: I'm not aware of any, either.

Can I ask the--related to this, also--

MR. RIVKIN: But in further response, I don't think the NAFTA Parties wouldn't have to state that they intend for the Vienna Convention on the Law of Treaties to be applied--

ARBITRATOR SANDS: No, no, sorry--

MR. RIVKIN: --to be applied to interpret the

10:59:22 treaty.

ARBITRATOR SANDS: By final authorities, I meant jurisprudence. I meant case law. I'm just looking to see whether the--can I then ask also how, assuming the Vienna Convention on the Law of Treaties does apply, how does that relate to Paragraph 3 or Section 3, whatever it's properly called, of the introductory section to Annex I which has a--I won't call it a special rule, but it has an explicit provision on the interpretation of a reservation? And my question is, how does Paragraph 3 there relate to what you say is the general rule of the Vienna Convention on the Law of Treaties?

MR. RIVKIN: I think it fits that text perfectly. What it says is, all the elements of the reservation shall be considered and the reservation shall be interpreted in light of the relevant provisions of chapters against which the reservation is taken.

As I just said, under the Vienna Convention of the Law of Treaties, you have to look at the object and purpose of the Treaty. The object and purpose of

11:00:26 the NAFTA is to create free trade and to eliminate barriers. When you have a reservation that is an exception that is allowing a certain amount of exception to free trade, then Article 1108 makes clear that those exceptions are to be narrowly construed, and the headnote also makes clear that the measures have to be listed in the nonconforming measures and Section 3 reinforces that.

You have to look at it as, as we said, a measure that is an exception to the rule and, therefore, it has to be narrowly and carefully construed.

ARBITRATOR SANDS: So, just to assist me, if the Vienna Convention on the Law of Treaties is to apply, and this essentially reflects that rule, why did the Parties feel the need to put this provision in?

MR. RIVKIN: There are a lot of provisions that make that clear. There are other provisions in the annex. They're making very clear that the reservations are to be tightly construed.

ARBITRATOR SANDS: Thank you.

11:01:34 MR. RIVKIN: So, with these principles--by the way, members of the Tribunal, I apologize. I'm running a little bit longer than I planned, but I think this is an important topic.

PRESIDENT van HOUTTE: That's to be expected.

MR. RIVKIN: When I went over it last night, I didn't expect it. The energy of the moment takes, more time.

So, did the drafters--your Question 3 is, did the drafters of the NAFTA intend any difference between a standard of consistent with in the headnote to Annex I and not decreasing the conformity of amendments in 1108(1)(c), and this is the question Professor Sands raised on Tuesday, and my answer on Tuesday was no, and my answer today is--remains no, but I have an even better way of explaining it to you, which is looking at the French text of the NAFTA which is created by Canada. If you look at the French text, you see that they use precisely the same word in Annex I, Section 2(f), "conformément" with Article 1108(1)(c). La conformité.

So, Canada clearly understood that the terms

11:02:38 were meant to have the same meaning in the two provisions. The words are slightly different in the English and Spanish version, but they clearly get to the same purpose in those languages, and Canada understood it to be the same.

The second part of the Tribunal's question asks whether "consistent with" implies any requirement that there should be no decrease in the conformity of the new subordinate measure with the reserve measure. The answer to that is clearly yes, and this answer follows naturally from the answer I just gave to you Question 4. The words "consistent with" are not to be read in isolation but in context of the object and purpose of NAFTA.

The context is the exceptions regime set up by 1108(1)(c). It's a limited grandfathering provision which makes clear in subparagraph (c) that the reserve measure can only be liberalized and not made more restrictive of foreign trade or investment in the future. It's based on the premise that the reserved measure will not change for the worse. Any allowance for a future subordinate measure would make

11:03:40 sense in this regime only if it too could not effect a change for the worse. This is the only approach consistent with the context of Annex I's headnote and the NAFTA's objective of eliminating barriers to cross-border trade.

So, your second question asked if a determination of whether a subordinate measure is consistent with the measure or authorized by it is to be assessed by national law, the NAFTA, or a combination of the two.

Q. The Claimants' answer is that the NAFTA and international law supplied the governing standard, not national law you. When you take a look at Article 102 of the NAFTA and Article 1131(1), it makes clear the NAFTA is an international agreement governed by international law, not national law.

Under international law, the terms of the NAFTA, including "consistent with," have to be interpreted according to their ordinary meaning in their context and in light of the NAFTA's objectives. Those are different terms in a very different context and with very different objectives than that of

11:04:43 Canadian administrative law, which applied in the cases that challenge the Guidelines. We will do that comparison now.

The terms in the NAFTA apply--

ARBITRATOR SANDS: Just to test that, Mr. President, sorry, just teasing out the issues--these are very significant issues and I think that you'd appreciate it. Does that then mean--let's take a totally different performance requirement.

The United States has put in reservation in relation to the Clean Water Act. Does your answer therefore mean that the conformity of a subordinate measure to the Clean Water Act under U.S. law is to be assessed not by reference to U.S. law but by reference to the law of the NAFTA?

MR. RIVKIN: It has to be looked at with--yes, with--in terms of the conformity with the objectives and purposes of Article 11081 and the NAFTA. That's what the NAFTA Treaty provides.

ARBITRATOR SANDS: So, the United States, in entering that reservation and becoming a part of the NAFTA, accepted that a NAFTA tribunal would be free to

11:05:47 put on one side a U.S. court determination, for example, and deal with it purely as a matter of NAFTA and international law? I'm just trying to get a sense.

MR. RIVKIN: Yeah. I'm not here to speak for the United States, as you know, and in answering that question in a void without knowing the measure. What is being done in terms of conformity, what's being challenged, is a very difficult question to answer. I think you have to look at the specifics.

When you look at specifics here, as I'm about to show you, the purpose and terms of NAFTA are entirely different from the manner in which Canada reviewed under its own administrative law whether Guideline were consistent with the Accord Acts.

ARBITRATOR SANDS: My question was on authority. I specifically didn't ask about consistency. I asked about authority.

MR. RIVKIN: It's the same.

ARBITRATOR SANDS: This Tribunal should apply NAFTA and international law in determining whether a subordinate measure is or is not under the authority?

11:06:50 MR. RIVKIN: Correct.

ARBITRATOR SANDS: Right. Thanks.

MR. RIVKIN: As I said, the terms of the NAFTA appear in a free trade agreement, the pertinent objective of which is to eliminate barriers to trade.

The object of Canadian administrative law is to ensure that, as justice Welsh said--these are all quotes from the Hibernia Decision--to ensure that agencies implement and administer laws in a legal, fair, and reasonable manner. Very different. The immediate context of the terms of the NAFTA is a limited exception for specified measures that violate the treaties--violate the objectives the Treaty and, indeed, the specific obligations imposed to achieve nose measures.

Article 1108(1), the relevant operative provision, allows such measures to be maintained only if the conformity is not decreased. By contrast, Canadian administrative law applied in the court cases permissively considers that administrative acts are subject to a wide margin of appreciation.

The ordinary meaning of the terms "under the

11:07:57 authority of" and "consistent with" suggests no particular deference to the reading of the accepted measure by the national authorities. Under Canadian administrative law, the test is whether the agency's reading of the measure falls within a range of possible, reasonable outcomes with mandated judicial deference to the agency's approach. That is what the Canadian courts held here.

Finally, under NAFTA, subordinate measures have to be consistent with the nonconforming provision of the reserve measure. Under Canadian administrative law agency measures not reviewed for consistency with measure but for reasonableness, whether the agency action falls within range of possible acceptable outcomes which are defensible in respect of the facts and law.

You can see here the enormously different purposes of the two scopes of review. So, there is no basis to review the terms--those terms under American--under Canadian law. The comparison shows that the requirement--and that may also go to your question, Professor Sands. Again, it is very

11:09:10 difficult to answer in a void. If the purpose of the U.S. statute was similar to the object and purpose of the NAFTA, then one could see how the national law could potentially inform the interpretation under the NAFTA, if the object and purpose is the same. What we have here is a very different object and purpose, very different standards being applied between the NAFTA and the relevant Canadian law.

The issues decided in the Canadian courts were different, and you raised that question before, Arbitrator Janow, and the Tribunal need not and should not defer to any of the court's rulings. There is certainly nothing in the NAFTA that suggests any intent to have these issues determined by national law.

We reject Canada's assertion that the Court of Appeal determined issues of authority or consistency under national law and that you defer to it. In its opening, Canada misleadingly suggested that the majority of the Court of Appeal made findings on these points; They did not.

Here is Slide 43 from Canada's opening.

11:10:11 Canada showed that the Tribunal--the snippet to suggest that the majority made broad findings about authority. What Canada didn't show you is the preceding paragraph that read in the context of the preceding Paragraph 78, it's clear that the snippet Canada relied on only reflected Justice Welsh's conclusion that the Guidelines did not constitute a tax, which the Board did not have authority to impose. It was not a general conclusion on the authority of the Board to issue the Guidelines.

Canada then flashed this snippet on the screen to suggest that there was a finding of consistency. In fact, this paragraph was merely one ancillary step in a line of reasoning that led to the conclusion in Paragraph 109 that, "The Board's interpretation of Section 138 is reasonable," and that the Board, therefore, had authority not to issue the Guidelines but to make compliance with them a POA condition.

As Claimants point out in their opening, the only the justice to address, actually, the questions of authority and consistency was Justice Rowe who

11:11:17 found neither to be present. This is, in short, familiar territory where the Rule of Decision to be applied by an international tribunal is a different standard governed by international and not national law.

The authorities cited by Canada on Tuesday in no way support a different conclusion. The Serbian Loans and Brazilian Loans Cases were two of the exceedingly rare cases in the Permanent Court of International Justice that were governed by--exclusively by national law. It's clear Canada, again, wanted you to point you to snippets and probably didn't read the entire case.

The issue in each case was whether the debt was due under a bond. The court made it clear that there was no issue of international law in play, in both cases.

Canada's suggestion that the Tribunal owes deference to Canadian court decisions applying Canada law is equally unfounded. As the NAFTA Tribunal in Feldman said, "Questions whether Mexican law as determined by administrative authorities or Mexican

11:12:17 courts is consistent with the requirements of NAFTA or international law are to be determined in this arbitral proceeding, nor is an action determined to be legal under Mexican law by Mexican courts necessarily legal under NAFTA or international law."

The approach of this NAFTA Tribunal accords with the general international law on the topic, such as the Articles on State Responsibility. And the recent decision in the Veteran Petroleum versus Russian Federation Case makes clear that the approach suggested by Canada is not only wrong but also bad policy. It said, international law and domestic law should not be allowed to combine to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation, and I won't read the rest of the quote, in order to save some time, but we all know that many other authorities come to the same conclusion.

Professor van Houtte raised in the opening the issue of expropriation cases, for example, where the State always covers itself by making its action consistent with national law.

Under general international law, exhaustion of local remedies signifies only that an international tribunal may then decide the case under international law. It doesn't mean, as Canada contends, that the international tribunal is then required to follow the decision of the local courts.

So, it follows from these points that our answer to Question 2(a) is that the NAFTA supplies the Rule of Decision--the Rule of Decision. National law is relevant here only as part of the facts of the case. It does not supply the rule for this Tribunal to apply.

And the question that--the answer to your Question 2(b) is that which I gave earlier to Question 3, the context of the headnote to Annex I, in light of the objectives of the NAFTA, compel the conclusion that a future subordinate measure cannot be consistent with the reserved measure if it decreases the conformity the measure. The Claimants' answer to Question 2(c), it should be obvious, is that the Rule of Decision does not include Canadian administrative law, which applies very different standards.

To answer Question 2(d), it's therefore the case that a subordinate measure cannot be consistent with the measure if it imposes additional or more onerous local content burdens on a legal or natural person subject to the measure.

With all of these points in mind, the Guidelines cannot be viewed as consistent with the listed measure. Under Canada's reading, the listed measure includes all prior subordinate measures, no matter when they were put in place.

When you asked, Professor Sands, on Tuesday, what is a measure, the NAFTA defines it in a broad, open-ended way. Article 201 says the measure includes any law, regulation, procedure, requirement, or practice. Decisions of the Government organ, including court decision, are measures, as the Loewen Tribunal held in its decision on jurisdiction.

As of 2004, the listed measure for The Accord Acts included not only 45(3)(c) and (d), but also the decisions adopting the Hibernia and Terra Nova Benefits Plans.

In its opening, Canada attempted to build an

argument that the Guidelines were consistent with this pre-existing legal regime, but as we've seen earlier, neither the Accord Acts nor the decisions adopting the Benefits Plans imposed a minimum level expenditure, required pre-approval, or had any--or reflected any of the changes that this chart showed. Canada has not disproven any of the elements on this chart.

The Guidelines cannot be viewed as consistent with the pre-existing legal regime for Hibernia and Terra Nova, and they cannot fall within the headnote to Annex I.

Finally, the obligation to interpret treaties in good faith and the principle of effectiveness mandate a finding that Canada is prevented from adopting as a covered subordinate measure, a measure that would not pass muster as an amendment to the Accord Acts.

The ratchet rule in Article 1108 only permits amendments that do not decrease the conformity of the measures. Had The Guidelines been formulated as an amendment to the decisions approving the Benefits Plans, that amendment would have to be judged

according to the terms of the ratchet rule. Canada cannot, in good faith, circumvent its treaty obligations by repackaging an amendment as a separate measure.

For the reasons we have stated, these Guidelines obviously cannot pass the test of the ratchet measure, they're not covered by the annex and the Accord Acts.

So, let me turn--I think I can do Article 1105 very briefly.

I will remind the Tribunal that there is no disagreement between the Parties over the relevant inquiry under Article 1105, under the FTC Note of Interpretation or Article 1105. The question is whether Canada has failed to accord fair and equitable treatment to our investments.

Both Article 1105 and the FTC Note of Interpretation evidence the fact that fair and equitable treatment is one element of the fair and equitable treatment standard.

We have seen the specific assurances and commitments contained in the Benefits Plans. The

Board member witnesses were in a far better position than Canada's counsel, apparently, to describe that regime. They described all the different--well, counsel deferred to the Board members, as you recall, many different times, but Mr. Fitzgerald confirmed that the Benefits Plans were negotiated, as was--as I've already shown you, and he said, yes, it was a negotiation. He agreed with my statement that there was an offer and an acceptance.

The Benefits Plans were offered by the Proponents submitted to the Board, the Proponents accepted the Board's approval with the additional conditions. So, I said, "So, you said you had an offer, you had an acceptance, and with some variation that was, in turn accepted.

"Right."

He also agreed that the Board did not have the power to unilaterally amend the Benefits Plan; again, very contractual.

Under the FIRA, a similar practice had been established in Canada for the submission, negotiation, and approval of a foreign investor undertakings. This

provided the context for the Claimants' investment. It again shows the contractual or quasi-contractual nature of the Benefits Plans and the Decisions adopting them.

And in addition to all those agreements that I already covered earlier, we have the Claimants' fiscal agreements with the Government. Now, Canada said that's a very different situation where a country negotiates a benefits agreement with an Operator. It's very different, they said, for example, that the agreement that was negotiated with regard to Hibernia in 1990. In those situations, they said, we have an Operator proposing benefits, we have the Government coming back with ideas and eventually we have a Government. Well, that's what happened here.

Canada said, this is an agreement between the Operators and the Provincial Government. It's an agreement with regard to the benefits that the Provincial Government expected in return for commitments from the owners. And they've consistently argued that the framework agreement did not add to--they agreed that the framework agreements did not

add to our obligations with respect to R&D.

But the framework agreement, the fiscal agreements, obviously form part of the benefits commitment agreed to between the Canadian Government and its various organs and the Claimants at the--at the inception of their investment of Hibernia. All--the Provincial Government, the Federal Government obviously, the Board are all organs of the Canadian state and all bear responsibility under the NAFTA.

We would not have proceeded under the Benefits Plans and its Decisions without those agreements with the Provincial and Federal Governments. The record make that clear.

So, this idea that Claimants' expectations and Canada's statement that Claimants' expectations cannot be based on assurances from more than one governmental entity is belied by basic principles of international law.

In Glamis, for example, the Tribunal analyzed whether Claimants' reasonable expectations were induced by the Federal Government and/or by the State of California, although in both cases it found that

the quasi-contractual inducement did not exist.

In MTD versus Chile, the Minister and the FIC were different channels of communication, but with outside Parties, but for purposes of the obligations of Chile under the BIT, they represented Chile as a unit, "as a monolith," to use Respondent's terms. That is true certainly on the other side of the table here today.

The terms of the agreements we've already stated what was the agreement between the Board and the Proponents with respect to their research and development expenditures, including, for example, no target expenditures.

The disagreement between the Parties centers on the content of the customary, fair, and equitable treatment standard. Canada states that only enacted as sufficiently egregious and shocking will be unfair and inequitable for purposes of customary international law. While we disagree with that statement of the law, the fact is the facts of this case, as I have described them to you at the beginning of this argument and just summarized are sufficiently

11:21:36 egregious and shocking under Canada's standard.

What does an obligation not to accord treatment that is sufficiently egregious and shocking mean? The terms used by Parties to describe the customary law standard that the Tribunal have to apply are vague and ill defined, egregious, shocking, but it must still be applied to the facts of this case.

Turning to the analysis that other tribunals have undertaken to define the standards in the cases that Canada relies on does not involve the creation of customary international law by way of international arbitration awards. There is value in utility in looking at how others have applied this standard.

Canada has explicitly relied on these two cases as accurately expressing the customary international law minimum standard of treatment: Glamis Gold and Cargill.

In Glamis, the Tribunal stated that it agrees with International Thunderbird that legitimate expectations relate to an examination under Article 1105(1) in such situations where a Contracting Party's conduct creates reasonable and justifiable

11:22:40 expectations on the part of an investor or investment to act in reliance on said conduct. In this way, a State may be tied to the objective expectations that it creates in order to induce investment. That is the standard that Canada has agreed applies here.

In Cargill, the Tribunal said--the Tribunal notes there are at least two bid awards, both involving a clause viewed as possessing autonomous meaning that, if found, an obligation to provide a predictable investment environment that does not affect the reasonable expectations of the Investor at the time of the investment. No evidence, however, has been played before the Tribunal in that case. That there is such a requirement in the NAFTA or customary law, and then, here is the key language, at least where such initiations do not arise from a contract or quasi-contractual basis. Again, that's the case they rely on.

So, we are looking for specific assurances and commitments under Glamis Gold, a quasi-contractual situation, reasonable and justifiable expectations arising from that situation, and the repudiation of

11:23:44 those expectations. That is exactly what we have in this case.

In Cargill, there was no claim that the Investor's legitimate expectations had been breached. In Glamis, the Investor they did make a such. The Tribunal considered whether U.S. Government measures violated Article 1105 because it changed in a dramatic way a previous law or prior legal interpretation.

The Tribunal explained that the violation based on an unsettling of reasonable-backed expectations requires as a threshold circumstance at least a quasi-contractual relationship between the State and Investor, whereby the State has purposely and specifically induced the investment precisely because these expectations were not--and in Cargill--I'm sorry, in Glamis, the finding of violation was rejected because the expectations were not based on specific commitments made by the Federal Government.

In this case, it could not be clearer, contractual or quasi-contractual arrangements were made with the State which have now been repudiated.

11:24:48 And there, Canada's witnesses confirmed this. As it was said in Glamis, Canada may be tied to the objective expectations that it creates in order to induce investment, including what's on the chart in front of you.

We have demonstrated the fair and equitable treatment applies--has evolved, and we stated that in the opening in our papers, and I'm going to skip over doing that now. But certainly, when you apply these same facts under that standard, we certainly agree, as well. But we have argued that in the past, and I won't reargue it here.

So, for all of these reasons stated above including the authorities on which Canada relies and the testimony of their own witnesses, we ask that the Tribunal find that Canada has breached Article 1105 as well as Article 1106.

Thank you very much for your patience. And I apologize, I have now used up exactly the 90 minutes and left no time for Sophie to talk about damages, but I know she does have a few words to share with you on that.

11:25:52 Do you have any questions on anything before I sit down?

ARBITRATOR JANOW: Well, I would like further clarification. It's not my philosophy to interrupt Parties during concluding statement, so--but I think these exchanges have been helpful.

With respect to the reservations, because there is very limited NAFTA case law on this question, I guess if I've understood what you said here today, you have argued that an evaluation of authorization and consistency are made with respect to NAFTA law and not made with respect to domestic law, the latter of which is a matter of fact; is that correct?

MR. RIVKIN: That's correct.

ARBITRATOR JANOW: Okay.

MR. RIVKIN: Because it has to be consistent with the object and purpose of the Treaty itself.

ARBITRATOR JANOW: Okay. So, thus, a matter of theory can be consistent and authorized under domestic law, but nevertheless be inconsistent for purposes of NAFTA?

MR. RIVKIN: Exactly.

11:26:57 ARBITRATOR JANOW: Okay, thank you.

MR. RIVKIN: Of course it's not an unusual situation where a State has its own practice which is legal under its own law but which violates its treaty obligations to some other country.

ARBITRATOR JANOW: But I guess my final question is: In coming to a view on this question, does the Treaty interpreter not have a requirement to look into the content of the measures in coming to a view? In other words, in coming to an evaluation, you are not just looking at the--for example, if the Accord Acts permit the issuance of Guidelines, for example, if we look at the facts of this case, but you're looking at the content of the measures at issue in their totality; is that correct?

MR. RIVKIN: Yes, that's correct. You have to look at what the pre-existing legal regime was before the Guidelines and what the Guidelines imposed on us. So, you would look at the content of the measures both before and after the Guidelines.

ARBITRATOR JANOW: Okay. Thank you.

MR. RIVKIN: Thank you.

11:28:04 Sophie.

ARBITRATOR SANDS: I am very grateful for you to putting in the French text, which I was wasn't aware of, and just say to my good friend Arbitrator Janow, I think it's just an expression of a different legal culture. In my legal culture, you do interrupt, and I, of course, have appeared as counsel appeared in many cases where I have been interrupted extensively. So, it is an explanation.

But on the French text, the 1108(1)(c) refers--may be sensible--have you got it in front of you? I am not--

MR. RIVKIN: Which slide is it, again?

ARBITRATOR SANDS: 67.

I'm trying to get conceptual clarification here on what the situation is.

MR. RIVKIN: Okay. I have it now.

ARBITRATOR SANDS: You've got it?

MR. RIVKIN: Yes.

ARBITRATOR SANDS: 1108(1)(c) deals with the situation of amendment, and in there it appears to be explicitly stated that to amend--that's why it's an

11:29:13 apparent measure--you cannot "réduire la conformité."

MR. RIVKIN: Oui.

ARBITRATOR SANDS: Mercí.

Annex I, Section 2(f) deals with subordinate measures. That does not, on its face, say anything about "réduire la conformité," but it does use the word "conformité."

Am I right to understand is that your argument is that we should read into Annex I, Section 2(f) the words ""réduire la conformité" to make it consistent with 1108(1)(c)?

MR. RIVKIN: Well, I have said that in order to interpret the headnote to Annex I in a manner which is consistent with the object and purpose of the terms of the Treaty, the fact that this is a reservation, the fact that it is an exception to the otherwise strong standards of Article 1106, you have to interpret the annex in a narrow manner that is consistent with that object and purpose.

And so, when the Parties stated that the subordinate measure had to be in conformity with, it had to be--it had to mean that they were--did not want

11:30:29 a subordinate measure to be open up a broader exception. It had to mean--consistent with in the English language, "conformément" in the French language. It had to mean they could not decrease the conformity.

So, I think the fact that Article--and as we also said, you couldn't--you can't interpret the statute, the Treaty, in a way that would allow Canada to adopt a subordinate measure that would open a hole in a manner they couldn't do through an amendment. So, I think all of that fits together, so it's not surprising that Canada, in drafting this itself, found that--used the same word.

ARBITRATOR SANDS: I can see that.

Bart would like to something else, if he may.

PRESIDENT van HOUTTE: We should move on.

ARBITRATOR SANDS: Again, I'm just trying to get clarification on this.

So, my follow-up with you is, just putting myself in the minds of the drafters of the three States, could they have had any policy reason for wanting to apply a different approach to an amendment

11:31:39 of a measure as opposed to the adoption of a new subordinate measure? That's my last question.

MR. RIVKIN: My short answer is, we have one of Parties here, and they haven't presented any, and it's their burden to prove this exception, and certainly they haven't presented anything different than the obvious plain meaning of the words and the object and purpose of the Treaty.

My friend Bart is desperately wanting to add something.

MR. LEGUM: I would simply note that the whole purpose of having a measure-by-measure annex is transparency. The three Parties know what the measures are that are nonconforming with the Treaty. So, the basis for 2(f) in this Interpretive Note is we know what the measure is. We know what its nonconforming aspects are. And a subordinate measure, if it is going to be covered, has to be consistent with that measure, which has to mean, in this context, that it can't be inconsistent with it in the sense of decreasing the conformity of the situation that existed beforehand.

11:32:56 ARBITRATOR JANOW: Could I say one more thing, and let me just say for the record that I have less deference during the interrogatories than in closing so you have shown a great deal of deference in that phase.

MR. RIVKIN: It's always good to learn the Arbitrators' philosophies, particularly at end of the case.

ARBITRATOR JANOW: To use a vernacular, which is not in this text--I mean, in trade terms, one might think about this in terms of an annex reflecting a standstill with respect to the scope of the measure that is subject to the reservation. Is that sort of philosophically what you're arguing?

I would suggest, Mr. Rivkin, that there is this notion of nothing that is additional or more burdensome is a very wide ambit that you are proposing, and that the notion that authorized subordinate measure could not impose any additional burdens or any additional characteristics. Is there some foundation for that characterization?

MR. RIVKIN: Well, I think it is all of the

11:34:14 grounds that we have stated that Article 1106 states very important trade benefits that the NAFTA is designed to create. Article 1108 creates some limited exceptions to it, and it provides that the Parties can identify those exceptions, those nonconforming aspects that it wishes to continue after 1994 in a very specific way the measure-by-measure process that Bart just mentioned.

And then, it allows the parties to list subordinate measures, and, under Canada's interpretation, that future measures that are adopted maintained under the nonconforming speaks of those measure, and it talks about the description of the measure as being important. So, again it's not--Mexico listed the Mexican Constitution. It can't be that any anything adopted pursuant to the "authority of" or "consistent with" Mexican Constitution is therefore allowed under the NAFTA. It has to be viewed with that interpretation.

It was meant to--you use the word "standstill". In a nonlegal way, I would call it a freeze. It was designed to force the Parties to

identify those nonconforming measures that they wished to accept from the otherwise very important terms of the NAFTA, and to provide a very limited basis--for example, to adopt future Benefits Plans under Article 45(c(3)--under Article 45(c)(3), rather, of the Accord Acts, that Canada needed to be able to adopt those future measures in order to implement the terms of the Benefits Plans' exception that was agreed to.

ARBITRATOR JANOW: There are some novel issues here, so I appreciate this additional time.

MR. RIVKIN: Thank you.

PRESIDENT van HOUTTE: Let's say, finally, I will also have something which is on my mind already for some time.

On your Slide 76, you indicated that what you called reasonableness is a matter of Canadian administrative law, and consistency is a matter of NAFTA.

Now, to which extent, if I may speak about from my EU perspective is proportionality also an element of check under NAFTA. Say, when you can reach

your target in two different ways and--are you obliged under NAFTA to take the most--the way which is least burdensome/

MR. RIVKIN: First of all, I'm not--Canadian law, obviously, has its own view of consistency, but the view of consistency under Canadian you is based on the stronger standard of reasonableness, what's reasonable for this agency to adopt that under the general terms of its authority. What we have said is that the meaning of consistency under the NAFTA has to be approached at a different way because it has to be approached in a manner that is consistent with the object and purpose of that agreement, which is to eliminate trade barriers.

And I guess I would--

PRESIDENT van HOUTTE: When you can reach the same purpose in two different ways.

MR. RIVKIN: I think the standard that the NAFTA has put forward is one of "under the authority of" and "consistent with" and I think you have to look at each of those two different ways and see if it meets that standard.

I don't think so, and Bart can tell me if he has a different view--I don't think that the NAFTA requires one when to choose the least burdensome of the two, if both otherwise meet the standard under NAFTA.

PRESIDENT van HOUTTE: Thank you.

MR. LEGUM: I think proportionality does have a role to play. Obviously, if the measure is very similar but maybe slightly different from the measures that is listed, that's one thing. If there are, however, very substantial differences then it's something else.

MR. RIVKIN: Yeah, I took the word "proportionality" means something difference, which is, as you have said, you have two different ways. You have to adopt the least burdensome. I don't think the NAFTA sets that up as a standard. The standard in the annex is "authority of" and "consistent with," and so you would have to look at each of those two measures and decide whether it meets that standard. Okay?

PRESIDENT van HOUTTE: Thank you.

(Brief recess.)

PRESIDENT van HOUTTE: Okay. Then, Ms. Lamb, you have the floor.

MS. LAMB: Damages.

Can we close the session for damages to be consistent with...

PRESIDENT van HOUTTE: Closed.

MS. LAMB: Close the session. Thank you.

THE SECRETARY: Please close the session.

(End of open session. Confidential business information redacted.)

CONFIDENTIAL SESSION

MS. LAMB: Canada's case is that if the Guidelines are found to violate the NAFTA, and Mr. Rivkin has demonstrated convincingly that they do, Canada's case is that Claimant should receive no compensation to account for the possibility that they might in the future derive some benefit from this mandated and unnecessary spending. Canada has the burden on the benefits issue. It admits that it has failed to quantify the supposed benefits, notwithstanding that the Guidelines credit, the SR&ED credit, the royalty credit are all within its control.

This twisted logic distorts commonly accepted principles of and policies and appealing compensation, Canada's overall approach to compensation ignores, in our view, the applicable standards of proof, ignores the burden of proof on that issue, and it allows Canada to benefit from its own creation and the potential benefits that it could but will not confirm.

That approach does not provide full compensation to the Chorzow standard. It disregards the continuous breach of Canada's NAFTA obligations,

and it ignores the damages resulting from it. It also imposes on the Claimants the risk and uncertainty created by the Guidelines and the burden of seeking periodic additional relief that this will inevitably perpetuate.

It doesn't have to be that way, and it shouldn't be that way. The Tribunal can award compensation for a continuing treaty violation. Treaty violations generally result in one of the following three outcomes: Expropriation of the investment, in which case the Investor will be looking for Fair Market Value; loss of contractual benefits, in which case the Investor will likely claim for actual losses and lost profits; and investment impairment, the Investor continues to own and enjoy the asset, but the asset is impaired by the illegal measure. It renders it less valuable, more expensive to operate and so on.

And that impairment scenario can be temporary, or it can be long term, and this is a long-term case. Examples of temporary impairment include the Cargill case, that Mr. Rivkin has referred

you to, and that's a case in which a NAFTA Tribunal awarded very substantial damages including for lost profits on a but-for scenario. And I want to emphasize that because lost profits in a but-for scenario requires a Tribunal to recreate a parallel hypothetical universe. It's a hypothetical marketplace in which the Claimant would have operated but for the treaty violation. It involves the very same assumptions and projections that we are asking you to make. NAFTA Tribunals have already blazed that path, but this will be the first continuing treaty violation NAFTA claim, so you can consider yourself pioneers.

So, as I said, to date, no NAFTA Tribunal has yet had to quantify the effects of a continuing treaty violation, and by that I mean one that continues to produce its effects at the date of the claim, continues to produce its effects at the hearing, will continue to produce its effects as you write your award, and it will continue for many years into the future.

And you've now heard from the Board. There

is no suggestion that the Guidelines are going away. On the contrary, you've heard any number of purported justifications for keeping them. Using standards that are clearly established in international law, you can award damages in respect of this continuing violation. So, let me very briefly outline the legal road map.

By way of introduction, and to finally, I hope, dispose of the Canadian myth that this Tribunal cannot address future losses, I just want to draw your attention to some text in an academic writing on investment treaty damages, and what it says is: "In cases involving a continuing breach by the Respondent, where Claimants' losses unfold over time, such cases involve impairment to rather than destruction of an investment. There is a choice between compensating for future losses to be incurred as a result of the continuing breach or rewarding only past losses, and the expectation that the Respondent will cease its wrongful conduct."

So, pausing there, there it is, in black and white, you have a choice as to how to approach compensation. There is no doctrinal or other

11:55:40 principled objection to compensate for future losses as Canada would have you believe.

There is also a reference in the final paragraph there on the slide to LG&E and Argentina. Now, I'm not going to walk you through all 17 pages of that award, but I would encourage you revisit it in your deliberations and, in fact, it appears in Canada's authorities under RA-25.

But in outline on liability, the Tribunal in LG&E found that it was a continuing treaty violation case. It referenced also the ILC commentary. If you look at Paragraphs 85 and 88 of the Award, they talk about the maintenance in effect of legislative provisions incompatible with treaty obligations. That is a continuing violation.

Point Number 2. In the early passages of the Award, the Tribunal confirms its intention to approach its mandate from first principles, namely the Chorzów Factory standard. That is exactly the approach that we endorse for this case.

Third point, turning to remedies, then, the remedies requested by the Investor. Well, firstly, it

11:57:01 invites--it suggested to the Tribunal that the Tribunal invite the Respondent State to withdraw the measure. The Tribunal viewed that as futile in the circumstances. And, of course, that is a choice that is not available to a NAFTA tribunal.

So, what was the alternative remedy? The Claimant asked for historical lost dividends, damages from up until the date--damages up to the date of the Award, and then the present value of lost dividends in the future, therefore as long as the measure that would likely infect the investment.

So what did the Tribunal say with regard to those future losses?

Well, firstly, there was no suggestion at all of a doctrinal or principled impediment to that claim. Instead, the Tribunal referred to the reasonable certainty standard. I'll ask you to look at Paragraph 89 in your own time and note the citations there, including: "Lost future profits have been awarded when an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be

11:58:20 compensable." So, that was the standard.

Final point, on the facts, Paragraphs 90 and 91. On the fact, no such certainty. No certainty with regard to future lost dividends. Why not? The Investor continued to hold its stake in the investment. So, as a factual matter, it continued to receive dividends and, therefore--and I'm quoting now the Tribunal--a situation of double recovery could arise, unduly enriching the Claimants.

So, on the facts, no reasonable certainty as to the likelihood of loss because the Claimant still held its investment, still collected dividends, could not prove with certainty that it would not receive dividends in the future. On the facts. And our case is very different to that.

But before I very briefly summarize the evidence which demonstrates why that is the case, I just want to address the practical application of the reasonable certainty standard, and certainly we've inferred from your questions to us that this is an issue that interests you in particular.

Of course this is not the first and won't be

11:59:40 the last Tribunal to have that grapple with some sort of practical articulation and implementation of the reasonable certainty standard, but that is neither a reason nor an excuse to avoid the challenge, particularly when the difficulties arise from the very illegal measure that Canada has put in place.

Now, earlier this year, the Rumeli Annulment Committee expressed its sentiments on this very issue in the following terms. Now, it first began with the Chorzow principle of full reparation, and then it said this: "It is necessary at this stage to make some general observations about the nature of the adjudicatory task confronting an arbitral tribunal, when it is determining the quantum of damages to award a claimant which has succeeded on liability."

Describes the full reparation test. It refers to the Chorzow Factory standard.

It is quite another thing, however, to translate that test into actuality in the circumstances of a particular case, but that is because the valuation of expropriated shares--because it was an expropriation case--necessarily involves

consideration of the future profitability of a business, a matter which is inherently uncertain. The fact that the exercise is inherently uncertain is not a reason for the Tribunal to decline to award damages.

And you'll recall, I referred in my opening to the Himpurna Tribunal, who of course stressed that this is precisely the exercise that commercial actors embark upon each and every day.

And I just, reminding the Tribunal, if I may, on the policy behind that standard, again another cite from my opening, an absolute certainty standard, a higher burden, that requirement would place an almost insurmountable burden on the Claimant while benefiting the Party who caused the damage and preventing the Claimant from being able concretely to prove its loss.

So, just a few words on the evidence. Where does the analysis begin? I suggest refreshing our memory on timing of damages, where are we drawing the line in the sand on losses based on historical known actual data. I suggest that that can be done in 2010, and you already have the numbers and percentages that relate to those years.

The starting point must be that there cannot be any serious doubt as to the fact that the Guidelines have adversely impacted the Claimants' investment. That they will have to spend more money than they otherwise would have is reasonably clear, if not absolutely clear.

So, we then turn to the Guidelines because they--that is where we find the formula. And really this is where the irony begins because if you find against Canada on liability, then the very measure that you've adjudged to be illegal will serve as the starting point in damages. It's where we find the ingredient. It's how we try and arrive at the number.

So, as a policy matter, what I'm suggesting to you is that any difficulty and uncertainty that you perceive in applying that formula to arrive at a damages number will be caused by that measure, and so those difficulties and uncertainties should be resolved in favor of the Claimants.

Ordinary course spending, so the money that the Claimants would have spent on R&D and E&T in the absence of the Guidelines Mr. Rosen's number is, a) statistically correct; and, b) conservative when compared to actual spending over an even longer period of time.

There is a fundamental misunderstanding of ordinary course in future years on Canada's part. R&D spend was already planned. Claimants are not evading their obligations, as Canada puts it. This morning, I showed Mr. Walck Exhibit CE-233. You saw there a budget depicting [redacted] planned expenditure for this year for next year. It depicted plans already in the pipeline, and it distinguished them very clearly from future work, from future R&D. That point is fundamentally misunderstood by Canada.

Production. Now, with production, the risk actually is with Claimants. And why do I say that? Because the Board's current estimate of reserves is actually higher than the number we use in our model. So using our model, if the Board is right and you arrive at a damages figure today, we will be undercompensated. The risk is with us.

Production could be plus or minus in any given year. You've heard Mr. Phelan's evidence on

that. It doesn't materially impact reserves, may have some nominal impact as a timing matter.

Price. Forecast assumption, projection, scenario, you say "to-may-to"; I say "to-mah-to." I think you know where I'm going with this. This is a nonissue.

Tribunals do rely on price projections. Mr. Davies admitted that BP repeatedly bought the ESAI forecast because it was among the best available information. Ms. Emerson is an expert in her field, and her projections are conservative by every measure in the record, including Government forecasts and private forecasts. There was attempt to challenge her with decade-old forecasts. An interesting point, of course, is that each and every one of those forecasts had underestimated the future price path.

Mr. Rosen summarized, though, the position in reality, and what he said in his cross-examination was this: Every valuation of damages that involves any kind of future-looking information suffers from the exact same uncertainty. We value these damages every day. We value businesses on this basis every single

12:06:53 day. Valuation occurs at a point in time. It's not a crystal ball that says with certainty "I know what the future price of this business is going to be. I know what the price of a commodity is going to be. I know what the price of anything is going to be." It can't and it's not meant to.

What we are meant to do and what markets around the world do every day is based on a single valuation date, make a decision on value. That's what Mr. Walck does when he values businesses and values damages that have any kind of future component. And it's what I do. It's what our whole profession does. It's what commodity markets do. It's what the NYMEX does. It's what the stock market does. It's what we all do.

And then Ms. Emerson, in answer to a question from Professor van Houtte. Professor, you asked her about different shades of certainty, and you said to her: Are your forecasts reasonably certain? And she said to you, convincingly: In my opinion they are. I'm very comfortable. I have a very high confidence in my forecasts, again especially in the period

12:08:06 covered by the damages, and I wouldn't be in business if I hadn't developed an approach to price forecasting that people pay me for. Those people, you will recall, include BP.

Exchange rate. Well, we now know that the Canadian dollar is a petro buck. It moves in lock-step with the price of crude. So this exaggerated suggestion of compound sensitivity really is flawed. As Mr. Rosen said in his cross-examination, if you try to count them as separate risks, you'd be double counting the risk.

Stat Canada factor, the benchmark. What the evidence over the last few days has shown quite convincingly is that, if anything, this number is going to get higher, higher than the number we use in the model. Why? Because it's going to start to acknowledge the significant additional amounts of R&D to be undertaken not just by the Claimants but by all other Project Proponents at these and other developments.

Potential benefits. As I said in my outline at the beginning, Canada has the burden. It hasn't

12:09:29 discharged the burdened. It cannot hope to. Canada's Expert has candidly accepted to you that he cannot discharge the burden.

Yesterday, Mr. Way, for the Board, would not even confirm that all expenditures undertake on pre-approved R&D projects will be eligible for Guidelines credit.

On SR&ED credit, well, our position is that there should be no discount. We don't even know if the Work Plan spend will occur in the form that the Work Plan contemplates or any form. As Mr. Phelan explained, it could just involve a check being written to the Board in 2015, or some part of a check. And, of course, Claimants would derive no benefit from that eventuality. Again, Canada could confirm the SR&ED benefits. It hasn't. It won't. But despite that, if you nevertheless do want to make a deduction, then it needs to be based on what we actually know about the CRA's treatment of R&D expenditures submitted to it, not Mr. Walck's skewed figures that don't actually reflect the expenditures submitted by the Claimants to the CRA and CRA's actual approval or rejection of

12:10:56 those claims. Mr. Walck's figure of [redacted] bears no relation to that experience. In fact, if you use the data which actually correlates to real experience, the discount will be something more like[redacted]

Royalties. Well, Canada hasn't even attempted to put a figure on this potential benefit. The Province won't confirm it, and critically we have no experience at all as yet of how the Province deals with expenditures that have been made since the Guidelines came into force. There is no evidence on which the Tribunal can reliably make any form of sort of informed estimation as to how the Province will likely treat royalty benefits.

Operational benefits. Mr. Walck accepted that he was not in a position to assess and quantify operational benefits. And of course, he hasn't. He hasn't put a value on them.

And interestingly, Mr. Noreng, who you didn't hear from this week, whose experience was called upon by Canada to analyze this work, to analyze the work in the Work Plans, he doesn't put a number on it. He doesn't quantify it. He's the person with the

12:12:29 expertise.

On the subject of operational--potential operational benefits, I would want to remind you of the words of the Myers Tribunal that I referenced in my opening submissions, because they endorsed this idea of a rationale and realistic test for damages. And what they said was that on the one hand a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof and to be awarded, the sums in question must neither be speculative nor too remote. But, on the other hand, fairness to the Claimant requires that the court or tribunal should approach the task both realistically and rationally.

Now, giving emphasis and credibility to hypothetical and remote possibilities that have not actually been quantified by the Party seeking to make that deduction does not meet the rational and realistic test, in my opinion.

Discount rate. Mr. Rosen's rationale for a low risk-free rate is clear and it's fair. On any view of the world, the discount rate is not

12:13:57 15 percent, as Mr. Walck has suggested. Mr. Rosen demonstrated to you quite convincingly in his direct presentation yesterday that Mr. Walck had made some fundamental technical errors in computing the discount rate that he says is based on a return on equity.

Now, Mr. Rosen said in direct that actually the market places that risk at nearer to 7 percent, but even that would be penal because it doesn't recognize that the uncertainty is created by the illegal measure. It also doesn't recognize that Claimants still have their assets. They still have the risks inherent in those assets.

The risk is greatly exaggerated by Mr. Walck. In this case, Claimants' losses arise in connection with long-term, mature activities. We know we are in our 13th year of production at Hibernia. We know that the Board estimates reserves at 1.4 billion barrels. In seeking to characterize the project's future fortunes as speculative, Canada's damages Expert invites the Tribunal to accept that the project participants were prepared to make enormous capital investments on the basis of wholly speculative

12:15:30 venture, and that the Canadian Government was willing to do likewise. That is not a credible assessment.

In conclusion, the Claimants are asking for compensation through 2023, but most will be realized by 2017, seven years from now. We believe that the Tribunal is well positioned, has authority and precedent to award full compensation in one Award. We have begun to give very careful consideration to the Tribunal's suggestion of a formula to cover the period post 2010. But that involves recognition of the limitations inherent in the NAFTA, on the power of the Tribunal to order remedies. It involves recognition of the three-year time bar imposed by the NAFTA so far as claims are concerned. It involves recognition of the two-year time bar in Canada on enforcement of Arbitral Awards.

Most significantly, it involves consideration of how efficiently this can be done in a way that genuinely reduces the potential for further disputes on these very same issues.

You have the tools to render an Award of full compensation for all losses. You can be the first

12:16:56 NAFTA Tribunal to employ those tools in a continuing violation context, and that is the right outcome for this case.

Thank you.

PRESIDENT van HOUTTE: Thank you, Ms. Lamb.

You know that the Tribunal would be interested in getting also precedence of other instances, internationally, if they exist, domestic from the Member States, the Parties; where there is, as you say the continuous violation and where damages have to be granted at the moment for future acts.

Do you intend to submit some of those cases to the Tribunal?

MS. LAMB: We do.

PRESIDENT van HOUTTE: You do. And of course the cases can--

MR. RIVKIN: But not today.

MS. LAMB: Not today.

PRESIDENT van HOUTTE: No, no, no. But the cases can be related to many different hypotheses. You know it's more the problem--how the problem has been solved by different courts.

12:18:05 MS. LAMB: We understand the context in which the question has been put--absolutely.
MR. RIVKIN: We'll be happy to give you some jury awards, if you want.
PRESIDENT van HOUTTE: Sorry?
MS. LAMB: Some jury awards from the United States I think you'll find very informative.
PRESIDENT van HOUTTE: Well, well, whatever, whatever. Maybe not only from United States but also from Canada. Okay, good.
ARBITRATOR JANOW: It would dwarf the books we have.
PRESIDENT van HOUTTE: Yeah, yeah. Concise information.
MS. LAMB: That's understood.
PRESIDENT van HOUTTE: Yes, concise information.
Do you have questions?
No.
MS. LAMB: Thank you.
PRESIDENT van HOUTTE: Thank you very much.
45 minutes would be a different break?

12:18:51 MR. GALLUS: Canada would of course appreciate maybe a little bit longer than 45 minutes if the Tribunal would--
PRESIDENT van HOUTTE: An hour?
MR. GALLUS: If it's possible to take an hour-and-a-half? We would like to take that but...
MR. RIVKIN: The original arrangement was for getting--trying to get the most out of the morning--
PRESIDENT van HOUTTE: I know that--
MR. RIVKIN: --taking the time to prepare his closing.
PRESIDENT van HOUTTE: Yeah.
(Discussion off microphone.)
MR. RIVKIN: And we do want to give you time to deliberate.
PRESIDENT van HOUTTE: That was our concern. Let's take 45 minutes.
MR. GALLUS: Could we perhaps compromise and take an hour.
PRESIDENT van HOUTTE: Well, one hour, one hour.
MR. GALLUS: Thank you.

12:19:26 PRESIDENT van HOUTTE: Okay? Because originally, like Mr. Rivkin said, there was no preparation time foreseen. Now you get one hour. Maybe your dinner will be short, but anyway, that's part of the game.
MR. GALLUS: We appreciate the time.
PRESIDENT van HOUTTE: Thank you.
(Whereupon, at 12:19 p.m., the hearing was adjourned until 1:20 p.m., the same day.)

AFTERNOON SESSION
THE SECRETARY: Mr. Gallus, I assume we are opening this session up?
MR. GALLUS: We are open, yes.
THE SECRETARY: Please open the session.
(End of confidential session.)

OPEN SESSION

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MR. GALLUS: I think it is helpful, Members of the Tribunal, if we start Canada's closing at the same point that the Claimants started their closing, and that's with one of the starting slides that they distributed to you. I think you will find is the second slide, and I encourage you to pull it up in front of you. It's actually Slide Number 3 in the slides that the Claimants distributed this morning.

I'm sorry, it's in the Claimants' bundle of slides from this morning. So it's the big blue bundle. Number three.

And you'll see there, there is the Claimants' alleged projected ordinary course spending heading into the future. Canada will address whether or not this is the Claimants' ordinary course expenditures heading into the future later on in its closing, but I think this slide illustrates well for the Tribunal where the Guidelines begin, and that was the decline in expenditures in the spring of 2001.

The Claimants again referred you to that

decline in expenditures, and you will find that in Slide 32 in their bundle of slides, and again I encourage you to turn to that slide.

Slide.

You see there on the left-hand side of that slide, we have the decline in R&D expenditures at Hibernia, and on the right-hand side we have the declining expenditures at Terra Nova. I should say these figures are taken from the Claimants'--or I should say from the Operator's own benefits reports submitted to the Board in the spring of 2001.

The Claimant said this morning that Canada had misrepresented the spending in 1997, said that Canada hadn't mentioned that revenue in 1997 for Hibernia was very small, and that was why the percentage of revenue was high. Canada didn't intend to mislead the Tribunal, and we apologize if we did. But the slides do tell an important story, and that is from 1997 through to 2000 and then projected into the future, the Operators were decreasing their expenditures on research and development. You'll see in Hibernia for 1997, expenditures were [redacted]

in 1998, they fell to [redacted]; in 1999 they fell again; in 2000, they fell again to [redacted]. By that time they only represented [redacted] of the revenue that the Claimants were--the Operators were making in that year.

The Terra Nova expenditures illustrates the same decline. Again, in 1997, you see expenditures of [redacted] Yet by 2001, you see that the Operators are projecting that their expenditures going into the future will be around [redacted] This is in the spring of 2001. And it contrasts sharply with the slide with which the Claimants began. It contrasts sharply with its projected expenditures heading into the future.

When the Board saw these declining expenditures, it realized that d the Operators were not fulfilling their obligation in the Accord Implementation Acts. Primarily they were not fulfilling their obligation in Section 45(3)(c), that the Operators expend on research and development in the Province of Newfoundland and Labrador.

Since the Operators Benefits Plans must

ensure those expenditure, by the fact that the Operators weren't expending on research and development and education and training, they were necessarily not fulfilling their obligations in the Benefits Plans, and we will refer to specific parts of the Benefits Plans later on which bear this out. But it is important to bear in mind that under Section 45(3)(c), Benefits Plans shall ensure expenditures on research and development and education and training. And through these declining expenditures, the Operators were not only not fulfilling their obligation in the Accord Implementation Act, but were also were not fulfilling their obligation in the Hibernia and Terra Nova Benefits Plans.

The Operators were also not satisfying obligations in the Atlantic Accord, and perhaps if we could pull up Section 55 of the Atlantic Accord--thanks, Thomas--CA-10, if we just highlight Section 55, you will see there that "Benefits Plans submitted pursuant to Clause 51 shall provide for expenditures to be made on research and development, and education and training, to be conducted within the

Province."

And it also says, "Expenditures made by Companies Active in the offshore pursuant to this requirement shall be approved by the Board."

The Claimants said this morning that this was irrelevant, that the Atlantic Accord has no implication for the Operators.

Thomas, if we could pull up the Atlantic Accord Implementation Act, CA-11, and specifically Section 17(1).

Section 17(1) talks of the functions of the Board, and it says: "The Board shall perform such duties and functions as are conferred or imposed on the Board by or pursuant to the Atlantic Accord or this Act." The Board shall perform such duties and functions as are conferred or imposed on the Board by the Atlantic Accord.

So let's go back to the Atlantic Accord. Let's go back to CA-10, and go back to Section 55, and again look at that second sentence: "Expenditures made by Companies Active in the offshore pursuant to this requirement shall be approved by the Board." It

is a function of the Board, it's something they're required to do under the Atlantic Accord, and it's something they are required to do under the Atlantic Accord Implementation Act through Section 17(1). Indeed, so much was recognized by the Canadian courts, and I encourage you when you read the decisions of the Canadian courts, because I suspect after extensive discussion we had of them earlier in this week and the further discussion we'll have of those decisions this afternoon, that you will be reading those decisions. When you do read those decisions, look out for the court's reference Section 55, and when they acknowledge this did impose an obligation on the Board to approve expenditures on research and development and education and training.

So, when the Board saw these declining expenditures in the spring of 2001, it realized that the Operators were not fulfilling their obligation in both the Atlantic Accord Implementation Act and the Atlantic Accord. The Board decided to intervene and issued the Guidelines which are the subject of this arbitration. Those Guidelines simply enforce the

obligation that the Operators had to expend on research and development and education and training in the Province. So much has been borne out by the evidence that you have heard this week. Canada will refer to that evidence as it addresses the individual claims for breach of Article 1106 and Article 1105. So, at this point I would like to turn to my colleague Mr. Luz who will address the argument that the Guidelines breach Article 1105.

Excuse me, I should correct myself. Indeed, Mr. Luz will address the argument that the Guidelines breach Article 1106.

MR. LUZ: I'll be addressing 1105 later, but I think I'll leave that for a few moments.

I would like to thank the Tribunal for your attention and patience and hard work in these proceedings, and I must say it's an honor for me to appear before you.

I will be addressing the question of whether or not the Guidelines violate Article 1106(1)(c) in the first place. The Claimants have studiously avoided talking about the specifics in the context of

that provision. They know that the devil is in the details.

This Tribunal is faced with a precedent setting task not only with respect to the meaning and context of 1106(1)(c), but as to whether Article 1106(5) remains the vital provision that the NAFTA Parties intended it to be or whether it is rendered without meaning, as the Claimants hope it will be.

Canada thinks it's critical to bring some law to bear on this issue, and the question of whether a requirement to carry out research and development or to provide education and training in a particular state is prohibited under 1106(1)(c) deserves more attention than the dismissive approach that the Claimants have given to it.

Now, the Parties have exchanged pointed written pleadings on this issue, and there are some areas of agreement. As Mr. Rivkin noted, Canada and Claimants agree that these two obligations, which are embodied in Section 45(3)(c) of the Accord Act, are requirements, as the term is used in the chapeau of Article 1106(1). The Parties agree that these two

obligations are in connection with the conduct or operation of the investment, also as those terms are used in the chapeau.

There's also some limited agreement as to whether 1106(1) is a closed list and if it contains exhaustive enumeration of the types of performance requirements that the NAFTA Parties agreed to exclude. But, of course, this agreement is qualified by the Claimants' contention that carrying out research and development and providing education and training in the Province fits into this closed list.

And there's also apparent agreement that if an impugned measure allows the option of expenditures on nonprohibited activities, then there is no compulsion to make a prohibited expenditure and, hence, no breach of Article 1106(1). This was a proposition put forward in Canada's Counter-Memorial, and the Claimants have never really addressed it one way or the other and they haven't raised any disagreement. So I presume that the intention is they will overlook this critical flaw in their argument.

But it is at this juncture where the

respective interpretations and applications of this provision diverge, and they diverge substantially. At its heart, Canada's ordinary meaning interpretation of 1106(1)(c)is faithful to its context and to its object and purpose. This NAFTA provision is intended to prohibit the mandatory purchase, use, or preference for domestic goods and services. The three NAFTA Parties agreed that this should not be allowed.

Six other types of performance requirements were also precluded. But the NAFTA Parties stopped there. Other types of performance requirements of which there are many different varieties were left off of NAFTA's closed list. A requirement to carry out research and development in the host state territory may have found its way into many investment treaties that the United States signed with other countries immediately following the NAFTA, but it cannot be retrospectively shoehorned into NAFTA's closed list.

But, on the other hand, the heart of the Claimants' argument really is a classic fallacy of logic. Research and development and education and training are performance requirements. NAFTA

prohibits performance requirements; therefore, research and development and education and training are prohibited performance requirements. The reasoning is flawed; and as I will explain, the ordinary meaning and object and purpose of these three different types of performance requirements are different, and the intention of 1106(5) was to ensure that only certain types of performance requirements were prohibited. Anything that was not prohibited by the NAFTA is permitted. I will present this argument in three broad parts.

First, I will explain why Article 1106(5) provides the critical interpretive guidance to 1106(1), and I will then discuss the specifics of 1106(1)(c) as well as its context and relevant treaties in pari materiae, to guide the interpretation of the Tribunal. And then I will briefly address the issue of the negative inference that the Claimants are seeking from the Annex I Reservation.

So, I'd would like to start my presentation with the text of 1106(5).

Thomas, you could pull that up.

And it's important to focus on the wording here. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

Now, the Tribunal may wonder why it's important to start the interpretive process with a provision other than that which is alleged to have been violated and we'll, of course, focus on 1106(1), but it's critical to note that Article 1106(5) is essential for explaining why the--what I will call the incidental effects hypothesis of the Claimants is exactly the type of argument that NAFTA Parties intended to foreclose.

And I think it's helpful to look back at some of the previous NAFTA cases that have had the opportunity to substantively look at 1106(1) and 1106(5).

The S.D. Myers case. We know as it's been quoted in our pleadings that the S.D. Myers case said although the Tribunal must review the substance of the measure, it cannot take into account any limitation or restrictions that do not fall squarely within the

requirements listed in 1106(1) and (3).

In S.D. Myers, the Claimants argued that Canada's export ban on hazardous waste forced the Investor to treat the waste using domestic services, in violation of 1106(1(c). Well, this is true. If you can't export the hazardous waste to the United States as the Investor had planned to do, then it's impossible to do anything other than use domestic waste treatment service, but the Tribunal still refused to find a violation of 1106(1)(c). Why? Because they recognized the important of 1106(5) and that the object and purpose of the two different types of requirements were distinct and could not be reconciled with 1106(5). The light of this is that the incidental effects are not sufficient to result in a violation of 1106(1)(c).

You will see the same thing in Pope & Talbot, and again this is the Tribunal's view of the importance of 1106(5), and I'll just read from the center of it: "Consequently, the ambit of these two Articles may not be broadened beyond their express terms. The enumeration of seven requirements in

1106(1) is limiting in each case."

In Pope & Talbot, the Claimants argued that Canada's implementation of the Softwood Lumber Agreement was tantamount to an impermissible export quota. The Tribunal found the export restraint regime in question undoubtedly deterred exports and made lumber exports economically undesirable above a certain level, but the Tribunal still refused to find a violation. There was no export requirement imposed upon the Investor. It didn't matter that the measure made it far more expensive and perhaps even undesirable to export above a certain level. The Investor still had the option to export what it wanted, even if it was cost prohibitive.

Again, they raised recognized that a measure which merely deterred the export of goods is not sufficient for a violation.

Merrill & Ring, a recent case that--a recent NAFTA case said the same thing with respect to 1106(5). It is mindful of the restricted scope of 1106(5) and that the performance requirements that are prohibited are limited to the specific matters

identified in Paragraphs 1 and 3. Pope & Talbot and S.D. Myers are convincing in this respect.

Again, in Merrill & Ring, the challenged measure required cutting, sorting, and scalings of logs in accordance with local laws and regulations. The Investor found it impossible to comply with this requirement without using domestic service providers because no foreign service providers would have realistically been to meet these requirements, but the Tribunal still found no violation of 1106(1)(c).

The Tribunal specifically noted that it was free--that the Investor was free to hire these services from whoever it wished. The fact that it was economically unfeasible to use foreign providers was not enough to shoehorn the provision back into 1106(1)C in light of 1106(5).

I should also mention that the--and again, like S.D. Myers, Pope & Talbot, the lesson from Merrill & Ring is that the incidental effects of a measure are not sufficient to find a violation.

I should also mention that in the most recent pleadings of the Claimants, they curiously suggest

that the case of Lamere (ph.) and Ukraine provides substantial support for their position. Clearly it does not. In that case, a performance requirement provision was similar to 1106(1)(c), although not exactly the same. The Investor and--the Investor argued that a requirement to broadcast 50 percent of its music had to be Ukrainian-produced music. And they argued that this was, de facto a compelled purchase of local goods and services. But like S.D. Myers, Pope & Talbot, Merrill & Ring, de facto the Investor had to purchase local goods and services because there was nowhere else to obtain Ukrainian, music, but the Tribunal still found there was no violation, and this is very important because Mr. Rivkin spoke quite a bit about the object and purpose, and the importance of object and purpose, object and purpose.

The Tribunal in that case recognized that the object and purpose of the measure in question was not the same as the performance requirement that was prohibited by the Treaty. So, again the incidental effects of the measure are sufficient to establish a

breach. So, even though Lamere is not a NAFTA Award, I think it illustrates Canada's point nicely.

To conclude on this point, to the Claimants, 1106(5) is a mere nuisance, it's afterthought that serves no real purpose. But 1106(5) plays a fundamental role in the interpretation of 1106(1), and it was intentionally inserted into the NAFTA for the purposes that Canada's arguing for today: That which is not specifically prohibited under the NAFTA is permitted.

So now that have--we are equipped with appropriate level of scrutiny that is mandated by 1106(5), let's go to the text of 1106(1)(c). We've seen it many times today, over the course of this week, and it's contrasted against the specific two performances--the two requirements that are set out in the legislation of the Accord Act. If you look at the specific wording of the legislation, expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province.

So, skepticism should arise immediately with

respect to the Claimants' arguments just simply on a facial comparison of the two types of performance requirements.

The Accord Act only says that expenditures shall be made. It doesn't say how they shall be made.

The expenditures shall be for research and development to be carried out in the Province. There is no direction as to who shall carry it out or how it shall be carried out--only that it be carried out in the Province.

Similarly, the other part of the Accord Act says for education and training to be provided in the Province. It doesn't say how it's to be provided or who it is to be provided, only that it be provided in the Province.

But in contrast, the ordinary meaning of 1106(1)(c) is that there must be a compelled and mandatory purchase, use or preference for domestic services. It only applies in situations when the Investor is forced to consumer a service from a domestic service provider. Without that compulsion, there can be no violation.

I think it's important to note, Mr. Rivkin mentioned today an argument that they referred to in their Reply that Canada for some reason they assumed at the beginning of the pleadings that R&D and E&T could not be a service. Canada never said that. In fact, much of their Reply really missed the point. That is not the issue. It's whether or not this particular performance requirement falls into the very limited list that the NAFTA Parties agreed to. And I can't quote from a legal expert, but I can quote from Mr. Fred Way, who himself yesterday under testimony, when posed with the question of Mr. Rivkin, said that in his mind, services are something that you purchase from someone else, not something that you do internally.

And the Claimants several times have tried to draw an analogy with the Canada FIRA case which occurred in the GATT context. In the FIRA decision, the challenged measure involved written undertakings by the Investor to purchase or give a preference to Canadian-produced goods from other parties. That was the object and purpose of the measure. Investors were

compelled to purchase or prefer goods made in Canada. It was mandatory. But in contrast, these types of performance requirements don't do the same thing.

Now, as I said before, Mr. Rivkin referred quite a bit this morning to the importance of object and purpose in context. But the Claimants have really ignored both of those elements with respect to 1106(1)(c) and the requirements at issue here.

As we noted in our Counter-Memorial, performance requirements are ultimately instruments of economic policy. They seek to achieve certain goals by imposing certain kinds of requirements on Investors as a condition for entry into operation in their country. So the object and purpose of 1106(1)(c), a domestic sourcing requirement, is to reduce imports, protect local industries against competing imports, and to provide a guaranteed market for domestic goods and services.

But in contrast, a requirement to carry out research and development and to provide education and training have very different objects and purposes--object and purpose.

01:51:29 The point is not to protect local industries against competing imports. Indeed, bringing in foreign expertise may be, in fact, the best way to carry out research and development or provide education and training. The object and purpose of a requirement to carry out research and development is to generate a training ground for scientists, engineers, and to promote the inevitable spillover of skills, knowledge, and technology into the country.

Education and training is an even broader role. By seeking to advance the knowledge and skills of the local populace, build on human capital, intellectual capital and human resources, especially in areas where it will build--and eventually bill entrepreneurial and value-added skill sets in technology, science and engineering. And these are all reflected in the reports that Canada relies on in its Counter-Memorial and Rejoinder that have been published by UNCTAD, WTO, the OECD. Those organizations recognize that there are very different effects, and states realize that there are very different effects. Some of them have been recognized

01:52:35 as not being desirable enough and they've been excluded from some treaties. Others, such as research and development and training, are usually left off international trade and investment treaties.

Again, context.

And I should note that the point is not to debate whether or not from an economic policy perspective these measures are good or bad. That's not the task of the Tribunal. The purpose is you look at the object and purpose of the measure and determine whether they fall specifically into the closed list. If not, 1106(5) demands that the claim be dismissed.

Now, the Claimants acknowledge that the Canada-U.S. Free Trade Agreement is context to the NAFTA, and I'll bring up one of the points that Canada made in its Counter-Memorial. The Free Trade Agreement, Article 1603, contained a list of four performance requirements, all four of which found their way into the NAFTA, including one that was the basis for 1106(1)(c). But Canada and the United States did not agree to include other types of performance requirements--product mandate, technology

01:53:43 transfer, and research and development--and this is reflected in Canada's synopsis of the Free Trade Agreement.

Now, the Claimants have taken issue with this in their pleadings, but they haven't produced any evidence to show that the United States had a different view. In fact, as you can see in Canada's Rejoinder at Paragraphs 28 and 29, the distinction between research and development requirements and local content requirements was recognized by the United States even before the NAFTA, during the TRIMs negotiations in various documents.

Now, you can just refer to our Rejoinder where Canada cites to those.

So, when it came time to negotiate the NAFTA, as I said, the four performance requirements that were in the FTA were transferred over to the NAFTA. Two others were included on the NAFTA list: Product mandate and technology transfer. You'll see those in NAFTA 1106(1)(f) and (g).

But what about research and development? Well, the Claimants seem to say that it's obvious that

01:54:49 it falls into 11--it obviously falls into 1106(1)(c), but, as we've said, the plain language of that provision doesn't make that obvious. UNCTAD, the WTO, to them it's not obvious. But most disturbing to the Claimants' case is that it must not have been obvious to at least one of Canada's NAFTA partners, the United States. And I will refer to the United States Model Bilateral Investment Treaty, Article 6. And I should remind the Tribunal that this was the model that came out only a few months after NAFTA came into force and only less than two years later after the performance requirements provisions of the NAFTA were negotiated.

The Claimants simply have no answer and no explanation to the simple question: If the language of 1106(1)(c) so obviously precludes requirements to carry out research and development in the host State, then why did the United States include an entirely separate provision on this specific issue to cover R&D requirements?

And again, this was not only--this exact model was incorporated into 13 different bilateral investment treaties by the United States.

01:56:07 Now, the Claimants argued at Paragraph 68 of their Reply that comparing 1106(1)(c) to Article CA of the U.S. Model BIT, and I quote: Renders it difficult to draw reliable conclusions based on a comparison of the two.

Actually, it's not that difficult. There is no substantive difference between the provisions; and if there were, the Claimants would surely have explained it in their written pleadings and they have not.

So, again, it cannot be that the United States inserted a redundant provision into its treaties. This goes against the rules of interpretation, and it also goes against the rule of interpretation that--not only to give all provisions an effect but also that a Treaty to two different Parties which use the same terms must have meant to give the same meaning to those terms. And it simply cannot be an oversight.

According to Professor Vandevelde, who wrote the seminal book on Bilateral Investment Treaty, and Canada refers to that source in our written pleadings,

01:57:07 the 94 Model BIT took a year to draft, and it was based on two previous versions. So it cannot be that this was just a case of forgetfulness.

And it simply cannot be because you can also look to other treaties that came after the NAFTA that reflected this string of recognition of the distinction between the performance requirements that started prior to--started in the Free Trade Agreement, came out on the other end of the NAFTA in the U.S. Model Bilateral Investment Treaty, and we can see that same evidence in other treaties: Canada and Japan-Korea BIT, for example, Article 9. You'll see that Article 9(1)(c) uses almost exactly the same language, almost word for word, as the NAFTA Article 1106(1)(c).

But, like the model--like the United States bilateral investment treaties, there is a separate provision dealing with research and development.

So, again, what the Claimants say is obvious is contradicted by the Treaty practice of the United States. The United States Treaty partners to all of its bilateral investment treaties as well as the five

01:58:21 Treaty partners to Japan, there are five other treaties that use that same language.

And I also point to the Multilateral Agreement on Investment. Now, of course, this is--it was never ratified and it's not a formal authority for the purposes of international law, but it confirms Canada's arguments perfectly.

There were two dozen negotiating Parties during the MAI, and again you can see the language of NAFTA 1106(1)(c) is included explicitly word for word in the draft MAI and yet a separate provision for research and development is explicitly inserted to recognize the distinction that they're not the same.

Now, I realize, and the Claimants made this point again this morning, that, well, they have no answer to this issue, and their really only answer is just don't look it because it doesn't conform to the Vienna Convention. But, in fact, if you accept Canada's ordinary meaning interpretation of 1106(1)(c), in its object and purpose, these treaties can be used under Article 32 of the Vienna Convention to confirm that ordinary meaning treaty. These are

01:59:32 treaties in pari materiae. And the fact that one of the NAFTA Parties made this--the Treaty practice of one of the NAFTA Parties confirms Canada's point. It simply cannot be ignored.

So again, to summarize the critical role of 1106(5) and 1106(1)(c) says that the requirements that are in the Accord Act are not the kind that are prohibited by 1106(1)(c), and 1106(5) means what is not prohibited is permitted.

Let's get straight to the factual debate. Can the Claimants fulfill their Guidelines obligations without purchasing, using or according a preference to domestic services? The answer is straightforward: Yes.

And there is an important part of context that I should remind the Tribunal of. We've spent most of the week--the Tribunal and the Claimants have spent most of their written pleadings focused solely on the research and development aspect of the measure in question. But as Mr. Smyth pointed out in his First Witness Statement, there is no requirement to spend a percentage on one part of--on education and

training or research and development. It is entirely up to the Claimants to decide how to allocate its required spending.

So, if they want, they can spend all the money they--all their money, their incremental spending on education and training. They don't have to do it all on research and development, nor do they have to do it by purchasing local goods and services.

Now, it seems that the Claimants have decided to carry out most of their obligations by performing research and development that will give them benefits. That's perhaps not surprising, but that is their choice.

An issue that has come up is whether or not internal research and development is prohibited. This is not the kind of transaction that is contemplated by 1106(1)(c). There is no reason to suggest that the Claimants cannot fulfill their Guidelines obligations by increasing their research and development capabilities that exist in-house in the province.

The Claimants have also pointed out that building an in-house R&D facility is one of the

things, but it should be maintained that doing this is one of the ways of carrying out R&D in the Province, but it's not prohibited by 1106(1)(c). And ExxonMobil has actually done this kind of thing in other parts of the world, so it's not like it's a crazy idea.

And if we could go to the next slide to show that ExxonMobil has established, for example, a research facility in Dubai that focuses on liquefied natural gas, and plans to spend 20 to 25 million over the first years of its existence.

It focuses on things that seem very familiar to the kinds of commitments in the Benefits Plans, focusing on issues of Qatar's coastal geography and issues that are specific to that region.

And it's particularly interesting to note that after the Guidelines came into effect, [redacted] It's not really at issue. The question is

whether they could do it, and they can do it.

With respect to the arguments that--and I don't want to focus all on research and development because, again, I think that's gotten a lot of attention, but the point is there are incidental effects. If you do carry out research and development in the territory, there may be the incidental effect of having to purchase local goods and services. But what the Claimants are asking is for the Tribunal to send the NAFTA Parties down a very slippery slope because by their logic, a requirement to do virtually anything would be considered a prohibited performance requirement. A requirement, as my colleague, Mr. Gallus picked up in the opening, a requirement to have a telephone requires you to use domestic telephone services. A requirement to carry a certain level of insurance requires you--will likely result in you using a local insurance broker.

These are examples. There are many, and there are many within the realm of possibility, and I'll just use one other example before I move on to education and training. If I could go on to something

that actually came--got a little bit of notoriety in the past year, and it was called the Newfoundland Oil Burn Experiment.

It was a cooperative endeavor back in 1993 between more than two dozen Canadian and U.S. government and private entities to do research on the ability to burn oil in case of an oil spill. And you can see from the project summary of this on the next slide, that there was all kinds of entities involved in this, both from the United States and Canada, the U.S. Coast Guard, the U.S. EPA, the American Petroleum Institute, U.S. Marine Spill Response.

MR. RIVKIN: Mr. President, I just have a quick question. I don't know that this is part of the record.

PRESIDENT van HOUTTE: We noticed it, too.

MR. LUZ: It is. The exhibit, and I can give you the exact exhibit number, it is cited in RA-50--I'll have to--it is cite--this particular document is in the record, and I will provide the exhibit number shortly, if my colleagues can find it.

So again, here you have--and if I could flip

to the next slide, you see--

PRESIDENT van HOUTTE: This is accepted on condition that you will then provide references.

MR. LUZ: Yes, of course. Yes, of course. It's in our Rejoinder in one of the footnotes as an exhibit.

Oh, it is. RA-52. I'm sorry, it's right in the bottom of the slide.

So here is R&D being carried out in the Province with Hibernia being a sponsor of it. It's not quite clear whether or not this kind of carrying out R&D in the Province is the specific kind of research and development that is contemplated by 1106(1)(c).

But again I'd like to move on to the education and training element here. And, in fact, something also else that Mr. Way pointed out is that research and development can also be carried out by donations to universities to allow researchers to carry out research and development. Now, I think this again is one of those issues where there is a fundamental disconnect in the view of what kind of

economic transaction is carried out by 1106(1)(c).

A donation is, by definition, something without consideration. It is given by one Party to another. There is no reciprocal provision of a service. I don't know any student who receives a scholarship that is going to provide a service back to the Party that endowed that scholarship, and these are the kinds of things that the Claimants have already been giving money for in the forms of scholarships, endowing chairs, donations to local training institutions. So there are mechanisms in the education and training part of the requirement that they are able to do to fulfill their Guideline obligations without necessarily violating 1106(1)(c).

And as Canada pointed out, and I should also point out, one of even more of an outlier is [redacted] This is the kind of expenditure that simply cannot be contemplated as being the type that is prohibited by 1106(1)(c).

Bearing in mind my time, I will only have a

very brief comment on the arguments that the Claimants have brought up with respect to Canada's Annex I Reservation. Canada had already argued this comprehensively in its pleadings, but I will just say that in drafting a treaty, at the time of the NAFTA Performance Requirements Provision in 1992, there were no precedents. There were no jurisprudence. There was no guidance for the Treaty drafters to be able to think whether or not this specific list was going to be broadened beyond its specific terms, and that's why the NAFTA Parties chose to insert 1106(5), is because they decided that there were seven types of performance requirements they did not want to allow, but they recognized that anything that was not prohibited could be permitted.

Now, why include it in the--why include it in the NAFTA--in the Annex I Reservation if Canada thought that there was no problem with it? Well, it's very clear: For a treaty drafter perspective, if a piece of legislation is important enough, the logical conclusion--and there is some uncertainty, the logical conclusion is adopt a belt-and-suspenders approach out

of an abundance of caution, and make the reservation.

My last point, ultimately with respect to the Annex I Reservation, the significance of that is really whatever the Tribunal ascribes to it. The Tribunal accepts Canada's ordinary meaning in its object and purpose interpretation of 1106(1)(c), the only inference the Tribunal can draw from the reservation is that it was included out of an abundance of caution. If the Tribunal accepts the Claimants' interpretation of 1106(1)(c), then Canada's wisdom of putting it into the reservation will be borne out.

I have no further comments, and I'd be happy to take any questions from the Tribunal, if you have any; otherwise, I'll turn it over to my colleague.

PRESIDENT van HOUTTE: There are no questions.

MR. LUZ: Thank you.

MR. GALLUS: Even if the Guidelines are inconsistent with Article 1106(1)(c), then they do not breach that Article because there is another Article, 1108.

With regard to the application of Article 1108, there are possibly three outstanding issues between the Parties. The first one is, of course, whether the Guidelines are actually subordinate to the Accord Implementation Act.

The second outstanding issue is whether the meaning--or whether the reservation is somehow limited by what's in the description of an Annex I measure--so I will say that again. The second outstanding issue between the Parties is whether, as a general matter, the reservation is limited by what's in a description of an Annex I measure.

And there is a third possible area of disagreement between the Parties with regard to the application of Article 1108, and I say "possible" because it is unclear.

Up to this point, the Claimants--or I should say up to this week, the Claimants had argued that subordinate measures adopted after the NAFTA entered into force could not be reserved. It was only those subordinate measures adopted before that date that were reserved under Annex I. The Claimants have not

pursued that argument this week; at least, I don't think they pursued it and, therefore, it's unclear whether currently that is an area of disagreement between the Parties.

Nonetheless, the Claimants did raise this argument earlier in their pleadings, and Canada is obliged to address it here, albeit very briefly. And we think we can address this argument just by reference to the submissions from the United States and Mexico under Article 1128 of the NAFTA.

In the opening submissions, Canada referred you to those Article 1128 submissions of the United States and Mexico, and we referred you to the passages where both United States and Mexico agreed with Canada's interpretation that subordinate measures are reserved, even if they were adopted after the NAFTA entered into force.

However, what we did not address in the opening is the consequences of the two other NAFTA Parties agreeing with Canada on this point. And to briefly address the Tribunal on that issue, I would like to invite Mr. Savoie to come to the lectern.

MR. SAVOIE: It's an honor for me to address this Tribunal today. I will briefly address the weight the Tribunal shall give to the 1128 submissions in this case, pursuant Article 31 of the Vienna Convention.

When interpreting NAFTA, Article 31 of the Vienna Convention is applicable because it is a rule of custom, and to try to answer the question of Arbitrator Sands, at least two cases, two NAFTA cases allude to this, the Final Award in Methanex and the Canadian Cattlemen Case. Specific pinpoint citations can be found at Paragraph 6, Footnote 7 of Canada's Reply to the 1128 submissions on this issue.

So, let's look at the first slide of this presentation. Paragraph 3 of Article 31 states that subsequent agreements and practice on interpretation shall be taken into account. In this case, because of the 1128 submissions of the U.S. and Mexico that concur with Canada's pleadings, the NAFTA Parties are in agreement on what it means for subordinate measures to be adopted or maintained. Claimants concede in their Reply to 1128 submissions at Paragraphs 22 and

23 that this agreement on interpretation creates a subsequent practice under Article 31(3(d).

The pleadings of the three NAFTA Parties in this case are also a subsequent agreement under Article 31(3)(a). Such subsequent agreements on interpretation or application do not have to be formal. For example, they do not require legislative approval. They may also be realized by an exchange of notes, except, of course, in what I'm talking about right now is three pleadings. But for the references about formality of these agreement, I refer the Tribunal to Paragraph 7, Footnote 8 of Canada's Reply to the 1128 submissions.

Subsequent practice and subsequent agreements on interpretation have the same weight: They shall be taken into account. The word "shall" means there is no discretion as to whether or not the Tribunal takes them into account.

Now we are going to move to Slide 5 of the presentation, just for time reasons. So let's look again at the chapeau of Paragraph 3. The question is: What does it mean to take into account or "tenir

compte" in the French version? Treaties do not appear to define these terms. As applied to Article 31(3) of the Vienna Convention, "take into account" surely means something more than just to consider. When it is found that there exists an agreement or practice on a specific provision, as we have here, there usually will not be a range of agreements or practices to consider and pick from. However, "does take into account" actually mean to apply, like when an interpreter would directly apply a treaty provision? To answer this question, the travaux préparatoires to the Vienna Convention are helpful, so, we'll look at the next slide.

The travaux préparatoires states: "An agreement as to the interpretation of a provision reached after the conclusion of the Treaty represents an authentic interpretation by the Parties which must be read into the Treaty for purposes of its interpretation."

A subsequent practice or agreement is the best evidence of the intention of the Parties as to how the Treaty ought to be interpreted. Since

subsequent agreements and practice are on the same footing, once one of them is established, it becomes presumptively conclusive as to the interpretation of a treaty provision.

This is also a matter of common sense. When you have all the Treaty Parties stating or agreeing that a provision must be interpreted in a certain way, no other interpretation should be applied.

If there are no further questions, I would give the floor to Mr. Gallus.

PRESIDENT van HOUTTE: No questions.

MR. SAVOIE: Thank you very much.

MR. GALLUS: As explained by Mr. Savoie, the Article 1128 submissions of the other NAFTA Parties effectively disposes of one of the possible areas of disagreement between the Parties on the application of Article 1108, and that leaves two areas of disagreement.

First, whether the Guidelines are, in fact, subordinate to the Accord Implementation Acts, a point I will address in a moment; and secondly whether the Guidelines--or whether the reservation for subordinate

measures is generally is limited by what is contained in the description of a measure listed in Annex I.

Before addressing this--

ARBITRATOR SANDS: There was one other issue which I raised this morning. What is Canada's position on the techniques for interpreting? Are you coming on to that?

MR. GALLUS: I was going to stop on that.

Before I do that, I think it's important to bear in mind, as Canada mentioned in the opening, Canada only saw this argument from the Claimants for the first time in their response to the Article 1128 submissions. I think that was about six weeks ago. Canada hasn't had an opportunity to respond to that argument in writing, and I would like you to bear that in mind as we try and walk you through Canada's position.

But let's turn first of all to Professor Sands's question on the interpretation of the Annex. The first point on which to begin is, in fact, a point of agreement between the Parties. Canada agrees with the Claimants that it is the Vienna Convention on the

Law of Treaties that applies to interpret the Annex. As Mr. Legum pointed out, the Annex is a part of agreement and, therefore, must be interpreted according to those principles.

However, one must also pay attention to Section 3 of the Interpretive Note to the Annex, and I think it's important to look at that section.

I should have checked this before, but by any chance, do the Tribunal Members have copies of the NAFTA with them?

(Comment off microphone.)

MR. GALLUS: Okay. Do you have the exhibit--or authorities--

ARBITRATOR SANDS: Tab 6.

MR. GALLUS: And does that make it CA-6? Is that right?

(Comment off microphone.)

MR. GALLUS: So, if the Tribunal can turn to CA-6 or to their copy of the NAFTA and have a look at the Interpretive Note to Annex I and...

Oh, there we have it. If you go to Paragraph 3. That's right. If you could just

highlight that third paragraph, that would be fantastic.

So, you can see that this explains some principles of interpretation to apply to reservation.

You'll see there it says: "In the interpretation of a reservation, all elements of the reservation shall be considered. A reservation shall be interpreted in the light of the relevant provisions of the chapter against which the reservation is taken."

And it says: "To the extent that"--and there are three subparagraphs there, which are important here, and those three subparagraphs provide, I guess, different principles of interpretation, depending on what different scenarios you might be in. The first of them refers to where there is a Phaseout element. That referring to a situation where a reservation is being reduced over time and is expressly acknowledged in the reservation. That obviously doesn't apply in the circumstances we have here. There is no phaseout within the reservations of the Accord Implementation Act.

So, that brings us to the second part of Paragraph 3, which refers to a situation where the Measures element is qualified by a liberalization commitment from the Description element. So this refers to a situation where the Measures element, as listed in Annex I, is qualified by a liberalization commitment. To see the situation to which that applied, you only need turn to Canada's second reservation under Annex I, which I believe is a reservation for the Investment Canada Act. If those of you, by any chance, have that reservation or have--

ARBITRATOR SANDS: Tab 7.

(Comments off microphone.)

MR. GALLUS: Without having access to that reservation in front of you, I'll read into the record what it says. This is a reservation for the Investment Canada Act, and under the Measures element, it lists the Act, and it says "Investment Canada Act." But then below that it says, "As qualified by Paragraphs 8 through 12 of the Description element." It says: "As qualified by Paragraphs 8 through 12 of the Description element"--oh, there we go. Excellent.

If you could highlight that part and just highlight that first sentence there.

Thanks very much.

So you see there that under the Measures element, we have the sentence "as qualified by Paragraphs 8 through 12 of the Description element."

If we could then go back to Paragraph 3 of the Interpretive Note, and if you could highlight Paragraph B for us.

Thanks, Thomas.

So, it's that kind of reservation to which interpretive note is referring when it refer in Part B--to the Measures element is qualified by a liberalization commitment from the Description element. That is not the type of reservation we're dealing with with the Accord Implementation Act. There is no such qualification in the Measures element in the reservations of the Accord Implementation Act. And thus we are not in the realm of Paragraph (a). We're not in the realm of Paragraph (b), but we're in the realm of Paragraph (c). So let's bring up Paragraph (c).

Paragraph (c) says that: "If the Measures element is not so qualified"--as we see in the situation of the Accord Implementation Acts--"then Measures element shall prevail over all other elements."

And it then goes on to include, I guess, a caveat to that: "unless any discrepancy between the Measures element and the other elements considered in their totality is so substantial and material that it would be unreasonable to conclude that the Measures element should prevail, in which case the other elements shall prevail to the extent of that discrepancy."

But unless that caveat applies, the Paragraph (c) is clear. But if the Measures element is not so qualified, then the Measures element shall prevail over all other elements.

And since in the reservations of the Accord Implementation Acts, the Measures element is not qualified, we are in the realm of Paragraph (c), and the Measures element shall prevail over all other elements. That means that the reservation is for the

Accord Implementation Acts as a whole.

The Claimants attempt to limit the reservation is based on the false argument that we're in the realm of Paragraph (b). However, as I just explained, this is not a qualified reservation. Consequently, we're in the realm of Paragraph (c). And consequently as it says in Paragraph (c), the Measures element shall prevail over all other elements.

However, even if we accept the Claimants' argument, even if somehow this description does limit the reservation of the Accord Implementation Acts and therefore limits what measure is subordinate to it, then the Guidelines are still reserved in the circumstance because the Guidelines--or I should go back.

The Accord Implementation Acts in the reservation in the NAFTA include the Section 45(3)(c) of the Accord Implementation Acts. It expressly states the obligation that Benefits Plans shall ensure expenditures for research and development and education and training in the Province.

And whilst the Claimants are right that the description does not expressly mention Section 151.1, it does not expressly mention the authority to issue Guidelines with respect to their obligation to expend on research and development and education and training, it would simply make no sense to reserve the obligation to expend on research and development and education and training without reserving the means to implement that. Consequently, even if we accept the Claimants' argument that the description does limit the reservation, the Guidelines are still reserved here because the obligation to expend on research and development and education and training is expressly reserved within the reservations of the Accord Implementation Act.

So that leaves the third outstanding issue between the Parties, and that is: Are the Guidelines actually subordinate to the Accord Implementation Act?

Actually, before we do that, before we leave the previous point, I should pause and make sure that the Tribunal has no questions on that issue, but I should also point out that, as I said at the start,

Canada hasn't had an opportunity to address this in its written pleadings. If the Tribunal is particularly interested in this point, then we encourage you to let us know, and we'll be happy to submit written pleadings on the interpretation of the Annex I Reservations.

PRESIDENT van HOUTTE: The question is whether the Claimant has some interest.

MR. RIVKIN: This is obviously a new argument that was developed at lunch after we pointed out that the response that they made in the opening argument was a faulty one. They didn't have pre-prepared slides for it. It's clear this is a new argument. We should consider it and perhaps respond, but it is obviously something brand new. I noticed that Mr. Gallus never mentioned Section 2(f) and how that relates to this argument. He never mentioned a number of other aspects of the identification of the nonconforming aspects of the Accord Acts.

So, there are certainly arguments that I can immediately think of in response, but I'm sure that we'd want to probably think about it a little bit more

since they just came up with it at lunch.

PRESIDENT van HOUTTE: Okay. We will then see what the position of the Claimant is at the end of the day.

Please continue.

MR. GALLUS: Before I do, I would like to correct the record that Canada did not just make up this argument at lunch. Given the time that we had for lunch, we were very busy trying to finish our lunch, and certainly didn't have time to come up with new arguments.

PRESIDENT van HOUTTE: That's then the difference between 45 minutes and one hour and 45 minutes.

(Laughter.)

MR. GALLUS: So let's turn to whether the Guidelines actually are subordinate to the Accord Implementation Acts.

And perhaps let's start by the definition of a subordinate measure, which I believe is the next slide or--Thomas, perhaps you could bring up--that's right--the first slide from the 1108. If you could

move on. Next one. Next one. Oh, sorry, go back to the previous one. That's right.

So, in the Interpretive Note to Annex I in Article 2(f)(ii) it says that: "A measure cited in the Measures element includes any subordinate measure adopted or maintained under the authority of and consistent with the measure."

So, this is the test that we have to apply to determine whether the Guidelines are subordinate to the Accord Implementation Act.

In this sentence, then, the measures cited in the Measures element is the Accord Implementation Act, the alleged subordinate measure is the Guidelines, and therefore the issue are: One, whether the Guidelines are adopted under the authority of the Act; and, two, are the Guidelines consistent with the Act in the previous Benefits Decisions?

These necessarily involve issues of domestic law. We are comparing a domestic measure of a regulator with the regulatory regime. To make that comparison, you necessarily involve issues of domestic law. Consequently, domestic law is very important to

your decision. It is a fact that you can incorporate or that you can take into account when applying the test that you have to apply under Article 2(f)(ii) of the Interpretive Note.

Fortunately, for the Tribunal, we have decisions of Canadian courts on these aspects of Canadian law; and as Canada pointed out in its openings as being extensively discussed already today, the Canadian courts, when dismissing the challenge to the Guidelines, applied the same language that you see in the test for subordinate measure. The Canadian courts expressly stated that the Guidelines were authorized by the Act. They expressly stated that the Guidelines were consistent with the Act and were consistent with the previous Benefits Plans, the Hibernia and Terra Nova Benefits Plans.

In our opening, Canada referred the Tribunal to several extracts from the decisions of the Court of Appeal, and I won't repeat those extracts now. You have them in the opening slides, and you can refer to them again, but what I would like to do is just refer to a couple of extracts from the Trial Court Decision,

which we didn't refer to in the opening and which the Claimants did not refer to earlier.

I think it's important to go back and look at these paragraphs in the trial court decision because the Claimants did raise the court decisions again before and did argue that, no, no, these decisions did not really address the issues that are at issue before the Tribunal here now.

And the extracts to which I'd like to refer you are quite lengthy, and I apologize in advance for asking you to go through this, but I think this is critical and I think it's important that we go through this slowly and understand how it is that the trial court addressed exactly the issues that we're forced to address now. The Trial Court Decision was then approved by the Appeal Court.

Let's look at the next slide, which hopefully--or perhaps the next one. Skip forward until we get to Paragraph 44 of CA-52. Thanks, Thomas.

Yeah, keep going.

There we go.

So, this is the trial court considering the challenge to the Guidelines, and you see here in Paragraph 44 that the trial court summarizes the position taken by the Operators in that case, and you'll recognize some of the language here because the trial court summarizes the challenge in much the same words that the Claimants have used this week, and I will read this into the record. The trial court says: "The Applicants take the position that once the Board approved their respective Benefits Plans, that fixed their obligations regarding benefits for the entire duration of the project."

Sorry, I got the emphasize wrong there: "Once the Board approved their respective Benefits Plans, that fixed their obligations regarding benefits for the entire duration of the project." They say that if the Board wished to establish targets for expenditures on research and development, they should have been fixed at the time of the approvals of the respective Benefits Plans and cannot now be imposed after the fact. They say that the Applicants undertook these expensive, long-term projects with the

firm understanding that the benefits they would be obliged to provide would be as set out in those plans as approved. They submit that the Board no longer has any authority to impose any additional or different obligations on them.

This is the same language that the Claimants have been using this week to challenge the Guidelines before you.

What did the trial court decide in response? With respect--so if we could turn to the next slide, thank, Thomas--"With respect, I find that this is not a reasonable or purposive interpretation of the Accord and the Acts and the Board's previous decisions approving these developments. These offshore developments have a life spanning decades. The Benefits Plans themselves proposed the establishment of general principles and commitments and eschewed ed any specific expenditure commitments for research and development and education and training. They proposed regular reporting by the Operators and ongoing monitoring by the Board to ensure compliance with the commitments undertaken and that maximum benefits would

flow to the Province in particular and Canada generally."

And then in the next paragraph, Paragraph 46: "To adopt the Applicants' submissions would be to allow them to unilaterally determine what amount to spend on research and development and education and training. They could choose to spend nothing and simply report that they were spending nothing. This, in their interpretation, would be the fulfillment of their obligation. As I have already stated, this is not a reasonable and purposive interpretation of the legislation and the Board's authority and obligations under the Accord and the Acts."

Then in Paragraph 47, and we're getting to the end of the paragraph to which I would like to refer you, the trial court goes on to say that "the Applicant, by accepting the Board's approval of their respective Benefits Plans, have accepted that the Board has an ongoing obligation and authority to assess and monitor the appropriateness of the levels of expenditure on research and development and education and training. Having accepted these

approvals on the basis that they had done, it is not now open to them to deny the Board's authority to fulfill its duties set out under the Accord"--again, I refer you to what we talked about earlier--"and the Act, and its early interpretations contained in Decisions 86.01"--which is the Hibernia Decision--"and 9702"--"which is the Terra Nova Decision--"to effectively monitor their activities and ensure compliance and adequate and reasonable expenditures."

It goes on in Paragraph 51: "The Board in this case is granted the continuing power to monitor and assess the appropriateness of the level of expenditures of the Applicants on research and development from time to time throughout the duration of these decades-long projects."

And then finally, in Paragraph 52, from halfway down it states: "It was left to the Board to determine from time to time what would amount to an appropriate and adequate level of expenditure. This could not be and was not determined at the beginning of the project, and this was acknowledged by the Applicants. As stated earlier, the Board has the

continuing power to make these decisions."

So, we see in the decision of the trial court, the court rejecting the same arguments that the Claimants have made this week. The decision of the trial court was approved by the Court of Appeal, and I refer you again to the extracts of--to which Canada referred you in the opening. And I caution you against relying on the selective words to which the Claimants referred you in their closing presentation earlier.

The decision of the Court of Appeal--I should rephrase that. The Claimants--or the Operators sought to appeal the decision of the Court of Appeal to the Supreme Court of Canada, and the Supreme Court of Canada refused to give leave to appeal.

So, what should the Tribunal do with these decisions? As I said before, these are facts which can be used by the Tribunal to apply the tests they have to apply to determine whether the Guidelines are subordinate to the Accord Implementation Acts. And the Tribunal should defer to the court's determination of those facts. In the opening, I referred the

Tribunal to several decisions. In fact, I think I started with citing several reasons why it was the Tribunal should defer to the Court Decisions, and I won't repeat those reasons.

I will, however, touch briefly on a couple up the decisions to which I referred the Tribunal in the opening, and it's telling that the Claimants didn't refer the Tribunal to those decisions.

ARBITRATOR SANDS: Just before you do that, can I just go back to this. We had addressed, as a Tribunal, a number of questions to you. We heard answers from the Claimant, and I heard certainly you say that it is a matter of Canadian law that determines this issue a matter of national--let's just assume hypothetically you're wrong on that. Let's assume that the Claimants are right, that it's not a Canadian law standard, it's a NAFTA or international law standard, and that the words "under the authority of and consistent with" and in particular "and consistent with," are the words I think the ones I'm particularly interested in, and are to be applied by reference to the NAFTA.

We asked a question and we heard from the Claimants their response as to whether as a matter of NAFTA law a measure which imposed additional or more onerous burdens would be consistent. In that regard, I draw your attention again to the French text, which was at Tab 67, which had very helpfully set out the standard for amendment and the standard for subordinate measures, and I've got two questions.

Question Number 1 is do you have you any comment on the French text? Can we treat the French text as an equally authentic text and do away completely with the distinctions between consistent and conformity, or should we adopt a different approach? That's my first question.

My second question is, what is to be read, having regard to the French text, into the fact that the standard for amendment explicitly refers to a requirement not to decrease conformity, the standard for the subordinate--let's assume a new subordinate measure does not refer to that. What implications should the Tribunal draw from that?

And then there is a third question which is

this: If the answers to your questions are, as I suspect they will be in a particular direction, what is to stop a State using the technique of adopting a new subordinate measure to get around what appears to be an explicit limitation to amend a measure?

MR. GALLUS: Let me start by clarifying Canada's position with regard to Canadian law standard versus the NAFTA standard. I think you said, Professor Sands, that I had stated before that it is Canada's position that the standard we apply here is the Canadian law standard. If that is what I said before, then I apologize. That was not my intention. Canada has not taken a position thus far as to whether the standard you apply under the test is a Canadian law standard or an international law standard.

What Canada has said is in applying the test you are necessarily referred to domestic law and, therefore, the decisions of Canadian court on that domestic law are very important.

Now, as to whether you apply a standard applied by a Canadian court, as to whether you apply, for example, this reasonable standard that was applied

by these Canadian courts, or whether you apply some other standard is not important to this case because, in this case, if you look at the decisions of the Canadian courts, regardless of the test that they applied, they want to state categorically that yes, the Guidelines are authorized by the Act and yes, the Guidelines are consistent with the Act and the Benefits Plans decisions.

ARBITRATOR SANDS: Just to play devil's advocate, I mean assuming it is a Canadian standard that applies for the interpretation of the application, that would on one view be dispositive of the issue. To the extent that Canadian court had decided, one could see why some people would say that's dispositive to the issue. So, with respect, it does make a difference as to whether you apply an international standard or a domestic standard, and I'm not clear whether you're going to sit on the fence and not express a view or whether you're going to tell us what the Canadian Government's position is on whether it's a national standard or an international standard or both, as we asked.

02:45:24 MR. GALLUS: Much as I would like to take a position that would represent the position of the Canadian Government, I'm not in a position to do that. If this is an issue on which the Tribunal is particularly interested, again we can go back and we can address it in our written submissions.

Canada's position at this point, however, is that the precise Canadian law standard or international law standard is not important because, as is clear from the decisions, regardless of the standard that they applied, they did find the Guidelines were authorized by the Act and were consistent with the Benefits Plans.

PRESIDENT van HOUTTE: I guess when you look at the results that could be fine, but from an academic point, that's, of course, very unsatisfactory. It would be very useful to get the submission there on that point.

MR. GALLUS: I think that brings me to your second question, Professor Sands, and this is your question with regard to the French text. Certainly, again, I can't speak to the French text, much to the

02:46:22 continued disappointment of my colleagues in Government. I'm afraid I barely speak a word of French, so I certainly won't be speaking to the French text and what it means. And again, I think this seems to be an issue that's best addressed if you are particularly interested in subsequent written submissions.

PRESIDENT van HOUTTE: We are interested, especially as Canada may be the only addressee of the French text.

MR. RIVKIN: And drafted it.

PRESIDENT van HOUTTE: Maybe.

MR. GALLUS: And as a representative of the Canadian Government, I can say how embarrassed I am to not actually be able speak...

(Comments off microphone.)

MR. GALLUS: And again, I should point out to end the question, it is Canada's position that there is no need to expressly address this issue because, in the view of Canada, there are no additional more onerous burdens that are being imposed by the Guidelines here; however, again, I recognize that if

02:47:21 the Tribunal is particularly interested in the issue, we can consider whether we can address it in written pleadings.

ARBITRATOR SANDS: So, you don't want to answer the third question either at this point.

MR. GALLUS: That's correct.

PRESIDENT van HOUTTE: Well, then there are three easy questions to be answered.

Please continue.

MR. GALLUS: In its opening, Canada referred the Tribunal to several NAFTA Decisions which supported its position that the Tribunal should defer to the decision of the Canadian courts on these issues.

These are decisions to which the Claimants do not refer you in their closing, and whilst we did refer the Tribunal to these decisions in the opening, I think it's worth touching on them again briefly, just to illustrate the way that--the role of domestic law when it comes to applying the standard here. I recognize that Canada has not completely settled this issue for the Tribunal; however, these decisions are

02:48:26 illustrative as to the role, at least, that domestic law can play.

The first quote to which we referred you in the opening was a quote from the Waste Management II Tribunal and--do we have that, Thomas?

Apparently not on this screen. Oh, I can see from there.

This quote says: "A NAFTA Tribunal does not have plenary appellate jurisdiction in respect of decision s of national courts, and whatever may have been decided by those courts as to national law will stand unless shown to be contrary to NAFTA itself."

What we didn't mention in the opening was the context in which the Tribunal said this. This was said in the context of a claim for breach of Article 1105, the same Article that the Claimants allege is breached here.

In that case, the Claimants alleged that there was a breach of Article 1105, partly through the wrongful termination of a Concession Contract. Yet the Tribunal recognized that Mexican courts had addressed the issue of the termination of the

Concession Contract, and it was in that context that the Tribunal said that a NAFTA tribunal does not have plenary appellate jurisdiction in respect of decisions of national courts, and whatever may have been decided by these courts as to national law will stand unless shown to be contrary to the NAFTA itself.

I also referred you to the Decision in Azinian in which the Tribunal made these comments in a similar context. In this case, however, there was a claim for breach of Article 1110. The issue again was--or one of the issues in the claim for breach of Article 1110 was whether a contract had been validly terminated. And, again, the Tribunal conscious of the fact that domestic Mexican courts had addressed the termination of the contract, and it's in this context that the Tribunal states that the possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national Court Decisions as though the international jurisdiction seized has plenary appellate jurisdiction."

Canada also referred you to the decision in

Thunderbird. That's a decision you will find at CA-33. For the sake of time, I won't take you through the context, but again it was--the Tribunal made these comments in a similar context.

Now, while these decisions are very helpful for the Tribunal, they're not exactly analogous to the situation we have here because each of these tribunals was addressing whether there was a breach of a NAFTA obligation, either NAFTA Article 1105 or NAFTA Article 1110. Yet, when it comes to the issue of whether the Guidelines are subordinate to the Accord Implementation Acts, we are not considering the application of a NAFTA obligation. We're considering whether the Guidelines are subordinate to the Accord Implementation Acts.

Therefore, it's important to bear in mind that while these NAFTA Decisions are helpful for the Tribunal in the sense that they identify the importance that domestic Court Decisions can play, in this circumstance there is almost more reason to defer to domestic courts because we're not talking about the application of a NAFTA obligation. We're talking

about the simple determination of whether or not a domestic measure of a regulator falls within the Regulatory Framework.

ARBITRATOR SANDS: With respect, it's not, I think, quite that simple. One issue is whether or not it's subordinate. Put that on one side. Then there is the issue of whether it's "under the authority of," and then there is the issue of "whether it's consistent with."

Whether or not we have to judge those latter two conditions by reference to NAFTA law or not is, on one approach, pretty central, and would then put this Tribunal into an analogous situation; and that, I think, explains why this is an issue on which we are going to have to have the assistance of Canada, if it wishes to give us assistance.

MR. GALLUS: Before I leave the decisions which have addressed the deferral that an international tribunal should give to decisions of domestic court, I want to address briefly a decision--or two decisions which the Claimants referred you earlier, and both of these decisions were

referring to a principle found in Article 3 of the International Law Commission Articles on State Responsibility, which I think we might have as a slide here. Thomas, is that right?

Or actually, I'm not sure. That's all right. I will just read it into the record.

Article 3 says: "The characterization of an Act of a State that is internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

And while that's true, it doesn't help the Claimants here because Canada is not saying that simply because the Guidelines are consistent with Canadian law they do not breach the NAFTA. Canada accepts that you have to apply Article 1105 and you have to apply Article 1106. Canada is simply saying that this test you're required to apply to determine whether the Guidelines are subordinate to the Accord Implementation Acts necessarily refers you to domestic law.

Now, the Claimants relied on two decisions

earlier. The first was Veteran Petroleum. Veteran Petroleum concerned a very different circumstance to what we have here. First of all, I should say the extract from Veteran Petroleum to which the Claimants referred you was--simply mirrored what it said in Article 3 of the International Law Commission Articles. The situation--or the circumstances in which the Tribunal said that were the circumstances in which Russia was alleged to breach Article 45--sorry, was alleged to breach the Energy Charter Treaty, and there was a question whether the Energy Charter Treaty applied provisionally to Russia because Russia had signed it but had not yet entered into force.

Section 45 of the Energy Charter Treaty says that a treaty will not provisionally apply--I should start with saying that it says: "The Energy Charter Treaty shall provisionally apply to the signatories unless the domestic law says that it does not."

And it was Russia's argument that that required the Tribunal to examine whether Russian law was consistent with each of the obligations under the Energy Charter Treaty, whether Russian law on

expropriation was consistent with the Energy Charter Treaty obligation with regard to expropriation. And Russia's argument was that unless they're consistent on each of these levels, then you can't apply the Treaty provisionally to us. And it's in this context that the Tribunal made the comments to which the Claimants referred you in their closing and to which they referred in their written pleadings, and it's that context the Tribunal said you can't simply rely on domestic law to avoid your international law obligations.

Similarly, the quote to which they referred you from Feldman is just a reflection of Article 3 of the International Law Commission Articles. I'd like to have quick look at that quote, which you'll find at Slide 82 of the Claimants' bundle, this blue bundle of documents.

And the--or perhaps I can just read the quote into the record. I'll just read the quote into the record.

The quote on which they relied from Feldman in Mexico is simply: "Nor is an action determined to

be legal under Mexican law by Mexican courts necessarily legal under NAFTA or international law."

I'm looking at Slide 82 of the Claimants' bundle here. And you'll see the second highlighted passage on which they're relying.

"Nor is an action determined to be legal under Mexican law by Mexican courts necessarily legal under NAFTA or international law."

Well, that's true, but it doesn't help us here. Canada is not arguing that simply because the Guidelines are consistent with Canadian law they're necessarily consistent with the NAFTA.

So, let's leave the decisions of the Canadian courts and look at the Guidelines themselves, and let's see whether or not they are in fact subordinate to the Accord Implementation Act, whether they're authorized by the Acts and whether they're consistent with the Acts and with the previous Benefits Decisions.

Before we examine the--this issue, I think there's three issues we need to clarify for the record with regard to the Guidelines that were raised by the

Claimants in their closing. The first is that they seem to repeat this statement that the Research and Development Guidelines were the first Guidelines issued by the Board that are backwards-looking that apply to previous benefits to the plans, and on that point I would refer the Tribunal again to the testimony of Fred Way, where he confirmed that the 2002 Waste Management Guidelines are an example of another Guideline issued by the Board that did apply to previous decisions.

MR. RIVKIN: Sorry. He testified with respect to Development Plans--

MR. GALLUS: I was just going to clarify that. That's right.

As Mr. Rivkin points out, Mr. Way did point out that these Guidelines did not apply to the Benefits Plans so much as the Development Plans, but the principle is still the same. These Development Plans were approved in 1987--sorry, 1987 and 1997, and the Guidelines applied to those projects despite the fact they'd been approved 30 years ago.

The second issue that we need to clarify for

02:58:30 the record is the Claimants' point that Canada has submitted no evidence from Statistics Canada, that it has not submitted a witness statement from someone at Statistics Canada.

In the Claimants' Reply, they said that the Statistics Canada issue was irrelevant. You might recall from the Reply that they included an annex at the back of their reply in which they included a series of issues which they say is irrelevant for the dispute. And one of those issues was the benchmark as calculated by Statistics Canada, and how they came up with this benchmark, how they extracted the data from around Canada to come up with the average research in development spending.

The Claimants said in their Reply that this issue was irrelevant, and consequently, understandably, Canada did not address it in its Rejoinder, and consequently the Claimants cannot now accuse Canada of avoiding submitting evidence from Statistics Canada if they, themselves, say the issue is irrelevant.

The final issue that we need to correct for

02:59:33 the record with regard to the Guidelines is the issue of research and development during the Exploration Phase. Mr. Rivkin said that--I think he referred you to the ExxonMobil Web site and said that if you're interested in Research and Development during the Exploration Phase, you should look at the ExxonMobil Web site. I don't think an extract from that Web site is in the record, and I don't think there is anything in the record to contradict the evidence of Mr. Way that, in his experience, there is not much research and development in the Exploration Phase.

So, having corrected the record, let's address succinctly, bearing in mind the time, why it is that the Canadian courts are right, why it is the Guidelines are consistent with the previous regime and authorized by the Accord Implementation Acts.

First of all, we have the key parts of the Accord Implementation Acts, and these are parts of the Acts to which we've referred you at many times during the week. First of all, Section 45(3)(c), which states that Benefits Plans shall ensure expenditures on research and development and education and

03:00:38 training.

Secondly, Section 55 of the Accord, which says those expenditures shall be approved by the Board; and as we discovered earlier, that is expressly incorporated into the Accord Implementation Act through Section 17(1). Consequently, it's a requirement of both the Accord and the Accord Implementation Act that the Board approves expenditures.

And the third key part of the Accord Implementation Act is of course Section 151.1(1) which gives the Board the authority to issue Guidelines with respect to the obligation to expend on research and development and education and training. This is the precise authority on which the Board relied to issue its Guidelines.

So, let's look at the--turn to the Hibernia Benefits Decision--or the Hibernia Benefits Plan that was approved by the Hibernia Benefits Decision. Again, Canada referred you to aspects of the decision in detail in the opening, and mindful of the time, I won't go back to the documents. You have both the

03:01:48 transcript from the opening as well as the slides to point you to those key parts, but I will list them again for you.

The first is the recognition of the decision that the Operators would provide benefits for the--throughout the project, not just restricted to a particular stage.

The second is the commitment of the Operators to a series of principles, including technology transfer, which I believe even Mr. Way or Mr. Fitzgerald confirmed includes research and development and education and training in certain circumstances. Within that plan, the Operators also committed to continue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment, not to solve problems that they thought was necessary, but to solve problems unique to the Canadian offshore environment.

Another key part of the Benefits Plan Decision is that the Board believe that effective monitoring and reporting will be necessary to ensure

that the Benefits Plans' objectives are accomplished. The Board also recognized in the Decision, and the Operators accepted, that the Benefits Plan process is an evolutionary process. The proponents committed to respond positively to issues of concern.

And, finally, there is the key issue of the Environmental Assessment Panel report which recommended research and development that was important for Newfoundland and Labrador and not just necessarily important for the Operators, and you heard the witnesses this week confirm the importance of those reports for the Hibernia Benefits Decision.

I will also briefly recap the key parts of the Terra Nova Decision. Again, we referred to these key parts in the opening and encourage the Tribunal to go back and look at the transcript and look at the slides on which Canada relied. But the key part include that the Board stated explicitly that the plan submitted by the Operators did not fulfill the obligation to ensure expenditures on research and development and education and training. And I recognize the Claimants said before that I said

earlier in the week that that plan was rejected and that a supplementary Benefits Plan was submitted later on. I recognize that that was not correct, and I'm happy to correct the record on that point, that the--there was not a supplementary Benefits Plan. The Board simply recognized in their Terra Nova Decision that the Plan did not fulfill this commitment to expend on research and development and education and training; and, consequently, the Board imposed these specific reporting requirements.

Within the Decision, the Board also endorsed the recommendation of the Environmental Assessment Panel that the Operators fund basic research, not necessarily research for the projects, but basic research.

And finally, there's the Board's express recognition of the Decision that the Board will monitor the expenditures because the Board--and I'm going to quote now from Page 2 of the Decision--"has an obligation as the regulator to ensure that the Proponents' commitments are met." And when it came to issuing the Guidelines, all they were doing was acting

as the regulator to ensure that the Proponents' commitments are met.

During the week we--I should rephrase that.

It's also important to remember the evidence that we heard this week with regard to whether or not Benefits Plans are agreements, an issue that's in dispute between the Parties. The Claimants talked earlier about what Mr. Fitzgerald said about whether this was the result of a negotiation, whether this was actually an agreement. I encourage you to look carefully at the extract from Mr. Fitzgerald's transcript to which they refer. I think you'll see that the Claimants was coaxing Mr. Fitzgerald along to try and say what they wanted him to say, and he never actually acknowledged this was a free negotiation between the Parties.

I will also remind the Tribunal that the Claimants never put to Mr. Fitzgerald this is an agreement, and it's therefore very difficult for them to claim now that Mr. Fitzgerald agreed with that proposition.

Indeed, the only person this week who was

asked expressly--I should rephrase that.

The only member of the Board this week who was asked expressly "are the Benefits Plans an agreement?" was Fred Way, and he stated explicitly that they were, and the page in the transcript is Page 727, where he was asked: "In your view, is a Benefits Plans an agreement?" He said, "No, it isn't." And: "Is the Benefits Plans a result of negotiation"? No." And he goes on to explain why.

And if you're particularly interested in the issue, I encourage you to look at his explanation, but to sum it up he says it's not the result of a negotiation because the Board is a regulator, and in approving the Benefits Plans is acting as that regulator, and it only approves that Benefits Plan if it complies with its obligation in the Act to expend on research and development and education and training.

Consequently, the evidence this week, together with the plain terms of the Terra Nova and Hibernia Benefits Decisions confirm that the Guidelines are consistent with the previous regime.

The plain terms of the Accord Implementation Acts confirm that the Guidelines are consistent with that Act, and they are authorized by that Act. Consequently, even if the Guidelines are inconsistent with Article 1106(1)(c), which they're not, they cannot breach that Article because they are subordinate to that Act, and consequently they are reserved under Article 1108.

I will pause now to ask if the Tribunal has any questions on this issue. At this point, Canada was intending to refer to Mr. Luz again to address the Tribunal with regard to Article 1105.

PRESIDENT van HOUTTE: Maybe it would be a good idea to have a short break, if you agree, because it's already one hour and three quarters of an hour. Just a 15 minutes' break?

Or less for me.

MR. GALLUS: It's up to you.

PRESIDENT van HOUTTE: When I say five minutes, it becomes 15 minutes. Then it's a five minutes' break.

MR. GALLUS: Five-minute break.

PRESIDENT van HOUTTE: Yes.

(Brief recess.)

PRESIDENT van HOUTTE: Okay.

MR. RIVKIN: Mr. President, could I ask just a quick question before Canada begins? As you've indicated, we have gone almost two hours now in their argument, and I see more than 50 slides remaining. It is getting late in the day, and there were some issues of fairness. I know we ran a bit over, but we did try to keep our argument, and it ended up being a little under two hours, actually about the same amount of time they have now, and I know there are some other administrative and other issues the Tribunal wants to talk about before we all take off this afternoon. So, I'm just wondering whether it might be possible to ask Canada how much longer they expect to go and perhaps if there could be some cap to it so we could move on.

MR. GALLUS: I would perhaps if we could clarify how long we have gone and how long the Claimants went for?

THE SECRETARY: It was about two hours and 20--my computer crashed during the break, but there

was about two hours and 25 minutes--

MR. RIVKIN: No.

THE SECRETARY: For Claimants, including--

MR. RIVKIN: Including the half-hour break--oh, including the cross-examination?

THE SECRETARY: Exactly.

MR. RIVKIN: Our closing was under two hours. And I know it was 90 minutes when I stopped, and Sophie took about 20 minutes.

PRESIDENT van HOUTTE: It was 95 minutes, if I remember correctly.

THE SECRETARY: And I'm not sure about yours, I'm afraid. I would have to wait until my computer comes back.

MR. GALLUS: Regardless, Canada doesn't expect to--

THE SECRETARY: I think you have about one hour and 25 minutes.

PRESIDENT van HOUTTE: You were 90 minutes in your closing statement.

MR. GALLUS: I'm sorry, I didn't quite hear.

PRESIDENT van HOUTTE: It was 90 minutes in

your closing statement.

MR. LUZ: Unfortunately for all involved, my presentation will be brief and focus on the legal standard applicable under Article 1105. My colleague, Mr. Gallus, will discuss the specific facts of this case in the context of 1105, but I believe it is of great importance for the clarity of the NAFTA process to have a clear elucidation of what the legal standard under 1105 the Claimants are subject to.

(Pause.)

MR. LUZ: The Claimants have already noted some of the areas of agreement of the Parties. The FTC Note of Interpretation is binding on this Tribunal, and it states explicitly that fair and equitable treatment does not require any treatment in addition to or beyond that which is required by the customary international minimum standard of treatment for aliens.

It is also common ground that the burden of proving a rule of custom rests on the Party that asserts the rule, the existence of the rule, and that to prove a rule of custom you must have substantial

State practice and opinio juris.

There is also an area of agreement with respect to legitimate expectations to the extent that some non-NAFTA tribunals have recognized this measure of protection. And Canada sets out this criteria at Paragraph 271 of its Counter-Memorial, and I think it's worth repeating here:

Legitimate expectations must be based on objective rather than subjective expectations of the Investor;

Second, there must be specific assurance by the State to induce the investment that was reasonably relied upon by the investor;

Third, the relevant expectations are those existing at the time the investment was made;

And, finally, to assess the reasonableness of those expectations, the Tribunal should take into account all the circumstances.

Now, we have already talked about the minimum standard of treatment, and I will just skip forward to our--to the second slide. And the recent Cargill Decision aptly summarized the standard of treatment

applicable under Article 1105. I will read it into the record, and this is the Cargill Decision, and it's cited in Canada's Counter-Memorial, and it's in the handouts that you have before you.

To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic, arbitrary beyond merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of the policy's very purpose and goals, or otherwise to subvert domestic law or policy for an ulterior motive or to involve an utter lack of due process so as to defend judicial propriety.

Now, the Claimants have expressed great dissatisfaction with the Cargill Decision as well as Glamis, but I will also point out that the Claimants have referred to Waste Management, and if you look in your slides from both the opening and in their Counter-Memorials, they point to Waste Management and

only refer to one sentence in a relevant paragraph, and I would like to present that whole paragraph to the Tribunal because I think the standard basically reflects what Cargill and Glamis have said.

In the next slide, again this Tribunal, "The minimum standard of treatment is infringed by conduct that is harmful to the Claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic." I will go on, "or involves a lack of due process leading to an outcome which offends judicial propriety, as might be in the case of a manifest failure of natural justice in judicial proceedings or complete lack of transparency or candor in the administrative process."

Now, the Claimants only focus on the last sentence in applying the standard. It is relevant that the treatment is in breach of representations made by the host State, which were reasonably relied on by the Claimant. This is consistent with other NAFTA cases that simply say this is relevant.

Now, I won't go on for very long, but I do want to respond to a specific question that Professor

Sands asked at the beginning of the week as to whether or not the Claimants--the cases, the non-NAFTA cases that the Claimants rely upon discuss any State practice or opinio juris for the proposition that they have put forward. They do not. And I encourage the Tribunal to look to the Cargill and Glamis Decisions because they went through exactly this analysis. And I will direct the Tribunal to our Counter-Memorial at Paragraph 269 and our Rejoinder Paragraph 140 to 142.

And I will finally, in the interest of time, just like to point the Tribunal to the two final points that the Claimants have brought up with respect to whether or not there has been a breach of contract, and I don't wish to get into semantics as to whether the Benefits Plans or anything is a contract or not because it really doesn't matter for the purposes of 1105.

And I would just point the Tribunal to the rule of international law that a mere breach of contract does not rise to a level of breach of international law. And two NAFTA Tribunals, Azinian and Waste Management, have both explicitly recognized

that. And I will just point forward to the second slide of Waste Management and read into the record: "Even as to 1105, while it would be relevant to show that the particular conduct of the host State contradicted agreements and understandings reached at the time of the investment, it is still necessary to prove that this conduct was in breach of the substantive standards embodied in Article 1105. Showing that it was a breach of contract is not enough."

I refer the Tribunal to our pleadings. If you have any questions on this particular issue, I would be happy to answer them. Otherwise, I will turn the table over to my colleague.

PRESIDENT van HOUTTE: No questions.

MR. LUZ: Thank you.

MR. GALLUS: Even if we accept the Claimant's Submission that Canada is obliged to protect legitimate expectations, then Canada had not breached Article 1105 because Canada has fulfilled any expectations of the Claimants legitimately should have had.

As I explained in the opening, again the decisions of the Canadian courts are relevant on this point. The Canadian courts, as we've described before, held that the Guidelines are consistent with previous regime; and, if they're consistent with the previous regime, they can't possibly be inconsistent with any legitimate expectations that were generated by that regime.

I refer you specifically to the decision of Justice Barry at Paragraph 135, the last two sentences of that paragraph, Justice Barry confirms these were rules of the game, and the same rules apply today. Well, if the Board is just operating under the rules of the game, it can't possibly be inconsistent with any legitimate expectations that the Claimants had.

So, what do we have now that was not before the Canadian courts? What do we have now that emerged from the evidence this week? Let's start with the witnesses.

First of all, we do not have any witnesses or any witness testimony with regard to Murphy Oil. Murphy is the co-Claimant in this case; however, has

submitted no evidence as to their legitimate expectations. The only evidence we have from Murphy in this case is a witness statement from Mr. Buchanan, in which he merely states that since Murphy is not the Operator of the projects, it defers to the Operator.

So, we have no evidence from Murphy as to their legitimate expectations. We also have no witnesses from Terra Nova. No witnesses from Petro-Canada concerning the legitimate expectations of the Terra Nova Operator. Indeed, during the written pleadings in this case, the Claimants acknowledge that they do not know the understanding of the Terra Nova Operator. I refer you to the next slide which is a footnote from the Claimants' Reply, where they're referring to one of the benefits reports submitted by Terra Nova, and you might recall that this is the benefits report where Terra Nova states explicitly in 1999 that when we are expending on research and development, we are not only expending on what's necessary for the project but expending for what's not necessary. We are expending for what's important for the development of the Canadian offshore industry.

And in responding to this report, the Claimants state here in the last sentence, "The Claimants had no hand in drafting this language and cannot speak to Petro-Canada's intended meaning." So, the Claimants have not purported to understand the legitimate expectations of Petro-Canada, the Terra Nova Operator in this case, and they provided no witnesses from Petro-Canada.

We also have no witnesses from the Claimants during the key period of 1985 to 1990, the key period when the Atlantic Accord was signed, when the Acts came into force, and when the Hibernia Benefits Plan was approved. We have no witnesses from Mobil who could speak to their expectations from that time.

We also have no witnesses from the Claimants who can speak to their legitimate expectations concerning benefits reporting between 1998 and the announcement of the Guidelines in 2001.

The only witness from the Claimants who had spoken to their legitimate expectations or said something that could be interpreted as affecting their legitimate expectations is Paul Phelan.

MR. RIVKIN: Mr. President, I know it's not proper to object during the other side's argument, but I do want to point out that Canada, in its Rejoinder, said that legitimate expectations must be based on objective rather than subjective expectations of the Investor, and that is certainly how we have pleaded our case. We rely on the documents which we believe show both sides' expectations. It could save some time this afternoon. I see an awful lot of slides of what people were apparently thinking. That's not--it does not seem to be relevant as to who testified about whose expectations.

PRESIDENT van HOUTTE: What's your reaction?

MR. GALLUS: If the Claimants are willing to admit that Paul Phelan nor anyone else from the Claimants can speak to their legitimate expectations, then we are happy to not refer to the evidence of Mr. Phelan.

PRESIDENT van HOUTTE: We assume that we will consider your slides as part of your argumentation and that you move on? We will attach the relevance--we will attach the weight to those slides which we deem

proper.

MR. GALLUS: I think there are some important aspects of those slides. For example, during the week we've heard about meetings that took place, informal meetings that took place in the early days where perhaps the Claimants' expectations would have been formed. We've talked about situations where the Operators would have met with the Board, and there has been some discussions about what they would have been told then. The point of the references to the transcript is that neither Paul Phelan nor anyone else from the Claimants were at those meetings and, therefore, can't speak to what was said and can't speak to what the Board was telling them.

By contrast, we do have the evidence of John Fitzgerald, who was around at that time, and he did speak to what his understanding was and what he thought he conveyed to the Claimant and the Operator.

Rather than walking the Tribunal in detail through the testimony of Paul Phelan, I will just point out the key aspects of that testimony and refer you to the transcript in case you're interested.

First of all, he confirmed that when he was talking about the R&D expenditure obligation, he was just speaking from an accountant's point of view, and I will refer you to the transcript at Page 408, Lines 1 through 11.

He confirmed that he wasn't involved in process at key times. I refer to the transcript at Page 399, Line 20, to Page 400, Line 1.

And he confirmed that he wasn't at key meetings. I refer you to the transcript at Page 409, Lines 16 to 21.

And he also confirmed that he wasn't aware of key documents, and I refer on the transcript at Page 372, Line 11.

He also confirmed in the transcript that, even though he was the accountant who started in 1990 after this critical period, that he knew that the Operators had committed to spend on research and development and education and training, and Mr. Phelan confirmed that in the transcript at Page 402 at Lines 16 to 19.

As I said before, in contrast to the

Claimants, Canada has put forth the evidence of John Fitzgerald, who was very much front and center during these key periods. And you heard John Fitzgerald testify as to certainly what the Board legitimately expected, but also what he would have identified as the sources for those legitimate expectations for the Claimants.

And you recall that Mr. Fitzgerald referred to the environment at the time that the investments were made. The Claimants have not denied that a key factor in determining the legitimate expectations of an investor is the environment at the time or the circumstances at the time the investment was made. And Mr. Fitzgerald confirmed that at that time the Government was repeatedly stating that it expected to achieve sustainable development from the revenues from the oil off of the coast, and that to achieve that sustainable development there was a need for expenditures on research and development and education and training.

Mr. Fitzgerald also referred to the accord as a key source of the Operator's legitimate

expectations, and we identified before the importance of the accord because it is expressly incorporated into the Act, including the provision stating that the expenditures shall be approved by the Board.

He also identified the active course as a key source of the Claimants' legitimate expectations and the Environmental Assessment Panel reports with regard to Hibernia and Terra Nova, both of which identified general research and development that the Claimants were expected to undertake, regardless of whether it was necessary for their projects.

Mr. Fitzgerald also referred to the 1986 Exploration Phase Guidelines. You will recall that these are the Guidelines under which the Board stated that expenditure targets will be set. And you will recall also that in the 1987 Exploration Phase Guidelines, that stipulation was not made. And there was a suggestion that that meant that the Board had expressed a view that he had abandoned forever the idea of expressing targets for research and development and education and training expenditures. The implication is the opposite.

But in 1986, when the Hibernia Benefits Plan was approved, the Board had issued to the Operators a document in which they had stated that expenditure targets would be set. That means the Operators were now considering that Benefits Plan in 1986 must have been aware that the Board thought it had the authority to set express expenditure targets.

As I said before, there was a suggestion that by not including that stipulation in the 1987 Guidelines that the Board had abandoned forever this idea of setting express expenditure targets, but that's not correct. First of all, within those 1987 Guidelines, the Board expressly stated that these Guidelines may be revised from time to time following consultation with the industry. That's indicating that the Board was not abandoning the idea that it would again set expenditure targets for the Operators.

And John Fitzgerald spoke to what his reaction would have been to the 1986 and 1987 Guidelines, which I believe is on the previous slide there, Thomas. But are seeing John Fitzgerald's statement, "I don't want to be flippant, but if I was

a Proponent and I had a piece of paper from a regulator that had this clue in it, I would breathe a sigh of relief when it didn't appear afterwards and say we got off the hook this time, that you know, pay attention to what our commitments are because, obviously, somebody over there thinks it might be necessary to be more explicit on these matters."

Obviously, the content of the Hibernia and Terra Nova Benefits Decisions are critical for determining the legitimate economics of the Operators of the Claimants. Canada has already extensively referred to the aspects of those decisions, which indicated that the Board expected expenditures on research and development, would monitor those expenditures, and would intervene if those expenditures were not meeting their obligation under the Act. And I would refer you again to those aspects of the decision to which we referred in our opening and our opening slides.

I would also like to refer you briefly to the testimony of Andrew Ringvee. Once again, I won't take you through these slides specifically, but I will

address the general issue.

Andrew Ringvee addressed the expenditures that the Operators were undertaking under the Work Plans. These are the expenditures that the operators are undertaking to fulfill their shortfall under the Guidelines, and he talked about the expenditures under these Work Plans. But in describing these expenditures, he described them in exactly the same way that the expected expenditures were described in the Hibernia and Terra Nova Decisions. If we could just skip on a couple of slides--stay there for a moment, the previous slide.

You see that in the Hibernia Benefits Plan Decision the Board is referring to research development into ice detection systems, iceberg towing and ice forecasting, and you will see at the bottom, "The panel recommendation of research and development to improve the ability to detect and manage ice under adverse weather conditions. This was what was stated in the Hibernia Benefits Plan Decision of the sort of research and development that was expected from the Hibernia Project.

And I won't go into the detail of the transcript because you could see it for yourselves in both the slides and your own versions of the transcript, but when describing the expenditures that the Operators were undertaking now, Mr. Ringvee described them in the same terms as you see here. [redacted]

Consequently, the Operators are doing now exactly what they said they would do in 1986. And if they're doing what they said they are doing in 1986, it's difficult to conclude that the obligation to do this now is inconsistent with any legitimate expectations they took from this promise to do it in 1986.

If you refer to the next slide--let's skip down a couple--and there we have another commitment from the Hibernia Benefits Plan, where the Operators commit to do research and development to develop effective countermeasures to offshore oil spills. Again, I won't refer you to the explicit parts of the

transcripts--you could read them yourself--but in most parts of the transcripts Mr. Ringvee confirms that the research and development that [redacted]

So again, if the Operators are conducting now the research and development that they said they would conduct in 1986, it's difficult to accept an obligation to conduct this research and development now is inconsistent with the legitimate expectations they would have taken from this commitment.

Before I hand over to my colleague, Mr. Douglas, to address you on damages, I do want to make two final points on legitimate expectations, and it's, first of all, the Claimants referred before to the fact that they acknowledged that legitimate expectations must be objectively determined, but it's important to recognize that they have submitted no documents concerning legitimate expectations from these key periods, no documents concerning their expectations from the Accord Acts, their expectations from the Hibernia Decision or their expectations from

the Terra Nova Decision.

And, finally, it's important to remember that the Claimants have accepted that legitimate expectations must be based on specific assurances by a State to induce the investment. And while the Claimants have accepted that, they have not identified any specific assurances that are relevant to this dispute. They have identified no promises from the Board that the Operators can just undertake research and development necessary for the projects. They have identified no promises that the Operators could unilaterally determine how much they could spend. They have identified no promise that the Guidelines would not be issued; no promise that the Board would not rely on its authority under Section 151.1(1)1 to issue such Guidelines; and, finally, no promise that the Board would not enforce the Claimants' obligation under Section 45(3)(c) to expand on research and development and education and training in the Province.

And unless the Tribunal has any questions on those issues, I will turn to Mr. Douglas to address

you on damages.

PRESIDENT van HOUTTE: No questions, thank you.

MR. DOUGLAS: Good afternoon. It should be about 15, 20 minutes.

MR. RIVKIN: Martina, could you please close the session.

THE SECRETARY: Please close the session.

(End of open session. Confidential business information redacted.)

CONFIDENTIAL SESSION

MR. DOUGLAS: The case for damages is unlike any other NAFTA case; and, as far as I'm aware, it's actually unlike any other investment arbitration damages case I've read or seen. And it's important to appreciate why. There are two main reasons, and I will go through them both:

First, this is not a case where the Claimants have to pay a lump-sum over to the Government of Canada. The R&D and E&T spending is entirely within their control. The Claimants are asking this Tribunal to make an award that Canada pay for their spending under the Guidelines. And that's worth repeating: The Claimants are asking this Tribunal to make an award for Canada to pay for their spending under the Guidelines. This key aspect defines their claim.

And the Claimants have shown how it is they intend to spend the Award, and that is the Work Plans. Mr. Rosen confirmed that his damages assessment assumes that none of the Work Plan expenditures would have been undertaken in the ordinary course.

Next slide, Thomas.

"So, the Work Plans are planned incremental spending, is that what you're saying?"

"Yes."

"Okay."

"And but for the Guidelines, these expenditures would not about have been undertaken?"

"That is my understanding, yes."

Therefore, all of the Work Plan expenditures reflect incremental spending, if you recall incremental spending is the difference between Guideline obligations and ordinary course expenditures, and that's what the Claimants claim as damages.

However, when we look at the Work Plans, a different picture is painted. [redacted]

[redacted]

[redacted]

Now, this R&D is a great example of the kind of R&D that can be done in the Production Phase. [redacted] And there are other examples of this in the Work Plans. [redacted]

And I won't go through them all. They were discussed

in some detail. For the sake of time I will move on, but they are there.

Should Canada be required to pay the Claimants an award that they will use to conduct this R&D and reap the benefits from this R&D? The Claimants think so.

Now, there is also another expenditure in the Work Plans that was brought up this morning, and that was the [redacted]

And again--

MR. RIVKIN: You then made a characterization of the statement--

PRESIDENT van HOUTTE: I would suggest that we discuss this after the hearing.

MR. DOUGLAS: The reason why I bring it up,

and again, I do so tentatively, but the reason why is because the Claimants, in their damages assessment, are playing loose with the rules. They had filed Work Plans they claimed as incremental expenditures, but when you look at them, there is some doubt about that.

[redacted]

For the sake of time I should go on.

I would just refer you to the Expert Report of Professor Noreng. Now, Professor Noreng is an expert in Norway, and he examined the Work Plan expenditures in some detail in a concise and very thorough matter, looking at both whether they might be ordinary course expenditures or the benefits that are associated with them.

Now, the Claimants criticize Professor Noreng in their closing for not quantifying the benefits, and they state that he is the person with the expertise. And perhaps, then, this is the reason why they did not call him to testify.

It is also worth mentioning that when it comes to operational benefits, Canada sought from the

Claimants documents to show the economic benefits that might derive arrive from the expenditures. We wanted more information about the Work Plan expenditures, what they were about and what the benefits would be. We got no documents from them.

Now, the Claimants also refused to make any deductions for SR&ED tax savings or royalty payment saving, and this is astonishing in light of the fact that some of the Work Plan expenditures state they will be SR&ED-eligible.

[redacted]

And I put this to the Claimants' Expert, Mr. Rosen, and he said, "It hasn't been approved."

I said, "You don't make any deductions for SR&ED for this expenditure in your calculations?"

"No, it's not--it hasn't been SR&ED-approved."

So, according to that standard, unless and until an expenditure is submitted to the CRA and it is approved, that is the standard at which you can then deduct.

So, we have an expert who is willing to project the future price of oil or adopt a projection, future exchange rate, future ordinary course, future Stats Can factor--a whole host of future elements that increase the Claimants' damages, but he won't take into account any factors that decreased the Claimants' damages. And this is especially odd considering the alignment that exists between the Guidelines and SR&ED eligibility. The Guidelines themselves state that the Board will rely on the definition of what is SR&ED-eligible when determining what is eligible under the Guidelines.

Now, the uncertainties of the Claimants' loss are confirmed by their own documents and their own testimony, and I'm going to walk you through just a couple of points here that are important, [redacted]

03:56:36 [redacted]

03:58:02 [redacted]

03:59:15 [redacted]

Now, Ms. Lamb, in her opening remarks to the Tribunal, stated--and this is something they mentioned in their pleadings as well--"So, in our case, Claimants' loss in damage consists in the obligations created through the Board's implementation of the Guidelines, and those obligations, of course, already exist."

Clearly, this is false, [redacted] Mr. Rosen made much the same point in his First Expert Report. He stated, "The incremental spending does not represent an economic loss to the Claimants until the cash outlays are ultimately made."

And it is important to realize that, to date, the Claimants have barely spent any of their

04:00:41 incremental spending; thus, they have suffered to date very little economic loss.

Now, the Claimants argue that half of their damages fall within the past and half of their damages fall within the future. This is not the case. All of their damages are in the future because all of their incremental spending is in the future. It is only when they spend in the future that we can know whether or not that expenditure was ordinary course, whether it will entitle them to SR&ED tax credits or royalty savings, and what the operational benefits will be, operational benefits such as the production of additional oil.

And this point makes their damages assessment unique in another way, so the first way talked about was this was not a lump-sum payment over to the Government. Their spending is within their control. The second way is that they are claiming for damages they have not yet incurred.

It's an important point to note that the Claimants have not been able to find a single award for damages not yet incurred. They cite a number of

lost-profits cases, but they themselves argue that their case is not one for lost profits. They do so to justify their discount rate.

But the lost-profits cases they cite differ materially from this case. In all the cases they cite, the measure, the act were either an expression or was a breach of contract. In the case of an expropriation, that date happens in the past. The case of a breach of contract, that date also happens in the past. Here, the Claimants only suffer loss when they make payments in the future. [redacted]

Now, Canada did find two cases that discuss damages not yet incurred, and in neither of them did the Tribunal make an award for these kinds of damages.

The first case is LG&E. And you see this is RA-25. I'm referring you to Paragraph 96. Now, I won't want to take you through it, but this was a case of a continuing measure that the Tribunal found to be an infringement of the BIT. The Claimant sought damages, as Ms. Lamb notes, for both past and future lost dividends. However, the Tribunal refused to make

an award for the future lost dividends because the Claimant had not "actually suffered those losses." And this is a reflection of the ILC Article principle which states that only damages--I'm forgetting the wording--I believe the wording is "damages actually suffered" as they state and as they quote can be awarded as a matter of compensation.

The second case that refused to make an award for damages not yet incurred was Occi Petroleum, which was also on the screen. This case involved a claim for tax payments that were not yet due or paid.

Now, again this was a continuing measure, and again there was a distinction between this case and our case. This is not a case where future payments are just going to go the Government of Canada. Ours is even more remote than Occi Petroleum where the future payments are the Claimants' own payments, spending on themselves. And the Tribunal in Occi Petroleum dismissed the aspect for future tax payments or VAT payments because they were not yet due or paid. Dismissed them outright.

In line with these cases, the Claimants seek

damages they have not yet incurred. This has not been awarded before: Not under the NAFTA nor, as far as I'm aware, anywhere else.

Why the hesitancy? Because damages not yet incurred are speculative. The Claimants' assessment requires them to forecast, as I mentioned, the price of oil, oil production, exchange rate, ordinary course expenditures, ownership interests, SR&ED credit, royalty benefits, operational benefits. When the uncertain projections of each of these variables combine, the effect is overwhelming.

Now, I just want to say something here on this point with respect to the projection of oil prices.

Actually, this is going to be RA-77.

This is RA-77, Paragraph 2. The Tribunal in Amoco v. Iran, and this was referred to in Canada's pleadings. And they're discussing about what to do with oil price forecasts when awarding damages. Paragraph 239. They state, "The element of speculation in a short-term projection is rather limited, although unexpected events can make it turn

out to be wrong. The speculative element rapidly increases with the number of years to which a projection relates. It is well-known and certainly taken into account by investors that if it applies to a rather distant future, a projection is almost purely speculative, even if it is done by the most serious and experienced forecasting firms, especially if it relates to such volatile factor as oil prices.

Now, this next line here, and I'm reading it into the record, and I apologize, absolutely--I will move on--I just want to focus on that last line because the Claimants have justified the use of oil because it's what businesses do. However, the Tribunal in Amoco explicitly stated, "Such projections can be useful indications for a prospective investor who understands how far it can rely on them and accepts the risks associated with them; they certainly cannot be used by a tribunal as the measure of compensation."

PRESIDENT van HOUTTE: Mr. Douglas, in order to be fair to both sides, can you terminate your argument in five minutes, all of it?

MR. DOUGLAS: All of it in five minutes. You have my word. My apologies. The material just riveting, so it keeps me distracted from the time.

Now, compounding the problem of these future uncertainties, the Claimants make matters worse by arguing for a risk-free discount rate.

Now, Mr. Kantor talks about the principles of discounting, and he states, "The discount rate used in a DCF valuation is the rate of return used to convert future cash flows into a present value that reflects the risks associated with those cash flows."

Now, mr. Rosen testified that we should leave these risks to the marketplace, and he confirms that his discount rate does not account for the uncertainties in his projections. However, Mr. Kantor noted, along with Rapinsky and Williams and Marbo--and this is all in Canada's pleadings and damages and Expert Reports--it is the very purpose of the discount rate to account for the risks inherent in a projection. Some commentators have gone so far to say that the use of a risk-free rate is egregious.

See here, these are the words of Susan Pratt,

"While not the most common error, this is certainly one of the most egregious. Some analysts have even erroneously discounted a highly risky series of projected economic income by the Treasury bill rate." That's exactly what Mr. Rosen is doing. Mr. Rosen argues that a risk-free 2 percent discount rate is justified because the Claimants are not seeking lost profits, but he confirms that some of the same elements in his analysis would be those in a lost-profits analysis.

Again, I won't read it into the transcript, but it's Page 950, Lines 3 through 13.

And the last point I wish to raise is with respect to the gross-up. This is nothing more than a flagrant attempt to inflate the Claimants' damages. Mr. Rosen testified in his direct, he said, "In fact, when I was making my Final Report, I had an opportunity to interview the people in the Tax Department at ExxonMobil and discover that, in fact, the Claimant is a U.S. entity and will be taxed in the U.S."

His report--and again, I mean no disrespect,

but his report respects the same cavalier attitude. He cites no evidence--no evidence--to support the gross-up. And he says--and this is the only thing he says--"In the preparation of my updated calculation, I was advised by management that an award of damages would likely be taxable, in the United States, at an expected rate of 38 percent." That's all he says. That's the only guidance he gave Canada as to how to respond to a gross-up that accounts in his own admittance for about an [redacted] difference in his quantification.

Now, as has been discussed, I forget, yesterday or the day about, the issue is plainly resolved by not having an award made payable to the U.S. investor or the U.S. parent, and Mr. Rosen confirmed as such. I asked him explicitly, "If an award is made payable to the Canadian entity--"

"Yes."

"--is a tax gross-up required?"

"No."

Problem solved.

Now, it's almost five minutes, and I

appreciate the fact that the Tribunal has asked for some guidance in terms of what it can award in terms of formula or whatnot. Mr. President, would you like me to provide some comments on that?

PRESIDENT van HOUTTE: Very briefly.

MR. DOUGLAS: Very briefly.

It's Canada's view that Article 1135 of the NAFTA governs, and Article 1135 of the NAFTA provides for issuance of Final Award for monetary damages. Thus, in Canada's view, the only option available to this Tribunal is to make a Final Award for monetary damages.

Now, I note this isn't particularly helpful to the Tribunal. If the Tribunal does find a breach, it will look to damages. However, when it does, it is important to recall the legal limitations of an award. It's first important to note that damages are the Claimants' responsibility. It is their burden, and the damages must be reasonably certain. The Claimants attempt to skirt this issue in a number of ways that I will not, because for the sake of time, go into.

It's important to recall in Mr. Walck's

testimony he testified that the fact that the Claimants will suffer damage is not reasonably certain; thus, this distinction between fact and amount that the Claimants try to put forward to justify their, quote-unquote, best guess is not apt.

Now, they also cite Himpurna to support their proposition that approximations are appropriate. And, indeed, many approximations were taken in Himpurna, but if you were to look at the discount rate used in Himpurna, it was a discount rate of 26 percent.

Now, if the Tribunal is inclined--disagrees with Canada with respect to liability and disagrees with Canada's assessment of damages and is inclined to make an award, I know, Mr. President, both yourself and I and Mr. Legum have talked about the Experts coming together and whatnot. We haven't had a chance or opportunity to address that, so perhaps we can at a later date, if it interests the Tribunal.

And I just wanted to note that Mr. Walck in his report does offer, in the alternative, quantification. This is the one that I, quote-unquote, made him do, and he removes some of the

assumptions that Mr. Rosen does in his report and offers his own quantification. And, of course, the discount rate is much higher.

And barring any questions, those are my submissions.

PRESIDENT van HOUTTE: Thank you very much. We will cross that bridge when we are there, but we are not there yet.

There are no questions from the Tribunal.

So, a short break in how we will spend the rest? Ideally, I guess we should finish by 5:00 or so because the Tribunal would still like to have some time. There are some administrative matters, there are some replies, maybe, but how do you see things?

MR. RIVKIN: I think in terms of replies, frankly, there have been quite a few misstatements about our position, misstatements about the record that I think, rather than taking time this afternoon, it's been a long day, and because Canada already has to do some fair amount in writing, I would--I think we should simply respond in writing on an appropriate schedule. Canada has not just the questions that

Professor Sands asked during the questioning, but several of the questions such as Question 3 that you posed us yesterday that they haven't yet answered. We know we have to answer 5-C, and we also have some--have begun to put together some State practice authority in Professor Sands's question from Tuesday.

So, I would propose in terms of that that we have an opportunity to do some clarification, correction, but also fold that in with the other focused points that need to be dealt with, and that Nick and I can speak next week and work out an appropriate schedule and the manner of doing that.

MR. GALLUS: I think it might be important to talk about the parameters on the submission to which Mr. Rivkin is referring. As far as I understood his proposition, the Claimants, in a further written submission, would get the opportunity to respond to what Canada has said here, but it would appear that Canada would not be given an opportunity to respond to what the Claimants have said.

Furthermore, if I understand his proposition, Canada's submissions might be confined to certain

questions put by the Tribunal. The Claimants would have the opportunity to respond to anything that Canada said in its closing.

MR. RIVKIN: That actually wasn't what I was saying.

MR. GALLUS: I'm sorry, I thought that's what you were saying.

MR. RIVKIN: That's why I thought we could talk about it next week.

MR. GALLUS: Sorry, Mr. Rivkin.

MR. RIVKIN: The original contemplation for today was that we would be done before lunch, and then we would each of a time for short rebuttal. Obviously, that didn't happen, but the arguments have been useful. But I think given the writing that you have to do, given what we would like to say, I'm sure we could work out an appropriate, focused and hopefully brief Post-Hearing Briefing schedule.

PRESIDENT van HOUTTE: The Tribunal has appreciated the reluctance of both sides for Post-Hearing Briefs, and we share that reluctance; and, therefore, we are confident that whatever you do

will be the minimal performance, if that's possible.

Now, how you have to respond to each other's briefs and so on, maybe it's best that you discuss it among yourselves.

MR. RIVKIN: I think we could work it out better.

I know you mentioned some other administrative matters. Did you want to take a short break and come back and talk about the administrative matters?

PRESIDENT van HOUTTE: Short break, or do it now?

MR. RIVKIN: Now is fine.

(Comments off microphone.)

MR. RIVKIN: I know Mr. Douglas raised it, and I know the Tribunal raised it as a possibility--we know you're not there yet--but Claimants would be happy to if at any time the Tribunal felt it would be helpful to have the Experts come together, the Damages Experts come together for whatever conversation/questioning the Tribunal would want to have, we think it would be helpful before that to have

some indication of some focus and perhaps some preliminary comments from the Tribunal that would help the Experts know what to talk about.

We would hope that the lawyers for each side could come and observe. Not participate, but observe.

PRESIDENT van HOUTTE: Again, we will cross that bridge when we are coming there, and we are not yet there. I'm afraid that there is much ground to cover before, but it's good to know now that if it's useful that we can discuss a few things.

MR. RIVKIN: You asked and we want to get back to you.

A couple of other things that have been asked this week and mentioned this week, we mentioned at the beginning of the week the concerns we have about the latest order involving HSE. Given the other time requirements this week, we have not come back to you with our request for an action, if there is to be one, and we will try to do that and make an application, if need be.

The two other NAFTA Parties asked for copies of the transcripts, and while we are on the record, I

should--I can mention the agreements that have been reached with them. The United States Government said that it would be happy to simply receive the transcript that eventually is public, and Mexico has told us that it would like to have the full transcript, but it will wait to do so until both the Parties have had an opportunity to review the transcript and make whatever corrections would be made in the ordinary course, and also that we would have the opportunity to designate the portions of the transcript as confidential that are--and that need to be protected by Mexico from public approval--public disclosure, rather, and the Parties agreed to that on that basis. But that will take a little bit of time, but as soon as we are able to do that, we would be happy to provide it to Mexico on that basis.

One question for--two questions for the Tribunal.

PRESIDENT van HOUTTE: Please.

MR. RIVKIN: One is whether the Tribunal has any guidance to the Parties about how you would like us to address the issue of costs and whether--

PRESIDENT van HOUTTE: That was my question, too.

MR. RIVKIN: And my other question was a simpler one. You heard a lot of argument today. David is the best court reporter around, and I know he had access to our notes in doing so, but if it would be helpful for the Tribunal to have our notes in whatever random shape they are, in addition to the transcript, we would be happy to provide them. I have to say some of them are outlined, some of them are written out. It's a lot of different forms.

PRESIDENT van HOUTTE: We will cross that bridge when we are there.

What's Canada's view on what has been said, and do you have anything to add?

MR. GALLUS: I don't believe, but if I could just take one second to confirm with my colleagues.

(Pause.)

MR. GALLUS: Canada has one comment we would like to make, and that is with regard to the Claimants' proposed submissions on State practice and opinio juris. Canada just wants to make two comments

on this.

First of all, the evidence of State practice and opinio juris has been at issue since the very beginning of this dispute, and the Claimants, until now, have not provided any evidence. We recognize that Professor Sands has invited the Claimants to submit such evidence, and we respect that, but we think that perhaps Canada should have an opportunity to respond to whatever is put in by the Claimants.

MR. RIVKIN: As I said, Nick, we could work all that out in our conversation next week. If we can't agree on something, we will have them solve it.

PRESIDENT van HOUTTE: With regard to the costs, now we were briefly considering the English practice that a decision on costs is rendered after an award is issued so both have a clear view and don't have to do useless work. However, under the Rules, NAFTA Rules, the decision of costs has to be included in the Award.

Now, how would you envisage--what is in your mind the best methodology for costs?

MR. RIVKIN: Perhaps that's something we

should throw into the conversation next week and see if we can work something out and come back to you.

PRESIDENT van HOUTTE: Fine. Because also the documents you submit to sustain your demand and so on, if you could agree to which extent you request from each other evidence, that would be nice.

Are there other issues?

MR. GALLUS: Not from Canada.

MR. RIVKIN: Nothing from Claimants, except to once again thank the panel for attention and long days and good questions and the thorough understanding of the case, and we look forward to continuing to work with you on this case.

PRESIDENT van HOUTTE: We are starting to thank, and I guess that Canada joins the thanking.

From the Tribunal, it is also the moment to thank counsel--the different counsel for both sides for their professionalism and courtesy towards each other. You were not shouting to each other. It was also your courtesy to the Tribunal. And, of course, the excellent quality of your arguments.

I also want to thank in the name of the

Tribunal the witnesses and the Experts because also for them it has--it has been a big investment in time.

And I also would like to thank the representatives of the United States and Mexico, who we did not welcome officially because it was a little--we didn't know their presence from the very beginning, but we appreciate the interest in having this case. And we also appreciate the submissions those two countries have made under Article 1128, the submissions of the 8th of July and of the 1st of September.

And, as a matter of fact, if the Tribunal deems or would deem it necessary, it intends to ask the two countries more clarifications on their submissions whenever that would be useful, but that would also be done in--whatever we will receive from the countries would also be submitted to the Parties for further comments.

I have a formal question: Do you have objections against the way the proceedings have been conducted?

MR. RIVKIN: Claimants have no objections.

MR. GALLUS: Nor does Canada.

PRESIDENT van HOUTTE: Okay. Then we were thinking that--that's only a suggestion from our part, and maybe you will refine it in your discussions next week, but that the documents or the briefs or whatever you call it you would like to submit should be submitted by the 15th of November. That's three weeks. I don't know whether that's feasible. Let's take that as a working hypothesis. We would appreciate as short a period as possible.

And then as another principle, no further submissions may be made except with the prior authorization of the Tribunal. You agree?

MR. GALLUS: That's fine with Canada.

MR. RIVKIN: Yes.

PRESIDENT van HOUTTE: Okay, fine. And it is now the moment to thank, in the name of the Tribunal, David Kasdan for his work and the long hours he has spent.

(Applause.)

PRESIDENT van HOUTTE: Then I also want to thank Martina Polasek for her invaluable help and her

presence and all the care she has given us. And, of course, I want to thank ICSID for the hospitality.

And now I give the floor to my two colleagues.

ARBITRATOR JANOW: Well, I just also want to express my appreciation. I think the purpose of a hearing is to develop greater clarity on the issues, and I think this has absolutely achieved that through your excellent remarks and submissions. So, I just want to extend my personal appreciation to both Parties for this very professional and excellent experience. Thank you.

ARBITRATOR SANDS: And I join my colleagues and friends in commending really both sides for the excellent standards of advocacy and clarity, and the real decency and collegiality that both sides have gone about helping us. I think the hearing is about assisting a tribunal in dealing with the difficult issues, and identifying them and addressing them, and neither side has shirked from that responsibility, and it's very much appreciated.

There is one final thing, you, Mr. Rivkin,

mentioned a whole raft of things to address as one aspect simply by reminder, it's not that I love reading annexes and things, but I did mention, I for one, and I would welcome just the written briefings in the Canadian domestic proceedings and the application to the Supreme Court, which was the subject of the decision of the Supreme Court, would be useful to see to complete the picture, if that is possible.

Thank you very much.

PRESIDENT van HOUTTE: Thank you. And that brings us to the end of those four days. I wish you safe return, and all the best for the future. Thank you.

(Whereupon, at 4:31 p.m., the hearing was adjourned.)

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