IN THE ARBITRATION
UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

MOBIL INVESTMENTS CANADA INC. &
MURPHY OIL CORPORATION

Claimants

AND

GOVERNMENT OF CANADA

Respondent

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

CLAIMANTS' POST-HEARING BRIEF (REDACTED)

ARBITRAL TRIBUNAL:

Professor Hans van Houtte, President
Professor Merit Janow
Professor Philippe Sands

January 7, 2011

Redacted per Order of the Tribunal.
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I.

INTRODUCTION

1. This post-hearing brief is limited to (i) Claimants' response to certain points made by Canada in its closing arguments, (ii) answers to specific questions put to the parties by the Tribunal,[*] and (iii) updates on Claimants' positions as to the recipients of any Award, the possibility proposed by the Tribunal of a formula to determine damages in the future, and the Board's conditional approval of the Amended Hibernia Benefits Plan for the Hibernia Southern Extension ("HSE").

[*] In response to Tribunal Question 5(c), which is reproduced in full at page A-5 of the Annex to this submission, the original version of Claimants' Post-Hearing Brief, filed on December 3, 2010, contained reference to an extensive collection of authorities from the national courts of the three NAFTA Parties. Faced with a request by Canada for substantial additional time to respond to Claimants' showing, the Tribunal subsequently ordered Claimants to provide a redacted version of Part III.B.2 making reference only to seven of the domestic law authorities initially cited. This submission complies with that Order. The authority cited in this redacted version therefore should be understood as exemplary of a broader base of domestic authority that supports Claimants' case with regard to future damages.

II.

CLAIMANTS' RESPONSE TO CERTAIN POINTS RAISED DURING CANADA'S CLOSING ARGUMENT

2. In Claimants' closing argument, as throughout the hearing, we demonstrated that Canada's defense amounts to an after-the-fact justification for a measure that on its face violates the NAFTA. While the testimony of Claimants' fact witnesses was consistent with their prior witness statements and well-supported by contemporaneous documents, Canada's witnesses could not defend the positions they had taken in their witness statements, which were never supported by contemporaneous documents.

3. Canada failed to address many of the key points that Claimants had substantiated. Most importantly, Canada failed to explain how a measure enacted by one of its Provinces to require vastly more R&D and E&T spending in the Province than the operators otherwise would undertake, in their best business judgment and on a competitive basis, does not require the use of or accord a preference to goods and services in that Province.[1] Canada never explained how the prior legal regime that indisputably did not require *inter alia* a minimum or targeted level of R&D or E&T expenditures, approvals by the Board either prior to or following those expenditures, or the posting of a financial instrument to guarantee a minimum level of spending could be consistent with the regime imposed by the Guidelines twenty years after the Board's approval of Hibernia's Benefits Plan.[2] Canada could not refute that the Board's POA renewals of the Hibernia project, as recently as 2000, demonstrated that Hibernia was in compliance with its

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1 *See, e.g., infra* ¶¶ 8-12.

2 *See, e.g., infra* ¶¶ 23-24.

obligations under its Benefits Plan while spending substantially smaller amounts on R&D and E&T than the Guidelines now require.[3] Canada did not deny that Claimants' conservative damages calculations included nearly $150 million in ordinary course R&D and E&T expenses for which Claimants are not seeking compensation, or that most of Claimants' damages already have been calculated by the Board or will be incurred over the next half-dozen years.[4] Canada never provided any evidence or quantification of benefits that purportedly will arise from the additional spending required by the Guidelines — nor could it, because the Board's own documents and witnesses confirmed that R&D spending is by nature experimental.[5] Canada also never sought to explain the contradiction between its position that a NAFTA Tribunal cannot award future damages with its position that claims must be brought within three years of the measure that violated the NAFTA.[6]

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[3] *See, e.g., infra* ¶¶ 5-6.

[4] *See, e.g., infra* ¶¶ 31-32.

[5] *See* Tr. 777:20-783:17 (Way). *See also* **CE-178**, CNLOPB, Staff Analysis of the Research and Development Education and Training Report Hibernia Project (April 2004 to December 2008) (Dec. 1, 2009), p. 3 [redacted] **CE-188**, CNLOPB, Staff Analysis of the Research and Development Education and Training Report Suncor Energy Terra Nova Development (April 2004 to December 2008) (Dec. 1, 2009), p. 5 [redacted]

[6] *See, e.g., infra* ¶¶ 33-34.

4. Because the parties had agreed that post-hearing briefs would be limited and because this written rebuttal is intended to be a substitute for the oral rebuttal that was not possible on the final day of the hearing, this section is written concisely and only in order to correct or to clarify certain comments made by Canada's counsel. Claimants do not feel that it is necessary or appropriate to repeat the arguments and evidence presented in our closing or opening arguments or in the written briefs, and we respectfully refer the Tribunal to those more complete statements of our positions. To avoid any doubt, neither the Tribunal nor Canada should infer that failure to address any particular comment by Canada implies agreement with that comment.

5. "*When the Board saw these declining expenditures, it realized that the Operators were not fulfilling their obligation in the Accord Implementation Acts*." (Tr. 1191:15-18)

- This statement is factually inaccurate for several reasons. First, the Board had seen this level of expenditures by the Hibernia Project prior to June 1, 2000, when it issued Hibernia's second POA.[7] Two months prior to this date, Hibernia had submitted its latest benefits report to the Board in which it reported R&D expenditures declining [redacted][8]

- Second, if the Board truly believed in 2000-2003 that the operators were not fulfilling their obligations, one would expect *some*

[7] **CE-99**, Letter from H. Pike, CNLOPB, to D. Willis, HMDC (June 1, 2000) (transmitting Hibernia POA, June 1, 2000 – November 1, 2005).

[8] **CE-71**, Hibernia 1999 Benefits Report, p. 13.

contemporaneous documentation informing the operators of that fact. Canada has produced absolutely no such documentation, and Mr. Way testified that he does "not recall any specific correspondence, internal memoranda, minutes of meetings or other specific documents related to R&D and E&T expenditures prior to the Board focusing its attention on the need for guidance for such expenditures."[9] In particular, the Board did not provide any response to the benefits reports submitted by the operators.

- Finally, Canada points to the Board's statements in Decision 2001.1 approving the White Rose project as evidence that the Board immediately informed Hibernia and Terra Nova of its expectations once it observed that R&D expenditures for the two Projects were declining.[10] White Rose, of course, was a new project, with different ownership interests. The White Rose decision did not give the Hibernia and Terra Nova owners any reason to believe that these requirements would be applied *retroactively* to projects whose benefits plans had already been approved. Moreover, Canada has failed to explain why the Board waited three years to issue those guidelines — or, for that matter, why the Board said nothing to the Hibernia or Terra Nova operators of its alleged concerns during much of that three-year period. If the Board legitimately was dissatisfied with R&D activity levels reported by those projects, it would have been logical for the

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[9] Second Witness Statement of Frederick Way, ¶ 3.

[10] Rej. ¶ 212, n. 299.

Board to seek improvements, even on a voluntary basis, without waiting to finalize the Guidelines.[11]

6. "*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[.]*" (Tr. 1191:18-1192:5)

- As Claimants have consistently demonstrated, Section 45(3)(c) provides no independent obligation to spend on R&D. That section obliges operators to

[11] Tr. 602:8-603:10 (Smyth) ("Arbitrator Sands: Now that I understand, but I'm trying to understand the time--what happened in the time gap in your two--identified in your two paragraphs. Paragraph 6 you refer to a decrease in the period leading up to 2001, and then at Paragraph 8 you refer to the Guidelines developed over the period from January 2002 to April 2004. So, I suppose what I'm asking is: Between those two dates, between 2001 and 2002 and 2003, did you give the Operators an opportunity to get their act together and increase expenditures? The Witness: In--in that period White Rose happened, and that was genesis of the thinking as, number one, how to interpret 45 and make a plain statement to the public--the Commissioner encouraged us to do that and the Board chose to do that. In the course of that work led to this whole discussion of an emergence of R&D Guideline statement by the Board, that was the period in which that was done. At the same period resonant with their knowledge that there was a decline both in reporting and predicted was present in their thinking as well. So, to go out as a Board while developing, I think, into White Rose, the Board chose not to do that or saw it not appropriate to do that."). The Board first provided industry with a draft of the Guidelines in July 2003. *See* **CE-40**, CNLOPB, Draft Guidelines for Research and Development Expenditures (July 2003).

enter into and then comply with benefits plans that are consistent with the terms of the provision. The Hibernia and Terra Nova Benefits Plans did comply with section 45(c)(3), as evidenced by the Board's approval of them after consultation with the federal and provincial governments. The operators were thus required to comply with those Benefits Plans, and Hibernia and Terra Nova were spending on R&D and E&T at levels consistent with those plans, as the Board's consistent approvals of the projects' POAs demonstrated.[12] Canada's witnesses consistently testified that the operators were judged for their compliance with the Benefits Plans.[13]

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[12] **CE-98**, CNLOPB, Hibernia POA June 5, 1997 – June 1, 2000; **CE-99**, Letter from H. Pike, CNLOPB, to D. Willis, HMDC (June 1, 2000) (transmitting Hibernia POA, June 1, 2000 – November 1, 2005); **CE-106**, Letter from H. Pike, CNLOPB, to G. Lever, Petro-Canada (July 26, 2001) (transmitting Terra Nova POA, July 26, 2001 – August 31, 2004). *See also* First Witness Statement of Frederick Way, ¶ 28 (hereinafter "Way Statement I") ("The Hibernia and Terra Nova POAs always required compliance with the applicable Benefits Plans. The Board would be entitled to suspend or revoke the POA if an Operator were not in compliance with its Benefits Plan."); Tr. 493:19-494:2 (Fitzgerald) ("Q. Right. And similarly, if a POA is granted, the Board can only do that if it feels that the Proponent is in compliance with its Benefits Plan's obligations; right? A. At that point, yes.").

[13] *See, e.g.,* Way Statement I, ¶ 28 ("It has always been and remains the responsibility of the Board to ensure Operators are in compliance with their Benefits Plans."); First Witness Statement of John Fitzgerald, ¶ 47 (hereinafter "Fitzgerald Statement I") ("[I]n giving its approval the Board stated that it would monitor the proponent's activities to see how well it was meeting its undertakings."); *id*. ¶ 54 (the approach taken in the Hibernia Benefits Plan was to "monitor the proponent's performance in

- The lack of connection between the Guidelines and what the Benefits Plans (and even Section 45(c)(3) under Canada's interpretation) required can perhaps best be seen in the fact that the Guidelines require Hibernia to spend about four times as much on R&D and E&T as the Board had found sufficient in the 1997-2000 period. Hibernia reported annual R&D expenditures of [redacted] in 1997; [redacted] in 1998; [redacted] in 1999; and [redacted] in 2000.[14] During the first five years of the Guidelines, Hibernia's R&D expenditure requirement was $12.23 million in 2004; $17.98 million in 2005; $15.52 million in 2006; $11.63 million in 2007; and $16.62 million in 2008.[15]

7. "*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).*" (Tr. 1193:18-1194:4)

"*Section 55 of the Accord, which says those expenditures shall be approved by the Board; and as we discovered earlier, that*

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relation to its commitments"); Tr. 494:3-7 (Fitzgerald) ("Q. Okay. And going forward, once the Benefits Plan is approved, what the Proponent has to do is to--its obligation is to meet the requirements as set forth in the Benefits Plan; isn't that right? A. Yes.").

[14] **CE-72**, Hibernia 2000 Benefits Report, p. 13.

[15] **CE-116**, Letter from F. Smyth, CNLOPB, to P. Sacuta, HMDC, at EMM0002117-19 (Feb. 26, 2009).

is expressly incorporated into the Accord Implementation Act through Section 17(1)." (Tr. 1267:2-6)

- Canada's reliance on this sentence from Section 55 of the Atlantic Accord at the hearing is curious. As Claimants have noted,[16] this requirement was not specifically carried forward in the Atlantic Accord Implementation Act. Section 17(1) is only a very general reference to the Board's authority.[17]
- The Board's behavior proves conclusively the inapplicability of this provision. If indeed the Board was required to approve expenditures on R&D under the Atlantic Accord and Section 17(1), it failed to fulfill those obligations for nearly twenty years. There is no dispute in the record that the Board did not require such approvals until the issuance of the Guidelines in 2004.[18]

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[16] Tr. 1073:13-1074: 15.

[17] **CA-11**, *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C., 1987, c. 3, s. 17(1) ("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.").

[18] Tr. 524:22-525:6 (Fitzgerald) ("Q. And [the Board] never imposed prior approval of individual R&D expenditures by the Board [in the Hibernia Benefits Plan approval]. A. No. The process was for the Proponent to propose and report and the Board to look at the reports at the end of the year and to inform Mobil of their satisfaction or otherwise or where they though there could be improvements."); Tr. 537:22-538:2 (Fitzgerald) (Q. And [the Board] did not impose pre-approval of R&D expenditures [in the Terra Nova Benefits Plan approval]. A. No, no."); Tr. 784:9-11 (Way) ("It was--pre-approval of R&D expenses was not required prior to the Guidelines, was it? A. Not that I recall.").

8. *"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." (Tr. 1196:3-8)*

"1106(5) plays a fundamental role in the interpretation of 1106(1)[.]" (Tr. 1205:5-6)

- Claimants have never sought to avoid Article 1106(5). As Canada admitted in its Rejoinder, R&D is a category of service.[19] Therefore, it falls squarely within the language of Article 1106(1)(c), which prohibits a measure that requires the purchase or use or accords a preference to local services. Because services are specifically mentioned in Article 1106(1)(c), the exclusion in Article 1106(5) for matters not mentioned does not apply here.

9. *"[T]here'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." (Tr. 1197:12-20)*

"The Accord Act only says that expenditures shall be made. It doesn't say how they shall be made . . . .[T]he 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

[19] Rej., ¶ 14.

consumer [sic] a service from a domestic service provider. Without that compulsion, there can be no violation." (Tr.1206:4-5, 16-22)

"*Can the Claimants fulfill their Guidelines obligations without purchasing, using or according a preference to domestic services? The answer is straightforward: Yes*." (Tr. 1216:11-14)

"*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)*." (Tr. 1217:14-17)

"*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*." (Tr. 1219:6-8)

- There is no such agreement. First, Canada has presented no example of spending that fails to require the use of or accordance of a preference to goods or services in the Province. This is no surprise, since the Guidelines' stated justification is to ensure that "expenditures … be made for research and development to be carried out in the Province."[20] Canada's oft-repeated comments about an in-house research facility demonstrate that fact, for there is of course no way to create or to conduct such a facility without using or according a preference to local goods and services in its construction and operation.[21] That is not "incidental

[20] **CE-1**, CNLOPB, Guidelines for Research and Development Expenditures, § 1.0 (Oct. 2004).

[21] Tr. 742:8-21 (Way) ("Q. In order to build that in-house research and development facility, of course, the Hibernia owners

spending," as Canada likes to call it, but substantial and essential spending for such a facility. Article 1106(1)(c) and the NAFTA prohibit such performance requirements so that companies can make their own business decisions as to where and how to operate. Canada stated repeatedly that ExxonMobil could have chosen to locate an in-house R&D facility in the Province, just as it has done elsewhere,[22] but if it is doing so because the Guidelines require it to spend a substantial amount on R&D in the Province, then this is compulsion that is prohibited by Article 1106(1)(c).

- Second, as stated in Claimants' closing, it is not up to the foreign investor to develop a means to read the measure that does not violate the Treaty.[23]

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would have to buy local goods in order to build the facility; right? A. I presume some local goods. Q. And they would have to buy local services because those are the people who are going to build the facility; right? A. Yes. Q. And once that facility was up and running, the services would be--the R&D in-house facility would be providing research services in the Province of Newfoundland; correct? A. Yes.").

[22] Tr. 254:10-18, 1217:14-1219:1; Counter-Mem., ¶ 198; Rej., ¶¶ 37-38, n. 43.

[23] Tr. 1110:2-11 ("Canada's argument has it backwards. A measure that requires conduct contrary to the obligation Canada undertook violates the NAFTA. It's not … 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.").

- Third, all of Canada's arguments in this vein completely ignore the focus of the Guidelines on R&D and the massive amounts of money — more than $10 million annually — required to be spent in order to comply with them.

10. "*[T]he 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.*" (Tr. 1198:19-1199:3)

- Canada misstates Claimants' position. Claimants have consistently stated that R&D and E&T are services.[24] A measure that requires the use of or accords a preference to the use of local services violates Article 1106(1)(c). Therefore, the Guidelines' requirement to spend a fixed amount on these services is prohibited by that section.

11. "[T]he Claimants acknowledge that the Canada-U.S. Free Trade Agreement is context to the NAFTA . . . . [T]he Free Trade Agreement, Article 1603, contained a list of four performance requirements, all four of which found their

[24] Mem., ¶ 151; Reply, ¶¶ 24-29; Tr. 76:19-77:1 ("We demonstrated in our are Reply Memorial that R&D and E&T are services within the ordinary meaning of Article 1106(1)(c), and Canada now appears to accept that interpretation, as it said in its Rejoinder[.]"). Canada's witnesses agreed. Tr. 507:19-21 (Fitzgerald) ("Q. Well, R&D it--the conduct of research and development involves services; isn't that right? A. In--it's a service, yes."); Tr. 742:17-21 (Way) ("And once that facility was up and running, the services would be--the R&D in-house facility would be providing research services in the Province of Newfoundland; correct? A. Yes.").

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 transfer, and research and development—and this is reflected in Canada's synopsis of the Free Trade Agreement." (Tr. 1210:13-1211:1)

"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 [in its 1994 Model BIT]?" (Tr. 1212:13-19)

- As Claimants demonstrated in our Reply, Canada's arguments based on other treaties and sources attempt to create a special meaning for "services" in Article 1106 that excludes R&D and E&T services. Canada does not come close to discharging its burden of proof on this issue, as none of the sources on which it relies qualifies among the primary sources of treaty interpretation stated in the VCLT.[25]

- Claimants addressed Canada's arguments based on the CUSFTA in our Reply. Canada relies on its own synopsis of that treaty — a unilateral statement and therefore of little relevance to the interpretation of the treaty — which states that "the negotiation of product mandate, research and development, and technology transfer requirements with investors,

[25] Reply, ¶¶ 54-59. For the avoidance of doubt, Claimants also reject the suggestion that the CUSFTA constitutes "context" to the NAFTA within the meaning of VCLT Article 31(2).

however, will not be precluded."[26] This is unsurprising because there is no equivalent to Article 1106(3) in the CUSFTA. Thus, the performance requirement prohibition in the CUSFTA did not prohibit investment incentives conditioned on performance requirements.[27] The CUSFTA provides no support for Canada's argument that the ordinary meaning of the word "services" does not include R&D and E&T.[28]

- Claimants also addressed Canada's arguments based on the 1994 Model U.S. BIT in our Reply. As Claimants noted there, Canada's reliance on the Model BIT is contrary to the principle of intertemporality as applied to treaty interpretation. More importantly, the local content prohibitions of the NAFTA and the 1994 Model are framed in different terms, which renders it difficult to draw reliable conclusions based on a comparison of the two.[29]

- For example, the reference to services of "domestic origin" or "domestic source" in the 1994 Model presents coverage difficulties not presented by the language of Article 1106(1)(c), which specifies the precise location of covered services or service providers. "Domestic origin" is not defined in the 1994 Model. It would, therefore, be logical to give content to this term by reference to how services of

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[26] **RA-9**, Canada-U.S. Free Trade Agreement, Synopsis, at 375.

[27] **RA-9**, CUSFTA, art. 1603.

[28] Reply, ¶¶ 61-63.

[29] *See* Reply, ¶¶ 64-68.

domestic origin or source are generally understood. In 1994, the widely adhered-to GATS Agreement would be an obvious reference point. However, the GATS included "Mode 3": the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member." The GATS treats these locally-provided services as cross-border rather than domestic-origin or sourced services.[30] A measure requiring a local presence of an investor to perform a service in the local territory — such as carrying out R&D — could therefore be viewed as cross-border services and not of domestic source or origin. A rational drafter wishing to ensure that such measures remained prohibited despite the change in text to "domestic origin or . . . source" might well add a new subparagraph along the lines of Article VI(f) of the 1994 Model. Doing so in that instance, however, would not reflect a change in policy, but rather would reflect a drafting adjustment to continue the policy implemented by the text of Article 1106(1)(c) by compensating for the different text of Article VI(a) of the 1994 Model.

- As noted above, the public record does not state the reason for the drafting change in the 1994 Model. The analysis above demonstrates, however, that because of material differences between the text of the 1994 Model and that of Article 1106(1)(c) of the

[30] **CA-208**, *General Agreement on Trade in Services*, April 15, 1994, 1869 UNTS 183 (entered into force January 1, 1995), art. I(2)(c) ("For the purposes of this Agreement, trade in services is defined as the supply of a service: … (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; …").

NAFTA, Canada's theory that the 1994 Model can only be construed as intended to prohibit a category of measures not prohibited by the NAFTA cannot be sustained.

12. "*A donation is, by definition, something without consideration. It is given by one Party to another. There is no reciprocal provision of a service*." (Tr. 1222:2-5)

- Canada continually tries to read into Article 1106 a requirement that services be purchased from a local third party provider. The Article contains no such language, but rather has a broader prohibition against according a preference to goods or services in the territory of a NAFTA party. This is in contrast to the second clause of Article 1106(1)(c), which is explicitly limited to purchases of goods or services from local persons. If, as Canada argues, the Guidelines can be met entirely through more than $10 million of donations to local institutions annually for them to conduct R&D, this spending, which necessarily accords a preference to local goods and services, is compelled.

- In addition, Canada's Orwellian notion of a "required donation" distorts the concept beyond recognition. The difference between a required payment for services that one does not need and a purchase of unnecessary services is neither apparent nor established on this record.

13. "*[W]hy 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? . . . [T]he logical conclusion is adopt a belt-and-suspenders approach out of an abundance of caution, and make the reservation*." (Tr. 1223:16-18, 21-22, 1224:1)

- Claimants have previously addressed this point at length.[31] In short, besides being inconsistent with the language of the Annex I reservation itself, which refers only to "non-conforming measures," Canada's argument fails because Canada has presented absolutely no evidence to support this "logical conclusion." It is Canada's burden to prove that the Guidelines fit within the Annex I reservation,[32] so Canada's failure to present evidence to support its so called "belt-and-suspenders approach" is fatal to its position.

14. "*[T]he Claimants had argued that subordinate measures adopted after the NAFTA entered into force could not be reserved. . . . The Claimants have not pursued that argument this week . . . therefore, it's unclear whether currently that is an area of disagreement between the Parties*." (Tr. 1225:18-20, 22, 1226:1)

- This statement is not true. Claimants specifically mentioned that argument in our opening statement.[33] Claimants also have shown that, even if the NAFTA Parties' interpretations as stated in the Article 1128 submissions are correct, only future measures implementing the existing measure, such as the Board's Decision 97.01 approving the Terra Nova

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[31] Reply, ¶¶ 35-37; Tr. 83:12-84:17.

[32] Mem., ¶ 162, n. 306.

[33] Tr. 89:6-90:7. *See also* Mem., ¶ 169; Reply, ¶¶ 85-105; Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶¶ 17-19, 24.

Benefits Plan, may be included under the reservation.[34]

15. "*[O]ne must also pay attention to Section 3 of the Interpretive Note to the Annex[.]*" (Tr. 1232:5-6)

- Section 3 confirms that "[i]n 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 Chapters against which the reservation is taken." This approach fully accords with Claimants' reading of the Accord Act reservation.

- Canada, however, relies not on these directive principles but on the remainder of Section 3, which deals with how to treat liberalization commitments and instances where there is a discrepancy between the Measures element and another element. Neither eventuality is present here. There is no liberalization commitment in the Accord Act reservation. The only provision of the Accord Act that qualifies as a non-conforming measure is identified in the Description element. There is no discrepancy between the two. Canada's reliance on paragraphs (a) through (c) of Section 3 is misplaced.

- The issue before this Tribunal is not the application of Section 3 of the headnote to Annex I, but that of the reference to subordinate measures in Section 2 — and notably whether the Guidelines can be considered "adopted under the authority of and consistent with" anything other than the non-

[34] Tr. 90:19-91:12; Tr. 1115:20-1117:3; Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶¶ 29-33.

conforming aspect of the listed measure. Here the Disputing Parties agree: As stated in Canada's Rejoinder, the NAFTA Parties "confin[ed] subordinate measures to those consistent with, and adopted under the authority of, *the non-conforming aspect of the existing measure* listed in Annex I …"[35]

- This interpretation is the only one compatible with the context. For example, Mexico lists as an excepted measure in its Schedule to Annex I Article 25 of Mexico's Constitution. The listing is accompanied by no explicit statement that that measure is qualified by the Description element. Article 25 is a grant of law-making authority in the broadest terms to conduct the economy of the country: "The State is in charge of directing national development and must guarantee that such development is comprehensive and sustainable, that it strengthens national sovereignty and its democratic regime, and that it enables full exercise of the liberties and dignity of the individuals, groups and social classes, whose safety is protected by this Constitution, by promoting economic growth and employment, and a more just distribution of income

[35] Rej., ¶ 114 (emphasis added). *See also id*. ¶ 109 ("[I]f a NAFTA party has described the non-conforming aspect of its measure under the "Description" heading in Annex I, only subordinate measures which address that aspect of the measure will be reserved."); *id*. ¶ 111 ("Reserving *only those future measures authorized by and consistent with the non-conforming aspects of the Annex I listed measures* is nothing like a reservation for *all future measures in a particular sector*.") (emphasis in original).

and wealth."[36] A reading of Section 2 of the headnote to encompass future subordinate measures adopted under the authority of and consistent with anything other than the *non-conforming* aspect of this listed measure would write Article 1102 out of the NAFTA (the article from which Mexico reserved the measure).

16. "*[W]hilst the Claimants are right that the description does not expressly mention Section 151.1 … 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*." (Tr. 1238:1-2, 6-9)

- It would have been easy for Canada to include in its description of "non-conforming measures" in Annex I the ability under Section 151.1 of the Accord Acts to issue Guidelines. Canada chose not to do so.
- Under the Annex I reservation, Canada retained the ability to approve future benefits plans.[37] The benefits plans and the Board's decisions approving them are the "means to implement" the obligation to spend on R&D and E&T.

17. "*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*." (Tr. 1242:11-16)

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[36] **CA-230**, Political Constitution of the United Mexican States, art. 25.

[37] **CA-7**, NAFTA, Annex I, Schedule of Canada.

- Claimants covered this point in our opening and closing statements and memorials, and will not repeat those comments at length here.[38] As we conclusively demonstrated, the Canadian courts were simply applying a reasonableness standard under Canadian administrative law. The Newfoundland Court of Appeal therefore held only that it was reasonable for the Board to find that the Guidelines are authorized by the Act, which is very different from Canada's statements above.

18. "*[I]t's important to go back and look at these paragraphs in the trial court decision …. [T]he trial court addressed exactly the issues that we're forced to address now*." (Tr. 1243:3-4, 13-15)

- The trial court also applied the standard of reasonableness to questions involving the interpretation by the Board of its constitutive statute and its own decisions.[39] Therefore, its decision is of no more help to Canada than the Court of Appeal decision.

19. "*[W]hat 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*." (Tr. 1248:16-20)

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[38] Tr. 88:12-18; Tr. 97:18-98:9; Tr. 1137:16-1139:5; Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶¶ 44-48.

[39] **CA-52**, *Hibernia and Petro-Canada v. C-NOPB*, Supreme Court of Newfoundland and Labrador Trial Division, 2007 NLTD 14 (Jan. 22, 2007), ¶ 27.

- This Tribunal is not bound by any fact-finding by a Canadian court.[40] This Tribunal has heard evidence as to the legal regime that existed prior to the Guidelines and how substantially it changed following the Guidelines.[41] As noted, the Canadian courts followed different principles in reaching determinations under different legal standards.[42] These findings by the Canadian courts are therefore irrelevant to this Tribunal's task.

20. "*[T]his reasonable standard that was applied by these Canadian courts[.]*" (Tr. 1251:22-1252:1)

- Canada here admits that the standard applied by the Canadian courts was one of reasonableness, as Claimants have argued. Because the Canadian courts applied this standard, among other reasons, their findings have no relevance here.

21. "*In its opening, Canada referred the Tribunal to several NAFTA Decisions which supported its position that*

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[40] **CA-91**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, ICJ Reports 1989, p. 15, Judgment of July 20, 1989, ¶ 99 ("Whether regarded as findings of Italian law or as findings of fact, *the decisions of the courts of Palermo simply constitute additional evidence of the situation* which the Chamber has to assess.") (emphasis added); **CA-85**, *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award of November 20, 1984, ¶ 177 ("the judgments of a national court can be accepted as *one of the many factors which have to be considered by the arbitral tribunal*") (emphasis added).

[41] Reply, ¶ 107; Claimants' Opening Argument Presentation, Slide 31.

[42] Tr. 1135:3-1138:19; Claimants' Closing Argument Presentation, Slide 76.

the Tribunal should defer to the decision of the Canadian courts on these issues." (Tr. 1255:10-14)

- None of the NAFTA decisions to which Canada referred in its opening argument are relevant to the issue of whether the Board should defer to the Canadian court decisions in this case:
    - *Azinian*:[43] The claimants in *Azinian* contended that the respondent's "wrongful repudiation of the Concession Contract" violated Article 1110 and 1105.[44] However, they raised no challenge against the decisions of the Mexican courts that the contract was in fact void under Mexican law.[45] As neither party contested the correctness of the courts' decisions, it was natural for the tribunal to accord weight to the national courts' findings on national law. The record in that case contrasts with that here, where international law applies to the key questions at issue and the Claimants do not accept that the Canadian court decisions were correctly decided. In making its own fact determinations and in applying the terms of the NAFTA and the standards of international law to the Guidelines, the Tribunal will not be exercising "plenary appellate jurisdiction," as Canada implies.

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[43] Tr. 238:5-239:3.

[44] **RA-3**, *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award of November 1, 1999, ¶¶ 75, 87.

[45] *Id.* ¶ 100.

- *Waste Management II*:[46] The tribunal simply assured the parties that it did not deny the value of the principle of *res judicata* in international law in response to Mexico's argument that the *Waste Management I* tribunal had effectively dealt with the merits of the claim in its Award on Jurisdiction.[47] The effect of national court decisions on proceedings before international tribunals was not an issue presented for decision in that case.

- *Mondev*:[48] *Mondev* was a denial of justice case. The claimant submitted that the decision of a local court not to remand certain questions of fact to the jury constituted a denial of justice under Article 1105(1). The tribunal disagreed and in that context stated that "[o]n the approach adopted by Mondev, NAFTA tribunals would turn into courts of appeal, which is not their role."[49] This statement is simply irrelevant to this case. As explained above, Claimants are not asking the Tribunal to review the correctness of the Canadian court decisions or to decide again

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[46] Tr. 237:14-238:4.

[47] **RA-132**, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3), Decision on Mexico's Preliminary Objection to Jurisdiction, 26 June 2002, ¶¶ 38-47.

[48] Tr. 249:17-18.

[49] **CA-36**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002, ¶¶ 135-136.

on issues that were decided by the Canadian courts.

- *Thunderbird*:[50] In *Thunderbird*, the Mexican courts had determined that claimant's gaming machines were prohibited gambling equipment under Mexican law, and the tribunal simply noted, in agreement with the parties, that "[i]t is not the Tribunal's function to act as a court of appeal or review in relation to the Mexican judicial system regarding the subject matter of the present claims."[51] Yet this did not prohibit the Tribunal from proceeding to "measure the conduct of Mexico towards Thunderbird against the international law standards set up by Chapter Eleven of the NAFTA."[52] Likewise, it is not the Tribunal's function in this case to decide whether the Board acted *ultra vires* as a matter of Canadian law. The Tribunal must instead measure Canada's conduct towards Claimants under the NAFTA, in accordance with the standards and tests established thereunder.

22. "*In the Claimants' Reply, they said that the Statistics Canada issue was irrelevant*." (Tr. 1265:5-6)

- Claimants argued in our original Memorial that, if the Guidelines were an amendment to the Accord

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[50] Tr. 249:19-21.

[51] **CA-33**, *International Thunderbird Gaming Corporation v. United Mexican States*, (UNICTRAL) Award of January 26, 2006, ¶ 125.

[52] *Id.* ¶ 127.

Acts, they would fall outside of the scope of Canada's Annex I reservation because they would fail the ratchet rule.[53] As part of this argument, Claimants demonstrated that the Board's use of Statistics Canada data to develop the R&D benchmark yields an arbitrary expenditure requirement.[54] Canada conceded in its Counter-Memorial that the Guidelines do not constitute an amendment to the Accord Acts.[55] It was therefore no longer necessary for Claimants to argue for the purposes of the ratchet rule that the Guidelines decreased the conformity of the measure to the NAFTA, and as a result Claimants dealt with the Board's use of Statistics Canada data in Annex A of our Reply Memorial.[56]

23. "*[L]et's look at the—turn to the Hibernia Benefits Decision—or the Hibernia Benefits Plan that was approved by the Hibernia Benefits Decision*." (Tr. 1267:17-19)

- Canada's argument was noteworthy in that it never addressed any of the following points that Claimants consistently made about the Hibernia and Terra Nova Benefits Plans and the decisions approving them: First, neither the Hibernia nor the Terra Nova Benefits Plan approval decisions required a mandatory quantum of spending on R&D or E&T.[57]

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[53] Mem., ¶¶ 179-193.

[54] Mem., ¶¶ 184-186. *See also* Reply, ¶ 107, n. 111.

[55] Counter-Mem., ¶ 239.

[56] Reply, Annex A, ¶¶ 19-22.

[57] Tr. 510:22-511:3 (Fitzgerald) ("Q. And, indeed, the Board did not impose a particular spending threshold on R&D in the Benefits Plan. A. No, it did not."); Tr. 524:17-21 (Fitzgerald) ("Q.

- Second, neither decision stated that any such quantum would be imposed in future. In setting forth the minimal reporting requirements, neither decision stated that if those requirements did not show sufficient levels of R&D or E&T, a required spending level would be imposed.[58]

- Third, neither Benefits Plan approval decision required pre-approval of such expenditures.[59]

Okay. Thank you. And at this time the Board did not impose mandatory expenditure thresholds; right? A. During my time, the Board never imposed mandatory thresholds."); Tr. 537:18-21 (Fitzgerald) ("Q. And again condition seven [of Terra Nova Decision 97.02] did not impose mandatory spending requirements. A. No, it did not state a threshold, as you have described it previously."). *See also* **CE-47**, CNLOPB, Hibernia Decision 86.01, §§ 2.5 and 2.6 (June 18, 1986), (hereinafter "Hibernia Decision 86.01"); **CE-57**, CNLOPB, Terra Nova Decision 97.02, § 3.5 (Dec. 1997) (hereinafter "Terra Nova Decision 97.02").

[58] Tr. 529:8-12 (Fitzgerald) ("Q. Okay. But at that time, Decision 86.01 did not inform the Hibernia Proponents of the possibility of setting expenditure targets, did it? A. No, it did not talk to that explicitly at all."); Tr. 539:17-540:5 (Fitzgerald) ("When you retired at the end of 1998, the Board had never published any statement that said that it might more explicitly describe the quantum and kind of expenditures it would judge acceptable or that it would, indeed, require from Operators in terms of research and development. A. No, it had never stated that publicly. Q. So, to the extent that there is any Board consideration described here in Paragraph 72, it's all entirely internal. A. It's all entirely internal, so yes."). *See also* **CE-47**, Hibernia Decision 86.01, §§ 2.5 and 2.6; **CE-57**, Terra Nova Decision 97.02, § 3.5.

[59] *Supra* n. 18. *See also* **CE-47**, Hibernia Decision 86.01, §§ 2.5 and 2.6; **CE-57**, Terra Nova Decision 97.02, § 3.5.

- Fourth, both Benefits Plans recognized that the R&D to be conducted would be that which was appropriate for the projects, such as R&D relating to the "unique problems of the Canadian offshore environment."[60]

- Fifth, because no quantum was required, neither Plan or approval decision provided that the Board would determine whether certain expenditures were or were not R&D or E&T to satisfy the Plan (or, under Canada's argument, section 45(c)(3)). Therefore, the operators determined what R&D to undertake in the Province in compliance with the Benefits Plans, based on the projects' need for the R&D and on the competitiveness of local providers.[61]

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[60] Tr. 519:15-21 (Fitzgerald) ("And the types of problems that [Hibernia] list are all relating to the particular conditions of the Canadian offshore environment; isn't that right? A. They were--yes, yes. They may have some applications elsewhere, but I'm sure that the list, as created at that time, was out of their immediate prospect of working in that environment."); Tr. 524:6-16 (Fitzgerald) ("Q. Okay. There is a reference on Page 7 of Exhibit 46, the supplemental plan, on which it says that: 'Mobil will continue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment.' Do you see that? A. Yes. Q. That's no different from what we were just looking at in the Benefits Plan, isn't it? A. They seem to be substantially the same."). *See also* **CE-45**, Hibernia Benefits Plan, p. 49; **CE-168**, Terra Nova Benefits Plan, p. 7-3.

[61] Tr. 509:3-12 (Fitzgerald) ("*[The Board] never took the position of telling the Proponent what it should do*. It just kept reminding him that it had an obligation to make these expenditures, *encouraging him to identify the things which were useful to its*

- Because the Benefits Plans are the standards to which the operators were consistently held,[62] Canada's failure to rebut these points is fatal to its case.

24. "*The Board also recognized in the Decision, and the Operators accepted, that the Benefits plan process is an evolutionary process*." (Tr. 1269: 2-4)

- While the Hibernia Benefits Plan did contain a loose reference to the "evolutionary process" involved in the development and implementation of a benefits plan,[63] it is not disputed that the Plan contained no explicit expenditure levels and that the Board "was conscious that if it set an explicit expenditure level

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purpose, acknowledge that the Proponent and its partners were probably best positioned to determine what was required, and it expected them to take into account the local capabilities in placing contracts for those activities.") (emphasis added). Tr. 522:7-11 (Fitzgerald) ("Q. During your time, you were happy to leave it to the Hibernia Project to undertake the research and development that was important to them at the time. A. *Well, we asked them to identify the things which were most important to them*[.]") (emphasis added); Tr. 537:13-17 (Fitzgerald) ("Q. Okay. And--but at the time [of Terra Nova Decision 97.02] the Board was still looking to the industry to take the lead in identifying where it wished to direct its expenditures; correct? A. Yes.").

[62] *Supra* n. 13. *See also* **CE-199**, CNLOPB, Draft Presentation Hibernia Supplier Development Seminar, § 3 (Nov. 23, 1988) ("To ensure that the partnership's commitments and undertakings contained in the Hibernia Benefits Plan and the Statement of Principles will be met, the Board is establishing a monitoring system for the Project[.]").

[63] **CE-47**, Hibernia Decision 86.01, p. 8.

early on that later proved to be too low, it would be very difficult to increase it later."[64]

25. "*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*." (Tr. 1271:12-21)

- Canada's attempt to avoid the clear import of Mr. Fitzgerald's testimony will not succeed. Mr. Fitzgerald's testimony was extensive, and so was his agreement with Claimants' positions.[65] Mr.

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[64] Fitzgerald Statement I, ¶ 50. *See also* Tr. 579:18-21 (Fitzgerald) ("[I]t would be extremely difficult on a huge project to set a very low threshold and then find that, you know, it really should have been higher because the capacity was there to do more.").

[65] *See, e.g.*, Tr. 493:4-9 (Fitzgerald) ("Well, the Board never amends a Benefits Plan unilaterally anyway; it can't. It can only respond to an application, monitor whether or not the Proponent is--continues to be in compliance through his actions, and come to a view as to whether or not it is in compliance."); Tr. 508:20-509:12 (Fitzgerald) ("Well, there is a requirement to conduct R&D in the Province or to make expenditures in the Province for those purposes. The Board would have no knowledge of whether--what the Proponent was proposing to do in the Province was competitive with what its costs might be somewhere else. It never took the position of telling the Proponent what it should do. It just kept reminding him that it had an obligation to make these expenditures, encouraging him to identify the things which were useful to its purpose, acknowledge that the Proponent and its partners were probably best positioned to determine what was required, and it expected them to take into account the local capabilities in placing

Fitzgerald specifically stated that the Benefits Plan was an offer, that the Board accepted that offer with conditions in its approval decision, and that the operators then accepted the conditions.[66] That is the *sine qua non* of formation of an agreement. In any event, Claimants are not seeking to enforce the Benefits Plans as a breach of contract, but rather that they constitute specific assurances by Canada and that they are the standards to which Claimants were held before the Guidelines.[67]

26. "*[T]he Claimants have referred to Waste Management . . . . '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*

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contracts for those activities."); Tr. 524:20-21, 525:2-6 (Fitzgerald) ("During my time, the Board never imposed mandatory thresholds …. The process was for the Proponent to propose and report and the Board to look at the reports at the end of the year and to inform Mobil of their satisfaction or otherwise or where they though there could be improvements.").

[66] Tr. 488:20-489:2, 491:18-21, 492:8-10, 492:16-493:1 (Fitzgerald) ("Q. And yet [the Benefits Plan is] authored by the Proponent of the project. A. It's authored by the Proponent. Q. And submitted to the Board. A. And submitted to the Board …. Q. And the Board then went ahead and granted approval to the Hibernia Plan after asking for a Supplemental Benefits Plan. A. Yes …. And the Board then approved the Hibernia Benefits Plan as stated in Decision 86.01; correct? A. That's correct …. Q. Okay. And the Hibernia Proponents then accepted the Board's approval with those additional conditions; isn't that right? A. Yes. Q. So, you said you had an offer, and you had an acceptance, and that with some variation that was, in turn, accepted; right? A. Yes.").

[67] Tr. 62:6-65:14; Tr. 1144:21-22; Tr. 150:19-1152:5.

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.'" (Tr. 1278:19-20, 1279:5-14)

- As Canada points out, a violation of the minimum standard of treatment under *Waste Management* may involve a "complete lack of transparency or candor in the administrative process." As noted above, the Benefits Plans decisions included no requirements for mandatory spending, no statement that such requirement could be imposed in the future, no statement that any reporting could be used for such a purpose, and no requirement of approval of R&D expenditures.[68] Mr. Fitzgerald testified several times that the Board was considering the imposition of such requirements or that monitoring was to be used for such purposes, but he stated explicitly that the Board chose not so to inform the operators. [69] There could be no more obvious

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[68] *Supra* ¶ 23.

[69] *Supra* n. 58. *See also* Tr. 502:18-503:2 (Fitzgerald) ("Q. Okay. By the way, your Witness Statement also describes a number of internal staff reviews about the Hibernia Benefits Plan and, later, the Terra Nova Plan. Those internal staff reviews were never disclosed to the Proponents, were they? A. No, nor were their internal discussions disclosed to us."); Tr. 525:15-526:1 (Fitzgerald) ("Q. And then the Board approved the Benefits Plan in Decision 86.01; that's Tab 47? A. Yes. Q. And it imposed a variety of conditions in that Decision, did it not? A. It did. Q. But it didn't impose any condition with respect to R&D, did it? A. Not explicitly."); Tr. 529:1-12 (Fitzgerald) ("Q. That is no--what you state [in Fitzgerald Statement I, ¶ 54] as to the Board's approach is not stated in the Board's Decision 86.01, is it? A. No. What I'm telling you is, you know, some of the--illuminating some of the discussion which took place internally at the time informed the way

"complete lack of transparency or candor" than such circumstances.

27. "*[W]e do not have any witnesses or any witness testimony with regard to Murphy Oil. . . . We also have no witnesses from Terra Nova. . . . We also have no witnesses from the Claimants during the key period of 1985 to 1990[.]*" (Tr. 1282:20-21, 1283:7-8, 1284:9-10)

"*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.*" (Tr. 1284:15-18)

"*By contrast, we do have the evidence of John Fitzgerald, who was around at that time, and he did speak to what his*

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the decision report was finally written. Q. Okay. But at that time, Decision 86.01 did not inform the Hibernia Proponents of the possibility of setting expenditure targets, did it? A. No, it did not talk to that explicitly at all."); Tr. 539:17-540:5 (Fitzgerald) ("Q. Sorry. When you retired at the end of 1998, the Board had never published any statement that said that it might more explicitly describe the quantum and kind of expenditures it would judge acceptable or that it would, indeed, require from Operators in terms of research and development. A. No, it had never stated that publicly. Q. So, to the extent that there is any Board consideration described here in [Fitzgerald Statement I, ¶ 72], it's all entirely internal. A. It's all entirely internal, so yes."); Tr. 573:19-574:8 (Fitzgerald) ("Arbitrator Sands: Did you in your conversations on this aspect with the developer, assuming it was communicated, address in any way the extent of expenditures over the life of the project? The Witness: No, we didn't. Arbitrator Sands: In other words, was it consistent over time, or would it be large expenditure at the beginning and then it would tail down? Was there any-- The Witness: We did not talk about the quantum at all, only that there had to be expenditures.").

understanding was and what he thought he conveyed to the Claimant and the Operator." (Tr. 1286:15-18)

"*[T]hey 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*." (Tr. 1294:18-1295:1)

- No witness testimony was necessary for such purposes. The Benefits Plans and the Board's decisions approving those Plans clearly set out Claimants' legitimate expectations at the time they entered into their investments.[70] Claimants' case is based squarely on such contemporaneous documents. Canada's case, by contrast, is based

[70] Tr. 500:4-12 (Fitzgerald) ("Q. Well, you stated that the Board's Decision reflects its expectations at the time; correct? A. Yes. Q. And would you agree with me that the best place to look at the parties' expectations at the time was in those documents that they exchanged. A. The Parties being... Q. The Proponent and the Board. A. Yes."); Tr. 506:11-507:6 (Fitzgerald) ("Q. Okay. And then the next sentence says that, again: 'The Hibernia Benefits Plan provided information on the Proponent's expectations of the industrial and employment benefits to Canada and Newfoundland.' And then it goes on to note: 'in particular, the technology, transfer, and supplier development.' Do you see that? A. Yes. Q. And you were Vice-Chairman of the Board at the time? A. Yes. Q. So, I take it it's fair to say that at the time the Board believes the Plan was a-- that the Benefits Plan provided information on Mobil Canada's expectations of the benefits to be received? A. This section recites what the Board's reading of the day is, and it says what it says."). *See also* **CE-48**, Hibernia Decision 90.01, §3.1 (The Hibernia Benefits Plan "provided information on the Proponent's expectations of the industrial and employment benefits to Canada and Newfoundland[.]").

entirely on explanations by its witnesses that are not consistent with those documents and for which Canada has presented *no* contemporaneous documentary support.[71] That difference is the essence of this case.

- Further, Canada itself has argued consistently that, to the extent the doctrine of legitimate expectations is recognized by international law, in order to be protected such expectations must be objective rather than subjective.[72] There can be no doubt that contemporaneous documentation, as opposed to *ex post facto* witness testimony, is far better evidence of such objective expectations.

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[71] For example, Canada has argued that "Claimants were aware of the sustainable development goals of NL at the time of their entry into the Hibernia and Terra Nova projects, and they were aware at all times of the legislative purpose of the Accord Acts and Accord to ensure a legacy in the province from the limited resources of offshore oil and gas." Counter-Mem., ¶ 277. Besides its witness testimony, Canada has only referred to government documents that were drafted almost a decade prior to the submission and approval of the Hibernia Benefits Plan, the report of a 1985 Task Force established by the Government of NL, and a loose reference in the Atlantic Accord to promoting economic growth and development in order to optimize benefits accruing to the province and Canada. *See* Counter-Mem., ¶¶ 13-23. Apart from the Accord, Canada has not sought to argue that Claimants were aware of these documents. What is clear from the record is that, two years after issuing its approval of the Hibernia Benefits Plan, the Board did not include Hibernia's R&D and E&T undertakings in a list of "[t]he commitments with the most significance to Canadian suppliers" at a "Hibernia Supplier Development Seminar." **CE-199**, CNLOPB, Presentation: Hibernia Supplier Development Seminar (Nov. 23, 1988), p. 2.

[72] Counter-Mem., ¶ 271; Rej., ¶ 152; Tr. 1277:8-10.

28. "*Mr. Fitzgerald also referred to the 1986 Exploration Phase Guidelines*." (Tr. 1289:12-13)

- Like Canada's attempted reliance on Section 55 of the Atlantic Accord, its continued reliance on one phrase in the 1986 Exploration Phase Guidelines reveals how far it has to stretch to try to support its case:

- The subsequent 1987 Exploration Phase Guidelines and 1988 Development Plan Application Guidelines specifically did not include any reference to that possibility.[73]

- These guidelines served to assist proponents of new projects in the preparation of exploration phase benefits plans for submission to the Board. They did not govern the development or production phases.[74]

- Eighteen years passed between that comment and the issuance of the Guidelines in 2004 without any similar threat or comment by the Board.[75]

29. "*Andrew Ringvee addressed the expenditures that the Operators were undertaking under the Work Plans. . . . [I]n describing these expenditures, he described them in exactly the same way that the expected expenditures were*

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[73] **CE-33**, 1987 Exploration Phase Guidelines, § 1.0; **RE-9**, 1988 Development Application Guidelines, § 5.0.

[74] **CE-32**, 1986 Exploration Phase Guidelines, § 1.0; **CE-33**, 1987 Exploration Phase Guidelines, § 1.0; **RE-9**, 1988 Development Application Guidelines, § 5.0. *See also* Counter-Mem., ¶ 51 ("Like the 1986 Exploration Phase Guidelines, the 1987 Guidelines applied only to the exploration phase of the projects and did not apply to the subsequent development and production phases.").

[75] Claimants' Closing Argument Presentation, Slide 12.

described in the Hibernia and Terra Nova Decisions. . . . Consequently, the Operators are doing now exactly what they said they would do in 1986." (Tr. 1292:2-4, 7-10, 1293:10-11)

- This is an absurd statement and proves Claimants' point that the Guidelines require the operators to undertake unnecessary R&D that would not otherwise be conducted for the projects. During the twenty years since Hibernia's Benefits Plan described the types of R&D that the project would undertake, Hibernia has already spent more than $100 million on R&D related to iceberg control and the other subjects mentioned in the Benefits Plan. Likewise, Terra Nova has spent over $20 million on the subjects mentioned in its Benefits Plan. Now, in order to comply with the Guidelines, Hibernia and Terra Nova must undertake additional research, some of which is likely to fall within the subject areas identified in their Benefits Plans. That does not show that this additional R&D was anticipated or that it is ordinary course, but rather the extent to which Claimants must stretch to develop projects to satisfy the Guidelines, even in areas where Hibernia is comfortable with its current technology, often developed through its prior R&D.[76]

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[76] *See, e.g.*, Tr. 811:13-812:6 (Way) ("Q. Okay. And that's because Hibernia was in an operations phase, and they had already solved the very difficult design and construction problems associated with operating in the offshore environment; isn't that right? A. Yes. We acknowledge Hibernia had spent a lot of money up to that point. Q. And, for example, they already had a very effective mechanism for controlling icebergs? A. There had been considerable advances in ice management technology in the area, yes. Q. And, in fact, some of those advancements were by Hibernia,

30. "*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.*" (Tr. 1295:3-8)

- As Claimants have consistently argued, the Board's decisions approving the Benefits Plans (which did not contain any of the requirements now found in the Guidelines[77]), constituted specific assurances by the State. So did the 1990 fiscal agreements between the federal and provincial governments and Hibernia. [78] Case law is clear that specific assurances can come from multiple arms of the State, as here.[79]

31. *"Mr. Rosen confirmed that his damages assessment assumes that none of the Work Plan expenditures would have been undertaken in the ordinary course."* (Tr. 1297:19-21)

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through their research; right? A. Yes. Q. And they already had them in place in 2004? A. Yes.").

[77] *See supra* ¶ 23.

[78] *See* Mem., ¶¶ 205-212; Reply, ¶¶ 187-188; Claimants' Submission on the US and Mexico's Article NAFTA 1128 Submissions, ¶ 64; Tr. 1144:21-22.

[79] *See, e.g.*, **CA-32**, *Glamis Gold, Ltd. v. United States of America*, (UNCITRAL) Award of May 16, 2009, ¶¶ 767, 800 (the Tribunal analyzed whether Claimant's reasonable expectations were induced by the federal government and or by the State of California); **CA-38**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award of May 25, 2004, ¶ 166 ("Minister Hermosilla and the FIC were different channels of communication of the Respondent 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 the Respondent's term.").

"They had filed Work Plans they claimed as incremental expenditures, but when you look at them, there is some doubt about that." (Tr. 1302:3-5)

- It is clear that Canada fundamentally misunderstands Mr. Rosen's model with respect to measuring future incremental expenditure (i.e., the additional expenditure required by the Guidelines beyond what would have been made in the ordinary course of events). First, Mr. Rosen's model assumes that substantial expenditures of about $143 million would have been made by Hibernia and Terra Nova on both R&D and E&T between 2010 and 2036.[80]

- Where plans were already in place to make specific expenditures, Mr. Rosen's model accounts for them.[81] Exhibit CE-233, for example, confirms which of the Work Plan expenditures would have been undertaken in the ordinary course of business and the extent to which additional work has had to be contrived in order to allow Claimants to fulfill their obligations under the Guidelines.[82] Therefore,

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[80] First Expert Report of Howard N. Rosen, ¶ 41 ("In determining the Incremental Spending, I have deducted from the Net R&D Requirement, the R&D expenditures that would have been made in the normal course of the Projects based on commercial needs."); Third Expert Report of Howard N. Rosen, ¶ 8, Schedules 2 and 3 (hereinafter "Rosen Report III").

[81] *See* Tr. 875:6-7 (Rosen) ("Q: Not all of the [redacted] is incremental spending? A: Some of it is ordinary course spending."); Tr.875:18-20 (Rosen) ("But certainly in the [redacted] there was some portion of it that was ordinary course spending, and I think we footnoted it for that very purpose.").

[82] **CE-233**, Hibernia Research and Development Expenditure Outlook.

Claimants are not asking Canada to pay for their R&D.

- In any event, Mr. Rosen did not endeavor to assess each individual item of future R&D spending, nor would one expect an economic expert to do so. His is an economic analysis focusing on the *level* of expenditures made in previous years. He calculated future incremental expenditure as the difference between the likely net requirement under the Guidelines (revenue multiplied by the Statistics Canada factor) and the level of spending that the projects have typically undertaken in the ordinary course in past years (average historical expenditures deemed eligible for Guidelines credit by the Board).[83] There was no need to, nor would it have been possible for Mr. Rosen to, determine to what extent individual expenditures detailed in the Work Plan are incremental to the project's ordinary course operations.

- Finally, Canada's position ultimately consisted in its counsel's own assessment: "it looks like ordinary course spending to me."[84] That is not a credible or serious response to Mr. Rosen's model.

32. [redacted] (Tr. 1306:6-13)

[83] Rosen Report III, ¶ 8.

[84] Tr. 1300:10-11.

[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.'" (Tr. 1307:16-20)

- Canada's repeated and irrelevant questions on the subject of international accounting standards revealed that Canada misunderstands the obligation in question. [redacted] is not relevant to whether an economic loss has occurred.

- Canada has not disputed Claimants' calculations of the amounts required to be spent under the Guidelines — about $10 million or more annually through 2014 and substantial amounts beyond that. For 2004-2008, the Board has already determined that the shortfall is about $32 million, and Hibernia owners have had to post letters of credit to cover the shortfall amount.

- That amount must be spent, and it is therefore an economic loss now. HMDC is required to notify its owners of the circumstances of any outstanding claims and assessments. [redacted] nly certain liabilities to third parties require accounting provision [redacted]

[85] **GFA-80**, Hibernia Development Project Statement of Joint Account Costs July 1, 1988 to December 31, 2009, Notes, p. 6.

[86] *See* **GFA-23**, International Accounting Standard 37, *Provisions, Contingent Liabilities and Contingent Assets*, IN2 (requiring companies to record a liability of uncertain timing or amount as a provision only when: "(a) an entity has a present obligation (legal or constructive) as a result of a past event; (b) it is probable (i.e. more likely than not) that an outflow of resources embodying economic benefits will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation."). *See also* Tr. 362:10-11 (Phelan) [redacted]

- In cross examination Mr. Rosen also stressed that the Guidelines had already created an economic liability for the Claimants: "If you look at Footnote 17, it says, 'irrespective of the cash outlay, the implementation of the Guidelines has created a liability relating to the incremental spending. The timing of the cash flows is associated with discharging this liability has been reflected in my analysis.' So it still creates a liability."[88]

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[87] Tr. 351:17-21 (Phelan) Tr. 352:16-20 (Phelan) ("We are uncertain as to whether our Work Plan will be successful and completed, and if it was not completed and successful, then we are in a situation where Hibernia owners will have to pay out--will have to basically pay into a fund at that the Board has."); Tr. 362:15-20 (Phelan) *See also* Third Witness Statement of Paul Phelan, ¶¶ 16-17 (hereinafter "Phelan Statement III").

[88] *See also* Tr. 863:7-13 (Rosen). *See also* Tr. 865:15-21 (Rosen) ("From my point of view they've suffered a loss. They will not feel the economic impact of the loss until they start spending the money, so they won't be out of pocket, out of cash, incurring interest

33. *"[T]he Claimants have not been able to find a single award for damages not yet incurred."* (Tr. 1308:20-22)

- Canada persists in characterizing Claimants' losses as those "not yet incurred" despite the fact that such an argument is foreclosed by the decision of the NAFTA tribunal in *Grand River*. The *Grand River* tribunal held that:

> A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.[89]

- In any event, Claimants have demonstrated the power of a tribunal to award damages for a continuing treaty violation.[90] In addition, in *LG&E*

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expense, other costs until they actually spend it, but they have a loss, certainly, that has been crystallized as an obligation.").

[89] **CA-95**, *Grand River Enterprises Six Nations Ltd. v United States*, (UNCITRAL) Decision on Objections to Jurisdiction of July 20, 2006, ¶ 77.

[90] **CA-150**, Sergey Ripinsky and Kevin Williams, *Cross-cutting Issues*, in *Damages in International Law* (BIICL 2009), pp. 115-116 ("In cases involving a *continuing breach* by the respondent, where claimant's losses unfold over time (such cases involving 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 awarding only past losses (up to the time of award) in the expectation that the respondent will cease

v. Argentina, the Tribunal found the existence of a claim for future loss in the context of a continuing treaty violation, though it ultimately found that such losses had not been proven.[91]

34. *"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."* (Tr. 1310:8-14)

- Canada is wrong on this point. *Occidental* did not involve a "continuing measure," and the decision does not assist a tribunal confronted with a continuing treaty violation.[92] In *Occidental*, Ecuador's wrongful conduct consisted of a series of individual denials of VAT refunds to Occidental. In each instance, Occidental submitted a claim for refund, and Ecuador's IRS considered and then denied the claim. When Occidental would submit refund claims in the future, Ecuador's IRS could have made a different determination. By contrast, here the Guidelines will remain in effect, and Claimants will be required to spend the amounts calculated under the Guidelines formula. This case therefore presents a continuing treaty violation from a single measure, unlike *Occidental*.

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its wrongful conduct. If the second course of action is chosen by the tribunal, the claimant should be entitled to subsequent compensation where the respondent fails to cease the breach.").

[91] **RA-25**, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of July 25, 2007, ¶¶ 79-98.

[92] *See* Reply, ¶ 248.

35. *"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.'"* (Tr. 1312:13-19).

- Claimants have already explained why the *Amoco* award is not a reasonable point of reference for this Tribunal. The reference period for the *Amoco* tribunal represented a fundamental transformation in the global oil market from one during which oil prices were set by oil producing countries to one in which prices were set by market forces.[93] In any event, the *Amoco* tribunal's approach to future damages has been roundly criticized for its rejection of DCF analysis.[94]

- In any event, Tribunals plainly do base significant damages awards on projections as to the future price of oil.[95]

36. *"Now, compounding the problem of these future uncertainties, the Claimants make matters worse by arguing for a risk-free discount rate …. '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.'"* (Tr. 1313:4-6, 1314:1-4)

- This point was not put to Mr. Rosen in cross-examination. In any event, Mr. Walck has cited a

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[93] *Id.* ¶ 284.

[94] *Id.* ¶ 285.

[95] *See* **CA-189**, Final Award in ICC Case 11073, ICC International Court of Arbitration Bulletin, Vol. 20/2 (2009).

text on business valuation (not damage quantification) and valuations of "highly risky" cash flows in particular.[96] Mr. Walck's own errors in arriving at a discount rate were well explained by Mr. Rosen in his direct testimony.[97] It is clear that the market assesses the "risk" at nearer to 7%.[98]

37. *"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."* (Tr. 1314:13-15)

- Surely Canada is not suggesting that Claimants should not be awarded compensation that will "so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[99] As Claimants have proven, if the Tribunal makes an award of compensation to the U.S.-based investor, to make the investor whole, that award will need to be grossed up to reflect the different tax regimes in place in the U.S., where the award will be received, and in Canada where the expenditures are actually made.[100] Without such a gross-up, Claimants will not have sufficient funds

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[96] First Expert Report of Richard E. Walck, ¶ 139 (*citing* **GFA - 12**, Shannon P. Pratt, Robert F. Reilly & Robert P. Schweihs, *Valuing a Business* (4th Ed., 2000)).

[97] Tr. 830:8-834:19, 841:15-849:13 (Rosen).

[98] Tr. 848:14-22 (Rosen); **FTI H-1**, Standard & Poor's, Exxon Mobil Corp Stock Report (Sept. 25, 2010), p. 1 (suggesting a WACC of 6.7% for ExxonMobil).

[99] **CA-28**, *Factory at Chorzów*, 1928 P.C.I.J. (Ser. A) No. 17, Decision of September 13, 1928, at 47.

[100] Rosen Report III, ¶¶ 38-40; Tr. 849:15-852:2 (Rosen).

after the payment of taxes to fund the required incremental R&D spending.

III.

CLAIMANTS' RESPONSE TO CERTAIN QUESTIONS POSED BY THE TRIBUNAL

38. During the hearing, the Tribunal posed a series of questions as to which it invited commentary from the parties. Claimants answered the majority of the Tribunal's questions in our closing argument. Rather than repeating those answers here, we have included as Annex A to this submission an index to the portions of the hearing transcript where those answers appear.

39. This section provides further commentary on two of the Tribunal's questions.

A. Evidence of State Practice and *Opinio Juris* Supports Claimants' Argument that a Failure to Fulfill Legitimate Expectations May Breach the Minimum Standard of Treatment

40. The Tribunal posed the following question to the parties during the hearing:

> What evidence of "state practice" and *opinio juris* is available, if any, to support the conclusion that "fair and equitable treatment" encompasses a substantive obligation to protect the legitimate expectation of the parties?[101]

[101] Legal Questions to the Parties from the Tribunal, to be Addressed in Closing Arguments (Oct. 21, 2010), ¶ 1.

41. Consistent with the Tribunal's instructions, Claimants limited our review to "materials relating to authorities and cases already cited in the pre-hearing submissions."[102] Claimants understand "materials relating to authorities and cases" in the record to include the pleadings and the bilateral investment treaties at issue in those cases, as reflected in Arbitrator Sands' question during Claimants' opening argument.[103] The Tribunal will be aware that, in general, written pleadings in ICSID cases are confidential. Nevertheless, Claimants have reviewed those materials to which we had access in order to respond to the Tribunal's question.

1. Evidence of State Practice and *Opinio Juris*

42. Claimants have dealt extensively with the argument that the customary international law minimum standard of treatment requires a state to protect the legitimate expectations of a foreign investor and that the international standard is not limited to a 1920s case that involved the physical security of an alien. In support of that argument, Claimants have pointed to both NAFTA and bilateral investment treaty awards, and have demonstrated to the Tribunal why it may rely on these awards to make a finding in Claimants' favor on the facts of this case.[104] In addition to the arguments and authorities

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[102] Letter from M. Polasek, ICSID, to the Parties (Nov. 9, 2010), ¶ 3.

[103] Tr. 115:22-118:20.

[104] Mem., 194-203; Reply, ¶¶ 125-133; Tr. 102:8-105:15. *See also* **CA-36**, *Mondev*, ¶ 116 ("[I]t is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms — had they been current at the time — might have meant in the 1920s when applied to the physical security of an alien. To the modern eye,

presented there, Claimants respond to the Tribunal's question more fully as follows:

43. Two of the bilateral investment treaties related to the materials in the record explicitly tie fair and equitable treatment to the provision of a stable and predictable framework:

- Argentina and the United States agreed that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources."[105]
- Ecuador and the United States agreed that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment

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what is unfair or inequitable need not equate with the outrageous or the egregious.").

[105] **CA-209**, *Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, November 14, 1991 (entered into force October 20, 1994), Preamble. The U.S.-Argentina BIT was at issue in **CA-19**, *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of July 14, 2006; **CA-21**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of May 12, 2005; **CA-45**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of September 28 2007; **CA-26**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of May 22, 2007; **CA-34**, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of October 3, 2006.

and maximum effective utilization of economic resources."[106]

44. The Chapter 11 tribunal in *Metalclad Corporation v. Mexico*, which found that the breach of an investor's legitimate expectations violated Article 1105 (albeit prior to the FTC's Note of Interpretation) had before it further evidence of state practice in this regard. For example, the European Community adopted its "Investment Protection Principles" in October 1992, which state in part that the "'fair and equitable' treatment standard should be understood as an 'overriding concept' that encompasses in particular the following investment protection principles: (i) transparency and stability of investment conditions."[107]

45. This emphasis on the necessity of maintaining a stable and predictable framework for investment under the fair and equitable treatment standard requires that a state protect the legitimate expectations of foreign investors.[108]

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[106] **CA-210**, *Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment*, August 27, 1993 (entered into force May 11, 1997), Preamble. The U.S.-Ecuador BIT was at issue in **CA-39**, *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award of July 1, 2004; **CA-25**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of August 18, 2008.

[107] **CA-212**, *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Claimant's Memorial of October 13, 1997, ¶ 163.

[108] **CA-25**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of August 18, 2008, ¶ 340 ("The stability of the legal and business

46. Finally, Claimants refer the Tribunal to the case of *Merrill & Ring v. Canada* and Claimants' discussion of that award in our response to the U.S. and Mexico's Article 1128 Submissions.[109] As Claimants have described previously, the *Merrill* tribunal undertook its own analysis of state practice in relation to the minimum standard of treatment. Claimants refer to the authorities on which that tribunal relied in holding that (i) the *Neer* standard no longer represents customary international law, except within "the strict confines of personal safety, denial of justice and due process,"[110] (ii) in the context of "business, trade and investment" cases, "[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment … has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*,"[111] and (iii) protection of legitimate expectations and maintaining a stable and

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environment is directly linked to the investor's justified expectations.").

[109] **RA-104**, *Merrill & Ring Forestry L.P. v. Canada*, (UNCITRAL) Award of March 31, 2010; Claimants' Submission on the U.S. and Mexico's NAFTA Article 1128 Submissions, ¶¶ 49-53.

[110] **RA-104**, *Merrill & Ring Forestry L.P. v. Canada*, (UNCITRAL) Award of March 31, 2010, ¶ 204. The Chapter 11 tribunal in ADF also specifically found that there is no state practice to support the argument that the current minimum standard of treatment is represented by the *Neer* standard. **CA-16**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (A)/00/1, Award of January 9, 2003, ¶ 181.

[111] **RA-104**, *Merrill & Ring Forestry L.P. v. Canada*, (UNCITRAL) Award of March 31, 2010, ¶ 210.

predictable framework for investment are both relevant elements under that standard.[112]

2. Legitimate Expectations as a Relevant Consideration Under Article 1105

47. Every Chapter 11 tribunal to address claims under Article 1105 since the FTC issued its Note of Interpretation in July 2001 has analyzed that standard in terms of the minimum standard of treatment under customary international law.[113]

48. The majority of these tribunals have found that, at the very least, the fact that a claimant's legitimate expectations have been repudiated is a relevant consideration when deciding whether a NAFTA Party has violated Article 1105. This includes the two awards on which Canada places great emphasis, *Glamis* and *Cargill*, which Claimants will address further below.[114] Claimants have addressed these awards in our written pleadings,[115] and will provide only a brief recap here:

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[112] **RA-104**, *Merrill & Ring Forestry L.P. v. Canada*, (UNCITRAL) Award of March 31, 2010, ¶¶ 187, 208.

[113] *See, e.g.,* **CA-33**, *International Thunderbird Gaming Corporation v. United Mexican States*, (UNICTRAL) Award of January 26, 2006, ¶ 192; **CA-51**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004, ¶ 90 *et seq.*; **CA-16**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (A)/00/1, Award of January 9, 2003, ¶ 175 *et seq.*; **RA-104**, *Merrill & Ring Forestry L.P. v. Government of Canada*, (UNCITRAL) Award of March 31 2010, ¶ 186.

[114] *See infra* ¶¶ 49-50.

[115] Reply, ¶¶ 131-132.

- *International Thunderbird Gaming Corporation v. United Mexican States*: "[T]he concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[116]

- *Waste Management, Inc. v. United Mexican States*: "In applying this 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."[117]

- *Gami Investments, Inc. v. United Mexican States*: "The imposition of a new licence requirement may for example be viewed quite differently [under Article 1105] if it appears on a blank slate or if it is an arbitrary repudiation of a preexisting licensing regime upon which a foreign investor has demonstrably relied."[118]

- *ADF Group Inc. v. United States of America*: The tribunal rejected claimant's submission that the U.S. had ignored "the Investor's legitimate expectations,"

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[116] **CA-33**, *International Thunderbird Gaming Corporation v. United Mexican States*, (UNICTRAL) Award of January 26, 2006, ¶ 147.

[117] **CA-51**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004, ¶ 98.

[118] **CA-31**, *Gami Investments, Inc. v. United Mexican States*, (UNCITRAL) Award of November 15, 2004, ¶ 91.

not because legitimate expectations are not protected under the standard but because (i) the circumstances of the repudiation did not reach the threshold set by Article 1105 and (ii) the expectations had not been generated by the state, but rather by the investor's own private counsel.[119]

- *Merrill & Ring Forestry L.P. v. Government of Canada*:
  - "The availability of a secure legal environment has a close connection too to [general principles of international law] and transparency, while more recent, appears to be fast approaching that standard."[120]
  - "[L]egitimate expectation has been discussed in several [NAFTA] cases, *although not endorsed on questions of fact and evidence*."[121]

49. Canada has not argued that these awards incorrectly apply Article 1105, and indeed it has relied on a number of them in defense of its own argument that the threshold for a

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[119] **CA-16**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (A)/00/1, Award of January 9, 2003, ¶ 189.

[120] **RA-104**, *Merrill & Ring Forestry L.P. v. Government of Canada*, (UNCITRAL) Award of March 31 2010, ¶ 187. *See also id.* ¶ 232 (discussing whether Canada had maintained a stable and predictable framework on the facts).

[121] **RA-104**, *Merrill & Ring Forestry L.P. v. Government of Canada*, (UNCITRAL) Award of March 31 2010, ¶ 208 (emphasis added). *See also id.* ¶¶ 233, 242 (discussing whether there had been a repudiation of the investor's legitimate expectations on the facts).

violation of Article 1105 is high.[122] Its criticism of Claimants' reliance on arbitral awards has been limited to our reliance on decisions interpreting autonomous bilateral investment treaty provisions contained in bilateral investment treaties.[123] Indeed, Canada explicitly accepts that "NAFTA tribunals have considered as a relevant element the repudiation of the legitimate expectations of foreign investors,"[124] and the two awards on which it explicitly relies as correctly stating the applicable standard under Article 1105 find that the repudiation of an investor's legitimate expectations can constitute "shocking and egregious" treatment in violation of Article 1105: [125]

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[122] Counter-Mem., n. 365 (endorsing the Waste Management tribunal's elaboration of the standard); Rej., ¶ 134 (endorsing *Thunderbird*); Rej. ¶ 139 (endorsing *ADF* and *Merrill & Ring*).

[123] Counter-Mem., ¶¶ 257-267.

[124] Counter-Mem., ¶ 270; Rej. ¶¶ 140.

[125] Counter-Mem., ¶ 247; Rej., ¶¶ 124-139; Tr. 1277:21-22, 1278:1-22, 1279:1-22, 1280:1-9. *See also* Tr. 1279:21-22, 1280:1-7 ("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 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*.") (emphasis added). Claimants dispute this proposition. Rather, the *Glamis* and *Cargill* tribunals found that the parties agreed that the customary international law standard was at least the standard set forth in *Neer*, and that Claimants had failed to provide evidence of state practice and *opinio juris* to support its claim that the standard had evolved. The tribunals applied the *Neer* standard under Article 1105 on this basis. **CA-32**, *Glamis Gold, Ltd. v. United States of America*, (UNCITRAL) Award of May 16, 2009, ¶¶ 600, 612-616. **RA-84**, *Cargill, Incorporated v. United*

- *Glamis Gold, Ltd. v. United States of America*: "Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations. The Tribunal therefore 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 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."[126]

- *Cargill, Incorporated v. United Mexican States*: "The Tribunal notes that there are at least two BIT awards, both involving a clause viewed as possessing autonomous meaning, that have 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 placed before the Tribunal that there is such a requirement in the NAFTA or in customary international law, at

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Mexican States, (ICSID ARB(AF)/05/2) Award of September 18 2009, ¶¶ 272-273, 286.

[126] **CA-32**, *Glamis Gold, Ltd. v. United States of America*, (UNCITRAL) Award of May 16, 2009, ¶¶ 620-621.

least where such expectations do not arise from a contract or quasi-contractual basis."[127]

50. Claimants consistently have argued that their justifiable expectations (i) were induced by specific assurances made by the state and (ii) arose from a quasi-contractual basis, and were subsequently repudiated.[128] In other words, the Tribunal need not engage in any analysis of the relevant threshold and standard under Article 1105 because Claimants' case succeeds even if the Tribunal adopts the standard which Canada seeks to apply.

B. Decisions of NAFTA Arbitral Tribunals and National Courts of All Three NAFTA Parties Provide Ample Support for Claimants' Approach to Future Damages

51. The Tribunal posed the following questions to the parties during the hearing:

> With regards to remedies that might be available in the event of a violation of the NAFTA, what options are available to a Tribunal in the granting of relief in circumstances in which the only relief sought by the Claimant is monetary compensation?
>
> If the assessment of such compensation is to be based upon a range of variables only some of which are presently known, what principles should govern the assessment by the Tribunal?
>
> Is any assistance to be obtained on this issue from

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[127] **RA-84**, *Cargill, Incorporated v. United Mexican States*, (ICSID ARB(AF)/05/2) Award of September 18, 2009, ¶ 290.

[128] Tr. 1149:14-1152:5; Claimants' Submission on the U.S. and Mexico's NAFTA Article 1128 Submissions, ¶ 64; Reply, ¶¶ 185-188.

> awards of NAFTA arbitral tribunals or national court decisions of the three NAFTA parties?[129]

52. Article 1135(1) of the NAFTA only permits NAFTA tribunals formed under Chapter 11 to award monetary damages. Thus, Claimants cannot request injunctive or other non-monetary relief for a continuing treaty violation such as this one.

53. As Claimants have demonstrated in our written and oral pleadings, NAFTA tribunals awarding damages for non-expropriation violations of the NAFTA are consistent in their elaboration of the principles underlying an award of monetary damages.[130] In particular, the tribunals stress that, as the NAFTA is silent on the measure of damages to be awarded following treaty violations other than Article 1110, NAFTA tribunals are afforded considerable discretion in fashioning the appropriate monetary remedy.[131] Further, in the absence of a specific compensation regime under the NAFTA, "the principles upon which compensation should be awarded

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[129] Legal Questions to the Parties from the Tribunal to be Addressed in Closing Arguments (Oct. 21, 2010), ¶ 5.

[130] Claimants' Reply Memorial, ¶¶ 240-242; Tr. 120:2-17; 131:7-17.

[131] **CA-44**, *S.D. Myers Inc. v. Government of Canada*, (UNCITRAL) Partial Award of November 13, 2000, ¶ 309 (the NAFTA's silence on issue of compensation indicates intention of treaty drafters "to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case."); **CA-29**, *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, ¶ 197 (NAFTA tribunals have "exercised considerable discretion in fashioning what they believed to be reasonable approaches to damages consistent with the requirement of NAFTA.").

derive from the applicable international law rules."[132] The *ADM* Tribunal enumerated the following relevant principles: "[a] breach by a state party to an investment treaty … triggers the obligation to make 'full reparation' for the injury caused,"[133] and "[c]ompensation encompasses both the loss suffered (*damnum emergens*) and the loss of profits (*lucrum cessans*). *Any direct damage is to be compensated*."[134] Indeed, "[i]f [damages] were caused by the event, engage Chapter 11 and are not too remote, there is nothing in the language of Article 1139 that limits their recoverability."[135]

54. The Tribunal has also asked whether any assistance is to be derived from awards rendered under the NAFTA, or from domestic jurisprudence in the NAFTA countries, considering the question of future damages. Claimants have identified Chapter 11 awards and many examples of national courts employing a similar methodology to that adopted by Claimants in this arbitration. As demonstrated further below,[136] Chapter 11 tribunals apply international law, and

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[132] **CA-18**, *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award of November 21, 2007, ¶ 278. See also **CA-44**, *S.D. Myers Inc. v. Government of Canada*, (UNCITRAL) Partial Award of November 13, 2000, ¶ 315.

[133] *Id.* ¶ 275.

[134] *Id.* ¶ 281 (emphasis added). See also **CA-29**, *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, ¶ 194 ("in case of discrimination that constitutes a breach of Article 1102, *what is owed by the responding Party is the amount of loss or damage that is adequately connected to the breach*.") (emphasis added).

[135] **RA-44**, *S.D. Myers Inc. v. Government of Canada*, (UNCITRAL) Second Partial Award of October 21, 2002, ¶ 160 (emphasis added).

[136] *See infra* ¶¶ 55-81.

national courts use similar principles and terminology, to describe the applicable standards and principles governing an award of future damages. Claimants describe briefly below the general principles employed by Chapter 11 tribunals and national courts when awarding future damages, and to elaborate on examples of methodologies on which such awards of damages rely.

1. Decisions of NAFTA Arbitral Tribunals Provide Ample Support for Claimants' Approach to Future Damages

55. Although no NAFTA tribunal has yet been faced with a continuing treaty violation or continuing investment impairment scenario, the Tribunal's task in this case is not materially different from that of any tribunal asked to award damages for lost profits or indeed to value a lost investment using DCF principles. In a lost profits scenario, a Tribunal must by definition make assumptions as to how an investment would have performed but for the introduction of the contested measure. The Tribunal must create that hypothetical marketplace by reference to informed assumptions and must assess and ascribe a value to a number of "variables" in order to construct this hypothetical marketplace, for it can never know with certainty how the world would have looked in the absence of the measure.

56. NAFTA Tribunals have made such assumptions in the context of lost profits claims. Indeed, when it comes to applying the principle of "full reparation" to the facts of the relevant cases, NAFTA tribunals have been prepared to award considerable damages in such cases.[137] For example, the

[137] *See, e.g.,* **CA-18**, *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award of November 21, 2007, ¶ 287 ("Based on the evidence presented, the

Cargill tribunal found that a tax imposed by Mexico on high fructose corn syrup violated NAFTA Articles 1102, 1105 and 1106. With regard to damages, the tribunal held that:

> The Tribunal therefore accepts the methodology used by Claimant to calculate damages by determining the present value of the net lost cash flows. This calculation, as accepted and utilized by the Tribunal in its own analysis, calculates net lost cash flows as equal to the 'but for' quantity of HFCS that Claimant would have sold — where quantity is determined as the product of the entire market for HFCS multiplied by the percentage of Claimant's projected share of that market — *multiplied by the price of HFCS*, determined over the period of loss and brought to the present value using the appropriate interest rate.
>
> However, as noted in the Tribunal's consideration of factors within, several of the figures utilized by Claimant in its calculations must be discounted as it finds some of them to not be sufficiently

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Tribunal concludes that the introduction of the Tax adversely affected the business of Claimants. The issue becomes the quantum of damages which in the present case will depend on the amount of lost profits that have been proved."); **RA-84**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009, ¶ 444 ("The Tribunal agrees with Claimant that the appropriate approach to assessing damages in this proceeding is to determine the present value of net lost cash flows."); **RA-44**, *S.D. Myers Inc. v. Government of Canada*, (UNCITRAL) Second Partial Award of October 21, 2002, ¶ 228 ("Canada should compensate SDMI for the net income streams that it lost, for the abridgement of the time available to SDMI and the value of income delayed by the Canadian closure.").

> established by the record; these discounts are detailed below. In such instances, the Tribunal's discount reflects its considered assessment of the evidence submitted by the Parties.[138]

57. In other words, the tribunal assessed and quantified three "variables" to determine what Cargill's profits would have been but for the impugned tax: (i) the market for HFCS in Mexico; (ii) Cargill's share of that market; and (iii) the price of HFCS. Its assessment of these variables resulted in a damages award of over US $77 million.[139] Further, the tribunal acknowledged Mexico's concern with regard to the difficulties involved in projecting the various factors required to calculate damages, but found that such projections were not "so unusual or difficult that the employment of the method is inappropriate in this proceeding,"[140] and noted in this regard that Cargill had participated in the Mexican HFCS market in the early 1990s and was doing so again at the time of the Award.[141] Of particular relevance, with regard to the projection of Cargill's market share, the tribunal accepted Cargill's projection, noting that the parties were in tacit agreement on this figure, which was based on Cargill's historic market share.[142]

58. An issue confronting the tribunal in *S.D. Myers v. Canada* was the measure of compensation recoverable by the claimant, SDMI, in a case where Canada's closure of the

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[138] **RA-84**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2. Award of 18 September 2009, ¶ 447-448 (emphasis added).

[139] *Id.* ¶ 559.

[140] *Id.* ¶ 445.

[141] *Id.* ¶ 446.

[142] *Id.* ¶¶ 488-492.

U.S.-Canada border to the export of PCB waste was found to violate Articles 1102 and 1105. The tribunal found that "the appropriate loss to be addressed in this particular case is the loss of net income stream,"[143] which reflected SDMI's profitability but for the impugned measure. Again, the tribunal took note of the "special challenges" associated with the quantification of loss of future profits, especially "in start-up situations where there is little or no relevant track record."[144] The tribunal noted the significant disparities in the positions of the Parties and determined that, as a result of these disparities, it would have to perform its own quantification analysis.[145] It proceeded to do so, despite the fact that "[t]here is no clear measure of the effect of the [border] closure on SDMI,"[146] and it relied in part on SDMI's record in the U.S. and on expert and witness testimony.[147] The methodology adopted by the tribunal in order to calculate SDMI's compensation included assessment and quantification of the following "variables":

- The realistic value of the quotations relied upon by SDMI in support of its case on quantum.
- The price degradation that would have occurred if the border had remained open.
- SDMI's likely success rate for turning quotations into completed orders.

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[143] **RA-44**, *S.D. Myers Inc. v. Government of Canada*, (UNCITRAL) Second Partial Award of October 21, 2002, ¶ 100.

[144] *Id.* ¶ 173.

[145] *Id.* ¶ 175.

[146] *Id.* ¶ 183.

[147] *See generally id.* ¶¶ 176-215.

- The proportion of the quotations value that would have been converted into a gross income stream for SDMI during the period of the closure.[148]

59. These cases should provide the Tribunal with considerable comfort in relation to Claimants' damages claim in this case. In particular, it is clear that NAFTA tribunals have not shied away from awarding future damages despite the fact that there is some uncertainty surrounding some components of the calculation. The *Cargill* award in particular provides support on the following fronts: (i) variables calculated by reference to historical business data, such as Claimants' normalized average, are not too uncertain; and (ii) tribunals do rely on commodity price projections and may base their awards on an average of the projections relied on by claimants and defendants to smooth out any "distortions" inherent in relying on one party's number. Of course, in this case Claimants and Canada have both used the forecast provided by Claimants' expert, Sarah Emerson.[149]

60. Also of relevance is the tribunal's response to Mexico's argument that an investment by Cargill in Mexico's third largest sugar producer should be subtracted from the assessment of Cargill's total damages, because this investment would not have been valuable but for the disputed tax. The tribunal refused to deduct anything from Cargill's damages, noting first that this investment was distinct from the investment that was the subject of the NAFTA claim. The tribunal also refused to deduct this alleged "benefit" accruing to Cargill because there was no proof that the investment was at all profitable and therefore there was "*no means by which*

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[148] *Id.* ¶ 229.

[149] Third Expert Report of Richard E. Walck, ¶ 98 (hereinafter "Walck Report III").

to determine how it could be accounted for as mitigation."[150] Likewise, Canada has provided no means by which the Tribunal might attempt to account for the ill-defined "operational benefits" that Claimants are said to enjoy as a result of the expenditures required under the Guidelines. Therefore, Claimants' damages should not be reduced to take account of this "mitigation."

2. Decisions of National Courts of All Three NAFTA Parties Provide Ample Support for Claimants' Approach to Future Damages

61. Because international law — and NAFTA arbitral jurisprudence, in particular — so clearly supports Claimants' approach to damages in this case, Claimants respectfully urge that the Tribunal need not rely upon the decisions of the NAFTA Parties' national courts to craft its approach to damages. If, however, the Tribunal wishes to look to those decisions for additional support, it will find that the national law of all three NAFTA Parties mirrors international law with regard to the principles that should govern the assessment of compensation where such compensation is to be based upon a range of variables, only some of which are presently known.

62. In practice, because national courts have the power in appropriate cases to award injunctive relief, they can simply order continuing wrongs like imposition of the Guidelines to cease. Alternatively, they can permit future recourse to the courts to recover damages over time. As a result, national courts do not frequently confront the kinds of constraints with regard to remedies that bind a specially-constituted NAFTA tribunal. Where, however, national

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[150] **RA-84**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2. Award of 18 September 2009, ¶¶ 534-537 (emphasis added).

courts of the three NAFTA Parties do undertake to calculate future damages, such as in lost profits cases, the methodologies that they employ to address variables as to which there is some uncertainty closely conform to the approach advocated by Claimants here. Reasonable estimates based on historical data, expert opinion, and projections generated in the ordinary course of business are satisfactory measures, and the burden of any remaining uncertainty as to the amount of damages rests with the wrongdoer.

(a) The NAFTA Parties' Laws on Future Damages Conform Closely to the International Law Standard

63. Like international law, the law of all three NAFTA Parties clearly provides for the award of future damages, such as in lost profits cases.[151] The difficulty of quantifying future damages is no bar to their recovery. Indeed, as one Canadian court reasoned:

> Why shouldn't damages be awarded for the loss of that contemplated future profit? The Court, I believe, would be shirking its duty if it were to say that no damages should flow because of the difficulty of

[151] **CANADA**: **CA-214**, *Canlin Ltd. v. Thiokol Fibres Canada Ltd.*, Ontario Court of Appeal, 1983 CarswellOnt 136, ¶ 14 (Jan. 12, 1983) (*per* Cory J.A.) (confirming the availability of damages for the loss of contemplated future profit). **U.S.A.**: **CA-260**, *Travellers International, A.G. v. Trans World Airlines, Inc.*, United States Court of Appeals, Second Circuit, 41 F.3d 1570, 1577 (Dec. 8, 1994) (setting forth the standard for the recovery of lost profits as damages for breach of contract under New York law). **MEXICO**: **CA-236**, Civil Appeal 78/41, *Islas German*, Fifth Period, First Chamber, Supreme Court of Justice, T. LXXII, number 352,591, p. 5877 (20 June, 1942) (discussing evidentiary standards for demonstrating lost profits under Mexican law).

> calculating and assessing such damages and that they are therefore too remote.[152]

For this reason, the law of all three NAFTA Parties clearly provides that, once the *fact* of the damage has been established, the *amount* of future damages reasonably may be estimated using assumptions, approximations and common sense. In other words, the quantum of future damages may be established with proof of a lesser degree of certainty than is required to demonstrate the fact of the loss. Courts recognize that, of course, future results may vary, but they base their damages estimates on the best available evidence.[153]

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[152] **CA-214**, *Canlin Ltd. v. Thiokol Fibres Canada Ltd.*, Ontario Court of Appeal, 1983 CarswellOnt 136, ¶ 14 (Jan. 12, 1983) (*per* Cory J.A.).

[153] **CANADA**: **CA-214**, *Canlin Ltd. v. Thiokol Fibres Canada Ltd.*, Ontario Court of Appeal, 1983 CarswellOnt 136, ¶ 14 (Jan. 12, 1983) (*per* Cory J.A.) ("An assessment of future loss of profits must, of necessity, be an estimate. Whether such damages are awarded will depend entirely upon the Court's assessment of the evidence put forward."). **U.S.A.**: **CA-260**, *Travellers International, A.G. v. Trans World Airlines, Inc.*, United States Court of Appeals, Second Circuit, 41 F.3d 1570, 1579 (Dec. 8, 1994) ("Any calculation of damages based on lost profits always entails a degree of uncertainty caused by the need to rely on assumptions and estimates. The 'mere fact that [a party] disagrees with the methodology utilized ... or [a particular] assumption ... does not render ... proof speculative.'") (internal citation omitted); **CA-257**, *Story Parchment Co. v. Paterson Parchment Paper Co.*, Supreme Court of the United States, 282 U.S. 555, 562 (Feb. 24, 1931) ("[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of

64. The wrongdoer rule, which finds expression in both Canadian and U.S. law,[154] further counsels in favor of an award of future damages even where they admit of some uncertainty. The rule, as a general matter, calls for flexibility in permitting proof of damages, such as through just and reasonable inference, in order that compensation not be frustrated. As the U.S. Supreme Court has explained:

> Where the [claim] itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only

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their amount."). **MEXICO**: **CA-236**, Civil Appeal 78/41, *Islas German*, Fifth Period, First Chamber, Supreme Court of Justice, T. LXXII, number 352,591, p. 5877 (20 June, 1942) ("When lost profits are involved, we are dealing with future events that failed to occur (the legitimate profit not obtained as a result of the acts or omissions attributable to someone). Experience and common sense tell us that in most cases, lost profits cannot be demonstrated with direct and rigorous evidence that create absolute certainty of their existence, and that most of the time, we have to settle for relative certainty.").

[154] Mexican case law is not as widely available as Canadian and U.S. case law. Decisions are selectively published and only in excerpted format. In addition, academics have not dealt with the practical issues related to future damages. Accordingly, it was not always possible to verify whether Mexican courts follow the Canadian and U.S. approach. When we refer to Canadian and U.S. law alone, the Tribunal should assume that we were without adequate information to make any statement with regard to Mexican law, not that Mexican law is inconsistent.

> approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.[155]

With regard to the difficulty of ascertaining lost future profits, the Ontario Court of Appeal — which is the highest court in the seat of this arbitration — has echoed, "it must be remembered that they arise as a result of the breach of the defendant and the Court should make all reasonable efforts to assess those damages."[156]

65. Canada will undoubtedly present cases before the Tribunal in which national courts of the NAFTA parties have rejected future damages. However, as the principles stated above make clear, such cases should be viewed as a rejection of future damages on the facts, and not on the basis of a principled rejection of this type of damages.

66. Thus, while the Tribunal need not look to domestic law to support an award of future damages here, it should take

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[155] **CA-257**, *Story Parchment Co. v. Paterson Parchment Paper Co.*, Supreme Court of the United States, 282 U.S. 555, 563 (Feb. 24, 1931).

[156] **CA-214**, *Canlin Ltd. v. Thiokol Fibres Canada Ltd.*, Ontario Court of Appeal, 1983 CarswellOnt 136, ¶ 35 (Jan. 12, 1983) (*per* Cory J.A.). *See also* **CA-223**, *Mason Homes Ltd. v. Oshawa Group Ltd.*, Ontario Superior Court of Justice, 2003 CarswellOnt 3728, ¶ 257 (Sept. 29, 2003) ("Where damages are difficult to assess and cannot be calculated with certainty, as is the case here, the wrongdoer is not relieved of its obligation to pay damages."); **CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶¶ 80-88 (Nov. 18, 1997) (addressing application of the wrongdoer rule in a case where the defendant prevents the plaintiff from establishing its loss, such as by withholding critical facts).

comfort in the knowledge that the national law of all three NAFTA Parties embraces the same fundamental principle as the international standard. Where the fact of the damage has been established with reasonable certainty, as it unquestionably has been here, the Tribunal is expected to arrive at a sensible estimate for the quantum of any future damages that cannot be assessed with precision. As sub-section (c) below details, the particular indicia that Claimants have employed to that end in our damages model are not only reasonable, but find explicit support in the decisions of the NAFTA Parties' national courts.

(b) In Practice, a NAFTA Tribunal Has an Even Greater Imperative to Arrive at a Measure of Future Damages Because the Treaty Restricts the Form of Relief Available

67. Before considering how national courts have applied the foregoing principles to estimate future damages, it is useful to recall the particular features of the NAFTA that make such an exercise necessary in this case. Because the NAFTA permits only monetary relief, this Tribunal does not have the option of simply enjoining enforcement of the Guidelines against the Claimants.[157] Further, the NAFTA provides for a three-year statute of limitations, which may well prevent Claimants from bringing future claims based on the Guidelines (which were first applied to the Hibernia and

[157] **CA-3**, NAFTA, art. 1135(1) ("Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, *only*: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing party may pay monetary damages and any applicable interest in lieu of restitution.") (emphasis added).

Terra Nova Projects in 2004).[158] Thus, it appears that Claimants can only receive full relief for the damages caused by the Guidelines through a calculation of future damages on the principles and variables espoused by Claimants — and fully supported by NAFTA and other international tribunals and domestic court cases.

68. By contrast, the national courts of all three NAFTA Parties enjoy the power to order injunctive relief in appropriate cases. Alternatively, they may permit further recourse to the courts with regard to future damages. For example, plaintiffs in antitrust actions under U.S. law are permitted to return to court after the expiration of the applicable limitations period if the violation persists or if the amount of damages is too speculative to form the basis of a future damages award at the outset. Canadian and Mexican courts similarly permit recovery of damages from time to time as they accrue. In Mexico, if a claimant fails to establish the quantum of its damages, the court may render its judgment on liability, and defer determination of the quantum to an "ancillary" trial. Thus, it can be said that national courts have less of an imperative to arrive at a suitable measure of future damages than does a NAFTA Tribunal. That said, the national courts sometimes do have occasion to undertake such analyses, and when they do, they tend to look to precisely the kinds of data that Claimants have incorporated in our damages model in this case to quantify future damages.

[158] *See* **CA-3**, NAFTA, art. 1116(2) ("An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.").

(c) The Methodologies Employed by the National Courts of the NAFTA Parties to Quantify Future Damages Validate the Approach Adopted by the Claimants in This Case

69. The national courts of the three NAFTA Parties rely on the following kinds of data when assessing future damages: (i) historical data; (ii) expert opinion; and (iii) data generated in the ordinary course of business by knowledgeable persons. National courts will be more likely to rely on such data when it has been adopted or approved by the defendant, or when it is shown to be conservative in comparison to data produced by third parties that are external to the dispute.

70. Historical Data: When Canadian and U.S. courts award prospective damages, they often look to a record of past performance as the most reliable statistical basis for prediction. For example, they may look to past earnings to estimate future profits.[159]

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[159] **CANADA**: **CA-214**, *Canlin Ltd. v. Thiokol Fibres Canada Ltd.*, Ontario Court of Appeal, 1983 CarswellOnt 136, ¶ 14 (Jan. 12, 1983) (*per* Cory J.A.) ("Whether [damages for future loss of profit] are awarded will depend entirely upon the Court's assessment of the evidence put forward. The clearest case might base the loss of future profits upon past history of sales to the same or similar customers for same or similar items."). **U.S.A.**: **CA-260**, *Travellers International, A.G. v. Trans World Airlines, Inc.*, United States Court of Appeals, Second Circuit, 41 F.3d 1570, 1579 (Dec. 8, 1994) ("Established businesses have a record of past performance that may offer a reliable statistical basis for prediction."); **CA-257**, *Story Parchment Co. v. Paterson Parchment Paper Co.*, Supreme Court of the United States, 282 U.S. 555, 561 (Feb. 24, 1931) (noting that "there was evidence of the prices received by petitioner before the cut prices [resulting from the alleged conspiracy between defendants] were put into operation, and those received after,

71. The wisdom of relying on historical data to estimate future data is particularly clear where, as here, there is an established track record of past performance. The Hibernia and Terra Nova projects have been producing oil for roughly twenty-three years and nine years, respectively.[160] Furthermore, they have been subject to the Guidelines requirement for an effective period of nearly seven years, and have been advised by the Board of their Guidelines expenditure requirements for six of those seven years.[161] This historical record is more than ample as a basis to estimate future variables.

72. Historical data informs three variables in Claimants' damages model:

- Oil production profiles are developed in the ordinary course of business by the Hibernia and Terra Nova project operators. These profiles reflect historical data in that they are periodically refined to address new learning about the fields and the production capabilities of the facilities.[162] The most recent

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showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated").

[160] **CE-238**, Hibernia Production Profile (2010); **CE-241**, Terra Nova Production Profile (2010).

[161] **CE-116**, Letter from F. Smyth, CNLOPB, to P. Sacuta, HMDC (Feb. 26, 2009); **CE-117**, Letter from F. Smyth, CNLOPB, to G. Vokey, Petro-Canada (Mar. 3, 2009); **CE-225**, Letter from J. Bugden, CNLOPB, to P. Sacuta, HMDC (Feb. 11, 2010); **CE-226**, Letter from J. Bugden, CNLOPB, to G. Vokey, Suncor (Feb. 11, 2010).

[162] *See* Phelan Statement III, ¶ 13 (Updated Hibernia production profile generated by "reservoir team" and updated Terra Nova production profile generated by "geosciences team" to take "recent production data" into account).

available data were incorporated in the damages model.

- An average of the Statistics Canada benchmark factor calculated by the Board for 2004 through 2009 was used to derive an estimate for 2010 and onward.[163]

- A normalized average of past R&D and E&T expenditures was used to estimate the future course of business spend.[164]

73. Expert Opinion: National courts recognize expert opinion as a valid basis for forecasting future damages.[165] For

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[163] *See* Rosen Report III, ¶ 25. *See also* **CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶¶ 141-146 (Nov. 18, 1997) (endorsing the practice of averaging data to estimate future damages).

[164] *See* Rosen Report III, ¶ 26. *See also* **CA-260**, *Travellers International, A.G. v. Trans World Airlines, Inc.*, United States Court of Appeals, Second Circuit, 41 F.3d 1570, 1579-80 (Dec. 8, 1994) (condoning the trial judge's reliance on historical data and noting that the judge "was also careful to normalize the figures to factor in and account for potential anomalies").

[165] **CA-223**, *Mason Homes Ltd. v. Oshawa Group Ltd.*, Ontario Superior Court of Justice, 2003 CarswellOnt 3728, ¶ 252 (Sept. 29, 2003) (finding the plaintiff's approach to damages calculation, including future damages, to be more persuasive than the defendant's due in part to the reliability of plaintiff's experts); **CA-228**, *Xerex Exploration Ltd. v. Petro-Canada*, Alberta Court of Appeal, 2005 CarswellAlta 879, ¶ 99 (June 30, 2005) (the value of plaintiff's working interest in the ongoing exploitation of an oil well was "ascertainable at trial[] from the Hunter Report," an expert report submitted by plaintiff); **CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶ 67 (Nov. 18, 1997) (noting that trial judge found the report of plaintiff's experts "a reasonable basis to work from").

example, the Ontario Superior Court of Justice — which would have initial jurisdiction over any judicial proceedings related to this arbitration[166] — found a plaintiff's approach to damages, including future damages, to be convincing in part because "[t]he plaintiff's damages witnesses were experts in the specific areas about which they were requested to provide opinions."[167] Indeed, the Court found the testimony of a "leading consultant and acknowledged expert in [his] field" with "extensive knowledge … gained over a period of more than 25 years" to be "most persuasive."[168] At least one Canadian court has based its damages calculation on oil production and price forecasts generated by an expert witness.[169]

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[166] Procedural Order No. 2, Decision of the Tribunal on the Court of the Place of Arbitration (Nov. 5, 2009).

[167] **CA-223**, *Mason Homes Ltd. v. Oshawa Group Ltd.*, Ontario Superior Court of Justice, 2003 CarswellOnt 3728, ¶ 252(1) (Sept. 29, 2003).

[168] *Id.*, ¶ 252(4).

[169] **CA-228** & **CA-229**, *Xerex Exploration Ltd. v. Petro-Canada*, Alberta Court of Appeal, 2005 CarswellAlta 879, ¶¶ 99-100 (June 30, 2005) & Expert Witness Statement of John P. Hunter, Future Production (Oct. 4, 2002) (endorsing trial court's determination that Plaintiff was entitled to recover 50 per cent of past and future net profit from an oil well and calculation of damages because the "value of this interest was ascertainable at trial, from the Hunter Report," which provided oil price forecasts for the period 2002-2013 and oil production forecasts for the period 2002-2023). *See also* **CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶¶ 67, 109-111 (Nov. 18, 1997) (where defendant's actions prevented plaintiff from marketing the software that formed the basis of the contract at issue, the trial judge assessed damages by reference to market projections provided by plaintiff's experts).

74. Mr. Rosen's damages model relies upon oil price forecasting data supplied by Sarah Emerson.[170] Like the expert relied upon by the Ontario court, Ms. Emerson has twenty-five years of experience generating oil price forecasts.[171] Canada tellingly declined to submit any contrary projection. In fact, Canada's own damages expert, Richard Walck, adopted Ms. Emerson's data when he put forth an alternate damages figure.[172] Ms. Emerson has also demonstrated the conservative nature of her forecast.[173]

75. Data Generated in the Ordinary Course of Business by Knowledgeable Individuals: Expert opinion is not limited to outside consultants. Under both Canadian and U.S. law, party witness testimony and evidence relied upon by parties in conducting their own business dealings may also form the basis of a damages award, particularly where it reflects significant experience in a particular area. For example, courts may rely upon business plans.[174]

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[170] Rosen Report III, ¶ 25.

[171] First Expert Report of Sarah A. Emerson, Appx. A.

[172] Walck Report III, ¶ 98.

[173] Third Expert Report of Sarah A. Emerson, ¶¶ 18-24 (hereinafter "Emerson Report III"); see also *infra* ¶¶ 78-79.

[174] **CANADA**: **CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶ 117 (Nov. 18, 1997) (upholding reliance on certain projections contained in plaintiff's business plan as a basis for calculation of damages for loss of profits, even where the product had never been marketed and there was no historical record from which to extrapolate, because the persons generating the projections were "knowledgeable people"). **U.S.A.**: **CA-260**, *Travellers International, A.G. v. Trans World Airlines, Inc.*, United States Court of Appeals, Second Circuit, 41 F.3d 1570, 1580 (Dec. 8, 1994) (affirming district court decision where "the ratio analysis adopted by Judge Ward was a technique recognized and used in the industry, was integral to projecting the

76. The Hibernia and Terra Nova oil production profiles clearly merit this validation, both because they form the basis of highly significant business decisions and because they were developed by individuals who are experts in their field — or at the very least, to use a phrase of the Ontario Court of Appeal, "knowledgeable people."[175]

77. Data That Have Been Accepted by the Defendant: Both Canadian and U.S. courts have held that an opposing party's acceptance, or even tacit endorsement, of data contained in a damages model constitutes grounds for reliance by the court on those data.[176] While Canada has made much of the fact that the production profile on which Claimants rely

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expected demand for [the tours at issue] at each annual planning meeting, and was of the same type of data relied on by both [parties] in conducting their businesses").

[175] *See* Phelan Witness Statement III, ¶ 13 (Hibernia production profile generated by "reservoir team" and Terra Nova production profile generated by "geosciences team"); **CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶ 117 (Nov. 18, 1997) (upholding reliance on projections generated by "knowledgeable people").

[176] **CANADA**: **CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶¶ 118-119 (Nov. 18, 1997) (finding that the trial judge was entitled to rely on projections contained in the plaintiff's business plans because "the projections in [the defendant's] own business plans substantially corroborated those in [the plaintiff's] business plans" and the defendant "led no evidence at trial to refute the reasonableness of its own projections"). **U.S.A.**: **CA-260**, *Travellers International, A.G. v. Trans World Airlines, Inc.*, United States Court of Appeals, Second Circuit, 41 F.3d 1570, 1580 (Dec. 8, 1994) (endorsing trial judge's employment of a ratio analysis to calculate plaintiff's lost profits in part because "[the defendant] had used such a ratio analysis in the past" to project market demand, and because he applied the ratio to the defendant's actual operating data)

in this arbitration has not been submitted to, or reviewed by, the Board, the profile relied on in this arbitration estimates [redacted] additional barrels of recoverable oil than the profile accepted by the Board in the recent Hibernia Development Plan Amendment.[177] Furthermore, as Mr. Phelan confirmed during his testimony, HMDC's current estimate of recoverable reserves is more conservative than the Board's own estimate of reserves for the Hibernia North field.[178]

78. Projections That Are Conservative When Compared to External Data: Courts have found the use of conservative figures a compelling factor in their decisions to rely upon data for an award of future damages.[179]

79. In each instance, where more than one data set was available as an input in the damages model, Claimants adopted a conservative outlook resulting in a lower damages

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[177] *Compare* **CE-238**, Hibernia Production Profile (2010) (estimating recoverable reserves of [redacted] barrels for Hibernia North) *with* **CE-244**, CNLOPB, Staff Analysis: Hibernia Development Plan Amendment, p. 26 (Sept. 2, 2010) (HMDC's previous reserves estimate of 1055.4 million barrels).

[178] *Compare* **CE-238,** Hibernia Production Profile (2010) (estimating recoverable reserves of [redacted] barrels for Hibernia North) *with* **CE-244**, CNLOPB, Staff Analysis: Hibernia Development Plan Amendment, p. 26 (Sept. 2, 2010) (Board's recoverable reserves estimate of 1180.3 million barrels). *See also* Tr. 981:14-989:17 (Phelan).

[179] **CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶137 (Nov. 18, 1997) (noting, as part of its determination that the trial court was correct to rely on the projections in question, that certain of the plaintiff's projections were reasonable, and even conservative, when compared to data generated by a third party unconnected with the case).

figure.[180] For example, Ms. Emerson, provided an oil price forecast that is lower than the EIA's reference forecast, the IEA's reference forecast and Canada's NEB reference forecast. [redacted][181] Claimants' use of more conservative forecasts resulted in a lower damages figure, because it yielded a lower estimate of the total expenditure requirement under the Guidelines. The following data sets in Claimants' damages model, among others, are also conservative:

- Production profiles: Hibernia and Terra Nova are likely to produce more oil, which would increase their Guidelines obligations.
- Ordinary course of R&D spending projections: these projections do not reflect decreased expenditures expected in mature projects.

* * *

80. Thus, the national law of each of the NAFTA parties provides support for the method employed by Claimants with regard to each "variable" in the future damages calculation. As a reminder, Claimants' future damages model derives directly from the Guidelines themselves. Claimants first calculated the total future expenditure requirement under the Guidelines using the formula set forth in the Guidelines, which essentially contains three variables: average annual

[180] Claimants' use of conservative data realistically also means that an award of the full value of damages sought could prove insufficient compensation for their actual losses. This risk was one that Claimants were prepared to accept in order to put forth a credible case. Particularly given its responsibility for Claimants' losses, Canada must be expected to bear at least the same level of risk with regard to the damages award.

[181] Emerson Report III, ¶¶ 18-24.

price per barrel of oil, total number of barrels of oil produced per year, and the Statistics Canada benchmark factor. From that amount, Claimants deducted what that they would otherwise spend on R&D and E&T in the ordinary course of business. The difference constitutes Claimants' damages.[182] The following chart demonstrates the data that Claimants used to estimate each of the four variables on a prospective basis:

Variable in Formula	**Type of Data Used to Estimate**	**Comments**
Average price of oil	Expert opinion	Claimants' forecast is conservative relative to external data No contrary forecast
Oil production volume	Oil production forecasts generated by the Hibernia and Terra Nova project operators in the ordinary course of business	Forecasts were developed by industry experts and take account of historical data
Statistics Canada factor	Historical data	The board is responsible for supplying this data
Ordinary course R&D and E&T expenditures	Historical data	Normalized average used

[182] *Id.* ¶ 8.

IV.

UPDATES ON OTHER ISSUES

A. Recipients of the Award

81. As the Tribunal requested, Claimants have considered whether any Award in their favor could be made to one of their Canadian entities in order to avoid the necessity of a tax gross-up on the damages. While Claimants have thoughtfully considered this suggestion, unfortunately Claimants must repeat the request that any Award be made to them and that, as a result, any damages be grossed-up to compensate for U.S. taxes that would be owed on such an Award. While payment to the Canadian entities would eliminate the need for tax gross-up, it would create other issues that would then have to be compensated for in an Award. Therefore, Claimants request that, as provided in NAFTA Article 1116, the Award be made to them.

B. Possibility of a Formula for Future Damages

82. Claimants also have carefully considered the Tribunal's question whether, so far as future losses are concerned, a formula might be identified by which Claimants' exposure under the Guidelines could be monitored over time. Claimants believe that the Tribunal could adopt such a formula as part of its Award (subject to Claimants' understanding and Canada's agreement on the issues discussed below). A number of legal considerations underlie using such a formula, but Claimants can agree to the use of a formula assuming that Canada agrees with our understanding that: (i) an Award containing such a formula would constitute an award of "monetary damages" for the purposes of NAFTA Article 1135; and (ii) provided Claimants bring a domestic

court action in Ontario for recognition of the Award within a two-year period after the Award is issued, there will be no limitations period on their enforcement of the order recognizing the Award, and the damages formula contained therein.[183]

83. If Canada confirms that understanding, we will work with Canada's counsel in trying to agree on such a formula before the reply submissions are due on December 21, 2010. If the parties cannot agree, we will propose a formula in our reply submission.

C. Hibernia Southern Extension

84. Fortunately, Claimants do not need to make any application to the Tribunal as a result of the Board's conditional approval of the Amended Hibernia Benefits Plan for the HSE. As the Tribunal will recall, the Board required that Hibernia confirm that the Board's Guidelines apply to the entire Hibernia project, not just to the HSE. In making the required confirmation, HMDC stated that the confirmation is "not a waiver of any right that a Hibernia owner may have under the NAFTA and is without prejudice to" this ongoing arbitration. On November 19, 2010, the Board acknowledged receipt of this statement and advised that the condition related to the Board's approval of the Amendment to the Hibernia Benefits Plan for the HSE was satisfied.

85. As a result, it is clear that the current position of the parties continues: namely, that for purposes of Canadian law, Claimants and other owners of Hibernia and Terra Nova

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[183] *See* **CA-211**, *Limitations Act (Ontario)*, 2002, S.O. 2002, c. 24, Sched. B, s. 16(1)(b) ("There is no limitation period in respect of … a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court[.]").

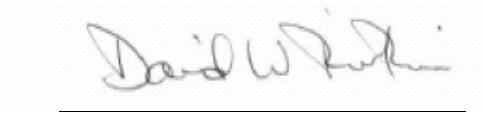
accept the application of the Guidelines to those projects, but Claimants retain the ability to argue — as indeed they have demonstrated here — that the Guidelines violate Canada's obligations under the NAFTA.

V.

CONCLUSION

86. For all of the reasons stated here and in prior oral and written submissions by Claimants, we respectfully urge the Tribunal to hold that the Guidelines violate Canada's obligations under Articles 1105 and 1106 of the NAFTA and to award Claimants full damages to compensate for this violation.

Respectfully submitted,



David W. Rivkin
Jill van Berg
Samantha J. Rowe
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
United States of America
T: + 1 212 909 6000
F: + 1 212 909 6836

Sophie J. Lamb
DEBEVOISE & PLIMPTON LLP
Tower 42
Old Broad Street
London
EC2N 1HQ
United Kingdom
T: + 44 (0)20 7786 9000
F: + 44 (0)20 7588 4180

Barton Legum
SALANS
5 boulevard Malesherbes
75008 Paris
France
T: + 33 (0)1 42 68 48 70
F: + 33 (0)1 42 68 71 55

Toni D. Hennike
Anna T. Knull
EXXON MOBIL CORPORATION
Law Department – International
Investments and Arbitration
800 Bell Street -CORP-EMB-1707C
Houston, TX 77002
United States of America
T: + 1 713 656 6716
F: + 1 713 656 3496

Walter Compton
MURPHY OIL CORPORATION
P.O. Box 7000
El Dorado, AR 71730
United States of America
T: + 1 870 864 6555
F: + 1 870 864 6489

ANNEX A:
INDEX TO PORTIONS OF HEARING TRANSCRIPT AND POST-HEARING BRIEF WHERE CLAIMANTS' ANSWERS TO QUESTIONS POSED BY THE TRIBUNAL APPEAR

No.	Tribunal Question	Reference to Record
1	Article 1105 of the NAFTA provides that "(1) Each Party shall accord to investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001) provide that Article 1105(1) "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." What evidence of "state practice" and *opinio juris* is available, if any, to support the conclusion that "fair and equitable treatment encompasses a substantive obligation to protect the legitimate expectation of the parties?	Claimants' Post-Hearing Brief, ¶¶ 40-50.

2	The Introduction to Annex I of the NAFTA (Reservations for Existing Measures and Liberalization Commitments) provides at section 2(f) of the introduction that a measure means a measure as amended, continued or renewed as of the date of entry into force of this Agreement, and "includes any subordinate measure adopted or maintained under the authority of and *consistent with the measure*" (emphasis added).	
	(a) As a matter of law, is the determination of whether a subordinate measure is "consistent with the measure" to be assessed by reference to (i) the national law governing the measure under the authority of which the subordinate measure has been adopted, or (ii) the law of NAFTA, or (iii) both?	Tr. 1132:6-1141:12
	(b) If it includes the law of NAFTA, what is the standard by which such assessment is made, and the available sources thereof.	Tr. 1141:13-19
	(c) If it is or includes 'the national law governing the measure,' what is the standard of review to be adopted by the Tribunal in assessing 'consistency' in circumstances where a national court may have addressed issues of 'authority' and / or 'consistency' by reference to	Tr. 1141:19-22

	that national law? (d) As a matter of (i) national law, and (ii) the law of NAFTA, can a subordinate measure be "consistent with the measure" if it imposes additional and / or more onerous burdens on a legal or natural person who is subject to the subordinate measure?	 Tr. 1142:1-5
3	Article 1108(1)(c) of the NAFTA provides that Article 1106 does not apply to "an amendment to any non-conforming measure referred to in [Article 1108(1)(a)] to the extent that the amendment *does not decrease the conformity of the measure*, as it existed immediately before the amendment, with [Article 1106]" (emphasis added). (a) Did the drafters of the NAFTA intend there to be any difference between a standard of "consistent with" (section 2(f) of Annex I, above) and "not decreasing the conformity of (Article 1108(1)(c))? If so, what is that difference and what sources can be relied upon for identifying the meaning of these terms? (b) Do the words "consistent with" imply any requirement that there should be no decrease in the conformity of a new subordinate measure with the	 Tr. 1130:9-1131:5 Tr. 1131:6-1132:5

	measure that is the subject of the reservation, as compared with the situation that existed prior to the adoption of the new subordinate measure?	
4	Section 4 of Annex I of the NAFTA (Reservations for Existing Measures and Liberalization Commitments) sets out certain matters to be taken into consideration when interpreting reservations to the NAFTA, but does not identify principles of interpretative techniques to be utilized. What principles should the Tribunal take into account in interpreting a reservation made to Article 1106 of the NAFTA?	Tr. 1124:8-1126:2
5	The parties have presented detailed arguments on remedies, of which the Tribunal has taken note. Against that background: (a) With regard to remedies that might be available in the event of a violation of the NAFTA, what options are available to a Tribunal in the granting of relief in circumstances in which the only relief sought by the Claimant is monetary compensation?	Claimants' Post-Hearing Brief, ¶¶ 52-53, 83-84

	(b) If the assessment of such compensation is to be based upon a range of variables only some of which are presently known, what principles should govern the assessment by the Tribunal? (c) Is any assistance to be obtained on this issue from awards of NAFTA arbitral tribunals or national court decisions of the three NAFTA Parties?	Mem., ¶¶ 215, 222; Reply, ¶¶ 226-265, 295-296 Tr. 126:3-135:3; 1168:7-1173:15 Claimants' Post-Hearing Brief, ¶¶ 51-81