INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE ARBITRATION
UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE ICSID CONVENTION

BETWEEN:

MOBIL INVESTMENTS CANADA INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. ARB/15/6)

DECISION ON JURISDICTION AND ADMISSIBILITY

Members of the Tribunal

Sir Christopher Greenwood, GBE, CMG, QC, *President*

Mr J. William Rowley, QC

Dr Gavan Griffith, QC

Secretary of the Tribunal

Ms Lindsay Gastrell

Date of dispatch to the Parties: 13 July 2018

REPRESENTATION OF THE PARTIES

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I. INTRODUCTION

A. Parties

1. The Claimant is Mobil Investments Canada Inc. ("Mobil"), a company incorporated in Delaware, United States of America ("United States").[1] Mobil is an indirect subsidiary of Exxon Mobil Corporation, a publicly traded energy company incorporated in New Jersey, United States.

2. The Claimant brings its claims on its own behalf and on behalf of two subsidiaries: (a) ExxonMobil Canada Resources Company,[2] a corporation organized under the laws of Nova Scotia, Canada; and (b) ExxonMobil Canada Properties,[3] a partnership organized under the laws of the Province of Alberta, Canada.

3. The Respondent is Canada.

4. The Claimant and the Respondent are collectively referred to as the "Parties." The Parties' representatives and their addresses are listed above on page (ii).

B. Overview of the Proceedings

5. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID") on the basis of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

6. The dispute arises out of the Claimant's investment in the Hibernia and Terra Nova oil field development projects located off the coast of the Canadian province of Newfoundland and Labrador (together, the "Projects"). In an earlier arbitration

[1] **C-4**, Delaware Certificate of Good Standing for Mobil Investments Canada Inc., 5 January 2015.
[2] Initially, Claimant brought its claims on behalf of its subsidiary ExxonMobil Canada Hibernia Company Ltd., which directly owned a 5% participation interest in the Hibernia project at issue in this arbitration. In 2017, that company amalgamated with ExxonMobil Canada Resources Company. Through this amalgamation, ExxonMobil Canada Resources Company became the direct owner of the 5% interest in the Hibernia project. See Claimant's letter to the Tribunal of 19 June 2017.
[3] ExxonMobil Canada Properties directly owns a 28.125% participation interest in the Hibernia project and a 19% participation interest in the Terra Nova project, also at issue in this arbitration.

involving the same disputing Parties ("*Mobil I*"),[4] the Claimant challenged Canada's implementation in 2004 of the Guidelines for Research and Development Expenditures (the "2004 Guidelines"), which introduced mandatory research and development ("R&D") expenditure requirements relating to the Projects. The majority of the tribunal in *Mobil I* held that Canada had breached the performance requirement prohibition in NAFTA Article 1106, and awarded the claimants a portion of the damages they sought for expenditures incurred under the 2004 Guidelines. In this proceeding, the Claimant seeks damages for expenditures it allegedly incurred in 2012-2015 as a result of Canada's continued enforcement of the 2004 Guidelines. The Decision and Award in the *Mobil I* proceedings are summarized in Part III, below.

C. Procedural History

7. On 16 January 2015, Mobil filed a Request for Arbitration, including Annexes A to F (the "Request"), with ICSID.

8. On 2 February 2015, the ICSID Secretariat wrote to the Claimant with a question about the Request. In response, on 6 February 2015, the Claimant submitted a letter to supplement the Request.

9. On 18 February 2015, in accordance with Article 36(3) of the ICSID Convention, the Secretary-General of ICSID registered the Request as supplemented and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible pursuant to Articles 37 to 40 of the ICSID Convention.

10. By letter of 24 February 2015, the Respondent acknowledged receipt of the Request and the Notice of Registration, and confirmed that it would be in contact with the Claimant regarding next steps.

11. On 24 July 2015, the Parties informed ICSID that, pursuant to NAFTA Article 1123, the tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the Parties. Mobil appointed Mr J. William Rowley, QC (a national of the United Kingdom and Canada)

[4] *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Canada*, ICSID Case No. ARB(AF)/07/4: Decision on Liability and on Principles of Quantum, 22 May 2012 ("*Mobil I* Decision"); Award, 20 February 2015 ("*Mobil I* Award").

as arbitrator, and Canada appointed Dr Gavan Griffith, QC (a national of Australia). Both arbitrators accepted their appointments.

12. By agreement of the Parties, Sir Christopher Greenwood, QC (a national of the United Kingdom) was appointed President of the Tribunal, and he accepted his appointment on 11 September 2015. On the same day, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. ICSID provided the Parties with the signed declaration and statement of each Member of the Tribunal.

13. In consultation with the Parties, the Tribunal scheduled the first session to be held by teleconference on 3 November 2015. The Secretary of the Tribunal provided the Parties with a draft agenda for the session and a draft Procedural Order No. 1, which had been approved by the Tribunal. The Parties were invited to confer on procedural matters and to inform the Tribunal of any agreements they reached or, in the absence of agreement, their respective positions.

14. On 20 October 2015, the Claimant informed ICSID and the Tribunal that Norton Rose Fulbright US LLP would replace Debevoise & Plimpton LLP as the Claimant's representative in this matter. The Claimant subsequently provided the corresponding powers of attorney.

15. On 3 November 2015, during the first session teleconference, the Tribunal heard the Parties' oral argument on the confidentiality of the proceedings and procedural issues, including the Claimant's request for bifurcation to allow the Tribunal to "consider and rule on the issue of the binding and preclusive effect of the decisions and Award" in *Mobil I* as a preliminary matter. This request was opposed by the Respondent. Following the session, the Tribunal provided the Parties with an updated draft Procedural Order No. 1 and a draft Confidentiality Order, reflecting the Tribunal's decisions on issues addressed by the Parties during the hearing. The Tribunal invited any final comments from the Parties, which the Parties submitted on 11 and 12 November 2015.

16. On 24 November 2015, the Tribunal issued Procedural Order No. 1, recording the Parties' agreements and the Tribunal's decisions on procedural matters. Procedural

Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules were those in effect from 10 April 2006, that the procedural language was English, and that the place of proceedings was Washington, D.C. It also recorded the Tribunal's decision not to bifurcate the proceedings. The corresponding Procedural Timetable for the proceedings (the "Procedural Timetable") was included as Annex A to the Order.

17. On the same date, the Tribunal issued Procedural Order No. 2, governing the confidentiality of the proceedings. This Order set out a procedure by which the Parties were to identify and redact confidential information contained in case documents. The Parties agreed that redacted versions of decisions and orders would be published, but Mobil objected to the publication of pleadings. Procedural Order No. 2 also provided that all hearings were to be open to the public through closed-circuit video link, except that the Tribunal would hold *in camera* sessions at the request of either Party to protect confidential information.

18. In accordance with the Procedural Timetable, on 4 December 2015, Mobil served Canada with a request for document production. The Respondent objected to certain document requests, and on 10 February 2016, the Tribunal issued Procedural Order No. 3, including Annex A, containing its decision on each disputed document request.

19. On 11 March 2016, the Claimant submitted its Memorial on the Merits (the "Memorial"), accompanied by witness statements from eight witnesses, 352 factual exhibits and 68 legal authorities.

20. On 29 March 2016, Canada served Mobil with a request for document production. On 12 April 2016, the Claimant objected to certain document requests. After considering the Parties' submissions set out in the form of a Redfern Schedule, on 18 May 2016, the Tribunal issued Procedural Order No. 4, including Annex A, containing its decision on each disputed document request, together with its decision on a dispute regarding confidentiality and the redaction of documents.

21. On 30 June 2016, the Respondent submitted its Counter-Memorial on the Merits (the "Counter-Memorial"), together with an expert report, 238 factual exhibits and 45 legal authorities.

22. In accordance with the Procedural Timetable, on 15 July 2016, Mobil served Canada with a request for document production. On 1 August 2016, the Respondent objected to certain document requests and, after considering the Parties' submissions set out in the form of a Redfern Schedule and the agreement of the Parties on a number of requests, on 19 August 2016 the Tribunal issued Procedural Order No. 5, including Annex A, containing its decision on each disputed document request.

23. On 23 September 2016, the Claimant filed its Reply on the Merits (the "Reply"), together with five witness statements, an expert report, a further 43 factual exhibits and a further 23 legal authorities.

24. On 2 September 2016, the Parties informed the Tribunal that they had been unable to agree on a number of Mobil's proposed confidential designations to the Counter-Memorial, and requested a decision from the Tribunal on the disputed designations. Together with this request, the Parties provided the Tribunal with a schedule of each disputed designation and each Party's position thereon. After considering the Parties' positions, on 4 October 2016, the Tribunal issued Procedural Order No. 6, including Annex A, containing its decision on each disputed designation.

25. By letter of 7 October 2016, Canada applied for leave to submit an additional request for document production based on the content of the Reply. Together with its application, Canada submitted a Redfern Schedule containing the proposed document requests. After hearing from Mobil on 12 October 2017, the Tribunal granted the Respondent leave to proceed with the document request and fixed a schedule to address the request.

26. In accordance with that schedule, Mobil provided its objections on 2 November 2016, and the Respondent provided its responses to those objections on 8 November 2016. By the agreement of the Parties, certain requests were withdrawn on 16 November 2016. On 17 November 2016, the Tribunal issued Procedural Order No. 7, including Annex A, containing its decision on the four outstanding document requests.

27. On 16 December 2016, the Respondent filed its Rejoinder on the Merits (the "Rejoinder"), together with a witness statement, a second report from its expert, a further 58 factual exhibits and a further 59 legal authorities.

28. On 22 December 2016, the ICSID Secretariat notified the United Mexican States ("Mexico") and the United States of the deadline for written submissions by the non-disputing NAFTA Parties pursuant to NAFTA Article 1128. On the same day, an announcement was posted on the ICSID website to inform the public of the deadline and instructions for submitting an application for leave to file a non-disputing party (*amicus*) submission.

29. On 13 January 2017, the United States informed the Tribunal that it did not intend to make a submission pursuant to NAFTA Article 1128 at that stage of the proceeding, but reserved the right to do so during the hearing. On the same date, Mexico similarly informed the Tribunal that it did not intend to make a submission under NAFTA Article 1128 at that stage of the proceeding, but reserved the right to present a future submission on any issue of interpretation that might arise at the hearing or during the post-hearing submissions of the Parties.

30. The Tribunal did not receive any applications for leave to file a non-disputing party (*amicus*) submission.

31. In preparation for the oral hearing on jurisdiction, merits and quantum, the Tribunal scheduled a pre-hearing teleconference to be held on 20 June 2017. On 6 June 2017, the Parties informed the Tribunal that they had exchanged the names of the witnesses whom each Party intended to call for cross-examination, and that they would be prepared to discuss additional procedural and scheduling matters during the pre-hearing teleconference.

32. On 15 June 2017, the Tribunal provided the Parties with a draft Procedural Order No. 8 addressing the organization of the hearing. The Parties were invited to confer and to inform the Tribunal of any agreements they reached or, in the absence of agreement, their respective positions on the items in the draft.

33. Also on 15 June 2017, the President of the Tribunal wrote to the Respondent in reference to footnote 62 of the Rejoinder, concerning the Claimant's expert witness, Professor Dan Sarooshi. In that footnote Canada stated that it "must register [its] objection to the inappropriate selection of Professor Sarooshi by the Claimant, whose close ties to members of this Tribunal could raise a perception of bias and unnecessarily taint the arbitration proceedings". The President took note of the objection and also

invited the Respondent to set out for the record, during the pre-hearing conference call, whether or not it intended to make any application with regard to the membership of the Tribunal or the participation of Professor Sarooshi. The President also confirmed that neither he nor Dr Griffith had any connection with Professor Sarooshi regarding the present proceedings and that they would approach the case in an entirely independent and impartial fashion. No suggestion had been made of any ties between Mr Rowley and Professor Sarooshi.

34. Later on 15 June 2017, Mobil informed the Tribunal of an unrelated disagreement that had arisen between the Parties relating to the testimony of Professor Sarooshi. Mobil sought to call Professor Sarooshi for direct examination, and Canada objected because it had opted not to call him for cross-examination. Upon the invitation of the Tribunal, Canada provided its comments on the issue by letter of 20 June 2017.

35. On 19 June 2017, the Parties submitted their comments on the draft Procedural Order No. 8. This draft reflected *inter alia* the Parties' agreement that the public would be permitted to attend the hearing through closed-circuit video link, but that this link would be closed for all witness and expert examination.

36. As scheduled, on 20 June 2017, the President of the Tribunal held a pre-hearing teleconference with the Parties to discuss the organization of the hearing, including the issue of Professor Sarooshi's participation in the proceeding and his appearance at the hearing. Canada confirmed for the record that it did not intend to challenge either of the Members of the Tribunal referred to in connection with Professor Sarooshi's expert report, or to object to Professor Sarooshi's expert report being admitted into the record (see para. 33, above).

37. On the following day, the Tribunal issued Procedural Order No. 8 concerning the organization of the hearing. This order set out the daily hearing schedule, rules for oral argument and witness examination, the Parties' agreement on public access, and directions to the Parties regarding the hearing materials to be provided to the Tribunal. With respect to the Parties' disagreement over Professor Sarooshi's appearance at the hearing, the Tribunal decided that Professor Sarooshi should not be called to testify because, under paragraph 18 of Procedural Order No. 1, the scope of direct examination was limited to addressing "new facts or other evidence that have only come to light

since the report was submitted," and no such new facts or evidence were present. The Tribunal confirmed that it would take full account of Professor Sarooshi's report as part of the legal case advanced by Mobil.

38. Pursuant to Procedural Order No. 8, any request to file new documents and evidence was to be submitted by 12 July 2017. On that date, Canada requested leave to introduce three new legal authorities, and Mobil requested leave to introduce three new fact exhibits and four new legal authorities.

39. A disagreement arose between the Parties with respect to the four legal authorities proposed by Mobil; the Respondent objected because those authorities predated the Respondent's Reply. By letter of 18 July 2017, the Tribunal informed the Parties that all the new exhibits and authorities would be admitted into the record, including the authorities that predated the Reply. The Tribunal stated that each Party would have the opportunity to respond to the authorities introduced by the other Party, including by submitting any responsive authorities of its own, by 21 July 2017.

40. In the meantime, each Party submitted its list of participants for the upcoming hearing. In doing so, Mobil included Mr Paul Phelan under the category of party representative. By letter of 13 July 2017, Canada objected to this designation on the basis that it would evade the rule on witness sequestration contained in Procedural Order No. 8. The Tribunal then received further comments from both Parties on Canada's objection, and in particular on the question of whether Mr Phelan should be permitted to attend the opening statements. On 18 July 2017, the Tribunal informed the Parties that Mr Phelan, as the Claimant's principal representative, could be present in the hearing room during opening statements.

41. Pursuant to the Tribunal's instructions of 18 July 2017, the Respondent submitted one responsive legal authority as RL-104 on 21 July 2017.

42. The Tribunal held the hearing on jurisdiction, merits and quantum from 24 July to 28 July 2017 at the World Bank Headquarters in Washington D.C. (the "Hearing"). The following individuals were present at the Hearing:

Tribunal

Sir Christopher Greenwood, QC, President

Dr Gavan Griffith, QC, Arbitrator

Mr J. William Rowley QC, Arbitrator

ICSID Secretariat

Ms Lindsay Gastrell, Secretary of the Tribunal

Mr Alex Kaplan, Legal Counsel

Ms Phoebe Ngan, Paralegal

Claimant

Counsel:

Mr Kevin O'Gorman, Norton Rose Fulbright US LLP

Mr Paul Neufeld, Norton Rose Fulbright US LLP

Mr Denton Nichols, Norton Rose Fulbright US LLP

Mr Rafic Bittar, Norton Rose Fulbright US LLP

Ms Katie Connolly, Norton Rose Fulbright US LLP

Ms Lawri Lynch, Norton Rose Fulbright US LLP

Ms Alice Brown, Exxon Mobil Corporation

Mr Tom Sikora, Exxon Mobil Corporation

Ms Stacey O'Dea, ExxonMobil Canada Ltd.

Parties:

Mr Paul Phelan, ExxonMobil Canada Ltd., seconded to Syncrude Canada Limited

Witnesses / Experts:

Mr Ryan Noseworthy , Exxon Mobil Corporation

Mr Krishnaswamy Sampath, Retired

Mr Robert Dunphy, ExxonMobil Canada Ltd., seconded to Hibernia Management and Development Company Ltd.

Mr Paul Durdle, ExxonMobil Canada Energy, seconded to Newfoundland Transshipment Limited

Respondent

Counsel:

Mr Mark A. Luz, Senior Counsel, Trade Law Bureau, Government of Canada

Mr Adam Douglas, Counsel, Trade Law Bureau, Government of Canada

Ms Heather Squires, Counsel, Trade Law Bureau, Government of Canada

Ms Michelle Hoffmann, Counsel, Trade Law Bureau, Government of Canada

Ms Valantina Amalraj, Counsel, Trade Law Bureau, Government of Canada

Ms Melissa Perrault, Senior Paralegal, Trade Law Bureau, Government of Canada

Ms Darian Parsons, Paralegal, Trade Law Bureau, Government of Canada

Parties/Other Attendees:

Ms Julie Boisvert, Global Affairs Canada, Government of Canada

Ms Lisa Mullins, Department of Natural Resources, Government of Canada

Ms Meaghan McConnell, Department of Justice & Public Safety, Government of Newfoundland & Labrador

Mr Gerard Collins, Department of Natural Resources, Government of Newfoundland & Labrador

Mr Chris Reynolds, Core Legal (trial graphics/technical expert)

Mr Raymond Froklage, Global Affairs Canada, Government of Canada

Witnesses / Experts:

Mr Jeff O'Keefe, Canada-Newfoundland & Labrador Offshore Petroleum Board

Mr Richard (Rory) E. Walck, Global Financial Analytics

Ms Carolyn Witthoft, Global Financial Analytics

Non-Disputing NAFTA Party Representatives

Mr Aristeo López Sánchez, Office of the Ministry of Economy of the United Mexican States in Washington D.C.

Ms Nicole C. Thornton, U.S. Department of State

Mr J. Benton Heath, U.S. Department of State

Court Reporter

Mr David Kasdan, B&B Reporters

43. In its written pleadings and on the first day of the hearings, Canada advanced two legal arguments. First, Canada argued that the Tribunal lacked jurisdiction on the ground that Mobil had commenced the present proceedings more than three years after Mobil had first become aware of the alleged breach of NAFTA with the result that the proceedings were barred by the provisions of NAFTA Articles 1116(2) and 1117(2) (see paras. 96-108, below). Secondly, Canada maintained that Mobil's claim for compensation had been advanced before, and rejected by, the *Mobil I* Tribunal, so that the claim was barred by the principle of *res judicata* (see paras. 174-178, below).

44. On the second day of the hearings, the Tribunal informed the Parties that it would first determine these two preliminary matters. If it accepted either of them, it would do so in the form of an award which would put an end to the proceedings. If, however, Mobil

were to prevail on both preliminary issues, the Tribunal would issue a decision to that effect and then request a post-hearing briefing on damages from the Parties.

45. The Tribunal invited both Parties to submit short post-hearing briefs regarding the two issues. The Parties submitted their post-hearing briefs on 11 August 2017 and replies on 8 September 2017. On 26 September 2017, the United States informed the Secretary that it was considering making a non-Party submission under Article 1128 of NAFTA. Having obtained the views of the Parties, the Tribunal informed the United States that it might make an Article 1128 submission by 24 October 2017 dealing with the interpretation of Articles 1116(2) and 1117(2) of NAFTA. The United States filed its submission on 24 October 2017. On 25 October 2017, Mexico indicated that it wished to file a submission on the same issue and was given until 7 November 2017 to do so. Mexico filed its submission on 7 November 2017.

46. The Tribunal gave the Parties an opportunity to file observations on the submissions of Mexico and the United States. The Parties' observations on those submissions were filed on 14 December 2017.

47. In its Response to the Article 1128 Submissions, Mobil informed the Tribunal that the Parties had agreed that they should receive one month's notice of the date of dispatch of the decision or award. Accordingly, the Secretary informed them, on 13 June 2018, that they would receive the Tribunal's ruling on the two legal issues on 13 July 2018.

II. FACTUAL BACKGROUND

48. Since the present decision is concerned only with the two legal issues raised by Canada, the Tribunal makes no findings of fact at this stage. Nevertheless, some account of the factual background is necessary for a proper understanding of the way in which these two issues arise. Accordingly, and without prejudice to the findings which it will need to make in its final Award, the Tribunal sets out a brief summary of the factual background which is largely based upon the more detailed account in paras. 34-75 of the *Mobil I* Decision.

A. The Regulatory Framework for Offshore Oil Production

49. The exploitation of offshore petroleum resources in the waters off the coast of Newfoundland is based upon an agreement between the Government of Canada and the

Government of the Province of Newfoundland known as the Atlantic Accord. Pursuant to that Accord, parallel federal and provincial legislation was adopted to regulate the conduct of petroleum development projects in the relevant area.[5] The Accord Acts, as the two pieces of legislation are known, established the Canada-Newfoundland and Labrador Offshore Petroleum Board (the "CNLOPB" or the "Board"), whose mandate was to "interpret and apply the provisions of the Atlantic Accord and the [Accord Acts] to all activities of operators in the Newfoundland and Labrador Offshore Area; and to oversee operator compliance with those statutory provisions".[6]

50. In order to develop a field in the relevant area, an operator was required to submit to the Board a development plan, which had to include a "benefits plan" describing how Canadians, and in particular, members of the labour force of the Province, would have a full and fair opportunity to participate on a competitive basis in the supply of goods and services. Under the Accord Acts, an operator was required to obtain from the Board a valid Operations Authorization in order to extract oil. Such authorizations normally covered a period of three to five years, after which a new authorization had to be obtained.

51. In 1986 the Board issued a set of Guidelines (the "1986 Guidelines") regarding the requirements for an operator to report on research and development expenditure and the extent to which this was to be spent on activities within the Province. The Guidelines were revised in 1987 (the "1987 Guidelines").

52. When NAFTA was adopted in 1984, Article 1106(1)(c) provided that:

> No party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of a Party or of a non-party in its territory:
>
> …

[5] The federal legislation is the Canada-Newfoundland Atlantic Accord Implementation Act 1987, c. 3 (the "Federal Accord Act"), while the Newfoundland legislation is the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act, R.S.N.L. 1990, c. 2 (the "Provincial Accord Act").
[6] **C-36**, CNLOPB, *About CNLOPB: Mandate and Objectives*.

> (c) 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.

53. However, under NAFTA Article 1108, a NAFTA Contracting Party was entitled to enter a reservation regarding non-conforming measures which it specifically identified. Article 1108(1) provided that certain provisions of NAFTA, including Article 1106, were not to apply to:

> (a) any existing non-conforming measure that is maintained by
>
> a Party at the Federal level, as set out in its Schedule to Annex I or III;
>
> 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 …
>
> …
>
> (c) an amendment to any non-conforming measure referred to in sub-paragraph (a) 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.

54. Canada entered a reservation under Article 1108 in respect of the benefits plans required by the Federal Accord Act and the consequent requirements regarding research and development and education and training expenditure in the Province.

55. In 2004 the Board adopted new Guidelines (the "2004 Guidelines"). The 2004 Guidelines, which were effective from 1 April 2004, required that a percentage of the revenue derived from oil produced in the offshore area adjacent to the coast of Newfoundland and Labrador was henceforth to be spent on research and development activities and education and training in the province.

B. The Hibernia and Terra Nova Projects

(1) Hibernia

56. The Hibernia oilfield was the first oil project in the relevant area. It was constructed between 1990 and 1997 and began production in November 1997. The project is owned by a consortium and, at all relevant times, operated by Hibernia Management and Development Company ("HMDC"), a Canadian company owned by the members of

the consortium. HMDC operates as an agent of the consortium members who contribute to its expenses in proportion to their shares in the consortium. Mobil controls the largest share (33.125%) of the consortium.

57. The Hibernia project participants submitted a development plan, including benefits plans, to the Board in 1986, in accordance with the Accord Acts and the 1986 Guidelines. The benefits plans contained a commitment that research and development activity would be conducted as needed and that local providers would be given priority consideration. The plans were approved by Board Decision 86.01 in June 1986. Operating authorizations for Hibernia were issued in 1997 and 2000.

58. The Hibernia oilfield is predicted to be operational until 2040.

(2) Terra Nova

59. The Terra Nova project was constructed between 1999 and 2001 and production commenced in January 2002. The project is organized as an unincorporated joint venture. Operation is carried out by Suncor, which owns the largest share, on behalf of all of the members of the venture. ExxonMobil indirectly owns a 19% interest.

60. Suncor's predecessor, Petro-Canada, submitted the development plan and benefits plan for Terra Nova in August 1996 in accordance with the Accord Acts and the 1987 Guidelines. The plans were approved by Board Decision 97.02.

61. The Terra Nova oilfield is predicted to be operational until 2026.

C. The Effects of the 2004 Guidelines on the Hibernia and Terra Nova Projects

62. According to the claimants in *Mobil I* (see para. 64, below), the 2004 Guidelines brought about a substantial change in the requirements which they, and the other participants in the Hibernia and Terra Nova Projects, had to observe. In particular, following the adoption of the 2004 Guidelines, the Board required the expenditure in the Province of specified sums of money with regard to research and development and education and training, irrespective of whether such expenditure was commercially necessary in respect of either project. Moreover, for individual items of expenditure to count towards this requirement, project operators were required to obtain approval for those items from the Board. While the 2004 Guidelines were not themselves legally

binding, the claimants maintained that failure to comply would have resulted in the Board refusing to renew the operating authorizations without which production could not have continued.

63. The claimants maintained that the result was that they were required to bear a share of expenditures (proportionate to their stake in each oil field) for which there was no commercial necessity.

64. The 2004 Guidelines were challenged before the courts of Newfoundland and Labrador but those challenges were rejected in September 2008.[7] The Supreme Court of Canada dismissed an application for leave to appeal on 19 February 2009.[8] Thereafter, the 2004 Guidelines, enforcement of which had been suspended pending the outcome of the litigation, were enforced by the Board.

III. THE *MOBIL I* AWARD AND ITS AFTERMATH

A. The Claims in *Mobil I*

65. On 2 November 2007, Mobil and Murphy Oil Corporation filed a request for arbitration under the ICSID Additional Facility alleging that the enforcement of the 2004 Guidelines with respect to Hibernia and Terra Nova constituted a breach of NAFTA Article 1106(1) by Canada. Since Murphy Oil Corporation is not involved in the present proceedings, references will be to Mobil alone.

66. Mobil claimed that the 2004 Guidelines introduced a material change into the regulatory regime for offshore oil projects and thus fell outside the Canadian reservation under Article 1108 (see para. 53, above). Moreover, according to Mobil, the 2004 Guidelines imposed requirements for local expenditure which were more onerous and consequently, in the words of NAFTA Article 1108(1)(c) (see para. 52, above) "did not decrease the conformity" of the regime in respect of which Canada had made that reservation.

67. Mobil claimed damages for the cost of its share of the increased expenses undertaken in respect of Hibernia and Terra Nova in order to comply with the 2004 Guidelines.

[7] **C-153**, *Hibernia and Petro-Canada* v. *CNLOPB*, Supreme Court of Newfoundland and Labrador Court of Appeal, 2008 NLCA 46.
[8] **C-154**, Judgment No. 32866 of the Supreme Court of Canada.

The claim was for damages already incurred in the period in respect of which the 2004 Guidelines had been enforced and for future damages.

68. Canada maintained that the 2004 Guidelines were a refinement of the regime already in place at the time NAFTA entered into force and were therefore covered by Canada's reservation under Article 1108(1). Canada denied that Mobil had suffered any loss.

B. The *Mobil I* Decision and Award

69. In its Decision on Liability and on principles of Quantum of 22 May 2012, the *Mobil I* Tribunal held, unanimously, that the 2004 Guidelines fell within the scope of Article 1106(1) of NAFTA,[9] and, by a majority (Professor Philippe Sands QC dissenting) that the 2004 Guidelines were not covered by Canada's reservation under Article 1108(1) and were therefore a violation of Article 1106(1).[10] While Canada makes plain that it disagrees with the majority's decision,[11] it quite rightly concludes that the matter is *res judicata* and does not seek to reopen the question of the compatibility of the 2004 Guidelines with Article 1106(1) in the present proceedings.[12]

70. It is the *Mobil I* Tribunal's decision regarding damages that is the principal focus of the present proceedings and which is directly relevant to the issues before the Tribunal in the current phase of those proceedings. Accordingly, a more detailed summary of that part of the Decision and the subsequent Award is required.

71. The *Mobil I* Tribunal held, in its 2012 Decision, that it had jurisdiction to consider damages pursuant to Article 1116(1) of NAFTA.[13] It went on to hold that the claimants were "entitled to recover damages incurred as a result of the Respondent's breach provided that the Claimants submit evidence of any such damages no later than 60 days of receipt of this Decision and that the Tribunal finds such evidence persuasive".[14]

72. This decision regarding entitlement to damages has to be read in light of the reasoning in paras. 414-489 of the 2012 Decision. The majority of the *Mobil I* Tribunal there distinguished between past and future damages. They held that Mobil was entitled to

[9] *Mobil I* Decision, para. 490 (2) (*dispositif*) and paras. 210-246 (reasoning).
[10] *Mobil I* Decision, para. 490 (3) (*dispositif*) and paras. 247-413 (reasoning).
[11] Canada Counter-Memorial, paras. 110-135.
[12] Transcript, 24 July 2017, pp. 185-186
[13] *Mobil I* Decision, para. 490(4).
[14] *Mobil I* Decision, para. 490(5).

be compensated only when there was sufficient evidence that a call for payment had actually been made or that damages have otherwise occurred, "i.e. that they are 'actual'".[15] The majority accepted that it was not necessary to prove the quantum of damages with absolute certainty and held that they would apply a standard of "reasonable certainty".[16] That reasoning plainly could apply only in respect of past damages.

73. With regard to damages for future losses, the position is more complicated. The majority of the *Mobil I* Tribunal held that "for jurisdictional purposes, [NAFTA] Article 1116(1) requires *inter alia* that the investor must have incurred 'loss or damage by reason of, or arising out of, that breach' of Chapter XI".[17] It went on, however, to hold that

> There is nothing in the language of Article 1116(1) that convinces us that the provision is directed only to damages that occurred in the past and does not extend, in principle, to damages that are the result of a breach which began in the past (the adoption of the 2004 Guidelines) and continues (the implementation of the 2004 Guidelines) resulting in the *incurring* of losses which crystallise (i.e. become quantifiable) and must be paid sometime in the future (hereafter "future damages"). We consider by extension that the same reasoning applies to damages in the past which are already identified or quantified, but must be paid in the future.[18]

74. The majority then made an important observation about the scope of this part of its decision, in paragraph 427:

> In the present case, the introduction of the 2004 Guidelines triggered an obligation to make expenditures that would continue over the life of the projects. It amounts to a continuing breach resulting in ongoing damage to the Claimants' interests in the investment. Thus, Article 1116(1) does not, in our view, as a jurisdictional matter, preclude the Tribunal from deciding on appropriate compensation for future damages. However, this conclusion only determines *whether* a claim for damages is admissible. It does not determine *how* compensation for future damage is to be assessed or whether it is appropriate for this Tribunal to consider damages or make an

[15] *Mobil I* Decision, para. 488.
[16] *Mobil I* Decision, paras. 437-439.
[17] *Mobil I* Decision, para. 427.
[18] *Mobil I* Decision, para. 427.

> award of compensation with regard to the future damages claimed in this particular case. Those matters remain to be addressed.[19]

75. The Tribunal turned to those matters in paras. 473-478 from which it is necessary to quote at some length:

> 473. Turning to future damages, under the facts before us, we are not yet able to properly assess the Claimants' claim for future damages; too many critical questions remain open. Although the Majority recognizes that the Claimants are likely to incur a legal liability that would give rise to potentially compensable losses, the claim for such losses is not yet ripe for determination.
>
> 474. As detailed above, we were presented with evidence relating to at least two types of variables on which the Claimants base their assumptions for their incremental expenditure analysis. One group of variables consists of objective, market-based factors, and the second consists of the results of the Board's regulatory decisions. The critical market-based variables, oil production forecasts for each of Hibernia and Terra Nova as well as future oil prices and exchange rates (inter alia), routinely experience considerable fluctuations. The contents of the second group of variables are derived from regulatory outcomes and require an estimation of the deductible R&D expenditures which have not yet been made or even identified from 2010 onwards. Ultimately, after undertaking a critical examination of these variables, the Majority considers that there is insufficient certainty and too many questions still remain unanswered to allow it to assess with sufficient certainty the amounts of damages incurred under the 2004 Guidelines for the 2010-2036 period. The Tribunal has applied the reasonable certainty standard discussed above, which has not led to a conclusion *per se*, but rather to a finding that there is too much *uncertainty* at this stage for the tribunal to make a determination.
>
> …
>
> 477. As we have noted, in considering and distinguishing the practice of other tribunals, the fact that the damages in this case will eventually be "actual" (thereby removing the necessity to forecast losses which has been present in other cases) is a decisive distinguishing factor. However, it is also worth noting some of the differing circumstances under which other cases concerning future damages have been determined. The number of variables that have to be taken into account in determining the incremental expenditure requirements are much greater in this dispute than was the case of the relevant markets in *Cargill* and *S.D. Myers*. … While some variables in the current case may be more amenable to assessment

[19] *Mobil I* Decision, para. 429.

> than others (e.g. production level estimates for developed production sites in the near term may be more likely to be accurate than those that focus on longer term production forecasts), looking at the totality of relevant and necessary variables that would comprise the calculation of damages, we are simply unable to have confidence that the estimation of the entire picture is one that meets a test of "reasonable certainty". The evaluation of future damages for such a long period is extremely hazardous and it does not, on balance, seem to us that the estimates are more probable than not.
>
> 478. With regard to the 2010-2036 period, we have discussed how estimated future losses caused by "one off" breaches are compensable. However, this principle does not apply here because in the present case the breach (i.e. the application and enforcement of the 2004 Guidelines) gives rise to continuing losses which are typically not known until well after the relevant year has passed. Although ultimately it is not strictly relevant given that we are not inclined to compensate for expenditures not paid or levied (i.e. required to be paid), we have also highlighted the uncertainty of the evidence pertaining to the amount of incremental expenditures in this largely future period. In our view, there is no basis at present to grant compensation for uncertain future damages. Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings.

76. In the 2015 Award, the *Mobil I* Tribunal went on to award damages which it held to be "actual" in respect of both Hibernia and Terra Nova. It held that damages had become actual with regard to Terra Nova up to 1 January 2012 and with regard to Hibernia up to 1 May 2012. Mobil was awarded damages totalling 13,893,013 Canadian dollars, plus pre-award interest.[20]

C. Developments Following the *Mobil I* Award

77. Canada challenged the *Mobil I* Award before the courts of Ontario on the ground that the *Mobil I* Tribunal had exceeded its jurisdiction. That challenge was pending at the time that the present Tribunal was constituted. On 16 February 2016, the Ontario Superior Court of Justice dismissed Canada's application to set aside the Award.[21]

[20] *Mobil I* Award, para. 178.
[21] **C-173**, *Attorney-General of Canada* v. *Mobil Investments Canada Inc. and Murphy Oil Corporation*, CV-15-11079-00CL (Conway J.).

78. On 5 July 2012, i.e. some six weeks after the *Mobil I* Decision, Mobil wrote to the Board. After drawing attention to the Decision, the letter requested that the Board waive Mobil's portion of Hibernia and Terra Nova's outstanding shortfall under the 2004 Guidelines. The letter continued:

> We also seek the Board's assurance that the Guidelines will not be applied to ExxonMobil Canada Properties, ExxonMobil Canada Ltd. and ExxonMobil Canada Hibernia Company Ltd. for 2012 or any future period. We appreciate your assistance in providing the requested clarification.[22]

79. The Board replied on 9 July 2012 in the following terms:

> In response to your correspondence of July 5, 2012, the validity of the Board's guidelines has been affirmed by the Courts and we will continue to verify an Operator's obligation to ensure that research and development and education and training projects, initiatives and expenditures are aligned with the eligibility criteria and benchmarks established by these guidelines.
>
> There is no intention to "waive" in whole or in part any of the Operator's obligations respecting research and development or education and training for any of the projects that fall under the Board's jurisdiction.[23]

80. Mobil commenced the present proceedings by submitting its Request for Arbitration on 16 January 2015.

IV. THE CLAIMS IN THE PRESENT PROCEEDINGS

81. The *Mobil I* Tribunal having awarded Mobil damages in respect of the Terra Nova Project up to 1 January 2012 and in respect of Hibernia up to 1 May 2012, in the present proceedings, Mobil seeks damages caused by the continued application of the 2004 Guidelines from those dates until the end of 2015.

82. Unlike the position in *Mobil I*, therefore, the present case is concerned solely with a claim for damages which it is said have already become "actual"; there is no claim in respect of future losses.

[22] **C-174**, Letter from Mr Paul Sacuta, Operations Manager, ExxonMobil Canada Ltd to Mr Jeffrey Budgen, Manager, Industrial Benefits, Policy and Regulatory Coordination CNLOPB.
[23] **C-176**, Letter from Mr Jeffrey Budgen to Mr Paul Sacuta.

83. In its Memorial, Mobil describes the present proceedings in the following terms:

> This arbitration, therefore, is effectively a second quantum phase of a prior arbitration, required because of Canada's ongoing breach of the NAFTA, as well as the manner in which the earlier Tribunal approached the question of the losses suffered by Mobil. The question of liability can and should be resolved summarily by this tribunal by reliance upon the awards issued by the competent first tribunal.[24]

84. Mobil initially claimed 20,845,708 Canadian dollars as compensation, together with 54,209 Canadian dollars as the cost of letters of credit which it alleges it was obliged to place or maintain during the period to which its claims relate.[25] That claim was later reduced, and in its Rejoinder, Mobil claims 19,883,897 Canadian dollars, together with pre-award and post-award interest and costs.[26]

85. In addition to contesting the jurisdiction of the Tribunal and the admissibility of the claim, Canada contests the damages claimed by Mobil. It is, however, unnecessary to enter into the differences between the Parties on the issues of quantum at this stage of the proceedings.

V. THE ISSUES BEFORE THE TRIBUNAL

A. The Three Issues Before the Tribunal

86. Canada challenges the jurisdiction of the Tribunal, or the admissibility of the claim, on two grounds.

87. First, Canada maintains that Mobil's claim fails to comply with the provisions of Article 1116 of NAFTA. Article 1116, which forms part of Section B of Chapter 11 of NAFTA, provides as follows:

> Article 1116: Claim by an Investor of a Party on its Own Behalf
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A [of Chapter 11] …

[24] Memorial, para. 1.
[25] Memorial, para. 322.
[26] Rejoinder, para. 177.

> and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

88. According to Canada, the breach in respect of which Mobil claims is the adoption of the 2004 Guidelines, something of which Mobil became aware in 2004. Canada therefore contends that the time limit set by Article 1116(2) expired in 2007, so that Mobil's present claim is time barred. To the extent that Mobil claims not on its own behalf but on behalf of companies which it owns or controls (see para. 2, above), and thus relies upon Article 1117 of NAFTA, Canada maintains that the claim is similarly time barred, because of Article 1117(2), the provisions of which are substantially identical to those of Article 1116(2).

89. Secondly, Canada contends that Mobil's claim is barred by the doctrine of *res judicata*. According to Canada, Mobil has already advanced, in the *Mobil I* proceedings, a claim for damages allegedly caused by the 2004 Guidelines in the period covered by its present claim. Canada maintains that the *Mobil I* Tribunal considered and rejected that claim and that its decision is binding upon Mobil. In Canada's submission, the doctrine of *res judicata* thus precludes Mobil from renewing the same claim in the present proceedings.

90. Mobil, as will be seen, rejects both of these arguments. It accepts, however, that if Canada succeeds on either of them, then the proceedings are at an end and the Tribunal will be unable to consider its claim for damages.

91. Conversely, Canada accepts that, if the Tribunal rejects both of its preliminary arguments, the *res judicata* effect of the *Mobil I* Decision and Award means that Canada cannot contest liability, since it is bound by the *Mobil I* ruling that enforcement of the 2004 Guidelines is contrary to NAFTA Article 1106.[27] Nevertheless, Canada maintains that Mobil has failed to discharge the burden of showing that the entirety of

[27] Canada Counter-Memorial, para. 8; Transcript, Day 1, pp. 185-186.

the expenditure for which it claims would not have been incurred but for the 2004 Guidelines.

92. The Tribunal thus has three issues before it:

(1) whether Mobil has failed to comply with the provisions of Articles 1116(2) and 1117(2) of NAFTA and, if so, whether the consequence is that the Tribunal lacks jurisdiction or the claim is inadmissible ("the temporal issue");

(2) whether Mobil's claim is barred by the doctrine of *res judicata* as a result of the decision and award in the *Mobil I* proceedings ("the *res judicata* issue"); and

(3) whether the losses claimed by Mobil were caused by the enforcement of the 2004 Guidelines during the relevant period ("the causation issue").

B. The Tribunal's Decision to Deal Separately with the First and Second Issues

93. On the third issue, each party has produced extensive documentary material in support of its case. In addition, Mobil has submitted witness statements from eight witnesses, while Canada submitted one witness statement and two expert reports from a damages expert. Five of Mobil's witnesses, together with Canada's witness and its expert, appeared for cross-examination at the July 2017 Hearing. The Tribunal has found this evidence, and the Parties' accompanying submissions, very helpful, but it became clear during the Hearing that further briefing on the third issue would be necessary before it could be the subject of a final determination.

94. As noted above, it is common ground that, if Canada succeeds on either of the first two issues, the third issue will never be reached. The Tribunal therefore concluded, for reasons of procedural economy, that it should give a preliminary ruling on the first two issues. Accordingly, the Tribunal informed the Parties, during the Hearing, that it proposed to set to one side the third issue while it reached its conclusions on the first and second issues. In the event that the Tribunal found in favour of Canada on either the first or the second issue, it would set out its reasoning and conclusions in an award which would bring the proceedings to an end. On the other hand, if the Tribunal concluded that Canada failed on both the first and second issues, its reasoning and conclusions would be given in a decision. The Tribunal would then request post-

hearing briefs on aspects of the third issue, after receipt of which it would proceed to an award. Neither Party made any objection to this approach.

95. In deciding to proceed in this way, the Tribunal was mindful of the fact that, shortly after it was constituted, it rejected a request for bifurcation made by Mobil.[28] The course of action now taken, however, was quite different from that then proposed by Mobil. At the time that the Mobil made its request, Canada had yet to indicate the submissions which it intended to make, so that neither the first nor the second issue was then in contemplation. Mobil had requested that the Tribunal decide, as a preliminary matter, that the decision of the *Mobil I* Tribunal on liability was *res judicata*, a matter which, as indicated in paragraph 68, above, is not now contested.

96. The Tribunal will, therefore, first consider the temporal issue (Part VI) and then turn to the *res judicata* issue (Part VII). The Tribunal's conclusions are set out in Part VIII.

VI. THE TEMPORAL ISSUE

A. Canada's Position

97. Canada maintains that compliance with the relevant provisions of NAFTA Articles 1116(2) and 1117(2) is a jurisdictional requirement in respect of which Mobil bears the burden of proof. That follows from NAFTA Articles 1121 and 1122. Article 1122(1) provides that each NAFTA Contracting Party consents to the submission of a claim in accordance with the procedures set out in NAFTA, while Article 1121(1) provides that an investor may submit a claim only if it consents to arbitration in accordance with the procedures set out in NAFTA. According to Canada, an essential part of those procedures is the requirement, in Articles 1116(2) and 1117(2) that a claim must be brought within three years of the date on which the investor (or, under Article 1117, the enterprise on whose behalf the investor claims) first acquires knowledge (or should first have acquired knowledge) of the alleged breach and of the fact that the investor (or enterprise) has incurred loss or damage.

98. Canada relies, in this regard, on the award in *Methanex* v. *United States*, which states:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e.

[28] Procedural Order No. 1, para. 14.1.

> that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[29]

99. Canada considers that these requirements are strict. They exist because the NAFTA Contracting Parties were determined to ensure finality and not to be exposed to claims being brought years after the investor or enterprise acquired knowledge of the alleged breach and damage.

100. In the present case, Canada argues, the relevant breach is the promulgation of the 2004 Guidelines, a fact of which Mobil became aware on 5 November 2004, with the result that the three-year limitation period expired on 5 November 2007, long before the filing of the Request for Arbitration in the present proceedings.

101. Mobil cannot get around that time limit, Canada maintains, by portraying the breach as a "continuing breach". It argues that

> [n]ot only would such an interpretation contradict the plain language of [Articles 1116(2) and 1117(2)] and the long-standing and consistent position of all three NAFTA Parties that a continuing course of conduct does not renew the limitations period, it would have an impact for the Chapter Eleven NAFTA regime far beyond the present dispute.[30]

102. So far as the text is concerned, Canada emphasizes that an investor cannot *first* acquire knowledge of a breach on more than one occasion, so that the "continuing breach" theory would make a nonsense of the provision.[31]

103. Canada argues that the "long-standing and consistent position" of the three NAFTA States has to be taken into account by the Tribunal because of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, which provides that, in the interpretation of a treaty, "there shall be taken into account, together with the context … (b) any subsequent practice in the application of the treaty which establishes the

[29] **RL-2**, *Methanex Corporation* v. *United States of America* (UNCITRAL), Partial Award of 7 August 2002, para. 120.
[30] Canada Counter-Memorial, para. 152.
[31] Canada Counter-Memorial, paras. 145-151; Rejoinder, paras. 56-80.

agreement of the parties regarding its interpretation."[32] While the Vienna Convention is not, as such, applicable to NAFTA,[33] it is generally agreed that its provisions on interpretation reflect customary international law and are therefore of general application (something which is common ground in the present case).

104. According to Canada, the three NAFTA Contracting Parties in their submissions to other NAFTA tribunals, whether as parties to the proceedings or as non-disputing parties making a submission under Article 1128, have consistently adopted the position that whether a breach is to be regarded as continuing does not affect the application of Articles 1116(2) and 1117(2). In this regard, it points to the submissions by Mexico and the United States in *Merrill and Ring* v. *Canada*,[34] and subsequent submissions in *DIBC* v. *Canada*,[35] *Bilcon* v. *Canada*,[36] *Apotex* v. *United States*,[37] *Mercer* v. *Canada*[38] and *Eli Lilly* v. *Canada*.[39]

105. Canada points to a number of NAFTA arbitration awards which it maintains support its position regarding the interpretation and application of Articles 1116(2) and 1117(2). In particular, it invokes *Grand River* v. *United States*, which described the two provisions as having "introduced a clear and rigid limitation defense – not subject to any suspension, prolongation or other qualification" and added that:

> [an analysis that led to] not one limitations period but many … [would] render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent

[32] **CL-35**, Vienna Convention on the Law of Treaties, 1969.
[33] Under Article 4 of the Vienna Convention, the Convention is applicable to a multilateral treaty only if, at the time of the conclusion of that treaty, all of its contracting parties were also parties to the Vienna Convention. That is not the case with NAFTA.
[34] **RL-14**, *Merrill & Ring Forestry L.P.* v. *Government of Canada* (UNCITRAL), 1128 Submission of the United States, 14 July 2008, para. 5 and **RL-15**, *Merrill & Ring Forestry L.P.* v. *Government of Canada* (UNCITRAL) Submission of Mexico Pursuant Article 1128 of NAFTA, 2 April 2009.
[35] **RL-11**, *Detroit International Bridge Company* v. *Government of Canada* (UNCITRAL), Submission of the United States Pursuant Article 1128 of NAFTA, 14 February 2014, para. 3 and **RL-12**, *Detroit International Bridge Company* v. *Government of Canada* (UNCITRAL), Submission of Mexico Pursuant Article 1128 of NAFTA, 14 February 2014, para. 21.
[36] **RL-17**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Of Delaware Inc.* v. *Government of Canada* (UNCITRAL) ("*Bilcon* v. *Canada*"), Submission of the United States of America, 19 April 2013, para. 12.
[37] **RL-18**, *Apotex Inc.* v. *United States of America* (UNCITRAL), Memorial on Objections to Jurisdiction of Respondent United States of America, 16 May 2011, paras. 46-49.
[38] **RL-19**, *Mercer International Inc.* v. *Government of Canada*, ICSID Case No. ARB(AF)/12/3, Submission of the United States of America, 8 May 2015, para. 5 and **RL-20**, *Mercer International Inc.* v. *Government of Canada*, ICSID Case No. ARB(AF)/12/3, Canada's Rejoinder Memorial, 31 March 2015, paras. 223-228.
[39] **RL-21**, *Eli Lilly and Company* v. *Government of Canada* (UNCITRAL), Submission of the United States of America, 18 March 2016, para. 4.

> state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.[40]

106. Canada also cites *Apotex*[41] and *Bilcon*[42] as adopting the same approach. According to Canada, the only award which comes to the opposite conclusion is *UPS* v. *Canada*,[43] which has not been followed and which is treated as wrongly decided on this point by all three NAFTA Parties.

107. Canada further argues that this interpretation of Articles 1116(2) and 1117(2) is supported by Mobil's own arguments before the *Mobil I* Tribunal, before which Mobil argued that it was obliged to bring its claim for damages for future losses in the *Mobil I* arbitration, because of the three-year limitation period in those provisions.

108. Canada maintains that Mobil's alternative argument that the time limit starts to run from the moment when the Board made clear, in its letter of 9 July 2012, that it would continue to enforce the Guidelines notwithstanding the *Mobil I* Decision is artificial. The breach is still the 2004 Guidelines. Canada's refusal to revoke or cease to enforce the Guidelines following the *Mobil I* Decision is irrelevant, because a Chapter 11 Tribunal has power only to award monetary damages or restitution of property (NAFTA Article 1135) and may not order a NAFTA Party to repeal or cease to enforce a measure.

109. Finally, Canada dismisses the sentence in the *Mobil I* Decision that Mobil would be able to claim for future losses in subsequent proceedings.[44] Since Articles 1116(2) and 1117(2) lay down a jurisdictional requirement, Canada maintains that statements made by the *Mobil I* Tribunal cannot operate to confer upon the present Tribunal a jurisdiction which NAFTA does not grant to it.

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[40] **RL-3**, *Grand River Enterprises Six Nations, Ltd., et al.* v. *United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, paras. 29 and 81.
[41] **RL-5**, *Apotex Inc.* v. *United States of America* (UNCITRAL), Award on Jurisdiction and Admissibility, 14 June 2013, para. 325.
[42] **RL-6**, *Bilcon* v. *Canada*, Award on Jurisdiction and Liability, 17 March 2015, para. 268.
[43] **RL-25**, *United Parcel Service of America* v. *Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007 ("*UPS*"), paras. 26-28.
[44] *Mobil I* Decision, final sentence of para. 478.

B. Mobil's Position

110. Mobil denies that the time limits in Articles 1116(2) and 1117(2) amount to a jurisdictional requirement and contends that they are, instead, a matter of admissibility. Consequently, the burden of proof is on Canada, rather than on Mobil.

111. According to Mobil, the requirements of Articles 1116(2) and 1117(2) have to be interpreted in light of the object and purpose of the NAFTA and the fundamental condition of fairness. To bar Mobil from recovery in the present proceedings, given what occurred in the *Mobil I* proceedings, and what was said by the *Mobil I* Tribunal in paragraph 478 of its Decision, would be grossly unfair.

112. Mobil's principal argument, which is supported by the expert report of Professor Sarooshi, is that the enforcement of the 2004 Guidelines is a continuing breach and, according to Professor Sarooshi (whose views Mobil adopts), "there is good authority that where there is a continuing breach, then time does not begin to run for the purposes of a limitation period until the breach in question ceases to exist".[45]

113. Professor Sarooshi and Mobil maintain that this interpretation is supported by the only two NAFTA arbitrations which are truly in point: *UPS* v. *Canada* and *Feldman* v. *Mexico*. In *UPS*, the tribunal held that "the generally applicable ground for our decision is that … continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly".[46] While Canada has submitted in the present proceedings that the *UPS* award is wrong on this point, Mobil points out that Canada had expressly relied on this very passage in *UPS* in its submissions to the *Mobil I* Tribunal.

114. Mobil dismisses the awards on which Canada relies on the basis that none of them is truly in point, since none concerned continuing breaches comparable to the one alleged by Canada in the present case and none "involved a prior tribunal establishing liability and directing the claimant to file another arbitration for damages incurred in the future".

115. Mobil rejects Canada's reliance on the submissions of the three NAFTA Parties as subsequent practice establishing their agreement on the interpretation of Articles

[45] Sarooshi Report, para. 47.
[46] **RL-25**, *UPS*, para. 28.

1116(2) and 1117(2). It points to the fact that, had the three NAFTA Parties wished to establish a definitive interpretation of those provisions, they could have done so by means of an interpretation by the Free Trade Commission established by Article 2001 of NAFTA. Under Article 1131(2), the Free Trade Commission, which is comprised of representatives of the three NAFTA Parties, is empowered to adopt interpretations of provisions of NAFTA which are then binding on Chapter Eleven tribunals. The fact that it has not done so with regard to the effect of Articles 1116(2) and 1117(2) in cases of continuing breach, despite having been faced with arguments regarding that issue in a number of cases, Mobil maintains, is telling.

116. Mobil also advances an alternative argument to the effect that the letter of 9 July 2012, by which the Board made clear that it would continue to enforce the 2004 Guidelines notwithstanding the *Mobil I* Decision, and/or the adoption in 2012 (Hibernia) and 2014 (Terra Nova) of new operating agreements which required compliance with the 2004 Guidelines amounted to new breaches with the result that the three-year limitation period began to run afresh.

C. The Hearing and Post-Hearing Briefs

117. At the Hearing on 28 July 2017, a member of the Tribunal posed the following question:

> Has there been a new breach following the decision, by the Board, to continue to impose or enforce the Guidelines after the Decision of the earlier Tribunal? And on that question, the issue arguably is this: there is an obligation in international law to perform a treaty, including NAFTA, in good faith, and can it not be said that a decision by the Board to continue to enforce the Guidelines after the Decision of the Mobil I Tribunal constitutes a breach of that obligation?
>
> And that gives rise to a couple of questions: … first of all, is a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA? And, secondly, is an allegation of such a breach properly before us? For example, I don't recall it being pleaded as such, but can it be said to have been pleaded in the pleading that is before us on abuse of process?[47]

118. The Tribunal invited the Parties to file post-hearing briefs on this question.

[47] Transcript, 28 July 2017, p. 1122 (Mr Rowley).

119. In its post-hearing briefs, Canada replied, first, that the principle of good faith, while undoubtedly part of international law, did not give rise to a free-standing obligation.[48] Secondly, Canada maintained that an allegation of a breach of the obligation to perform a treaty in good faith was not properly before the Tribunal, since Mobil had based its Request for Arbitration and its Memorial on the breach being the 2004 Guidelines and could not now be allowed to alter the entire basis of its claim.[49] Lastly, Canada argued that there was no obligation owed to an investor to repeal or cease application of the 2004 Guidelines. Any obligation arose under customary international law and not from NAFTA as such, still less from NAFTA Chapter Eleven, and could not therefore form the subject of a claim by an investor under Chapter Eleven.[50]

120. Mobil replied to the question posed at the Hearing by first repeating its principal argument concerning continuing breach.[51] However, it then developed an alternative argument that the decision of the Board to continue enforcing the 2004 Guidelines manifested in its 9 July 2012 letter,[52] and the subsequent adoption of the 2012 operating authorization for Hibernia and the 2014 operating authorization for Terra Nova[53] amounted to distinct acts each of which triggered the application of Articles 1116(2) and 1117(2) afresh. Mobil also argued that this alternative argument was properly before the Tribunal, having first been canvassed in the Memorial.[54]

D. The Submissions of the United States and Mexico

121. On 24 October 2017, the United States filed, pursuant to NAFTA Article 1128, a submission regarding the interpretation of NAFTA. The United States submitted that consent to arbitration under Chapter Eleven was confined to disputes concerning claims for breach of provisions of Chapter Eleven and did not extend to "consent to arbitrate disputes based on alleged breaches of obligations found in other articles or chapters of the NAFTA or alleged breaches of other treaties or other international obligations".[55] The United States further maintained that (a) the principle that every treaty is binding on the parties to it and must be performed in good faith is derived from customary

[48] Canada Post-Hearing Brief, paras. 3-5.
[49] Canada Post-Hearing Brief, paras. 6-9.
[50] Canada Reply Post-Hearing Brief, paras. 8-21.
[51] Mobil Post-Hearing Brief, paras. 1-2.
[52] Mobil Post-Hearing Brief, paras. 9-19
[53] Mobil Post-Hearing Brief, paras. 20-24.
[54] Mobil Post-Hearing Brief, paras. 25-33 and Mobil Reply Post-Hearing Brief.
[55] United States submission, para. 2.

international law, not NAFTA Chapter Eleven;[56] (b) the principle of good faith is not in itself a source of obligation where none would otherwise exist;[57] and (c) there is no specific treaty obligation under NAFTA to repeal or cease enforcement of a measure in response to an adverse arbitral award.[58]

122. On 7 November 2017, Mexico filed a submission pursuant to Article 1128. In its submission, Mexico agreed with Canada and the United States that the principle of good faith is not a source of obligation where none otherwise exists.[59] Mexico further stated that it agreed with Canada that there was no separate obligation to perform in good faith under NAFTA Chapter Eleven and that claims alleging breach of the good faith principle do not fall within the jurisdiction conferred by Chapter Eleven on an arbitral tribunal.[60] Finally, Mexico concurred with the United States that there is no specific treaty obligation under NAFTA to repeal or cease enforcement of a measure in response to an adverse arbitral award or decision.[61]

123. The Tribunal accorded the Parties an opportunity to respond to the Article 1128 submissions.

124. In its response, filed on 14 December 2017, Canada drew attention to the fact that all three NAFTA Contracting Parties agreed that (a) an alleged failure to perform the provisions of NAFTA in good faith does not fall within the jurisdiction conferred by Chapter Eleven;[62] and (b) Mobil is wrong to suggest that NAFTA does not merely include a remedy for unlawful conduct but also an obligation to end it and that there is no specific NAFTA obligation to repeal or cease enforcement of a measure in response to an adverse arbitral award.[63] Canada further maintained that the concordant views of the three States on this issue should be given significant weight by the Tribunal in interpreting the NAFTA provisions in issue.[64]

[56] United States submission, para. 3.
[57] United States submission, para. 4.
[58] United States submission, para. 5.
[59] Mexico submission, para. 3.
[60] Mexico submission, para. 4.
[61] Mexico submission, para. 5.
[62] Canada response to the Article 1128 submissions, paras. 4-6.
[63] Canada response to the Article 1128 submissions, paras.7-9.
[64] Canada response to the Article 1128 submissions, paras. 10-11.

125. Mobil also filed a response to the Article 1128 submissions on 14 December 2017. In that response, it noted that neither Mexico nor the United States had addressed the interpretation of Articles 1116(2) and 1117(2) as such,[65] nor did they go to the essence of Mobil's claim, which is for breach of Article 1106(1) of NAFTA, not a free-standing obligation of good faith or a duty to cease and desist that is separate and apart from NAFTA.[66] Mobil noted, however, that the submissions affirmed the existence of a principle of good faith in international law[67] and contended that the Tribunal had the jurisdiction and the mandate to apply customary international law.[68]

E. The Tribunal's Analysis

(1) The Relevant NAFTA Provisions

126. It is useful to begin by recalling the relevant NAFTA provisions. Article 1116 reads (in relevant part) as follows:

> *Article 1116: Claim by an Investor of a Party on its Own Behalf*
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A [of Chapter 11] …
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

127. Article 1117 contains substantially the same requirement where an investor claims on behalf of an enterprise:

> *Article 1117: Claim by an Investor of a Party on behalf of an Enterprise*
>
> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls

[65] Mobil response to the Article 1128 submissions, para. 2.
[66] Mobil response to the Article 1128 submissions, paras. 8-17.
[67] Mobil response to the Article 1128 submissions, paras. 4-7.
[68] Mobil response to the Article 1128 submissions, paras. 18-23.

> directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A [of Chapter 11]…
>
> and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

128. Since Mobil claims both on its own behalf, as an investor of the United States, and on behalf of ExxonMobil Canada Resources Co. and ExxonMobil Canada Properties,[69] both provisions are relevant.

129. Articles 1116 and 1117 appear in Section B of Chapter Eleven. Other material provisions of Section B are Articles 1121 and 1122. Article 1121 provides in relevant part:

> *Article 1121: Conditions Precedent to Submission of a Claim to Arbitration*
>
> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
>
> (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement;
>
> …
>
> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if the investor and the enterprise:
> consent to arbitration in accordance with the procedures set out in this Agreement; …

130. Article 1122 provides:

> *Article 1122: Consent to Arbitration*
>
> Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. …

[69] See paras. 1 and 2, above.

131. It is also important to keep in mind the relevant part of Article 1106, the provision with which the *Mobil I* Tribunal found the 2004 Guidelines to be inconsistent. Article 1106(1) provides:

> No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> …
>
> (c) 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; …

132. Finally, it is useful to recall two of the more general provisions of NAFTA. The objectives of NAFTA are set out in Article 102, which provides:

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most favored-nation treatment and transparency, are to:
>
> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> (b) promote conditions of fair competition in the free trade area;
>
> (c) increase substantially investment opportunities in the territories of the Parties;
>
> (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
>
> (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
>
> (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.
>
> 2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

133. Also relevant is Article 105, which provides:

> The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

134. This provision requires that Canada ensure that the CNLOPB act in conformity with NAFTA.

(2) Is Compliance with the Requirements of Article 1116(2) and Article 1117(2) a Jurisdictional Requirement?

135. As noted above, Canada maintains that compliance with the time limits laid down in Articles 1116(2) and 1117(2) is a precondition for the jurisdiction of a Chapter Eleven tribunal. Mobil, on the other hand, considers it a matter of admissibility, not jurisdiction, and contends that the burden of proof is therefore on Canada, not on Mobil.

136. The Tribunal does not consider it necessary to decide this question. Whether the requirement that a claim be brought within the three-year period stipulated in the two provisions is treated as a matter of jurisdiction or admissibility, the practical consequences in the present case are the same. If Mobil has failed to comply with that requirement, then the case cannot proceed.

137. Moreover, since what is at issue is essentially a question of law, not evidence, the Tribunal does not consider it helpful to think in terms of burden of proof. It will examine carefully the arguments submitted by both parties, without any preconceptions as to burden.

(3) The Mobil I Proceedings

138. Both Parties have made much of what was said during the *Mobil I* proceedings.

139. Canada emphasizes the submissions made by Mobil in respect of the claim it advanced in those proceedings for damages for future losses, suggesting that the position then taken by Mobil confirms the interpretation which Canada now seeks to place on Articles 1116(2) and 1117(2).

140. The Tribunal is not persuaded by this argument. It is true that, in the *Mobil I* proceedings, Mobil sought to justify its claim for future damages by pointing to what it regarded as the danger that it might be held to be time-barred if it had to bring a fresh

claim for damages arising after the beginning of 2012.[70] Yet the recognition that there was a danger that a future tribunal might come to such a conclusion is not at all the same thing as an acceptance that it would, or should, do so. The Tribunal does not consider that Mobil is estopped from arguing that it has met the time limits requirements in Articles 1116(2) and 1117(2) merely because it advanced in *Mobil I* an argument that a future tribunal *might* take the view that it could not meet those requirements.

141. More importantly, what is at issue here is the proper interpretation of provisions of NAFTA which govern when and how claims may be made by investors. While the practice of the NAFTA Parties is undoubtedly relevant as an aid to the interpretation of those provisions,[71] the arguments advanced by an investor in an earlier case offer no such assistance.

142. Mobil advanced an argument that Canada was now arguing the opposite, with regard to the *UPS* award, of the position it had taken in *Mobil I.* Again, the Tribunal does not find this argument persuasive. Just as Mobil was entitled to point out that a future tribunal *might* read Articles 1116(2) and 1117(2) as precluding it from bringing a fresh claim, even though it now maintains that such a conclusion would be wrong in law, so Canada was entitled to point out to the *Mobil I* Tribunal that, in the light of the decision of the *UPS* tribunal, a future tribunal might accept the continuing act approach to those provisions for which Mobil is now contending.

143. Nor is the Tribunal convinced by Mobil's reliance on the following passage in the *Mobil I* Decision:

> Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings.[72]

144. Whatever the relevance of this passage to the *res judicata* issue (a matter to which the Tribunal will turn in Part VII), it is of little importance in relation to the decision which the Tribunal must make regarding the interpretation and effects of Articles 1116(2) and

[70] Mobil stated that the three-year limitation period "may well prevent Claimants from bringing future claims". **R-87**, *Mobil I*, Claimants' Post-Hearing Brief of 3 December 2010, para. 67.
[71] See paras. 157-159, below.
[72] *Mobil I* Decision, para. 478.

1117(2). Those provisions determine either the extent of the jurisdiction of the present Tribunal or, at the least, the admissibility of the claim brought before it. The brief passage in the *Mobil I* Decision on which Mobil now relies cannot confer upon the present Tribunal a jurisdiction which it would not otherwise possess, or render admissible a claim which, under a proper interpretation of the relevant NAFTA provisions, would not otherwise be admissible. Whether the present claim complies with the requirements of Articles 1116(2) and 1117(2) is a matter which the Tribunal must determine for itself.

(4) Is Mobil's Claim barred by Articles 1116(2) and 1117(2)?

145. The Tribunal will therefore turn to the central question before it, namely whether or not the claim brought by Mobil in the present proceedings, which relates to the losses it claims to have sustained as a result of the application of the 2004 Guidelines is barred by the application of Articles 1116(2) and 1117(2). At the outset, the Tribunal wishes to say that it has found the submissions of the Parties and the Article 1128 submissions from Mexico and the United States of great assistance. To the extent that it does not deal in detail with every point made in those various submissions, that is only because it considers that some are concerned with points which the Tribunal is not compelled to decide.

146. The Tribunal considers that the requirement, in Articles 1116(2) and 1117(2), that any claim in respect of a breach of Section A of Chapter Eleven must be brought within three years of the investor (or enterprise) first acquiring knowledge of the alleged breach and first acquiring knowledge that it has suffered loss or damage as a result of that breach plays an important role within the scheme of Chapter Eleven. By preventing claims being brought against a NAFTA Party after more than three years, it guarantees for all three States a degree of certainty and finality. Their submissions in several earlier NAFTA arbitrations make clear the importance which they attach to that guarantee while the awards themselves highlight that the limitation period is "clear and rigid".[73]

[73] See **RL-8**, *Marvin Roy Feldman Karpa* v. *United Mexican States*, ICSID Case No. ARB(AF)99/1, Award, 16 December 2002, para. 63 and **RL-3**, *Grand River Enterprises Six Nations, Ltd., et al.* v. *United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, para. 29, and the references at notes 34-39, above.

147. Moreover, the Tribunal accepts Canada's argument that the fact that the limitation period begins to run when a would-be claimant *first* acquires (or should first have acquired) the requisite knowledge is significant; as Canada points out, an investor cannot *first* acquire knowledge of the same matter on more than one occasion.

148. It is, however, important to identify precisely what it is of which the investor or enterprise must acquire knowledge in order for the limitation period in Articles 1116(2) and 1117(2) to begin to run. First, there must be knowledge of the alleged breach. Secondly, there must be knowledge that the investor or enterprise has suffered loss or damage as a result of that alleged breach.

149. For Canada the application of that test to the facts of the present case is simple. The alleged breach is the 2004 Guidelines, promulgated on 5 November 2004 and the existence of which became known to Mobil on that date. The three-year period must, therefore, have started to run from that date, and thus expired on 5 November 2007, whereas the present arbitration was not commenced until 16 January 2015. However, that approach overlooks a number of important considerations.

150. First, it misunderstands the nature of the breach on which Mobil's claim is based. Mobil asserts – and the *Mobil I* Tribunal, in a decision which both Parties accept is *res judicata* on this point, decided – that the breach is a breach of Canada's obligations under Article 1106 of NAFTA.

151. Article 1106(1) provides that no Party may:

- impose or *enforce* a requirement 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; or
- *enforce* a commitment or undertaking in connection with, *inter alia*, the management, conduct or operation of an investment 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.

152. While the imposition of the 2004 Guidelines took place on 5 November 2004, their enforcement was a different matter. Due to the challenge brought by Mobil in the Canadian courts, it was not until 19 February 2009, when the Supreme Court of Canada

dismissed Mobil's petition for leave to appeal and thus ended the challenge in the Canadian courts, that the Guidelines were actually enforced (albeit with retrospective effect)[74] against Mobil or that Mobil could have acquired knowledge that they would be enforced. Canada's approach, which elides the promulgation of the 2004 Guidelines with their subsequent enforcement, is thus an over-simplification.

153. Secondly, Canada's approach fails to take proper account of the fact that the limitation period starts to run only when the investor or enterprise has not only acquired (or ought to have acquired) knowledge of the alleged breach but also has acquired (or ought to have acquired) knowledge that it has incurred loss or damage as a result. The date on which an investor or enterprise first acquires (or ought to have acquired) knowledge that it has suffered loss or damage may not be the same as the date on which it first acquires (or ought to have acquired) knowledge of the alleged breach which causes that damage.

154. Moreover, the language of Article 1116(2) and Article 1117(2) is quite clear in requiring knowledge that loss or damage has been incurred. It is impossible to know that loss or damage *has been* incurred until that loss or damage actually has been incurred. Thus, even if Mobil had first acquired knowledge of the enforcement of the 2004 Guidelines in 2004, it could not have acquired knowledge that it had incurred loss or damage in consequence until that loss or damage had actually been sustained.

155. Even if it is possible to read the requirement in Articles 1116(2) and 1117(2) that the investor must have acquired knowledge that loss or damage *has been* incurred as embracing a case in which the investor knows that loss or damage *will be* incurred, the time limit imposed in those provisions could not start to run until the investor had *knowledge* that it would suffer such loss or damage. To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty. While the Tribunal agrees with Canada that it is not necessary that the quantum of loss or damage be known, it is clear that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained. Thus, although Mobil knew about the 2004 Guidelines on 5 November 2004, when they were promulgated, it could

[74] See para. 63, above.

not have had the requisite knowledge that it would incur loss or damage as a result of those Guidelines until the Canadian courts had finally disposed of its challenge to the Guidelines.

156. Mobil maintains that the enforcement of the 2004 Guidelines is a continuing breach and, as such, there is no single date from which the limitation period in Articles 1116(2) and 1117(2) can run. That argument is supported by the expert report of Professor Sarooshi and by the *UPS* award.

157. The Tribunal nevertheless sees certain difficulties with this argument. It would render Articles 1116(2) and 1117(2) largely ineffective in cases of a change in regulatory framework, since it could always be argued that each day's instance of application or enforcement of a measure was a separate act.

158. In addition, such an approach has clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA. In accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight.

159. The Tribunal notes Mobil's argument that the significance of concordant submissions by the three NAFTA Parties to different Chapter Eleven tribunals has to be assessed in light of the fact that, unusually, NAFTA contains an express provision concerning the subsequent agreement of the Contracting Parties regarding the interpretation of the treaty. Article 1131 of NAFTA provides that if such agreement is adopted in the form of a decision of the Free Trade Commission, it becomes binding on all Chapter Eleven tribunals. Mobil therefore argues that the availability of this process means that very little weight should be attached to other instances of subsequent practice; in effect Mobil says that, if the NAFTA Parties want their views on interpretation to be effective, they can, and should, incorporate those views into a Commission decision. Moreover, Mobil argues that submissions to Chapter Eleven tribunals must be treated with particular caution, given the danger that those submissions will be affected by the circumstances of the arbitrations involved, and notes that tribunals have been wary of

attaching much weight to such submissions when considering the correct interpretation of a NAFTA provision.

160. In the present case, there is no pertinent decision of the Free Trade Commission. The Tribunal is not, however, wholly persuaded by Mobil's argument. The Tribunal accepts that there is a difference between the importance of a Free Trade Commission decision on interpretation and the importance of other forms of subsequent practice. The former is binding upon the Tribunal by virtue of NAFTA Article 1131, whereas Article 31(3)(b) of the Vienna Convention directs only that the latter kind of practice should be "taken into account" in relation to interpretation. Moreover, the Tribunal accepts that the fact that the three States have not elected to move to a decision of the Free Trade Commission is significant. Nevertheless, it considers that there might be many reasons for the absence of a Free Trade Commission decision and it does not believe that the subsequent practice of the three NAFTA Parties can be disregarded merely because it takes forms different from a Commission decision.

161. Finally, apart from *UPS*, Mobil's continuing breach argument has attracted comparatively little support in the jurisprudence of NAFTA arbitration tribunals. While Mobil rightly points out that none of the awards on this subject concerned facts directly comparable to those in the present case, it is now over ten years since the award in *UPS* and the absence of any subsequent endorsement of that tribunal's views on continuing breach means that, at the very least, they should be treated with caution.

162. The Tribunal sees no need, however, to enter into the difficult question whether every continuing breach has the effects suggested by Mobil. What the Tribunal is called upon to decide is how the limitation period in Articles 1116(2) and 1117(2) is to be applied to the actual facts of the present case. What sets those facts apart from the more general hypothetical instances of continuing breach is the decision in *Mobil I*, which was handed down on 22 May 2012. According to Mobil, once the *Mobil I* Tribunal had decided that the imposition and enforcement of the 2004 Guidelines contravened NAFTA Article 1106, Canada was obliged to cease enforcing them against Mobil and it wrote to the CNLOPB to that effect on 5 July 2012.[75] When the Board replied on 9 July 2012 that it had no intention of waiving the Guidelines and continued to enforce

[75] **C-174**, Letter from Paul Sacuta of ExxonMobil Canada Ltd. to Jeffrey Bugden of the CNLOPB.

the requirements held by the *Mobil I* Tribunal to be a breach of Article 1106, there was a fresh breach of which Mobil acquired knowledge on receipt of the letter, and shortly afterwards it incurred loss or damage in consequence.

163. Canada disputes this approach. It maintained in its Rejoinder that "there is no obligation on the part of a NAFTA party vis à vis a claimant investor to remove a measure which has been found to violate NAFTA Chapter Eleven",[76] and repeated that argument at the Hearing. According to Canada, the only remedy is the payment of monetary compensation and NAFTA Article 1135 gives a Chapter Eleven tribunal no power to order any remedy other than monetary damages.[77]

164. The Tribunal considers that Canada's response confuses the right with the remedy. It is true that Article 1135 confers no power on a Chapter Eleven tribunal to order that an offending measure be repealed or that it cease to be enforced. But that does not mean that the State which has adopted such a measure is not under such an obligation, only that such an obligation cannot be derived from the decision of the tribunal.

165. The Tribunal considers that, as a matter of general international law the position is quite straightforward. NAFTA Article 1106(1) prohibits Canada from imposing or enforcing measures which are contrary to its terms. That obligation is a continuing one and, like any treaty obligation, must be performed in good faith.[78] Once a Chapter Eleven tribunal found that the imposition and enforcement of the 2004 Guidelines was contrary to Article 1106, it is difficult to see how Canada could discharge its duty to perform its obligations under Article 1106 in good faith while still enforcing the Guidelines. That conclusion is reinforced by the ILC Articles on State Responsibility, Article 30 of which provides that a State which is responsible for an internationally wrongful act is under an obligation to cease that act if it is a continuing one.

166. It was for that reason that one Member of the Tribunal, with the consent of the other Members (see para. 116, above), put a number of points to the Parties on the last day of the hearing for post-hearing briefing. Those points sought to elucidate the views of the parties on the significance – if any – of the *Mobil I* ruling and the subsequent

[76] Canada Rejoinder, para. 32.
[77] Article 1135 also provides for restitution of property but that has no application here.
[78] Article 26, Vienna Convention on the Law of Treaties, 1969, which is entitled "Pacta sunt Servanda", provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".

decision of the Board to continue enforcing the 2004 Guidelines for the application of Articles 1116(2) and 1117(2) in the present proceedings.

167. In light of the answers to those questions from the Parties and the submissions of the two non-disputing NAFTA States, it is possible to draw certain conclusions.

168. First, both Parties, as well as Mexico and the United States are clear that the principle of good faith forms part of international law and is relevant to the manner in which a State is required to perform its treaty obligations, but that it does not constitute a separate source of obligation where none would otherwise exist. The Tribunal agrees with this view which is based upon clear statements to that effect by the International Court of Justice. As the Court explained in a 1988 passage cited by Canada:

> The principle of good faith is … "one of the basic principles governing the creation and performance of legal obligations" … it is not in itself a source of obligation where none would otherwise exist.[79]

169. In the context of the law of treaties, however, the principle of good faith is not called upon to be "a source of obligation where none would otherwise exist". A party to a treaty is under a specific obligation to perform its obligations under the treaty, derived from the principle *pacta sunt servanda*, which can reasonably be described as one of the cornerstones of international law. Good faith is pertinent to the manner in which that obligation is to be performed; it is not put forward as a free-standing obligation.[80]

170. Secondly, that obligation is derived from customary international law, not from NAFTA, for the binding force of a treaty cannot be derived from the treaty itself but must reside in some rule of international law which exists independently of the treaty. That conclusion has a particular importance for the present case, because Chapter Eleven of NAFTA confers upon the Tribunal jurisdiction only with regard to disputes concerning alleged breaches of Chapter Eleven itself. While the Tribunal is empowered by Article 1131(1) of NAFTA to "decide the issues in dispute in accordance with this agreement and applicable rules of international law", that does not give it the

[79] *Border and Transborder Armed Actions* (*Nicaragua* v. *Honduras*), *I.C.J. Reports 1988*, p. 69, para. 94, quoting *Nuclear Tests* (*Australia* v. *France*), *I.C.J. Reports 1974*, p. 268, para. 46. See also *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*), *Preliminary Objections*, *I.C.J. Reports 1998*, p. 275, para. 38.
[80] Article 26 of the Vienna Convention on the Law of Treaties, 1969.

jurisdiction to hear a dispute concerning an alleged breach not of Chapter Eleven but of other rules of international law. Quite apart, therefore, from whether the duty to repeal, or at least cease to enforce, the 2004 Guidelines is a duty owed to Mobil (as opposed to one owed by Canada to Mexico and the United States), a breach of that duty could not, by itself, give rise to a claim falling within the jurisdiction of the Tribunal.

171. In the Tribunal's view, however, that is not the end of the matter. When the *Mobil I* Tribunal ruled that the 2004 Guidelines were contrary to Article 1106(1) of NAFTA, the legal environment in which those Guidelines existed was altered. Canada's obligation under customary international law to perform its obligations under Article 1106(1) of NAFTA in good faith, even if not enforceable by Mobil through Chapter Eleven arbitration, was nonetheless a highly relevant factor in that changed legal environment. Mobil could not have known that Canada would continue to enforce the 2004 Guidelines against it; indeed, Mobil could reasonably have expected that Canada would not do so.

172. In these circumstances, the Tribunal considers that the decision of the Board to continue enforcing the 2004 Guidelines notwithstanding the decision of the *Mobil I* Tribunal was an act separate and distinct from the promulgation of the 2004 Guidelines and their enforcement until that date. In the immediate aftermath of the *Mobil I* Decision, Mobil could not have known that the Guidelines would have been enforced in the future and that it would incur loss as a result of their future enforcement. It first acquired knowledge that the Guidelines would be enforced in the future, and that it had suffered loss as a result, at the earliest when it received the 9 July 2012 letter. The Tribunal therefore concludes that the limitation period in Articles 1116(2) and 1117(2) began to run again from the time of receipt of that letter. Since the present arbitration was commenced on 16 January 2015, the Tribunal concludes that Mobil's claim was not barred by the limitation provisions of Articles 1116(2) and 1117(2).

173. In reaching that conclusion, the Tribunal is not endorsing Mobil's "continuing breach" argument, with which the Tribunal has already explained it has some difficulties. In the present case, the Tribunal considers that the particular importance of the 9 July 2012 letter in the context of the *Mobil I* Decision makes it unnecessary to decide whether the continuing breach theory is correct or not as a matter of law.

174. One final point which needs to be considered is whether or not the issues examined above are properly before the Tribunal. The Parties devoted considerable attention to this question both at the hearing and in their post-hearing briefs. The Tribunal has concluded that the essence of Mobil's case all along has been that the decision of the Board in July 2012 to continue to enforce the 2004 Guidelines after the adoption of the *Mobil I* Decision was contrary to Article 1106(1). The Tribunal has concluded that that case is essentially correct. In making its case, Mobil's reasoning has differed from the manner in which it was originally framed, but that difference concerns aspects of the legal reasoning in support of the claim, not the nature of the claim itself. The Tribunal accordingly concludes that the claim is properly before it. It is unnecessary for the Tribunal to consider whether that would have been the case had the Tribunal been tempted to adopt any of the other ways in which Mobil put its case in its final submissions.

VII. THE *RES JUDICATA* ISSUE

A. Canada's Position

175. Canada maintains that the doctrine of *res judicata* is a well established general principle of international law, which has been recognized in the jurisprudence of a wide range of international courts and tribunals and in the literature of international law.[81] Canada refers, in particular, to the decisions of NAFTA arbitration tribunals which have applied the doctrine of *res judicata*, specifically the tribunals in *Apotex Holdings Inc.* v. *United States* (*Apotex III*)[82] and *Waste Management* v. *Mexico*,[83] as well as the decisions of other investment tribunals, such as that in *Vivendi* v. *Argentina*.[84] As this argument was set out in Canada's Counter-Memorial, it was summarized as follows:

> The doctrine of *res judicata* stipulates that a final decision made by a competent international court or tribunal is conclusive between those same parties. This means that the same question or dispute cannot be raised again by the same parties before another international tribunal. The doctrine is intended to assure consistency

[81] Canada Counter-Memorial, paras. 173-200; Canada Rejoinder, paras. 133-219; Transcript, 24 July 2017, pp. 277-315; Transcript, 28 July 2017, pp. 1070-1117.
[82] **CL-22**, *Apotex Holdings Inc. and Apotex Inc.* v. *United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014.
[83] **CL-23**, *Waste Management Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Preliminary Objections, 26 June 2002.
[84] **RL-36**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005.

> amongst decisions, efficiency in decision-making, and finality of disputes.
>
> For a claim to be barred by the *res judicata* effect of a prior decision, three criteria have to be satisfied: the proceedings must have been conducted (1) before international courts or arbitral tribunals in the same legal order, that is, both decision-making bodies are international courts or international tribunals; (2) between the same parties; (3) concerning the same subject matter. These requirements are met in the present case.[85]

176. Canada refers to the passage in Mobil's Memorial quoted in para. 82, above as indicating that Mobil's claim in the present proceedings was identical to that advanced in the *Mobil I* proceedings, with the same cause of action and a claim for the same relief.[86] The only difference is that the claim for damages allegedly sustained during the period 2012 to 2015 was there advanced as a claim for future losses and is here put forward as a claim for damages already incurred. In Canada's view, the *Mobil I* Tribunal held that it had jurisdiction to consider Mobil's claim for these damages, considered them on the merits and rejected that claim because the evidence advanced in support was found to be insufficient.[87]

177. Canada's argument was developed in much greater detail in the Rejoinder. Canada there sets out what it regards as the two branches of *res judicata*:

(a) issue estoppel, which "prevents re-litigation of specific issues that were decided upon by a previous tribunal";[88] and

(b) cause of action estoppel, which "has the broader effect of barring a second claim based on an identical cause of action or subject-matter as was previously adjudicated".[89]

178. In its Rejoinder, Canada argues that cause of action estoppel is applicable because Mobil is advancing the same claim, based on the same cause of action, as it had advanced in *Mobil I*.[90] In this context, it relies upon the decision of the Appellate Body

[85] Canada Counter-Memorial, paras. 179-180.
[86] Canada Counter-Memorial, para. 182.
[87] Canada Counter-Memorial, paras. 181-199.
[88] Canada Rejoinder, para. 134.
[89] Canada Rejoinder, para. 134.
[90] Canada Rejoinder, paras. 138-165.

of the World Trade Organization in the 2003 *EC-India* case,[91] and the awards of the Spain-US Claims Commission in *Machado*[92] and *Delgado*[93] as authority for the proposition that

> the mere fact that an arbitral tribunal did not make a decision on a specific issue or sub-issue relating to a claim or cause of action does not impair the operation of *res judicata* such that a claimant can commence another arbitration relying on the same underlying injury or cause of action and undecided issues.[94]

179. Nevertheless, Canada also maintains, in its Rejoinder, its earlier argument that the claim is barred by issue estoppel, because it was decided by the *Mobil I* Tribunal.[95] Both arguments were confirmed by Canada at the Hearing. At the Hearing, Canada's counsel told the Tribunal:

> … our core submission is this: The Mobil/Murphy Tribunal decided that it had jurisdiction over Mobil's entire claim for damages, including the period before this Tribunal, 2012 to 2015, and that the claim was admissible.
>
> The evidence produced by the Claimant in support of quantification of its future damages was examined extensively on the merits. Both sides had full and fair opportunity to plead their case, but it was the Claimant's burden to prove quantification.
>
> After extensive submissions, the Tribunal found and came to the conclusion that the Claimant simply did not reach its burden of proof to a standard of reasonable certainty. That finding has res judicata effect as a matter of international law. It is a substantive decision on the merits that extinguishes the claim forever.[96]

B. Mobil's Position

180. Mobil accepts that the doctrine of *res judicata* is a well established principle of international law; indeed it relies upon that doctrine itself in support of its contention (which is not disputed by Canada) that the decision of the *Mobil I* Tribunal finding

[91] **RL-80**, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen*, Report of the Appellate Body, 8 April 2003 (WT/DS141/AB/RW) AB-2003-1.
[92] **RL-37**, 3 *Moore's International Arbitrations* 2193 (1880).
[93] **RL-38**, 3 *Moore's International Arbitrations* 2196 (1880).
[94] Canada Rejoinder, para. 154.
[95] Canada Rejoinder, paras. 175-198.
[96] Transcript, 24 July 2017, pp. 278-279.

Canada in breach of Article 1106(1) of NAFTA cannot be reopened in the present proceedings.

181. For Mobil, however, the real question before the Tribunal is "was the issue at the heart of this arbitration, namely the determination of the quantum of losses suffered by Mobil from 2012 through 2015, finally determined by the Mobil I Tribunal such as to render it *res judicata* between the parties? The answer is no."[97]

182. Referring to the award in *Grynberg* v. *Grenada*,[98] Mobil summarizes the *res judicata* doctrine in the following terms:

> a finding [of a prior competent tribunal] concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal) if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claim before that court or tribunal.[99]

183. According to Mobil, the second part of this test is not satisfied, because the *Mobil I* Tribunal did not decide the question of damages for the period 2012 to 2015. On the contrary, it stated that the matter was "not ripe for determination" and concluded:

> In our view, there is no basis at present to grant compensation for uncertain future damages. Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings.[100]

C. The Hearing

184. During the Hearing, the Tribunal drew the attention of the Parties to the Judgment of the International Court of Justice of 17 March 2016 in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua* v. *Colombia*).[101] In that case, the International Court of Justice had been faced with an argument advanced by Colombia that the question of whether Nicaragua was entitled to a continental shelf beyond 200 nautical

[97] Mobil Reply, para. 96.
[98] **CL-18**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation* v. *Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.1.1.
[99] Mobil Reply, para. 100.
[100] *Mobil I* Decision, para. 478.
[101] *I.C.J. Reports 2016*, p. 100.

miles from its coast was *res judicata* as between the two States, because of the Judgment of the Court of 2012 in earlier proceedings between them.[102] The Court concluded that *res judicata* did not operate as a bar in the 2016 case, because the Court had not, in its 2012 Judgment, actually decided the issue. The Parties made submissions regarding the effect of this 2016 Judgment at the Hearing on 28 July 2017.

185. For Mobil, the Court's 2016 Judgment confirmed its argument that *res judicata* did not operate with regard to a question unless the earlier court or tribunal had actually decided that issue; it was not enough that the issue had been put before it. Indeed, Mobil considered the case against the application of *res judicata* in the present proceedings to be stronger than that in the proceedings before the International Court of Justice, since the Court, in the operative part of its 2012 Judgment, had made an express finding that it could not uphold Nicaragua's claim,[103] whereas there was no such finding in the *Mobil I* Decision or Award. Moreover, while the *Mobil I* Tribunal had expressly stated that Mobil could bring its claim for damages for future losses in fresh NAFTA proceedings, the International Court of Justice had said nothing in its 2012 Judgment about the possibility of Nicaragua bringing a new case before the Court.[104]

186. Canada, on the other hand, denied that the International Court of Justice's 2016 Judgment ran counter to its submission that a party could not be allowed to advance in a second set of proceedings a claim that had been advanced in earlier proceedings between the same parties and which was based upon the same cause of action. Canada also affirmed its case that the *Mobil I* Tribunal had in fact ruled upon, and rejected, Mobil's claim for future losses.

D. The Tribunal's Analysis

187. The principle of *res judicata* has long formed part of many – if not most – systems of national law. That is not to say that the scope and application of the principle is the same in every national legal system.[105] Nevertheless, whatever its origins, it is now an established principle of international law. In the words of Bin Cheng, "[t]here seems

[102] *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), *I.C.J. Reports 2012 (II)*, p. 624.
[103] *I.C.J. Reports 2012 (II)*, p. 719, para. 251(3).
[104] Transcript, 28 July 2017, pp. 1002-1003.
[105] See Zuener and Koch, "Res Judicata" in Cappelletti (ed.) *International Encyclopaedia of Comparative Law*, vol. XVI (2014), Chapter 9.

little, if indeed any, question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings".[106]

188. An international law principle of *res judicata* can be traced back to the decisions of the various mixed claims commissions more than one hundred years ago. As the French-Venezuelan Mixed Claims Commission put it in the *Orinoco* case, "a right, question or fact *distinctly put in issue and directly determined* by a court of competent jurisdiction, as a ground of recovery, cannot be disputed".[107]

189. The principle has long been accepted and applied by the International Court of Justice and its predecessor, the Permanent Court of International Justice. In its Judgment of 2007 in the *Bosnia* v. *Serbia and Montenegro* case, the International Court of Justice observed:

> Two purposes, one general, the other specific underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to "decide", that is, to bring to an end "such disputes as are submitted to it". Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.[108]

190. This decision was followed by the Court in its 2016 Judgment in *Nicaragua* v. *Colombia*, to which reference has already been made, and, most recently, in its Judgment of 2018 in two joined cases between Costa Rica and Nicaragua.[109] The principle has also been applied in NAFTA arbitrations and other investment cases.[110]

191. The question, therefore, is not whether a principle of *res judicata* is embodied in international law but rather what is its extent. In a dissenting, but nonetheless influential, opinion in the Permanent Court of International Justice, Judge Anzilotti

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[106] **CL-17**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 336.
[107] **CL-88**, *Company General of the Orinoco* case, 31 July 1905, X UNRIAA 276 (emphasis in the original).
[108] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), *I.C.J. Reports 2007 (I)*, pp. 90-91, para. 116.
[109] *Maritime Delimitation in the Caribbean Sea and Pacific Ocean* and *Land Boundary in the Northern Part of the Isla Portillos* (*Costa Rica* v. *Nicaragua*), Judgment of 2 February 2018, para. 68 (not yet reported).
[110] See *Apotex III*, *Waste Management* and *Vivendi*, cited above at notes 82-84, above.

maintained that *res judicata* required identity of parties, object and legal ground (*personae*, *petitum* and *causa petendi*). The subsequent case law of the International Court has, however, made clear that these are necessary but not sufficient conditions. As the Court put it in its 2016 *Nicaragua* v. *Colombia* Judgment:

> 59. It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled.
>
> 60. The Court underlined in its Judgment of 26 February 2007, rendered in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), that "[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of res judicata attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it" (I.C.J. Reports 2007 (I), p. 95, para. 126).[111]

192. While the 2016 Judgment was adopted on the casting vote of the President, the principal focus of the dissenting opinions was upon the application of the above test to the earlier Judgment of 2012. The test laid down in paragraphs 59 and 60 of the 2016 Judgment was repeated and applied in the 2018 Judgment in *Costa Rica* v. *Nicaragua*, the relevant part of which was adopted by fifteen votes to one.[112]

193. A similar approach has been taken by other international tribunals. The passage from the *Orinoco* case which requires that the right, question or fact must have been "directly determined" by the prior tribunal has already been quoted.[113] In the context of investor-State arbitration, the requirement that, for *res judicata* to apply in respect of a particular issue, that issue must actually have been decided by the prior court or tribunal was

[111] *I.C.J. Reports 2016*, p. 126.
[112] *Maritime Delimitation in the Caribbean Sea and Pacific Ocean* and *Land Boundary in the Northern Part of the Isla Portillos* (*Costa Rica* v. *Nicaragua*), Judgment of 2 February 2018, para. 205(1) (not yet reported).
[113] See para. 187, above.

expressly affirmed in *Amco* v. *Indonesia*,[114] *Grynberg*,[115] *Waste Management*[116] and *Apotex III*.[117]

194. There is no doubt that there is an identity of parties between the present case and *Mobil I*. It also clear that the claim presently advanced by Mobil was also advanced by it in the *Mobil I* proceedings, since Mobil asked the *Mobil I* Tribunal to award it damages for the same period for which it seeks damages in the present proceedings and in respect of the same losses. The only difference is that in the present case the damages are sought for losses which, in the words of the *Mobil I* Tribunal are now "actual", whereas they were found not to be "actual" at the time of the *Mobil I* decision.[118]

195. The question, therefore, is whether, in the words of the International Court of Justice, the claim for damages for the period 2012 to 2015 was "definitively settled" by the *Mobil I* Tribunal. Canada maintains that it was. It notes that the *Mobil I* Tribunal held that it had jurisdiction to determine the claim for future damages which had been submitted to it and that that claim was admissible.[119] Canada considers that, in Part VIII of the Decision and, in particular, in paragraphs 473-478, the *Mobil I* Tribunal then assessed the evidence advanced by Mobil in support of its claim for future damages and found it wanting, and that its decision must, therefore, be treated as a definitive rejection of the claim, precluding Mobil from having what Canada terms "a second bite at the cherry" by renewing its claim in the present proceedings.

196. The Tribunal considers that Part VIII of the *Mobil I* decision is not as clear as might be wished. The *Mobil I* Tribunal certainly did consider the evidence of future loss put before it and commented thereon, highlighting the uncertainty of that evidence[120] and observing that "the evaluation of future damages for such a long period is extremely

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[114] **CL-87**, *Amco Asia Corporation and others* v. *Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Resubmitted), para. 30 (quoting an expert opinion by Professor Reisman which in turn relied upon the passage from the *Orinoco* case quoted above at para. 187, above).
[115] See note 98, above.
[116] **CL-89**, *Waste Management, Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Preliminary Objections, 26 June 2002, para. 45 ("a decision on a particular point constitutes a *res judicata* as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal").
[117] **CL-22**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, 25 August 2014, para. 7.20.
[118] *Mobil I* Decision, para. 478.
[119] *Mobil I* Decision, paras. 429.
[120] *Mobil I* Decision, para. 478.

hazardous and it does not, on balance, seem to us that the estimates are more probable than not".[121]

197. Nevertheless, on a close reading of Part VIII of the Decision, there are several factors which the present Tribunal considers show that the *Mobil I* Tribunal did not in fact arrive at a definitive settlement of the claim.

198. First, that Tribunal said on more than one occasion that it was not making a final determination. Thus, the *Mobil I* Tribunal observed that

(a) "Turning to future damages, under the facts before us, we are not yet able to properly assess the Claimants' claim for future damages; too many critical questions remain open … the claim for such losses is not yet ripe for determination";[122] and

(b) "The Tribunal has applied the reasonable certainty standard discussed above, which has not led to a conclusion *per se*, but rather to a finding that there is too much *uncertainty* at this stage for the Tribunal to make a determination".[123]

199. The present Tribunal is neither required, nor entitled, to rewrite the *Mobil I* Decision and we find it very difficult to conclude that that Tribunal was in fact deciding an issue when it said in terms that it was not doing so.

200. Secondly, the *Mobil I* Tribunal said that the claim for future damages was "not yet ripe for determination".[124] Canada has tried to represent this statement as meaning that the evidence for the claim was not sufficient and that the *Mobil I* Tribunal was therefore finding that Mobil had failed to discharge its burden of proof. But that is not the ordinary meaning of the words used. To say that something is "not yet ripe" implies that it will, or, at least, may be expected to, become "ripe" at a later stage. That is true whether one is talking about an apple being "ripe for eating" or a claim being "ripe for determination".

[121] *Mobil I* Decision, para. 477.
[122] *Mobil I* Decision, para. 473.
[123] *Mobil I* Decision, para. 474.
[124] *Mobil I* Decision, para. 473; see also paras. 470 and 472.

201. Thirdly, a passage on which Canada particularly relies does not seem to us to support Canada's interpretation of what the *Mobil I* Tribunal decided. That passage is:

> Although ultimately it is not strictly relevant given that we are not inclined to compensate for expenditures not paid or levied (i.e. required to be paid), we have also highlighted the uncertainty of the evidence pertaining to the amount of incremental expenditures in this largely future period. In our view, there is no basis to grant at present compensation for uncertain future damages.[125]

202. This passage is certainly suggestive of a weakness in the evidence advanced by Mobil in support of its claim but it is not a finding that Mobil had failed to meet its burden of proof. The Tribunal states that its observation is "not strictly relevant". It then goes on to say that it has "highlighted" the uncertainty of the evidence. That is not the language of a "final determination" or "definitive settlement" of the claim. Moreover, the passage quoted should not be taken out of context. It has to be read in the light of the other statements quoted in which the *Mobil I* Tribunal denied that it was making a decision on the evidence.

203. Lastly, the passage quoted in para. 201 above was immediately followed by this statement:

> Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA proceedings for losses which have accrued but are not actual in the current proceedings.[126]

204. This statement is wholly incompatible with an interpretation of the *Mobil I* Decision as a finding that against the claim for future damages on the ground that the evidence was insufficient. The very experienced members of the *Mobil I* Tribunal would have known full well that, because of the doctrine of *res judicata*, such a finding would have precluded any future claim.

205. It can of course be argued that, having heard evidence and argument in support of the claim for future damages, held that it had jurisdiction to determine that claim, and (seemingly)[127] that the claim was admissible, the *Mobil I* Tribunal should have decided

[125] *Mobil I* Decision, para. 478.
[126] *Mobil I* Decision, para. 478.
[127] The only reference to admissibility is in para. 429 but the reasoning in that paragraph addresses the different issue of jurisdiction.

the claim on its merits and, if it considered that the evidence was insufficient, have dismissed the claim. But it did not do so and *res judicata* requires that the previous court or tribunal *did* decide a question, not that it *should* have done so. This Tribunal is no more entitled to substitute its view of what the *Mobil I* Tribunal should have decided for what it did decide on this issue than it is to substitute its view as to the merits of whether there was a breach of Article 1106 for that of the *Mobil I* Tribunal.

206. The Tribunal cannot, therefore, accept Canada's principal argument based on the "issue estoppel" branch of *res judicata*.

207. That leaves Canada's alternative argument based on what it terms the "cause of action" branch of *res judicata*. As outlined above (paras. 176-177), this argument, which was first advanced in Canada's Rejoinder, is that even if a prior tribunal did not definitively decide on a claim, if that claim was put before it and the tribunal held that it possessed jurisdiction, the same claim based on the same cause of action cannot be advanced before a later tribunal.

208. The Tribunal is not persuaded by this argument. First, it runs counter to a long line of authority. As has been seen, the International Court of Justice has consistently insisted that a matter must have been decided by the earlier judgment in order to give rise to a *res judicata*. That is particularly clear in the 2016 *Nicaragua* v. *Colombia* Judgment. In those proceedings, Nicaragua was advancing a claim which it had already put before the Court in the earlier proceedings which had culminated in the 2012 Judgment. Its cause of action was the same. Yet the Court held that *res judicata* did not bar the later claim, because the Court, in its 2012 Judgment, had not ruled upon it. Indeed, as Mobil points out, the Court reached that conclusion notwithstanding the fact that, in the operative part of the 2012 Judgment, the Court had expressly concluded that it could not uphold Nicaragua's claim (a decision that has no counterpart in the *Mobil I* Decision). It is difficult to see how Canada's alternative argument can be reconciled with the Court's 2016 Judgment.

209. Similarly, the majority of the arbitration awards which discuss *res judicata*, as has already been shown, emphasize the need for a matter to have been "distinctly determined" before *res judicata* can apply.[128]

210. Secondly, the authorities on which Canada particularly relies do not afford much support for its position. The Decision of the WTO Appellate Body in the *EC-India* case was that the European Commission was barred by *res judicata* from advancing a claim in the later proceedings when the Panel in the earlier proceedings had held that it had failed to establish even a *prima facie* case in support of the same claim. There was no suggestion that the claim was "not yet ripe for determination". Of the older authorities cited by Canada, the award of the Spain-US Claims Commission in *Machado* concerned a claim which had earlier been dismissed for want of prosecution. Such a decision can reasonably be considered to have definitive effect and to bar the bringing of a fresh claim but it is quite different from the circumstances of the present case. The award of the same Commission in *Delgado* comes closer to providing support for Canada's argument but the Tribunal considers that this award, given in 1880, cannot prevail against the long series of modern awards and judgments of the International Court of Justice.

211. Finally, the Tribunal considers that Canada's alternative argument does not reflect the principles on which the International Court said, in its 2007 Bosnia Judgment, the international law doctrine of *res judicata* rests.[129] The stability of legal relations is not threatened by allowing a litigant to pursue a claim when the previous tribunal had expressly stated that that claim was not yet ripe for determination and should be pursued in later proceedings. On the contrary, to hold in such circumstances that the litigant was barred from bringing such a claim would be to work a considerable injustice. Nor is there any question of depriving Canada of the benefit of a judgment it has already obtained, since the *Mobil I* Decision expressly states that no judgment was being given in favour of Canada on this point.

212. The Tribunal therefore rejects Canada's *res judicata* argument.

[128] See para. 192, above.
[129] See para. 188, above.

VIII. CONCLUSIONS

213. Accordingly, the Tribunal:

(1) rejects Canada's argument that the claim is barred by Articles 1116(2) and 1117(2);

(2) rejects Canada's argument that the claim is barred by the doctrine of *res judicata*;

(3) decides to proceed to post-hearing briefing on the remaining questions and to issue an award thereon. The Tribunal will consult the Parties regarding the schedule for such pleading which will then be embodied in a procedural order;

(4) decides that the question of costs will be reserved to be dealt with in the final award.

[signed]

Dr Gavan Griffith, QC
Arbitrator

Date: 28 June 2018

[signed]

Mr J. William Rowley, QC
Arbitrator

Date: 26 June 2018

[signed]

Sir Christopher Greenwood, CMG, QC
President of the Tribunal

Date: 2 July 2018