

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

BETWEEN:

**MOBIL INVESTMENTS CANADA INC. &
MURPHY OIL CORPORATION**

Claimants

AND

GOVERNMENT OF CANADA

Respondent

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

**CLAIMANTS' SUBMISSION ON THE US AND
MEXICO'S NAFTA ARTICLE 1128 SUBMISSIONS**

ARBITRAL TRIBUNAL:

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

September 1, 2010

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. THE GUIDELINES VIOLATE ARTICLE 1106(1)(C)	3
A. Claimants Agree with the Interpretation of Article 1106(1)(c) Advanced by Mexico in Its Article 1128 Submission	3
B. Mexico’s Article 1128 Submission Does Not Support Canada’s Argument that Article 1106(1)(c) Permits Imposition of the Guidelines	4
III. THE GUIDELINES ARE NOT COVERED BY CANADA’S ANNEX I RESERVATION TO THE NAFTA.....	8
A. The Guidelines Do Not Qualify As A Covered “Subordinate Measure”	13
B. The Canadian Court Decisions Do Not Address Whether the Guidelines Are a “Subordinate Measure” under the NAFTA	21
IV. RECENT DEVELOPMENTS IN NAFTA CASE LAW SUPPORT CLAIMANTS’ CASE.....	25
A. The Merrill & Ring Award Is Consistent with Claimants’ Presentation of the Applicable Standard Under Article 1105	25
B. The Merrill & Ring Award Does Not Support Canada’s Article 1106 or Damages Case	28
1. The Merrill & Ring Award Does Not Support Canada’s Article 1106 Case.....	28
2. The Merrill & Ring Award Does Not Support Canada’s Damages Case	31

C. The Cargill Award Is Not a Correct Statement of the Applicable Standard Under Article 1105	32
V. CANADA’S REJOINDER RAISES A JURISDICTIONAL ISSUE UNDER NAFTA ARTICLE 1116 FOR THE FIRST TIME	34

I.

INTRODUCTION

1. Claimants hereby submit their response to the Article 1128 Submissions of Mexico and the United States,¹ as provided in the Minutes of the First Session of the Arbitral Tribunal, dated May 6, 2009.

2. In brief, the Guidelines violate Article 1106(1)(c) under the standard advocated by Mexico precisely because they require Claimants to “purchase, use or accord a preference to goods produced or services provided” or to “purchase goods or services from persons” in Canada. Canada’s attempts to present ways for Claimants to spend up to \$10 million annually in unnecessary R&D and E&T expenditures without somehow spending money on or according a preference to goods and services in the Province of Newfoundland are unavailing. In addition, the Guidelines are not covered by Canada’s Annex I reservation because (i) they do not constitute an “existing non-conforming measure” as required by the plain text of Article 1108(1); and (ii) they were not adopted “under the authority of and consistent with” any measure listed in Canada’s Schedule to Annex I. Among other reasons, as demonstrated in Claimants’ Reply Memorial, the Guidelines impose obligations that are not consistent with the Hibernia and Terra Nova Benefits Plans that the Board had previously adopted. Moreover, the NAFTA prohibits Canada from adopting the Guidelines as an amendment to the Accord Acts. Good-faith interpretation of the NAFTA does

¹ Article 1128 Submission of the United Mexican States (July 8, 2010) (hereinafter “Mexico Article 1128 Submission”); Article 1128 Submission of the United States of America (July 8, 2010) (hereinafter “US Article 1128 Submission”).

not permit Canada to circumvent this prohibition by characterizing the Guidelines as a supposed “subordinate measure.”

3. As discussed with Canada, and without objection on its part, Claimants also take this opportunity to comment on two NAFTA Awards that were made public subsequent to the submission of their Reply Memorial, but prior to the submission of Canada’s Rejoinder. Canada has presented its view of those cases in its Rejoinder.

4. The Award of the Chapter 11 Tribunal in *Merrill & Ring v. Canada* provides strong support for Claimants’ argument that the applicable standard under Article 1105 has evolved since 1926 and provides a lower threshold for state action than the “egregious and shocking” standard on which Canada relies. While the recent Chapter 11 Award in *Cargill v. Mexico* takes a different approach to Article 1105, the weight of authority, including *Merrill*, falls clearly behind Claimants’ position. Canada’s attempts to rely on *Merrill* to support its Article 1106 and damages arguments ignore the language of that Award and the facts on which it was based. To the contrary, the *Merrill* Award and the recent ICSID Award in *Lemire v. Ukraine*, on which Canada also seeks to rely, are either irrelevant or provide support for Claimants’ position.

II.

THE GUIDELINES VIOLATE ARTICLE 1106(1)(C)

A. Claimants Agree with the Interpretation of Article 1106(1)(c) Advanced by Mexico in Its Article 1128 Submission

5. Mexico's Article 1128 Submission provides the following interpretation of Article 1106(1)(c):

[A] requirement to conduct research and development and / or education and training in the territory of a Party would not amount to a breach of Article 1106(1)(c) in the absence of a requirement to purchase, use or accord a preference to goods produced or services provided in the territory of that Party, or to purchase goods or services from persons in the territory of that Party.²

6. Claimants agree with this interpretation, as they agree with Mexico's further points that "not all types of performance requirements are prohibited by Article 1106," and "Article 1106(5) clarifies that paragraphs 1 and 3 of Article 1106 apply only to the types of performance requirements listed in therein [sic]."³ Indeed, Mexico's interpretation accords perfectly with that put forward by Claimants in this arbitration. As Mexico notes, the NAFTA forbids any requirement imposed on an investor to "purchase, *use or accord a preference* to ... services provided in the territory of" a Party or to "purchase ... services from persons

² Mexico Article 1128 Submission, ¶ 2.

³ *Id.* ¶ 1. See Claimants' Reply Memorial, ¶ 31 ("Claimants agree with Canada that the only requirements prohibited under Article 1106(1) are those listed in that provision").

in the territory of” a Party.”⁴ Claimants have consistently argued that the Guidelines violate Article 1106(1)(c) because they do precisely that.

7. For example, Claimants argued in their Memorial that expenditures on R&D entail “the purchase of services” and “the purchase of goods ... to support those services.”⁵ In their Reply Memorial, Claimants established that the word “services” plainly includes R&D and E&T,⁶ and that Article 1106(1)(c) prohibits a requirement to “use or accord a preference to” services provided in the territory of a Party.⁷ Even if, as Canada argues, the Guidelines can potentially be satisfied, for example, by funding a research chair at a local university or providing funds for the furnishing of a classroom, and even if such grants are not considered to be the purchase of goods or services, such expenditures nevertheless “accord a preference” to research and educational services provided in the Province, in violation of the NAFTA.⁸

B. Mexico’s Article 1128 Submission Does Not Support Canada’s Argument that Article 1106(1)(c) Permits Imposition of the Guidelines

8. Mexico’s Article 1128 Submission lays out its interpretation of Article 1106(1)(c) in clear terms: if an

⁴ Mexico Article 1128 Submission, ¶ 2.

⁵ Claimants’ Memorial, ¶ 151. *See also* First Witness Statement of Edward Graham, ¶ 6 (R&D “typically involves the procurement of engineering services and, to a lesser extent, the purchase of goods needed to fabricate an original technology or test a design.”).

⁶ Claimants’ Reply Memorial, ¶¶ 24-29.

⁷ *Id.* ¶ 79.

⁸ *Id.* ¶ 80.

Investor is not required to purchase, use or accord a preference to goods produced or services provided in the territory of a Party, or to purchase goods or services from persons in the territory of that Party, then there is no violation of Article 1106(1)(c).⁹ As noted above, Claimants agree with this position.¹⁰ Yet, as Claimants have consistently argued, it is impossible to make the expenditures required by the Guidelines on R&D and E&T without purchasing, using or according a preference to local goods and services, or purchasing services from persons in Canada. Therefore, the Guidelines violate Article 1106(1)(c).

9. Support for this argument can be found in the GATT Panel Report in the *Canada-FIRA* case.¹¹ The Panel analyzed whether undertakings to buy from Canadian suppliers gave preference to the purchase of Canadian goods, in violation of Article III:4 of the GATT.¹² The Panel found that “purchasing imported products through a Canadian agent or importer would normally be less advantageous” than purchasing such products directly from the foreign producer. Therefore, in practice, the imported product would have difficulty in competing with Canadian products and would be treated less favorably. Even though the undertakings were not formulated as requirements to buy Canadian goods, they

⁹ Mexico Article 1128 Submission, ¶ 2.

¹⁰ *Supra* ¶¶ 6-7.

¹¹ **CA-88**, *Canada - Administration of the Foreign Review Act*, GATT Panel Report, L/5504 - 30S/140 (Feb. 7, 1984).

¹² Article III:4 of the GATT provides, in relevant part, that “[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin[.]” **CA-183**, General Agreement on Tariffs and Trade, October 30, 1947, 55 U.N.T.S. 194, art. III:4 (entered into force January 1, 1948).

would normally have the same trade-distorting effect. As a result, the undertakings were found to be inconsistent with Canada's obligations under GATT Article III:4.¹³

10. Mexico's Submission therefore does not assist Canada's latest attempts to argue that the Guidelines do not require Claimants to purchase, use or accord a preference to local goods and services. *First*, Canada states conclusorily that Article 1106(1)(c) applies "only in situations where the service supplier and the service consumer are separate entities" and "only when a requirement compels the provision of a service from a domestic service provider to the investment of the investor."¹⁴ Therefore, it contends that establishing an in-house R&D facility or providing in-house E&T in the Province could qualify under the Guidelines, but does not violate Article 1106(1)(c).¹⁵ There is no support for Canada's erroneous interpretation in the text of the NAFTA or in Mexico's Submission. In any event, establishing an in-house R&D or E&T facility and conducting R&D or E&T there would of course require Claimants to spend money on local goods and services. Therefore, such a project involves the purchase, use and accordance of a preference to goods produced and services provided in the territory of Canada and thus runs afoul of the prohibition contained in Article 1106(1)(c).

11. *Second*, Canada argues that donations to local institutions do not violate Article 1106(1)(c) because they are not made in consideration for the "reciprocal provision" of a service.¹⁶ This argument ignores the fact that "according a

¹³ **CA-88**, *Canada-FIRA* GATT Panel Report, ¶ 5.10.

¹⁴ Canada's Rejoinder ¶ 22.

¹⁵ *Id.* ¶¶ 38, 41.

¹⁶ *Id.* ¶ 44.

preference” to local services requires no such reciprocal obligation.

12. *Third*, Canada postulates that funding study and work abroad terms do not violate the NAFTA.¹⁷ It is absurd to suggest that Hibernia and Terra Nova will spend \$10 million a year on such programs, and this argument contradicts the Guidelines’ emphasis on R&D and Canada’s own submissions before this Tribunal in their defense.¹⁸ In any case, such expenditures require Claimants to “purchase ... services from persons in the territory” of Canada (as expenditures must be made in the Province to be eligible under the Guidelines),¹⁹ even if those services are to be provided elsewhere and to a third-party recipient.

13. Further, the actual wording in the Accord Acts with regard to E&T expenditures is that “expenditures shall be made for ... education and training to be *provided in the province*.”²⁰ In turn, the Guidelines define “[s]cholarships and work terms including provincial residents who may study or work outside the Province” as “*education and training in the Province*, as contemplated in Section 45 of the [Accord Acts].”²¹ Thus, the Guidelines recognize that funding study and work abroad programs is simply another way of

¹⁷ *Id.* ¶ 42.

¹⁸ *See* Claimants’ Reply Memorial, ¶¶ 82-83.

¹⁹ **CE-1**, CNLOPB, Guidelines for Research and Development Expenditures, § 3.1 (Oct. 2004) (hereinafter “2004 R&D Guidelines”).

²⁰ **CA-11**, *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C., 1987, c. 3, s. 45(3)(c); **CA-12**, *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, R.S.N.L. 1990, c. C-2, s. 45(3)(c) (emphasis added). *See also* **CE-1**, 2004 R&D Guidelines, § 1.0.

²¹ **CE-1**, 2004 R&D Guidelines, § 3.4.

according a preference to E&T services “provided in the province.”

* * *

14. In sum, Claimants agree with Mexico’s interpretation that Article 1106(1)(c) prohibits regulations that require an investor to “purchase, use or accord a preference to goods produced or services provided in the territory of that Party, or to purchase goods or services from persons in the territory of that Party.”²² The Guidelines violate Article 1106(1)(c) precisely because they do require Claimants to purchase, use or accord a preference to R&D and E&T services provided in Newfoundland or to purchase goods or services from persons in Canada.

III.

THE GUIDELINES ARE NOT COVERED BY CANADA’S ANNEX I RESERVATION TO THE NAFTA

15. Canada’s principal argument under Article 1106 is that the Accord Acts’ R&D and E&T requirements are consistent with the NAFTA and that it did not believe that those requirements were “non-conforming measures” when it included them in its Schedule to Annex I, which covers “non-conforming measures.”²³ Canada also advances an alternative argument that the Accord Acts, and the Guidelines as “subordinate measures” adopted thereunder, are covered by its Annex I reservation.²⁴ This argument rests on a dual proposition: (i) that a subordinate measure adopted *after* the NAFTA’s entry into force can be an “*existing* non-conforming

²² Mexico Article 1128 Submission, ¶ 2.

²³ See Canada’s Counter-Memorial, ¶¶ 203-213.

²⁴ *Id.* ¶¶ 222-238.

measure” under Article 1108(1); and (ii) that the opinion of two Newfoundland Court of Appeal judges on a point of Canadian administrative law requires this Tribunal to find that the Guidelines were adopted “under the authority of and consistent with” the Accord Acts.²⁵

16. In response, Claimants demonstrated that the exception stated in Article 1108(1) of the NAFTA applies only to “existing” measures and that future measures, whether subordinate or otherwise, do not fall within the unequivocal definition of “existing” in Article 1108(1).²⁶

17. Mexico and the United States, in their Article 1128 Submissions, conclude that a Party’s Schedule to Annex I includes both subordinate measures existing as of the time of the NAFTA’s entry into force and future subordinate measures, “so long as the subordinate measure is adopted or maintained under the authority of and consistent with the listed measure.”²⁷ This conclusion is based on the demonstrably false premise that “maintained” is always used in the NAFTA to signify “in effect at the time of NAFTA’s entry into force” and “adopted” to signify “entered into effect after the date of NAFTA’s entry into force.”²⁸

18. This approach is inconsistent with the text of the NAFTA. An example of a contrary use of the word “maintained” is provided in NAFTA Annex 314(1)(b)(ii), which allows certain export taxes:

²⁵ *Id.*

²⁶ *See* Claimants’ Reply Memorial, ¶¶ 85-105.

²⁷ US Article 1128 Submission, ¶ 8; Mexico Article 1128 Submission, ¶ 3.

²⁸ US Article 1128 Submission, ¶¶ 5-7; Mexico Article 1128 Submission, ¶ 3.

to ensure the availability of sufficient quantities of such foodstuff to domestic consumers or of sufficient quantities of its ingredients, or of the goods from which such foodstuffs are derived, to a domestic processing industry, when the domestic price of such foodstuff is held below the world price as part of a governmental stabilization plan, provided that such duty, tax, or other charge

(i) does not operate to increase the protection afforded to such domestic industry, and

(ii) is *maintained* only for such period of time as is necessary to maintain the integrity of the stabilization plan.²⁹

19. Similarly, “adopted” cannot refer only to measures adopted after the NAFTA entered into force when, for example, in Annex 304.2 it states that:

Article 405 of the Canada-United States Free Trade Agreement is hereby incorporated and made a part of

²⁹ **CA-179**, NAFTA, Annex 314(1)(b) (emphasis added). *See also CA-180*, NAFTA, Annex 300-B, Section 4(4)(a) (permitting NAFTA Parties to take bilateral emergency tariff actions under certain circumstances in relation to the import of textile and apparel goods, subject to the following limitation: “no action may be *maintained* for a period exceeding three years or ... have effect beyond the expiration of the transition period [the period between the entry into force of the NAFTA and the elimination of certain tariffs]”) (emphasis added); **CA-181**, NAFTA, art. 801(2)(c) (allowing NAFTA Parties to take bilateral action in relation to the trade in goods in certain circumstances, subject to the following limitation: “no action may be *maintained* (i) for a period exceeding three years ... or (ii) beyond the expiration of the transition period [.]”); *see also CA-181*, art. 805 (defining “transition period” as “the 10-year period beginning on January 1, 1994”).

this Annex solely with respect to measures *adopted* by Canada or the United States *prior to the date of entry into force of this Agreement*[.]³⁰

20. The United States expresses no conclusion with respect to the implications of its view on the definition of “existing non-conforming measure” in Article 1108(1). To the contrary, the United States expressly states as follows:

Under Article 1108(1)(a)(i), Articles 1102, 1103, 1106, and 1107 do not apply to “any existing nonconforming measure that is maintained by . . . a Party at the federal level, as set out in its Schedule to Annex I or III” to the Agreement. “Existing” is defined under Article 201(1) to mean “in effect on the date of entry into force of this Agreement.”³¹

21. By contrast, Mexico “agrees with Canada” that “subordinate measures that are adopted *after* the NAFTA entered into force are covered by the reservations in Articles 1108(1)(a)(i) and (ii),” so long as they are adopted under the authority of and consistent with a measure listed in Annex I.³²

22. Review of the Article 1128 Submissions thus reveals a single, limited point common to the views expressed by the NAFTA Parties: the reference to subordinate measures in the headnote to Annex I can encompass future subordinate measures, provided that they are adopted or maintained under the authority of and consistent with the listed measure. The Submissions reflect no tripartite concurrence on the implications of this view on the application of Article 1108(1). They reflect no concurrence at all as to the

³⁰ CA-178, NAFTA, Annex 304.2 (emphasis added).

³¹ US Article 1128 Submission, ¶ 2.

³² Mexico Article 1128 Submission, ¶ 3 (emphasis in original).

implications of this view on the facts of this case. Both Mexico and the United States expressly disavow any position on the application of the law to the facts of this case.³³

23. At most, a subsequent practice on the interpretation of a treaty is something to be taken into account along with the other context for the text and its object and purpose; it does not qualify as a source within the primary rule of treaty interpretation of Article 31(1) of the Vienna Convention.³⁴

24. For the reasons described in Claimants' Reply Memorial, Claimants continue to maintain that the reading of the headnote to Annex I expressed by Mexico and the United States is erroneous and, as noted, is based on a false premise.³⁵ Nevertheless, assuming *arguendo* that the limited common view of that clause expressed by the NAFTA Parties is correct, Claimants address its implications for the issues to be decided on these facts by the Tribunal.

25. As demonstrated below, even taking the common view into account, the Guidelines clearly do not qualify as a subordinate measure falling within the exception in Article 1108(1), and Canada's contention that this Tribunal must defer to an opinion of two judges on a local court of appeal on this question is without merit.

³³ US Article 1128 Submission, ¶ 1; Mexico Article 1128 Submission, headnote.

³⁴ **CA-9**, Vienna Convention on the Law of Treaties, May 23, 1969, 1115 U.N.T.S. 31 (entered into force January 27, 1980), art. 31(3) (hereinafter "VCLT") ("There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]").

³⁵ Claimants' Reply Memorial, ¶¶ 93-105.

A. The Guidelines Do Not Qualify As A Covered “Subordinate Measure”

26. The Guidelines do not constitute a “subordinate measure” within the meaning of the headnote to Annex I for several reasons.

27. *First*, as the Article 1128 Submission of the United States observes, the exception stated in Article 1108(1) is limited to *existing* measures.³⁶ As a reminder, that Article provides in pertinent part as follows:

1. 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,

(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[.]³⁷

28. The condition that the measure be “existing” – “in effect on the date of entry into force of this Agreement” pursuant to Article 201³⁸ – applies to all measures within the exception, whether subject to an additional condition of listing in Annex I (federal and state and provincial measures after 1996) or not subject to such an additional condition (local

³⁶ US Article 1128 Submission, ¶ 2.

³⁷ CA-3, NAFTA, art. 1108(1) (emphasis added).

³⁸ CA-2, NAFTA, art. 201.

measures and state and provincial measures before 1996). The Accord Acts fall into the first category, and therefore by the plain terms of Article 1108(1) *both conditions* must be satisfied: the Acts must be “existing” and listed in Annex I. The headnote to Annex I merely explains how the measures listed in that Annex should be read. It does not, nor can it, alter or amend the terms of the exception stated in Article 1108(1).

29. Even accepting *arguendo* the NAFTA Parties’ reading of the headnote to Annex I to include subordinate measures adopted after the entry into force of the NAFTA, Claimants submit that it can only be viewed as expressing that future measures specifically contemplated by an Annex reservation must be deemed to fall within that reservation.

30. For an example of a future subordinate measure that would be covered by Article 1108(1) under this interpretation, the Tribunal need look no further than the Board’s Decision 97.02 adopting the Benefits Plan for Terra Nova.³⁹ Decisions adopting benefits plans fall within the broad definition of “measure” in Article 201.⁴⁰ They are explicitly contemplated by Canada’s Annex I exception for the Accord Act, which specifically notes that benefits plans must 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” and the Board’s role in providing input into the plan.⁴¹ A future decision adopting a benefits plan that contains the requirement mentioned in the exception is inherently covered by the exception; otherwise, the

³⁹ **CE-57**, CNLOPB, Terra Nova Decision 97.02 (Dec. 1997)

⁴⁰ See **CA-2**, NAFTA, art. 201 (“**measure** includes any law, regulation, procedure, requirement or practice; ...”).

⁴¹ **CA-7**, NAFTA, Annex I, Schedule of Canada, exception for Accord Acts.

exception would be rendered meaningless. Decision 97.02 is precisely the type of future measure that the exception for certain “existing measures” in Article 1108(1) could cover. Consistent with this view, Claimants have at no point in this arbitration ever suggested that the Board’s decision adopting the Terra Nova Benefits Plan violates the NAFTA.⁴²

31. Other examples of such a measure include the “licenses” for “facilities that produce or use nuclear materials,” specifically mentioned in the first exception of the Schedule of the United States to Annex I,⁴³ and the “determinations” and “court order[s]” under the Investment Canada Act mentioned in the first exception of the Schedule of Canada to Annex I.⁴⁴ Each of these constitutes a “measure” under Article 201. Unless future licenses for nuclear materials under the US Atomic Energy Act and determinations under the Investment Canada Act were deemed covered, the exception for these acts would be rendered ineffective. Article 1108(1) implicitly covers future measures of this genre.

32. The Guidelines, by contrast, are not at all this kind of measure. They are not a case-specific application specifically anticipated in the exception, but an exercise in law-making – an enactment of new rules of general application, which set forth a new general legal regime that did not previously exist.⁴⁵ The Guidelines cannot be deemed an “existing measure” within the meaning of Article 1108(1).

⁴² See Claimants’ Reply Memorial, n. 8.

⁴³ **CA-182**, NAFTA, Annex I, Schedule of the United States, exception for Atomic Energy Act.

⁴⁴ **CA-7**, NAFTA, Annex I, Schedule of Canada, exception for Investment Canada Act.

⁴⁵ See **CE-1**, 2004 R&D Guidelines, § 1 (“This document is intended to provide an operator engaged in petroleum exploration

33. This approach is fully consistent with that applied by other tribunals addressing the application of similar “grandfathering” provisions in trade agreements.⁴⁶ As noted in Claimants’ Reply, GATT panels repeatedly found future executive acts mandated by pre-1947 legislation to be covered by the GATT’s grandfathering exception for “existing legislation,” but future discretionary acts by the executive not to be covered.⁴⁷

34. *Second*, in any event, the Guidelines do not meet the requirements for a covered subordinate measure stated in the headnote to Annex I. They were not adopted under the authority of the listed measure, and they are not consistent with that measure as it existed at the time of their adoption.

35. Headnote 2(f) to Annex I states in pertinent part as follows:

Measures identifies the laws, regulations or other measures, *as qualified, where indicated, by the Description element*, for which the reservation is taken. A measure cited in the Measures element

...

development and production activities in the Newfoundland Offshore Area with guidance parameters and criteria for R&D expenditures in the Province[.]”).

⁴⁶ See US Article 1128 Submission, n. 1 (“Article 1108 creates a system of limited ‘reservations’ and ‘grandfathering’ to exempt certain laws and regulations that are not in conformity with the non-discrimination, performance requirement and senior management obligations” in the Chapter.) (*citing* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. DOC. No. 103-159, Vol. 1, 103d Cong., 1st Sess. at 142 (1993)).

⁴⁷ Claimants’ Reply Memorial, ¶ 105 & n. 108.

(ii) includes any subordinate measure adopted or maintained *under the authority of and consistent with* the measure[.]⁴⁸

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, including 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.”⁴⁹ The Guidelines, however, were not adopted under the Act’s grant of authority to the Board to approve or reject benefits plans, to which Canada’s Schedule refers. Instead, they were adopted under a general grant of authority in the Accord Acts to issue guidelines.⁵⁰ That general grant of authority is nowhere mentioned in the description of the non-conforming measure. The Guidelines – unlike the Board decision adopting the Terra Nova Benefits Plan – were not adopted under the authority of the listed measure, as qualified by Canada’s description of it.

⁴⁸ **CA-6**, NAFTA, Annex I, Interpretative Note, s. 2(f)(ii).

⁴⁹ **CA-7**, NAFTA, Annex I, Schedule of Canada, exception for Accord Acts.

⁵⁰ See **CA-11**, *Federal Accord Act*, s. 151.1(1); **CA-53**, *Hibernia and Petro-Canada v. C-NOPB*, Supreme Court of Newfoundland and Labrador Court of Appeal, 2008 NLCA 46 (Sept. 4, 2008), ¶ 122 (hereinafter “*Hibernia II*”) (per Justice Barry) (“Although s. 151.1(2) of the federal legislation says that the Board’s guidelines shall be deemed not to be subordinate legislation for the purposes of the Statutory Instruments Act, the Board’s function issuing guidelines might be regarded as a legislative rather than an adjudicative one[.]”).

37. Most importantly, the Guidelines cannot be viewed to be *consistent with* the excepted measure as it existed in 2004. Under the NAFTA Parties' reading of the headnote to Annex I, the excepted measure includes all subordinate measures adopted under its authority, whether before or after the NAFTA's entry into force. Accepting *arguendo* that reading, the relevant excepted measure as of 2004 included not only the Accord Acts, but also the Board decisions adopting the Benefits Plans for Hibernia and Terra Nova.

38. The Guidelines cannot be viewed as "consistent with" the excepted measure as it existed at the time of their adoption. The ordinary meaning of "consistent," current at the time the NAFTA was drafted, is "[i]n agreement: compatible."⁵¹ As demonstrated at length in the Reply, the Guidelines made dramatic changes to Claimants' substantive R&D and E&T commitments, reporting requirements, and the relationship between R&D activity and the operators' authorization to continue with their operations.⁵² The Guidelines are not "in agreement" or "compatible" with the pre-2004 framework. Therefore, they cannot be viewed as consistent with the pre-existing legal regime of measures adopted under the Accord Acts.

⁵¹ **CA-185**, The American Heritage Dictionary Second College Edition, p. 313 (1991). *See also* **CA-188**, Webster's Ninth New Collegiate Dictionary, p. 280 (1991) ("compatible"); **CA-186**, Merriam-Webster's Collegiate Dictionary, p. 266 (2003) ("marked by agreement: compatible"); **CA-187**, Oxford English Dictionary Online ("[a]greeing or according in substance or form; congruous, compatible"), *available at* dictionary.oed.com (last checked August 13, 2010).

⁵² *See* Claimants' Reply Memorial, ¶ 107 (table comparing differences between Guidelines and pre-existing regime).

39. Canada's argument that the Guidelines are consistent with the *Accord Acts* misses the point.⁵³ If the Board had simply used the Guidelines to inform its negotiating position on benefit plans for future projects only — i.e. those projects that did not have a benefits plan in place in 2004 — then when the Board made a subsequent decision on whether to adopt a benefits plan that would be covered by Canada's Annex I reservation, there would be no measure with respect to that future project with which the Guidelines-informed Board position would be inconsistent. However, because under the headnote to Annex I the Guidelines must be compared against the measure and all pre-existing subordinate measures, including here the Hibernia and Terra Nova Benefits Plans and the Board's Decisions 86.01 and 97.02, they cannot be read as being consistent with the listed measure.⁵⁴

40. This conclusion as to the application of "consistent with" in the headnote to Annex I is confirmed by the object and purpose of the NAFTA, which include "eliminat[ing] barriers to trade in, and facilitat[ing] the cross-border movement of, goods and services," and "increas[ing] substantially investment opportunities in the territories of the Parties."⁵⁵ The Guidelines act as a barrier to the cross-border movement of R&D and E&T services, and constitute a radical amendment to the obligations of operators with pre-existing benefits plans.⁵⁶ They cannot be considered "consistent with"

⁵³ See Canada's Counter-Memorial, ¶¶ 233-234. For the avoidance of doubt, Claimants do not accept that the Guidelines are consistent with the *Accord Acts*, at least as applied to pre-existing projects like Hibernia and Terra Nova.

⁵⁴ *Supra* ¶¶ 37-38; Claimants' Reply Memorial, ¶ 107.

⁵⁵ Claimants' Reply Memorial, ¶ 99.

⁵⁶ *Supra* note 54.

the prior regime of measures and subordinate measures under the Accord Acts. Because they are not consistent with the excepted measure, the Guidelines do not meet the definition of a “subordinate measure” covered by Canada’s Annex I reservation.

41. *Finally*, the obligation to interpret treaties in good faith and the principle of effectiveness prevent Canada from adopting as a covered “subordinate measure” a measure that would not pass muster as an “amendment” to the Accord Acts.⁵⁷ As the United States observed in its Article 1128 Submission:

Under Article 1108(1)(c), Articles 1102, 1103, 1106, and 1107 do not apply to an “amendment” of a non-conforming measure set out in a Party's Schedule to Annex I or Annex III *only* “to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106, and 1107.”⁵⁸

42. As demonstrated in Claimants’ previous Memorials, the Guidelines impose substantially more burdensome requirements to purchase, use or accord a preference to local goods and services than existed under the previous regime.⁵⁹ Canada offered no response of substance to this showing in its Rejoinder. There can be little doubt, on this record, that the Guidelines “decrease[d] the conformity of the measure, as it existed immediately before” their adoption.

⁵⁷ CA-9, VCLT, art. 31(1); RA-101, *Territorial Dispute (Libya v. Chad)*, 1994 ICJ Reports 6, Judgment of 3 February 1994, ¶ 51.

⁵⁸ US Article 1128 Submission, ¶ 3 (emphasis added).

⁵⁹ Claimants’ Memorial, ¶¶ 179-193; Claimants’ Reply Memorial, ¶ 107; *supra* ¶¶ 34-40.

43. Canada thus could not permissibly put into place the Guidelines' regime as an amendment to the Accord Acts. It cannot, consistent with the requirement that the NAFTA be interpreted in good faith, be permitted to undermine the treaty's clear terms by implementing the Guidelines in the form of a supposed subordinate measure.

B. The Canadian Court Decisions Do Not Address Whether the Guidelines Are a “Subordinate Measure” under the NAFTA

44. Thus, whether or not the Tribunal adopts the interpretation of the Annex I headnote urged by Mexico and the United States, a proper reading of the NAFTA demonstrates that the Guidelines are not “subordinate measures” covered by Canada's Annex I reservation.⁶⁰ Canada has sought to rely on domestic court decisions to support its contention that the Guidelines were adopted “under the authority of and consistent with” the pre-existing legal regime.⁶¹ However, this argument is unavailing for two reasons. *First*, the Newfoundland Court of Appeal did not hold that the Guidelines were adopted under the authority of and consistent with the Accord Acts. Rather, the Court held only that it was *reasonable* for the Board to determine that it had authority to adopt the Guidelines and to apply them to projects with pre-existing benefits plans, such as Hibernia and Terra Nova. In doing so, the Court took a deferential approach to the Board's decision that does not apply to an international tribunal formed under the NAFTA. *Second*, in any event, “under the authority of and consistent with” is an international law standard and not a domestic administrative law standard. Therefore, whether the Guidelines were

⁶⁰ *Supra* ¶¶ 26-43.

⁶¹ Canada's Counter-Memorial, ¶¶ 234-238.

adopted “under the authority of and consistent with” the pre-existing regime is a question for this Tribunal to decide as a matter of first impression.

45. Soon after the Guidelines were promulgated, the operators of Hibernia and Terra Nova filed suit against the Board in Newfoundland. The Trial Court held that the Board’s decision to issue the Guidelines and apply them to Hibernia and Terra Nova was reasonable,⁶² and the Court of Appeal upheld this decision.⁶³ The Court of Appeals agreed with the Trial Court that reasonableness was the correct standard to apply to the challenged decisions of the Board.⁶⁴ Reasonableness is a deferential standard “concerned mostly with ... whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”⁶⁵ Applying this standard, both Justice Welsh and Justice Barry, two of the three judges who sat on the Court of Appeal panel, found that the Board’s interpretation of the legislative scheme as permitting application of the 2004 Guidelines was reasonable.⁶⁶ Justice Welsh also found that the parameters established by the Guidelines were reasonable.⁶⁷

⁶² **CA-52**, *Hibernia and Petro-Canada v. C-NOPB*, Supreme Court of Newfoundland and Labrador Trial Division, 2007 NLTD 14 (Jan. 22, 2007).

⁶³ **CA-53**, *Hibernia II*.

⁶⁴ *Id.* ¶¶ 58 (per Justice Welsh), 124 (per Justice Barry).

⁶⁵ *Id.* ¶ 33 (per Justice Welsh) (citation omitted). In fact, the majority criticizes the dissenting judge, Justice Rowe, for considering the question of authority as a threshold or jurisdictional question. *Id.* ¶¶ 118-123.

⁶⁶ *Id.* ¶¶ 70, 79 (per Justice Welsh); ¶ 136 (per Justice Barry).

⁶⁷ *Id.* ¶ 91 (per Justice Welsh).

46. Thus, two of the Court of Appeal judges did not consider whether the Board was actually authorized by the prior legislative scheme to apply the Guidelines to Hibernia and Terra Nova. The one judge who did address that question found that the Guidelines were “made without authority.”⁶⁸

47. Further, the *dicta* on which Canada relies to argue that the Court found that the Guidelines are “consistent with” the prior regime is contradicted elsewhere in the decision.⁶⁹ Justice Welsh stated that the Guidelines “are a *departure* from the approach adopted in the initial stages of development of the offshore petroleum industry,”⁷⁰ and Justice Rowe agreed with the operators that “the Guidelines *impose additional*

⁶⁸ *Id.* ¶ 182 (per Justice Rowe).

⁶⁹ See Canada’s Counter-Memorial, ¶ 136; **CA-53**, *Hibernia II*, ¶¶ 67-68 (per Justice Welsh) (“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. Further to this point, the effect of the Guidelines is to advise companies regarding what to expect when the Board undertakes its monitoring function This interpretation is consistent with the Board’s Decision 86.01[.]”); ¶ 105 (per Justice Welsh) (“[A]pplication of the Guidelines to the Hibernia and Terra Nova Projects does not involve an amendment to the benefits plans. Rather, the Guidelines set parameters consistent with the Board’s responsibility to monitor expenditures for research and development required under the benefits plans.”). *But see id.* ¶ 150 (per Justice Rowe) (“it is beyond question that the Guidelines impose additional R&D requirements inconsistent with [Decision] 97.02 [and Decision 86.01]”).

⁷⁰ **CA-53**, *Hibernia II*, ¶ 62 (per Justice Welsh) (emphasis added). See also *id.* (per Justice Welsh) (“These Guidelines apply to companies already in the production phase, and, to that extent, alter the earlier basic principles approach set out in the originally approved benefits plans.”)

R&D requirements inconsistent with [Decision] 97.02 The same is true regarding [Decision] 86.01[.]^{71]}

48. In any event, even if the Court of Appeals had decided that the Board had authority to promulgate the Guidelines under Canadian law (which it did not), such a decision would in no way decide the issues in dispute in this arbitration. The NAFTA makes clear that “[a] Tribunal established under [Chapter 11] shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”⁷² The NAFTA requires that a subordinate measure be adopted “under the authority of and consistent with” the relevant measure listed in a Party’s Schedule to Annex I.⁷³ This is an international law requirement, the content of which is not dictated by domestic law.⁷⁴ Thus, an international law analysis is required to determine the meaning of the requirement, and whether it is satisfied in this case. As demonstrated above, and in Claimants’ prior Memorials, such an analysis can only lead the Tribunal to conclude that the Guidelines were not adopted

⁷¹ *Id.* ¶ 150 (per Justice Rowe, dissenting) (emphasis added).

⁷² **CA-3**, NAFTA, Art. 1131.

⁷³ **CA-6**, NAFTA, Annex I, Interpretative Note § 2(f) (ii).

⁷⁴ *See, e.g., CA-184, Veteran Petroleum Ltd v Russian Federation*, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility of November 30, 2009, ¶ 315 (“International law and domestic law should not be allowed to combine ... to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation. This would create unacceptable uncertainty in international affairs. Specifically, it would allow a State to make fluctuating, uncertain and un-notified assertions about the content of its domestic law, after a dispute has already arisen. ... A treaty should not be interpreted so as to allow such a situation unless the language of the treaty is clear and admits no other interpretation.”).

under the authority or consistent with the Accord Acts and the approvals of the Benefits Plans, so that they are not “subordinate measures” for the purposes of Canada’s Annex I reservation.⁷⁵

IV.

RECENT DEVELOPMENTS IN NAFTA CASE LAW SUPPORT CLAIMANTS’ CASE

A. **The *Merrill & Ring* Award Is Consistent with Claimants’ Presentation of the Applicable Standard Under Article 1105**

49. Claimants explained in their Memorial and Reply Memorial how the customary international law minimum standard of treatment has evolved over time, shaped by the fair and equitable treatment provisions included in bilateral investment treaties.⁷⁶ Claimants further demonstrated that the *Glamis* Tribunal’s holding that the customary international minimum standard of treatment was frozen in amber in 1926 is wrong.⁷⁷ Since the submission of Claimants’ Reply Memorial, the NAFTA Tribunal in *Merrill & Ring v. Canada* has rendered its Award, which supports many of Claimants’ arguments on the minimum standard of treatment and rejects many of the arguments advanced by Canada.⁷⁸ Canada’s explanation of the Award in its Rejoinder is incomplete at best.

⁷⁵ *Supra* note 59.

⁷⁶ *See* Claimants’ Memorial, ¶¶ 197-200; Claimants’ Reply Memorial, ¶¶ 125-133.

⁷⁷ Claimants’ Reply Memorial, ¶¶ 117-130.

⁷⁸ **RA-104**, *Merrill & Ring Forestry L.P. v. Canada*, (UNCITRAL) Award of March 31, 2010.

50. The *Merrill* Tribunal began its analysis of Article 1105 by noting that the “evolutionary nature of customary international law ... provides scope for the interpretation of Article 1105(1), even in the light of the Free Trade Commission’s 2001 Interpretation.”⁷⁹ The Tribunal proceeded to track the evolution of this standard, noting the “obsolescence” of the approach taken by the *Neer* Commission,⁸⁰ and finding that the standard described in *Neer* no longer represents customary international law, except within “the strict confines of personal safety, denial of justice, and due process.”⁸¹

51. The Tribunal then turned to the applicable standard in the context of “business, trade and investment” cases. After analyzing the relevant state practice and *opinio juris*, the Tribunal found that “[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment ... has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.” With regard to the content of this standard, the Tribunal held that “the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.” While these concepts cannot be defined precisely,⁸² both legitimate expectations and the maintenance of a secure legal environment are relevant considerations in deciding whether a violation of Article 1105 has occurred on the facts.⁸³

⁷⁹ *Id.* ¶ 192.

⁸⁰ *Id.* ¶ 202.

⁸¹ *Id.* ¶ 204.

⁸² *Id.* ¶ 210.

⁸³ *Id.* ¶ 187 (“Good faith and the prohibition of arbitrariness are no doubt an expression of [general principles of law] and no tribunal today could be asked to ignore these basic obligations of

52. The *Merrill* Tribunal was unable to agree on the level of severity of conduct required to constitute a breach of Article 1105, and instead analyzed the facts of the case under two thresholds: one comparatively higher and one lower. However, even the higher threshold did not “rely[] on *Neer* or some other similarly high threshold.”⁸⁴ Applying both standards to the facts of the present dispute, it is clear that Canada has violated Article 1105. Under the more stringent standard, the *Merrill* Tribunal found that there was “a complete absence of evidence of any representation by Canada to the Investor which might be said to have induced or even encouraged its investment.”⁸⁵ The Tribunal also found that the stability of the legal environment was not at issue in *Merrill* because “[t]o the extent that it was adverse, it has been continuously and stably adverse.”⁸⁶

53. Claimants, on the other hand, have described how they relied on assurances from Canada which were subsequently repudiated, and how the legal regime governing their R&D and E&T expenditure obligations was repudiated twenty years after Claimants first made their investments in Newfoundland.⁸⁷ Therefore, even under the more stringent *Merrill* standard, Canada has violated Article 1105.

international law. The availability of a secure legal environment has close connection too to such principles[.]”); *id.* ¶ 208 (“legitimate expectation has been discussed in several cases, although not endorsed on questions of fact and evidence” in relation to the fair and equitable treatment standard under Article 1105).

⁸⁴ *Id.* ¶ 219.

⁸⁵ *Id.* ¶ 242.

⁸⁶ *Id.* ¶ 232.

⁸⁷ Claimants’ Memorial, ¶¶ 204-212; Claimants’ Reply Memorial, ¶¶ 187-188.

B. The *Merrill & Ring* Award Does Not Support Canada’s Article 1106 or Damages Case

1. The *Merrill & Ring* Award Does Not Support Canada’s Article 1106 Case

54. Canada attempts to rely on the decision in *Merrill* as support for two of its arguments under Article 1106: (i) Article 1106(5) requires that Article 1106(1) should be interpreted restrictively;⁸⁸ and (ii) a requirement that may or may not, depending on the business choice of the investment, result in an investment making an expenditure covered by Article 1106(1) is not a prohibited performance requirement.⁸⁹

55. It is true that the *Merrill* Tribunal places emphasis on the closed nature of the list of performance requirements contained in Article 1106(1).⁹⁰ However, as noted above, this does not advance Canada’s position.⁹¹ Claimants accept that Article 1106(1) is a closed list; however, a requirement to spend money on R&D and E&T in the territory of a Party falls within that list. Further, Canada fails to mention that the *Merrill* Award suggests that the list of measures in Article 1106(1) may be broadened through a “reasonable interpretation.”⁹²

⁸⁸ Canada’s Rejoinder, ¶ 18.

⁸⁹ *Id.* ¶¶ 20, 39.

⁹⁰ **RA-104**, *Merrill & Ring*, ¶ 111.

⁹¹ *See supra* ¶¶ 5-14; *see also* Claimants’ Reply Memorial, ¶¶ 30-31.

⁹² **RA-104**, *Merrill & Ring*, ¶ 120 (“[T]he measures complained of do not lend themselves to inclusion in the closed list of performance requirements laid down under Article 1106, *unless these requirements were to be broadened beyond a reasonable interpretation.*”) (emphasis added).

56. Canada also cannot rely on *Merrill* and the *Lemire* Award⁹³ to argue that a requirement that may *or may not*, depending on the business choice of the investment, result in an investment making an expenditure covered by Article 1106(1) is not a prohibited performance requirement. First, Claimants have clearly demonstrated that the Guidelines do in fact require Hibernia and Terra Nova to make expenditures covered by Article 1106(1).⁹⁴ Second, the cases on which Canada relies do not provide support for its position. In *Merrill*, the investor challenged a requirement to cut, sort and scale its logs in accordance with local market practices under Article 1106(1)(c) and argued that this requirement accorded a preference to local services. The Tribunal rejected this argument, by noting that the investor was free to hire these services from anyone that it wished.⁹⁵ This is a very different situation from the one in which Claimants find themselves. Claimants are required to make expenditures on R&D and E&T in the Province; they are not free to make those expenditures anywhere or to anyone that they wish.⁹⁶

57. Similarly, the investor in *Lemire* was required to satisfy a regulation that music produced in Ukraine must constitute at least 50% of broadcasting time on each radio station. The *Lemire* Tribunal noted first that the fact that such

⁹³ **RA-100**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of January 14, 2010. Claimants discuss *Lemire* in the context of this Submission because it was raised for the first time in Canada's Rejoinder.

⁹⁴ See Claimants' Memorial, ¶ 151; Claimants' Reply Memorial, ¶¶ 79-80; *supra* ¶¶ 6-14.

⁹⁵ **RA-104**, *Merrill & Ring*, ¶¶ 115-118.

⁹⁶ **CE-1**, 2004 R&D Guidelines, § 3.1 ("any R&D expenditure must occur in the Province of Newfoundland and Labrador").

a requirement did not necessarily require the investor to purchase goods or services locally did not necessarily mean that it was permissible under the Germany-Ukraine BIT's prohibition on performance requirements. Indeed, this requirement might still violate the BIT because, although the impugned regulation "does not prohibit radio stations from obtaining Ukrainian music from non-Ukrainian sources, *de facto* the market for Ukrainian-authored, -composed or -produced music is located in Ukraine." The *Lemire* Tribunal turned next to the object and purpose of the Treaty. It found that the regulation did not breach the BIT because, while the purpose of the performance requirement prohibition is trade-related, Ukraine enacted the impugned regulation "not to protect local industries and restrict imports, but rather to promote Ukraine's cultural inheritance." Therefore, the motivation behind the BIT and the regulation were "compatible."⁹⁷

58. Thus, the *Lemire* Award in fact provides substantial support for Claimants' position under Article 1106. Further, the Board's self-proclaimed motivation in promulgating the Guidelines is the protection and promotion of R&D and E&T capacity in the Province, which is not compatible with the trade-related purpose underlying prohibitions on performance requirements in the NAFTA.⁹⁸

⁹⁷ **RA-100**, *Lemire*, ¶¶ 509-510.

⁹⁸ **CE-35**, CNLOPB, White Rose Decision 2001.01, §§ 3.2.2.3 (2001) ("Expenditures for research & development and education & training are viewed by the Board to be strategically important contributions to the growth and development of the research and development and education and training capacity in the Province.").

2. The *Merrill & Ring* Award Does Not Support Canada's Damages Case

59. Canada also attempts to rely on the *Merrill* Award to provide support for its argument that “a historical record provides little certainty” for the purposes of calculating future damages.⁹⁹ However, Canada fails to acknowledge that the Tribunal's findings with regard to future damages were limited to the specific situation of the investor in that case. Indeed, speaking more generally, the Tribunal found that:

[T]here is always some element of uncertainty involved in future scenarios, and even in often used valuation methods, such as the discounted cash flow, future estimates are based on assumptions. But these are inevitably drawn from specific information provided by a historical record of profitability, or other elements that allow for an educated estimate.¹⁰⁰

60. The difficulty in predicting future losses in *Merrill* arose from the fact that the investor's past record of profitability was “inextricably and permanently related to the existence and application of the regulatory regime.” Therefore, even educated estimates were not possible. As there was no historical period preceding the adoption of the impugned measures against which future damages could be calculated, “the future scenario will be characterized more by speculation than by educated estimates.”¹⁰¹ Therefore, the Tribunal declined to award future damages.

61. As Claimants explained in their Memorial and Reply Memorial, they have the necessary historical information on which to base future estimates to calculate

⁹⁹ Canada's Rejoinder, ¶¶ 319-320.

¹⁰⁰ **RA-104**, *Merrill & Ring*, ¶ 264.

¹⁰¹ *Id.*

their future damages without resorting to “speculation.”¹⁰² Their position is not comparable to that of the investor in *Merrill*, and Canada’s reliance on that Award to argue that Claimants are not entitled to future damages is inapt.

C. The Cargill Award Is Not a Correct Statement of the Applicable Standard Under Article 1105

62. Canada relies on the recent Chapter 11 decision in *Cargill v. Mexico* as support for its argument that the customary international law minimum standard of treatment has not evolved from the shocking and egregious standard described in *Neer*.¹⁰³ Claimants demonstrated in their Reply Memorial that the strong weight of Chapter 11 decisions dealing with Article 1105 supported Claimants’ position that the *Neer* standard does not represent the correct standard under that provision. Further, NAFTA Tribunals criticized Canada’s reliance on that case.¹⁰⁴ While *Cargill* now joins *Glamis* in adopting the *Neer* standard under Article 1105, the *Merrill* Award was consistent with the longer line of authority on which Claimant relies.¹⁰⁵ Thus, the weight of authority still supports the proposition that *Neer* does not provide the controlling standard. For this reason, and all the reasons stated in Claimants’ Memorial and Reply, the *Glamis* and *Cargill* decisions do not accurately reflect current customary international law.¹⁰⁶ As stated in *Merrill*, the applicable

¹⁰² Claimants’ Memorial, ¶¶ 217-218; Claimants’ Reply Memorial, ¶¶ 272-291.

¹⁰³ Canada’s Rejoinder, ¶¶ 127-131. See **RA-84**, *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/02, Award of September 18, 2009.

¹⁰⁴ Claimants’ Reply Memorial, ¶¶ 116-124.

¹⁰⁵ *Supra* ¶¶ 49-53.

¹⁰⁶ *Supra* notes 76-77.

standard “protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.”¹⁰⁷

63. Canada does now admit that there has been some evolution in the minimum standard.¹⁰⁸ The Tribunals in *Cargill* and *Glamis* also both found that, as the minimum standard of treatment is now implicated in situations that were unforeseen in 1926 (such as trade and investment), “we may be shocked by State actions that did not offend us previously.”¹⁰⁹ The *Cargill* Tribunal further noted that it “observes a trend in previous NAFTA Awards ... to adapt the principle underlying the holding of *Neer* to the more complicated and varied economic positions held by foreign nationals today.” However, despite this concession, the *Cargill* Tribunal continued that “[k]ey to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained.”¹¹⁰

64. Even if the *Cargill* Tribunal is correct and the *Neer* standard is maintained with regard to the severity of conduct required to violate Article 1105, Claimants demonstrated in their Reply Memorial that, in the *Glamis* Award’s own terms, they have satisfied this threshold on the facts.¹¹¹ Further, while the *Cargill* Tribunal noted that the failure to provide a stable and predictable environment in which reasonable expectations are upheld would not reach the *Neer* threshold, an investor’s expectations may be protected under Article 1105 where they arise from a “contract or quasi-contractual

¹⁰⁷ *Supra* ¶ 51.

¹⁰⁸ Canada’s Rejoinder, ¶ 125.

¹⁰⁹ **CA-32**, *Glamis Gold, Ltd. v. United States of America*, (UNCITRAL) Award of May 16, 2009, ¶ 616; **RA-84**, *Cargill*, ¶¶ 282-284.

¹¹⁰ **RA-84**, *Cargill*, ¶ 284.

¹¹¹ Claimants’ Reply Memorial, ¶¶ 185-188.

basis.”¹¹² The same facts that demonstrate how specific assurances made by Canadian officials at the local, provincial and federal levels induced and encouraged Claimants’ expectations with regard to their R&D and E&T expenditure obligations likewise show that these expectations arose from a “quasi-contractual basis.”¹¹³ Thus, no matter which standard the Tribunal chooses to apply, Claimants have proved that Canada violated Article 1105.

V.

CANADA’S REJOINDER RAISES A JURISDICTIONAL ISSUE UNDER NAFTA ARTICLE 1116 FOR THE FIRST TIME

65. Canada argued in its Counter-Memorial that under NAFTA Article 1116 a tribunal’s damages award is limited to compensation for damages already incurred; therefore, damages relating to the period 2009-2036 could not be awarded.¹¹⁴ In its Rejoinder, Canada took this position one step further, arguing for the first time that the Tribunal does not have jurisdiction under NAFTA Article 1116 to award damages after November 1, 2007, the date on which Claimants filed their claim against Canada.¹¹⁵

66. Claimants do not intend to refute this clearly erroneous argument here, as they have presented a full rebuttal of Canada’s argument on the availability of future damages under the NAFTA in their Reply Memorial.¹¹⁶

¹¹² **RA-84**, *Cargill*, ¶¶289-290.

¹¹³ *Supra* note 111.

¹¹⁴ Canada’s Counter-Memorial, ¶¶ 325-331.

¹¹⁵ Canada’s Rejoinder, ¶¶ 232-235.

¹¹⁶ Claimants’ Reply Memorial, ¶¶ 236-242.

However, Claimants do wish to draw the Tribunal's attention to the fact that Canada phrased its argument as a jurisdictional issue for the first time in its Rejoinder, at which point it was too late in the proceedings to raise a jurisdictional challenge.¹¹⁷

¹¹⁷ See ICSID Additional Facility Rules, Schedule C, Arbitration (Additional Facility) Rules, art. 45(2) ("Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal and in any event *no later than the expiration of the time limit fixed for the filing of the counter-memorial ... unless the facts on which the objection are based are unknown to that party at that time.*") (emphasis added).

Respectfully submitted,



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

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

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

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

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