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

BETWEEN:

MOBIL INVESTMENTS CANADA INC. AND MURPHY OIL CORPORATION

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

GOVERNMENT OF CANADA

REPLY TO CLAIMANTS' POST HEARING BRIEF

31 January 2011

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I. INTRODUCTION

1. The Claimants' Post-Hearing Brief fails to prove that the Guidelines for Research and Development Expenditures ("Guidelines") breach the NAFTA. Instead, it confirms the claim is an attempt to misuse the NAFTA to appeal the decisions of Canadian courts.

2. The Brief fails to prove that the Guidelines are a prohibited performance requirement under NAFTA Article 1106. Instead, the Claimants continue to try to fill the round hole of Article 1106(1)(c) with the square peg of research and development ("R&D") and education and training ("E&T") requirements. Article 1106(1)(c) prohibits requirements to consume local goods or services. However, this is not what is required by the Guidelines. They merely require that R&D is "carried out" and E&T is "provided" in the Province.[1] The Guidelines do not compel the consumption of local goods or services to fulfil these requirements. Indeed, many of the projects identified by the Claimants to fulfil their obligation under the Guidelines engage no local goods or services at all.

3. Even if the Guidelines are inconsistent with Article 1106(1)(c), they cannot breach that Article because they are reserved. The Guidelines fall within the NAFTA Annex I reservation for the Federal Accord Act, as well as the reservation for the Provincial Accord Act, because they are subordinate to both Acts. The NAFTA reserves "any subordinate measure adopted or maintained under the authority of and consistent with the measure" listed in Annex I.[2] Canadian courts have decided that the Guidelines are authorized by and consistent with both the Acts and the Hibernia and Terra Nova Benefits Decisions. The Tribunal should defer to these decisions. In an award issued

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[1] The Guidelines merely enforced the requirement of section 45(3)(c) of the Federal and Provincial Accord Acts, which states: "A Canada-Newfoundland and Labrador benefits plan shall contain provisions intended to ensure that...(c) expenditures shall be made for research and development to be carried out in the province and for education and training to be provided in the Province." **CA-11,** Canada-Newfoundland Atlantic Accord Implementation Act, 1987, c. 3 (hereinafter "Federal Accord Act"); **CA-12,** Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act, R.S.N.L. 1990, c. C-2 (hereinafter "Provincial Accord Act"). This Reply to Claimants' Post-Hearing Brief refers to these two Acts collectively as the "Accord Acts." References to sections are references to sections in the Federal Accord Act, unless stated otherwise.

[2] Article 1108(1)(a) and Article 2(f)(ii) of the Interpretative Note to Annex I.

since the hearing, the *RSM v Grenada* tribunal emphatically confirmed that bilateral investment treaty "tribunals do not reopen the municipal law decisions of competent *fora*, absent a denial of justice."[3]

4. The Claimants' Post-Hearing Brief also fails to prove that the Guidelines breach Article 1105. The Claimants maintain that the Guidelines breach that Article simply because they are inconsistent with the Claimants' legitimate expectations. However, in their Brief, the Claimants have still failed to provide any evidence that the protection of such expectations is part of the customary international law standard of treatment required by Article 1105.

5. Regardless, the Claimants have failed to prove that the Guidelines are inconsistent with any expectations that the Claimants should have had. The Claimants confirm in their Brief that the sole source of their legitimate expectations is the Hibernia and Terra Nova Benefits Decisions. However, Canadian courts reviewed those Decisions and decided that they are consistent with the Guidelines. Since the Guidelines are consistent with the Hibernia and Terra Nova Benefits Decisions, they cannot possibly be inconsistent with any legitimate expectations generated by those Decisions.

6. Even if the Guidelines did breach the NAFTA, the Claimants have not identified in their Post-Hearing Brief a single dollar of damage. Instead, that Brief confirms the conclusions from the evidence at the hearing: the Claimants have yet to undertake any R&D or E&T under the Guidelines; the Claimants have failed to prove that the R&D and E&T they will undertake would not have been undertaken anyway; if there is incremental spending, the amount of that spending is entirely uncertain; and any such incremental spending will generate benefits for which the Claimants have still not accounted.

[3] **RA-169** *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6) Award, 11 March 2009 (hereinafter "*RSM*"), ¶ 7.1.11.

II. THE CLAIMANTS HAVE NOT PROVEN THE GUIDELINES BREACH ARTICLE 1106

A. The Claimants Have Not Proven the Guidelines are Inconsistent with Article 1106(1)(c) of the NAFTA

7. The Claimants allege that the Guidelines breach Article 1106(1)(c), which prohibits requirements "to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory." However, the Guidelines merely enforce the Accord Acts' requirement that the Claimants "carry out research and development" and "provide education and training" in the Province. Neither of these requires the Claimants to purchase, use or accord a preference to local service providers, which is all that is prohibited under the ordinary meaning of Article 1106(1)(c).[4] Since Article 1106(5) dictates that Article 1106(1)(c) be interpreted narrowly,[5] if an impugned measure does not specifically require the investment of the investor to purchase, use or prefer local services, and allows compliance by means which do not implicate Article 1106(1)(c), then the claim of a violation must be rejected.

8. The *provision* of a service is a prerequisite for the application of Article 1106(1)(c), under its ordinary meaning.[6] The Guidelines are broad enough to permit expenditures which do not result in the provision of a service to the Claimants at all. Indeed, the Claimants are not required to conduct or obtain *any* R&D themselves - they are free to contribute to the endowment of academic research chairs,[7] fund student

[4] Counter Memorial, ¶¶ 184-202; Rejoinder, ¶¶ 21-25, 36-46; Hearing Transcript, pp. 1205:11-22, 1208:1-3.

[5] Counter Memorial, ¶¶ 144-154; Rejoinder, ¶¶ 16-20; Hearing Transcript, pp. 1199:20 - 1205:10.

[6] Counter Memorial, ¶ 186-202; Rejoinder, ¶¶ 22-25, 36-46; Hearing Transcript, p. 1216:10 -1222:21.

[7] **CE-124**, R&D Work Expenditure Application Form: Terra Nova Young Innovators Award (May 25, 2009). For other examples of such expenditures, see Counter Memorial, ¶ 199. The Guidelines also permit endowments for the establishment and/or maintenance of educational infrastructure. **CE-1**, Guidelines for Research and Development Expenditures, s. 3.4.

scholarships and bursaries[8] or work abroad programs for students,[9] all of which fulfils the R&D and E&T objectives of the Guidelines, but do not involve the Claimants doing or receiving any R&D service from a local provider.[10] Another example is the Claimants' financial support for research carried out in Newfoundland and Labrador ("NL") by a collection of Canadian and American government and private companies into the effectiveness of oil burning in case of an offshore spill. This fulfils the R&D objectives of the Guidelines, but does not involve the type of transaction prohibited by Article 1106(1)(c).[11] Even the sponsorship of student string musicians at the Newfoundland Symphony Orchestra, which is certainly not a "service," has qualified under the Guidelines as providing E&T in the Province.[12]

9. Not only do the R&D and E&T requirements not fall squarely into the ordinary meaning of Article 1106(1)(c), but the contextual and supplementary evidence cited in Canada's Counter Memorial and Rejoinder confirm that R&D and E&T requirements have an object and purpose distinct from Article 1106(1)(c).[13] R&D was not captured by Article 1603(1)(c) of the Canada-U.S. Free Trade Agreement ("CUSFTA"), the predecessor to NAFTA Article 1106(1)(c).[14] In the decade immediately following the

[8] **GFA-71**, R&D Work Expenditure Application Form: Flight 491 Legacy Ford Scholarships and Bursaries (March 1, 2010). Hearing Transcript, p. 734:14-16. ("Q: If the operators spend $5 million on a scholarship, does that qualify under the Guidelines? A: Yes.").

[9] **CE-1**, Guidelines for Research and Development Expenditures, s. 3.4.

[10] Hearing Transcript, pp. 797:7-22; 798:1-7. As Mr. Smyth noted in his witness statement, the Claimants are free to spend on R&D or E&T in whatever proportion they choose. First Witness Statement of Frank Smyth, ¶ 41 (hereinafter "Smyth Statement I").

[11] Hearing Transcript, pp.1220:2-22, 1221:1-14; See Rejoinder, ¶ 37 fn. 39. **RE-52**, Report prepared by Environment Canada and others, "The Newfoundland Offshore Burn Experiment – NOBE" (1993); **RE-63**, CBC News, "Gulf Oil Burn Method has Newfoundland Roots" (Apr. 29, 2010).

[12] **GFA-70**, Letter from J. Bugden, CNLOPB, to K. Healey, Suncor Energy Inc., (May 13, 2010) and R&D Work Expenditure Application Form: NSO String Apprentices Program (SESAP)/NSYO Youth String Program (April 20, 2010).

[13] Counter Memorial, ¶¶ 160-182; Rejoinder, ¶¶ 26-34.

[14] Counter Memorial, ¶¶ 180-182; Rejoinder, ¶ 27; Hearing Transcript, pp. 1210:13-22 – 1211:1-20. The Claimants' position that CUSFTA is not 'context' to the NAFTA within the meaning of VCLT Article 31(2) (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 11 fn. 25) is untenable given that the negotiations for the NAFTA were based on the CUSFTA and the performance requirement provision of the CUSFTA is clearly the basis for NAFTA Article 1106. See Rejoinder, ¶ 27 fn. 19. The Claimants also

NAFTA, the United States and thirteen of its bilateral investment treaty ("BIT") partners carved out R&D as a separate and distinct performance requirement from a requirement to purchase, use or prefer local goods or services.[15] Japan and five of its treaty partners did the same, as did the more than two dozen negotiating parties of the Multilateral Agreement on Investment (which included the United States, Canada and Mexico), using exactly the same language as NAFTA Article 1106(1)(c) and providing, separately, a prohibition against requirements to carry out R&D in the territory of the host state.[16]

10. In their Post-Hearing Brief, the Claimants argue, for the first time, that a difference in language between NAFTA Article 1106(1)(c) and the equivalent article in the thirteen post-NAFTA US BITs explains why the US also included a separate provision to cover R&D requirements. The Claimants note that Article 1106(1)(c) prohibits requirements to consume "services provided in its territory," whereas the US BITs prohibit requirements to consume "services of domestic origin or from any domestic source." They argue that the wording of the US BIT is narrower than that used in Article 1106(1)(c) and that the drafters filled this alleged gap by also prohibiting requirements to carry out R&D in the territory of a host state.

11. However, if the scope of the local content provision in the US BIT is narrower than Article 1106(1)(c), then that provision would also exclude any other type of service

continue to contest Canada's "unilateral" statement with respect to the meaning of CUSFTA Article 1603, but they have provided no evidence that the United States rejected this position. In fact, the preparatory work from the CUSFTA suggests that the exclusion of R&D from the coverage of CUSFTA Article 1603 was understood by both Canada and the United States. See **RA-10**, CUSFTA, Summary – Elaborations and Clarifications to the Elements of the Agreement as Reflected in the Legal Text of the Free Trade Agreement between Canada and the United States of America, Copy. 10.12.87, pp. 394, 407 ("Introduction: Over the past two months, officials from Canada and the United States have translated the October 4 framework agreement into legal language. Officials have clarified the precise legal meaning of The Elements of the Agreement and elaborated on the details, ensuring that the balance of benefits is maintained. [...] Article 1603: Performance Requirements. 1603 proscribes the imposition of significantly trade distorting performance requirements. It does not limit Canada's ability to negotiate local employment, product mandate, technology transfer, or research and development undertakings with investors.").

[15] Counter Memorial, ¶¶ 172-174; Rejoinder, ¶¶ 49-55; Hearing Transcript, pp. 1212:4-22 – 1216:1-4.

[16] Counter Memorial, ¶¶ 175-178; Rejoinder, ¶ 56; Hearing Transcript, pp. 1214:4-22 – 1215:1-13. As Canada explained in its Rejoinder, the U.S. and Japanese treaties are *in pari materia* and may be relied on to confirm the ordinary meaning of Article 1106(1)(c). Rejoinder, ¶¶ 47-56.

that a state may require to be carried out in its territory, such as architectural, engineering, and software support services. However, the United States did not specifically enumerate those types of services in its list of prohibited performance requirements. The Claimants provide no explanation why R&D, as opposed to another type of service, was uniquely and specifically covered in Article 6(f) of thirteen treaties based on the 1994 U.S. Model BIT.[17]

12. Moreover, if the language of Article 1106(1)(c) does not, as the Claimants argue,[18] provide the same "coverage difficulties" as 1994 U.S. Model BIT Article 6(a), then there would have been no need for Japan and five of its treaty partners, as well as the negotiating parties of the Multilateral Agreement on Investment, which included Canada, the United States and Mexico, to uniquely and specifically carve out R&D from language virtually identical to NAFTA Article 1106(1)(c).[19]

13. In their Post-Hearing Brief, the Claimants also continue to misread the text of Article 1106(1)(c). They argue that it contains a "[broad] prohibition against according a preference to goods or services in the territory of a NAFTA Party."[20] Yet, the Claimants have omitted the critical words "goods *produced*" and "services *provided.*" If no service is *provided* to the investment of the investor, then Article 1106(1)(c) does not apply. This is why in-house R&D, endowments for research chairs or educational infrastructure, scholarships and bursaries do not implicate Article 1106(1)(c) - there is no provision of a service from a provider in exchange for the expenditure.[21] The Claimants may decide not

[17] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 11.

[18] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 11.

[19] Counter Memorial, ¶¶ 175, 177-178; Rejoinder, ¶¶ 48-56.

[20] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 12.

[21] Rejoinder, ¶¶ 22-25. The Claimants contest that Article 1106(1)(c) applies only through the provision of a service by a third party (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 12), but continue to fail to address the ordinary meaning as set out in Canada's Rejoinder, ¶ 22. As explained by Mr. Way at the hearing, "a service is something you purchase, not something you would undertake yourself," (Hearing Transcript, p. 772:5-6).

to make such expenditures, but that is their choice; it is not the result of any requirement in the Guidelines.

14. The Claimants argue that it is not for them to develop a means not to violate Article 1106(1)(c).[22] This argument misses the point. Article 1106(5) makes it clear that if the impugned requirement is not specifically prohibited by Article 1106(1)(c), then it is allowed.[23] A finding that a requirement is broad enough to leave the investor with a choice whether to purchase, use or prefer local services, is sufficient to end the analysis.

15. The Claimants also continue to misconstrue the Guidelines. They argue that the Guidelines force them to use local services to carry out R&D in the Province.[24] However, the Claimants confuse what the Guidelines require them to do and what they may choose to do as a matter of business convenience. The Guidelines place no restriction on the Claimants' ability to import personnel to carry out R&D or to provide E&T to individuals in the Province,[25] or to undertake work that may be associated with such R&D or E&T. For example, the Claimants assert that they are required to use local goods and services to construct and operate an in-house research facility.[26] The Claimants may elect to use local services if it is cheaper to do so, but they are not *required* to use local services by the Guidelines. Requirements which merely incidentally result in the purchase, use or preference for local services are not prohibited.[27] To find otherwise is a step down a slippery slope towards nullification of virtually any requirement on a foreign investor which indirectly implicates the use of a local service.

16. This conclusion is supported by previous NAFTA and non-NAFTA cases. In *SD Myers*, an export ban on hazardous waste in effect required the investor to use domestic

[22] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 9.

[23] Rejoinder, ¶¶ 16-20; Hearing Transcript, p. 1205:3-10.

[24] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 9.

[25] As Canada noted previously, the Claimants have historically used a combination of foreign and local service providers to provide training or carry out research in the Province. See Rejoinder, ¶¶ 37, 41.

[26] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 9.

[27] Rejoinder, ¶ 20; Hearing Transcript pp. 1200:5-22 – 1205:1-10, 1219:2-18.

waste treatment services. However, the ban did not violate Article 1106(1)(c) because the use of local services was only an incidental effect of the impugned measure.[28] In *Merrill & Ring*, the requirement to cut logs in compliance with local regulations made it, as a practical matter, essential for the investor to use local services. However, there was no violation of Article 1106(1)(c) because the measure did not specifically require the investor to use local services.[29] In *Lemire v. Ukraine*,[30] even though, practically, the investor had to purchase or prefer music locally produced, the tribunal still found no violation of the applicable BIT provision which precluded requirements to purchase local goods or services.[31] Thus, the fact that a requirement may indirectly result in some local services being purchased or used does not, as the Claimants assume, automatically result in a violation of Article 1106(1)(c). Since the Guidelines do not *require* the purchase, use, or accordance of a preference for local goods or services, they are consistent with that Article.

B. The Guidelines Fall in Canada's Annex I Reservation to Article 1106

1. NAFTA Reserves "Any" Measure Subordinate to a Measure Listed in Annex I

17. Article 1108(1)(a) of the NAFTA reserves from Article 1106 federal and provincial measures that are listed in Annex I of the Agreement.[32] Each reservation in

[28] **CA-44**, *S.D. Myers Inc. v. Government of Canada* (UNCITRAL) First Partial Award, 13 November 2000 (hereinafter "*SD Myers* – First Partial Award"); Hearing Transcript, pp.1200:14-22 – 1202:1. See also **CA-41**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 June 2000 (hereinafter "*Pope & Talbot* – Interim Award"), where the tribunal found that, even though the measure in question made softwood lumber exports economically undesirable, there was still no violation of Article 1106(1)(a). See also Counter Memorial, ¶ 185, fn. 308; Hearing Transcript, p. 1202:2-17.

[29] **RA-104**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010, ¶¶ 111 - 121 (hereinafter "*Merrill & Ring*"); Hearing Transcript, pp. 1202:18-22 - 1203:1-20.

[30] **RA-100**, *Joseph Charles Lemire v. Ukraine*, (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 501-511.

[31] Rejoinder, ¶ 20, fn. 10; Hearing Transcript, pp. 1203:21 – 1205:2.

[32] Article 1108(1)(a) states that "Articles 1102, 1103, 1106 and 1107 do not apply to:
(a) any existing non-conforming measure that is maintained by
(i) a Party at the federal level, as set out in its Schedule to Annex I or III,

Annex I contains a "Measures" element, which identifies the measures "for which the reservation is taken."[33] In Annex I, Canada listed both the Federal and Provincial Accord Acts as "Measures" which are reserved from Article 1106.[34]

18. Article 2(f)(ii) of the Interpretative Note to Annex I states that the "Measures" element also includes "any subordinate measure adopted or maintained under the authority of and consistent with the [listed] measure."[35] Consequently, for the purpose of the Annex I reservation, the Federal and Provincial Accord Acts "Measures," which are reserved, include measures subordinate to those Acts. Hence, the Guidelines are reserved from Article 1106 if they are subordinate to either the Federal or Provincial Accord Acts.

19. In their effort to prevent the reservation of the Guidelines, the Claimants have consistently manufactured restrictions which ignore the plain words of this reservation for subordinate measures. First, the Claimants alleged in their Reply that the reservation for subordinate measures excludes those adopted after the NAFTA entered into force.[36] After the three NAFTA parties rejected this argument,[37] it was effectively abandoned by the Claimants.[38]

(ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or
(iii) a local government."

[33] Interpretative Note to Annex I, Article 2(f).

[34] The reservation for the Federal Accord Act is at I-C-25: **CA-7**, NAFTA, Schedule of Canada, Annex I-C-25, p. 9. The reservation for the Provincial Accord is included in Canada's reservation for all existing provincial measures: **RE-11**, Government of Canada exchange of letters with other NAFTA Parties, 29 March 1996. While the Claimants suggested during the hearing that the reservations for existing provincial measures were invalid, they did not pursue this point in their Post-Hearing Brief. Regardless, Canada demonstrated in its Post-Hearing Submission (3 December 2010) at footnote 12 that this suggestion has no merit.

[35] Article 2(f)(ii) of the Interpretative Note to Annex I.

[36] Claimants' Reply Memorial, ¶¶ 85-105.

[37] Rejoinder, ¶¶ 76-115; Article 1128 Submission of the United Mexican States, July 8, 2010, ¶ 3; Article 1128 Submission of the United States of America, July 8, 2010, ¶ 5.

[38] While the Claimants argue in their Post-Hearing Brief at ¶ 14 that they have not abandoned this argument, they did not address the substance of this argument at the hearing, nor respond in their Brief to Canada's hearing submissions on the issue.

20. Next, in their response to the first Article 1128 submissions, the Claimants alleged that the description of the Federal Accord Act in Annex I of the NAFTA "qualified" the reservation for the Act.[39] Canada explained at the hearing that an Annex I reservation is only "qualified" by the Description if that qualification is expressly noted in the "Measures" element of the reservation.[40] Canada further explained that there is no such "qualification" expressly noted in the "Measures" element of the Federal Accord Act. Consequently, it is not one of the nineteen Annex I reservations which are expressly "qualified" by the Description.[41] The Claimants did not pursue this argument in their post-hearing brief.

21. Instead, the Claimants have manufactured two new restrictions to the reservation for subordinate measures. Neither has any basis.

22. First, the Claimants argue that only subordinate measures which are expressly identified in the Description are reserved. Thus, the Claimants argue that the Guidelines are not reserved because the authority under section 151.1(1) of the Federal Accord Act to issue guidelines is not expressly mentioned in the Description of that Act in Annex I.[42]

23. However, the Claimants identify no text in the NAFTA which supports this restriction. In fact, Article 3(c) of the Interpretative Note to Annex I states that where "the Measures element is not so qualified [by a liberalization commitment from the Description element], the Measures element shall prevail over all other elements ..." Since both parties agree that the Measures element in the reservation for the Federal

[39] Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, 1 September 2010, ¶ 36 ("Canada's Schedule to Annex I identified the Federal Accord Act in the 'measures' element and *qualified* that identification in the 'description' element by a specific reference to the non-conforming aspects of that Act" [emphasis added]); Hearing Transcript, pp. 1117:22 – 1118:7 ("The head note in question, Note 2(f) states that measures identifies the laws, regulations, or other measures *as qualified, where indicated, by the description element* for which this reservation is taken. Canada's scheduled Annex I does, indeed, *qualify* the identification of the Accord Act in the description element, the provision described as 45(3)(c) and (d) of the Accord Act [emphasis added].").

[40] Hearing Transcript, pp. 1234:1 – 1235:22.

[41] Canada's Post-Hearing Submission, 3 December 2010, ¶ 7.

[42] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 16.

Accord Act is not qualified by a liberalization commitment,[43] Article 3(c) states that the "Measures element shall prevail over all other elements," including the Description element.[44]

24. The Claimants dismiss the application of Article 3 and argue that in this case the only relevant Article in the Annex I Interpretative Note is Article 2(f)(ii).[45] The Claimants overlook that Article 3 itself states that it applies "[i]n the interpretation of a reservation." Even if the only relevant Article in the Annex I Interpretative Note is Article 2(f)(ii), the Claimants have failed to explain how their restriction is consistent with the text of that Article. It reserves "*any* subordinate measure adopted or maintained under the authority of and consistent with the [listed] measure."[46] The reservation is *not* for "any subordinate measure *which is expressly mentioned in the description of a reserved measure* adopted or maintained under the authority of and consistent with the [listed] measure." These highlighted words cannot simply be read into Article 2(f)(ii).

25. Neither the US nor Mexico recognized the Claimants' restriction in their Article 1128 submissions. In fact, the US expressly confirmed that "... the head note to Annex I provides that each measure listed on a Party's Schedule pursuant to Article 1108(1) includes *any* existing subordinate measures ..."[47]

26. Moreover, the alleged restriction is inconsistent with the reservation for all provincial measures existing at the time the NAFTA entered into force. Since there is no

[43] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 15 ("There is no liberalization commitment in the Accord Act reservation.").

[44] The Claimants argue in Claimants' Post-Hearing Brief, 3 December 2010, ¶ 15 that sub-Article 3(c) only applies to "instances where there is a discrepancy between the Measures element and another element." The Claimants do not explain how this interpretation is consistent with the text of sub-Article 3(c), nor do they provide any other support.

[45] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 15 ("The issue before this Tribunal is not the application of Section 3 of the head note to Annex I, but that of the reference to subordinate measures in Section 2 ...").

[46] Emphasis added.

[47] NAFTA Article 1128 Submission of the United States of America, 8 July 2010, ¶ 5, emphasis added.

description of any of these existing provincial measures in Annex I,[48] the Claimants' interpretation would ensure that no subordinate measures of states or provinces are reserved. It is implausible that the NAFTA parties intended to reserve subordinate measures of the federal governments but not of states or provinces.

27. Finally, the Claimants' restriction would prevent regulators from effectively regulating since few of their powers are expressly identified in the descriptions for measures listed in Annex I. For example, stripping the Board of the authority to issue guidelines on the requirement to expend on R&D and E&T in section 45(3)(c) of the Accord Acts, would prevent the Board from effectively administering that requirement. It would be unable to clarify ambiguities in the section or adapt the section to circumstances unforeseen when the section was drafted.

28. Hence, the Claimants' attempt to restrict the reservation to subordinate measures expressly identified in the Description of the Annex I listed measure is baseless. However, even if the reservation is restricted in this way, the Guidelines are still reserved. The Description of the Federal Accord Act expressly identifies the obligation under section 45(3)(c) to expend on R&D and E&T. The authority to issue guidelines concerning this obligation, expressly provided in section 151.1(1), is effectively covered by this Description.

29. In addition to attempting to limit the reservation to only those subordinate measures expressly identified in the Description, the Claimants also attempt to limit the reservation to only those measures subordinate to "a non-conforming aspect" of the listed measure.[49] Again, this restriction is neither consistent with the Article 1128 submissions of the US and Mexico, nor the text of the NAFTA. As explained above, the Agreement reserves "*any* subordinate measure adopted or maintained under the authority of and consistent with the [Annex I listed] measure." The reservation is *not* limited to "any

[48] **RE-11**, Government of Canada exchange of letters with other NAFTA Parties, 29 March 1996.

[49] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 15.

subordinate measure adopted or maintained under the authority of and consistent with the *non-conforming aspect of the* [listed] measure."

30. Indeed, the Claimants have identified no text of the NAFTA which supports their restriction. The only support which they provide is their assertion that it is supported by Canada.[50] However, this is not correct.

31. Even if the reservation is restricted in the manner alleged by the Claimants – which it is not – the Guidelines are still reserved. The Guidelines address the requirement in the Accord Acts that operators expend on R&D and E&T.[51] The Claimants allege that this requirement does not conform to the NAFTA.[52] Hence, under the Claimants' own argument, the Guidelines are subordinate to a non-conforming aspect of a listed measure. Thus, even if only those measures subordinate to "a non-conforming aspect" of the listed measure are reserved, as alleged by the Claimants, the Guidelines are still reserved.

32. Hence, the Claimants' attempt to manufacture restrictions to the reservation for subordinate measures is unavailing. The NAFTA plainly reserves "*any* subordinate measure adopted or maintained under the authority of and consistent with the [Annex I listed] measure." Thus, the only real question is whether the Guidelines are subordinate to the Federal Accord Implementation Act or the Provincial Accord Act. However, as explained below, this question has already been answered by Canadian courts.

[50] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 15.

[51] **CA-11, CA-12**, Accord Acts, section 45(3)(c).

[52] Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶ 36 ("... the non-conforming aspects of that Act, includ[ing] the Act's requirement that benefits plans ensure that 'expenditures be made for research and development to be carried out in the province, and for education and training to be provided in the province.").

2. The Guidelines are Subordinate to the Accord Acts

a) The Decisions of the Canadian Courts Confirm that the Guidelines are Subordinate to the Accord Acts

(i) The Subordination of One Domestic Measure to Another is an Issue of Domestic Law

33. While the Tribunal "must decide the issues in dispute in accordance with [the NAFTA] and applicable rules of international law,"[53] it can rely on domestic law as a fact to help it apply that Agreement and those rules.[54] Article 2(f)(ii) of the Interpretative Note to Annex I directs the Tribunal to apply domestic law as a fact to help it to determine if the Guidelines are subordinate to a measure listed in Annex I.

34. Article 2(f)(ii) states that an existing measure which is reserved under Annex I "includes any subordinate measure adopted or maintained under the authority of and consistent with the [listed] measure." As Canada explained in its Post-Hearing Submission, whether a domestic measure is subordinate to another domestic measure - whether it is authorized by and consistent with that domestic measure - can only be determined under domestic law.[55]

35. First, an international tribunal which ignores domestic law risks that its decision will conflict with those of domestic courts. Such conflicting decisions generate uncertainty and undermine the legitimacy of the international legal system. Second, the domestic law of the three NAFTA parties have highly developed rules to determine if a domestic measure is authorized by and consistent with another domestic measure. Finally, ignoring domestic laws created to decide the subordination of one domestic measure to another infringes the sovereignty of the NAFTA countries which created those laws.

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[53] **CA-3**, NAFTA, Chapter 11, Article 1131.

[54] Canada's Post-Hearing Submission, 3 December 2010, ¶ 24.

[55] Canada's Post-Hearing Submission, 3 December 2010, ¶ 26.

36. The other two NAFTA Parties have confirmed the importance of domestic law when deciding whether a measure is subordinate to a measure listed in Annex I. Mexico confirmed that:

> In order to determine whether a subordinate measure fulfils the requirements set out in paragraph 2(f)(ii) of Annex I, it would be necessary to carry on an assessment of the subordinate measure under the national law governing the measure listed in Annex I.[56]

37. Similarly, the United States explained that:

> Because a measure is taken by a Party under its national law, the Tribunal must look to the national law context under which the subordinate measure in question was adopted or maintained to determine whether it is in fact authorized under and consistent with the relevant measure.[57]

(ii) Canadian Courts Confirmed that the Guidelines are Subordinate to the Accord Acts and the Benefits Decisions

38. When dismissing the Claimants' challenge to the Guidelines, Canadian courts squarely addressed whether, as a matter of Canadian law, the Guidelines are subordinate to the Accord Acts and the Benefits Plan Decisions. The Trial Court described the issues as follows:

> Issues
>
> 1. Does the Board have the authority to establish the R&D Guidelines?
>
> 2. If so, has the Board exceeded its authority by implementing the Guidelines in their current form?[58]

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[56] Submission of the United Mexican States Responding to Questions Raised by the Tribunal, January 21, 2011, ¶ 3.

[57] Second Submission of the United States of America, January 21, 2011, ¶ 6. The U.S. also added at ¶ 7 that "[w]hether a subordinate measure is consistent with a measure is also a question of the NAFTA ..." Canada will address the remainder of the Mexican and US submissions in its February 7, 2011 response.

[58] **CA-52**, *Hibernia and Petro-Canada v. C-NOPB*, Supreme Court of Newfoundland and Labrador Trial Division, 2007 NLTD 14 (Jan. 22, 2007), ¶ 13 (hereinafter "Trial Court Decision").

39. After carefully reviewing the Accord Acts and the Benefits Plan Decisions, the Trial Court determined that the Board did have authority to issue the Guidelines and did not exceed that authority by implementing them in their current form.[59] This decision was upheld by a majority of the Court of Appeal,[60] and leave to appeal that decision was rejected by the Supreme Court of Canada.[61]

40. As Canada explained at the hearing, [62] in the process of rejecting the challenge to the Guidelines, the Canadian courts expressly stated that the Guidelines are authorized by and consistent with the Accord Acts and Benefits Decisions. In their Post-Hearing Brief, the Claimants challenge this statement,[63] yet do not confront the quotes on which Canada relied to make it. Indeed, throughout this arbitration, the Claimants have not confronted the Courts' statements that:

- "[The Board] has the **authority** to establish reasonable levels of expenditure required to be made for R&D and E&T as part of its ongoing monitoring and enforcement role under the Accord and the Act;"[64]
- "The Board … is granted the continuing **power** to monitor and assess the appropriateness of the level of expenditures of the applicants on R&D … throughout the duration of these decades-long projects;"[65]

[59] **CA-52**, Trial Court Decision, ¶ 92 ("In the context of the Accord, the Accord Acts and the previous Board decisions, the Board has the power, and it is not unreasonable, to impose R&D Guidelines in furtherance of its obligations to ensure that a benefits plan provides that expenditures shall be made for research and development in the province. It is not patently unreasonable, or unreasonable, for the Board to establish a level of expenditure based on industry norms; to impose compliance with the R&D Guidelines as a condition in a production operators' authorization …").

[60] For example, see Justice Welsh, ¶ 110 ("In summary, the applications judge did not err in concluding that: (1) The Board has authority to apply the Guidelines to the Hibernia and Terra Nova Projects; (2) The parameters set out in the Guidelines are reasonable; (3) The Board has authority to establish and administer the research and development fund; and (4) The Board has authority to make compliance with the benefits plan, which includes the Guidelines, a requirement of a production authorization."), **CA-53**, *Hibernia and Petro-Canada v. CNOPB*, Supreme Court of Newfoundland and Labrador Court of Appeal, 2008 NLCA 46 (Sept. 4, 2008) (hereinafter "Court of Appeal Decision").

[61] **CA-54**, Supreme Court of Canada - Judgments in Appeal and Leave Applications (2009), p. 3.

[62] Hearing Transcript, pp. 244:17 – 248:22; 1242:5 – 1248:15.

[63] Claimants' Post-Hearing Brief, 3 December 2010, ¶¶ 17-18.

[64] **CA-52**, Trial Court Decision, ¶ 74, emphasis added.

[65] **CA-52**, Trial Court Decision, ¶ 51, emphasis added.

- "… it cannot be said that, in issuing and applying the Guidelines, the Board acted beyond its **authority** …"[66]

- "The Applicants … say that if the Board wished to establish targets for expenditures on R&D these should have been fixed at the time of the approvals of the respective benefits plans and cannot now be imposed after the fact. … With respect, I find that this is not a reasonable or purposive interpretation of the Accord and the Acts and the Board's previous decisions approving these developments;"[67]

- "The applicants, by accepting the Board's approval of their respective benefits plans, have accepted that the Board has an ongoing obligation and authority to assess and monitor the appropriateness of the levels of expenditure on R&D and E&T. … Having accepted these approvals on the basis that they have done, **it is not now open to them to deny the Board's authority to fulfill its duties set out under the Accord and the Act and its earlier interpretations contained in decisions 86.01 … and 97.02** to effectively monitor their activities and ensure compliance and adequate and reasonable expenditures;"[68]

- "… the benefits plans provided for nothing more than general principles and commitments respecting R&D. **It was left to the Board to determine from time to time what would amount to an appropriate and adequate level of expenditure**;"[69]

- "A reasonable inference flowing from the monitoring function is that the Board may determine that the expenditures of a company do not meet the requirements of the benefits plan. … This interpretation is **consistent with** the Board's Decision 86.01, clause 2.5, regarding 'Monitoring and Reporting' with respect to the Hibernia Project … Similarly, regarding the Terra Nova Project, clause 3.5.3 of Decision 97.02 refers to providing 'a framework for monitoring the Proponent's activities' with respect to R&D expenditures;"[70]

[66] **CA-53**, Court of Appeal Decision, ¶ 57, emphasis added.

[67] **CA-52**, Trial Court Decision, ¶¶ 44-45.

[68] **CA-52**, Trial Court Decision, ¶ 47.

[69] **CA-52**, Trial Court Decision, ¶ 52, emphasis added.

[70] **CA-53**, Court of Appeal Decision, ¶ 67-68, emphasis added.

- "... the Guidelines set parameters **consistent with** the Board's responsibility to monitor expenditures for R&D required under the benefits plans;"[71] and

- "[The Board] approved the Hibernia and Terra Nova projects on condition that the Board have the authority to continuously monitor R&D expenditures and intervene by issuing guidelines requiring higher expenditures should the appellants' level of expenditures fall below that which the Board considered appropriate. **These were the rules of the game when development approvals [were] issued. The same rules apply today.**"[72]

41. Rather than confront these quotes, the Claimants repeat their argument that the decisions of the Courts are irrelevant because the Courts applied a "reasonableness" test.[73] Yet, the test ultimately applied by the Courts does not change the statements of the Court quoted above as they applied that test. These statements are part of the Court's decision, just as much as the Court's ultimate conclusion. They are statements on Canadian law which the Tribunal should apply as facts to determine that the Guidelines are authorized by, and consistent with, the Accord Acts listed in NAFTA Annex I.

(iii)The Tribunal Should Defer to the Canadian Courts

42. Canada explained at the hearing why an international tribunal should defer to the decision of a domestic court on issues of fact, including domestic law, unless it is tainted by a denial of justice.[74] Canada also explained how commentators and international tribunals, including under the NAFTA, uniformly agree.[75] Canada referred to *Azinian*,[76] in which the claimant alleged that its contractual rights had been expropriated in breach of NAFTA Article 1110. The *Azinian* tribunal noted that Mexican courts had already

[71] **CA-53**, Court of Appeal Decision, ¶ 105, emphasis added.

[72] **CA-53**, Court of Appeal Decision, ¶ 135, emphasis added.

[73] Claimants' Post-Hearing Brief, 3 December 2010, ¶¶ 17-18.

[74] Hearing Transcript, pp. 230:1 – 231:11.

[75] Hearing Transcript, pp. 234:16 – 239:3; 249:5 – 249:21; 1255:10 – 1258:4. See also Counter Memorial, fns. 355 and 479; Rejoinder, ¶ 219.

[76] Hearing Transcript, p. 1257:7-9.

decided that the contract had been validly terminated and, therefore, there were no contractual rights to be expropriated. The tribunal refused to examine the correctness of the court decisions:

> The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty.[77]

43. The Claimants seek to distinguish *Azinian* because "neither party contested the correctness of the courts' decisions." Thus, according to the Claimants, "it was natural for the tribunal to accord weight to the national courts' findings on national law."[78] However, the NAFTA tribunal did not state that it was deferring to the Mexican court decisions because their correctness had not been challenged by the Claimants. The tribunal was clearly identifying a general principle applicable to all international tribunals, regardless of the arguments of the parties.

44. The Claimants also mischaracterize *Waste Management II*. In that decision, the NAFTA tribunal considered whether the decision in *Waste Management I* prevented it from taking jurisdiction because the previous tribunal had decided on the same issues before it. The *Waste Management II* tribunal decided that "there was no decision by the first Tribunal between the parties which would constitute a *res judicata* as to the merits of the claim before us now."[79] However, the tribunal then went further and stated:

> In reaching this conclusion, the present Tribunal in no way denies the value of the principle of *res judicata*, nor its potential application in the present proceedings to the extent that any issue

[77] **RA-3**, *Robert Azinian et al. v. United Mexican States* (ICSID ARB(AF)/97/2) Award, 1 November 1999, ¶ 99 (hereinafter "*Azinian*").

[78] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 21.

[79] **RA-132**, *Waste Management Inc. v. United Mexican States*, Decision on Mexico's Preliminary Objection to Jurisdiction (ICSID Case No. ARB(AF)/00/3), 26 June 2002, ¶ 46 (hereinafter "*Waste Management II*").

> already decided between the parties may prove to be relevant at a later stage. In this respect, it draws attention to what was said in Azinian v. United Mexican States: a NAFTA tribunal does not have 'plenary appellate jurisdiction' in respect of decisions of national courts, and whatever may have been decided by those courts as to national law will stand unless shown to be contrary to NAFTA itself.[80]

45. Thus, the tribunal explained that, in the case before it, it would defer to the decisions of domestic courts. The tribunal was apparently referring to the Mexican court decisions issued before the claim for a breach of the NAFTA.[81]

46. Hence, the Claimants mischaracterize *Waste Management II* when they state that 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."[82] The Claimants ignore the tribunal's subsequent comments that, in the dispute before it, it would defer to the decisions of Mexican courts.

47. During the hearing, Canada also relied on *Thunderbird* and *Mondev* to explain how NAFTA tribunals have uniformly deferred to the decisions of domestic courts.[83] In *Thunderbird*, the tribunal noted that it could not examine the legality of an administrative order under Mexican law because Mexican courts had already approved the order and "[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 claim …"[84] In *Mondev*, the claimant alleged that the failure of a US court to remand a question to the jury contributed to a breach of Article 1105. The tribunal held that it could not review the

[80] **RA-132**, *Waste Management II*, ¶ 47.

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

[82] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 21.

[83] Hearing Transcript, p. 249:17; Hearing Transcript, p. 1258:22.

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

decision of the US court because "[o]n the approach adopted by Mondev, NAFTA tribunals would turn into courts of appeal, which is not their role."[85]

48. The Claimants allege that the statements in *Thunderbird* and *Mondev* are irrelevant because "Claimants are not asking the Tribunal to review the correctness of the Canadian court decisions or to decide again on issues that were decided by the Canadian courts."[86] Thus, the Claimants implicitly accept that if they are, in fact, asking the Tribunal to decide on issues that were decided by the Canadian courts, *Thunderbird* and *Mondev* state that the Tribunal must defer to those courts.

49. During the hearing, the Claimants relied on *Veteran Petroleum* and *Feldman* to argue that the Tribunal should not defer to the decisions of Canadian courts. Canada explained during the hearing why these decisions provide the Claimants with no support.[87] In their Post-Hearing Brief, the Claimants did not address Canada's submission on these decisions. Instead, they refer to quotes in *ELSI* and *Amco*.[88] However, these decisions provide them with no more support than *Veteran Petroleum* and *Feldman*.

50. The Claimants refer to *ELSI* and *Amco* to support the proposition that "[t]his Tribunal is not *bound* by any fact-finding by a Canadian court."[89] Canada agrees. As explained above, the Tribunal is not *bound* by the decisions of domestic courts and need not defer if those decisions are tainted by a denial of justice. Yet, this does not mean that the Tribunal should not defer to those decisions where there is no suggestion of a denial of justice, as in this case. *ELSI* and *Amco* are perfectly consistent with this conclusion. In both cases, the international tribunals carefully reviewed domestic decisions on factual issues that were before them. Both tribunals concluded that the decisions of the domestic

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

[86] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 21.

[87] Hearing Transcript, pp. 1259:17 – 1263:12.

[88] Claimants' Post-Hearing Brief, 3 December 2010, fn. 40.

[89] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 19, emphasis added.

courts were consistent with their own and, hence, there was no need for the tribunal to decide whether to defer to those decisions.[90]

51. The deference which an international tribunal should give to the decision of a domestic court on an issue of fact before the tribunal was confirmed in a decision published since the hearing. In *RSM v Grenada*, the tribunal rejected a claim under the Grenada – United States BIT as *manifestly* without legal merit because it required the tribunal to reconsider facts decided by a previous tribunal. That previous tribunal had applied Grenadian law to resolve a contractual dispute between the parties. The subsequent BIT tribunal explained that:

> An essential predicate to the success of each of the Claimants' claims is an ability for the Tribunal to re-litigate and decide in Claimants' favour conclusions of fact or law concerning the

[90] *ELSI* involved a claim by the US on behalf of its investors who owned an Italian company, ELSI, which produced defence-related electronics in Palermo, Italy. After ELSI fell into financial difficulty, the Mayor of Palermo requisitioned the factory and other assets. The US alleged that the requisition breached Italy's obligations in its treaty of Friendship, Commerce and Navigation with the US. Specifically, the US alleged that the requisition illegally interfered with the US investors' rights of control and management. Italy responded that the investors had no such rights at the time of the requisition because ELSI was insolvent. The International Court of Justice ("ICJ") stated at ¶ 94: "If however ELSI was in a state of legal insolvency at 31 March 1968 … then the relevant rights of control and management would not have existed to be protected by the FCN Treaty. … an assessment of ELSI's solvency as a matter of Italian law is thus highly material." The ICJ noted that the solvency of ELSI under Italian law had already been considered by local courts after ELSI's trustee claimed against the Mayor of Palermo for damages arising from the requisition. The ICJ stated at ¶ 96: "On this matter of insolvency in Italian law, consideration must also be given to … the findings of the Court of Palermo and the Court of Appeal of Palermo …" The ICJ then reviewed these decisions in detail before stating at ¶ 99 that "[t]he Chamber has no need to go into the question of the extent to which it could or should question the validity of a finding of Italian law … by the appropriate Italian courts." The ICJ stated that "[i]t is sufficient to note" that the ICJ's conclusion "is reinforced by reference to the decision of the courts of Palermo." Later in its judgment at ¶ 107, the ICJ deferred to the decision of the Italian courts that the workers occupying the investor's factory had not caused any damage, **CA-91**, *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, 1989 I.C.J. Reports 15, Judgment of 20 July 1989.

In *Amco*, the claimant alleged that an Indonesian state company, PT Wisma, and the Indonesian military had expropriated its Jakarta hotel in breach of international law. The claimants initially challenged the measure before Indonesian courts before bringing a claim at the ICSID. As part of its judgment at ¶ 176, the ICSID tribunal carefully reviewed the local court decisions and concluded that they were consistent with its own. The tribunal then went on to make the unremarkable observation that it is not bound by a decision of a domestic court, **CA-85**, *Amco Asia Corp. v. Republic of Indonesia*, Award (ICSID ARB/81/1) 20 November 1984.

> parties' contractual rights that have already distinctly been put in issue and distinctly determined by the Prior Tribunal.[91]

52. Consequently, the BIT tribunal rejected the claim as manifestly without legal merit. The tribunal stated definitively that "BIT tribunals do not reopen the municipal law decisions of competent *fora*, absent a denial of justice."[92]

53. Thus, there is no serious dispute that international commentators and tribunals, including under the NAFTA, uniformly agree that an international tribunal should defer to a domestic court on issues of fact, including domestic law, unless the decision is tainted by a denial of justice. Consequently, the Tribunal should defer to the decisions of the Canadian courts that the Guidelines are authorized by and consistent with the Accord Acts and Benefits Decisions.

b) The Provisions of the Accord Acts Confirm that the Guidelines are Subordinate

54. Canada demonstrated above that the Claimants' argument that the Tribunal should ignore the statements of the Canadian courts that the Guidelines were "authori[zed]" by and "consistent with" the Accord Acts has no foundation. However, even if the Tribunal does overlook these statements and focuses, instead, on the provisions of the Accord Acts, those provisions confirm that the Acts authorized the Guidelines and are consistent with them.

(i) Section 45(3)(c) Requires Expenditures on R&D and E&T

55. Section 45(3)(c) of the Acts impose an obligation on the operators to expend on R&D and E&T in NL:

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[91] **RA-169**, *RSM*, ¶ 7.2.1.

[92] **RA-169**, *RSM*, ¶ 7.1.11. The tribunal referred at ¶¶ 7.1.12 – 7.1.14 to the recent BIT decision, *Helnan International Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19), Award, 3 July 2008, where the tribunal reached the same conclusion.

> A Canada-Newfoundland Benefits Plan shall contain provisions intended to ensure that: ... (c) expenditures shall be made for R&D to be carried out in the Province and for E&T to be provided in the Province ...

56. The Claimants contend that section 45(3)(c) of the Accord Acts, instead of requiring them to expend on R&D and E&T, only required them to give first consideration to locals.[93] Yet, the Claimants are obliged to provide that first consideration by a separate section of the Accord Acts - section 45(3)(d).[94] Since section 45(3)(c) must impose an obligation different to that provided in section 45(3)(d), it cannot only require the Claimants to give first consideration to locals. It must require expenditures on R&D and E&T.

57. The Claimants also contend that, because section 45(3)(c) states that the *benefits plans* must ensure expenditures on R&D and E&T, and because the plans do not contain a quantum of spending, they can choose not to spend if they wish.[95] This is incorrect. Just because section 45(3)(c) requires that the *benefits plans* must ensure that "expenditures shall be made for R&D ... and for E&T" does not mean that there is no requirement to expend. Indeed, Canadian courts have confirmed that this section requires expenditures on R&D and E&T in NL. According to the Court of Appeal, section 45:

> ... not only establishes the requirement for a benefits plan, but also specifies in paragraph 45(3)(c) that 'expenditures shall be made for research and development to be carried out in the Province.' The

[93] Hearing Transcript, pp. 404:17 - 405:1 ("... we knew that we have to promote R&D when we have challenges associated with the project. And so, from that perspective, our commitment was that when we're doing work associated with a project, we would certainly look in full and fair opportunity to basically look to local companies to ... assist us with that R&D."). See also Claimants' Reply Memorial, ¶ 187: "... the project operators were left to decide how much to spend on R&D and E&T based on the commercial needs and subject to the requirement that they would look first to local providers ..."

[94] Section 45(3)(d) of the Acts states: "A Canada-Newfoundland benefits plan shall contain provisions intended to ensure that ... first consideration shall be given to services provided from within the Province and to goods manufactured in the Province, where those services and goods are competitive in terms of fair market price, quality and delivery." **CA-11, CA-12,** Accord Acts.

[95] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 6.

> benefits plans provide the manner in which this requirement is satisfied.[96]

58. Justice Barry confirmed that "[t]hese mandatory provisions contain no qualification entitling oil companies to refuse to expend on research and development because they are of the opinion the needs of their projects can be met with existing knowledge and technology."[97] The Claimants ask the Tribunal to overturn this finding of the Canadian courts.

59. The Claimants' interpretation of section 45(3)(c) is not only inconsistent with the Canadian court decisions, but is also inconsistent with what they were told. The Claimants were constantly informed that section 45(3)(c) required them to expend on R&D and E&T. For example:

- John Fitzgerald, who was a member of the Board from its inception until 1998, stated that the operators were constantly told that the Accord Acts required them to expend on R&D and E&T.[98] The Claimants provided no witness from the time to challenge Mr. Fitzgerald's evidence;
- in a 1988 Board document describing the Hibernia Benefits Decision, the Board stated that "[t]he Acts further require developers to provide for R&D and also for E&T in the Province;"[99]
- in its 1996 review of the Terra Nova Benefits Plan, the Environmental Assessment Panel stated that "[f]unding basic research ... is a requirement of the Atlantic Accord."[100] The Board endorsed this view in its 1997 Benefits Decision;[101]

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[96] **CA-53**, Court of Appeal Decision, Justice Welsh, ¶ 106.

[97] **CA-53**, Court of Appeal Decision, Justice Barry, ¶ 130.

[98] Hearing Transcript, pp. 508:20 – 509:6 ("Well, there is a requirement to conduct R&D in the Province or to make expenditures in the Province for those purposes. ... [The Board] just kept reminding [the Operator] that it had an obligation to make these expenditures.").

[99] **CE-199**, CNLOPB, Presentation: Hibernia Supplier Development Seminar, 23 November 1988, p. 2.

[100] **RE-14**, Terra Nova Project Environmental Assessment Panel Report, Recommendation 50, p. 49.

[101] **CE-57**, CNLOPB, Terra Nova Decision 97.02, (Dec. 1997), p. 23, s. 3.5.1, ("[The recommendation] related to funding basic research is consistent with the thrust of this legislative requirement.") (hereinafter "Terra Nova Decision 97.02").

- in that 1997 Terra Nova Benefits Decision, the Board criticized the Terra Nova Benefits Plan for not ensuring expenditures on R&D and E&T;[102]

- in a 1999 letter, the Board told the operators that "[s]ection 45(3)(c) of the Atlantic Accord legislation specifically requires that expenditures for R&D be carried out in the Province."[103]

60. In none of these documents did the Board state that this obligation in the Accord Acts to expend on R&D and E&T had been limited by the Benefits Decisions.

(ii) Section 17(1), Together With Section 55 of the Accord, Requires the Board to Approve Expenditures on R&D and E&T

61. The Accord Acts require the Board to approve expenditures on R&D and E&T. Section 17(1) of the Acts states:

> The Board shall perform such duties and functions as are conferred or imposed on the Board by or pursuant to the Atlantic Accord ...

62. Section 55 of the Atlantic Accord states:

> Benefits plans ... shall provide for expenditures to be made on R&D, and E&T, to be conducted within the province. *Expenditures made by companies active in the offshore pursuant to this requirement shall be approved by the Board.*[104]

63. Thus, section 17(1) of the Accord Acts and section 55 of the Accord require the Board to approve expenditures on R&D and E&T.

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[102] **CE-57**, Terra Nova Decision 97.02, p. 23, s. 3.5.1 ("The Proponent's commitments vis-à-vis its future support of such [R&D] activities are at best qualified, particularly inasmuch as there is no measure of the level of effort the Proponent intends to make in this regard (e.g., there are no expenditure estimates provided in the Benefits Plan). While the relevant provisions of the Accord Acts do not prescribe levels of expenditure, the Acts require that the Benefits Plan contain provisions intended to ensure that expenditures are made on research and development in the Province.").

[103] **RE-18**, Letter from H. Stanley, CNOPB, to G. Bruce, Petro-Canada, 3 February 1999.

[104] **CA-10**, The Atlantic Accord: A Memorandum of Agreement Between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing (Feb. 11, 1985), emphasis added.

64. Contrary to the Claimants' suggestion, section 17(1) is not a "very general reference."[105] It expressly incorporates into the Accord Acts the Board's obligations under the Atlantic Accord. Moreover, while Canada's reliance on section 17(1) of the Accord Acts and section 55 of the Accord is "curious" to the Claimants,[106] it is evidently not curious to Canadian courts. They expressly relied on these provisions to find that the Guidelines were authorized by, and consistent with, the Acts and Benefits Decisions. For example, Justice Barry of the Court of Appeal stated "[i]n the present case, clause 55 of the Accord expressly and clearly provides that expenditures made by companies on R&D shall be approved by the Board." After quoting section 151.1(1) of the Federal Act, he goes on to say: "[t]he authority of the Board to issue guidelines regarding R&D expenditures flows directly from these provisions [that is, section 55 of the Accord and section 151.1(1) of the Accord Act]."[107] The Claimants ask the Tribunal to overturn this interpretation of Canadian law by the Canadian courts.

65. The Claimants also assert that "the Board did not require ... approvals until the issuance of the Guidelines in 2004" and, therefore, the "[t]he Board's behaviour proves conclusively the inapplicability of" section 55 of the Atlantic Accord.[108] Yet, the Claimants' only support for this statement is the comments of Messrs Fitzgerald and Way that the Board did not require *pre*-approval of expenditures before the Guidelines.[109] However, that the Board did not require *pre*-approval of expenditures says nothing of whether it required *approval* of those expenditures. In fact, since its inception, the Board

[105] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 7.

[106] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 7.

[107] **CA-53**, Court of Appeal Decision, ¶ 120. See also **CA-52**, Trial Court Decision, ¶ 14, noting that section 55 of the Accord and section 17(1) of the Accord Acts were "relevant legislative provisions."

[108] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 7.

[109] Claimants' Post-Hearing Brief, 3 December 2010, fn. 18.

has consistently fulfilled its obligation to approve expenditures on R&D and E&T.[110] This was confirmed by Mr. Fitzgerald at the hearing:

> 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 thought there could be improvements.[111]

66. Thus, the Claimants' statement that "the Board did not require ... approvals [of expenditures on R&D and E&T] until the issuance of the Guidelines in 2004" is wrong. The Board's behaviour confirms, rather than undermines, the applicability of section 17(1) of the Accord Acts and section 55 of the Accord. These sections require the Board to approve expenditures on R&D and E&T.

(iii) Section 151.1(1) Gives the Board Authority to Issue Guidelines Regarding the Obligation to Expend on R&D and E&T

67. The third key provision in the Accord Acts is section 151.1(1) of the Federal Act (section 138.1(1) in the Provincial Act). This provision expressly gives the Board authority to issue the Guidelines:

> The Board may issue and publish, in such manner as the Board deems appropriate, guidelines and interpretation notes with respect to the application of section ... 45 ...

68. The Claimants object that section 151.1(1) does not give the Board authority to apply guidelines to projects with Benefits Plans which have already been approved. However, prior to issuing the R&D Guidelines, the Board relied on its authority under section 151.1(1) to issue dozens of guidelines, including guidelines which applied to the

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[110] Counter Memorial, ¶¶ 86-88. For example, see **RE-20**, Memorandum from H. Stanley, CNOPB, to Board Members, 11 February, 2000, in which the Board reviews and approves R&D expenditures for Terra Nova in 1997 and 1998.

[111] Hearing Transcript, p. 525:2-6. Moreover, the Board intervened when it felt expenditures were inadequate. For example, the Board intervened in early 1999 when it felt that the operators' failure to use local R&D on a particular project indicated that the operators' expenditures were insufficient: **RE-18**, Letter from H. Stanley, CNOPB, to G. Bruce, Petro-Canada, 3 February 1999, discussed in Counter Memorial, ¶ 87.

previously approved Hibernia and Terra Nova Development Plans.[112] The Claimants did not object that these guidelines applied to previously approved Development Plans.

69. Indeed, Canadian courts confirmed that section 151.1(1) gave the Board the authority to issue the Guidelines and apply them to the Hibernia and Terra Nova projects, even though the Benefits Plans for those projects had been approved.[113] The Claimants ask the Tribunal to overturn this interpretation of Canadian law by the Canadian courts.

(iv) Section 138 Enables the Board to Condition Its Continued Authorization of a Project on Compliance with the Guidelines

70. Section 138(1)(b) of the Federal Accord Act (and section 134(1)(b) of the Provincial Act) states:

> The Board may ... issue subject to section 45, an authorization with respect to each work or activity proposed to be carried on.

71. Thus, the authorization to operate is subject to ongoing compliance with the requirements in section 45, including the requirement to expend on R&D and E&T. Moreover, section 138(4) of the Federal Act (and section 134(4) of the Provincial Act) states that the authorization "is subject to such approvals as the Board determines ..."

72. Justice Welsh of the Court of Appeal reviewed these sections before concluding that "the Board has authority to make compliance with the benefits plan, which includes the Guidelines, a requirement of a production authorization."[114] The Claimants ask the Tribunal to overturn this interpretation of Canadian law by the Canadian courts.

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[112] **RE-25**, CNOLPB, Offshore Waste Treatment Guidelines.

[113] **CA-52**, Trial Court Decision, ¶¶ 30, 47, 55-56; **CA-53**, Court of Appeal Decision, ¶¶ 64-66.

[114] **CA-53**, Court of Appeal Decision, ¶ 109. See also **CA-53**, ¶ 112, per Justice Barry ("I concur with the decision of Welsh J.A. ..."). See also **CA-52**, Trial Court Decision, ¶ 90 ("... the affixing of a requirement to comply with the R&D Guidelines as a condition to a POA is a regulatory and enforcement matter within the authority of the Board pursuant to Section 138(4) of the *Act*. This section gives the Board a wide discretion. POA's have a limited life. Benefits are clearly linked to POA's by virtue of their relationship between Section 45(2) and Section 138(1)(b) of the *Act*.").

73. Thus, the four key sections of the Accord Acts – 45(3)(c), 17(1), 151.1(1) and 138 – establish that the Guidelines are subordinate to those Acts. The Guidelines are authorized by those sections and are entirely consistent with them.

c) The Benefits Decisions are Consistent with the Conclusion that the Guidelines are Subordinate to the Accord Acts

74. Nothing in the Hibernia or Terra Nova Benefits Decisions affects the authority of the Board, under the Accord Acts, to issue the Guidelines. Consequently, nothing in those decisions affects the conclusion that the Guidelines are subordinate to the Accord Acts. In fact, those decisions confirm the operators' obligation to expend on R&D and E&T, the Board's obligation to approve those expenditures, and the Board's authority to issue guidelines to enforce those obligations.

(i) The Hibernia Benefits Plan and Decision are Consistent with the Conclusion that the Guidelines are Subordinate to the Accord Acts

75. In the Hibernia Benefits Plan, the Claimants committed to "*[c]ontinue to support* local research institutions and *promote further* R&D in Canada to solve problems unique to the Canadian offshore environment."[115] On its face, this is far broader than a commitment to support and promote local R&D *when necessary for the Hibernia project*, as the Claimants seem to contend.[116] There is myriad R&D relating to the "unique problems of the Canadian offshore environment" which will not be necessary for the Hibernia project.

76. The scope of the Claimants' commitment is confirmed by the recommendation of the Environmental Assessment Panel that the Claimants undertake R&D in areas not necessarily related to the needs of the project.[117] John Fitzgerald confirmed the

[115] **CE-47**, CNLOPB, Hibernia Decision 86.01: Application for Approval: Hibernia Benefits Plan and Development Plan, 18 June 1986, p. 5 (hereinafter "CNLOPB, Hibernia Decision 86.01"), emphasis added.

[116] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 23.

[117] Counter Memorial, fn. 48; Rejoinder, ¶ 170.

importance of the Panel report for the interpretation of the Benefits Decision.[118] The Claimants neither cross-examined Mr. Fitzgerald on the Panel report nor addressed it in their Post-Hearing Brief.

77. John Fitzgerald also confirmed that he understood that the Claimants' commitment to "continue to support local research institutions and promote further R&D in Canada to solve problems unique to the Canadian offshore environment" was not restricted to R&D necessary for the projects.[119] The Claimants provided no witnesses from the time to challenge Mr. Fitzgerald's understanding.

78. Indeed, Canadian courts expressly held that the commitment to "continue to support local research institutions and promote further R&D in Canada to solve problems unique to the Canadian offshore environment" was not restricted to the needs of the project.[120] The Claimants ask the Tribunal to overturn this decision by Canadian courts.

79. In addition to committing to "support local research institutions" and "promote further R&D in Canada," the Claimants also committed to spend *over the life time of the projects*. The Hibernia Benefits Decision describes the "Proponent's overall strategy to achieve benefits to Newfoundland and the rest of Canada *throughout* the Hibernia Project."[121] Mr. Fitzgerald confirmed that "[t]he Board, from its inception, took the view

[118] Hearing Transcript, p. 548:12-18 ("Q: Do you think the report of the Hibernia Environmental Assessment Panel would be a likely source of the Claimants' expectations? A: I would think so. They were prominently present for the hearings and provided information at it. It was their Environmental Impact Statement that the panel was reporting upon."). See also **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 5 ("[the Panel's recommendations] form the basis for much of the Board's [Hibernia] Benefits Plan Decision ...").

[119] Hearing Transcript, p. 544:8-16 ("Q: So, the commitment that the Operators made to the Board was to promote research and development to solve problems unique to the Canadian offshore environment. A: Yes. Q: And did the Board understand that to be confined to just the needs of their project, or was it broader than that? A: The Board read it to be broader than that.").

[120] **CA-53**, Court of Appeal Decision, Justice Barry, ¶ 131 ("... in Decision 86.01, the Board expressed its intention to enforce the commitment for Hibernia made by Mobil to 'promote further R&D in Canada to solve problems unique to the Canadian offshore environment'. This did not restrict R&D to the specific needs of the Hibernia project.").

[121] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 24, s. 2.6, emphasis added.

that the requirement for [a] Benefits Plan had to do with the full life of the project ..."[122] He confirmed his "clear recollection" that "the Board's interest was to make sure that as long as the project was in existence, that there would be a continuing stream of expenditures on research and development."[123] He confirmed that expectation was "communicated to the developer."[124] The Claimants provided no witness from the time to challenge Mr. Fitzgerald's evidence.

80. The Claimants also committed to "[c]arry out a program of timely reporting to ... enable the Board to monitor the level of efforts and benefits achieved and to assist in promoting maximum benefits ..."[125] The only reason the Board would monitor the reports of expenditures is if it could intervene in response to those reports. As acknowledged by Justice Barry of the Court of Appeal, "[o]therwise, what was the purpose of the monitoring?"[126] Indeed, the Board expressly stated that it would monitor "to ensure that the Proponent complies with the commitments."[127] Justice Barry relied on these words to conclude that "the reservation of authority to require more expenditures was more than implicit."[128] The Claimants ask the Tribunal to overturn this interpretation of Canadian law.

81. Finally, the Board emphasized in the Hibernia Benefits Decision that "[t]he development and implementation of a benefits plan is ... an *evolutionary process*."[129] The Board also explained that "[i]t is [their] expectation that the Proponent's demonstrated

[122] Hearing Transcript, p. 571:15-17.

[123] Hearing Transcript, p. 572:10-21.

[124] Hearing Transcript, p. 573:12-14 ("Q: And was that expectation communicated to the developer? A: Yes.").

[125] **CE-46**, Hibernia Supplementary Benefits Plan, pp. 1, 4. See Counter Memorial, ¶¶ 43-44; Rejoinder, ¶¶ 173-174.

[126] **CA-53**, Court of Appeal Decision, ¶ 126.

[127] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 8, s. 2.1.

[128] **CA-53**, Court of Appeal Decision, ¶ 126.

[129] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 8, s. 2.1, emphasis added. See Counter Memorial, ¶ 45; Rejoinder, ¶ 175.

responsiveness in the area of benefits will continue through the duration of the project."[130] Thus, the Board highlighted from the beginning that it would intervene when concerned and that it expected the operators to respond to those concerns. Moreover, it highlighted that it expected the operators to respond "through the duration of the project."

82. Hence, through the Hibernia Benefits Plan and Decision, the Claimants committed to expend on R&D throughout the project, committed to report their expenditures so that they could be monitored by the Board, agreed to respond to concerns through the duration of the project, and recognized that the process was evolving. Canadian courts held that the Plan and Decision preserved the authority of the Board to intervene and issue guidelines if the operators failed to fulfil their obligation to expend on R&D and E&T. The Claimants ask the Tribunal to overturn this decision of Canadian courts.

(ii) The Terra Nova Benefits Plan and Decision Do Not Undermine the Conclusion that the Guidelines are Subordinate to the Accord Acts

83. The Terra Nova Benefits Plan and Decision also preserved the Board's authority to intervene and issue guidelines if the operators failed to fulfil their obligation to expend on R&D and E&T. The key features of that Plan and Decision include:

- the Board's endorsement of the statement that "[f]unding basic research from revenues generated from offshore petroleum resources is a requirement of the Atlantic Accord."[131] The Court of Appeal confirmed that "the reference to basic research indicates there was no intention in Decision 97.02 to restrict research requirements to those needed by a specific project."[132] The Claimants ask the Tribunal to overturn this decision of the Canadian courts;

[130] **CE-47**, Hibernia Decision 86.01, p. 8, s. 2.1. See Rejoinder, ¶¶ 173-176.

[131] **RE-14**, Report of the Environmental Assessment Panel: Terra Nova Project (August 1997), Recommendation 50, p. 49, endorsed at **CE-57**, Terra Nova Decision 97.02, p. 23, s. 3.5.1 ("[the recommendation] related to funding basic research is consistent with the thrust of this legislative requirement.").

[132] **CA-53**, Court of Appeal Decision, Justice Barry, ¶ 132.

- the recommendation of the Environmental Assessment Panel that the operators undertake R&D not necessarily needed for the project. [133] The Board noted that the Panel's recommendations were "an integral part of [the Board's] review of the [Benefits] Plan;" [134]

- the Board's criticism of the Terra Nova Benefits Plan because "there is no measure of the level of effort the Proponent intends to make in ... regard [to R&D] (e.g., there are no expenditure estimates provided in the Benefits Plan);"[135]

- the Board's statement that it "appreciates the difficulty in providing, in advance, detailed R&D and E&T plans *for the entire duration of the Development* ..."[136] This statement implicitly acknowledges the Board's expectation of expenditures for "the entire duration" of the project;

- the requirement to report previous and anticipated expenditures on R&D and E&T "to provide a framework for monitoring the Proponent's [R&D and E&T] activities ...."[137] Again, the only reason the Board would monitor the reports of expenditures is if it could intervene in response to those reports. Again, "[o]therwise, what was the purpose of the monitoring?"[138] Indeed, the Board expressly stated that it would monitor R&D and E&T expenditures because "the Board ... has an obligation as the regulator to ensure that the Proponent's commitments are met." [139]

84. Canadian courts confirmed that the Terra Nova Benefits Plan and Decision preserved the authority of the Board to intervene and issue guidelines if the operators failed to fulfil their obligation to expend on R&D and E&T.[140] The Claimants ask the Tribunal to overturn this decision of Canadian courts.

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[133] Counter Memorial, fn. 48, Rejoinder, ¶ 170.

[134] **CE-57**, Terra Nova Decision 97.02, p. 13, s. 3.1 ("To the extent that they relate to the Benefits Plan requirements of the legislation, the recommendations of the Panel have been considered as an integral part of its review of the [Terra Nova Benefits] Plan.").

[135] **CE-57**, Terra Nova Decision 97.02, p. 23, s. 3.5.1.

[136] **CE-57**, Terra Nova Decision 97.02, p. 24, s. 3.5.3, emphasis added.

[137] **CE-57**, Terra Nova Decision 97.02, p. 24, s. 3.5.3.

[138] **CA-53**, Court of Appeal Decision, ¶ 126.

[139] **CE-57**, Terra Nova Decision 97.02, p. 2, s. 1.2.

[140] For example, see **CA-52**, Trial Court Decision, ¶ 47: "Having accepted these approvals on the basis that that they have done, it is not now open to them to deny the Board's authority to fulfill its duties set out under the Accord and the Act and its earlier interpretations contained in decisions 86.01 ... and 97.02 to

(iii)The Claimants' Arguments on the Benefits Plans and Decisions are Unavailing

85. The Claimants ask the Tribunal to overturn the decision of the Canadian courts based on four aspects of the Benefits Decisions which they claim are inconsistent with the Guidelines.

86. First, the Claimants continue to focus on the fact that neither Benefits Decision "required a mandatory quantum of spending on R&D and E&T"[141] nor state "that any such quantum would be imposed in future."[142] However, Mr. Fitzgerald explained why this does not mean that the authority to impose a quantum was forever abandoned:

> At the start, we were very new to the field. Hibernia was the first project out the gate. We were the first Board in existence. There was discussion inside the Board as to how we should approach this. Obviously, as is evident from the Draft Guidelines on Exploration, there were some voices that were saying that maybe we should be – we'd have to be forthcoming on quantum, but ... the undertakings which we got from Hibernia were felt by the Board as a group to be sufficient at that time, and that rather than try to establish a particular level, that we would take the Proponents' stated commitments as having been given in good faith, and look at what our experience was, and continue to re-evaluate what our approach should be.[143]

87. Mr. Fitzgerald further explained that the Board did "re-evaluate" its approach when it considered the Terra Nova Benefits Plan in 1997:

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effectively monitor their activities and ensure compliance and adequate and reasonable expenditures;" **CA-53**, Court of Appeal Decision, ¶¶ 68, 105: "... the Guidelines set parameters consistent with the Board's responsibility to monitor expenditures for research and development required under the benefits plans;" ¶ 135: "[The Board] approved the Hibernia and Terra Nova projects on condition that the Board have the authority to continuously monitor research and development expenditures and intervene by issuing guidelines requiring higher expenditures should the appellants' level of expenditures fall below that which the Board considered appropriate. These were the rules of the game when development approvals [were] issued. The same rules apply today."

[141] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 23.

[142] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 23.

[143] Hearing Transcript, pp. 574:18-575:10. See also First Witness Statement of John Fitzgerald, ¶¶ 50-51 (hereinafter "Fitzgerald Statement I").

> ... we were beginning to hear a little bit ... back from the community that there was some slack capacity in the research institutions that had built up, and we were becoming apprehensive about the declining level of expenditures. Not enough to make an issue of it yet, but when we started considering what guidance we should be given to Terra Nova ... we said we'd better signal to them that we are going to be looking for something explicit from them against which we can measure their performance.[144]

88. Consequently, the Board increased reporting requirements through the Terra Nova decision. The subsequent report of declining expenditures led to the decision to issue the R&D Guidelines. Thus, just because the Benefits Decisions did not impose a quantum of expenditures does not mean that the Decisions prevented the Board from issuing the Guidelines. This was confirmed by the decisions of the Canadian courts,[145] which the Claimants ask the Tribunal to overturn.

89. The second feature of the Benefits Decisions on which the Claimants rely is that "neither Benefits Plan approval decision required *pre*-approval of R&D and E&T expenditures."[146] However, neither do the Guidelines. While the Guidelines suggest that operators obtain pre-approval of their expenditures to help ensure they do not undertake expensive R&D and E&T which would ultimately not qualify under the Guidelines,[147] eligible expenditures will be approved regardless of whether they have already been undertaken.[148]

90. Third, the Claimants argue that the Benefits Decisions superseded their statutory obligations because, according to the Claimants, they formed a separate "agreement"

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[144] Hearing Transcript, pp. 575:18-575:6. See also Fitzgerald Statement I, ¶¶ 69-72.

[145] **CA-52**, Trial Court Decision, ¶¶ 44-45 ("[The Applicants] say that if the Board wished to establish targets for expenditures on R&D these should have been fixed at the time of the approvals of the respective benefits plans and cannot now be imposed after the fact. ... I find that this is not a reasonable or purposive interpretation of the Accord and the Acts and the Board's decisions approving these developments.").

[146] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 23, emphasis added.

[147] Smyth Statement I, ¶ 43.

[148] For example, see **CE-178**, Staff Analysis of the R&D E&T Report, Hibernia Project, April 2004 to December 2008 (Dec. 2009), pp. 4, 5, approving 2004-2008 expenditures already undertaken.

between the operators and the Board like an agreement between two commercial parties.[149] However, on the sole occasion that he was asked if the decisions created an agreement, the Vice Chair of the Board, Frederick Way, plainly stated "no."[150] Both he and Mr. Fitzgerald explained that the Board is a regulator, not a commercial party and, therefore, the Decisions are not an agreement.[151] Indeed, this is why the Claimants did not challenge the Guidelines before Canadian courts as a breach of contract but challenged them through the normal means to challenge administrative measures of a regulator.

91. Finally, the Claimants argue that the Guidelines are inconsistent with the Benefits Decisions because of the difference in spending on R&D and E&T at Hibernia before and immediately after the Guidelines.[152] Yet, the difference in spending before and immediately after the Guidelines just reflects the difference in revenues.[153] In fact, the Guidelines actually require the Claimants to expend *less* on R&D and E&T at Hibernia, as a percentage of revenue, than they were expending before the Guidelines came into effect.[154] Moreover, under their own projections, the Claimants will annually spend *less*

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[149] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 25.

[150] Hearing Transcript, pp. 726:22 – 727:5 ("Q: ... In your view, is a Benefits Plan an agreement? A: No, it isn't. Q: And is the Benefits Plan a result of a negotiation? A: No.").

[151] Hearing Transcript, p. 727:10–15 ("[the Benefits Plan] is reviewed by the Board for completeness and relevance and appropriateness. If it isn't acceptable ... as being in accordance with the legislation and the Guidelines, it is returned to the Operator with reasons, and the Operator will then formulate the Plan and resubmit it."); John Fitzgerald, Hearing Transcript, pp. 483:6 – 484:13 ("Q: ... after the Benefits Plan was submitted, what happened after that? A: It would be circulated pretty widely both within the Board and in the agencies of both the Federal and Provincial Governments which had an interest. And the Board would begin its examination of it, taking into account, first of all, the requirements of the statutes itself, which requires that the plan contain certain elements. And it would also take into account the recommendations, if any, regarding these matters which would have come forward from a public hearings process for the environmental impact assessment ... Having all these – all of these considerations before it, the Board receives input from the two Governments, if they have anything to say, and then it reflects upon what's there, and it makes a decision as to whether or not the Plan as presented complies with the requirements of the statute."); Hearing Transcript, p. 485:13–17 ("the approval ... including the conditions which the Board may attach in giving its approval become a requirement, if the Proponent wishes to proceed with the project.").

[152] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 6.

[153] Rejoinder, ¶ 214.

[154] The Claimants state that "the Guidelines require Hibernia to spend about four times as much on R&D and E&T between 2004 and 2007 as the Board had found sufficient in 1997-2000." However, Hibernia revenues in the second period are over four times greater than revenues in the first period. From 1997 to

under the Guidelines on R&D and E&T at Hibernia than they annually spent before.[155] Far from highlighting a "lack of connection" between the Guidelines and what the Benefits Plans required," as alleged by the Claimants, a comparison between spending before and after the Guidelines confirms that connection.

92. Thus, none of these four aspects identified by the Claimants provide any basis to overturn the decision of the Canadian courts that the Benefits Decisions are consistent with the Guidelines.

(iv) Witness Evidence and Contemporaneous Documents Confirm that the Benefits Decisions are Consistent with the Guidelines

93. John Fitzgerald, who helped draft the Terra Nova and Hibernia Benefits Decisions, confirmed that they preserved the authority of the Board to intervene and issue guidelines if the operators failed to fulfil their obligation to expend on R&D and E&T.[156] The Claimants provided no witnesses to challenge this evidence. They provided no witness statements from:

- Murphy Oil concerning its understanding of the benefits decisions;
- anyone at Mobil who was involved in drafting the Hibernia Benefits Plan;
- anyone at Mobil concerning their understanding of the Hibernia Benefits Plan or Decision;
- PetroCanada, the operator of Terra Nova, concerning its understanding of the Terra Nova Benefits Plan or its obligations under the Benefits Decision;

2000, Hibernia revenues were just over $3.5 billion. This figure is calculated by combining the revenues estimated in fn. 296 of the Rejoinder (1997 – $33,515,644; 1998 – $448,037,024; 1999 – $974,396,543; 2000 - $2,242,084,183 which gives $3,698,033,394). By contrast, from 2004 to 2007, those revenues were just over $14.5 billion, First Expert Report of Howard N. Rosen , Appendix B, Schedule 2, page 2 (hereinafter "Rosen Report I").

[155] Compare annual spending before the Guidelines identified in **CE-144** – Hibernia SR&ED Acceptance Chart with annual spending after identified in Rosen III, Schedule 2.

[156] Fitzgerald Statement I, ¶ 72.

- anyone at Mobil concerning the drafting of the Terra Nova Benefits Plan; or

- anyone at Mobil concerning their understanding of the Terra Nova Benefits Plan or Decision.[157]

94. Nor did the Claimants submit any documents to support their alleged understanding of their obligations under the Hibernia or Terra Nova decisions. In fact, the Claimants' documents confirm the opposite. The reports submitted by Hibernia included spending on R&D and E&T which was not necessary for the projects, such as furnishing classrooms[158] and funding research chairs.[159] The benefits reports submitted by PetroCanada also contained such unnecessary spending and expressly acknowledged it was spending more than what was necessary for the projects.[160] The Claimants never explained why PetroCanada would make such a statement if it believed its obligation was confined to spending only what was necessary for the projects.

95. Instead of relying on contemporaneous documents or witness statements, the Claimants rely solely on the Benefits Decisions themselves. They argue that the Benefits

[157] The Claimants' only witness who addressed the effect of the Benefits Decision was Paul Phelan, who admitted that he could only address their effect from an accounting perspective: Hearing Transcript, p. 398:14-16: "... my comment specifically in my witness statement was, at no time in all *my involvement through the accounting reporting* ...[emphasis added];" Hearing Transcript, p. 409:16-21: "Q: You explained in answer to the question from Arbitrator Janow that ... there was an ongoing process of conversation with the Board. Were you involved directly? ... A: No, no."

[158] **CE-66**, Hibernia 1988 Benefits Report, 31 March 1989, p. 3.

[159] **CE-62**, Hibernia 1986 Benefits Report, 20 April 1987, s. d (2); **CE-66**, Hibernia 1988 Benefits Report, 31 March 1989, s. E; **CE-68**, Hibernia 1989 Benefits Report, 31 March 1990, s. D (3), addressed in Counter Memorial, ¶ 83, Rejoinder, ¶ 172.

[160] **CE-81**, Terra Nova 1998 R&D Report, p. 8 ("[Terra Nova] will continue to support technically worthy R&D activities and programs in the province where the results of such activities and programs have application to the Terra Nova Development and/or to the development of an offshore oil industry in the province;"); **CE-82**, Terra Nova 1998 E&T Report, p. 3 ("In addition to implementing training initiatives aimed at meeting the specific training requirements of the development, the Proponents also continue to work actively ... in various areas related to the furthering of opportunities for the establishment of offshore related skills in the province."), discussed in Counter Memorial, ¶ 84; Rejoinder, ¶ 172. See also **CE-81**, Terra Nova 1998 R&D Report, p. 5, **CE-88**, Terra Nova 2000 E&T Report, p. 11, which report R&D and E&T expenditures not necessary for the Terra Nova project, addressed in Counter Memorial, ¶ 83, Rejoinder, ¶ 172.

Plans, and the Board's decisions approving them, speak for themselves.[161] However, as explained above, those Plans and Decisions do not say what is asserted by the Claimants. Indeed, so much was confirmed by Canadian courts after a thorough review of those Plans and Decisions.

96. Thus, the Claimants provide no basis to disrupt the conclusion that the Benefits Plans and Decisions preserved the authority of the Board under the Accord Acts to issue guidelines concerning the obligation to expend on R&D and E&T. Indeed, those decisions confirm the Claimants' obligation to expend on R&D and E&T, the Board's obligation to approve those expenditures, and the Board's authority to issue guidelines to enforce those obligations. The Benefits Decisions confirm the conclusion of the Canadian courts that the Guidelines were authorized by, and consistent with, the Accord Acts and Benefits Decisions. Consequently, the Guidelines are subordinate to the Accord Acts and fall within the reservation for those Acts in Annex I of the NAFTA.

III. THE CLAIMANTS HAVE NOT PROVEN THE GUIDELINES BREACH ARTICLE 1105

A. The Claimants Have Not Proven that the Customary International Law Minimum Standard of Treatment Requires the Protection of Legitimate Expectations

97. The Claimants allege that the Guidelines breach Article 1105 of the NAFTA because they are inconsistent with the Claimants' legitimate expectations. There is no dispute between the parties that only a failure to provide the minimum standard of treatment of aliens under customary international law will breach Article 1105.[162] There is also no dispute that the Claimants have the burden to prove that the protection of a foreign investor's legitimate expectations is part of that standard.[163] To carry this burden,

[161] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 27 ("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.").

[162] Claimants' Memorial, ¶ 196; Canada's Counter Memorial, ¶¶ 244 – 245; Hearing Transcript, p. 102:8 – 15.

[163] Canada's Counter Memorial, ¶¶ 252-253; Hearing Transcript, pp. 102:20 – 103:1.

the Claimants must demonstrate such protection is "both extensive and virtually uniform...and ... occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[164]

98. After it was noted during the hearing that the Claimants had failed to provide evidence of state practice concerning the protection of legitimate expectations,[165] the Tribunal requested that the Claimants provide evidence that the protection of legitimate expectations was part of the customary international law standard of treatment.[166] In response, the Claimants submitted no evidence of practice of the three NAFTA Parties regarding the protection of legitimate expectations, let alone evidence of practice by any of the other 189 members of the United Nations, as would be necessary to prove that a rule of custom crystallized through widespread and consistent practice undertaken out of a sense of legal obligation.[167]

99. Instead, in their Post-Hearing Brief, the Claimants rely on a European Community document, to which the claimant referred in *Metalclad*, which addresses the "'fair and equitable' treatment standard."[168] This is not evidence of customary international law. First, the document on which the Claimants seek to rely has never been produced in this arbitration. Second, there is no evidence that this document was even produced to the *Metalclad* tribunal – the document is only paraphrased by an unidentified author in the *Metalclad* claimant's Memorial. Third, the summary description gives no indication as to whether this document is referring to the customary international law minimum standard

[164] **RA-35**, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment [1969] I.C.J., p. 43 (cited in Counter Memorial at p. 104, fn. 374.

[165] Hearing Transcript, p. 116:7-9 (Professor Sands: "... I'm not aware that we've actually got any State practice on the legitimate expectation component ..."). See also Counter Memorial, ¶¶ 254-256; Rejoinder, ¶¶ 124-151.

[166] Legal Questions to the Parties from the Tribunal to be addressed in Closing Arguments, 21 October 2010, ¶ 1 ("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 expectations of the parties?").

[167] Counter Memorial, ¶ 252.

[168] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 44.

of treatment of aliens, nor is there any mention of legitimate expectations. Fourth, the *Metalclad* tribunal did not refer to this document in its award, nor did it undertake any analysis of state practice and *opinio juris* with respect to legitimate expectations.[169] The Claimants' reference to a summary of an unproduced European Community document is not evidence of customary international law.

100. The Claimants also referred to the preambles of the United States BITs with Argentina and Ecuador which state that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment."[170] These references are also irrelevant. First, the cited preambles say nothing about legitimate expectations. Second, the preamble to a treaty is not an obligation. Third, the expression of a "desire" to maintain a "stable framework for investment" is not evidence of either state practice or *opinio juris*.[171]

101. Thus, the three new documents on which the Claimants rely provide no support for their assertion that the protection of legitimate expectations is part of the minimum standard of treatment of aliens under customary international law.

102. In addition to relying on these three new sources, the Claimants rely again on *Merrill & Ring* and suggest that the tribunal "undertook its own analysis of state practice in relation to the minimum standard of treatment."[172] This is incorrect. None of the material reviewed by the *Merrill & Ring* tribunal related to state practice concerning legitimate expectations and the tribunal did not make a decision on the role of such expectations in the customary international law standard of treatment.[173]

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[169] The Claimants continue to wrongly assert that *Metalclad* found that failure to fulfill legitimate expectations was a breach of the customary international law standard, Claimants' Post-Hearing Brief, 3 December 2010, ¶ 44. As Canada noted in its Rejoinder, ¶ 141, *Metalclad* made no such finding.

[170] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 43.

[171] See also Counter Memorial, ¶ 268, where Canada explains that requiring states to maintain a "stable framework for investment" would prevent states from regulating anything at all.

[172] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 46.

[173] **RA-104**, *Merrill & Ring*, ¶ 242; Rejoinder, ¶ 139.

103. None of the other NAFTA cases to which the Claimants refer in their Post-Hearing Brief support the conclusion that the protection of legitimate expectations is part of the customary international law standard of treatment.[174] Nor does *Cargill*, the most recent NAFTA Chapter 11 decision. As Canada noted during the hearing,[175] *Cargill* aptly summarized the customary international law minimum standard of treatment of aliens and the appropriate Article 1105 analysis as follows:

> To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.[176]

104. Hence, mere failure to fulfil legitimate expectations does not fall below the customary international law standard of treatment required by Article 1105 of the NAFTA.

B. Even if Article 1105 Requires the Protection of Legitimate Expectations, the Claimants Have Still Not Proven that the Guidelines are Inconsistent with Those Expectations

1. The Board Had the Authority to Issue Guidelines in Response to Declining Expenditures on R&D and E&T

105. Canada explained in its previous pleadings that a legitimate expectation must be based on a specific assurance.[177] This has not been challenged by the Claimants. Instead, in their Post-Hearing Brief, the Claimants argue that the Hibernia and Terra Nova

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[174] See Rejoinder, ¶¶132-142.

[175] **RA-84**, *Cargill, Incorporated v. United Mexican States*, Award (ICSID ARB(AF)/05/2), 18 September 2009, (hereinafter "*Cargill*"); Hearing Transcript, pp. 1277:21 - 1278:16.

[176] **RA-84**, *Cargill*, ¶ 296.

[177] See Counter Memorial, ¶ 271; Rejoinder, ¶ 152.

Benefits Decisions contained such specific assurances that the Board would not issue the Guidelines. With one minor exception,[178] the Claimants rely on no other documents or witness statements to support the content of their legitimate expectations. The Claimants argue that witness statements were not "necessary" because the Benefits Decisions speak for themselves.[179]

106. However, the Benefits Decisions do not say what is asserted by the Claimants. Nowhere do they state that the Board will not rely on its authority to issue guidelines concerning the operators' obligation to expend on R&D and E&T. Nor do they state that the Board will not set a minimum expenditure requirement to ensure that operators fulfil that obligation. In fact, as explained above,[180] the Benefits Plans and Decisions are consistent with the Guidelines. The Plans and Decisions confirm the operators' obligation to expend on R&D and E&T, the Board's obligation to approve those expenditures, and the Board's authority to issue guidelines to enforce those obligations.

107. Examining the Benefits Decisions in context reinforces this conclusion. That context includes:

- the provisions of the Accord Acts which require expenditures on R&D and E&T, give the Board authority to issue guidelines concerning this obligation, and require the Board to approve expenditures on R&D and

[178] See Claimants' Post-Hearing Brief, 3 December 2010, ¶ 30, where the Claimants briefly argue that the 1990 fiscal agreements between the federal and provincial governments and Hibernia was a "specific assurance." However, the Claimants do not identify what the agreements assured. As Canada explained in its Counter Memorial at ¶¶ 59-60 and its Rejoinder at ¶ 225, and the Claimants accepted in their Memorial at ¶ 69, the agreements contained no assurances concerning the R&D and E&T expenditure requirements under the Accord Acts. Consequently, they contained no assurances relevant to this dispute. So much was confirmed by Canadian courts, **CA-52**, Trial Court Decision, ¶ 59 ("The Framework Agreement does not purport to restrict the obligations of the applicants under the Accord, the *Acts*, the Benefits Plans, or the Board decisions. It does not purport to restrict or limit the authority of the Board …").

[179] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 27, ("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.").

[180] See ¶¶ 74-96 above.

E&T.[181] These provisions have existed since the Claimants invested and are fundamental to their legitimate expectations;

- the statements from the provincial government that using revenue from oil to fund R&D and E&T in NL was vital to ensure the sustainable development of the province.[182] John Fitzgerald confirmed the importance of these statements for the expectations of any oil company operating in NL;[183]

- the Environmental Assessment Panel Reports, which recommended that the operators undertake R&D not necessarily needed for the projects;[184] and

- the 1986 Exploration Phase Guidelines, in which the Board indicated that it believed it had the authority to require a minimum amount of expenditures.[185]

108. Indeed, after carefully reviewing the Benefits Plans and Decisions, Canadian courts concluded that they are perfectly consistent with the Guidelines.[186] Consequently,

[181] See ¶¶ 55-69 above.

[182] Counter Memorial, ¶¶ 13-23.

[183] Hearing Transcript, p. 548:19 – 549:7, ("Q: And at the time immediately before the Hibernia Benefits Plan, do you think that the statements in the Province of the importance of using revenue from oil off the coast to expend on research and development and education and training, do you think those general statements would have been a likely source of the Claimants' legitimate expectations? A: Certainly the representatives of the Proponent who were residents in the Province at the time would have been very much aware of it."). See also Counter Memorial at ¶ 271 confirming the importance of circumstances surrounding the investment when identifying the legitimate expectations of the investor.

[184] See ¶¶ 76-77 above.

[185] **CE-32**, Guidelines for Benefits Plan Approval and Reporting Requirements for Exploration Activities in the Newfoundland Offshore Area, attached to letter from T. O'Keefe, CNLOPB, to W. Abel, Mobil Oil Canada, 14 April 1986, ¶ 4.2.3. See Counter Memorial, ¶ 39. The Claimants note that these guidelines only applied to the exploration phase and, moreover, subsequent guidelines did not include such a promise. Yet, the Claimants overlook that these subsequent guidelines were issued after the Hibernia Benefits Decision. Consequently, when the Claimants received that decision, the position of the Board was that it would issue guidelines on expenditure amounts. The Claimants also overlook that the promise to issue those guidelines indicated the Board's belief that it had the authority to require a minimum amount of spending on R&D and E&T. As explained by Mr. Fitzgerald, "if I had seen that, it would mean that someone over at the Board … was thinking along these lines, where we're going to require expenditures for these purposes as part of your approval. We haven't decided what the amount is yet, so make a proposal", (Hearing Transcript, p. 558:15-21). See also Hearing Transcript, pp. 560:17 – 561:3 ("Q: To the best of your recollection, when the Board inserted reference to the possibility of drafting Guidelines dealing with expenditures in '86, did it do so by reference to what it was able to do lawfully under the Acts and/or the Accords? A: I would believe that is … what it was saying it had the statutory authority to do.") The Claimants provided no witnesses from this time to challenge Mr. Fitzgerald's testimony.

the Tribunal can only accept that the Benefits Plans and Decisions created a legitimate expectation that the Board would not issue the Guidelines if the Tribunal overturns the decisions of the Canadian courts.

2. The Board Legitimately Issued the Guidelines After Declining Expenditures on R&D and E&T

109. Mr. Way confirmed that the Board publicly declared in late 2001 that it would issue the Guidelines after declining R&D and E&T expenditures were reported by Hibernia and Terra Nova earlier that year.[187] Both he and Frank Smyth confirmed in their witness statements that those declining expenditures motivated the Guidelines.[188] Neither was cross-examined on these statements during the hearing.

110. Nonetheless, in their Post-Hearing Brief, the Claimants continue to question whether those declining expenditures actually motivated the Guidelines.[189] The Claimants do not explain how this is relevant to their claim, nor do they provide any credible basis for their suspicion.

111. The Claimants note that the Board renewed the authorization for the Hibernia project in 2000, two months after it had received a report identifying declining expenditures.[190] The Claimants imply that if the Board was really concerned about declining expenditures then it would have refused to renew the authorization in response to this report.

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[186] See ¶¶ 38-41 above.

[187] Hearing Transcript, p. 730:3-13 ("Q: So, you're saying, Mr. Way, that the Board issued its first public statement that it would issue the Guidelines in late 2001. And at that stage was the Board aware of the decline in expenditures on the Hibernia and Terra Nova Projects? A: Yes. The Board, in my experience, first became aware of the sort of declining expenditures in the spring of 2001 when the Annual Reports were submitted by Operators for their – essentially their R&D reports in respect of the Year 2000 which were submitted in the spring of 2001."). See also Counter Memorial, ¶¶ 88-90; Rejoinder, ¶¶ 210-212.

[188] Smyth Statement I, ¶ 6; First Witness Statement of Frederick Way, ¶¶ 44, 47 (hereinafter "Way Statement I").

[189] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 5.

[190] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 5.

112. However, the *pattern* of declining expenditures only emerged in early 2001. The Hibernia report of that time identified a second consecutive year of significantly declining expenditures. Moreover, the Terra Nova report of early 2001 identified, for the first time, the dramatically declining expenditures on that project.[191] In the light of these reports, the Board used the White Rose Benefits Decision to publicly declare that they would issue guidelines.

113. The Claimants allege that "if the Board truly believed in 2000-2003 that the operators were not fulfilling their obligations, one would expect some contemporaneous documentation informing the operators of that fact."[192] However, the Board did effectively tell the operators they were not fulfilling their obligations by publicly announcing in the White Rose Decision of November 2001 that it expected R&D and E&T expenditures "consistent with national norms."[193]

114. The Claimants assert that "[t]he White Rose decision did not give the Hibernia and Terra Nova owners any reason to believe that these requirements would be applied ... to projects whose benefits plans had already been approved."[194] This is not correct. The White Rose decision stated how the Board interpreted the obligations in the Accord Acts, which are shared by all the operators, including those operating Hibernia and Terra Nova.[195] Indeed, the Claimants have not provided any witnesses who have suggested that they had a different understanding of the White Rose decision.

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[191] **CE-84**, Terra Nova 1999 R&D Report, March 2000. See Counter Memorial, ¶ 88; Rejoinder, ¶ 211.

[192] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 5.

[193] **CE-35**, CNLOPB, Decision 2001.01: Application for Approval: White Rose Canada-Newfoundland Benefits Plan, White Rose Development Plan, 26 November 2001, p. 18 (hereinafter "White Rose Decision").

[194] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 5.

[195] The Board begins by acknowledging that "[t]he Commissioner's Report recommended ... that the Board ... release a definitive statement as to how it interprets and applies the provisions of the Atlantic Accord and the Legislation. Part A of Chapter 3 of this Decision Report constitutes the Board's response to that recommendation by the Commission. It describes the Board's approach." (**CE-35**, White Rose Decision, p. 15). After noting the wording of section 45(3)(c), the Board stated at page 18 that "[s]ince the Legislation simply requires that expenditures be made for these purposes in the Province, latitude is left to the Board to establish parameters and criteria for such expenditures. ... The amount of financial contribution in this area

115. The Claimants argue that "Canada has failed to explain why the Board waited three years [between November 2001 to November 2004] to issue those guidelines ..."[196] However, the Board did not wait three years to issue the Guidelines. It immediately commissioned a report on national norms for R&D expenditures, which was completed by March 2002. The Board subsequently examined reports by Statistics Canada on average R&D spending by oil companies in Canada before producing draft guidelines by August 2002. These draft guidelines were discussed internally and revised in July 2003.[197] The July 2003 draft guidelines were presented to the operators for discussion.[198] The Board consulted with the operators and delayed issuing the Guidelines to give operators an opportunity to propose an alternative.[199] After the operators failed to agree on an alternative, the Board issued the Guidelines.[200]

116. Thus, the Claimants have failed to establish any doubt that the rapidly declining expenditures reported in early 2001 motivated the Board's decision to issue the Guidelines later that year. Indeed, this has already been accepted by the Canadian courts[201] and the Claimants, yet again, ask this Tribunal to overturn that decision.

3. The Claimants are Expending on R&D Which They Promised to Undertake in Their Benefits Plans

117. That the Guidelines are consistent with any legitimate expectations arising from the Hibernia and Terra Nova Benefits Plans is confirmed by the R&D and E&T which the Claimants are now performing under those Guidelines. Mr. Ringvee's testimony

is expected to be consistent with national norms for such expenditures by the private sector." The Board goes on to state at page 19 that "[f]or the operations phase, [such norms] might include the national average level of expenditures by the private sector as a percentage of revenue." The Board concludes at page 25 that it "will proceed in the coming months to revise its Benefits Guidelines along the lines described in this document."

[196] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 5.

[197] Counter Memorial, ¶ 97.

[198] Counter Memorial, ¶ 98.

[199] Counter Memorial, ¶¶ 97-103.

[200] Counter Memorial, ¶¶ 98-104.

[201] **CA-52**, Trial Court Decision, ¶ 79.

confirms that the Claimants are expending on exactly the type of projects they promised to undertake in those Plans. For example:

- **Iceberg Impact on Subsea Wells Study.**[202] Mr. Ringvee confirmed that the purpose of this study is [redacted] The potential benefit of this project is to [redacted]'[204] This is consistent with the Claimants' commitment in the Hibernia Benefits Plan to carry out "research to develop effective countermeasures … to minimize oil spills from … subsea components due to iceberg impact."[205]

- **Development of Trenching System for Ice Scour Environments.**[206] Mr. Ringvee confirmed tha[redacted][207] He confirmed that the goal of this research project

[202] **GFA-65**, R&D Work Expenditure Application – Iceberg Impact Study.

[203] Hearing Transcript, pp. 433:19-22 – 434:5[redacted] See also **GFA-65**, R&D Work Expenditure Application – Iceberg Impact Study, p. 1, § A.[redacted]

[204] **GFA-65**, R&D Work Expenditure Application – Iceberg Impact Study, p. 2 § I.[redacted] Hearing Transcript, p. 438:11-18.

[205] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 83, s. 3.9.4 (endorsing the recommendations of the Hibernia Environment Panel. See *Id.*, p. 95).

[206] **GFA-67** and **GFA-68** R&D Work Expenditure Application: Development of a Trenching System for Ice Scour Environments (July 23, 2010).

[207] Hearing Transcript, p. 446:2-13[redacted]

[redacted][208] This is consistent with the Claimants' Benefits Plan commitment to "*...promote further* research and development in Canada to solve problems unique to the Canadian offshore environment"[209] and to carry out "research to develop effective countermeasures ... to minimize oil spills from ... subsea components due to iceberg impact."[210]

- **Advancement of Fixed Wing Ice Reconnaissance.**[211] Mr. Ringvee confirmed that there is an [redacted][212] and that this research woul[redacted]

[redacted] See also **GFA-67**, R&D Work Expenditure Application: Development of a Trenching System for Ice Scour Environments (July 23, 2010), p. 2-3 of 9 [redacted] **CE-212**, HMDC, Hibernia R&D Work Plan to Meet C-NOLPB R&D Guidelines (March 31, 2010) (hereinafter "Hibernia R&D Work Plan"), p. EMM-3514.

[208] Hearing Transcript, p. 444:3 - 445:2 [redacted].

[209] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 25, emphasis added.

[210] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 83.

[211] **GFA-72**, R&D Work Expenditure Application Form: Advancement of Fixed Wing Ice Reconnaissance Program.

[212] Hearing Transcript, p. 452:17-20 [redacted]

[redacted].[213] This is consistent with the Claimants' Benefits Plan commitment that "research and development into ice detection sensors… would *continue to be supported* ...," that "research and development to *improve* the ability to detect and manage ice … be undertaken"[214] and to undertake a "*continuous program of observation and research* that leads to the improvement of radar and other remote sensing devices that will make possible the early detection of even low-lying masses of floating ice."[215]

- **Centre for Arctic Resources Development (CARD).**[216] Mr. Ringvee confirmed that Hibernia and Terra Nova's support for CARD will promote research into problems experienced in the Canadian Arctic.[217] Mr. Ringvee also confirmed that [redacted]

[213] Hearing Transcript, p. 452:7-16 [redacted] also **GFA-72**, R&D Work Expenditure Application Form: Advancement of Fixed Wing Ice Reconnaissance Program, s. 2 [redacted].

[214] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 82, emphasis added.

[215] **CE-57**, Terra Nova Decision 97.02, p. 47 (emphasis added). The Board specifically stated that such research was necessary because the Claimants' "accumulated experience with exposure to iceberg risks is relatively small in comparison with the many years of exposure to other types of potential hazard which it, and other operators, have worldwide." See *Id.*, p. 47.

[216] **GFA-63**, R&D Work Expenditure Application: Centre for Arctic Resources Development (CARD).

[217] Hearing Transcript, p. 454:16-19 (Q: So, generally the idea of CARD is to conduct longer term research [redacted]).

[218] Hearing Transcript, p. 456:8-20 [redacted]. See also **GFA-63**, R&D Work Expenditure Application: Centre for Arctic Resources Development (CARD), pp. 3-4 of 1[redacted].

consistent with the Claimants' Benefits Plan commitment to "*continue to support* local research institutions and *promote further* research and development in Canada to solve problems unique to the Canadian offshore environment"[219] that "research and development into ice detection sensors, iceberg towing and ice forecasting would *continue to be supported* ...."[220] and to undertake a "*continuous program of observation and research* that leads to the improvement of radar and other remote sensing devices that will make possible the early detection of even low-lying masses of floating ice."[221]

118. The Claimants argue that Mr. Ringvee's testimony "does not show that this additional R&D was anticipated ... 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 ..."[222] However, Hibernia has confirmed that it is *not* comfortable with its current technology.

119. For example, Hibernia stated that [redacted][223] Mr. Ringvee confirmed tha[redacted][224] and Hibernia and Terra Nova have both acknowledged that [redacted][225] Similarly, Hibernia has acknowledged that [redacted]"

[219] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 25, emphasis added. The Board also expected the Claimants to fund basic research and to consider ways they could support education generally in the Province beyond the specific needs of the Terra Nova project. **CE-57**, Terra Nova Decision 97.02, p. 23.

[220] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 82.

[221] **CE-57**, Terra Nova Decision 97.02, p. 47.

[222] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 29.

[223] **GFA-63**, R&D Work Expenditure Application: Centre for Arctic Resources Development (CARD), p. 4 (page 7 of the pdf, which is page 4 of 14 of the CARD document). See also Hearing Transcript, p. 458:9 – 12[redacted].

[224] Hearing Transcript, p. 444:3-5[redacted].

[225] **GFA-67, GFA-68**, R&D Work Expenditure Application: Development of a Trenching System for Ice Scour Environments (July 23, 2010)[redacted]

[redacted]The Claimants are filling these deficiencies through their R&D under the Guidelines, exactly as was envisioned in the Benefits Plans.

120. Moreover, the Claimants' support for scholarships,[228] research chairs[229] and even music apprenticeships[230] are also fully consistent with the commitments made in the Benefits Plans to "continue to support local research institutions,"[231] "funding basic research,"[232] and "[supporting] education...generally in the Province..."[233] That the Claimants are fulfilling their obligations under the Guidelines by expending on exactly the R&D and E&T which they promised to undertake in the Benefits Plans confirms that the Guidelines are perfectly consistent with any legitimate expectations arising from those Plans.

[redacted].

[226] **GFA-63**, R&D Work Expenditure Application: Centre for Arctic Resources Development (CARD), p. 9 (page 12 of the pdf, which is page 9 of 14 of the CARD document [redacted].

[227] **GFA-72**, R&D Work Expenditure Application Form: Advancement of Fixed Wing Ice Reconnaissance Program, p. 1 [redacted].

[228] **GFA-71**, R&D Work Expenditure Application Form: Flight 491 Legacy Ford Scholarships and Bursaries (March 1, 2010).

[229] **CE-124**, R&D Work Expenditure Application Form: Terra Nova Young Innovators Award (May 25, 2009).

[230] **GFA-70**, R&D Work Expenditure Application Form: NSO String Apprentices Program (SESAP)/NSYO Youth String Program (April 20, 2010).

[231] **CE-47**, CNLOPB, Hibernia Decision 86.01, p. 25.

[232] **CE-57**, Terra Nova Decision 97.02, p. 23.

[233] **CE-57**, Terra Nova Decision 97.02, p. 23.

IV. THE CLAIMANTS HAVE NOT PROVEN ANY DAMAGES

121. Even if Canada has breached the NAFTA, which it has not, the Claimants are not entitled to any compensation. Neither the Claimants' Post-Hearing Brief, nor the domestic decisions on which they rely,[234] proves that they have suffered a single dollar of damage. Instead, the Brief confirms that the Claimants:

- seek compensation for R&D and E&T they would have undertaken anyway;
- fail to deduct the benefits they will receive from any additional R&D and E&T;
- seek damages they have not incurred;
- seek damages that are not reasonably certain;
- exaggerate their loss through a risk-free discount rate; and
- inflate their loss through a tax gross-up.

[234] Canada agrees with the Claimants that the Tribunal need not rely upon the domestic court decisions of the NAFTA Parties to craft an approach to damages (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 61). Moreover, there are significant practical difficulties to applying domestic court principles to the issue of damages in this case. First, domestic law has different principles for the award of damages depending on the type of breach and obligation involved. The Claimants' own cases touch at least four areas with different rules: anti-trust claims (**CA-257**, *Story Parchment Co. v. Paterson Parchment Paper Co.*, Supreme Court of the United States, 282 U.S. 555 (Feb. 24, 1931) (hereinafter "*Story Parchment*")), p. 559); tort (**CA-228**, *Xerex Exploration Ltd. v. Petro-Canada*, Alberta Court of Appeal, 2005 CarswellAlta 879 (June 30, 2005), ¶ 95 (hereinafter "*Xerex*")); loss of profit following a breach of contract (**CA-260**, *Travellers International, A.G. v. Trans World Airlines, Inc.*, United States Court of Appeals, Second Circuit, 41 F.3d 1570 (Dec. 8, 1994), p. 1571 (hereinafter "*Travellers*") and loss of chance following a breach of contract (**CA-223**, *Mason Homes Ltd. v. Oshawa Group Ltd.*, Ontario Superior Court of Justice, 2003 CarswellOnt 3728 (Sept. 29, 2003) ¶¶ 277-278, 282). Second, each NAFTA Party has several jurisdictions, each with its own rules regarding the law of damages. Canada has 14 such jurisdictions, the United States has at least 50, and the United Mexican States has 33.

A. The Claimants Seek Compensation for Ordinary Course Expenditures

122. The hearing confirmed that the Claimants are seeking a windfall from the Government of Canada. Specifically, they are requesting compensation for R&D and E&T which they would have undertaken in the absence of the Guidelines.

123. The Work Plans describe how the Claimants intend to spend any compensation they are awarded by the Tribunal.[235] Mr. Rosen confirmed that his damages calculation is based on the assumption that none of these expenditures would have been undertaken in the absence of the Guidelines – he assumed that all of these expenditures are "Incremental Spending."[236] The hearing confirmed that this assumption has no foundation.

124. For example, during the hearing, the Claimants confirmed that expenditures on the following projects, which Mr. Rosen assumed was Incremental Spending, are, in fact, expenditures which the Claimants would have undertaken anyway (that is, "Ordinary Course Expenditures"):

- [redacted][237]
- R&D related to the [redacted][238]

[235] **CE-212**, Hibernia R&D Work Plan; **CE-213**, Terra Nova R&D and E&T Work Plan. See also **GFA 62-GFA-78** and the expert report of Professor Noreng which addresses the Claimants' intended expenditures.

[236] Hearing Transcript, p. 870:16-22 ("Q: So, the Work Plans are planned incremental spending, is what you're saying? A: Yes. Q: Okay. Fair enough. And but for the Guidelines, these expenditures would not have been undertaken? A: That is my understanding, yes.").

[237] Mr. Rosen characterized this expenditure as Incremental Spending in his damages model (Hearing Transcript, p. 884:16-17 ("Q: [redacted]s incremental spending? A: I believe so, yes.")). However, the Claimants now describe it is an Ordinary Course Expenditure (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 31 ("Exhibit CE-233, for example, confirms which of the Work Plan expenditures would have been undertaken in the ordinary course of business..."); **CE-233**, Hibernia Research and Development Expenditure Outlook, (hereinafter "Hibernia R&D Outlook"); Hearing Transcript, p. 964:2-8 ("Q: Can you just go down to Line 18 [on CE-233], please? A: Previous Budgeted Projects and Studies. Q: And if you have a look at the list of study of projects there, so, what is Line 18 telling us about the studies that are listed? A: These were previously budgeted, so they would have been ordinary course.")).

[238] Mr. Rosen characterized this expenditure as Incremental Spending in his damages model (Hearing Transcript, p. 870:16-22). However, during cross-examination, Mr. Rosen confessed that "some of [the

- [redacted]

125. Thus, the Claimants ask Canada to pay for R&D and E&T that they would have done in the absence of the Guidelines.

126. The Claimants argue that "[t]here was no need" for Mr. Rosen to assess future R&D and E&T as either Incremental or Ordinary Course Spending.[242] This is an astonishing admission for that is exactly what Mr. Rosen *should* have been doing. The distinction between Incremental and Ordinary Course Spending is a cornerstone of his damages model.[243] The fact that he did not undertake an assessment of the Claimants' future R&D and E&T spending proves that the Claimants have not put before the Tribunal an objective assessment of their loss.

[redacted] is ordinary course spending" (Hearing Transcript, p. 875:3-7) but could not identify which parts. **CE-233,** Hibernia R&D Outlook, identifies the monetary extent of the Ordinary Course Expenditures related to [redacted] (Hearing Transcript, p. 964:2-8), but not the portion that is Incremental Spending.

[239] Mr. Rosen characterized this expenditure as Incremental Spending in his damages model (Hearing Transcript, p. 870:16-22). However, the Claimants now describe it is an Ordinary Course Expenditure (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 31; **CE-233**, Hibernia R&D Outlook; Hearing Transcript, p. 964:2-8).

[240] Mr. Rosen characterized this expenditure as Incremental Spending in his damages model (Hearing Transcript, p. 870:16-22). However, the Claimants now describe it is an Ordinary Course Expenditure (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 31; **CE-233**, Hibernia R&D Outlook; Hearing Transcript, p. 964:2-8).

[241] Mr. Rosen characterized this expenditure as Incremental Spending in his damages model (Hearing Transcript, p. 894:11-16 ("Q: This expenditure, [redacted] forms part of the Claimants' incremental spending? A: The E&T Spending, yes. Q: So, in the absence of the Guidelines, [redacted] would not have been established? A: That's my understanding.")). However, the Claimants now describe it is an Ordinary Course Expenditure (Hearing Transcript, p. 1072:13-18 (Mr. Rivkin: "...Claimants' counsel referred to the documents referring to [redacted] We account for that money as ordinary course spending.")).

[242] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 31.

[243] Third Expert Report of Howard N. Rosen, ¶ 7 (hereinafter "Rosen Report III").

B. The Claimants Have Failed to Deduct the Benefits from the R&D and E&T

127. The hearing confirmed that the Claimants will likely receive significant benefits from the R&D and E&T they have chosen to conduct under the Guidelines. These benefits will have application not only to the Hibernia and Terra Nova projects, but also projects which the Claimants pursue in the Arctic. For example, the Claimants confirmed:

- they could save [redacted].[244] Thus, they could save [redacted].[245]

- research into [redacted] will provide the Claimants with [redacted].[246] This project is [redacted].[247]

[244] **CE-212**, Hibernia R&D Work Plan, p. EMM-3462 [redacted] (Hearing Transcript, p. 441:11-18) [redacted] (Hearing Transcript, p. 441:19-442:5).

[245] Hearing Transcript, p. 330:8-16 (Mr. Phelan: [redacted] would be able to save [redacted]" Mr. Rivkin: [redacted]" Mr. Phelan: [redacted] Mr. Rivkin: "So, that would be a savings of [redacted]" Mr. Phelan: "Approximately [redacted].

[246] Hearing Transcript, pp. 438:1-6; 444:20-445:2.

[247] **GFA-67**, R&D Work Expenditure Application: Development of a Trenching System for Ice Scour Environments (July 23, 2010), pp. 7-8 [redacted]. See also Hearing Transcript, p. 448:6-14 [redacted] Mr. Luz: ... the knowledge developed in Newfoundland and Labrador as part of this project can then be utilized in these areas. [redacted] Mr. Ringvee: That would be correct.")

- the development of a Center for Arctic Resource Development ("CARD") will provide the Claimants with longer-term research on Arctic issues[248] [redacted] [249]

- replacing the [redacted] will likely result in significant savings;[250]

- their R&D will likely enable them to produce more oil;[251] and

[248] Hearing Transcript, p. 454:16-19 ("Mr. Luz: So, generally the idea of CARD is to conduct longer term research on Arctic issues experienced in Canada; is that right? Mr. Ringvee: That's the general idea.").

[249] **GFA-63**, R&D Work Expenditure Application: Centre for Arctic Resources Development (CARD), p. 13 (page 16 of the pdf, which is page 13 of 14 of the CARD document) [redacted].

[250] See **CE-212**, Hibernia R&D Work Plan, pp. EMM-3464-3466, 3478-3485; **GFA-66**, R&D Work Expenditure Application Form: Hibernia OLS Replacement Project [redacted].

[251] For example, the Hibernia Work Plan contains three enhanced oil recovery R&D projects – the BNA Study, the Dual Oil Producer Concept, and the Gas Utilization Study (Second Witness Statement of Andrew Ringvee, ¶ 19 (hereinafter "Ringvee II") [redacted].

- they intend to spend in ways that will bring them value.[252]

128. The Claimants failed to deduct any of these benefits from their damages.[253]

C. The Claimants Seek Damages They Have Not Incurred

129. The Claimants maintain that they have already incurred all their damages under the Guidelines until the end of the projects.[254] If this is correct, then their financial statements would reflect that liability.[255] [redacted][256]

[252] Hearing Transcript, pp. 429:22 – 430:7 [redacted]. See also: Hearing Transcript, pp. 869:2-870:4, 901:15-21, 904:12-16; Counter Memorial, ¶¶ 317-324, 367; Rejoinder, ¶¶ 249-264, 279-282, 299 (fn. 437-438), 315; First Expert Report of Richard E. Walck, ¶¶ 99-106 (hereinafter "Walck Report I"); Second Expert Report of Richard E. Walck, ¶¶ 44, 48, 51-55, 72-96, 165-168 (hereinafter "Walck Report II"); Third Expert Report of Richard E. Walck, ¶¶ 40-43, 111-113 (hereinafter "Walck Report III"). Examples of the types of benefits the Claimants will receive are described in the Work Plans (**CE-212; CE-213**) and in the Claimants' formal proposals to the Board (see **GFA 62-78**). The benefits are analyzed in the expert report of Professor Noreng (Noreng, ¶¶ 21-51).

[253] The Claimants rely on *Cargill* to defend their decision not to deduct operational benefits (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 60). In that case, Mexico argued that Cargill's damages should be reduced because Cargill allegedly benefited from the impugned measure through a second investment not related to the arbitration. The tribunal dismissed Mexico's argument because the second investment was "separate from that which Claimants made in Cargill de Mexico." Moreover, the tribunal found there was "no proof" that the second investment was even profitable. The tribunal's finding in *Cargill* is irrelevant because there is only one investment in this case and substantial proof that the Claimants will benefit from their R&D and E&T.

[254] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 32, bullet 4. To support this argument, the Claimants rely on Rosen Report I, footnote 17. However, that note merely states: "Irrespective of the cash outlay, the implementation of the Guidelines has created a liability relating to the Incremental Spending *for the period April 1, 2004 to June 30, 2009 for the Claimants as at the Calculation Date* [emphasis added]." Thus, the view expressed by Mr. Rosen in his first report is *not* that the Guidelines created a liability for *all* future Incremental Spending, but that the Guidelines created a liability for Incremental Spending up until the "Calculation Date," that is, the date of his report.

[255] Walck Report II, ¶ 56.

[256] [redacted] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 32, bullet 3; Hearing Transcript, p. 365:3-5;

130. Since the Claimants have not incurred those damages, they cannot be compensated by the Tribunal.[257] Should this Tribunal award compensation for damages not incurred, it would be the first international arbitration tribunal to do so. At the end of the arbitration, the Claimants have still failed to identify a single international tribunal that has awarded damages which have not been incurred.[258] Conversely, Canada referred the Tribunal to two cases where such damages were contemplated and rejected.[259]

131. The Claimants argue that, even if they have not incurred their future damages, they are still entitled to compensation for those future damages because their claim is

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GFA-80, Hibernia Development Project Statement of Joint Account Costs July 1, 1988 to December 31, 2009, p. 6)

[257] See Counter-Memorial, ¶¶ 328-339; Rejoinder, ¶¶ 232-235, 289-293. Domestic courts also refuse to grant damages which have not been incurred. For example, **RA-167** *Markesteyn v. R.*, Federal Court of Canada Trial Division, 2000 CarswellNat 1960, ¶¶ 17, 26 (Aug. 11, 2000) (emphasis added) ("*McGregor* then considers the situation in which there is a continuing wrong lying in the future: But where there is a continuing wrong, and to a lesser extent where there is a single act causing separate damage on two separate occasions, the further causes of action lie still in the future and, therefore, it is impossible to bring an action to recover for prospective loss, even if it is foreseeable. *The Rule here is that where a single act constitutes a continuing wrong, damages at common law can only be awarded in respect of loss accruing before the commencement of the action by the issue of the writ.* ... In the present instance, future damages cannot be awarded in anticipation of what might or might not happen through some negligent operation of the Dam in controlling the water level, in front of the Plaintiff's property, from year to year. The law is so well settled on this point that the Plaintiff's action, in this respect, is futile: it is an aspect on which, plainly and obviously, the Plaintiff cannot succeed [emphasis added].").

[258] The only support which the Claimants provide for their interpretation of what damages "incurred" means is the NAFTA tribunal's decision in *Grand River*. However, as Canada explained in its Rejoinder (Rejoinder, ¶¶ 240-242), the Claimants misread that case.

[259] **CA-39,** *Occidental Exploration and Production Company v. The Republic of Ecuador.* LCIA Case No. UN3467, Final Award of July 1, 2004, T 192 (hereinafter *"Occidental"*); **RA-25**, *LG&E Energy Corp. v. The Argentine Republic,* (ICSID Case No. ARB/02/1) Award, July 25, 2007, ¶ 144; see Counter Memorial, ¶¶ 332-339; Rejoinder, ¶¶ 242, 290-293. The Claimants attempt to distinguish *Occidental* because, they allege, the future loss in that case would not be incurred unless and until a future rebate was sought and then denied by Ecuador (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 34). The Claimants misread the case. As Canada explained in its Rejoinder (Rejoinder, ¶ 242, fn. 336), Ecuador had issued "Denying Resolutions" that pre-emptively denied all future reimbursement applications by the Claimants (**CA-39**, *Occidental,* ¶ 3). According to the tribunal, seeking rebates was "futile" and they awarded damages for past rebates that had *not* been requested from Ecuador (**CA-39**, *Occidental*, ¶ 205). Thus, despite the "futility" of seeking rebates under the Denying Resolutions, the tribunal did not award VAT that was not yet due or paid.

analogous to a claim for lost future profits.[260] This is incorrect. First, the Claimants agree their claim is *not* for lost profits.[261] Second, in all of the lost profits decisions on which the Claimants rely, damages were incurred in the past.[262] Finally, none of the cases on which the Claimants rely in their Post-Hearing Brief even address a claim for *future* lost profits. Each involves a claim for *past* lost profits within a discrete timeframe.[263] Less uncertainty exists in such claims because variables are known.[264] The cases on which the Claimants rely to support their claim are therefore not analogous.

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[260] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 55.

[261] Reply Memorial, ¶ 294 ("Claimants are not seeking future lost profits"); Hearing Transcript, p. 843:1-3 (Mr. Rosen: "And as I explained just before, you're not valuing a lost-profits claim here.").

[262] See Rejoinder, ¶ 292.

[263] In *Cargill*, the compensable period of loss was in the past, between June 2002 and December 2007 (**RA-84**, *Cargill*, ¶ 464). In *SD Myers*, the compensable period of loss was also in the past between November 1995 and February 1997 (**CA-44**, *SD Myers - First Partial Award*, ¶ 127). In *ADM*, the period of compensable loss was again in the past, from January 2002 to December 2006 (**CA-18**, *Archer Daniel Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States* (ICSID Case No. ARB(AF)06/13) Award, 21 November 2007, ¶ 260 (hereinafter "*ADM*"). Moreover, most of the domestic cases on which the Claimants rely are also for *past*, rather than future lost profits. For example, in *Travellers* the compensable period was in the past between 1987 and 1990 (p. 1573). The court was therefore able to determine that the deficient past profits were not only the result of the breach, but also the result of declining business (**CA-260**, *Travellers*, p. 1574). In *Ticketnet*, the compensable period was in the past between 1987 and 1993 (**CA-226**, *Ticketnet Corp. v. Air Canada*, Ontario Court of Appeal, 1997 CarswellOnt 4273, ¶ 85 (Nov. 18, 1997), ¶ 67, (hereinafter "*Ticketnet*")), in *Canlin* the compensable period was in the past between 1976 and 1980 (**CA-214**, *Canlin Ltd. v. Thiokol Fibres Canada Ltd.*, Ontario Court of Appeal, 1983 CarswellOnt 136 (Jan. 12, 1983), ¶ 37), and in *Story Parchment* (**CA-257**, *Story Parchment*) the compensable period was also in the past. None of these cases support the Claimants' proposition that, "[l]ike international law, the law of all three NAFTA Parties clearly provides for the award of future damages…"(Claimants' Post-Hearing Brief, 3 December 2010, ¶ 63, emphasis added).

[264] In *Cargill*, the Tribunal had to determine (i) the Mexican price of High Fructose Corn Syrup ("HFCS") over the compensable period; (ii) the market for HFCS in Mexico over the compensable period; and (iii) Cargill's share of the Mexican HFCS market over the compensable period. To determine the price of HFCS in Mexico over the compensable period, the NAFTA tribunal did not rely on "commodity price projections" as the Claimants allege (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 59), but used the known US market price for HFCS over the compensable period (**RA-84**, *Cargill*, ¶ 510-514). The Tribunal could also determine the market for HFCS in Mexico over the compensable period because of the known "economic and social constraints in place" (**RA-84**, *Cargill*, ¶ 481). Finally, Cargill's market share over the compensable period was not in dispute (**RA-84**, *Cargill*, ¶ 492). Given the nature of the claim and the information available, the decision in *Cargill* cannot "support the Claimants' approach to future damages," as they allege in their heading (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 62). Similarly, the NAFTA tribunal in *SD Myers* believed it had sufficient evidence to make a determination on damages because the claim was for past rather than future lost profits. For example, the tribunal knew that over 50% of the Canadian waste inventory on which the claimant had bid was destroyed by Canadian operators during the period of the border closure (**RA-44,** *S. D. Myers v. Government of Canada* (UNCITRAL)

D. The Claimants Seek Damages That Are Not Reasonably Certain

132. The rule that international tribunals only award compensation for damages already incurred stems from the principle that States are only obliged to compensate for damages that are sufficiently certain. International tribunals and domestic courts have consistently applied this principle.[265] Since un-incurred damages will always be speculative, tribunals have refused to compensate them.[266]

133. The Claimants argue their damages are not uncertain for five reasons. None have merit.

Second Partial Award, October 21, 2002, ¶ 220 (hereinafter "*SD Myers - Second Partial Award*") and that when the border re-opened 40% of the Canadian waste inventory on which the claimant bid was available to it (**RA-44**, *SD Myers - Second Partial Award*, ¶ 221). In *ADM*, the Tribunal relied on empirical data that showed the "sharp drop" in sales immediately following the impugned measure (**CA-18,** *ADM*, ¶ 287).

[264] Counter Memorial, ¶¶ 332-339; Rejoinder, ¶¶ 242, 290-293.

[265] See Counter Memorial, ¶ 340; Rejoinder, ¶¶ 294-298. See also **CA-18**, *ADM*, ¶ 285 ("[L]ost profits are allowable insofar as the Claimants prove that the alleged damage is not speculative or uncertain – *i.e.*, that the profits anticipated were probable or reasonably anticipated and not merely possible."). U.S. courts have held that a plaintiff's losses must be reasonably certain. For example, the Court in **RA-170**, *Kenford Co., Inc. v. Erie County*, Court of Appeals of New York, 67 N.Y.2d 257(May 6, 1986) (hereinafter "*Kenford*"), p. 261 stated: "Loss of profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law... [T]he alleged loss must be capable of proof with *reasonable certainty*. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain..." (emphasis added). In **RA-165**, *Kidder, Peabody & Co. Incorporated v. IAG International Acceptance Group N.V.* (Dec. 21, 1998) 1998 WL 888988 (S.D.N.Y.) (hereinafter, "*Kidder*"), pp. 4-5, the Court refused to apply a less stringent standard than *Kenford*'s "reasonable certainty" standard. ("In short, the cases IAG cites – even if they nominally apply the principle that some generosity should be afforded to the plaintiff when the amount of damages cannot be calculated with precision – do not alter the long standing precept that the law does not countenance the award of damages based on guesswork and speculation... IAG also cites a number of cases (1) to argue that courts afford flexibility in awarding lost profits damages even after *Kenford*, and (2) to demonstrate the widespread application of the principle the wrongdoers must bear the consequences of uncertain damages...However, none of these cases supports the proposition that reasonable certainty must give way to a less stringent, more flexible standard when the defendant's wrongdoing prevents lost profits from being calculated with precision...[N]one of the cases espousing the flexibility principle can be read to authorize the award of speculative damages.").

[266] Counter Memorial, ¶¶ 332-339; Rejoinder, ¶¶ 242, 290-293.

1. The Claimants' "Up-to-Date Assumptions" Do Not Reduce the Uncertainty of Their Future Damages

134. The Claimants argue they can mitigate any future uncertainty by using the most up-to-date information.[267] The evidence proves otherwise. Between the time that Mr. Rosen filed his first report (August 4, 2009) and the time he filed his final report (August 6, 2010), his quantification changed dramatically:

- the Projects' Ordinary Course Expenditures changed by [redacted][268]
- Ms. Emerson's oil price forecast changed in a "material sense;"[269]
- the adopted Canada-US exchange rate forecast changed in a "material sense;"[270]
- the oil production profiles changed considerably[271] and "keep getting updated;"[272]
- the calculation of the Projects' Incremental Spending between 2004-2008 decreased by [redacted][273] and
- the calculation of overall damages decreased from $65.41 million[27][redacted][275] (Mr. Rosen filled that gap in his final report with a [redacted] tax "gross-up,"[276] which is baseless, as explained below.[277])

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[267] Hearing Transcript, p. 910:5-10.

[268] Hearing Transcript, pp. 941:5-942:15.

[269] Hearing Transcript, p. 919:12-19 ("Q: Okay. You mentioned there are other factors that changed in a material sense. Could you identify those factors for me? [redacted] Ms. Emerson's price forecast changed by as much as [redacted] (Walck Report III, Table 4).

[270] Hearing Transcript, p. 919:12-19. The exchange rate forecast changed by as much as [redacted] (Walck Report III, ¶ 24).

[271] Oil production forecasts for Hibernia changed by as much as [redacted] from Rosen Report I to Rosen Report III (Walck Report III, Table 2), and by as much as [redacted] for Terra Nova (Walck Report III, Table 3).

[272] Hearing Transcript, p. 923:17.

[273] Hearing Transcript, p. 911:5-11.

[274] Rosen Report I, ¶ 14.

[275] Rosen Report III, ¶ 4.

[276] Walck Report III, ¶ 46.

[277] See ¶¶ 163-165 above.

135. Mr. Rosen defended these substantial changes on the basis that an expert must value loss at a "point in time."[278] However, there is no "point in time" in a claim for damages not incurred. The Claimants' "valuation date" is not, for example, the date of an expropriation or the breach of a contract, but simply the date of the merits hearing. Thus, the Claimants ask the Tribunal to accept as fact their projections of the future, an approach that was rejected by the tribunal in *Phillips Petroleum*.[279]

2. The Claimants' Oil Price Forecast Is Not Reasonably Certain

136. The Claimants predict the future annual price of oil. However, the tribunal in *Amoco* confirmed that predicting the future price of oil is highly speculative and cannot be used as a basis for compensation.[280] Domestic courts have agreed.[281]

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[278] Hearing Transcript, pp. 917:18-918:7.

[279] See Rejoinder, ¶ 310, fn. 453. In that case, the tribunal had to determine the fair market value of an expropriated asset on the date of the taking. The tribunal considered a reasonable buyer's assessment of the future price of oil on the date of expropriation and indicated that it would not be prepared to accept that assessment for any other purpose: "In order to estimate what revenue could have reasonably been expected in September 1979 to be received from the sales of the oil to be produced under the JSA, an assessment has to be made of what oil prices would have been foreseen in September 1979 to prevail on world markets during the remaining years of the JSA. *While experience shows that forecasting future crude oil process is difficult and open to a high risk of being proved wrong by the subsequent realities of the actual market, the Tribunal's objective here is to determine the range of expectations that seemed reasonable in September 1979, not the accuracy of those expectations in fact.*" The Claimants' claim for damages not incurred requires the Tribunal to accept all of their forecasts, including the future price of oil, as "expectations in fact," an approach which was rejected in *Phillips Petroleum*.

[280] **CA-17**, *AMOCO International Finance Corporation v. Iran*, Award of July 14, 1987, ¶ 239 (hereinafter "*Amoco*"), ("[Oil] price projections can be useful indication 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 a fair compensation."). The Claimants also cite *11073*, **CA-189,** for the proposition that tribunals make "damages awards on projections as to the future price of oil" (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 35). However, in that case the price of oil was not in dispute as the experts agreed to use the prices of the oil futures market. Moreover, since that decision, studies have confirmed that futures prices are not reliable predictors of future oil prices (see Davies Report I, ¶ 46).

[281] **RA-163** See *America Southwest Corp. v. Allen*, Supreme Court of Mississippi, 336 So.2d 1297, 1300 (August 24, 1976) ("Who knows, or can fairly estimate, what the price of oil and the rate of allowable production will be? True, these 'facts' must be determined in order to decide whether a prudent operator would drill. But does it follow that estimates used for the purpose of determining liability should also be used to fix monetary damage? … [I]t has become increasingly clear that the market value of oil and oil products is directly affected, not only by world economic conditions, but by unpredictable political upheavals and the worldwide conflicts of nations, as well as by embargoes and tariffs, and the extent to

137. The Claimants argue that the structure of the oil market is different today than it was at the time of the decision in *Amoco*.[282] However, this does not demonstrate that future oil prices are reasonably certain,[283] as explained by Mr. Davies.[284]

138. The Claimants also argue that oil price forecasting is reasonably certain because many investment and financing decisions rely on such forecasts.[285] However, Mr. Davies explained that, as the Chief Economist of British Petroleum, he purchased oil price

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which productive fields can be discovered and exploited. … These and other factors are rationally unpredictable and are not so clearly foreseeable as to be reasonably capable of supporting an award of damages extended for many years into the future."). See also **RA-164** *Erehwon Exploration Limited v. Northstar Energy Corp*, Alberta Court of Queen's Bench, 15 Alta. L.R. (3d) 200, ¶ 51 ("The evidence is also that the market price of gas has fluctuated greatly over time and that prices can vary dramatically depending upon the type of contracts that are entered into. In such circumstances damages could provide an appropriate remedy as to past gas sales, but could not possibly provide an appropriate remedy as to the future."). The Claimants argue that at least one domestic court has relied on the future price of oil when quantifying damages (**CA-228**, *Xerex*). However, that case is different to the dispute before this Tribunal. First, *Xerex* required a valuation of an asset that was no longer in the plaintiff's possession. Hence, the court had to estimate what a willing buyer would have paid a willing seller at the time of dispossession. That inherently requires estimation of future events, which is what any buyer and seller have to do when negotiating a deal. By contrast, the Claimants have not been dispossessed of their investment. They still control it, and there is no issue of what a willing buyer would pay today, nor how that hypothetical price may have been impacted by the Guidelines. Second, *Xerex* involved the misrepresentation of material facts to induce a contract, which shifted the burden of proof to the defendant who had to prove that the plaintiff's estimates were wrong (**CA-228**, *Xerex*, ¶ 96). In this case, the burden is still on the Claimants to establish their claim with sufficient certainty, and they have not met that burden. Finally, it is not known what evidence, if any, the defendant in *Xerex* adduced at trial. Conversely, in this case, there is considerable evidence undermining the Claimants' forecasts.

[282] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 35. The Claimants also criticize the decision in *Amoco* because the tribunal's approach to lawful expropriation has been criticized in academic writings (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 35, fn. 94). As Canada explained in its Rejoinder (Rejoinder, ¶ 303, fn. 442), the *Amoco* tribunal's approach to lawful expropriation is irrelevant to this case. On the contrary, their approach to speculative damages *is* relevant and academic writings have affirmed the *Amoco* tribunal's approach. For example, Irmgard Marboe (**CA-146**, Irmgard Marboe, *Methods of Valuation in International Practice*, in *Calculation of Compensation and Damages in International Investment Law* (Oxford International Arbitration Series 2009)) writes: "The tribunal in *Amoco International Finance v. Iran* held in its often-quoted statement, that "[o]ne of the best settled rules of the law of international responsibility of states is that no reparation for speculative or uncertain damages cane be awarded."

[283] Rejoinder, ¶ 303; Second Expert Report of Peter A. Davies, ¶ 38 (hereinafter "Davies Report II").

[284] Hearing Transcript, p. 708:6-13 ("…today is a very uncertain time. We saw the EIA's three scenarios, and they have the price, one scenario at $50 and one at $200, which is a mass--I think it reflects the fact that the current world is one of great uncertainty, and even their lowest scenario is above the average price of the last 20 or 30 years. So, I think we are very much in an uncertain period.")

[285] Reply Memorial, ¶ 281.

forecasts to obtain the economic data underlying the forecasts and not for the forecasts themselves.[286] When asked whether he purchased oil price forecasts because of their reasonable certainty, he replied: "Absolutely never."[287]

139. While Ms. Emerson persisted that her oil price forecast is "reasonably certain,"[288] she confirmed that, in her view, a reasonably certain forecast is not one that is accurate, but one that is merely "carefully and thoughtfully done."[289] Indeed, she confirmed her belief that forecasts of the U.S. Energy Information Association are "reasonably certain" even though she conceded they were "inaccurate."[290] She also argued that her only past forecast on the record was "reasonably certain"[291] even though it was incorrect by 300%.[292] Canada cannot examine the "reasonable certainty" of her other past forecasts since the Claimants refused to produce them.[293]

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[286] Hearing Transcript, p. 713:1-5.

[287] Hearing Transcript, p. 702:7-13.

[288] Hearing Transcript, p. 669:15.

[289] Hearing Transcript, p. 673:14-15.

[290] Hearing Transcript, pp. 674:15 - 675:4 ("Based on what they knew, they tried to be reasonably certain. It turns out they were inaccurate."). The U.S. Energy Information Association itself has said that "any long term projection of world oil prices is highly uncertain." See **Davies R17**, U.S. EIA Annual Energy Outlook (2008), p. 50.

[291] Hearing Transcript, pp. 666:16 - 668:22.

[292] Rejoinder, ¶ 321; **Davies R1**, Energy Bulletin, "Innovation seen crucial to future energy supply", Oil & Gas Journal Online (Nov. 22, 2004). The Claimants argue that Ms. Emerson's forecast is more reliable because the Claimants' damages terminate in 2023, making her forecast relevant only to the next 13 years (Hearing Transcript, pp. 636:12-637:1). However, the tribunal in *Amoco* would not even accept an oil price forecast 8 years into the future (*Amoco*, ¶ 237). Moreover, Mr. Davies testified that shorter forecasts can even be less reliable than longer ones (Hearing Transcript, p. 709:17-21 ("And short-term forecasts, I don't think, have been any more accurate than long-term forecasts. In fact, sometimes you can get the long term right, but the world in between has been very wrong, so I don't think the certainty factor is there."). The Claimants also argue that Ms. Emerson's forecast is reliable because she has "twenty-five years of experience" (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 74). However, Mr. Davies was Chief Economist at British Petroleum for 17 years (Hearing Transcript, p. 689:18-19) and believes Mr. Emerson's forecast is uncertain and unreliable (Third Expert Report of Peter A. Davies, ¶ 3 (hereinafter "Davies Report III")). Finally, the Claimants argue that Canada is somehow bound to Ms. Emerson's forecast because it "adopted" that forecast (Claimants' Post-Hearing Brief, ¶ 74). This is false. Canada has never "adopted" Ms. Emerson's forecast but has consistently maintained that it is uncertain. The Claimants cite *Ticketnet* for the proposition that a defendant may tacitly adopt elements of a plaintiff's damages model **CA-226**, *Ticketnet*, ¶¶ 118-119. However, in that case the defendant Air Canada's own business plan substantially corroborated certain projections in plaintiff Tickenet's business plan, and the defendant "led

3. The Claimants' Oil Production Forecast Is Not Reasonably Certain

140. The Claimants argued in their Reply that their forecast of future oil production was reasonably certain because it was approved by the Board.[294] However, the Hibernia forecast on which the Claimants now rely has not been approved by the Board. Moreover, it estimates [redacted] additional barrels of oil than the profile recently accepted by the Board.[295] These additional barrels of oil significantly increase the Claimants' estimate of their future damages.[296]

141. Regardless, even an oil production forecast approved by the Board is still not reasonably certain.[297] For example, oil production at Terra Nova has consistently been 25% lower than the forecasts approved by the Board.[298]

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no evidence at trial to refute the reasonableness of its own projections." In contrast, here Canada has led significant evidence, such as the testimony of Peter Davies, to refute the reasonableness of Ms. Emerson's oil price forecast.

[293] Redfern Schedule, October 6, 2009, Request 34; Redfern Schedule, April 19, 2010, Request 9.

[294] Reply Memorial, ¶ 278; Second Expert Report of Howard N. Rosen ¶ 33 (hereinafter "Rosen Report II").

[295] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 78 ("...the profile relied on in this arbitration estimates [redacted] additional barrels of recoverable oil than the profile accepted by the Board...").

[296] Assuming the price of oil is $75 and the StatsCan Factor is 0.4%, the [redacted] increase Hibernia's obligation under the Guidelines by [redacted] (Hearing Transcript, pp. 938:7–940:18) and therefore the Claimants' damages by [redacted] (taking their 39.625% combined ownership interest in Hibernia). The Claimants argue that their production profile is more conservative than the Board's own estimate of the Hibernia reserves (Claimants' Post-Hearing Brief, 3 December 2010, ¶ 78). This is incorrect. The Board's estimate on which the Claimants rely (**CE-244**, CNOLPB, Staff Analysis, Hibernia Development Plan Amendment (September 2 2010), p. 26) includes oil produced from two reservoirs that do not form part of this arbitration – the "Hibernia (HSE Unit)" and the "BNA (HSE Unit)." In any event, the Board did not approve its own estimate of the reserves, but the forecasts submitted by the Claimants (**CE-244**, CNOLPB, Staff Analysis, Hibernia Development Plan Amendment (September 2 2010), Table 4.3.4.1, p. 31), which are [redacted] than the forecasts the Claimants provide in this arbitration.

[297] Walck Report I, ¶ 33-64.

[298] Walck Report I, ¶ 57; Walck Report II, ¶ 149.

4. The Claimants Ignore "Historical Data"

142. Claimants argue that their calculation of damages is not uncertain because they rely on "historical data."[299] However, the Claimants have merely selected the historical data which supports their forecast and ignored the data which undermines it. Thus, the Claimants:

- fail to project forward their past oil production shortfalls;[300]
- fail to consider the impact of historical trends in the price of oil on forecasts of future prices;[301]
- fail to account for the historic volatility in the Canada-US exchange rate;[302]
- ignore their past Ordinary Course Expenditures when forecasting future expenditures;[303]
- fail to account for the past SR&ED tax credits they have received from their R&D spending;[304] and

[299] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 70-72.

[300] Walck Report II, ¶ 149; Hearing Transcript, pp. 921:17-923:1. Had the Claimants relied on historical data, they would have accounted for the fact that they consistently under-produce at Terra Nova by 25%.

[301] Hearing Transcript, pp. 700:19-701:15. Had the Claimants relied on historical data, they would have accounted for the fact that the average price of oil over the past 20 years is $40.

[302] Walck Report I, ¶¶ 74-75; Walck Report II, ¶ 146. The Claimants argue their forecast accounts for "historical fluctuations," but they cite no evidence (see Rosen Report II, ¶ 61).

[303] Memorial, ¶ 218. The Claimants' "normalized average" lowers the projection of their ordinary course expenditures. For example, the "normalized average" disregards a significant amount of historic R&D related to the [redacted]. The Claimants have repeatedly asserted that this R&D was done in the ordinary course of business (see, for example, Hearing Transcript, p. 319:11-18 ("Mr. Rivkin: "Did [redacted] believe that the [redacted] was, in fact, research and development? Mr. Phelan: "Yes, [redacted] had reported it as R&D. We believe very strongly that it fits into the category.")). However, the Claimants refuse to account for it in their ordinary course projections.

[304] **CE-144**, Hibernia SR&ED Acceptance Chart, July 29, 2009, details the significant amount of SR&ED tax credits the Claimants have received in the past. However, Mr. Rosen refuses to make any projection based on these historic figures and on cross-examination confirmed that he will not make any deductions

- fail to account for the operational benefits they have received from their past R&D and E&T spending.[305]

143. Contrary to the Claimants, Canada's expert analyzed the historic variation around the Claimants' oil production, oil price and exchange rate figures.[306] Based on these variations, Mr. Walck concluded that the Claimants' calculations are "highly unlikely."[307]

144. Thus, the Claimants have ignored the historical data which undermines their calculation of damages. However, even the historical data on which they have relied does not assist them. *Merrill & Ring* confirmed that historical data does not provide a basis to forecast the future with reasonable certainty.[308]

5. The Claimants' Damages Are Not in the Past

145. The Claimants argue that their claim is reasonably certain because, they assert, half of their damages are in the past.[309] This is incorrect – the Claimants have yet to suffer any damages. The Claimants have not yet undertaken any incremental R&D or E&T expenditures under the Guidelines. It is only when the Claimants undertake this spending in the future that we can know how much of that spending is Ordinary Course

for SR&ED tax credits until the Canada Revenue Agency conclusively determines SR&ED eligibility (Hearing Transcript, pp. 898:8-899:16).

[305] For example, Locke Exhibit 19, ExxonMobil's 2007 Corporate Citizenship Report, p. 12 ("Over the past five years, ExxonMobil has invested about $3.5 billion in research. As new technologies are developed, our global functional organization enables rapid deployment and value capture. We have remained an industry leader in technology by focusing on both breakthrough concepts and process modifications that enhance performance across our business line.").

[306] Walck Report II, ¶¶ 131-154. The analysis Mr. Walck conducted is called a "Monte Carlo Simulation," which uses the degree of historic variation seen in each analyzed variable to determine how that degree of historic variation might effect the calculation of future damages.

[307] Walck Report II, ¶ 213.

[308] Rejoinder, ¶ 320; **RA-104**, *Merrill & Ring*, ¶ 263 ("Even if the Investor's past loss figures were accurate, there is no way of knowing whether the situation in the future will be identical or altogether different").

[309] Hearing Transcript, p. 135:8-14.

Expenditure and what the SR&ED tax credits, royalty savings and operational benefits might be. So much has been recognized by their own expert.[310]

E. The Claimants Have not Proven the Tribunal Should Compensate Damages that Are Not Reasonably Certain

146. The Claimants argue that, even if their damages are highly uncertain, they should still be awarded by the Tribunal. The Claimants' arguments have no merit.

1. There is No Distinction Between the "Fact of Damage" and the "Amount of Damage"

147. The Claimants argue that the uncertainty of their future damages is irrelevant because, once the "fact of damage" is established, the "amount of damage" may be estimated using "approximations and common sense."[311] Yet, this distinction is inconsistent with international decisions and commentary.[312] Moreover, the domestic law of the all three NAFTA Parties requires a higher standard of proof than mere "approximations and common sense."[313]

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[310] Rosen Report I, ¶ 43 ("The Incremental Spending does not represent an economic loss to the Claimants until the cash outlays are ultimately made").

[311] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 63.

[312] Rejoinder, ¶¶ 295-298.

[313] **RA-170**, *Kenford*, p. 261 ("Loss of profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law…[T]he alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain..."); **RA-165**, *Kidder*, p. 5 ("…New York law requires that lost profit damages must be 'capable of measurement based on known reliable factors without undue speculation.'"); **RA-166**, *Magnussen Furniture Inc. v. Mylex Ltd.*, 2008 CarswellOnt 1352, 2008 ONCA 186, 89 O.R. (3d) 401, 234 O.A.C. 329, 42 B.L.R. (4th) 177, 164 A.C.W.S. (3d) 790 (March 14, 2008), ¶ 76 ("The trial judge was not obliged to accept the entirety of Dyson's evidence. This was especially so given the trial judge's finding that Dyson's analysis was predicated on sales projections (and, hence, profit projections) that were not established to a reasonable certainty."); **RA-168**, Civil Appeal 154/2003, *Promociones Russek,* S.A. de C.V., Ninth Era, Seventh Collegiate Court of Appeals for Civil Matters for the First Circuit, S.J.F. y su Gaceta, XVII, June 2003, Jurisprudencia I.7o.C.J/9, p. 727 (10 April 2003), ("[I]t is not sufficient to prove the existence of the foregoing in order to find that damages and lost profits were suffered as they need to be proved independently, given that, upholding the contrary would lead to grant an award automatically even in cases when none of the injuries referred to were suffered…From the moment that the criteria demands proof of the right to receive reparations, such proof can be no other that the presence of the loss, detriment or deprivation which have been mentioned and, therefore, if they are not proved, there shall be no award of damages and lost profits."); **CA-236**, Civil Appeal 78/41, *Islas German*, Fifth Period, First Chamber, Supreme Court of Justice, T. LXXII, number 352,591 (20 June, 1942). ("An

148. Even if the standard of proof for the "amount" of damage is lower than that for the "fact," this distinction does not help the Claimants because they have failed to prove even the fact of damages. The Claimants have still not undertaken any incremental R&D or E&T under the Guidelines. Moreover, much of the planned expenditure is expenditure they would have undertaken anyway and which will generate significant benefits. Thus, Mr. Walck confirmed that even the Claimants' "fact of damage" is not reasonably certain.[314]

2. The Claimants Misstate the "Wrongdoer Rule" and it Does Not Apply to the Facts of This Case

149. The Claimants argue that the uncertainty of their damages is irrelevant because of the "wrongdoer rule." The Claimants assert that this rule of domestic law permits an award for uncertain amounts "in order that compensation not be frustrated."[315]

150. The Claimants refer to no international tribunal which has applied the "wrongdoer rule." Moreover, the Claimants misstate the rule under U.S. law, which does not relieve a plaintiff from proving the amount of its damages with "reasonable certainty."[316] The

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abstract assessment of the existence of lost profits is not enough; that specific proof is required of the events which, according to all probabilities, demonstrate the reality of the profit that was not obtained....The dream of profit must unquestionably be differentiated from the true concept of lost profits; the mere possibility and even slim probability of making a profit is not enough for lost profits to arise."). Moreover, the primary case on which the Claimants rely, **CA-257**, *Story Parchment*, is the judicial review from a 1932 jury-award under the U.S.'s anti-trust legislation, which is not analogous to this case.

[314] Hearing Transcript, pp. 1004:9-1005:13; Walck Report II, ¶ 215 ("The degree to which Incremental Spending to offset the shortfalls represents damage to Claimants is unknown and unknowable at this time. That spending has not yet occurred. As a result, the degree to which it will result in tax benefits, royalty credits and operational benefits to the Claimants is not determinable."). The Claimants argue that, because the Projects are mature, the fact of their loss is reasonably certain (Reply Memorial, ¶ 264; Claimants' Post-Hearing Brief, 3 December 2010, ¶ 71). The Claimants fail to explain how that maturity affects the certainty of the elements of their damages calculation. For example, the Claimants fail to explain how the maturity of the projects affects the price of oil, the exchange rate or the benefits the Claimants will receive from their Incremental Spending.

[315] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 64.

[316] Referring to the decision in **CA-257**, *Story Parchment*, the Court in **RA-165**, *Kidder*, pp. 4-5 stated: "IAG argues that it should be afforded flexibility in proving lost profits because Kidder's misconduct prevented such damages from being proven with certainty. This argument is without merit...[T]he *amount* of lost profits must be proven with reasonable certainty... [N]one of these cases supports the proposition that reasonable certainty must give way to a less stringent, more flexible standard when the defendant's

Claimants also misstate the rule under Canadian law. In Canada, courts have only compensated damages which are not reasonably certain under the "wrongdoer rule" in two narrow circumstances. First, where the "wrongdoer" has committed some "wrong," other than the illegal act, that makes it difficult or impossible for the innocent party to prove its loss. Second, where the facts needed to prove the loss are known solely by the "wrongdoer" and the "wrongdoer" does not disclose these facts to the innocent party.[317] Neither of these circumstances is present here.

151. First, the Claimants have identified no "wrong" by Canada, other than the Guidelines, which has made it difficult for the Claimants to prove their loss. Moreover, the uncertainty of the Claimants' losses is not even caused by the Guidelines but by the Claimants' own damages model, which forecasts speculative elements and takes no account of the benefits the Claimants will receive from the R&D and E&T spending they chose.

152. The second circumstance under which Canadian courts have applied the "wrongdoer rule" is also not present. Canada has not withheld any facts which the Claimants need to prove their loss. In fact, it is the Claimants, themselves, who have refused to produce information necessary to calculate their loss. The Claimants have refused to provide:

- Ms. Emerson's past oil price forecasts;[318]
- documents concerning the model and method used by Ms. Emerson to generate her oil price forecast;[319]

wrongdoing prevents lost profits from being calculated with precision...[N]one of the cases espousing the flexibility principle can be read to authorize the award of speculative damages [emphasis added]."

[317] **CA-226**, *Ticketnet* ("In my view, the maxim should only apply where the wrongdoer's acts make it difficult or impossible for the innocent party to prove its loss or where the facts needed to prove the loss are known solely by the wrongdoer and the wrongdoer does not disclose these facts to the innocent party.").

[318] Redfern Schedule, October 6, 2009, ¶ 34; Redfern Schedule, April 19, 2010, ¶ 9.

[319] Redfern Schedule, October 6, 2009, ¶ 31-33.

- documents relating to the Claimants' rate of return, which would provide a contemporaneous assessment of the risks of their forecast; and [320]
- economic data relating to the benefits from their R&D spending.[321]

153. Thus, the Claimants have not proven that this Tribunal is bound by any "wrongdoer rule" to compensate damages that are not reasonably certain.

3. It is not "Imperative" that the Tribunal Award Damages

154. Article 1135(1) of the NAFTA only allows the Tribunal to award monetary damages that have been incurred and are reasonably certain.[322] The Claimants argue that the limits of the NAFTA and international principles of compensation can be overlooked because the NAFTA does not allow a tribunal to order a State to refrain from future conduct.[323] Thus, the Claimants argue that they have no choice but to claim uncertain and un-incurred damages because they cannot request an order that the Guidelines be revoked.

155. However, the Claimants did have a choice. For example, the Claimants could have claimed for any loss of value to their business from the Guidelines. Under this method, the Claimants' damages would be any difference between the value of the projects with and without the Guidelines. That difference, if any, may be a loss they have already incurred. The Claimants chose not to value their damages in this way. Instead, they chose to provide the Tribunal with only one way to quantify their losses. The Claimants cannot rely on their own choices to avoid the plain limits of the NAFTA and their burden of proof.

[320] Counter Memorial, ¶ 382; Rejoinder, ¶ 334; Walck Report I, ¶ 142; Walck Report II, ¶ 190.

[321] Redfern Schedule, April 19, 2010, ¶ 3-4.

[322] Hearing Transcript, p. 1316:7-12.

[323] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 67.

4. The Claimants' Forecasts are Not Conservative

156. The Claimants argue that the uncertainty of their forecasted damages can be overlooked because, they assert, it is conservative. However, the Claimants have provided no evidence to demonstrate that their forecasts are conservative. They cited no evidence to support their assertion that Hibernia and Terra Nova are likely to produce more oil than their current production profiles.[324] Nor did they cite any evidence to support their assertion that their Ordinary Course Expenditure on R&D will decrease in the production phase.[325] Indeed, Professor Noreng explained that this assertion has no foundation.[326] He was not cross examined on this evidence.

157. The Claimants' only evidence that their oil price forecast is conservative is the reference case scenarios of the Energy Information Association, the International Energy Agency, and National Energy Board.[327] However, Peter Davies confirmed that forecasts cannot be compared to reference case scenarios.[328]

158. Thus, the Claimants have provided no evidence to support their assertion that their forecast is conservative. Conversely, the difference between their initial forecast eighteen months ago and the actual values observed since demonstrates that their

[324] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 79.

[325] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 79.

[326] Noreng, ¶ 22.

[327] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 79.

[328] Counter Memorial, ¶ 342-352; Rejoinder, ¶ 301-310; Davies I, ¶ 44; Davies II, ¶¶ 4, 7-8, 26-31; Davies III, ¶¶ 10-17. Note in particular that the reference case scenarios against which the Claimants compare their forecast specifically differentiate themselves from forecasts. For example: the IEA 2009 Reference Case Scenario explicitly states that it "does not include possible, potential or even likely future policy initiatives, thus it cannot be considered a forecast of what is likely to happen" (ESAI Exhibit 13, p. 55); the EIA's 2010 Reference Case states that its projections "are not directly comparable with private energy forecasts that include estimates of policy changes in their scenarios" (ESAI Exhibit 9, p. 3); and the NEB 2007 Reference Case Scenario explicitly states that it is not a forecast (**RE-55**, National Energy Board, "Canadian Energy, Supply and Demand to 2025 " (July 1, 2003), p. 7).

forecasts are not conservative. The Claimants' allegedly "conservative" forecast was inflated by almost [redacted].[329]

F. The Claimants Exaggerate Their Loss Through a Risk-Free Discount Rate

159. Canada has demonstrated above that the Claimants' future loss is too uncertain to be awarded. However, if that loss is compensated, it must be discounted to reflect its uncertainty. Mr. Walck assesses that discount rate at 15%.[330]

160. Despite the considerable uncertainty in their damages calculation, the Claimants maintain they are entitled to a risk-free discount rate. Thus, the Claimants not only continue to exaggerate their estimated future losses, they also continue to exaggerate the present value of those future losses.

161. Mr. Rosen acknowledged that he provided no authority for applying a risk-free discount rate.[331] Conversely, every authority on the record confirms that the discount rate must reflect the risk of the cash flows that are being discounted.[332] Moreover, leading

[329] The Claimants' initial calculation was $65.41 million (Rosen I, ¶ 14) but their updated calculation was $60.02 million (Rosen III, ¶ 4), including a new tax gross-up o[redacted] (Walck III, ¶ 48).

[330] Walck Report I, ¶¶ 131-152; Walck Report II, ¶¶ 169-206; Walck Report III, ¶¶ 114-118.

[331] Hearing Transcript, p. 952-7-13 ("Q: In your reports, do you cite any journals to support your view? A: No. Q: Do you cite any textbooks? A: No. Q: Any articles? A: No.).

[332] See Walck Report I, ¶¶ 135-137. Moreover, the concept of providing a risk-free fund from which a plaintiff can fund any future damages is one that Mr. Rosen borrows from tort law. (Hearing Transcript, p. 1008:1-12 (Mr. Walck: "Mr. Rosen pulls a concept from tort law, and namely the law for personal injury, wrongful death kinds of actions, where public policy concerns for the protection of an injured person require deliberate overcompensation of the plaintiff to take any risk that they might have to invest and take investment risks, to take that away from them and put all of that risk on the defendant. That's not used in a business context that I've seen, and I have been in practice for 33 years and done several hundred litigation and arbitration engagements. I have never seen it before.")). As Mark Kantor explains, "while [the concept of a risk-free rate] has been used in personal injury and disability cases, it makes far more sense to recognize risk in the discount rate, so that the investor is not compensated as if the future sums were guaranteed." **(GFA-10,** Working Draft of AICPA Audit and Accounting Guide "*Entities With Oil and Gas Producing Activities*, October 9 2009").

valuation authorities state that using a risk-free rate to discount risky cash flows is one of the most egregious errors analysts can make.[333]

162. Despite having filed three expert reports, Mr. Rosen waited until the hearing to offer an alternative to his risk-free discount rate, but provided no documents or explanation to support this alternative.[334]

G. The Claimants Inflate Their Loss Through a Tax Gross-Up

163. At the eleventh hour, the Claimants requested the Tribunal to pay any compensation to the U.S. parents under NAFTA Article 1116 rather than to the Canadian enterprises under NAFTA Article 1117.[335] Furthermore, they argue that their compensation must therefore be grossed-up to account for the different tax treatment of the U.S. parents and the Canadian enterprises.

164. The Claimants' request is too late. First, the Claimants have quantified the damages of the Canadian enterprises in this arbitration, and not those of the U.S. parents.[336] An award to the U.S. parents would therefore be incongruous with the Claimants' damages model. Second, the Claimants brought their claim under Article 1117[337] and the Tribunal is therefore bound by Article 1135(2), which states that, "where

[333] Walck Report I, ¶ 139; **GFA-12,** Shannon P. Pratt et al., *Valuing a Business: The Analysis and Appraisal of closely held companies* (New York: (4th ed.) McGraw-Hill Books, 2000).

[334] Hearing Transcript, p. 848:14-22. Indeed, ExxonMobil's share price-earnings ratio suggested by Mr. Rosen does not reflect the risks inherent in his projections because it is a one-time snapshot of the ratio. By contrast, Mr. Walck's discount rate reflects the Claimants' return on equity over the long term. Indeed, ExxonMobil has projected returns of 12-18% in 2009 and 13-19% in 2010 (**GFA-15,** *Value Line Investment Survey*, September 11, 2009; **GFA-38,** *Value Line Investment Survey*, Exxon Mobil Corp., March 12, 2010), which is consistent with Mr. Walck's 15% rate.

[335] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 81 ("Claimants request that, as provided in NAFTA Article 1116, the Award be made to them.").

[336] For example, Mr. Rosen's damages model forecasts the *Projects'* Incremental Spending, and not the effect of that Incremental Spending on the U.S. parents (Rosen III, Schedules 2 and 3). Also, the Claimants argue they will invest an Award in Canadian Bonds (Hearing Transcript, p. 945:10-22). However, it is not logical that a U.S. company, which has received compensation in its own name, will invest in Canadian bonds.

[337] Notice of Intent to Submit a Claim to Arbitration, 2 August 2007, ¶ 6 (Mobil); Notice of Intent to Submit a Claim to Arbitration, 2 August 2007 (Murphy Oil) ¶ 6; Request for Arbitration, 1 November 2007, Preamble.

a claim is made under Article 1117(1)... (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise...". Moreover, an award to the Canadian enterprises would avoid any tax problems.[338]

165. Until their Post-Hearing Brief, the Claimants provided no reason why compensation should be awarded to the U.S. parents. Now, for the first time, they argue that payment to the Canadian enterprises "would create other issues that would then have to be compensated for in an Award."[339] However, they do not even identify these issues. Hence, the Claimants have provided no justification for their gross-up of [redacted][340]

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[338] Hearing Transcript, pp. 958:20-959:2 ("Q: Okay. If an award is made payable to the Canadian entity--- A: Yes. Q: -- is a tax gross-up required? A: No.").

[339] Claimants' Post-Hearing Brief, 3 December 2010, ¶ 82.

[340] Walck Report III, ¶ 46.