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

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In the Matter of Arbitration :
Between: :
:
MOBIL INVESTMENTS CANADA, INC., :
and MURPHY OIL CORPORATION, :
:
 Claimants, :
:
 and : ICSID Case No.
 : ARB(AF)/07/4
:
GOVERNMENT OF CANADA, :
:
 Respondent. :
:
- - - - -x Volume 4

HEARING ON THE MERITS

Friday, October 22, 2010

The World Bank
1818 H Street, N.W.
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter came
on, pursuant to notice, at 8:34 a.m. before:

PROF. HANS van HOUTTE, President

PROF. MERIT E. JANOW, Arbitrator

PROF. PHILIPPE SANDS, Q.C., Arbitrator

Also Present:

MS. MARTINA POLASEK,
Secretary to the Tribunal

Court Reporter:

MR. DAVID A. KASDAN, RDR-CRR
B&B Reporters
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

APPEARANCES: (Continued)**Counsel:**

MR. NATHAN BAINES, Law Department, ExxonMobil
Canada Ltd.

MR. RENE MOULEDOUX,
Coordinator, International Disputes Group,
Law Department, Exxon Mobil Corporation

APPEARANCES:**On behalf of the Claimants:**

MR. DAVID W. RIVKIN
MS. JILL van BERG
MS. SAMANTHA ROWE
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

MS. SOPHIE LAMB
Debevoise & Plimpton, LLP
Tower 42
International Financial Centre
25 Old Broad Street
London
EC2N 1HQ
United Kingdom
+44 20 7588 4180

MR. BART LEGUM
Salans
5 Boulevard Malesherbes
7508 Paris
France
+33 (0)1 42 68 48 70

Counsel:

MS. TONI HENNIKE,
Senior Counsel, International Disputes Group
Law Department, Exxon Mobil Corporation

MS. ANNA TAYLOR KNULL,
Attorney, International Disputes Group
Law Department, Exxon Mobil Corporation

MR. WALTER COMPTON,
Vice President, Law, Murphy Oil Corporation

APPEARANCES: (Continued)**On behalf of the Respondent:**

MR. NICK GALLUS
MR. MARK LUZ
MR. ADAM DOUGLAS
MR. PIERRE-OLIVIER SAVOIE
MR. HUGH CHEETHAM
Director and General Counsel
Department of Foreign Affairs
and International Trade, Canada
Trade Law Bureau (JLT)
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada
(613) 944-0027

MR. GORDON VOOGD,
Senior Policy Advisor, Natural
Resources Canada

MR. MATTHEW TONE,
Senior Policy Trade Analyst, Foreign
Affairs and International Trade Canada

MS. MARGARET GILLIES,
Solicitor, Department of Justice,
Government of Newfoundland and Labrador

MR. PAUL SCOTT,
Government Representative, Government of
Newfoundland and Labrador

ALSO PRESENT:

On behalf of the United States:

MR. MARK E. FELDMAN
 Chief, NAFTA/CAFTA-DR Arbitration
 Division, Office of International Claims
 and Investment Disputes
 Office of the Legal Adviser
 U.S. Department of State
 Suite 203, South Building
 2430 E Street, N.W.
 Washington, D.C. 20037-2800
 (202) 776-8443

On behalf of the United Mexican States:

SR. SALVADOR BEHAR,
 Legal Counsel for International Trade
 Embassy of Mexico
 Secretaria de Economia
 Trade and NAFTA Office
 1911 Pennsylvania Avenue, N.W.
 Washington, D.C. 20006
 (202) 728-1707

P R O C E E D I N G S

PRESIDENT van HOUTTE: Are we ready?

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

FREDERICK E. WALCK, RESPONDENT'S WITNESS, RESUMED

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

(Pause.)

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

MS. LAMB: Thank you.

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

MS. LAMB: Thank you, Martina.

THE SECRETARY: Please close the session.

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

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08:34:13 1 CONFIDENTIAL SESSION

2 CROSS-EXAMINATION

3 BY MS. LAMB:

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

6 A. Just like "walk down the street."

7 Q. Okay. Thank you.

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

12 A. Yes.

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

17 A. Yes.

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

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

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08:35:08 1 Q. So, you would know that Hibernia is the fifth
2 largest oilfield in Canada?
3 A. I do know that it's a large field, yes.
4 Q. And that it's now one of Canada's most
5 prolific oilfields?
6 A. I know that it has produced something on the
7 order of 700 million barrels of oil to date.
8 Q. And it's now into its 12th year of
9 production, or 13th year even; is that right?
10 A. I think that's correct.
11 Q. And it's a mature asset with a finite life;
12 that's right, isn't it?
13 A. Well, it's certainly more mature than the
14 other assets. As to finiteness of its life, I
15 think--was that the right word? I think that's
16 subject to whatever engineering data continues to be
17 developed from the production of the well, whatever
18 new technologies are developed and so forth.
19 Q. And that the Board currently estimates the
20 reserves at Hibernia at about just under 1.4 billion
21 barrels; is that right?
22 A. That is the Board's current estimate, yes.

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08:37:33 1 clearly did not find overwhelming when they committed
2 funds to this project?
3 A. I'm not sure I understood the question.
4 Q. The price of oil, when the Government made
5 its investment commitment to Hibernia, was a lot lower
6 than it is today; right?
7 A. In nominal terms, certainly, yes.
8 Q. And in your opinion, the outlook for Hibernia
9 is so speculative that you are not comfortable
10 expressing an opinion as to the level of damages in
11 this case; is that about right?
12 A. No, I don't think so. The mechanics of the
13 calculation of the potential additional spending that
14 might be required in order to comply with the
15 Guidelines is where I find speculation.
16 Q. And the Guidelines, the formula in the
17 Guidelines, is obviously a mechanism of Canada's own
18 creation, isn't it?
19 A. The Guidelines are, in fact, the creation of
20 the Board.
21 Q. In your First Report and subsequent reports,
22 I think you do criticize Mr. Rosen for making

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08:36:18 1 Q. The Government of Canada itself committed
2 very substantial public funds to this project in 1990;
3 is that right?
4 A. I don't recall the year. I do recall that
5 they committed a substantial amount of money, yes.
6 Q. And the price of oil had dropped quite
7 considerably at that time to around \$20 per barrel?
8 A. I recall that it had dropped. I don't recall
9 the level.
10 Q. But you would agree with me, then, that
11 Canada effectively committed billions of dollars of
12 public funds at a time when the price of oil was much
13 lower than it is today, for example?
14 A. Yes.
15 Q. And a few years later we know that the
16 Government actually took a stake in Hibernia of around
17 8.5 percent?
18 A. I don't know exactly what their stake is.
19 Q. Mr. Walck, in light of the investment
20 decision that both the Claimants and Canada have made
21 with respect to Hibernia, doesn't your approach to
22 damages advocate a level of risk that these Parties

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08:38:53 1 assumptions as to the future, if I can put it that
2 way. Do you stand by those criticisms?
3 A. I made observations in the First Report about
4 the various variables that he had to make assumptions
5 on and the number of them and the potential
6 variability in them.
7 Q. Can I just ask you to take a look at
8 Mr. Rosen's First Report, if you have it to hand. If
9 you would like to turn to Paragraph 60, six-zero.
10 Just in terms of context, so Mr. Rosen has
11 expressed his preliminary view and what he says in
12 Paragraph 60 is, "I expect that I will be able to
13 update the analysis in my subsequent submission as it
14 becomes clearer how the Board will plan to administer
15 the Guidelines," and so on.
16 So, you appreciate it when you read his
17 report that it was his intention to update as more
18 information from the Board became available; right?
19 A. Certainly, and with the knowledge that there
20 would be a second round of reports and pleadings.
21 Q. In your First Report, you, in a sense,
22 speculated as to how the Board would likely treat the

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08:40:33 1 Claimants' R&D expenditures for Guidelines credit
2 purposes.
3 A. In my First Report, I believe I was careful
4 to disclose the uncertainty regarding the amount of
5 SR&ED credits.
6 Q. Sorry, so we are not at cross-purposes, I was
7 asking whether in your First Report you made any
8 assumptions as to whether the Board would accept as
9 eligible for Guidelines purposes the R&D that the
10 Claimants had undertaken. If you recall, we didn't
11 have the Board's Decision at that time.
12 A. As I recall in the First Report, I simply
13 stated, and I may have gotten confused by your prior
14 question and thought you were talking about SR&ED, if
15 you're talking about the Board's treatment of the
16 Proponents' submissions of their R&D and E&T
17 expenditures under the Guidelines, what I knew at the
18 time was the calculation of the required spending and
19 the amount that had been submitted in response to
20 that. And I said if the Board were to accept
21 everything that has been submitted, there would be no
22 shortfall for Hibernia. So I don't know at that point

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08:44:26 1 likely have spent on R&D in future years.
2 Can you see the line that I'm referring to?
3 A. Yes, I can.
4 Q. So, for 2011, it's [REDACTED] the next
5 year [REDACTED], the next year [REDACTED] and so on and so on and
6 so on throughout the life of the project.
7 And you see underneath that there is also a
8 provision for E&T training in each and every
9 subsequent year throughout the remaining life of the
10 project.
11 So, I guess my first question is: You do
12 acknowledge that there is already in the model
13 provision for the R&D and E&T expenditures that
14 Claimants say that they would likely have made in the
15 absence of the Guidelines.
16 A. Yes, I see that.
17 Q. You cited Professor--not
18 Professor--Mr. Noreng's opinion in your reports.
19 Assuming for a moment that Mr. Noreng is in any
20 position to know what the Claimants might have done in
21 future years, there is effectively already a budget in
22 place for any of the work that he references in his

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08:42:17 1 in time, and I said so in my report, what the amount
2 of shortfall, if any, will be.
3 Q. And in the event for Hibernia, the Board
4 accepted just [REDACTED] of the expenditures that were
5 submitted by the Project Proponents; that's right,
6 isn't it?
7 A. I don't remember the percentage.
8 Q. As you well know, the Claimants have sought
9 to quantify the cost differential between the R&D they
10 say they likely would have done in the future in the
11 absence of the Guidelines and what they now think they
12 will have to do in light of the formula.
13 Can I ask you to take a look at Mr. Rosen's
14 Third Report, and to Schedule 2 in particular.
15 A. All right.
16 Q. If we look at the future years, so you will
17 see that there are years marked across the top of the
18 axis there, maybe we will just start with 2011. So,
19 if I ask you, in the column that's entitled "Formula,"
20 if you go down to Row J, we there have expenditures in
21 the ordinary course. So, these are the numbers that
22 Claimants have informed Mr. Rosen that they would

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08:45:46 1 opinion; correct?
2 A. There is a number in Mr. Rosen's model, but I
3 don't know that it covers any, as you say, of the work
4 that might be undertaken in the ordinary course.
5 There is a figure in Mr. Rosen's report.
6 Q. Can I ask you to take up Exhibit C-233, and
7 maybe Greg can help if you don't have it to hand.
8 I don't know if you--in the--it appears as an
9 exhibit to Claimants' updated damages calculations.
10 Because you haven't gotten the file there as such, you
11 won't see the index which says "Hibernia Research and
12 Development Expenditure Outlook."
13 So, if I ask you to just turn to the second
14 page there, and if you look down to Row 18--I'm sorry,
15 just looking at the top of the Page 2 there, it says:
16 "Hibernia Research and Development Expenditure
17 Outlook." Line 18 says, "previous," or "preeve"--I'm
18 assuming "previous"--"budgeted projects and studies,
19 and the first example that's give there that the
20 previous budgeted project and study is [REDACTED]
[REDACTED] And if we look in the
22 column 2010, we can see a provision of [REDACTED]

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08:47:44 1 Do you see that?
2 A. Yes, I do.
3 Q. And if you go back to Column B, you'll also
4 see [REDACTED] Provision already made
5 for 2010 is [REDACTED] And if you go down to the
6 next one: [REDACTED] The figure there is
7 [REDACTED]
8 So, I'm assuming that you were able to take a
9 look at this document before you prepared your
10 pre-hearing update; is that right?
11 A. I don't recall if I saw this one previously
12 or not, prior to the report.
13 Q. Would you agree with me that this document
14 appears to show that [REDACTED]
15 is already budgeted for at the project level for some
16 of the R&D projects that Mr. Douglas referred to in
17 his cross-examination of Mr. Rosen yesterday?
18 A. There appears to be money in the budget,
19 according to this document, yes.
20 Q. Thank you.
21 And you have read the Work Plans. I can
22 assume that, can I?

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08:50:44 1 that to say if the Claimants do not spend, whether
2 they can or not--if they don't.
3 Q. I accept the reformulation.
4 Let's just put it neutrally.
5 If it gets to 2015 and the Claimants have not
6 spent all of the shortfall, do you accept that [REDACTED]
[REDACTED] that will
8 not involve any benefit for the Claimants?
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 In the course of preparing your report, I
21 understand you to have spoken directly to CRA about
22 SR&ED credit; is that right?

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08:49:19 1 A. I have reviewed the Work Plans, yes.
2 Q. It's right, isn't it, that if the Project
3 Proponents cannot spend the shortfall before 2015, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
8 Q. And if and to the extent that Claimants have
9 not spent their full shortfall [REDACTED]
[REDACTED] that will not
11 involve any benefit whatsoever to Claimant, will it?
12 They're not going to get a--I'm sorry, let me be more
13 specific.
14 [REDACTED]
[REDACTED]
[REDACTED] the Claimants are not going to get a tax
17 credit for that. They're not going to get royalty
18 credits for that. There is no operational benefit to
19 that. Do you agree?
20 A. I think that's probably correct. I would, I
21 think, change in the formulation of your question, if
22 the Claimants cannot spend, I would perhaps broaden

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08:51:54 1 A. I spoke with an individual from CRA, yes.
2 Q. And in the course of those interactions, were
3 you told that either the State or Federal Governments
4 intend to change any aspect of the SR&ED tax credit
5 program?
6 A. I was not.
7 Q. Can I ask you to pull up your First Report,
8 please.
9 A. Of course.
10 Q. The paragraph I have in mind is 34.
11 And what you say there is, "I would be
12 attempted to add to the list of Rosen's assumptions
13 that he assumes no change in the tax structure
14 regarding tax credits for R&D expenditures through
15 2036."
16 Now, in light of what you've just said, it
17 seems to be perfectly fair that Mr. Rosen didn't make
18 any assumptions that the SR&ED regime would change.
19 Do you now agree?
20 A. Mr. Rosen did not include any credit
21 whatsoever for SR&ED.
22 Q. No. My question is in relation to the

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08:53:12 1 criticism that you have made that Mr. Rosen did not
2 take account of the possibility that the SR&ED tax
3 credit system might change, you now have spoken to CRA
4 and you know that there is no plan to change that
5 system.

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

9 A. I don't think it is.

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

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

16 A. Sure.

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

19 A. I think that's fair.

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

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08:55:59 1 A. With the caveat that I asked counsel for
2 Canada to make contact.

3 Q. Sure.

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

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

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

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

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08:54:39 1 A. Bear with me one moment. I was in the wrong
2 report. I apologize.

3 Q. I'm sorry.

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

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

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

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

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

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

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08:57:35 1 say specifically--or something to that effect.

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

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

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

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

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

19 A. They do not.

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

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08:58:46 1 A. I think it's within both CRA's and the
 2 Claimants' control. The Claimant will submit--will
 3 spend money in areas. As I understand their intent,
 4 to spend efficiently, they will try to spend in areas
 5 that will [REDACTED]
 [REDACTED] So, they have some
 7 control because they control their spending.
 8 And then CRA, of course, will have control to
 9 the extent that they have the tax regulations to
 10 follow and to implement.
 11 Q. CRA controls the decision whether or not to
 12 accept the expenditures as SR&ED-eligible; right?
 13 A. CRA ultimately has to make that
 14 determination, yes.
 15 Q. And on a going-forward basis, you look at the
 16 Work Plans and you assume that all of the R&D
 17 component in the Work Plans will be accepted as
 18 SR&ED-eligible; is that right?
 19 A. I have made a calculation that I believe I
 20 have provided sufficient caveat around so that it's
 21 clear that I am not opining that this amount of SR&ED
 22 credit will be received by the Claimants. It's a

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09:01:50 1 been SR&ED-eligible, which is what they were willing
 2 to say.
 3 Q. And just focusing on one slightly different
 4 issue, when you look at the Work Plan and you make
 5 your assumption about likely SR&ED treatment, you
 6 assume that all of the R&D component will be accepted
 7 by the Board for Guidelines eligibility; is that
 8 right?
 9 A. Again, I would have to reformulate your
 10 question because I am not suggesting likely SR&ED
 11 eligibility. I'm suggesting potential SR&ED
 12 eligibility under an assumption.
 13 Q. Let me be clearer, then, with my question.
 14 A. Thank you.
 15 Q. You arrive at a suggested deduction of about
 16 [REDACTED] for Hibernia on the assumption that the
 17 Claimants will receive SR&ED benefit--SR&ED credit,
 18 I'm sorry--from the work to be performed under the
 19 Work Plan. So far, is that fair?
 20 A. I arrive for Hibernia at a SR&ED credit of
 21 approximately [REDACTED] based on a review of the
 22 historical submissions of research and development

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09:00:13 1 hypothetical. What I am trying to do is take an item
 2 for which I do have some historical data with which to
 3 work and say, "if the R&D component of the Work Plan
 4 project receives SR&ED credit in the same rough
 5 proportion, this is what the impact would be." The
 6 objective of that is to try to give the Tribunal a
 7 better sense of how material or immaterial a
 8 particular item may be.
 9 Q. And you've expressed an opinion on that that
 10 CRA was not willing to endorse, if I could put it that
 11 way. That's not a methodology that CRA anticipated in
 12 the letters that you'd provided with your report; is
 13 that fair?
 14 A. I can't speak for CRA as to what they
 15 anticipated. I can only tell you the question that we
 16 asked them was not whether past expenditures are a
 17 useful proxy for the future. The question we asked
 18 them was whether, from their review of the Work Plan
 19 project, they could determine a) whether the research
 20 and development components would be SR&ED-eligible,
 21 which they cannot say, b) whether they were of the
 22 general character of projects that have historically

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09:03:06 1 activities without the [REDACTED] which is not research
 2 and development as I understand it, and the amount of
 3 SR&ED credit that was granted, and then I do some
 4 calculations from there based on the 32 percent
 5 combined Federal and Provincial SR&ED tax credits to
 6 arrive at the [REDACTED] figure.
 7 Q. Sorry, I'm just reading LiveNote back on your
 8 answer there. You referred to the [REDACTED]. You,
 9 yourself, are not, as I've understood it, an engineer
 10 or an expert in drilling or any other aspect of
 11 petroleum operational matters; is that fair?
 12 A. I am not an engineer, correct.
 13 Q. Can we just talk about this prior CRA
 14 experience that you've used in your model. I want to
 15 ask you to have a look at Paragraph 79 of your Second
 16 Report, please. And if it's fair, can I ask you to
 17 have one other document to hand while we do this.
 18 A. Sure.
 19 Q. The exhibit I would like to look at is
 20 CE-144.
 21 MS. LAMB: Greg, perhaps you could help with
 22 that.

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09:05:01 1 BY MS. LAMB:
2 Q. So, let's look first at your report,
3 Paragraph 79, and you have the table there by year,
4 "amount submitted to CRA," "amounts accepted by CRA."
5 [REDACTED]
6 [REDACTED]
7 A. Yes.
8 Q. But it doesn't appear in this table.
9 A. No. As I've indicated in the paragraph above
10 the table.
11 Q. And if I've understood the exercise that
12 you're completing here, you are looking at actual
13 prior experience with CRA, is that right?
14 A. I am looking at the actual R&D expenditures
15 submitted to CRA--
16 Q. [REDACTED]

7 A. Yes.

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

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

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

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

16 Q. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

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09:07:34

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

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

[illegible]

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

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[illegible]

8 1 A. They were, yes.

[illegible]

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[illegible][illegible]

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

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

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

21 A. I did.

22 Q. In your Final Report, you do not attribute

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

1055

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

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

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

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

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

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

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

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09:23:13 1 Memorial--it's Paragraph 218, but it goes on for some
2 bullets, and it's actually Page 114. And this is--I
3 know you may not have this in front of you, Mr. Walck,
4 but you could read on the screen in front of you.

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

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

10 Q. Absolutely.

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

13 A. Okay.

14 Q. And then, the next page, Thomas.

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 Do you see that?

22 A. Yes.

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09:25:41 1 chance to look at that reconciliation table that
2 Mr. Rosen prepared yesterday that characterized your
3 own divergence with his numbers.

4 Did you have a chance to look at that?

5 Because it's a kind of exercise that, of course, the
6 Tribunal needs to do to understand alternative
7 approaches. If you have any corrections, if you could
8 share shows, that would be helpful.

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

11 ARBITRATOR JANOW: Okay.

12 THE WITNESS: It would take more than an
13 overnight.

14 ARBITRATOR JANOW: Okay. Thank you.

15 But no, I have another little question.

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

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09:24:37 1 Q. Okay. So, on the one hand, the Claimant's
2 criticizing you for not referring--

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

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

8 BY MR. DOUGLAS:

9 Q. Do the Claimants deduct the [REDACTED] in other
10 contexts in their damages assessment?

11 A. Yes.

12 Q. In what context do they do that?

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

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

18 QUESTIONS FROM THE TRIBUNAL

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

21 THE WITNESS: Certainly.

22 ARBITRATOR JANOW: I'm wondering if you had a

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09:27:04 1 operational, royalty, and other benefits.

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

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

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

1065

09:28:37 1 For the royalty credit, we know the royalty
2 amounts, [REDACTED]
[REDACTED] --but we need a method to
4 determine how much of the incremental spending in the
5 Work Plans would be likely to be royalty deductible.

14 I don't have any prior data to go back to and
15 try to analyze and try to reach that conclusion
16 myself, so it's not something where I can reach a
17 conclusion. I would be violating Rule 202 that we
18 just talked about a few minutes ago.

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

1067

09:31:27 1 saying we have reached that stage and we are reaching
2 that stage, but whenever the Tribunal thinks it would
3 be proper to determine numbers, each of the Experts
4 has his own--has developed its own argument,
5 criticized the other, but what should the Tribunal
6 then do when the Tribunal finds somewhere in the
7 middle there could be a solution? I'm not saying
8 that's the case.

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

13 I have no further questions.

14 THE WITNESS: Was that a question?

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

20 Shall we now have a break?

21 MR. RIVKIN: Yes.

22 PRESIDENT van HOUTTE: Then, Mr. Walck, you

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09:30:12 1 succeed, and the degree to which those benefits are
2 achieved, or exceeded, or not achieved.

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

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

13 ARBITRATOR JANOW: Thank you. Thank you.

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

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

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09:32:56 1 are released, and then a short break, and then we will
2 have the closing statements of 90 minutes each.

3 (Witness steps down.)

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

6 (Brief recess.)

7 MR. RIVKIN: 90 minutes.

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

10 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

11 MR. RIVKIN: Thank you very much.

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

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

15 THE SECRETARY: Please open the session.

16 (End of confidential session.)
17
18
19
20
21
22

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09:51:38 1

OPEN SESSION

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

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

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

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

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09:54:18 1

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

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

So, when you hear Canada talk about projects

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09:52:57 1

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

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

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

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09:55:43 1

2 not being included or trying to pretend that Claimants
3 were taking the position that it was a contrast
4 between spending nothing and spending what the
5 Guidelines require, that's not the issue before you.
6 Claimants are meeting their obligations to spend money
7 on research and development just as they have since
8 the very beginning of the project, more than
9 [REDACTED] worth, and more than--and [REDACTED]
10 worth during the Guidelines phase of the project. And
11 what we are seeking in damages is our share of that
12 additional [REDACTED].

13 And along that line, one comment made
14 yesterday cannot go unanswered, when Claimants' (sic)
15 counsel referred to [REDACTED]
[REDACTED]

16 We account for that money as ordinary course
17 spending. That money was--that document was submitted
18 to the Board not as incremental spending, but as part
19 of the [REDACTED] of E&T that is
20 spent every year and which you can see in Mr. Rosen's
21 reports, for which no credit is being sought.

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09:57:04 1 It was submitted to the Board because now
 2 they require that all those expenditures be
 3 pre-approved in order to get Guidelines credit.
 4 That's why it was submitted, not because it's
 5 incremental spending, not because Hibernia was seeking
 6 to get Canada to pay for [REDACTED] and it was
 7 an outrageous comment, and it can't go unanswered.
 8 So, let me go back and talk about the--go
 9 back in history and then take you chronologically
 10 through what the hearing showed. First, the
 11 beginning. Let's look at the goals and statutory
 12 framework that existed at the time.
 13 You heard a lot from Canada's counsel about
 14 the Atlantic Accord as opposed to the Atlantic--the
 15 Accord Acts, the Federal and the Provincial acts. And
 16 you heard about that because they love to rely upon
 17 the second sentence of Section 55 of the Atlantic
 18 Accord which says that expenditures made by companies
 19 active in the offshore shall be approved by the Board.
 20 Now, and they say this is an important piece
 21 of the expectations that the Parties had at the time,
 22 that we should have known that the kind of

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09:59:22 1 superseded it through the passage of the
 2 Implementation Acts. They decided what was important
 3 from the Accord to implement. That's why those acts
 4 are called the Accord Implementation Acts.
 5 ARBITRATOR SANDS: So is it your submission
 6 that we, as a tribunal, should not have regard to the
 7 Atlantic Accord in interpreting the Implementation
 8 Acts?
 9 MR. RIVKIN: Where it's consistent, but where
 10 it's inconsistent--
 11 ARBITRATOR SANDS: That wasn't my question.
 12 MR. RIVKIN: Well, yes, it is.
 13 ARBITRATOR SANDS: That's--no, no.
 14 My question is: In interpreting the
 15 Implementation Acts, is it permissible to have regard
 16 to the terms of the Atlantic Accord? It's not a
 17 question of should we look at it, but are we allowed
 18 to look at it?
 19 MR. RIVKIN: If there is a question about
 20 what a measure of the Atlantic--of the Accord
 21 Implementation Act might mean, then perhaps you could
 22 see a reason to go back to the Accord. When you're

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09:58:08 1 pre-approval that was later imposed on the project
 2 almost 20 years later would happen.
 3 Well, how important was it to Canada and the
 4 Province? It was of so little importance that when
 5 they adopted the Accord Implementation Acts, they
 6 didn't include that measure. They did include, of
 7 course, the requirement that the Benefits Plans shall
 8 contain provisions to ensure that expenditures shall
 9 be made, but they didn't include this provision. It
 10 had no effect after the Accord Acts were put in place.
 11 It can't be said to impact the expectations. But
 12 Canada is so grasping for straws that it goes back to
 13 this sentence which they did--which Canada itself
 14 didn't feel was important enough to include in the
 15 Accord Implementation Acts.
 16 Also part of that, unquestioned statutory
 17 framework at the time the investments were made was
 18 the fact that the Board--yes?
 19 ARBITRATOR SANDS: Before you get on that, is
 20 it your submission, then, the Atlantic Accord is
 21 irrelevant to this case?
 22 MR. RIVKIN: I believe it is, because Canada

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10:00:08 1 talking about this provision on which they have
 2 put--Canada has put so much--
 3 ARBITRATOR SANDS: We will come to that. I'm
 4 just dealing with a general issue of principle, as you
 5 will have gleaned from our questions. What is the
 6 proper approach to the interpretation of the measure
 7 that has been reserved?
 8 MR. RIVKIN: It's--that's really--Canada has
 9 presented no basis for you to put any weight on the
 10 terms of the Atlantic Accord, particularly because
 11 Canada passed--Canada and its Province passed the
 12 Implementation Act. If they--
 13 ARBITRATOR SANDS: That may well be, but I'm
 14 asking a purely legal question, not a question as to
 15 either Party has argued. As a purely legal matter, in
 16 interpreting the meaning of the measure that has been
 17 reserved by Canada, is it proper to have regard to the
 18 Atlantic Accord in interpreting the Accord Acts?
 19 MR. RIVKIN: I think I have answered that. I
 20 don't believe--I don't believe that you need--I don't
 21 believe that it can be of any use to you, except
 22 perhaps if there is some provision which may be--may

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10:01:16 1 be used--the probably provision of the Atlantic Accord
2 to which Canada has pointed you is the second sentence
3 of Section 55, and clearly you cannot put any weight
4 on that when Canada chose not to put it into the
5 Implementation Act.

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

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

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

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10:04:03 1 obviously support our positions than what we've said.
2 But again, Mr. Fitzgerald made several comments along
3 that line.

4 Actually, if you could go back to 508 a
5 minute, Sam, that would be very helpful. His answer
6 there is quite useful. When I asked him about
7 45(3)(c) and 45(3)(d), the former Chairman of the
8 Board, who was responsible for the implementation of
9 the Acts at the time said, "I think the whole thing
10 reads together. The whole section reads together.
11 What you say is, I think, what you agree with."

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

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

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10:02:40 1 financial instrument.

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

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

19 On Page 508, he made similar comments.

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

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10:05:10 1 So, again, that decision, to the extent it
2 incorporates particular information or concerns from
3 the environmental impact study, that's fine. It's
4 there in the decision. To the extent the Board chose
5 not to incorporate any comments or requirements from
6 that plan, then, of course, it's not part of the
7 decision that impacted these Parties' relationship.

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

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

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10:06:30 1 technology, not research and development technology.
 2 Again, if sustainable development was so
 3 important, wouldn't it have been in here? There is a
 4 sentence that Mr. Gallus pointed to in this document
 5 that refers to the commitment in the Hibernia Plan to
 6 spend money on research and development by the
 7 Hibernia owners. What's interesting is that statement
 8 does not say this is a really important goal of the
 9 Province because we want to make sure there is a
 10 legacy. We want to make sure there is sustainable
 11 development. None of that. If this was as important
 12 as their witnesses and Canada have pretended, wouldn't
 13 that have been in this document just from two years
 14 after the Plan in 1988? It's not there.
 15 You also know that sustainable development
 16 was not truly a goal of theirs in 1986 because Canada
 17 did not require any--and the Board did not require any
 18 specific monitoring of research and development
 19 expenses until 1998. There was general monitoring.
 20 As Mr. Fitzgerald said, "They kind of knew what we
 21 were doing, they were out there in the community." We
 22 don't contest that. But if sustainable development

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10:09:04 1 in 1997, they still did not. When they approved the
 2 Terra Nova Project, which was their second major
 3 project, again no reference to Guidelines, no R&D
 4 expenditure threshold, no suggestion the Guidelines
 5 could be imposed in the future in the Terra Nova
 6 Decision, just a request that they provide information
 7 about specific R&D expenditures.
 8 It wasn't until 2001, 15 years after that
 9 reference in 1986, that the Board indicated the
 10 Guidelines in a target expenditure might be
 11 appropriate for the White Rose Project and not for the
 12 others. So the expectations of the Parties with
 13 respect to all of these issues are quite clear.
 14 Then let's turn to what the nature of the
 15 Benefits Plans were and their legal regime. You will
 16 remember that the Tribunal asked Canada's counsel many
 17 times on Tuesday, what is Canada's view about its own
 18 statutory framework with the Benefits Plans? How do
 19 those Benefits Plans and the decisions work together?
 20 And you remember Canada didn't state what its position
 21 was on its own law--really rather shocking for a
 22 nation in a case like this.

1082

10:07:43 1 was so important to them, why did they not ask for
 2 specific information on research and development
 3 expenditures at the time? They did not. They didn't
 4 do so until 1998 in the Terra Nova Project.
 5 And just to clear up, just to make sure there
 6 is no question about one other document on which they
 7 might try to rely, the 1986 Exploration Guidelines
 8 which did have a reference to the fact that the Board
 9 might issue some Guidelines on expenditures, again not
 10 at the Development Phase, not at the Operations Phase,
 11 but at the Exploration Phase. But even then, while
 12 there was some reference to it in 1986, Canada may try
 13 to rely on it again in some way, so we prepared this
 14 timeline to make it clear how little--how no such
 15 reliance can be placed. That document was issued in
 16 1986 as a draft, as Mr. Fitzgerald said. In 1987 they
 17 considered it more, and they put out another version
 18 of the exploration plans--exploration Benefits Plan
 19 Guidelines. They contained no such reference.
 20 In 1988, they came out with another one. It
 21 contained no such reference. And then they made no
 22 statements about Guidelines in any document until--and

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10:10:17 1 And the Tribunal must have been suspicious
 2 why that wasn't so. Well, we learned, once we heard
 3 from their Board witnesses, why it was so. Canada
 4 must have known that the real nature of the Benefits
 5 Plans and the Decisions adopting them was fatal to its
 6 case. When Canada did refer that question to its
 7 Board member, their answers confirmed the obvious.
 8 The testimony confirmed that the Benefits Plan and the
 9 decision adopting them were in agreement between the
 10 Board and the Proponents. They--and I'll refer you to
 11 Mr. Fitzgerald's testimony from Page 488 through
 12 496--too many pages to put up on slides. But he went
 13 through the process. He carefully described it as the
 14 Proponent setting out its proposal for benefits,
 15 including R&D, that there was some discussion and
 16 negotiation, in his words. In the case of Terra Nova,
 17 he pointed out there was even discussion and
 18 negotiation prior to the submission of the plan.
 19 Based on the Board's comments, the Proponent came back
 20 in Hibernia's place with a supplemental plan that
 21 responded to those. The Board then accepted the offer
 22 from the Proponents, imposed certain conditions which,

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10:11:38 1 of course, the Proponents had the right to accept or
2 reject. They chose to accept those conditions. That
3 is classic offer and acceptance, classic formation of
4 a contract, and that's exactly what Mr. Fitzgerald
5 understood.

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

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

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10:14:01 1 and it accepted the Terra Nova Proponent statements
2 that they were not--that they did not need to
3 undertake much R&D because of the nature of that
4 project.

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

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

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

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10:12:48 1 members, both here and in their written statements,
2 make that clear.

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

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

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

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10:15:16 1 complying with their Benefits Plans. That is the
2 structure. That is the legal structure in place.
3 That was the purpose of monitoring. Not against some
4 overarching obligations, certainly not against the
5 Atlantic Accord, Professor Sands.

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

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

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10:16:46 1 Board did not impose a particular spending threshold
 2 on research and development in the Benefits Plan.
 3 Again, that's what the Board said in Decision 97.02.
 4 That's what Mr. Fitzgerald confirmed, the former
 5 chairman. No pre-approval, no financial instrument,
 6 no set threshold.
 7 And again, as I pointed out earlier, but the
 8 research and development was to be conducted on a
 9 competitive basis. If they could not--if Newfoundland
 10 was not the best place for reasons of cost, for
 11 reasons of experience, it would not--the Proponents
 12 were not under any obligation to spend useless money
 13 on research and development.
 14 What they said was in the Plan, they would
 15 conduct research and development; and as I said, they
 16 did. They met that obligation. They spent more than
 17 \$200 million on R&D before 2008. That is certainly
 18 compliance.
 19 And when the Board had the opportunity to ask
 20 for more clarifications, both in 1986 and in 1997 with
 21 respect to the two projects, the clarifications they
 22 asked for in the Benefits Plans did not involve R&D.

1091

10:19:25 1 Well, when you compare what he said the Board
 2 was thinking at the time to what the Board actually
 3 said in Decisions 86.01 and 97.02, they are completely
 4 different. There is no mention of the possibility of
 5 an expenditure target. There is no statement that
 6 they are reserving judgment. And when I asked
 7 Mr. Fitzgerald about that, he agreed. He said yes.
 8 What--he agreed with me that what was stated there as
 9 to the Board's approach is not stated in the Board's
 10 Decision. No, I'm telling you, you know, some of
 11 the--illuminating some of the discussion that took
 12 place internally at the time.
 13 Again, you know, I know Mr. Gallus enjoyed it
 14 when I referred to double secret probation in Animal
 15 House in my opening, but, you know, that's
 16 certainly--sound like that's what this is. No, no, we
 17 were thinking about it, but we certainly didn't tell
 18 the Proponents that there was this possibility.
 19 And again he said it was true with Terra Nova
 20 as well. When I asked him when you retired at the end
 21 of 1998, the Board never published a statement that
 22 said it might more explicitly describe the quantum and

1090

10:17:58 1 Mr. Fitzgerald confirmed that. The text of the
 2 conditions imposed did not make--also make that clear.
 3 And Mr. Fitzgerald confirmed that the
 4 conditions imposed by the Board reflected their
 5 current expectations at the time of approval. He
 6 confirmed that was true. And, of course, the Board
 7 had previously said that in its 1990 Decision
 8 accepting the amended Development Plan from Hibernia,
 9 where the Board made clear that the Benefits Plan was
 10 the best way of looking at the Proponent's
 11 expectations of what it was required to do.
 12 The testimony confirmed that there was
 13 no--that targets would never--were never stated, they
 14 were never imposed at that time, and there was never
 15 any mention of targets. What I'm showing you here in
 16 Slide 28 are two statements from Mr. Fitzgerald's
 17 Witness Statement, where he said, oh, well, you know,
 18 our general statements about asking for information,
 19 monitoring, you know, that showed that we were
 20 reserving judgment as to the possibility of setting
 21 expenditure targets. You remember him saying that in
 22 his Witness Statements in Paragraphs 54 and 72.

1092

10:20:28 1 the kind of expenditures it would judge acceptable or
 2 that it would require from Operators in terms of
 3 research and development, and he said no, we had never
 4 stated that publicly.
 5 All of that testimony is damning for Canada's
 6 case.
 7 And again, if those--if, as Mr. Fitzgerald
 8 said, well, we were thinking about it internally, even
 9 if that were so, couldn't Canada have come up with a
 10 single document that said that that was so at the
 11 time? Wouldn't there have been a single internal memo
 12 that referred to that in some way? No. Nothing.
 13 Never. When the Board said to the suppliers "here is
 14 the Plan Hibernia Benefits Plan, here are the benefits
 15 we're giving you" not only did they not mention R&D
 16 among those benefits, but when they did mention that
 17 the Benefits Plan would require some R&D, they didn't
 18 say, "oh, and by the way, we might impose targets
 19 later on." There is no contemporaneous mention of
 20 this, and it's not stated in the Board Decisions, and
 21 as Mr. Fitzgerald--and Mr. Fitzgerald confirmed that
 22 it was never told to the benefit--to the Project

1093

10:21:40 1 Proponents.

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

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

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

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

1095

10:24:12 1 percentage of revenue.

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

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

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

1094

10:23:02 1 Board was so concerned about the decline of the
2 percentage of revenue that Hibernia was spending on
3 the project, look at these numbers from 1997 to 2000,
4 went from [REDACTED]

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

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

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

1096

10:25:22 1 found in 2000 that Hibernia was fully in compliance
2 with its requirements under its Benefits Plan.

3 So, when the Board made that decision, it
4 knew that Hibernia's spending in 1998 was [REDACTED]
5 It knew that its spending in 1999 was [REDACTED] It
6 knew that the expenditure in 1997 would have been
7 [REDACTED]

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

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

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

1097

10:26:33 1 Plan--whether the Guideline requirement is imposed by
 2 the Benefits Plan.
 3 And we heard a little bit, by the way, at the
 4 end of Mr. Way's testimony, that the Board was--that
 5 the industry was crying out for a benchmark. Well, he
 6 kind of backtracked from that a little bit as the
 7 questioning went on. But again, there is no
 8 documentary record to support that, and I'm not going
 9 to say why Mr. Way said that, but there is no record.
 10 Do you think if industry was crying out, don't you
 11 think Canada in the several years this case has been
 12 going on would have produced a document that said
 13 that? We saw other Board, internal Board memos
 14 describing their meetings with the industry, where
 15 industry's position was taking place. Do you think if
 16 the Board--sorry, if industry was crying out for a
 17 benchmark, don't you think somebody would have
 18 recorded that somewhere within the Board?
 19 We also know that the Guidelines presented a
 20 fundamental change for Hibernia and Terra Nova. The
 21 testimony has confirmed all of the changes we showed
 22 you in this slide, and I'm not going to take time with

1099

10:28:42 1 Guidelines that the Board had put out were always
 2 prospective. It said we're putting out this document
 3 to provide guidance for--in the preparation of
 4 Benefits Plans. That language was in every one of
 5 those Benefits Plan Guidelines, including even in 2006
 6 when it said that.
 7 What's the one exception of the Guideline
 8 that applies to the Benefits Plan? The 2004 R&D
 9 Expenditure Guidelines, which were applied
 10 retroactively to the Hibernia and Terra Nova Project.
 11 And we know that--and by the way, testimony
 12 also confirmed that the Guidelines were always
 13 forward-looking.
 14 Let's keep going.
 15 We know when they approved the POAs after
 16 issuing the Guidelines for both Hibernia and Terra
 17 Nova, and this is Hibernia's but it was true for both,
 18 they put in two different conditions: One, that the
 19 Operator had to comply with the Benefits Plan; and a
 20 separate one, that the Operator had to comply with the
 21 Research and Development Guidelines. That tells you
 22 also whether the Board believed that the Guidelines

1098

10:27:38 1 it again. But we also know that--we also know that
 2 the framework for the White Rose Project, when they
 3 finally did mention targeted amounts, was very
 4 different. Remember the White Rose Decision said
 5 we're going to impose an appropriate expenditure
 6 target, and it said it would be not less than
 7 \$12 million. This slide compares that language with
 8 the equivalent language and conditions in the Hibernia
 9 and Terra Nova Projects, so we knew it was in a
 10 different legal framework.
 11 And Mr. Way's memo of the December 2003
 12 meeting confirms that the Board knew it was a
 13 different framework, and that the only way they were
 14 going to be able to impose the Guidelines
 15 retroactively on Hibernia and Terra Nova, which had
 16 approved Development Plans, was to use the threat of
 17 not renewing the POAs. That's what Mr. Way's memo
 18 makes clear, and that they were in a different legal
 19 framework from Hebron and the White Rose Projects
 20 which were going forward.
 21 And talking about going forward, we also know
 22 what the record also shows is that the other

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10:29:48 1 fell within the requirements to comply with the
 2 Benefits Plan.
 3 We also heard a lot more this week about the
 4 arbitrariness of the Guidelines, that they have no
 5 relationship to the competitiveness, that you have to
 6 spend money in the Province whether or not the
 7 suppliers are best suited. Mr. Way confirmed that
 8 yesterday.
 9 We've presented the evidence about all of the
 10 arbitrariness of the benchmark, and won't--it's
 11 summarized in this slide. We won't spend much time on
 12 it.
 13 Canada could have presented evidence to rebut
 14 this, but they chose not to. Stats Canada, of course,
 15 is a part of the Respondent over there. We raised
 16 these problems long ago. They never brought anybody
 17 from Stats Canada to say no, no, we're mistaken. They
 18 had--what did have was their Board members who
 19 confessed that they had no knowledge of how Stats
 20 Canada keeps them--talk about some second-hand
 21 information.
 22 They also said that we had the nerve not to

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10:30:48 1 explain about the benchmark before the Guidelines were
2 imposed. Well, we were too busy complaining about the
3 Guidelines. Mr. Phelan pointed out in his Second
4 Witness Statement that that was the thrust of
5 industry's position, but once we--and we didn't know
6 anything about the Stats Can factor. But once we
7 started having to use it, then we saw all the
8 problems.

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

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

1103

10:32:43 1 the Guidelines," even though that was the sole purpose
2 of the project was try to meet the Guidelines.

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

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

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

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

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

1102

10:31:45 1 I'd just ask you to go to ExxonMobil's Web site and
2 look at their descriptions of their research into 3-D
3 seismic drillings and other Exploration Phase work.

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

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

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

1104

10:33:52 1 in which the performance requirements are at the heart
2 of the case. In one case, frankly, the U.S. was
3 challenged on performance requirements, and it did
4 what Canada probably should have done in this case:

5 It admitted that it was a performance requirement, but
6 said that they were entitled to one of the exceptions
7 under NAFTA. That's the ADF case, if I remember
8 correctly. That's what Canada should have done. They
9 shouldn't have fought us that this was even an
10 improper performance requirement. They just have just
11 said, "but we were entitled to do it under Annex I."
12 But instead we've had to show you why the Guidelines
13 violate Article 1106(1)(c), and I believe we've proven
14 that.

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

1105

10:34:51 1 Claimants to spend millions of dollars on R&D and
2 education and training, whether commercially needed or
3 not, and whether or not the services available in the
4 Province are competitive with those elsewhere. Are
5 they requirements? Certainly. Messrs. Fitzgerald and
6 Way made plain that the answer is yes. If we don't
7 spend the money, they will take the money. And if we
8 don't comply, they will take away our POAs. That's a
9 requirement.

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

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

1107

10:36:57 1 MR. RIVKIN: Okay, sorry.

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

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

1106

10:35:50 1 at Page 507. Mr. Way said that at Page 771. R&D is a
2 service, and it also requires goods like lab equipment
3 that have to be purchased.

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

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

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

22 PRESIDENT van HOUTTE: No, no.

1108

10:37:56 1 Canada's witnesses agreed with that, and we have
2 already shown you that testimony. I have told you
3 where it is.

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

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

15 First of all, Canada implies that
16 Article 1106 is limited services purchased from a
17 local third-party provider, and that's what they said
18 in their Rejoinder. But a plain reading of
19 Article 1106(1)(c) makes clear that's not so. The
20 1106(1)(c) talks about using or according a
21 preference, a requirement of using or according a
22 preference to goods or services provided in its

1109

10:39:09 1 territory. There's no requirement that you have to
2 purchase from a third party. It applies to goods
3 produced or services provided in the territory no
4 matter the identity, nationality, or residence of the
5 person supplying or providing them.

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

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

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10:41:21 1 fact, has conceded in its Rejoinder that the ordinary
2 meaning of 1106(1)(c) prohibits requirements to
3 purchase, use, or accord a preference to R&D and E&T
4 services, and therefore, supplemental means are not
5 carried out.

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

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

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

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10:40:16 1 around that anymore.

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

12 The remainder of Canada's arguments on
13 1106(1)(c) are based on supplementary means of
14 interpretation and the Vienna Convention. But the
15 Vienna Convention makes clear that you can only rely
16 on supplementary means of interpretation when--either
17 to confirm the meaning resulting from Article 31 or to
18 determine the meaning when Article--under the plain
19 terms under Article 31 the meaning is ambiguous or
20 obscure or leads to a result which is manifestly
21 absurd or unreasonable. That clearly is not the case
22 with the plain language of 1106(1)(c), and Canada, in

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10:42:24 1 Government. It also applies to those measures of
2 Federal and Provincial Governments that were to be
3 specifically set out in Annex I or III within two
4 years of the entry into force of NAFTA. All three
5 categories of measure have to be existing in order to
6 be covered.

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

13 The exception for the--yes.

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

19 MR. RIVKIN: Yes.

20 ARBITRATOR SANDS: You see there after
21 1108(2), each Party may set out in its schedule to
22 Annex I, and I think you are coming on to this issue.

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10:43:26 1 MR. RIVKIN: Yes.
 2 ARBITRATOR SANDS: My question is this: What
 3 are the principles governing the interpretation of a
 4 measure that is scheduled in the annex?
 5 Article 1108(2) said: "Each Party may set out in its
 6 schedule to Annex I."
 7 So my first question is: What's the
 8 mechanics of putting a reservation in?
 9 MR. RIVKIN: If you will let me describe what
 10 they did with respect to the Provincial measures, I
 11 will get to--
 12 ARBITRATOR SANDS: Just before that, as a
 13 general question: Is it unilateral Act? Does the
 14 United States submit its--
 15 MR. RIVKIN: Yes.
 16 ARBITRATOR SANDS: So it's a unilateral Act.
 17 MR. RIVKIN: Yes.
 18 ARBITRATOR SANDS: Then the follow-up
 19 question, if it's a unilateral Act, what principles
 20 govern? Because, you see, the Vienna Convention on
 21 the Law of Treaties in principle doesn't govern the
 22 interpretation of "unilateral act" as opposed to

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10:45:23 1 characterization, because it goes to the question of
 2 interpretation, and that is related to another--if I
 3 could just take you to the Annex I introductory
 4 section.
 5 PRESIDENT van HOUTTE: May I suggest that we
 6 have those questions after the closing?
 7 (Simultaneous conversation.)
 8 MR. RIVKIN: I have a way--it is done in a
 9 way that I think will answer your questions, if you
 10 will let me do that.
 11 PRESIDENT van HOUTTE: But the methodology,
 12 we also have to discuss that--
 13 MR. RIVKIN: Yeah.
 14 PRESIDENT van HOUTTE: --because it implies
 15 also Post-Hearing Briefs, and, anyway, that's also a
 16 question mark.
 17 MR. RIVKIN: Right. Okay. So, looking at
 18 Article 11081, it requires that an existing measure
 19 has to be listed in its schedule, and--in Annex I.
 20 And the exception for the Accord Act that was included
 21 in Canada's schedule specifically mentions--the
 22 exception for the Accord Act that Canada listed in its

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10:44:19 1 treaties, and that's what my question is getting to.
 2 MR. RIVKIN: Because Article 1108(2) is
 3 allowing the Parties to make submissions based on--for
 4 the reservation in Article 1108(1) and because that
 5 happens under the Annex I headnote, what is submitted
 6 by the nations has to be interpreted according to the
 7 principles laid out in 1108 and in the headnote to
 8 Annex I.
 9 ARBITRATOR SANDS: Because--
 10 MR. RIVKIN: And Mr. Legum would like to add
 11 to that answer.
 12 ARBITRATOR SANDS: Sure, sure, of course.
 13 MR. LEGUM: My understanding actually is that
 14 the annexes were not unilateral acts, that they were
 15 negotiated among the Parties as to what annexes would
 16 be accepted by the other Parties in a specific form.
 17 So, it's not accurate to say that they're unilateral
 18 acts.
 19 ARBITRATOR SANDS: I think it may be help--if
 20 this cannot be clarified now, I think it may be
 21 helpful in the post-hearing phase to have something on
 22 the mechanics of how it happens and the

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10:46:55 1 scheduled Annex I specifically mentions Benefits Plans
 2 that must be approved by the Board. This provision
 3 undisputedly was both existing and listing in the
 4 annex, and the exception also clearly contemplated
 5 that future subordinate measures in the form of
 6 decisions adopting Benefits Plans were to be adopted
 7 by the Board. So, for the exception to have any
 8 effect, those future specifically contemplated
 9 measures had to be covered, and we have consistently
 10 acknowledged this category of specifically
 11 contemplated measures as covered.
 12 We have never once in this arbitration
 13 suggested that the 1997 Decision approving the Terra
 14 Nova Benefits Plan fell outside this exception. To
 15 the contrary, the description of the Accord Act regime
 16 is one that required a decision on Benefits Plans
 17 necessarily encompasses decisions like that on Terra
 18 Nova made after the NAFTA went into effect. That is
 19 not at all the kind of measure the Guidelines
 20 represent.
 21 The Guidelines are nowhere mentioned in the
 22 annex description of the nonconforming aspects of the

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10:47:56 1 Accord Acts. They are not a decision approving a
 2 Benefits Plans in this case-specific context set out
 3 in the description.
 4 As Mr. Way stated in a response to a question
 5 from Professor Sands, the Guidelines set out a new
 6 kind of requirement that existed alongside the
 7 decisions adopting the Hibernia and Terra Nova
 8 Benefits Plans, and we saw in their POA approval
 9 requirements that they viewed this as being separate
 10 from the Benefits Plan requirements.
 11 This is not a requirement that could have
 12 been imposed through amending the Benefits Plans, as
 13 Mr. Fitzgerald testified. The Guidelines are an
 14 exercise in rule-making, enactment of new rules of
 15 general interpretation. They set out a general legal
 16 regime that did not previously exist. So, on their
 17 face, they do not fall within the Benefits Plan
 18 mechanism covered by the Accord Act exception.
 19 Canada argument that the Guidelines were
 20 adopted under the authority of the reserved measure
 21 within the meaning of the headnote of Annex I is
 22 similarly baseless. The headnote in question, Note

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10:50:04 1 argument is wrong in several respects.
 2 First of all, Canada rewrites its position
 3 from the past in this case. If you look at
 4 Paragraphs 109 through 114 of Canada's Rejoinder, they
 5 state over and over again--109 to 114. They state in
 6 109, for example, "For example, if a NAFTA Party has
 7 described the nonconforming aspect of its measure
 8 under the description headings only subordinate which
 9 address that aspect of the measure will be reserved."
 10 That is directly contrary to what Mr. Gallus told you
 11 Tuesday.
 12 They, in Paragraph 110--they talk about the
 13 narrow reservation for the listed measure.
 14 Paragraph 111, they say reserving only those
 15 future measures authorized by and consistent with the
 16 nonconforming aspects of the Annex I listed measures
 17 is nothing like a reservation for all future measures
 18 in a particular sector. So, they're focusing on how
 19 narrow the ability is to make an exception.
 20 They go on to say that--well, I'm just
 21 repeating.
 22 So, they accused us of overlooking the limits

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10:48:56 1 2(f) states that measures identifies the laws,
 2 regulations, or other measures as qualified, where
 3 indicated, by the description element for which this
 4 reservation is taken. Canada's scheduled Annex I
 5 does, indeed, qualify the identification of the Accord
 6 Act in the description element, the provision
 7 described as 45(3)(c) and (d) of the Accord Act.
 8 There is no reference to the Accord Act exception to
 9 the Guidelines in particular or even the Board's
 10 authority to issue Guidelines under Section 151. The
 11 Guidelines were not adopted under the authority of the
 12 nonconforming Act of the Accord Act--aspect of the
 13 Accord Act listed in the exception; they therefore
 14 cannot fall within the headnote to Annex I.
 15 On Tuesday, Canada argued that the ordinary
 16 meaning of these terms, as I have just laid out, makes
 17 no sense because the only reservations in Annex I of
 18 the NAFTA that included a description are the measures
 19 of the Federal Government--and Professor Sands, this
 20 is coming to your questions.
 21 Measures of the Provincial Government, they
 22 said, did not include a description. Canada's

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10:51:21 1 on the reservation for subordinate measures, which I
 2 have just described to you. So, keep that in mind
 3 when you re-read Mr. Gallus' opening argument and when
 4 you hear whatever he has to say today.
 5 Second, Canada rewrites its own history
 6 outside of this case. In the form of the Treaty
 7 approved by the NAFTA Government, the NAFTA required a
 8 measure-by-measure annex for Provincial measures just
 9 like it did for Federal measures. Local Government
 10 measures were the only ones that were not required to
 11 be detailed in an annex. Recall that the NAFTA
 12 provided two years for the annex for state and
 13 Provincial measures to be put together.
 14 The incomplete documents that Canada has
 15 tendered to this Tribunal consist of letter was of
 16 with some but not all of the mentioned attachments.
 17 We are showing you here RE-11, which is the annex page
 18 and that mentions Provincial measures.
 19 These letters were signed by Trade Ministers
 20 of the three NAFTA Parties in March 1996, after
 21 expiration of the two-year period. The letters were
 22 not posted on Canada's website or otherwise made

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10:52:27 1 public until some months after the Claimants put this
2 out in their Memorial in the case. So, if an investor
3 wanted to know what the scope of the exceptions were
4 for Provincial measure, there was no way to know until
5 we pointed it out in this case.

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

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

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

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

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

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

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

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10:53:31 1 two years later. That two-page headnote was written
2 for the measure-by-measure annex that NAFTA requires.
3 It was not designed to address a one-sentence document
4 that Canada submitted years later in a different form
5 than the text, indeed, requires.

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

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

16 Does this mean that limited future
17 subordinate measures are not covered? No. If the
18 nonconforming aspect of the measure that existed in
19 1994 explicitly contemplated future subordinate
20 measures as part of that nonconforming aspect, those
21 future subordinate measures would be covered.

22 In considering Canada's proposed rule, it's

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

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

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

22 First, the terms should be considered in the

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

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

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

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10:58:38 1 that the agreement is to be construed in accordance
2 with their national law.

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

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

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

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

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

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

21 ARBITRATOR SANDS: No, no, sorry--

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

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10:57:38 1 the territories.

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

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

11 PRESIDENT van HOUTTE: On the NAFTA.

12 ARBITRATOR SANDS: NAFTA.

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

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

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

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10:59:22 1 treaty.

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

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

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

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11:00:26 1 the NAFTA is to create free trade and to eliminate
2 barriers. When you have a reservation that is an
3 exception that is allowing a certain amount of
4 exception to free trade, then Article 1108 makes clear
5 that those exceptions are to be narrowly construed,
6 and the headnote also makes clear that the measures
7 have to be listed in the nonconforming measures and
8 Section 3 reinforces that.

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

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

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

22 ARBITRATOR SANDS: Thank you.

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11:02:38 1 were meant to have the same meaning in the two
2 provisions. The words are slightly different in the
3 English and Spanish version, but they clearly get to
4 the same purpose in those languages, and Canada
5 understood it to be the same.

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

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

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11:01:34 1 MR. RIVKIN: So, with these principles--by
2 the way, members of the Tribunal, I apologize. I'm
3 running a little bit longer than I planned, but I
4 think this is an important topic.

5 PRESIDENT van HOUTTE: That's to be expected.

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

9 So, did the drafters--your Question 3 is, did
10 the drafters of the NAFTA intend any difference
11 between a standard of consistent with in the headnote
12 to Annex I and not decreasing the conformity of
13 amendments in 1108(1)(c), and this is the question
14 Professor Sands raised on Tuesday, and my answer on
15 Tuesday was no, and my answer today is--remains no,
16 but I have an even better way of explaining it to you,
17 which is looking at the French text of the NAFTA which
18 is created by Canada. If you look at the French text,
19 you see that they use precisely the same word in Annex
20 I, Section 2(f), "conformément" with Article
21 1108(1)(c). La conformité.

22 So, Canada clearly understood that the terms

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11:03:40 1 sense in this regime only if it too could not effect a
2 change for the worse. This is the only approach
3 consistent with the context of Annex I's headnote and
4 the NAFTA's objective of eliminating barriers to
5 cross-border trade.

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

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

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

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11:04:43 1 Canadian administrative law, which applied in the
2 cases that challenge the Guidelines. We will do that
3 comparison now.
4 The terms in the NAFTA apply--
5 ARBITRATOR SANDS: Just to test that,
6 Mr. President, sorry, just teasing out the
7 issues--these are very significant issues and I think
8 that you'd appreciate it. Does that then mean--let's
9 take a totally different performance requirement.
10 The United States has put in reservation in
11 relation to the Clean Water Act. Does your answer
12 therefore mean that the conformity of a subordinate
13 measure to the Clean Water Act under U.S. law is to be
14 assessed not by reference to U.S. law but by reference
15 to the law of the NAFTA?
16 MR. RIVKIN: It has to be looked at
17 with--yes, with--in terms of the conformity with the
18 objectives and purposes of Article 1108(1) and the
19 NAFTA. That's what the NAFTA Treaty provides.
20 ARBITRATOR SANDS: So, the United States, in
21 entering that reservation and becoming a part of the
22 NAFTA, accepted that a NAFTA tribunal would be free to

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11:06:50 1 MR. RIVKIN: Correct.
2 ARBITRATOR SANDS: Right. Thanks.
3 MR. RIVKIN: As I said, the terms of the
4 NAFTA appear in a free trade agreement, the pertinent
5 objective of which is to eliminate barriers to trade.
6 The object of Canadian administrative law is
7 to ensure that, as justice Welsh said--these are all
8 quotes from the Hibernia Decision--to ensure that
9 agencies implement and administer laws in a legal,
10 fair, and reasonable manner. Very different. The
11 immediate context of the terms of the NAFTA is a
12 limited exception for specified measures that violate
13 the treaties--violate the objectives the Treaty and,
14 indeed, the specific obligations imposed to achieve
15 those measures.
16 Article 1108(1), the relevant operative
17 provision, allows such measures to be maintained only
18 if the conformity is not decreased. By contrast,
19 Canadian administrative law applied in the court cases
20 permissively considers that administrative acts are
21 subject to a wide margin of appreciation.
22 The ordinary meaning of the terms "under the

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11:05:47 1 put on one side a U.S. court determination, for
2 example, and deal with it purely as a matter of NAFTA
3 and international law? I'm just trying to get a
4 sense.
5 MR. RIVKIN: Yeah. I'm not here to speak for
6 the United States, as you know, and in answering that
7 question in a void without knowing the measure. What
8 is being done in terms of conformity, what's being
9 challenged, is a very difficult question to answer. I
10 think you have to look at the specifics.
11 When you look at specifics here, as I'm about
12 to show you, the purpose and terms of NAFTA are
13 entirely different from the manner in which Canada
14 reviewed under its own administrative law whether
15 Guideline were consistent with the Accord Acts.
16 ARBITRATOR SANDS: My question was on
17 authority. I specifically didn't ask about
18 consistency. I asked about authority.
19 MR. RIVKIN: It's the same.
20 ARBITRATOR SANDS: This Tribunal should apply
21 NAFTA and international law in determining whether a
22 subordinate measure is or is not under the authority?

1136

11:07:57 1 authority of" and "consistent with" suggests no
2 particular deference to the reading of the accepted
3 measure by the national authorities. Under Canadian
4 administrative law, the test is whether the agency's
5 reading of the measure falls within a range of
6 possible, reasonable outcomes with mandated judicial
7 deference to the agency's approach. That is what the
8 Canadian courts held here.
9 Finally, under NAFTA, subordinate measures
10 have to be consistent with the nonconforming provision
11 of the reserve measure. Under Canadian administrative
12 law agency measures not reviewed for consistency with
13 measure but for reasonableness, whether the agency
14 action falls within range of possible acceptable
15 outcomes which are defensible in respect of the facts
16 and law.
17 You can see here the enormously different
18 purposes of the two scopes of review. So, there is no
19 basis to review the terms--those terms under
20 American--under Canadian law. The comparison shows
21 that the requirement--and that may also go to your
22 question, Professor Sands. Again, it is very

1137

11:09:10 1 difficult to answer in a void. If the purpose of the
2 U.S. statute was similar to the object and purpose of
3 the NAFTA, then one could see how the national law
4 could potentially inform the interpretation under the
5 NAFTA, if the object and purpose is the same. What we
6 have here is a very different object and purpose, very
7 different standards being applied between the NAFTA
8 and the relevant Canadian law.

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

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

22 Here is Slide 43 from Canada's opening.

1139

11:11:17 1 found neither to be present. This is, in short,
2 familiar territory where the Rule of Decision to be
3 applied by an international tribunal is a different
4 standard governed by international and not national
5 law.

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

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

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

1138

11:10:11 1 Canada showed that the Tribunal--the snippet
2 to suggest that the majority made broad findings about
3 authority. What Canada didn't show you is the
4 preceding paragraph that read in the context of the
5 preceding Paragraph 78, it's clear that the snippet
6 Canada relied on only reflected Justice Welsh's
7 conclusion that the Guidelines did not constitute a
8 tax, which the Board did not have authority to impose.
9 It was not a general conclusion on the authority of
10 the Board to issue the Guidelines.

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

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

1140

11:12:17 1 courts is consistent with the requirements of NAFTA or
2 international law are to be determined in this
3 arbitral proceeding, nor is an action determined to be
4 legal under Mexican law by Mexican courts necessarily
5 legal under NAFTA or international law."

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

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

1141

11:13:17 1 Under general international law, exhaustion
2 of local remedies signifies only that an international
3 tribunal may then decide the case under international
4 law. It doesn't mean, as Canada contends, that the
5 international tribunal is then required to follow the
6 decision of the local courts.

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

13 And the question that--the answer to your
14 Question 2(b) is that which I gave earlier to Question
15 3, the context of the headnote to Annex I, in light of
16 the objectives of the NAFTA, compel the conclusion
17 that a future subordinate measure cannot be consistent
18 with the reserved measure if it decreases the
19 conformity the measure. The Claimants' answer to
20 Question 2(c), it should be obvious, is that the Rule
21 of Decision does not include Canadian administrative
22 law, which applies very different standards.

1143

11:15:14 1 argument that the Guidelines were consistent with this
2 pre-existing legal regime, but as we've seen earlier,
3 neither the Accord Acts nor the decisions adopting the
4 Benefits Plans imposed a minimum level expenditure,
5 required pre-approval, or had any--or reflected any of
6 the changes that this chart showed. Canada has not
7 disproven any of the elements on this chart.

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

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

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

1142

11:14:16 1 To answer Question 2(d), it's therefore the
2 case that a subordinate measure cannot be consistent
3 with the measure if it imposes additional or more
4 onerous local content burdens on a legal or natural
5 person subject to the measure.

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

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

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

22 In its opening, Canada attempted to build an

1144

11:16:14 1 according to the terms of the ratchet rule. Canada
2 cannot, in good faith, circumvent its treaty
3 obligations by repackaging an amendment as a separate
4 measure.

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

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

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

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

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

1145

11:17:17 1 Board member witnesses were in a far better position
2 than Canada's counsel, apparently, to describe that
3 regime. They described all the different--well,
4 counsel deferred to the Board members, as you recall,
5 many different times, but Mr. Fitzgerald confirmed
6 that the Benefits Plans were negotiated, as was--as
7 I've already shown you, and he said, yes, it was a
8 negotiation. He agreed with my statement that there
9 was an offer and an acceptance.

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

16 "Right."

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

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

1147

11:19:19 1 add to our obligations with respect to R&D.

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

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

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

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

1146

11:18:19 1 provided the context for the Claimants' investment.
2 It again shows the contractual or quasi-contractual
3 nature of the Benefits Plans and the Decisions
4 adopting them.

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

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

1148

11:20:18 1 the quasi-contractual inducement did not exist.

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

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

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

1149

11:21:36 1 egregious and shocking under Canada's standard.
 2 What does an obligation not to accord
 3 treatment that is sufficiently egregious and shocking
 4 mean? The terms used by Parties to describe the
 5 customary law standard that the Tribunal have to apply
 6 are vague and ill defined, egregious, shocking, but it
 7 must still be applied to the facts of this case.
 8 Turning to the analysis that other tribunals
 9 have undertaken to define the standards in the cases
 10 that Canada relies on does not involve the creation of
 11 customary international law by way of international
 12 arbitration awards. There is value in utility in
 13 looking at how others have applied this standard.
 14 Canada has explicitly relied on these two
 15 cases as accurately expressing the customary
 16 international law minimum standard of treatment:
 17 Glamis Gold and Cargill.
 18 In Glamis, the Tribunal stated that it agrees
 19 with International Thunderbird that legitimate
 20 expectations relate to an examination under
 21 Article 1105(1) in such situations where a Contracting
 22 Party's conduct creates reasonable and justifiable

1151

11:23:44 1 those expectations. That is exactly what we have in
 2 this case.
 3 In Cargill, there was no claim that the
 4 Investor's legitimate expectations had been breached.
 5 In Glamis, the Investor they did make a such. The
 6 Tribunal considered whether U.S. Government measures
 7 violated Article 1105 because it changed in a dramatic
 8 way a previous law or prior legal interpretation.
 9 The Tribunal explained that the violation
 10 based on an unsettling of reasonable-backed
 11 expectations requires as a threshold circumstance at
 12 least a quasi-contractual relationship between the
 13 State and Investor, whereby the State has purposely
 14 and specifically induced the investment precisely
 15 because these expectations were not--and in
 16 Cargill--I'm sorry, in Glamis, the finding of
 17 violation was rejected because the expectations were
 18 not based on specific commitments made by the Federal
 19 Government.
 20 In this case, it could not be clearer,
 21 contractual or quasi-contractual arrangements were
 22 made with the State which have now been repudiated.

1150

11:22:40 1 expectations on the part of an investor or investment
 2 to act in reliance on said conduct. In this way, a
 3 State may be tied to the objective expectations that
 4 it creates in order to induce investment. That is the
 5 standard that Canada has agreed applies here.
 6 In Cargill, the Tribunal said--the Tribunal
 7 notes there are at least two bid awards, both
 8 involving a clause viewed as possessing autonomous
 9 meaning that, if found, an obligation to provide a
 10 predictable investment environment that does not
 11 affect the reasonable expectations of the Investor at
 12 the time of the investment. No evidence, however, has
 13 been played before the Tribunal in that case. That
 14 there is such a requirement in the NAFTA or customary
 15 law, and then, here is the key language, at least
 16 where such initiations do not arise from a contract or
 17 quasi-contractual basis. Again, that's the case they
 18 rely on.
 19 So, we are looking for specific assurances
 20 and commitments under Glamis Gold, a quasi-contractual
 21 situation, reasonable and justifiable expectations
 22 arising from that situation, and the repudiation of

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11:24:48 1 And there, Canada's witnesses confirmed this.
 2 As it was said in Glamis, Canada may be tied to the
 3 objective expectations that it creates in order to
 4 induce investment, including what's on the chart in
 5 front of you.
 6 We have demonstrated the fair and equitable
 7 treatment applies--has evolved, and we stated that in
 8 the opening in our papers, and I'm going to skip over
 9 doing that now. But certainly, when you apply these
 10 same facts under that standard, we certainly agree, as
 11 well. But we have argued that in the past, and I
 12 won't reargue it here.
 13 So, for all of these reasons stated above
 14 including the authorities on which Canada relies and
 15 the testimony of their own witnesses, we ask that the
 16 Tribunal find that Canada has breached Article 1105 as
 17 well as Article 1106.
 18 Thank you very much for your patience. And I
 19 apologize, I have now used up exactly the 90 minutes
 20 and left no time for Sophie to talk about damages, but
 21 I know she does have a few words to share with you on
 22 that.

1153

11:25:52 1 Do you have any questions on anything before
 2 I sit down?
 3 ARBITRATOR JANOW: Well, I would like further
 4 clarification. It's not my philosophy to interrupt
 5 Parties during concluding statement, so--but I think
 6 these exchanges have been helpful.
 7 With respect to the reservations, because
 8 there is very limited NAFTA case law on this question,
 9 I guess if I've understood what you said here today,
 10 you have argued that an evaluation of authorization
 11 and consistency are made with respect to NAFTA law and
 12 not made with respect to domestic law, the latter of
 13 which is a matter of fact; is that correct?
 14 MR. RIVKIN: That's correct.
 15 ARBITRATOR JANOW: Okay.
 16 MR. RIVKIN: Because it has to be consistent
 17 with the object and purpose of the Treaty itself.
 18 ARBITRATOR JANOW: Okay. So, thus, a matter
 19 of theory can be consistent and authorized under
 20 domestic law, but nevertheless be inconsistent for
 21 purposes of NAFTA?
 22 MR. RIVKIN: Exactly.

1155

11:28:04 1 Sophie.
 2 ARBITRATOR SANDS: I am very grateful for you
 3 to putting in the French text, which I was wasn't
 4 aware of, and just say to my good friend Arbitrator
 5 Janow, I think it's just an expression of a different
 6 legal culture. In my legal culture, you do interrupt,
 7 and I, of course, have appeared as counsel appeared in
 8 many cases where I have been interrupted extensively.
 9 So, it is an explanation.
 10 But on the French text, the 1108(1)(c)
 11 refers--may be sensible--have you got it in front of
 12 you? I am not--
 13 MR. RIVKIN: Which slide is it, again?
 14 ARBITRATOR SANDS: 67.
 15 I'm trying to get conceptual clarification
 16 here on what the situation is.
 17 MR. RIVKIN: Okay. I have it now.
 18 ARBITRATOR SANDS: You've got it?
 19 MR. RIVKIN: Yes.
 20 ARBITRATOR SANDS: 1108(1)(c) deals with the
 21 situation of amendment, and in there it appears to be
 22 explicitly stated that to amend--that's why it's an

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11:26:57 1 ARBITRATOR JANOW: Okay, thank you.
 2 MR. RIVKIN: Of course it's not an unusual
 3 situation where a State has its own practice which is
 4 legal under its own law but which violates its treaty
 5 obligations to some other country.
 6 ARBITRATOR JANOW: But I guess my final
 7 question is: In coming to a view on this question,
 8 does the Treaty interpreter not have a requirement to
 9 look into the content of the measures in coming to a
 10 view? In other words, in coming to an evaluation, you
 11 are not just looking at the--for example, if the
 12 Accord Acts permit the issuance of Guidelines, for
 13 example, if we look at the facts of this case, but
 14 you're looking at the content of the measures at issue
 15 in their totality; is that correct?
 16 MR. RIVKIN: Yes, that's correct. You have
 17 to look at what the pre-existing legal regime was
 18 before the Guidelines and what the Guidelines imposed
 19 on us. So, you would look at the content of the
 20 measures both before and after the Guidelines.
 21 ARBITRATOR JANOW: Okay. Thank you.
 22 MR. RIVKIN: Thank you.

1156

11:29:13 1 apparent measure--you cannot "réduire la conformité."
 2 MR. RIVKIN: Oui.
 3 ARBITRATOR SANDS: Merci.
 4 Annex I, Section 2(f) deals with subordinate
 5 measures. That does not, on its face, say anything
 6 about "réduire la conformité," but it does use the
 7 word "conformité."
 8 Am I right to understand is that your
 9 argument is that we should read into Annex I, Section
 10 2(f) the words "réduire la conformité" to make it
 11 consistent with 1108(1)(c)?
 12 MR. RIVKIN: Well, I have said that in order
 13 to interpret the headnote to Annex I in a manner which
 14 is consistent with the object and purpose of the terms
 15 of the Treaty, the fact that this is a reservation,
 16 the fact that it is an exception to the otherwise
 17 strong standards of Article 1106, you have to
 18 interpret the annex in a narrow manner that is
 19 consistent with that object and purpose.
 20 And so, when the Parties stated that the
 21 subordinate measure had to be in conformity with, it
 22 had to be--it had to mean that they were--did not want

1157

11:30:29 1 a subordinate measure to be open up a broader
 2 exception. It had to mean--consistent with in the
 3 English language, "conformément" in the French
 4 language. It had to mean they could not decrease the
 5 conformity.
 6 So, I think the fact that Article--and as we
 7 also said, you couldn't--you can't interpret the
 8 statute, the Treaty, in a way that would allow Canada
 9 to adopt a subordinate measure that would open a hole
 10 in a manner they couldn't do through an amendment.
 11 So, I think all of that fits together, so it's not
 12 surprising that Canada, in drafting this itself, found
 13 that--used the same word.
 14 ARBITRATOR SANDS: I can see that.
 15 Bart would like to something else, if he may.
 16 PRESIDENT van HOUTTE: We should move on.
 17 ARBITRATOR SANDS: Again, I'm just trying to
 18 get clarification on this.
 19 So, my follow-up with you is, just putting
 20 myself in the minds of the drafters of the three
 21 States, could they have had any policy reason for
 22 wanting to apply a different approach to an amendment

1159

11:32:56 1 ARBITRATOR JANOW: Could I say one more
 2 thing, and let me just say for the record that I have
 3 less deference during the interrogatories than in
 4 closing so you have shown a great deal of deference in
 5 that phase.
 6 MR. RIVKIN: It's always good to learn the
 7 Arbitrators' philosophies, particularly at end of the
 8 case.
 9 ARBITRATOR JANOW: To use a vernacular, which
 10 is not in this text--I mean, in trade terms, one might
 11 think about this in terms of an annex reflecting a
 12 standstill with respect to the scope of the measure
 13 that is subject to the reservation. Is that sort of
 14 philosophically what you're arguing?
 15 I would suggest, Mr. Rivkin, that there is
 16 this notion of nothing that is additional or more
 17 burdensome is a very wide ambit that you are
 18 proposing, and that the notion that authorized
 19 subordinate measure could not impose any additional
 20 burdens or any additional characteristics. Is there
 21 some foundation for that characterization?
 22 MR. RIVKIN: Well, I think it is all of the

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11:31:39 1 of a measure as opposed to the adoption of a new
 2 subordinate measure? That's my last question.
 3 MR. RIVKIN: My short answer is, we have one
 4 of Parties here, and they haven't presented any, and
 5 it's their burden to prove this exception, and
 6 certainly they haven't presented anything different
 7 than the obvious plain meaning of the words and the
 8 object and purpose of the Treaty.
 9 My friend Bart is desperately wanting to add
 10 something.
 11 MR. LEGUM: I would simply note that the
 12 whole purpose of having a measure-by-measure annex is
 13 transparency. The three Parties know what the
 14 measures are that are nonconforming with the Treaty.
 15 So, the basis for 2(f) in this Interpretive Note is we
 16 know what the measure is. We know what its
 17 nonconforming aspects are. And a subordinate measure,
 18 if it is going to be covered, has to be consistent
 19 with that measure, which has to mean, in this context,
 20 that it can't be inconsistent with it in the sense of
 21 decreasing the conformity of the situation that
 22 existed beforehand.

1160

11:34:14 1 grounds that we have stated that Article 1106 states
 2 very important trade benefits that the NAFTA is
 3 designed to create. Article 1108 creates some limited
 4 exceptions to it, and it provides that the Parties can
 5 identify those exceptions, those nonconforming aspects
 6 that it wishes to continue after 1994 in a very
 7 specific way the measure-by-measure process that Bart
 8 just mentioned.
 9 And then, it allows the parties to list
 10 subordinate measures, and, under Canada's
 11 interpretation, that future measures that are adopted
 12 maintained under the nonconforming speaks of those
 13 measure, and it talks about the description of the
 14 measure as being important. So, again it's
 15 not--Mexico listed the Mexican Constitution. It can't
 16 be that any anything adopted pursuant to the
 17 "authority of" or "consistent with" Mexican
 18 Constitution is therefore allowed under the NAFTA. It
 19 has to be viewed with that interpretation.
 20 It was meant to--you use the word
 21 "standstill". In a nonlegal way, I would call it a
 22 freeze. It was designed to force the Parties to

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11:35:27 1 identify those nonconforming measures that they wished
2 to accept from the otherwise very important terms of
3 the NAFTA, and to provide a very limited basis--for
4 example, to adopt future Benefits Plans under
5 Article 45(c)(3)--under Article 45(c)(3), rather, of
6 the Accord Acts, that Canada needed to be able to
7 adopt those future measures in order to implement the
8 terms of the Benefits Plans' exception that was agreed
9 to.

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

12 MR. RIVKIN: Thank you.

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

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

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

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11:37:55 1 I don't think so, and Bart can tell me if he
2 has a different view--I don't think that the NAFTA
3 requires one when to choose the least burdensome of
4 the two, if both otherwise meet the standard under
5 NAFTA.

6 PRESIDENT van HOUTTE: Thank you.

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

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

22 PRESIDENT van HOUTTE: Thank you.

1162

11:36:44 1 your target in two different ways and--are you obliged
2 under NAFTA to take the most--the way which is least
3 burdensome/

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

15 And I guess I would--

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

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

1164

11:39:03 1 (Brief recess.)

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

4 MS. LAMB: Damages.

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

7 PRESIDENT van HOUTTE: Closed.

8 MS. LAMB: Close the session. Thank you.

9 THE SECRETARY: Please close the session.

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

1165

11:50:06 1

CONFIDENTIAL SESSION

2 MS. LAMB: Canada's case is that if the
3 Guidelines are found to violate the NAFTA, and
4 Mr. Rivkin has demonstrated convincingly that they do,
5 Canada's case is that Claimant should receive no
6 compensation to account for the possibility that they
7 might in the future derive some benefit from this
8 mandated and unnecessary spending. Canada has the
9 burden on the benefits issue. It admits that it has
10 failed to quantify the supposed benefits,
11 notwithstanding that the Guidelines credit, the SR&ED
12 credit, the royalty credit are all within its control.
13 This twisted logic distorts commonly accepted
14 principles of and policies and appealing compensation,
15 Canada's overall approach to compensation ignores, in
16 our view, the applicable standards of proof, ignores
17 the burden of proof on that issue, and it allows
18 Canada to benefit from its own creation and the
19 potential benefits that it could but will not confirm.
20 That approach does not provide full
21 compensation to the Chorzow standard. It disregards
22 the continuous breach of Canada's NAFTA obligations,

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11:52:53 1

2 you to, and that's a case in which a NAFTA Tribunal
3 awarded very substantial damages including for lost
4 profits on a but-for scenario. And I want to
5 emphasize that because lost profits in a but-for
6 scenario requires a Tribunal to recreate a parallel
7 hypothetical universe. It's a hypothetical
8 marketplace in which the Claimant would have operated
9 but for the treaty violation. It involves the very
10 same assumptions and projections that we are asking
11 you to make. NAFTA Tribunals have already blazed that
12 path, but this will be the first continuing treaty
13 violation NAFTA claim, so you can consider yourself
14 pioneers.
15 So, as I said, to date, no NAFTA Tribunal has
16 yet had to quantify the effects of a continuing treaty
17 violation, and by that I mean one that continues to
18 produce its effects at the date of the claim,
19 continues to produce its effects at the hearing, will
20 continue to produce its effects as you write your
21 award, and it will continue for many years into the
22 future.
And you've now heard from the Board. There

1166

11:51:38 1

2 and it ignores the damages resulting from it. It also
3 imposes on the Claimants the risk and uncertainty
4 created by the Guidelines and the burden of seeking
5 periodic additional relief that this will inevitably
6 perpetuate.
7 It doesn't have to be that way, and it
8 shouldn't be that way. The Tribunal can award
9 compensation for a continuing treaty violation.
10 Treaty violations generally result in one of the
11 following three outcomes: Expropriation of the
12 investment, in which case the Investor will be looking
13 for Fair Market Value; loss of contractual benefits,
14 in which case the Investor will likely claim for
15 actual losses and lost profits; and investment
16 impairment, the Investor continues to own and enjoy
17 the asset, but the asset is impaired by the illegal
18 measure. It renders it less valuable, more expensive
19 to operate and so on.
20 And that impairment scenario can be
21 temporary, or it can be long term, and this is a
22 long-term case. Examples of temporary impairment
include the Cargill case, that Mr. Rivkin has referred

1168

11:54:13 1

2 is no suggestion that the Guidelines are going away.
3 On the contrary, you've heard any number of purported
4 justifications for keeping them. Using standards that
5 are clearly established in international law, you can
6 award damages in respect of this continuing violation.
7 So, let me very briefly outline the legal road map.
8 By way of introduction, and to finally, I
9 hope, dispose of the Canadian myth that this Tribunal
10 cannot address future losses, I just want to draw your
11 attention to some text in an academic writing on
12 investment treaty damages, and what it says is: "In
13 cases involving a continuing breach by the Respondent,
14 where Claimants' losses unfold over time, such cases
15 involve impairment to rather than destruction of an
16 investment. There is a choice between compensating
17 for future losses to be incurred as a result of the
18 continuing breach or rewarding only past losses, and
19 the expectation that the Respondent will cease its
20 wrongful conduct."
21 So, pausing there, there it is, in black and
22 white, you have a choice as to how to approach
compensation. There is no doctrinal or other

1169

11:55:40 1 principled objection to compensate for future losses
 2 as Canada would have you believe.
 3 There is also a reference in the final
 4 paragraph there on the slide to LG&E and Argentina.
 5 Now, I'm not going to walk you through all 17 pages of
 6 that award, but I would encourage you revisit it in
 7 your deliberations and, in fact, it appears in
 8 Canada's authorities under RA-25.
 9 But in outline on liability, the Tribunal in
 10 LG&E found that it was a continuing treaty violation
 11 case. It referenced also the ILC commentary. If you
 12 look at Paragraphs 85 and 88 of the Award, they talk
 13 about the maintenance in effect of legislative
 14 provisions incompatible with treaty obligations. That
 15 is a continuing violation.
 16 Point Number 2. In the early passages of the
 17 Award, the Tribunal confirms its intention to approach
 18 its mandate from first principles, namely the Chorzów
 19 Factory standard. That is exactly the approach that
 20 we endorse for this case.
 21 Third point, turning to remedies, then, the
 22 remedies requested by the Investor. Well, firstly, it

1171

11:58:20 1 compensable." So, that was the standard.
 2 Final point, on the facts, Paragraphs 90 and
 3 91. On the fact, no such certainty. No certainty
 4 with regard to future lost dividends. Why not? The
 5 Investor continued to hold its stake in the
 6 investment. So, as a factual matter, it continued to
 7 receive dividends and, therefore--and I'm quoting now
 8 the Tribunal--a situation of double recovery could
 9 arise, unduly enriching the Claimants.
 10 So, on the facts, no reasonable certainty as
 11 to the likelihood of loss because the Claimant still
 12 held its investment, still collected dividends, could
 13 not prove with certainty that it would not receive
 14 dividends in the future. On the facts. And our case
 15 is very different to that.
 16 But before I very briefly summarize the
 17 evidence which demonstrates why that is the case, I
 18 just want to address the practical application of the
 19 reasonable certainty standard, and certainly we've
 20 inferred from your questions to us that this is an
 21 issue that interests you in particular.
 22 Of course this is not the first and won't be

1170

11:57:01 1 invites--it suggested to the Tribunal that the
 2 Tribunal invite the Respondent State to withdraw the
 3 measure. The Tribunal viewed that as futile in the
 4 circumstances. And, of course, that is a choice that
 5 is not available to a NAFTA tribunal.
 6 So, what was the alternative remedy? The
 7 Claimant asked for historical lost dividends, damages
 8 from up until the date--damages up to the date of the
 9 Award, and then the present value of lost dividends in
 10 the future, therefore as long as the measure that
 11 would likely infect the investment.
 12 So what did the Tribunal say with regard to
 13 those future losses?
 14 Well, firstly, there was no suggestion at all
 15 of a doctrinal or principled impediment to that claim.
 16 Instead, the Tribunal referred to the reasonable
 17 certainty standard. I'll ask you to look at
 18 Paragraph 89 in your own time and note the citations
 19 there, including: "Lost future profits have been
 20 awarded when an anticipated income stream has attained
 21 sufficient attributes to be considered legally
 22 protected interests of sufficient certainty to be

1172

11:59:40 1 the last Tribunal to have that grapple with some sort
 2 of practical articulation and implementation of the
 3 reasonable certainty standard, but that is neither a
 4 reason nor an excuse to avoid the challenge,
 5 particularly when the difficulties arise from the very
 6 illegal measure that Canada has put in place.
 7 Now, earlier this year, the Rumeli Annulment
 8 Committee expressed its sentiments on this very issue
 9 in the following terms. Now, it first began with the
 10 Chorzow principle of full reparation, and then it said
 11 this: "It is necessary at this stage to make some
 12 general observations about the nature of the
 13 adjudicatory task confronting an arbitral tribunal,
 14 when it is determining the quantum of damages to award
 15 a claimant which has succeeded on liability."
 16 Describes the full reparation test. It
 17 refers to the Chorzow Factory standard.
 18 It is quite another thing, however, to
 19 translate that test into actuality in the
 20 circumstances of a particular case, but that is
 21 because the valuation of expropriated shares--because
 22 it was an expropriation case--necessarily involves

1173

12:01:01 1 consideration of the future profitability of a
 2 business, a matter which is inherently uncertain. The
 3 fact that the exercise is inherently uncertain is not
 4 a reason for the Tribunal to decline to award damages.
 5 And you'll recall, I referred in my opening
 6 to the Kimpurna Tribunal, who of course stressed that
 7 this is precisely the exercise that commercial actors
 8 embark upon each and every day.

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

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

1175

12:03:53 1 statistically correct; and, b) conservative when
 2 compared to actual spending over an even longer period
 3 of time.

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

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

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

1174

12:02:30 1 The starting point must be that there cannot
 2 be any serious doubt as to the fact that the
 3 Guidelines have adversely impacted the Claimants'
 4 investment. That they will have to spend more money
 5 than they otherwise would have is reasonably clear, if
 6 not absolutely clear.

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

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

20 Ordinary course spending, so the money that
 21 the Claimants would have spent on R&D and E&T in the
 22 absence of the Guidelines Mr. Rosen's number is, a)

1176

12:05:26 1 that. It doesn't materially impact reserves, may have
 2 some nominal impact as a timing matter.

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

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

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

1177

12:06:53 1 day. Valuation occurs at a point in time. It's not a
2 crystal ball that says with certainty "I know what the
3 future price of this business is going to be. I know
4 what the price of a commodity is going to be. I know
5 what the price of anything is going to be." It can't
6 and it's not meant to.

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

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

1179

12:09:29 1 discharged the burdened. It cannot hope to. Canada's
2 Expert has candidly accepted to you that he cannot
3 discharge the burden.

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

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

1178

12:08:06 1 covered by the damages, and I wouldn't be in business
2 if I hadn't developed an approach to price forecasting
3 that people pay me for. Those people, you will
4 recall, include BP.

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

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

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

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12:10:56 1 those claims. Mr. Walck's figure of [REDACTED] bears
2 no relation to that experience. In fact, if you use
3 the data which actually correlates to real experience,
4 the discount will be something more like [REDACTED]

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

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

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

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12:12:29 1 expertise.

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

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

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

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12:15:30 1 venture, and that the Canadian Government was willing
2 to do likewise. That is not a credible assessment.

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

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

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

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12:13:57 1 15 percent, as Mr. Walck has suggested. Mr. Rosen
2 demonstrated to you quite convincingly in his direct
3 presentation yesterday that Mr. Walck had made some
4 fundamental technical errors in computing the discount
5 rate that he says is based on a return on equity.

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

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

1184

12:16:56 1 NAFTA Tribunal to employ those tools in a continuing
2 violation context, and that is the right outcome for
3 this case.

4 Thank you.

5 PRESIDENT van HOUTTE: Thank you, Ms. Lamb.

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

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

14 MS. LAMB: We do.

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

17 MR. RIVKIN: But not today.

18 MS. LAMB: Not today.

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

1185

12:18:05 1 MS. LAMB: We understand the context in which
 2 the question has been put--absolutely.
 3 MR. RIVKIN: We'll be happy to give you some
 4 jury awards, if you want.
 5 PRESIDENT van HOUTTE: Sorry?
 6 MS. LAMB: Some jury awards from the United
 7 States I think you'll find very informative.
 8 PRESIDENT van HOUTTE: Well, well, whatever,
 9 whatever. Maybe not only from United States but also
 10 from Canada. Okay, good.
 11 ARBITRATOR JANOW: It would dwarf the books
 12 we have.
 13 PRESIDENT van HOUTTE: Yeah, yeah. Concise
 14 information.
 15 MS. LAMB: That's understood.
 16 PRESIDENT van HOUTTE: Yes, concise
 17 information.
 18 Do you have questions?
 19 No.
 20 MS. LAMB: Thank you.
 21 PRESIDENT van HOUTTE: Thank you very much.
 22 45 minutes would be a different break?

1187

12:19:26 1 PRESIDENT van HOUTTE: Okay? Because
 2 originally, like Mr. Rivkin said, there was no
 3 preparation time foreseen. Now you get one hour.
 4 Maybe your dinner will be short, but anyway, that's
 5 part of the game.
 6 MR. GALLUS: We appreciate the time.
 7 PRESIDENT van HOUTTE: Thank you.
 8 (Whereupon, at 12:19 p.m., the hearing was
 9 adjourned until 1:20 p.m., the same day.)
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12:18:51 1 MR. GALLUS: Canada would of course
 2 appreciate maybe a little bit longer than 45 minutes
 3 if the Tribunal would--
 4 PRESIDENT van HOUTTE: An hour?
 5 MR. GALLUS: If it's possible to take an
 6 hour-and-a-half? We would like to take that but...
 7 MR. RIVKIN: The original arrangement was for
 8 getting--trying to get the most out of the morning--
 9 PRESIDENT van HOUTTE: I know that--
 10 MR. RIVKIN: --taking the time to prepare his
 11 closing.
 12 PRESIDENT van HOUTTE: Yeah.
 13 (Discussion off microphone.)
 14 MR. RIVKIN: And we do want to give you time
 15 to deliberate.
 16 PRESIDENT van HOUTTE: That was our concern.
 17 Let's take 45 minutes.
 18 MR. GALLUS: Could we perhaps compromise and
 19 take an hour.
 20 PRESIDENT van HOUTTE: Well, one hour, one
 21 hour.
 22 MR. GALLUS: Thank you.

1188

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

2 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

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

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

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

22 The Claimants again referred you to that

1191

01:30:07 1 in 1998, they fell to [REDACTED]; in 1999 they fell
2 again; in 2000, they fell again to [REDACTED]. By
3 that time they only represented [REDACTED] of the
4 revenue that the Claimants were--the Operators were
5 making in that year.

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

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

22 Since the Operators Benefits Plans must

1190

01:28:44 1 decline in expenditures, and you will find that in
2 Slide 32 in their bundle of slides, and again I
3 encourage you to turn to that slide.

4 Slide.

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

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

1192

01:31:26 1 ensure those expenditure, by the fact that the
2 Operators weren't expending on research and
3 development and education and training, they were
4 necessarily not fulfilling their obligations in the
5 Benefits Plans, and we will refer to specific parts of
6 the Benefits Plans later on which bear this out. But
7 it is important to bear in mind that under Section
8 45(3)(c), Benefits Plans shall ensure expenditures on
9 research and development and education and training.
10 And through these declining expenditures, the
11 Operators were not only not fulfilling their
12 obligation in the Accord Implementation Act, but were
13 also were not fulfilling their obligation in the
14 Hibernia and Terra Nova Benefits Plans.

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

1193

01:32:40 1 Province."

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

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

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

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

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

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01:35:19 1 obligation that the Operators had to expend on
2 research and development and education and training in
3 the Province. So much has been borne out by the
4 evidence that you have heard this week. Canada will
5 refer to that evidence as it addresses the individual
6 claims for breach of Article 1106 and Article 1105.

7 So, at this point I would like to turn to my colleague
8 Mr. Luz who will address the argument that the
9 Guidelines breach Article 1105.

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

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

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

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

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01:34:12 1 is a function of the Board, it's something they're
2 required to do under the Atlantic Accord, and it's
3 something they are required to do under the Atlantic
4 Accord Implementation Act through Section 17(1).

5 Indeed, so much was recognized by the Canadian courts,
6 and I encourage you when you read the decisions of the
7 Canadian courts, because I suspect after extensive
8 discussion we had of them earlier in this week and the
9 further discussion we'll have of those decisions this
10 afternoon, that you will be reading those decisions.

11 When you do read those decisions, look out for the
12 court's reference Section 55, and when they
13 acknowledge this did impose an obligation on the Board
14 to approve expenditures on research and development
15 and education and training.

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

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01:36:33 1 that provision. They know that the devil is in the
2 details.

3 This Tribunal is faced with a precedent
4 setting task not only with respect to the meaning and
5 context of 1106(1)(c), but as to whether Article
6 1106(5) remains the vital provision that the NAFTA
7 Parties intended it to be or whether it is rendered
8 without meaning, as the Claimants hope it will be.

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

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

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01:37:43 1 obligations are in connection with the conduct or
 2 operation of the investment, also as those terms are
 3 used in the chapeau.
 4 There's also some limited agreement as to
 5 whether 1106(1) is a closed list and if it contains
 6 exhaustive enumeration of the types of performance
 7 requirements that the NAFTA Parties agreed to exclude.
 8 But, of course, this agreement is qualified by the
 9 Claimants' contention that carrying out research and
 10 development and providing education and training in
 11 the Province fits into this closed list.
 12 And there's also apparent agreement that if
 13 an impugned measure allows the option of expenditures
 14 on nonprohibited activities, then there is no
 15 compulsion to make a prohibited expenditure and,
 16 hence, no breach of Article 1106(1). This was a
 17 proposition put forward in Canada's Counter-Memorial,
 18 and the Claimants have never really addressed it one
 19 way or the other and they haven't raised any
 20 disagreement. So I presume that the intention is they
 21 will overlook this critical flaw in their argument.
 22 But it is at this juncture where the

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01:40:03 1 prohibits performance requirements; therefore,
 2 research and development and education and training
 3 are prohibited performance requirements. The
 4 reasoning is flawed; and as I will explain, the
 5 ordinary meaning and object and purpose of these three
 6 different types of performance requirements are
 7 different, and the intention of 1106(5) was to ensure
 8 that only certain types of performance requirements
 9 were prohibited. Anything that was not prohibited by
 10 the NAFTA is permitted. I will present this argument
 11 in three broad parts.
 12 First, I will explain why Article 1106(5)
 13 provides the critical interpretive guidance to
 14 1106(1), and I will then discuss the specifics of
 15 1106(1)(c) as well as its context and relevant
 16 treaties in *pari materiae*, to guide the interpretation
 17 of the Tribunal. And then I will briefly address the
 18 issue of the negative inference that the Claimants are
 19 seeking from the Annex I Reservation.
 20 So, I'd would like to start my presentation
 21 with the text of 1106(5).
 22 Thomas, you could pull that up.

1198

01:38:52 1 respective interpretations and applications of this
 2 provision diverge, and they diverge substantially. At
 3 its heart, Canada's ordinary meaning interpretation of
 4 1106(1)(c) is faithful to its context and to its object
 5 and purpose. This NAFTA provision is intended to
 6 prohibit the mandatory purchase, use, or preference
 7 for domestic goods and services. The three NAFTA
 8 Parties agreed that this should not be allowed.
 9 Six other types of performance requirements
 10 were also precluded. But the NAFTA Parties stopped
 11 there. Other types of performance requirements of
 12 which there are many different varieties were left off
 13 of NAFTA's closed list. A requirement to carry out
 14 research and development in the host state territory
 15 may have found its way into many investment treaties
 16 that the United States signed with other countries
 17 immediately following the NAFTA, but it cannot be
 18 retrospectively shoehorned into NAFTA's closed list.
 19 But, on the other hand, the heart of the
 20 Claimants' argument really is a classic fallacy of
 21 logic. Research and development and education and
 22 training are performance requirements. NAFTA

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01:41:14 1 And it's important to focus on the wording
 2 here. Paragraphs 1 and 3 do not apply to any
 3 requirement other than the requirements set out in
 4 those paragraphs.
 5 Now, the Tribunal may wonder why it's
 6 important to start the interpretive process with a
 7 provision other than that which is alleged to have
 8 been violated and we'll, of course, focus on 1106(1),
 9 but it's critical to note that Article 1106(5) is
 10 essential for explaining why the--what I will call the
 11 incidental effects hypothesis of the Claimants is
 12 exactly the type of argument that NAFTA Parties
 13 intended to foreclose.
 14 And I think it's helpful to look back at some
 15 of the previous NAFTA cases that have had the
 16 opportunity to substantively look at 1106(1) and
 17 1106(5).
 18 The S.D. Myers case. We know as it's been
 19 quoted in our pleadings that the S.D. Myers case said
 20 although the Tribunal must review the substance of the
 21 measure, it cannot take into account any limitation or
 22 restrictions that do not fall squarely within the

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01:42:21 1 requirements listed in 1106(1) and (3).

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

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

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01:44:42 1 identified in Paragraphs 1 and 3. Pope & Talbot and
2 S.D. Myers are convincing in this respect.

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

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

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

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

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01:43:34 1 1106(1) is limiting in each case."

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

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

18 Merrill & Ring, a recent case that--a recent
19 NAFTA case said the same thing with respect to
20 1106(5). It is mindful of the restricted scope of
21 1106(5) and that the performance requirements that are
22 prohibited are limited to the specific matters

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01:45:48 1 that the case of Lamere (ph.) and Ukraine provides
2 substantial support for their position. Clearly it
3 does not. In that case, a performance requirement
4 provision was similar to 1106(1)(c), although not
5 exactly the same. The Investor and--the Investor
6 argued that a requirement to broadcast 50 percent of
7 its music had to be Ukrainian-produced music. And
8 they argued that this was, de facto a compelled
9 purchase of local goods and services. But like S.D.
10 Myers, Pope & Talbot, Merrill & Ring, de facto the
11 Investor had to purchase local goods and services
12 because there was nowhere else to obtain Ukrainian,
13 music, but the Tribunal still found there was no
14 violation, and this is very important because
15 Mr. Rivkin spoke quite a bit about the object and
16 purpose, and the importance of object and purpose,
17 object and purpose.

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

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01:46:58 1 breach. So, even though Lamere is not a NAFTA Award,
 2 I think it illustrates Canada's point nicely.
 3 To conclude on this point, to the Claimants,
 4 1106(5) is a mere nuisance, it's afterthought that
 5 serves no real purpose. But 1106(5) plays a
 6 fundamental role in the interpretation of 1106(1), and
 7 it was intentionally inserted into the NAFTA for the
 8 purposes that Canada's arguing for today: That which
 9 is not specifically prohibited under the NAFTA is
 10 permitted.

11 So now that have--we are equipped with
 12 appropriate level of scrutiny that is mandated by
 13 1106(5), let's go to the text of 1106(1)(c). We've
 14 seen it many times today, over the course of this
 15 week, and it's contrasted against the specific two
 16 performances--the two requirements that are set out in
 17 the legislation of the Accord Act. If you look at the
 18 specific wording of the legislation, expenditures
 19 shall be made for research and development to be
 20 carried out in the Province and for education and
 21 training to be provided in the Province.

22 So, skepticism should arise immediately with

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01:49:12 1 I think it's important to note, Mr. Rivkin
 2 mentioned today an argument that they referred to in
 3 their Reply that Canada for some reason they assumed
 4 at the beginning of the pleadings that R&D and E&T
 5 could not be a service. Canada never said that. In
 6 fact, much of their Reply really missed the point.
 7 That is not the issue. It's whether or not this
 8 particular performance requirement falls into the very
 9 limited list that the NAFTA Parties agreed to. And I
 10 can't quote from a legal expert, but I can quote from
 11 Mr. Fred Way, who himself yesterday under testimony,
 12 when posed with the question of Mr. Rivkin, said that
 13 in his mind, services are something that you purchase
 14 from someone else, not something that you do
 15 internally.

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

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01:48:10 1 respect to the Claimants' arguments just simply on a
 2 facial comparison of the two types of performance
 3 requirements.

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

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

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

16 But in contrast, the ordinary meaning of
 17 1106(1)(c) is that there must be a compelled and
 18 mandatory purchase, use or preference for domestic
 19 services. It only applies in situations when the
 20 Investor is forced to consumer a service from a
 21 domestic service provider. Without that compulsion,
 22 there can be no violation.

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01:50:21 1 compelled to purchase or prefer goods made in Canada.
 2 It was mandatory. But in contrast, these types of
 3 performance requirements don't do the same thing.

4 Now, as I said before, Mr. Rivkin referred
 5 quite a bit this morning to the importance of object
 6 and purpose in context. But the Claimants have really
 7 ignored both of those elements with respect to
 8 1106(1)(c) and the requirements at issue here.

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

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

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01:51:29 1 The point is not to protect local industries
 2 against competing imports. Indeed, bringing in
 3 foreign expertise may be, in fact, the best way to
 4 carry out research and development or provide
 5 education and training. The object and purpose of a
 6 requirement to carry out research and development is
 7 to generate a training ground for scientists,
 8 engineers, and to promote the inevitable spillover of
 9 skills, knowledge, and technology into the country.
 10 Education and training is an even broader
 11 role. By seeking to advance the knowledge and skills
 12 of the local populace, build on human capital,
 13 intellectual capital and human resources, especially
 14 in areas where it will build--and eventually bill
 15 entrepreneurial and value-added skill sets in
 16 technology, science and engineering. And these are
 17 all reflected in the reports that Canada relies on in
 18 its Counter-Memorial and Rejoinder that have been
 19 published by UNCTAD, WTO, the OECD. Those
 20 organizations recognize that there are very different
 21 effects, and states realize that there are very
 22 different effects. Some of them have been recognized

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01:53:43 1 transfer, and research and development--and this is
 2 reflected in Canada's synopsis of the Free Trade
 3 Agreement.
 4 Now, the Claimants have taken issue with this
 5 in their pleadings, but they haven't produced any
 6 evidence to show that the United States had a
 7 different view. In fact, as you can see in Canada's
 8 Rejoinder at Paragraphs 28 and 29, the distinction
 9 between research and development requirements and
 10 local content requirements was recognized by the
 11 United States even before the NAFTA, during the TRIMs
 12 negotiations in various documents.
 13 Now, you can just refer to our Rejoinder
 14 where Canada cites to those.
 15 So, when it came time to negotiate the NAFTA,
 16 as I said, the four performance requirements that were
 17 in the FTA were transferred over to the NAFTA. Two
 18 others were included on the NAFTA list: Product
 19 mandate and technology transfer. You'll see those in
 20 NAFTA 1106(1)(f) and (g).
 21 But what about research and development?
 22 Well, the Claimants seem to say that it's obvious that

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01:52:35 1 as not being desirable enough and they've been
 2 excluded from some treaties. Others, such as research
 3 and development and training, are usually left off
 4 international trade and investment treaties.
 5 Again, context.
 6 And I should note that the point is not to
 7 debate whether or not from an economic policy
 8 perspective these measures are good or bad. That's
 9 not the task of the Tribunal. The purpose is you look
 10 at the object and purpose of the measure and determine
 11 whether they fall specifically into the closed list.
 12 If not, 1106(5) demands that the claim be dismissed.
 13 Now, the Claimants acknowledge that the
 14 Canada-U.S. Free Trade Agreement is context to the
 15 NAFTA, and I'll bring up one of the points that Canada
 16 made in its Counter-Memorial. The Free Trade
 17 Agreement, Article 1603, contained a list of four
 18 performance requirements, all four of which found
 19 their way into the NAFTA, including one that was the
 20 basis for 1106(1)(c). But Canada and the United
 21 States did not agree to include other types of
 22 performance requirements--product mandate, technology

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01:54:49 1 it falls into 11--it obviously falls into 1106(1)(c),
 2 but, as we've said, the plain language of that
 3 provision doesn't make that obvious. UNCTAD, the WTO,
 4 to them it's not obvious. But most disturbing to the
 5 Claimants' case is that it must not have been obvious
 6 to at least one of Canada's NAFTA partners, the United
 7 States. And I will refer to the United States Model
 8 Bilateral Investment Treaty, Article 6. And I should
 9 remind the Tribunal that this was the model that came
 10 out only a few months after NAFTA came into force and
 11 only less than two years later after the performance
 12 requirements provisions of the NAFTA were negotiated.
 13 The Claimants simply have no answer and no
 14 explanation to the simple question: If the language
 15 of 1106(1)(c) so obviously precludes requirements to
 16 carry out research and development in the host State,
 17 then why did the United States include an entirely
 18 separate provision on this specific issue to cover R&D
 19 requirements?
 20 And again, this was not only--this exact
 21 model was incorporated into 13 different bilateral
 22 investment treaties by the United States.

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

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

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

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

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01:58:21 1 Treaty partners to Japan, there are five other
2 treaties that use that same language.

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

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

14 Now, I realize, and the Claimants made this
15 point again this morning, that, well, they have no
16 answer to this issue, and their really only answer is
17 just don't look it because it doesn't conform to the
18 Vienna Convention. But, in fact, if you accept
19 Canada's ordinary meaning interpretation of
20 1106(1)(c), in its object and purpose, these treaties
21 can be used under Article 32 of the Vienna Convention
22 to confirm that ordinary meaning treaty. These are

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01:57:07 1 the 94 Model BIT took a year to draft, and it was
2 based on two previous versions. So it cannot be that
3 this was just a case of forgetfulness.

4 And it simply cannot be because you can also
5 look to other treaties that came after the NAFTA that
6 reflected this string of recognition of the
7 distinction between the performance requirements that
8 started prior to--started in the Free Trade Agreement,
9 came out on the other end of the NAFTA in the U.S.
10 Model Bilateral Investment Treaty, and we can see that
11 same evidence in other treaties: Canada and
12 Japan-Korea BIT, for example, Article 9. You'll see
13 that Article 9(1)(c) uses almost exactly the same
14 language, almost word for word, as the NAFTA Article
15 1106(1)(c).

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

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

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01:59:32 1 treaties in pari materiae. And the fact that one of
2 the NAFTA Parties made this--the Treaty practice of
3 one of the NAFTA Parties confirms Canada's point. It
4 simply cannot be ignored.

5 So again, to summarize the critical role of
6 1106(5) and 1106(1)(c) says that the requirements that
7 are in the Accord Act are not the kind that are
8 prohibited by 1106(1)(c), and 1106(5) means what is
9 not prohibited is permitted.

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

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

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02:05:30 1 to the next slide, you see--

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

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

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

9 So here is R&D being carried out in the
10 Province with Hibernia being a sponsor of it. It's
11 not quite clear whether or not this kind of carrying
12 out R&D in the Province is the specific kind of
13 research and development that is contemplated by
14 1106(1)(c).

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

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02:07:48 1 very brief comment on the arguments that the Claimants
2 have brought up with respect to Canada's Annex I
3 Reservation. Canada had already argued this
4 comprehensively in its pleadings, but I will just say
5 that in drafting a treaty, at the time of the NAFTA
6 Performance Requirements Provision in 1992, there were
7 no precedents. There were no jurisprudence. There
8 was no guidance for the Treaty drafters to be able to
9 think whether or not this specific list was going to
10 be broadened beyond its specific terms, and that's why
11 the NAFTA Parties chose to insert 1106(5), is because
12 they decided that there were seven types of
13 performance requirements they did not want to allow,
14 but they recognized that anything that was not
15 prohibited could be permitted.

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

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02:06:33 1 economic transaction is carried out by 1106(1)(c).

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

15 And as Canada pointed out, and I should also
16 point out, one of even more of an outlier is [REDACTED]

[REDACTED]
[REDACTED] This
19 is the kind of expenditure that simply cannot be
20 contemplated as being the type that is prohibited by
21 1106(1)(c).

22 Bearing in mind my time, I will only have a

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02:08:59 1 of an abundance of caution, and make the reservation.

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

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

16 PRESIDENT van HOUTTE: There are no
17 questions.

18 MR. LUZ: Thank you.

19 MR. GALLUS: Even if the Guidelines are
20 inconsistent with Article 1106(1)(c), then they do not
21 breach that Article because there is another Article,
22 1108.

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02:10:21 1 With regard to the application of Article
2 1108, there are possibly three outstanding issues
3 between the Parties. The first one is, of course,
4 whether the Guidelines are actually subordinate to the
5 Accord Implementation Act.

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

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

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

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02:12:57 1 MR. SAVOIE: It's an honor for me to address
2 this Tribunal today. I will briefly address the
3 weight the Tribunal shall give to the 1128 submissions
4 in this case, pursuant Article 31 of the Vienna
5 Convention.

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

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

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02:11:33 1 pursued that argument this week; at least, I don't
2 think they pursued it and, therefore, it's unclear
3 whether currently that is an area of disagreement
4 between the Parties.

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

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

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

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02:14:15 1 23 that this agreement on interpretation creates a
2 subsequent practice under Article 31(3)(d).

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

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

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

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02:15:31 1 compte" in the French version? Treaties do not appear
 2 to define these terms. As applied to Article 31(3) of
 3 the Vienna Convention, "take into account" surely
 4 means something more than just to consider. When it
 5 is found that there exists an agreement or practice on
 6 a specific provision, as we have here, there usually
 7 will not be a range of agreements or practices to
 8 consider and pick from. However, "does take into
 9 account" actually mean to apply, like when an
 10 interpreter would directly apply a treaty provision?
 11 To answer this question, the travaux préparatoires to
 12 the Vienna Convention are helpful, so, we'll look at
 13 the next slide.

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

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

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02:17:54 1 measures is generally is limited by what is contained
 2 in the description of a measure listed in Annex I.
 3 Before addressing this--

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

8 MR. GALLUS: I was going to stop on that.
 9 Before I do that, I think it's important to
 10 bear in mind, as Canada mentioned in the opening,
 11 Canada only saw this argument from the Claimants for
 12 the first time in their response to the Article 1128
 13 submissions. I think that was about six weeks ago.
 14 Canada hasn't had an opportunity to respond to that
 15 argument in writing, and I would like you to bear that
 16 in mind as we try and walk you through Canada's
 17 position.

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

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02:16:44 1 subsequent agreements and practice are on the same
 2 footing, once one of them is established, it becomes
 3 presumptively conclusive as to the interpretation of a
 4 treaty provision.

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

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

11 PRESIDENT van HOUTTE: No questions.

12 MR. SAVOIE: Thank you very much.

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

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

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02:19:03 1 Law of Treaties that applies to interpret the Annex.
 2 As Mr. Legum pointed out, the Annex is a part of
 3 agreement and, therefore, must be interpreted
 4 according to those principles.

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

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

11 (Comment off microphone.)

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

14 ARBITRATOR SANDS: Tab 6.

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

17 (Comment off microphone.)

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

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

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02:20:12 1 highlight that third paragraph, that would be
2 fantastic.
3 So, you can see that this explains some
4 principles of interpretation to apply to reservation.
5 You'll see there it says: "In the
6 interpretation of a reservation, all elements of the
7 reservation shall be considered. A reservation shall
8 be interpreted in the light of the relevant provisions
9 of the chapter against which the reservation is
10 taken."
11 And it says: "To the extent that"--and there
12 are three subparagraphs there, which are important
13 here, and those three subparagraphs provide, I guess,
14 different principles of interpretation, depending on
15 what different scenarios you might be in. The first
16 of them refers to where there is a Phaseout element.
17 That referring to a situation where a reservation is
18 being reduced over time and is expressly acknowledged
19 in the reservation. That obviously doesn't apply in
20 the circumstances we have here. There is no phaseout
21 within the reservations of the Accord Implementation
22 Act.

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02:23:21 1 If you could highlight that part and just highlight
2 that first sentence there.
3 Thanks very much.
4 So you see there that under the Measures
5 element, we have the sentence "as qualified by
6 Paragraphs 8 through 12 of the Description element."
7 If we could then go back to Paragraph 3 of
8 the Interpretive Note, and if you could highlight
9 Paragraph B for us.
10 Thanks, Thomas.
11 So, it's that kind of reservation to which
12 interpretive note is referring when it refer in Part
13 B--to the Measures element is qualified by a
14 liberalization commitment from the Description
15 element. That is not the type of reservation we're
16 dealing with with the Accord Implementation Act.
17 There is no such qualification in the Measures element
18 in the reservations of the Accord Implementation Act.
19 And thus we are not in the realm of Paragraph (a).
20 We're not in the realm of Paragraph (b), but we're in
21 the realm of Paragraph (c). So let's bring up
22 Paragraph (c).

1234

02:21:37 1 So, that brings us to the second part of
2 Paragraph 3, which refers to a situation where the
3 Measures element is qualified by a liberalization
4 commitment from the Description element. So this
5 refers to a situation where the Measures element, as
6 listed in Annex I, is qualified by a liberalization
7 commitment. To see the situation to which that
8 applied, you only need turn to Canada's second
9 reservation under Annex I, which I believe is a
10 reservation for the Investment Canada Act. If those
11 of you, by any chance, have that reservation or have--
12 ARBITRATOR SANDS: Tab 7.
13 (Comments off microphone.)
14 MR. GALLUS: Without having access to that
15 reservation in front of you, I'll read into the record
16 what it says. This is a reservation for the
17 Investment Canada Act, and under the Measures element,
18 it lists the Act, and it says "Investment Canada Act."
19 But then below that it says, "As qualified by
20 Paragraphs 8 through 12 of the Description element."
21 It says: "As qualified by Paragraphs 8 through 12 of
22 the Description element"--oh, there we go. Excellent.

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02:24:57 1 Paragraph (c) says that: "If the Measures
2 element is not so qualified"--as we see in the
3 situation of the Accord Implementation Acts--"then
4 Measures element shall prevail over all other
5 elements."
6 And it then goes on to include, I guess, a
7 caveat to that: "unless any discrepancy between the
8 Measures element and the other elements considered in
9 their totality is so substantial and material that it
10 would be unreasonable to conclude that the Measures
11 element should prevail, in which case the other
12 elements shall prevail to the extent of that
13 discrepancy."
14 But unless that caveat applies, the Paragraph
15 (c) is clear. But if the Measures element is not so
16 qualified, then the Measures element shall prevail
17 over all other elements.
18 And since in the reservations of the Accord
19 Implementation Acts, the Measures element is not
20 qualified, we are in the realm of Paragraph (c), and
21 the Measures element shall prevail over all other
22 elements. That means that the reservation is for the

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02:25:53 1 Accord Implementation Acts as a whole.
 2 The Claimants attempt to limit the
 3 reservation is based on the false argument that we're
 4 in the realm of Paragraph (b). However, as I just
 5 explained, this is not a qualified reservation.
 6 Consequently, we're in the realm of Paragraph (c).
 7 And consequently as it says in Paragraph (c), the
 8 Measures element shall prevail over all other
 9 elements.
 10 However, even if we accept the Claimants'
 11 argument, even if somehow this description does limit
 12 the reservation of the Accord Implementation Acts and
 13 therefore limits what measure is subordinate to it,
 14 then the Guidelines are still reserved in the
 15 circumstance because the Guidelines--or I should go
 16 back.
 17 The Accord Implementation Acts in the
 18 reservation in the NAFTA include the Section 45(3)(c)
 19 of the Accord Implementation Acts. It expressly
 20 states the obligation that Benefits Plans shall ensure
 21 expenditures for research and development and
 22 education and training in the Province.

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02:29:17 1 Canada hasn't had an opportunity to address this in
 2 its written pleadings. If the Tribunal is
 3 particularly interested in this point, then we
 4 encourage you to let us know, and we'll be happy to
 5 submit written pleadings on the interpretation of the
 6 Annex I Reservations.
 7 PRESIDENT van HOUTTE: The question is
 8 whether the Claimant has some interest.
 9 MR. RIVKIN: This is obviously a new argument
 10 that was developed at lunch after we pointed out that
 11 the response that they made in the opening argument
 12 was a faulty one. They didn't have pre-prepared
 13 slides for it. It's clear this is a new argument. We
 14 should consider it and perhaps respond, but it is
 15 obviously something brand new. I noticed that
 16 Mr. Gallus never mentioned Section 2(f) and how that
 17 relates to this argument. He never mentioned a number
 18 of other aspects of the identification of the
 19 nonconforming aspects of the Accord Acts.
 20 So, there are certainly arguments that I can
 21 immediately think of in response, but I'm sure that
 22 we'd want to probably think about it a little bit more

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02:27:46 1 And whilst the Claimants are right that the
 2 description does not expressly mention Section 151.1,
 3 it does not expressly mention the authority to issue
 4 Guidelines with respect to their obligation to expend
 5 on research and development and education and
 6 training, it would simply make no sense to reserve the
 7 obligation to expend on research and development and
 8 education and training without reserving the means to
 9 implement that. Consequently, even if we accept the
 10 Claimants' argument that the description does limit
 11 the reservation, the Guidelines are still reserved
 12 here because the obligation to expend on research and
 13 development and education and training is expressly
 14 reserved within the reservations of the Accord
 15 Implementation Act.
 16 So that leaves the third outstanding issue
 17 between the Parties, and that is: Are the Guidelines
 18 actually subordinate to the Accord Implementation Act?
 19 Actually, before we do that, before we leave
 20 the previous point, I should pause and make sure that
 21 the Tribunal has no questions on that issue, but I
 22 should also point out that, as I said at the start,

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02:30:27 1 since they just came up with it at lunch.
 2 PRESIDENT van HOUTTE: Okay. We will then
 3 see what the position of the Claimant is at the end of
 4 the day.
 5 Please continue.
 6 MR. GALLUS: Before I do, I would like to
 7 correct the record that Canada did not just make up
 8 this argument at lunch. Given the time that we had
 9 for lunch, we were very busy trying to finish our
 10 lunch, and certainly didn't have time to come up with
 11 new arguments.
 12 PRESIDENT van HOUTTE: That's then the
 13 difference between 45 minutes and one hour and 45
 14 minutes.
 15 (Laughter.)
 16 MR. GALLUS: So let's turn to whether the
 17 Guidelines actually are subordinate to the Accord
 18 Implementation Acts.
 19 And perhaps let's start by the definition of
 20 a subordinate measure, which I believe is the next
 21 slide or--Thomas, perhaps you could bring up--that's
 22 right--the first slide from the 1108. If you could

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02:31:20 1 move on. Next one. Next one. Oh, sorry, go back to
2 the previous one. That's right.

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

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

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

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

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02:33:47 1 which we didn't refer to in the opening and which the
2 Claimants did not refer to earlier.

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

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

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

21 Yeah, keep going.

22 There we go.

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02:32:32 1 your decision. It is a fact that you can incorporate
2 or that you can take into account when applying the
3 test that you have to apply under Article 2(f)(ii) of
4 the Interpretive Note.

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

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

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02:34:48 1 So, this is the trial court considering the
2 challenge to the Guidelines, and you see here in
3 Paragraph 44 that the trial court summarizes the
4 position taken by the Operators in that case, and
5 you'll recognize some of the language here because the
6 trial court summarizes the challenge in much the same
7 words that the Claimants have used this week, and I
8 will read this into the record. The trial court says:
9 "The Applicants take the position that once the Board
10 approved their respective Benefits Plans, that fixed
11 their obligations regarding benefits for the entire
12 duration of the project."

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

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02:35:46 1 firm understanding that the benefits they would be
2 obliged to provide would be as set out in those plans
3 as approved. They submit that the Board no longer has
4 any authority to impose any additional or different
5 obligations on them.

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

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

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02:37:42 1 approvals on the basis that they had done, it is not
2 now open to them to deny the Board's authority to
3 fulfill its duties set out under the Accord"--again, I
4 refer you to what we talked about earlier--"and the
5 Act, and its early interpretations contained in
6 Decisions 86.01"--which is the Hibernia Decision--"and
7 9702"--"which is the Terra Nova Decision--"to
8 effectively monitor their activities and ensure
9 compliance and adequate and reasonable expenditures."

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

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

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02:36:47 1 flow to the Province in particular and Canada
2 generally."

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

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

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02:38:46 1 continuing power to make these decisions."

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

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

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

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02:40:08 1 Tribunal to several decisions. In fact, I think I
 2 started with citing several reasons why it was the
 3 Tribunal should defer to the Court Decisions, and I
 4 won't repeat those reasons.
 5 I will, however, touch briefly on a couple up
 6 the decisions to which I referred the Tribunal in the
 7 opening, and it's telling that the Claimants didn't
 8 refer the Tribunal to those decisions.
 9 ARBITRATOR SANDS: Just before you do that,
 10 can I just go back to this. We had addressed, as a
 11 Tribunal, a number of questions to you. We heard
 12 answers from the Claimant, and I heard certainly you
 13 say that it is a matter of Canadian law that
 14 determines this issue a matter of national--let's just
 15 assume hypothetically you're wrong on that. Let's
 16 assume that the Claimants are right, that it's not a
 17 Canadian law standard, it's a NAFTA or international
 18 law standard, and that the words "under the authority
 19 of and consistent with" and in particular "and
 20 consistent with," are the words I think the ones I'm
 21 particularly interested in, and are to be applied by
 22 reference to the NAFTA.

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02:42:48 1 this: If the answers to your questions are, as I
 2 suspect they will be in a particular direction, what
 3 is to stop a State using the technique of adopting a
 4 new subordinate measure to get around what appears to
 5 be an explicit limitation to amend a measure?
 6 MR. GALLUS: Let me start by clarifying
 7 Canada's position with regard to Canadian law standard
 8 versus the NAFTA standard. I think you said,
 9 Professor Sands, that I had stated before that it is
 10 Canada's position that the standard we apply here is
 11 the Canadian law standard. If that is what I said
 12 before, then I apologize. That was not my intention.
 13 Canada has not taken a position thus far as to whether
 14 the standard you apply under the test is a Canadian
 15 law standard or an international law standard.
 16 What Canada has said is in applying the test
 17 you are necessarily referred to domestic law and,
 18 therefore, the decisions of Canadian court on that
 19 domestic law are very important.
 20 Now, as to whether you apply a standard
 21 applied by a Canadian court, as to whether you apply,
 22 for example, this reasonable standard that was applied

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02:41:23 1 We asked a question and we heard from the
 2 Claimants their response as to whether as a matter of
 3 NAFTA law a measure which imposed additional or more
 4 onerous burdens would be consistent. In that regard,
 5 I draw your attention again to the French text, which
 6 was at Tab 67, which had very helpfully set out the
 7 standard for amendment and the standard for
 8 subordinate measures, and I've got two questions.
 9 Question Number 1 is do you have you any
 10 comment on the French text? Can we treat the French
 11 text as an equally authentic text and do away
 12 completely with the distinctions between consistent
 13 and conformity, or should we adopt a different
 14 approach? That's my first question.
 15 My second question is, what is to be read,
 16 having regard to the French text, into the fact that
 17 the standard for amendment explicitly refers to a
 18 requirement not to decrease conformity, the standard
 19 for the subordinate--let's assume a new subordinate
 20 measure does not refer to that. What implications
 21 should the Tribunal draw from that?
 22 And then there is a third question which is

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02:44:22 1 by these Canadian courts, or whether you apply some
 2 other standard is not important to this case because,
 3 in this case, if you look at the decisions of the
 4 Canadian courts, regardless of the test that they
 5 applied, they want to state categorically that yes,
 6 the Guidelines are authorized by the Act and yes, the
 7 Guidelines are consistent with the Act and the
 8 Benefits Plans decisions.
 9 ARBITRATOR SANDS: Just to play devil's
 10 advocate, I mean assuming it is a Canadian standard
 11 that applies for the interpretation of the
 12 application, that would on one view be dispositive of
 13 the issue. To the extent that Canadian court had
 14 decided, one could see why some people would say
 15 that's dispositive to the issue. So, with respect, it
 16 does make a difference as to whether you apply an
 17 international standard or a domestic standard, and I'm
 18 not clear whether you're going to sit on the fence and
 19 not express a view or whether you're going to tell us
 20 what the Canadian Government's position is on whether
 21 it's a national standard or an international standard
 22 or both, as we asked.

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02:45:24 1 MR. GALLUS: Much as I would like to take a
 2 position that would represent the position of the
 3 Canadian Government, I'm not in a position to do that.
 4 If this is an issue on which the Tribunal is
 5 particularly interested, again we can go back and we
 6 can address it in our written submissions.
 7 Canada's position at this point, however, is
 8 that the precise Canadian law standard or
 9 international law standard is not important because,
 10 as is clear from the decisions, regardless of the
 11 standard that they applied, they did find the
 12 Guidelines were authorized by the Act and were
 13 consistent with the Benefits Plans.
 14 PRESIDENT van HOUTTE: I guess when you look
 15 at the results that could be fine, but from an
 16 academic point, that's, of course, very
 17 unsatisfactory. It would be very useful to get the
 18 submission there on that point.
 19 MR. GALLUS: I think that brings me to your
 20 second question, Professor Sands, and this is your
 21 question with regard to the French text. Certainly,
 22 again, I can't speak to the French text, much to the

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02:47:21 1 the Tribunal is particularly interested in the issue,
 2 we can consider whether we can address it in written
 3 pleadings.
 4 ARBITRATOR SANDS: So, you don't want to
 5 answer the third question either at this point.
 6 MR. GALLUS: That's correct.
 7 PRESIDENT van HOUTTE: Well, then there are
 8 three easy questions to be answered.
 9 Please continue.
 10 MR. GALLUS: In its opening, Canada referred
 11 the Tribunal to several NAFTA Decisions which
 12 supported its position that the Tribunal should defer
 13 to the decision of the Canadian courts on these
 14 issues.
 15 These are decisions to which the Claimants do
 16 not refer you in their closing, and whilst we did
 17 refer the Tribunal to these decisions in the opening,
 18 I think it's worth touching on them again briefly,
 19 just to illustrate the way that--the role of domestic
 20 law when it comes to applying the standard here. I
 21 recognize that Canada has not completely settled this
 22 issue for the Tribunal; however, these decisions are

1254

02:46:22 1 continued disappointment of my colleagues in
 2 Government. I'm afraid I barely speak a word of
 3 French, so I certainly won't be speaking to the French
 4 text and what it means. And again, I think this seems
 5 to be an issue that's best addressed if you are
 6 particularly interested in subsequent written
 7 submissions.
 8 PRESIDENT van HOUTTE: We are interested,
 9 especially as Canada may be the only addressee of the
 10 French text.
 11 MR. RIVKIN: And drafted it.
 12 PRESIDENT van HOUTTE: Maybe.
 13 MR. GALLUS: And as a representative of the
 14 Canadian Government, I can say how embarrassed I am to
 15 not actually be able speak...
 16 (Comments off microphone.)
 17 MR. GALLUS: And again, I should point out to
 18 end the question, it is Canada's position that there
 19 is no need to expressly address this issue because, in
 20 the view of Canada, there are no additional more
 21 onerous burdens that are being imposed by the
 22 Guidelines here; however, again, I recognize that if

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02:48:26 1 illustrative as to the role, at least, that domestic
 2 law can play.
 3 The first quote to which we referred you in
 4 the opening was a quote from the Waste Management II
 5 Tribunal and--do we have that, Thomas?
 6 Apparently not on this screen. Oh, I can see
 7 from there.
 8 This quote says: "A NAFTA Tribunal does not
 9 have plenary appellate jurisdiction in respect of
 10 decision s of national courts, and whatever may have
 11 been decided by those courts as to national law will
 12 stand unless shown to be contrary to NAFTA itself."
 13 What we didn't mention in the opening was the
 14 context in which the Tribunal said this. This was
 15 said in the context of a claim for breach of
 16 Article 1105, the same Article that the Claimants
 17 allege is breached here.
 18 In that case, the Claimants alleged that
 19 there was a breach of Article 1105, partly through the
 20 wrongful termination of a Concession Contract. Yet
 21 the Tribunal recognized that Mexican courts had
 22 addressed the issue of the termination of the

1257

02:49:39 1 Concession Contract, and it was in that context that
2 the Tribunal said that a NAFTA tribunal does not have
3 plenary appellate jurisdiction in respect of decisions
4 of national courts, and whatever may have been decided
5 by these courts as to national law will stand unless
6 shown to be contrary to the NAFTA itself.

7 I also referred you to the Decision in
8 Azinian in which the Tribunal made these comments in a
9 similar context. In this case, however, there was a
10 claim for breach of Article 1110. The issue again
11 was--or one of the issues in the claim for breach of
12 Article 1110 was whether a contract had been validly
13 terminated. And, again, the Tribunal conscious of the
14 fact that domestic Mexican courts had addressed the
15 termination of the contract, and it's in this context
16 that the Tribunal states that the possibility of
17 holding a State internationally liable for judicial
18 decisions does not, however, entitle a claimant to
19 seek international review of the national Court
20 Decisions as though the international jurisdiction
21 seized has plenary appellate jurisdiction."

22 Canada also referred you to the decision in

1259

02:52:01 1 about the simple determination of whether or not a
2 domestic measure of a regulator falls within the
3 Regulatory Framework.

4 ARBITRATOR SANDS: With respect, it's not, I
5 think, quite that simple. One issue is whether or not
6 it's subordinate. Put that on one side. Then there
7 is the issue of whether it's "under the authority of,"
8 and then there is the issue of "whether it's
9 consistent with."

10 Whether or not we have to judge those latter
11 two conditions by reference to NAFTA law or not is, on
12 one approach, pretty central, and would then put this
13 Tribunal into an analogous situation; and that, I
14 think, explains why this is an issue on which we are
15 going to have to have the assistance of Canada, if it
16 wishes to give us assistance.

17 MR. GALLUS: Before I leave the decisions
18 which have addressed the deferral that an
19 international tribunal should give to decisions of
20 domestic court, I want to address briefly a
21 decision--or two decisions which the Claimants
22 referred you earlier, and both of these decisions were

1258

02:50:51 1 Thunderbird. That's a decision you will find at
2 CA-33. For the sake of time, I won't take you through
3 the context, but again it was--the Tribunal made these
4 comments in a similar context.

5 Now, while these decisions are very helpful
6 for the Tribunal, they're not exactly analogous to the
7 situation we have here because each of these tribunals
8 was addressing whether there was a breach of a NAFTA
9 obligation, either NAFTA Article 1105 or NAFTA Article
10 1110. Yet, when it comes to the issue of whether the
11 Guidelines are subordinate to the Accord
12 Implementation Acts, we are not considering the
13 application of a NAFTA obligation. We're considering
14 whether the Guidelines are subordinate to the Accord
15 Implementation Acts.

16 Therefore, it's important to bear in mind
17 that while these NAFTA Decisions are helpful for the
18 Tribunal in the sense that they identify the
19 importance that domestic Court Decisions can play, in
20 this circumstance there is almost more reason to defer
21 to domestic courts because we're not talking about the
22 application of a NAFTA obligation. We're talking

1260

02:53:13 1 referring to a principle found in Article 3 of the
2 International Law Commission Articles on State
3 Responsibility, which I think we might have as a slide
4 here. Thomas, is that right?

5 Or actually, I'm not sure. That's all right.
6 I will just read it into the record.

7 Article 3 says: "The characterization of an
8 Act of a State that is internationally wrongful is
9 governed by international law. Such characterization
10 is not affected by the characterization of the same
11 act as lawful by internal law."

12 And while that's true, it doesn't help the
13 Claimants here because Canada is not saying that
14 simply because the Guidelines are consistent with
15 Canadian law they do not breach the NAFTA. Canada
16 accepts that you have to apply Article 1105 and you
17 have to apply Article 1106. Canada is simply saying
18 that this test you're required to apply to determine
19 whether the Guidelines are subordinate to the Accord
20 Implementation Acts necessarily refers you to domestic
21 law.

22 Now, the Claimants relied on two decisions

1261

02:54:12 1 earlier. The first was Veteran Petroleum. Veteran
 2 Petroleum concerned a very different circumstance to
 3 what we have here. First of all, I should say the
 4 extract from Veteran Petroleum to which the Claimants
 5 referred you was--simply mirrored what it said in
 6 Article 3 of the International Law Commission
 7 Articles. The situation--or the circumstances in
 8 which the Tribunal said that were the circumstances in
 9 which Russia was alleged to breach Article 45--sorry,
 10 was alleged to breach the Energy Charter Treaty, and
 11 there was a question whether the Energy Charter Treaty
 12 applied provisionally to Russia because Russia had
 13 signed it but had not yet entered into force.

14 Section 45 of the Energy Charter Treaty says
 15 that a treaty will not provisionally apply--I should
 16 start with saying that it says: "The Energy Charter
 17 Treaty shall provisionally apply to the signatories
 18 unless the domestic law says that it does not."

19 And it was Russia's argument that that
 20 required the Tribunal to examine whether Russian law
 21 was consistent with each of the obligations under the
 22 Energy Charter Treaty, whether Russian law on

1263

02:56:22 1 be legal under Mexican law by Mexican courts
 2 necessarily legal under NAFTA or international law."
 3 I'm looking at Slide 82 of the Claimants'
 4 bundle here. And you'll see the second highlighted
 5 passage on which they're relying.

6 "Nor is an action determined to be legal
 7 under Mexican law by Mexican courts necessarily legal
 8 under NAFTA or international law."

9 Well, that's true, but it doesn't help us
 10 here. Canada is not arguing that simply because the
 11 Guidelines are consistent with Canadian law they're
 12 necessarily consistent with the NAFTA.

13 So, let's leave the decisions of the Canadian
 14 courts and look at the Guidelines themselves, and
 15 let's see whether or not they are in fact subordinate
 16 to the Accord Implementation Act, whether they're
 17 authorized by the Acts and whether they're consistent
 18 with the Acts and with the previous Benefits
 19 Decisions.

20 Before we examine the--this issue, I think
 21 there's three issues we need to clarify for the record
 22 with regard to the Guidelines that were raised by the

1262

02:55:24 1 expropriation was consistent with the Energy Charter
 2 Treaty obligation with regard to expropriation. And
 3 Russia's argument was that unless they're consistent
 4 on each of these levels, then you can't apply the
 5 Treaty provisionally to us. And it's in this context
 6 that the Tribunal made the comments to which the
 7 Claimants referred you in their closing and to which
 8 they referred in their written pleadings, and it's
 9 that context the Tribunal said you can't simply rely
 10 on domestic law to avoid your international law
 11 obligations.

12 Similarly, the quote to which they referred
 13 you from Feldman is just a reflection of Article 3 of
 14 the International Law Commission Articles. I'd like
 15 to have quick look at that quote, which you'll find at
 16 Slide 82 of the Claimants' bundle, this blue bundle of
 17 documents.

18 And the--or perhaps I can just read the quote
 19 into the record. I'll just read the quote into the
 20 record.

21 The quote on which they relied from Feldman
 22 in Mexico is simply: "Nor is an action determined to

1264

02:57:26 1 Claimants in their closing. The first is that they
 2 seem to repeat this statement that the Research and
 3 Development Guidelines were the first Guidelines
 4 issued by the Board that are backwards-looking that
 5 apply to previous benefits to the plans, and on that
 6 point I would refer the Tribunal again to the
 7 testimony of Fred Way, where he confirmed that the
 8 2002 Waste Management Guidelines are an example of
 9 another Guideline issued by the Board that did apply
 10 to previous decisions.

11 MR. RIVKIN: Sorry. He testified with
 12 respect to Development Plans--

13 MR. GALLUS: I was just going to clarify
 14 that. That's right.

15 As Mr. Rivkin points out, Mr. Way did point
 16 out that these Guidelines did not apply to the
 17 Benefits Plans so much as the Development Plans, but
 18 the principle is still the same. These Development
 19 Plans were approved in 1987--sorry, 1987 and 1997, and
 20 the Guidelines applied to those projects despite the
 21 fact they'd been approved 30 years ago.

22 The second issue that we need to clarify for

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02:58:30 1 the record is the Claimants' point that Canada has
2 submitted no evidence from Statistics Canada, that it
3 has not submitted a witness statement from someone at
4 Statistics Canada.

5 In the Claimants' Reply, they said that the
6 Statistics Canada issue was irrelevant. You might
7 recall from the Reply that they included an annex at
8 the back of their reply in which they included a
9 series of issues which they say is irrelevant for the
10 dispute. And one of those issues was the benchmark as
11 calculated by Statistics Canada, and how they came up
12 with this benchmark, how they extracted the data from
13 around Canada to come up with the average research in
14 development spending.

15 The Claimants said in their Reply that this
16 issue was irrelevant, and consequently,
17 understandably, Canada did not address it in its
18 Rejoinder, and consequently the Claimants cannot now
19 accuse Canada of avoiding submitting evidence from
20 Statistics Canada if they, themselves, say the issue
21 is irrelevant.

22 The final issue that we need to correct for

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03:00:38 1 training.

2 Secondly, Section 55 of the Accord, which
3 says those expenditures shall be approved by the
4 Board; and as we discovered earlier, that is expressly
5 incorporated into the Accord Implementation Act
6 through Section 17(1). Consequently, it's a
7 requirement of both the Accord and the Accord
8 Implementation Act that the Board approves
9 expenditures.

10 And the third key part of the Accord
11 Implementation Act is of course Section 151.1(1) which
12 gives the Board the authority to issue Guidelines with
13 respect to the obligation to expend on research and
14 development and education and training. This is the
15 precise authority on which the Board relied to issue
16 its Guidelines.

17 So, let's look at the--turn to the Hibernia
18 Benefits Decision--or the Hibernia Benefits Plan that
19 was approved by the Hibernia Benefits Decision.
20 Again, Canada referred you to aspects of the decision
21 in detail in the opening, and mindful of the time, I
22 won't go back to the documents. You have both the

1266

02:59:33 1 the record with regard to the Guidelines is the issue
2 of research and development during the Exploration
3 Phase. Mr. Rivkin said that--I think he referred you
4 to the ExxonMobil Web site and said that if you're
5 interested in Research and Development during the
6 Exploration Phase, you should look at the ExxonMobil
7 Web site. I don't think an extract from that Web site
8 is in the record, and I don't think there is anything
9 in the record to contradict the evidence of Mr. Way
10 that, in his experience, there is not much research
11 and development in the Exploration Phase.

12 So, having corrected the record, let's
13 address succinctly, bearing in mind the time, why it
14 is that the Canadian courts are right, why it is the
15 Guidelines are consistent with the previous regime and
16 authorized by the Accord Implementation Acts.

17 First of all, we have the key parts of the
18 Accord Implementation Acts, and these are parts of the
19 Acts to which we've referred you at many times during
20 the week. First of all, Section 45(3)(c), which
21 states that Benefits Plans shall ensure expenditures
22 on research and development and education and

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03:01:48 1 transcript from the opening as well as the slides to
2 point you to those key parts, but I will list them
3 again for you.

4 The first is the recognition of the decision
5 that the Operators would provide benefits for
6 the--throughout the project, not just restricted to a
7 particular stage.

8 The second is the commitment of the Operators
9 to a series of principles, including technology
10 transfer, which I believe even Mr. Way or
11 Mr. Fitzgerald confirmed includes research and
12 development and education and training in certain
13 circumstances. Within that plan, the Operators also
14 committed to continue to support local research
15 institutions and promote further research and
16 development in Canada to solve problems unique to the
17 Canadian offshore environment, not to solve problems
18 that they thought was necessary, but to solve problems
19 unique to the Canadian offshore environment.

20 Another key part of the Benefits Plan
21 Decision is that the Board believe that effective
22 monitoring and reporting will be necessary to ensure

1269

03:02:45 1 that the Benefits Plans' objectives are accomplished.
 2 The Board also recognized in the Decision, and the
 3 Operators accepted, that the Benefits Plan process is
 4 an evolutionary process. The proponents committed to
 5 respond positively to issues of concern.

6 And, finally, there is the key issue of the
 7 Environmental Assessment Panel report which
 8 recommended research and development that was
 9 important for Newfoundland and Labrador and not just
 10 necessarily important for the Operators, and you heard
 11 the witnesses this week confirm the importance of
 12 those reports for the Hibernia Benefits Decision.

13 I will also briefly recap the key parts of
 14 the Terra Nova Decision. Again, we referred to these
 15 key parts in the opening and encourage the Tribunal to
 16 go back and look at the transcript and look at the
 17 slides on which Canada relied. But the key part
 18 include that the Board stated explicitly that the plan
 19 submitted by the Operators did not fulfill the
 20 obligation to ensure expenditures on research and
 21 development and education and training. And I
 22 recognize the Claimants said before that I said

1271

03:04:49 1 as the regulator to ensure that the Proponents'
 2 commitments are met.

3 During the week we--I should rephrase that.

4 It's also important to remember the evidence
 5 that we heard this week with regard to whether or not
 6 Benefits Plans are agreements, an issue that's in
 7 dispute between the Parties. The Claimants talked
 8 earlier about what Mr. Fitzgerald said about whether
 9 this was the result of a negotiation, whether this was
 10 actually an agreement. I encourage you to look
 11 carefully at the extract from Mr. Fitzgerald's
 12 transcript to which they refer. I think you'll see
 13 that the Claimants was coaxing Mr. Fitzgerald along to
 14 try and say what they wanted him to say, and he never
 15 actually acknowledged this was a free negotiation
 16 between the Parties.

17 I will also remind the Tribunal that the
 18 Claimants never put to Mr. Fitzgerald this is an
 19 agreement, and it's therefore very difficult for them
 20 to claim now that Mr. Fitzgerald agreed with that
 21 proposition.

22 Indeed, the only person this week who was

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03:03:49 1 earlier in the week that that plan was rejected and
 2 that a supplementary Benefits Plan was submitted later
 3 on. I recognize that that was not correct, and I'm
 4 happy to correct the record on that point, that
 5 the--there was not a supplementary Benefits Plan. The
 6 Board simply recognized in their Terra Nova Decision
 7 that the Plan did not fulfill this commitment to
 8 expend on research and development and education and
 9 training; and, consequently, the Board imposed these
 10 specific reporting requirements.

11 Within the Decision, the Board also endorsed
 12 the recommendation of the Environmental Assessment
 13 Panel that the Operators fund basic research, not
 14 necessarily research for the projects, but basic
 15 research.

16 And finally, there's the Board's express
 17 recognition of the Decision that the Board will
 18 monitor the expenditures because the Board--and I'm
 19 going to quote now from Page 2 of the Decision--"has
 20 an obligation as the regulator to ensure that the
 21 Proponents' commitments are met." And when it came to
 22 issuing the Guidelines, all they were doing was acting

1272

03:05:48 1 asked expressly--I should rephrase that.

2 The only member of the Board this week who
 3 was asked expressly "are the Benefits Plans an
 4 agreement?" was Fred Way, and he stated explicitly
 5 that they were, and the page in the transcript is
 6 Page 727, where he was asked: "In your view, is a
 7 Benefits Plans an agreement?" He said, "No, it
 8 isn't." And: "Is the Benefits Plans a result of
 9 negotiation?" No." And he goes on to explain why.

10 And if you're particularly interested in the
 11 issue, I encourage you to look at his explanation, but
 12 to sum it up he says it's not the result of a
 13 negotiation because the Board is a regulator, and in
 14 approving the Benefits Plans is acting as that
 15 regulator, and it only approves that Benefits Plan if
 16 it complies with its obligation in the Act to expend
 17 on research and development and education and
 18 training.

19 Consequently, the evidence this week,
 20 together with the plain terms of the Terra Nova and
 21 Hibernia Benefits Decisions confirm that the
 22 Guidelines are consistent with the previous regime.

1273

03:07:01 1 The plain terms of the Accord Implementation Acts
 2 confirm that the Guidelines are consistent with that
 3 Act, and they are authorized by that Act.
 4 Consequently, even if the Guidelines are inconsistent
 5 with Article 1106(1)(c), which they're not, they
 6 cannot breach that Article because they are
 7 subordinate to that Act, and consequently they are
 8 reserved under Article 1108.
 9 I will pause now to ask if the Tribunal has
 10 any questions on this issue. At this point, Canada
 11 was intending to refer to Mr. Luz again to address the
 12 Tribunal with regard to Article 1105.
 13 PRESIDENT van HOUTTE: Maybe it would be a
 14 good idea to have a short break, if you agree, because
 15 it's already one hour and three quarters of an hour.
 16 Just a 15 minutes' break?
 17 Or less for me.
 18 MR. GALLUS: It's up to you.
 19 PRESIDENT van HOUTTE: When I say five
 20 minutes, it becomes 15 minutes. Then it's a five
 21 minutes' break.
 22 MR. GALLUS: Five-minute break.

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03:20:14 1 was about two hours and 25 minutes--
 2 MR. RIVKIN: No.
 3 THE SECRETARY: For Claimants, including--
 4 MR. RIVKIN: Including the half-hour
 5 break--oh, including the cross-examination?
 6 THE SECRETARY: Exactly.
 7 MR. RIVKIN: Our closing was under two hours.
 8 And I know it was 90 minutes when I stopped, and
 9 Sophie took about 20 minutes.
 10 PRESIDENT van HOUTTE: It was 95 minutes, if
 11 I remember correctly.
 12 THE SECRETARY: And I'm not sure about yours,
 13 I'm afraid. I would have to wait until my computer
 14 comes back.
 15 MR. GALLUS: Regardless, Canada doesn't
 16 expect to--
 17 THE SECRETARY: I think you have about one
 18 hour and 25 minutes.
 19 PRESIDENT van HOUTTE: You were 90 minutes in
 20 your closing statement.
 21 MR. GALLUS: I'm sorry, I didn't quite hear.
 22 PRESIDENT van HOUTTE: It was 90 minutes in

1274

03:08:00 1 PRESIDENT van HOUTTE: Yes.
 2 (Brief recess.)
 3 PRESIDENT van HOUTTE: Okay.
 4 MR. RIVKIN: Mr. President, could I ask just
 5 a quick question before Canada begins? As you've
 6 indicated, we have gone almost two hours now in their
 7 argument, and I see more than 50 slides remaining. It
 8 is getting late in the day, and there were some issues
 9 of fairness. I know we ran a bit over, but we did try
 10 to keep our argument, and it ended up being a little
 11 under two hours, actually about the same amount of
 12 time they have now, and I know there are some other
 13 administrative and other issues the Tribunal wants to
 14 talk about before we all take off this afternoon. So,
 15 I'm just wondering whether it might be possible to ask
 16 Canada how much longer they expect to go and perhaps
 17 if there could be some cap to it so we could move on.
 18 MR. GALLUS: I would perhaps if we could
 19 clarify how long we have gone and how long the
 20 Claimants went for?
 21 THE SECRETARY: It was about two hours and
 22 20--my computer crashed during the break, but there

1276

03:21:11 1 your closing statement.
 2 MR. LUZ: Unfortunately for all involved, my
 3 presentation will be brief and focus on the legal
 4 standard applicable under Article 1105. My colleague,
 5 Mr. Gallus, will discuss the specific facts of this
 6 case in the context of 1105, but I believe it is of
 7 great importance for the clarity of the NAFTA process
 8 to have a clear elucidation of what the legal standard
 9 under 1105 the Claimants are subject to.
 10 (Pause.)
 11 MR. LUZ: The Claimants have already noted
 12 some of the areas of agreement of the Parties. The
 13 FTC Note of Interpretation is binding on this
 14 Tribunal, and it states explicitly that fair and
 15 equitable treatment does not require any treatment in
 16 addition to or beyond that which is required by the
 17 customary international minimum standard of treatment
 18 for aliens.
 19 It is also common ground that the burden of
 20 proving a rule of custom rests on the Party that
 21 asserts the rule, the existence of the rule, and that
 22 to prove a rule of custom you must have substantial

1277

03:22:24 1 State practice and opinio juris.

2 There is also an area of agreement with
3 respect to legitimate expectations to the extent that
4 some non-NAFTA tribunals have recognized this measure
5 of protection. And Canada sets out this criteria at
6 Paragraph 271 of its Counter-Memorial, and I think
7 it's worth repeating here:

8 Legitimate expectations must be based on
9 objective rather than subjective expectations of the
10 Investor;

11 Second, there must be specific assurance by
12 the State to induce the investment that was reasonably
13 relied upon by the investor;

14 Third, the relevant expectations are those
15 existing at the time the investment was made;

16 And, finally, to assess the reasonableness of
17 those expectations, the Tribunal should take into
18 account all the circumstances.

19 Now, we have already talked about the minimum
20 standard of treatment, and I will just skip forward to
21 our--to the second slide. And the recent Cargill
22 Decision aptly summarized the standard of treatment

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03:24:35 1 only refer to one sentence in a relevant paragraph,
2 and I would like to present that whole paragraph to
3 the Tribunal because I think the standard basically
4 reflects what Cargill and Glamis have said.

5 In the next slide, again this Tribunal, "The
6 minimum standard of treatment is infringed by conduct
7 that is harmful to the Claimant if the conduct is
8 arbitrary, grossly unfair, unjust or idiosyncratic."
9 I will go on, "or involves a lack of due process
10 leading to an outcome which offends judicial
11 propriety, as might be in the case of a manifest
12 failure of natural justice in judicial proceedings or
13 complete lack of transparency or candor in the
14 administrative process."

15 Now, the Claimants only focus on the last
16 sentence in applying the standard. It is relevant
17 that the treatment is in breach of representations
18 made by the host State, which were reasonably relied
19 on by the Claimant. This is consistent with other
20 NAFTA cases that simply say this is relevant.

21 Now, I won't go on for very long, but I do
22 want to respond to a specific question that Professor

1278

03:23:28 1 applicable under Article 1105. I will read it into
2 the record, and this is the Cargill Decision, and it's
3 cited in Canada's Counter-Memorial, and it's in the
4 handouts that you have before you.

5 To determine whether an action fails to meet
6 the requirement of fair and equitable treatment, a
7 tribunal must carefully examine whether the complained
8 of measures were grossly unfair, unjust or
9 idiosyncratic, arbitrary beyond merely inconsistent or
10 questionable application of administrative or legal
11 policy or procedure so as to constitute an unexpected
12 and shocking repudiation of the policy's very purpose
13 and goals, or otherwise to subvert domestic law or
14 policy for an ulterior motive or to involve an utter
15 lack of due process so as to defend judicial
16 propriety.

17 Now, the Claimants have expressed great
18 dissatisfaction with the Cargill Decision as well as
19 Glamis, but I will also point out that the Claimants
20 have referred to Waste Management, and if you look in
21 your slides from both the opening and in their
22 Counter-Memorials, they point to Waste Management and

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03:25:37 1 Sands asked at the beginning of the week as to whether
2 or not the Claimants--the cases, the non-NAFTA cases
3 that the Claimants rely upon discuss any State
4 practice or opinio juris for the proposition that they
5 have put forward. They do not. And I encourage the
6 Tribunal to look to the Cargill and Glamis Decisions
7 because they went through exactly this analysis. And
8 I will direct the Tribunal to our Counter-Memorial at
9 Paragraph 269 and our Rejoinder Paragraph 140 to 142.
10 And I will finally, in the interest of time,
11 just like to point the Tribunal to the two final
12 points that the Claimants have brought up with respect
13 to whether or not there has been a breach of contract,
14 and I don't wish to get into semantics as to whether
15 the Benefits Plans or anything is a contract or not
16 because it really doesn't matter for the purposes of
17 1105.

18 And I would just point the Tribunal to the
19 rule of international law that a mere breach of
20 contract does not rise to a level of breach of
21 international law. And two NAFTA Tribunals, Azinian
22 and Waste Management, have both explicitly recognized

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03:26:47 1 that. And I will just point forward to the second
2 slide of Waste Management and read into the record:
3 "Even as to 1105, while it would be relevant to show
4 that the particular conduct of the host State
5 contradicted agreements and understandings reached at
6 the time of the investment, it is still necessary to
7 prove that this conduct was in breach of the
8 substantive standards embodied in Article 1105.
9 Showing that it was a breach of contract is not
10 enough."

11 I refer the Tribunal to our pleadings. If
12 you have any questions on this particular issue, I
13 would be happy to answer them. Otherwise, I will turn
14 the table over to my colleague.

15 PRESIDENT van HOUTTE: No questions.

16 MR. LUZ: Thank you.

17 MR. GALLUS: Even if we accept the Claimant's
18 Submission that Canada is obliged to protect
19 legitimate expectations, then Canada had not breached
20 Article 1105 because Canada has fulfilled any
21 expectations of the Claimants legitimately should have
22 had.

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03:29:00 1 submitted no evidence as to their legitimate
2 expectations. The only evidence we have from Murphy
3 in this case is a witness statement from Mr. Buchanan,
4 in which he merely states that since Murphy is not the
5 Operator of the projects, it defers to the Operator.

6 So, we have no evidence from Murphy as to
7 their legitimate expectations. We also have no
8 witnesses from Terra Nova. No witnesses from
9 Petro-Canada concerning the legitimate expectations of
10 the Terra Nova Operator. Indeed, during the written
11 pleadings in this case, the Claimants acknowledge that
12 they do not know the understanding of the Terra Nova
13 Operator. I refer you to the next slide which is a
14 footnote from the Claimants' Reply, where they're
15 referring to one of the benefits reports submitted by
16 Terra Nova, and you might recall that this is the
17 benefits report where Terra Nova states explicitly in
18 1999 that when we are expending on research and
19 development, we are not only expending on what's
20 necessary for the project but expending for what's not
21 necessary. We are expending for what's important for
22 the development of the Canadian offshore industry.

1282

03:27:53 1 As I explained in the opening, again the
2 decisions of the Canadian courts are relevant on this
3 point. The Canadian courts, as we've described
4 before, held that the Guidelines are consistent with
5 previous regime; and, if they're consistent with the
6 previous regime, they can't possibly be inconsistent
7 with any legitimate expectations that were generated
8 by that regime.

9 I refer you specifically to the decision of
10 Justice Barry at Paragraph 135, the last two sentences
11 of that paragraph, Justice Barry confirms these were
12 rules of the game, and the same rules apply today.
13 Well, if the Board is just operating under the rules
14 of the game, it can't possibly be inconsistent with
15 any legitimate expectations that the Claimants had.

16 So, what do we have now that was not before
17 the Canadian courts? What do we have now that emerged
18 from the evidence this week? Let's start with the
19 witnesses.

20 First of all, we do not have any witnesses or
21 any witness testimony with regard to Murphy Oil.
22 Murphy is the co-Claimant in this case; however, has

1284

03:30:18 1 And in responding to this report, the
2 Claimants state here in the last sentence, "The
3 Claimants had no hand in drafting this language and
4 cannot speak to Petro-Canada's intended meaning." So,
5 the Claimants have not purported to understand the
6 legitimate expectations of Petro-Canada, the Terra
7 Nova Operator in this case, and they provided no
8 witnesses from Petro-Canada.

9 We also have no witnesses from the Claimants
10 during the key period of 1985 to 1990, the key period
11 when the Atlantic Accord was signed, when the Acts
12 came into force, and when the Hibernia Benefits Plan
13 was approved. We have no witnesses from Mobil who
14 could speak to their expectations from that time.
15 We also have no witnesses from the Claimants
16 who can speak to their legitimate expectations
17 concerning benefits reporting between 1998 and the
18 announcement of the Guidelines in 2001.

19 The only witness from the Claimants who had
20 spoken to their legitimate expectations or said
21 something that could be interpreted as affecting their
22 legitimate expectations is Paul Phelan.

1285

03:31:34 1 MR. RIVKIN: Mr. President, I know it's not
2 proper to object during the other side's argument, but
3 I do want to point out that Canada, in its Rejoinder,
4 said that legitimate expectations must be based on
5 objective rather than subjective expectations of the
6 Investor, and that is certainly how we have pleaded
7 our case. We rely on the documents which we believe
8 show both sides' expectations. It could save some
9 time this afternoon. I see an awful lot of slides of
10 what people were apparently thinking. That's not--it
11 does not seem to be relevant as to who testified about
12 whose expectations.

13 PRESIDENT van HOUTTE: What's your reaction?

14 MR. GALLUS: If the Claimants are willing to
15 admit that Paul Phelan nor anyone else from the
16 Claimants can speak to their legitimate expectations,
17 then we are happy to not refer to the evidence of
18 Mr. Phelan.

19 PRESIDENT van HOUTTE: We assume that we will
20 consider your slides as part of your argumentation and
21 that you move on? We will attach the relevance--we
22 will attach the weight to those slides which we deem

1287

03:33:56 1 First of all, he confirmed that when he was talking
2 about the R&D expenditure obligation, he was just
3 speaking from an accountant's point of view, and I
4 will refer you to the transcript at Page 408, Lines 1
5 through 11.

6 He confirmed that he wasn't involved in
7 process at key times. I refer to the transcript at
8 Page 399, Line 20, to Page 400, Line 1.

9 And he confirmed that he wasn't at key
10 meetings. I refer you to the transcript at Page 409,
11 Lines 16 to 21.

12 And he also confirmed that he wasn't aware of
13 key documents, and I refer on the transcript at
14 Page 372, Line 11.

15 He also confirmed in the transcript that,
16 even though he was the accountant who started in 1990
17 after this critical period, that he knew that the
18 Operators had committed to spend on research and
19 development and education and training, and Mr. Phelan
20 confirmed that in the transcript at Page 402 at Lines
21 16 to 19.

22 As I said before, in contrast to the

1286

03:32:46 1 proper.

2 MR. GALLUS: I think there are some important
3 aspects of those slides. For example, during the week
4 we've heard about meetings that took place, informal
5 meetings that took place in the early days where
6 perhaps the Claimants' expectations would have been
7 formed. We've talked about situations where the
8 Operators would have met with the Board, and there has
9 been some discussions about what they would have been
10 told then. The point of the references to the
11 transcript is that neither Paul Phelan nor anyone else
12 from the Claimants were at those meetings and,
13 therefore, can't speak to what was said and can't
14 speak to what the Board was telling them.

15 By contrast, we do have the evidence of John
16 Fitzgerald, who was around at that time, and he did
17 speak to what his understanding was and what he
18 thought he conveyed to the Claimant and the Operator.

19 Rather than walking the Tribunal in detail
20 through the testimony of Paul Phelan, I will just
21 point out the key aspects of that testimony and refer
22 you to the transcript in case you're interested.

1288

03:35:07 1 Claimants, Canada has put forth the evidence of John
2 Fitzgerald, who was very much front and center during
3 these key periods. And you heard John Fitzgerald
4 testify as to certainly what the Board legitimately
5 expected, but also what he would have identified as
6 the sources for those legitimate expectations for the
7 Claimants.

8 And you recall that Mr. Fitzgerald referred
9 to the environment at the time that the investments
10 were made. The Claimants have not denied that a key
11 factor in determining the legitimate expectations of
12 an investor is the environment at the time or the
13 circumstances at the time the investment was made.
14 And Mr. Fitzgerald confirmed that at that time the
15 Government was repeatedly stating that it expected to
16 achieve sustainable development from the revenues from
17 the oil off of the coast, and that to achieve that
18 sustainable development there was a need for
19 expenditures on research and development and education
20 and training.

21 Mr. Fitzgerald also referred to the accord as
22 a key source of the Operator's legitimate

1289

03:36:21 1 expectations, and we identified before the importance
2 of the accord because it is expressly incorporated
3 into the Act, including the provision stating that the
4 expenditures shall be approved by the Board.

5 He also identified the active course as a key
6 source of the Claimants' legitimate expectations and
7 the Environmental Assessment Panel reports with regard
8 to Hibernia and Terra Nova, both of which identified
9 general research and development that the Claimants
10 were expected to undertake, regardless of whether it
11 was necessary for their projects.

12 Mr. Fitzgerald also referred to the 1986
13 Exploration Phase Guidelines. You will recall that
14 these are the Guidelines under which the Board stated
15 that expenditure targets will be set. And you will
16 recall also that in the 1987 Exploration Phase
17 Guidelines, that stipulation was not made. And there
18 was a suggestion that that meant that the Board had
19 expressed a view that he had abandoned forever the
20 idea of expressing targets for research and
21 development and education and training expenditures.
22 The implication is the opposite.

1291

03:39:11 1 a Proponent and I had a piece of paper from a
2 regulator that had this clue in it, I would breathe a
3 sigh of relief when it didn't appear afterwards and
4 say we got off the hook this time, that you know, pay
5 attention to what our commitments are because,
6 obviously, somebody over there thinks it might be
7 necessary to be more explicit on these matters."

8 Obviously, the content of the Hibernia and
9 Terra Nova Benefits Decisions are critical for
10 determining the legitimate economics of the Operators
11 of the Claimants. Canada has already extensively
12 referred to the aspects of those decisions, which
13 indicated that the Board expected expenditures on
14 research and development, would monitor those
15 expenditures, and would intervene if those
16 expenditures were not meeting their obligation under
17 the Act. And I would refer you again to those aspects
18 of the decision to which we referred in our opening
19 and our opening slides.

20 I would also like to refer you briefly to the
21 testimony of Andrew Ringvee. Once again, I won't take
22 you through these slides specifically, but I will

1290

03:37:41 1 But in 1986, when the Hibernia Benefits Plan
2 was approved, the Board had issued to the Operators a
3 document in which they had stated that expenditure
4 targets would be set. That means the Operators were
5 now considering that Benefits Plan in 1986 must have
6 been aware that the Board thought it had the authority
7 to set express expenditure targets.

8 As I said before, there was a suggestion that
9 by not including that stipulation in the 1987
10 Guidelines that the Board had abandoned forever this
11 idea of setting express expenditure targets, but
12 that's not correct. First of all, within those 1987
13 Guidelines, the Board expressly stated that these
14 Guidelines may be revised from time to time following
15 consultation with the industry. That's indicating
16 that the Board was not abandoning the idea that it
17 would again set expenditure targets for the Operators.

18 And John Fitzgerald spoke to what his
19 reaction would have been to the 1986 and 1987
20 Guidelines, which I believe is on the previous slide
21 there, Thomas. But are seeing John Fitzgerald's
22 statement, "I don't want to be flippant, but if I was

1292

03:40:32 1 address the general issue.

2 Andrew Ringvee addressed the expenditures
3 that the Operators were undertaking under the Work
4 Plans. These are the expenditures that the operators
5 are undertaking to fulfill their shortfall under the
6 Guidelines, and he talked about the expenditures under
7 these Work Plans. But in describing these
8 expenditures, he described them in exactly the same
9 way that the expected expenditures were described in
10 the Hibernia and Terra Nova Decisions. If we could
11 just skip on a couple of slides--stay there for a
12 moment, the previous slide.

13 You see that in the Hibernia Benefits Plan
14 Decision the Board is referring to research
15 development into ice detection systems, iceberg towing
16 and ice forecasting, and you will see at the bottom,
17 "The panel recommendation of research and development
18 to improve the ability to detect and manage ice under
19 adverse weather conditions. This was what was stated
20 in the Hibernia Benefits Plan Decision of the sort of
21 research and development that was expected from the
22 Hibernia Project.

1293

03:41:45 1 And I won't go into the detail of the
2 transcript because you could see it for yourselves in
3 both the slides and your own versions of the
4 transcript, but when describing the expenditures that
5 the Operators were undertaking now, Mr. Ringvee
6 described them in the same terms as you see here. ■

10 Consequently, the Operators are doing now
11 exactly what they said they would do in 1986. And if
12 they're doing what they said they are doing in 1986,
13 it's difficult to conclude that the obligation to do
14 this now is inconsistent with any legitimate
15 expectations they took from this promise to do it in
16 1986.

17 If you refer to the next slide--let's skip
18 down a couple--and there we have another commitment
19 from the Hibernia Benefits Plan, where the Operators
20 commit to do research and development to develop
21 effective countermeasures to offshore oil spills.
22 Again, I won't refer you to the explicit parts of the

1295

03:44:14 1 the Terra Nova Decision.

2 And, finally, it's important to remember that
3 the Claimants have accepted that legitimate
4 expectations must be based on specific assurances by a
5 State to induce the investment. And while the
6 Claimants have accepted that, they have not identified
7 any specific assurances that are relevant to this
8 dispute. They have identified no promises from the
9 Board that the Operators can just undertake research
10 and development necessary for the projects. They have
11 identified no promises that the Operators could
12 unilaterally determine how much they could spend.
13 They have identified no promise that the Guidelines
14 would not be issued; no promise that the Board would
15 not rely on its authority under Section 151.1(1)1 to
16 issue such Guidelines; and, finally, no promise that
17 the Board would not enforce the Claimants' obligation
18 under Section 45(3)(c) to expand on research and
19 development and education and training in the
20 Province.

21 And unless the Tribunal has any questions on
22 those issues, I will turn to Mr. Douglas to address

1294

03:43:02 1 transcripts--you could read them yourself--but in most
2 parts of the transcripts Mr. Ringvee confirms that the
3 research and development that ■

6 So again, if the Operators are conducting now
7 the research and development that they said they would
8 conduct in 1986, it's difficult to accept an
9 obligation to conduct this research and development
10 now is inconsistent with the legitimate expectations
11 they would have taken from this commitment.

12 Before I hand over to my colleague,
13 Mr. Douglas, to address you on damages, I do want to
14 make two final points on legitimate expectations, and
15 it's, first of all, the Claimants referred before to
16 the fact that they acknowledged that legitimate
17 expectations must be objectively determined, but it's
18 important to recognize that they have submitted no
19 documents concerning legitimate expectations from
20 these key periods, no documents concerning their
21 expectations from the Accord Acts, their expectations
22 from the Hibernia Decision or their expectations from

1296

03:45:32 1 you on damages.

2 PRESIDENT van HOUTTE: No questions, thank
3 you.

4 MR. DOUGLAS: Good afternoon. It should be
5 about 15, 20 minutes.

6 MR. RIVKIN: Martina, could you please close
7 the session.

8 THE SECRETARY: Please close the session.

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

1297

03:46:02 1

CONFIDENTIAL SESSION

2 MR. DOUGLAS: The case for damages is unlike
3 any other NAFTA case; and, as far as I'm aware, it's
4 actually unlike any other investment arbitration
5 damages case I've read or seen. And it's important to
6 appreciate why. There are two main reasons, and I
7 will go through them both:

8 First, this is not a case where the Claimants
9 have to pay a lump-sum over to the Government of
10 Canada. The R&D and E&T spending is entirely within
11 their control. The Claimants are asking this Tribunal
12 to make an award that Canada pay for their spending
13 under the Guidelines. And that's worth repeating:
14 The Claimants are asking this Tribunal to make an
15 award for Canada to pay for their spending under the
16 Guidelines. This key aspect defines their claim.

17 And the Claimants have shown how it is they
18 intend to spend the Award, and that is the Work Plans.
19 Mr. Rosen confirmed that his damages assessment
20 assumes that none of the Work Plan expenditures would
21 have been undertaken in the ordinary course.

22 Next slide, Thomas.

1299

03:48:38 1

PAGE 1298

1298

03:47:29 1

"So, the Work Plans are planned incremental spending, is that what you're saying?"

3 "Yes."

4 "Okay."

5 "And but for the Guidelines, these
6 expenditures would not about have been undertaken?"

7 "That is my understanding, yes."

8 Therefore, all of the Work Plan expenditures
9 reflect incremental spending, if you recall
10 incremental spending is the difference between
11 Guideline obligations and ordinary course
12 expenditures, and that's what the Claimants claim as
13 damages.

14 However, when we look at the Work Plans, a
15 different picture is painted. [REDACTED]

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

PAGE 1300

1300

03:50:02 1

[illegible]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

16 Now, this R&D is a great example of the kind
17 of R&D that can be done in the Production Phase. ■
■ And there are other examples
19 of this in the Work Plans. ■

22 And I won't go through them all. They were discussed

1301

03:51:27 1 in some detail. For the sake of time I will move on,
2 but they are there.

3 Should Canada be required to pay the
4 Claimants an award that they will use to conduct this
5 R&D and reap the benefits from this R&D? The
6 Claimants think so.

7 Now, there is also another expenditure in the
8 Work Plans that was brought up this morning, and that
9 was the [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

17 And again--

18 MR. RIVKIN: You then made a characterization
19 of the statement--

20 PRESIDENT van HOUTTE: I would suggest that
21 we discuss this after the hearing.

22 MR. DOUGLAS: The reason why I bring it up,

1303

03:53:50 1 Claimants documents to show the economic benefits that
2 might derive arrive from the expenditures. We wanted
3 more information about the Work Plan expenditures,
4 what they were about and what the benefits would be.
5 We got no documents from them.

6 Now, the Claimants also refused to make any
7 deductions for SR&ED tax savings or royalty payment
8 saving, and this is astonishing in light of the fact
9 that some of the Work Plan expenditures state they
10 will be SR&ED-eligible.

11 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

17 And I put this to the Claimants' Expert, Mr.
18 Rosen, and he said, "It hasn't been approved."

19 I said, "You don't make any deductions for
20 SR&ED for this expenditure in your calculations?"

21 "No, it's not--it hasn't been
22 SR&ED-approved."

1302

03:52:38 1 and again, I do so tentatively, but the reason why is
2 because the Claimants, in their damages assessment,
3 are playing loose with the rules. They had filed Work
4 Plans they claimed as incremental expenditures, but
5 when you look at them, there is some doubt about that.

6 [REDACTED]
[REDACTED]

8 For the sake of time I should go on.

9 I would just refer you to the Expert Report
10 of Professor Noreng. Now, Professor Noreng is an
11 expert in Norway, and he examined the Work Plan
12 expenditures in some detail in a concise and very
13 thorough matter, looking at both whether they might be
14 ordinary course expenditures or the benefits that are
15 associated with them.

16 Now, the Claimants criticize Professor Noreng
17 in their closing for not quantifying the benefits, and
18 they state that he is the person with the expertise.
19 And perhaps, then, this is the reason why they did not
20 call him to testify.

21 It is also worth mentioning that when it
22 comes to operational benefits, Canada sought from the

1304

03:55:22 1 So, according to that standard, unless and
2 until an expenditure is submitted to the CRA and it is
3 approved, that is the standard at which you can then
4 deduct.

5 So, we have an expert who is willing to
6 project the future price of oil or adopt a projection,
7 future exchange rate, future ordinary course, future
8 Stats Can factor--a whole host of future elements that
9 increase the Claimants' damages, but he won't take
10 into account any factors that decreased the Claimants'
11 damages. And this is especially odd considering the
12 alignment that exists between the Guidelines and SR&ED
13 eligibility. The Guidelines themselves state that the
14 Board will rely on the definition of what is
15 SR&ED-eligible when determining what is eligible under
16 the Guidelines.

17 Now, the uncertainties of the Claimants' loss
18 are confirmed by their own documents and their own
19 testimony, and I'm going to walk you through just a
20 couple of points here that are important, [REDACTED]

21 [REDACTED]
22 [REDACTED]

1305

03:56:36

[REDACTED]

1307

03:59:15

[REDACTED]

5 Now, Ms. Lamb, in her opening remarks to the
 6 Tribunal, stated--and this is something they mentioned
 7 in their pleadings as well--"So, in our case,
 8 Claimants' loss in damage consists in the obligations
 9 created through the Board's implementation of the
 10 Guidelines, and those obligations, of course, already
 11 exist."
 12 Clearly, this is false, [REDACTED]

[REDACTED]

[REDACTED] Mr. Rosen
 17 made much the same point in his First Expert Report.
 18 He stated, "The incremental spending does not
 19 represent an economic loss to the Claimants until the
 20 cash outlays are ultimately made."
 21 And it is important to realize that, to date,
 22 the Claimants have barely spent any of their

1306

03:58:02

[REDACTED]

1308

04:00:41

1 incremental spending; thus, they have suffered to date
 2 very little economic loss.
 3 Now, the Claimants argue that half of their
 4 damages fall within the past and half of their damages
 5 fall within the future. This is not the case. All of
 6 their damages are in the future because all of their
 7 incremental spending is in the future. It is only
 8 when they spend in the future that we can know whether
 9 or not that expenditure was ordinary course, whether
 10 it will entitle them to SR&ED tax credits or royalty
 11 savings, and what the operational benefits will be,
 12 operational benefits such as the production of
 13 additional oil.
 14 And this point makes their damages assessment
 15 unique in another way, so the first way talked about
 16 was this was not a lump-sum payment over to the
 17 Government. Their spending is within their control.
 18 The second way is that they are claiming for damages
 19 they have not yet incurred.
 20 It's an important point to note that the
 21 Claimants have not been able to find a single award
 22 for damages not yet incurred. They cite a number of

1309

04:02:16 1 lost-profits cases, but they themselves argue that
2 their case is not one for lost profits. They do so to
3 justify their discount rate.

4 But the lost-profits cases they cite differ
5 materially from this case. In all the cases they
6 cite, the measure, the act were either an expression
7 or was a breach of contract. In the case of an
8 expropriation, that date happens in the past. The
9 case of a breach of contract, that date also happens
10 in the past. Here, the Claimants only suffer loss
11 when they make payments in the future. [REDACTED]

13 Now, Canada did find two cases that discuss
14 damages not yet incurred, and in neither of them did
15 the Tribunal make an award for these kinds of damages.

16 The first case is LG&E. And you see this is
17 RA-25. I'm referring you to Paragraph 96. Now, I
18 won't want to take you through it, but this was a case
19 of a continuing measure that the Tribunal found to be
20 an infringement of the BIT. The Claimant sought
21 damages, as Ms. Lamb notes, for both past and future
22 lost dividends. However, the Tribunal refused to make

1311

04:05:36 1 damages they have not yet incurred. This has not been
2 awarded before: Not under the NAFTA nor, as far as
3 I'm aware, anywhere else.

4 Why the hesitancy? Because damages not yet
5 incurred are speculative. The Claimants' assessment
6 requires them to forecast, as I mentioned, the price
7 of oil, oil production, exchange rate, ordinary course
8 expenditures, ownership interests, SR&ED credit,
9 royalty benefits, operational benefits. When the
10 uncertain projections of each of these variables
11 combine, the effect is overwhelming.

12 Now, I just want to say something here on
13 this point with respect to the projection of oil
14 prices.

15 Actually, this is going to be RA-77.

16 This is RA-77, Paragraph 2. The Tribunal in
17 Amoco v. Iran, and this was referred to in Canada's
18 pleadings. And they're discussing about what to do
19 with oil price forecasts when awarding damages.
20 Paragraph 239. They state, "The element of
21 speculation in a short-term projection is rather
22 limited, although unexpected events can make it turn

1310

04:04:08 1 an award for the future lost dividends because the
2 Claimant had not "actually suffered those losses."
3 And this is a reflection of the ILC Article principle
4 which states that only damages--I'm forgetting the
5 wording--I believe the wording is "damages actually
6 suffered" as they state and as they quote can be
7 awarded as a matter of compensation.

8 The second case that refused to make an award
9 for damages not yet incurred was Occi Petroleum, which
10 was also on the screen. This case involved a claim
11 for tax payments that were not yet due or paid.

12 Now, again this was a continuing measure, and
13 again there was a distinction between this case and
14 our case. This is not a case where future payments
15 are just going to go the Government of Canada. Ours
16 is even more remote than Occi Petroleum where the
17 future payments are the Claimants' own payments,
18 spending on themselves. And the Tribunal in Occi
19 Petroleum dismissed the aspect for future tax payments
20 or VAT payments because they were not yet due or paid.
21 Dismissed them outright.

22 In line with these cases, the Claimants seek

1312

04:07:10 1 out to be wrong. The speculative element rapidly
2 increases with the number of years to which a
3 projection relates. It is well-known and certainly
4 taken into account by investors that if it applies to
5 a rather distant future, a projection is almost purely
6 speculative, even if it is done by the most serious
7 and experienced forecasting firms, especially if it
8 relates to such volatile factor as oil prices.

9 Now, this next line here, and I'm reading it
10 into the record, and I apologize, absolutely--I will
11 move on--I just want to focus on that last line
12 because the Claimants have justified the use of oil
13 because it's what businesses do. However, the
14 Tribunal in Amoco explicitly stated, "Such projections
15 can be useful indications for a prospective investor
16 who understands how far it can rely on them and
17 accepts the risks associated with them; they certainly
18 cannot be used by a tribunal as the measure of
19 compensation."

20 PRESIDENT van HOUTTE: Mr. Douglas, in order
21 to be fair to both sides, can you terminate your
22 argument in five minutes, all of it?

1313

04:08:19 1 MR. DOUGLAS: All of it in five minutes. You
 2 have my word. My apologies. The material just
 3 riveting, so it keeps me distracted from the time.
 4 Now, compounding the problem of these future
 5 uncertainties, the Claimants make matters worse by
 6 arguing for a risk-free discount rate.
 7 Now, Mr. Kantor talks about the principles of
 8 discounting, and he states, "The discount rate used in
 9 a DCF valuation is the rate of return used to convert
 10 future cash flows into a present value that reflects
 11 the risks associated with those cash flows."
 12 Now, Mr. Rosen testified that we should leave
 13 these risks to the marketplace, and he confirms that
 14 his discount rate does not account for the
 15 uncertainties in his projections. However, Mr. Kantor
 16 noted, along with Rapinsky and Williams and Marbo--and
 17 this is all in Canada's pleadings and damages and
 18 Expert Reports--it is the very purpose of the discount
 19 rate to account for the risks inherent in a
 20 projection. Some commentators have gone so far to say
 21 that the use of a risk-free rate is egregious.
 22 See here, these are the words of Susan Pratt,

1315

04:10:53 1 but his report respects the same cavalier attitude.
 2 He cites no evidence--no evidence--to support the
 3 gross-up. And he says--and this is the only thing he
 4 says--"In the preparation of my updated calculation, I
 5 was advised by management that an award of damages
 6 would likely be taxable, in the United States, at an
 7 expected rate of 38 percent." That's all he says.
 8 That's the only guidance he gave Canada as to how to
 9 respond to a gross-up that accounts in his own
 10 admittance for about an [REDACTED] difference in his
 11 quantification.
 12 Now, as has been discussed, I forget,
 13 yesterday or the day about, the issue is plainly
 14 resolved by not having an award made payable to the
 15 U.S. investor or the U.S. parent, and Mr. Rosen
 16 confirmed as such. I asked him explicitly, "If an
 17 award is made payable to the Canadian entity--"
 18 "Yes."
 19 "--is a tax gross-up required?"
 20 "No."
 21 Problem solved.
 22 Now, it's almost five minutes, and I

1314

04:09:37 1 "While not the most common error, this is certainly
 2 one of the most egregious. Some analysts have even
 3 erroneously discounted a highly risky series of
 4 projected economic income by the Treasury bill rate."
 5 That's exactly what Mr. Rosen is doing. Mr. Rosen
 6 argues that a risk-free 2 percent discount rate is
 7 justified because the Claimants are not seeking lost
 8 profits, but he confirms that some of the same
 9 elements in his analysis would be those in a
 10 lost-profits analysis.
 11 Again, I won't read it into the transcript,
 12 but it's Page 950, Lines 3 through 13.
 13 And the last point I wish to raise is with
 14 respect to the gross-up. This is nothing more than a
 15 flagrant attempt to inflate the Claimants' damages.
 16 Mr. Rosen testified in his direct, he said, "In fact,
 17 when I was making my Final Report, I had an
 18 opportunity to interview the people in the Tax
 19 Department at ExxonMobil and discover that, in fact,
 20 the Claimant is a U.S. entity and will be taxed in the
 21 U.S."
 22 His report--and again, I mean no disrespect,

1316

04:12:00 1 appreciate the fact that the Tribunal has asked for
 2 some guidance in terms of what it can award in terms
 3 of formula or whatnot. Mr. President, would you like
 4 me to provide some comments on that?
 5 PRESIDENT van HOUTTE: Very briefly.
 6 MR. DOUGLAS: Very briefly.
 7 It's Canada's view that Article 1135 of the
 8 NAFTA governs, and Article 1135 of the NAFTA provides
 9 for issuance of Final Award for monetary damages.
 10 Thus, in Canada's view, the only option available to
 11 this Tribunal is to make a Final Award for monetary
 12 damages.
 13 Now, I note this isn't particularly helpful
 14 to the Tribunal. If the Tribunal does find a breach,
 15 it will look to damages. However, when it does, it is
 16 important to recall the legal limitations of an award.
 17 It's first important to note that damages are the
 18 Claimants' responsibility. It is their burden, and
 19 the damages must be reasonably certain. The Claimants
 20 attempt to skirt this issue in a number of ways that I
 21 will not, because for the sake of time, go into.
 22 It's important to recall in Mr. Walck's

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04:13:19 1 testimony he testified that the fact that the
 2 Claimants will suffer damage is not reasonably
 3 certain; thus, this distinction between fact and
 4 amount that the Claimants try to put forward to
 5 justify their, quote-unquote, best guess is not apt.
 6 Now, they also cite Himpurna to support their
 7 proposition that approximations are appropriate. And,
 8 indeed, many approximations were taken in Himpurna,
 9 but if you were to look at the discount rate used in
 10 Himpurna, it was a discount rate of 26 percent.
 11 Now, if the Tribunal is inclined--disagrees
 12 with Canada with respect to liability and disagrees
 13 with Canada's assessment of damages and is inclined to
 14 make an award, I know, Mr. President, both yourself
 15 and I and Mr. Legum have talked about the Experts
 16 coming together and whatnot. We haven't had a chance
 17 or opportunity to address that, so perhaps we can at a
 18 later date, if it interests the Tribunal.
 19 And I just wanted to note that Mr. Walck in
 20 his report does offer, in the alternative,
 21 quantification. This is the one that I,
 22 quote-unquote, made him do, and he removes some of the

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04:15:50 1 Professor Sands asked during the questioning, but
 2 several of the questions such as Question 3 that you
 3 posed us yesterday that they haven't yet answered. We
 4 know we have to answer 5-C, and we also have
 5 some--have begun to put together some State practice
 6 authority in Professor Sands's question from Tuesday.
 7 So, I would propose in terms of that that we
 8 have an opportunity to do some clarification,
 9 correction, but also fold that in with the other
 10 focused points that need to be dealt with, and that
 11 Nick and I can speak next week and work out an
 12 appropriate schedule and the manner of doing that.
 13 MR. GALLUS: I think it might be important to
 14 talk about the parameters on the submission to which
 15 Mr. Rivkin is referring. As far as I understood his
 16 proposition, the Claimants, in a further written
 17 submission, would get the opportunity to respond to
 18 what Canada has said here, but it would appear that
 19 Canada would not be given an opportunity to respond to
 20 what the Claimants have said.
 21 Furthermore, if I understand his proposition,
 22 Canada's submissions might be confined to certain

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04:14:44 1 assumptions that Mr. Rosen does in his report and
 2 offers his own quantification. And, of course, the
 3 discount rate is much higher.
 4 And barring any questions, those are my
 5 submissions.
 6 PRESIDENT van HOUTTE: Thank you very much.
 7 We will cross that bridge when we are there, but we
 8 are not there yet.
 9 There are no questions from the Tribunal.
 10 So, a short break in how we will spend the
 11 rest? Ideally, I guess we should finish by 5:00 or so
 12 because the Tribunal would still like to have some
 13 time. There are some administrative matters, there
 14 are some replies, maybe, but how do you see things?
 15 MR. RIVKIN: I think in terms of replies,
 16 frankly, there have been quite a few misstatements
 17 about our position, misstatements about the record
 18 that I think, rather than taking time this afternoon,
 19 it's been a long day, and because Canada already has
 20 to do some fair amount in writing, I would--I think we
 21 should simply respond in writing on an appropriate
 22 schedule. Canada has not just the questions that

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04:17:07 1 questions put by the Tribunal. The Claimants would
 2 have the opportunity to respond to anything that
 3 Canada said in its closing.
 4 MR. RIVKIN: That actually wasn't what I was
 5 saying.
 6 MR. GALLUS: I'm sorry, I thought that's what
 7 you were saying.
 8 MR. RIVKIN: That's why I thought we could
 9 talk about it next week.
 10 MR. GALLUS: Sorry, Mr. Rivkin.
 11 MR. RIVKIN: The original contemplation for
 12 today was that we would be done before lunch, and then
 13 we would each of a time for short rebuttal.
 14 Obviously, that didn't happen, but the arguments have
 15 been useful. But I think given the writing that you
 16 have to do, given what we would like to say, I'm sure
 17 we could work out an appropriate, focused and
 18 hopefully brief Post-Hearing Briefing schedule.
 19 PRESIDENT van HOUTTE: The Tribunal has
 20 appreciated the reluctance of both sides for
 21 Post-Hearing Briefs, and we share that reluctance;
 22 and, therefore, we are confident that whatever you do

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04:17:57 1 will be the minimal performance, if that's possible.
 2 Now, how you have to respond to each other's
 3 briefs and so on, maybe it's best that you discuss it
 4 among yourselves.
 5 MR. RIVKIN: I think we could work it out
 6 better.
 7 I know you mentioned some other
 8 administrative matters. Did you want to take a short
 9 break and come back and talk about the administrative
 10 matters?
 11 PRESIDENT van HOUTTE: Short break, or do it
 12 now?
 13 MR. RIVKIN: Now is fine.
 14 (Comments off microphone.)
 15 MR. RIVKIN: I know Mr. Douglas raised it,
 16 and I know the Tribunal raised it as a possibility--we
 17 know you're not there yet--but Claimants would be
 18 happy to if at any time the Tribunal felt it would be
 19 helpful to have the Experts come together, the Damages
 20 Experts come together for whatever
 21 conversation/questioning the Tribunal would want to
 22 have, we think it would be helpful before that to have

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04:20:20 1 should--I can mention the agreements that have been
 2 reached with them. The United States Government said
 3 that it would be happy to simply receive the
 4 transcript that eventually is public, and Mexico has
 5 told us that it would like to have the full
 6 transcript, but it will wait to do so until both the
 7 Parties have had an opportunity to review the
 8 transcript and make whatever corrections would be made
 9 in the ordinary course, and also that we would have
 10 the opportunity to designate the portions of the
 11 transcript as confidential that are--and that need to
 12 be protected by Mexico from public approval--public
 13 disclosure, rather, and the Parties agreed to that on
 14 that basis. But that will take a little bit of time,
 15 but as soon as we are able to do that, we would be
 16 happy to provide it to Mexico on that basis.
 17 One question for--two questions for the
 18 Tribunal.
 19 PRESIDENT van HOUTTE: Please.
 20 MR. RIVKIN: One is whether the Tribunal has
 21 any guidance to the Parties about how you would like
 22 us to address the issue of costs and whether--

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04:19:02 1 some indication of some focus and perhaps some
 2 preliminary comments from the Tribunal that would help
 3 the Experts know what to talk about.
 4 We would hope that the lawyers for each side
 5 could come and observe. Not participate, but observe.
 6 PRESIDENT van HOUTTE: Again, we will cross
 7 that bridge when we are coming there, and we are not
 8 yet there. I'm afraid that there is much ground to
 9 cover before, but it's good to know now that if it's
 10 useful that we can discuss a few things.
 11 MR. RIVKIN: You asked and we want to get
 12 back to you.
 13 A couple of other things that have been asked
 14 this week and mentioned this week, we mentioned at the
 15 beginning of the week the concerns we have about the
 16 latest order involving HSE. Given the other time
 17 requirements this week, we have not come back to you
 18 with our request for an action, if there is to be one,
 19 and we will try to do that and make an application, if
 20 need be.
 21 The two other NAFTA Parties asked for copies
 22 of the transcripts, and while we are on the record, I

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04:21:48 1 PRESIDENT van HOUTTE: That was my question,
 2 too.
 3 MR. RIVKIN: And my other question was a
 4 simpler one. You heard a lot of argument today.
 5 David is the best court reporter around, and I know he
 6 had access to our notes in doing so, but if it would
 7 be helpful for the Tribunal to have our notes in
 8 whatever random shape they are, in addition to the
 9 transcript, we would be happy to provide them. I have
 10 to say some of them are outlined, some of them are
 11 written out. It's a lot of different forms.
 12 PRESIDENT van HOUTTE: We will cross that
 13 bridge when we are there.
 14 What's Canada's view on what has been said,
 15 and do you have anything to add?
 16 MR. GALLUS: I don't believe, but if I could
 17 just take one second to confirm with my colleagues.
 18 (Pause.)
 19 MR. GALLUS: Canada has one comment we would
 20 like to make, and that is with regard to the
 21 Claimants' proposed submissions on State practice and
 22 opinio juris. Canada just wants to make two comments

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04:24:45 1 on this.

2 First of all, the evidence of State practice
3 and opinio juris has been at issue since the very
4 beginning of this dispute, and the Claimants, until
5 now, have not provided any evidence. We recognize
6 that Professor Sands has invited the Claimants to
7 submit such evidence, and we respect that, but we
8 think that perhaps Canada should have an opportunity
9 to respond to whatever is put in by the Claimants.

10 MR. RIVKIN: As I said, Nick, we could work
11 all that out in our conversation next week. If we
12 can't agree on something, we will have them solve it.

13 PRESIDENT van HOUTTE: With regard to the
14 costs, now we were briefly considering the English
15 practice that a decision on costs is rendered after an
16 award is issued so both have a clear view and don't
17 have to do useless work. However, under the Rules,
18 NAFTA Rules, the decision of costs has to be included
19 in the Award.

20 Now, how would you envisage--what is in your
21 mind the best methodology for costs?

22 MR. RIVKIN: Perhaps that's something we

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04:27:01 1 Tribunal the witnesses and the Experts because also
2 for them it has--it has been a big investment in time.
3 And I also would like to thank the
4 representatives of the United States and Mexico, who
5 we did not welcome officially because it was a
6 little--we didn't know their presence from the very
7 beginning, but we appreciate the interest in having
8 this case. And we also appreciate the submissions
9 those two countries have made under Article 1128, the
10 submissions of the 8th of July and of the 1st of
11 September.

12 And, as a matter of fact, if the Tribunal
13 deems or would deem it necessary, it intends to ask
14 the two countries more clarifications on their
15 submissions whenever that would be useful, but that
16 would also be done in--whatever we will receive from
17 the countries would also be submitted to the Parties
18 for further comments.

19 I have a formal question: Do you have
20 objections against the way the proceedings have been
21 conducted?

22 MR. RIVKIN: Claimants have no objections.

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04:25:54 1 should throw into the conversation next week and see
2 if we can work something out and come back to you.

3 PRESIDENT van HOUTTE: Fine. Because also
4 the documents you submit to sustain your demand and so
5 on, if you could agree to which extent you request
6 from each other evidence, that would be nice.

7 Are there other issues?

8 MR. GALLUS: Not from Canada.

9 MR. RIVKIN: Nothing from Claimants, except
10 to once again thank the panel for attention and long
11 days and good questions and the thorough understanding
12 of the case, and we look forward to continuing to work
13 with you on this case.

14 PRESIDENT van HOUTTE: We are starting to
15 thank, and I guess that Canada joins the thanking.

16 From the Tribunal, it is also the moment to
17 thank counsel--the different counsel for both sides
18 for their professionalism and courtesy towards each
19 other. You were not shouting to each other. It was
20 also your courtesy to the Tribunal. And, of course,
21 the excellent quality of your arguments.

22 I also want to thank in the name of the

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04:28:24 1 MR. GALLUS: Nor does Canada.

2 PRESIDENT van HOUTTE: Okay. Then we were
3 thinking that--that's only a suggestion from our part,
4 and maybe you will refine it in your discussions next
5 week, but that the documents or the briefs or whatever
6 you call it you would like to submit should be
7 submitted by the 15th of November. That's three
8 weeks. I don't know whether that's feasible. Let's
9 take that as a working hypothesis. We would
10 appreciate as short a period as possible.

11 And then as another principle, no further
12 submissions may be made except with the prior
13 authorization of the Tribunal. You agree?

14 MR. GALLUS: That's fine with Canada.

15 MR. RIVKIN: Yes.

16 PRESIDENT van HOUTTE: Okay, fine. And it is
17 now the moment to thank, in the name of the Tribunal,
18 David Kasdan for his work and the long hours he has
19 spent.

20 (Applause.)

21 PRESIDENT van HOUTTE: Then I also want to
22 thank Martina Polasek for her invaluable help and her

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04:29:42 1 presence and all the care she has given us. And, of
 2 course, I want to thank ICSID for the hospitality.
 3 And now I give the floor to my two
 4 colleagues.

5 ARBITRATOR JANOW: Well, I just also want to
 6 express my appreciation. I think the purpose of a
 7 hearing is to develop greater clarity on the issues,
 8 and I think this has absolutely achieved that through
 9 your excellent remarks and submissions. So, I just
 10 want to extend my personal appreciation to both
 11 Parties for this very professional and excellent
 12 experience. Thank you.

13 ARBITRATOR SANDS: And I join my colleagues
 14 and friends in commending really both sides for the
 15 excellent standards of advocacy and clarity, and the
 16 real decency and collegiality that both sides have
 17 gone about helping us. I think the hearing is about
 18 assisting a tribunal in dealing with the difficult
 19 issues, and identifying them and addressing them, and
 20 neither side has shirked from that responsibility, and
 21 it's very much appreciated.

22 There is one final thing, you, Mr. Rivkin,

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter,
 do hereby certify that the foregoing proceedings were
 stenographically recorded by me and thereafter reduced
 to typewritten form by computer-assisted transcription
 under my direction and supervision; and that the
 foregoing transcript is a true and accurate record of
 the proceedings.

I further certify that I am neither counsel
 for, related to, nor employed by any of the parties to
 this action in this proceeding, nor financially or
 otherwise interested in the outcome of this
 litigation.

 DAVID A. KASDAN

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04:30:51 1 mentioned a whole raft of things to address as one
 2 aspect simply by reminder, it's not that I love
 3 reading annexes and things, but I did mention, I for
 4 one, and I would welcome just the written briefings in
 5 the Canadian domestic proceedings and the application
 6 to the Supreme Court, which was the subject of the
 7 decision of the Supreme Court, would be useful to see
 8 to complete the picture, if that is possible.

9 Thank you very much.

10 PRESIDENT van HOUTTE: Thank you. And that
 11 brings us to the end of those four days. I wish you
 12 safe return, and all the best for the future. Thank
 13 you.

14 (Whereupon, at 4:31 p.m., the hearing was
 15 adjourned.)
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