

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Mobil Investments Canada Inc.**

**v.**

**Canada**

**(ICSID Case No. ARB/15/6)**

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**PROCEDURAL ORDER NO. 7**

***Members of the Tribunal***

Sir Christopher Greenwood QC, President of the Tribunal

Dr. Gavan Griffith QC, Arbitrator

Mr. J. William Rowley QC, Arbitrator

***Secretary of the Tribunal***

Ms. Martina Polasek

***Assistant Secretary of the Tribunal***

Ms. Kendra Magraw

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November 17, 2016

**Background**

1. On October 7, 2016, the Respondent requested leave to submit additional requests for production of documents from the Claimant based on the contents of the Claimant's Reply Memorial. The proposed document requests were filed in a Redfern Schedule.
2. By letter of October 12, 2016, the Claimant objected to the Respondent's request, as the document production phase had already been completed and because, according to the Claimant, the Respondent did not provide adequate justification for additional production.
3. On October 19, 2016, the Tribunal granted leave to the Respondent to proceed with the document requests in the Redfern Schedule, and fixed time limits for dealing with the requests.

**Order: Production of Documents**

4. The Tribunal has received and considered the following submissions of the parties:
  - The Respondent's requests for the production of documents of October 7, 2016;
  - The Claimant's objections to Canada's requests for the production of documents of November 2, 2016;
  - The Respondent's responses to Mobil's objections of November 8, 2016, in which, *inter alia*, the Respondent made a conditional offer to withdraw Requests 3, 4 and 6;
  - The Claimant's letter of November 15, 2016, responding to the offer of withdrawal; and
  - The Respondent's letter of November 16, 2016, withdrawing Requests 3, 4 and 6.
5. The Tribunal's decisions on the Respondent's document requests are set forth in the last column of the Redfern Schedule incorporated as Annex A to this Order.
6. In ICSID's letter of October 19, 2016, the Tribunal informed the parties that the Claimant should produce any documents in respect of which a request was granted within three weeks of this Order. Since, however, the Tribunal has granted only one request, and in view of the imminent deadline for the Respondent to file its Rejoinder Memorial, the Tribunal has decided that the Claimant shall produce the document(s) in question by close of business (Washington DC time) on November 28, 2016.

On behalf of the Tribunal:

[signed]

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Sir Christopher Greenwood QC  
President of the Tribunal  
Date: November 17, 2016

**ANNEX A – PROCEDURAL ORDER NO. 7**

*Mobil Investments Canada Inc. v. Canada*  
**(ICSID Case No. ARB/15/6)**

**CANADA'S REQUESTS FOR DOCUMENT PRODUCTION**  
**October 7, 2016**

**MOBIL'S OBJECTIONS TO CANADA'S OCTOBER 7, 2016 REQUESTS**  
**November 2, 2016**

**CANADA'S RESPONSES TO THE CLAIMANT'S NOVEMBER 2, 2016 OBJECTIONS**  
**November 8, 2016**

1. Pursuant to Procedural Order No. 1 of the Arbitral Tribunal dated November 24, 2015, and in conformity with Article 3(3) of the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), the Respondent, the Government of Canada hereby requests the Claimant, Mobil Investments Canada Inc. ("Mobil"), produce for examination, inspection and copying the documents described below on or before November 11, 2016.
2. Canada uses certain terms and abbreviations in its requests for documents, which have the following meanings:
  - a) "Accord Acts" means the Federal Accord Act and the Provincial Accord Act;
  - b) "and" means "and/or";
  - c) "Award" means the Award issued on February 20, 2015 in the *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* NAFTA Chapter 11 arbitration (ICSID Case No. ARB(AF)/07/4);
  - d) "Board" means Canada-Newfoundland and Labrador Offshore Petroleum Board and Canada-Newfoundland Offshore Petroleum Board, including the Board's past and present members, officers, employees, directors, or other representatives, to the extent they presently possess or control responsive material;
  - e) "CRA" means the Canada Revenue Agency;
  - f) "concerning" means addressing, relating to, referring to, describing, discussing, identifying, evidencing, constituting, and recording;

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- g) "Decision" means the Decision on Liability and on Principles of Quantum issued on May 22, 2012 in the *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* NAFTA Chapter 11 arbitration (ICSID Case No. ARB(AF)/07/4);
- h) "Documents" is used in the broadest sense possible and includes, without limitation, all originals, non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise), and drafts, whether printed or recorded (through a sound, video or other electronic, magnetic or digital recording system) or reproduced by hand, including but not limited to writings, recordings, and photographs, letters, correspondence, purchase orders, invoices, telegrams, telexes, memoranda, records, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, "Post-It" notes, stenographic or other notes, opinions or reports of consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, checks (front and back), contracts, agreements, appraisals, analyses, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, photostats, speeches, data sheets, pictures, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data tapes or readable computer-produced interpretations or transcriptions thereof, electronically transmitted messages ("e-mail"), voice mail messages, inter-office communications, advertising, packaging and promotional materials, and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to all information contained in any computer or electronic data processing system, or on any tape, whether or not already printed out or transcribed;
- i) "E&T" means education and training;
- j) "Federal Accord Act" means the Canada-Newfoundland Atlantic Accord Implementation Act;
- k) "Guidelines" means the 2004 Canada-Newfoundland and Labrador Offshore Petroleum Board Guidelines for Research and Development Expenditures;
- l) "Hibernia" means the Hibernia oil field located in the North Atlantic Ocean, 315 kilometers east-southeast of St. John's, Newfoundland and Labrador;
- m) "HMDC" means the Hibernia Management and Development Company Ltd.;
- n) "including" means "including, but not limited to";
- o) "NAFTA" means the North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America;
- p) "NPI" means net profits interest;
- q) "or" means "and/or";
- r) "Province" means the Province of Newfoundland and Labrador;

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- s) "Provincial Accord Act" means the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act;
  - t) "SR&ED" means Scientific Research and Experimental Development;
  - u) "R&D" means research and development; and
  - v) "Terra Nova" means the Terra Nova oil field located in the North Atlantic Ocean, 350 kilometers east-southeast of St. John's, Newfoundland and Labrador.
3. The use of the singular form of any word includes the plural and vice versa.
4. For convenience, the Government of Canada has organized its requests for documents under the headings in the schedule below. A request for documents or categories of documents may be relevant to more than one heading. These headings are not intended to limit the documents or categories of documents that are to be produced pursuant to the requests in the schedule.
5. Canada requests the documents set out below which are material and relevant to the arbitration and are believed to be in the possession, custody or control of:
- a) Mobil Investments Canada Inc.;
  - b) ExxonMobil Canada Investments Company;
  - c) ExxonMobil Canada Finance Company;
  - d) ExxonMobil Canada Ltd;
  - e) ExxonMobil Canada Resources Co;
  - f) ExxonMobil Canada Hibernia Company Ltd;
  - g) ExxonMobil Canada Properties;
  - h) ExxonMobil Corporation;
  - i) ExxonMobil Upstream Research Company;
  - j) Hibernia Management & Development Company Ltd (the proponent of the Hibernia project); and

- k) Suncor (the proponent of the Terra Nova project).
6. Additionally, as set forth in Procedural Order No. 2, all documents produced in *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) ("Mobil I Arbitration") may be used by the disputing parties in this arbitration. For that reason, the following requests do not seek documents produced by Mobil to the Government of Canada in the course of the Mobil I Arbitration, except to the extent that these documents were subsequently modified or supplemented.
7. As Canada was instructed by the Tribunal in Procedural Order No. 3 (February 10, 2016), any documents redacted or withheld by Mobil on the basis of legal privilege should be listed in a privilege log.

**Mobil's Objection of November 2, 2016:** Canada seeks documents from Mobil, as well as ten companies who are not parties to this arbitration. The IBA Rules only entitle Canada to seek, and this Tribunal to order, documents "in [the] possession, custody or control" of Mobil. See IBA Rules, Article 3(4). With respect to any responsive documents in the exclusive possession or custody of ExxonMobil Corporation, ExxonMobil Upstream Research Company, and/or Suncor, Mobil lacks sufficient control to compel their production to Canada, and therefore documents held by these entities are outside the possession, custody or control of Mobil. Mobil does not object to searching for or producing responsive documents from the remainder of the entities set forth in item number 5, above.

**Canada's Response to Mobil's Objection of November 4, 2016:** With respect to document requests Nos. 1, 2, 5, and 7, Canada maintains its request that the Claimant produce any responsive documents in the possession, custody or control of ExxonMobil Corporation and ExxonMobil Upstream Research Corporation. The Claimant is raising exactly the same objection to producing these documents as it did before the Tribunal in response to Canada's first set of document requests.<sup>1</sup> This argument was rejected by the Tribunal in Procedural Order No. 4 with respect to ExxonMobil Corporation and ExxonMobil Upstream Research Corporation, and the Claimant was ordered to "produce any responsive documents in the possession, custody or control of ExxonMobil Corporation and ExxonMobil Upstream Research Company".<sup>2</sup> The Claimant did not raise any issue of inability to comply with that Order due to lack of access to the documents. Further, as the Claimant states in its response to Canada's document request #4 in this Redfern Schedule, with respect to the "Gas Utilization Study (WAG Pilot)" expenditure at Hibernia, Mobil voluntarily "offered to search for responsive documents held by ExxonMobil Upstream Research Company".<sup>3</sup> All 4 of these documents requests are carefully limited in scope and very narrow, so expanding the search to these 2 entities will not be burdensome to the Claimant. The Claimant has proffered witness testimony from current and former employees of both ExxonMobil Corporation and ExxonMobil Upstream Research Company. It is thus not credible for the Claimant to argue that it cannot compel the production of responsive documents from this entity. The Claimant has also made direct claims concerning its facilities at ExxonMobil Upstream Research Company and ExxonMobil Corporation.<sup>4</sup> It is thus the Claimant who has raised the company as an entity, not Canada. It would be prejudicial to Canada if the Claimant were permitted to not produce documents by hiding behind its various corporate entities.

<sup>1</sup> Procedural Order No. 4, p. 4.

<sup>2</sup> Procedural Order No. 4, p. 5.

<sup>3</sup> Mobil's Objections to Canada's October 7, 2016 Requests, Document Request No. 4.

<sup>4</sup> See, e.g. CW-5, Witness Statement of Ryan Noseworthy, ¶ 23.

With respect to document requests Nos. 3 and 6, Canada maintains its request that the Claimant produce any responsive documents in the possession, custody or control of Suncor, the proponent of the Terra Nova project. The Claimant has the right to access documents from Suncor pursuant to the Terra Nova Operating Agreement.<sup>5</sup> The Claimant seeks compensation for 17 different R&D/E&T projects initiated by Suncor, but has not proffered any evidence from Suncor concerning these projects. It is highly prejudicial and unfair to Canada for the Claimant to seek compensation for specific R&D/E&T expenditures at the Terra Nova project, but refuse to produce relevant and material documents in this arbitration. Canada notes that the Claimant produced documents from Petro-Canada (the former proponent of the Terra Nova project) and Suncor in the Mobil/Murphy arbitration.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
1.	Documents concerning the amendment to the Hibernia Benefits Plan in 2010 to incorporate and apply the Guidelines to the project for its duration.	<p>The requested documents are relevant and material for the following reasons:</p> <p>For the first time in its Reply Memorial, the Claimant has alleged as an alternative argument that it only incurred the requisite "knowledge of loss" under NAFTA Articles 1116(2) and 1117(2) when it received a "call for payment" from the Board concerning its R&amp;D and E&amp;T spending obligations under the Guidelines (Reply, ¶¶ 73, 80). It also argues that it only incurred knowledge that the Guidelines would continue to apply to the Hibernia project "when the Claimant received the Board's letter dated 9 July 2012" (Reply, ¶ 81). However, in 2010, prior to the Claimant receiving the Board's 9 July 2012 letter, the Hibernia Benefits Plan was formally amended (Canada's Counter-Memorial, ¶ 40, C-054). The 2010</p>	<p><b><u>Relevance and Materiality</u></b></p> <p>Documents concerning the 2010 amendment to the Hibernia Benefits Plan are neither relevant nor material to the outcome of the parties' dispute. Canada mistakes the position regarding the Board's letter of July 9, 2012 (C-176) in relation to Canada's limitation defense. The July 9, 2012 letter represents "the express failure of Canada to cease applying the Guidelines to Mobil on the basis of the findings in the [Mobil I] Decision."<sup>6</sup> In other words, if Canada's breach of the NAFTA were not deemed a continuing one, contrary both to the outcome of the Mobil I Arbitration and to Mobil's position, then the relevant specific breach is Canada's refusal, as communicated in the July 9, 2012 letter, to "desist from committing a further breach of the NAFTA</p>	<p><b><u>Relevance and Materiality:</u></b></p> <p>First, the Claimant's entire objection is based on the presumption that the Claimant's theory of the case will be ultimately accepted by the Tribunal. The Claimant's theory that (i) if the application of the 2004 Guidelines does not constitute a continuing breach, a separate breach stems from the July 9, 2012 letter; (ii) the Claimant could not have "first acquired" knowledge of losses in 2010; and (iii) the reference to the waiver in the amendment makes the amendment irrelevant to the question of when the Claimant "first acquired" knowledge of the alleged breach and loss. These matters cannot be prejudged and foreclosed by the Tribunal at this stage – the only issue is whether the requested</p>	<p>This request is denied.</p>

<sup>5</sup> C-19, Amended and Restated Terra Nova Development and Operating Agreement [Excerpt] (Jul. 18, 2003), s. 12.8(d).

<sup>6</sup> Mobil's Reply Memorial, ¶ 77 (emphasis added).

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
		<p>amendment committed HMDC and the Claimant to applying the Guidelines to the Hibernia project throughout its lifetime. As a result of the amendment, the Claimant had knowledge that the Guidelines would apply to the Hibernia project throughout its lifetime.</p> <p>According to the Claimant, the date on which it accrued knowledge of ongoing application of the Guidelines is relevant to the question of when the Claimant acquired knowledge of breach, and that is relevant to determining whether the Claimant's claim is barred by the NAFTA's limitation period (Reply, ¶ 81). The Claimant's knowledge and understanding of the obligations HMDC undertook in 2010 when the Hibernia benefits plan was amended and the context surrounding that amendment is thus relevant and material to the outcome of the</p>	<p>by refraining from implementing the 2004 Guidelines as required by the <i>Mobil I Decision</i>.<sup>7</sup> The amendment to the Hibernia Benefits Plan, which preceded the Mobil I Decision and the July 9, 2012 letter, are therefore irrelevant.</p> <p>Further, for its limitations defense to succeed in the alternative case, Canada would need to prove not only when Mobil acquired knowledge of Canada's <i>breach</i> of the NAFTA, but also when Mobil acquired knowledge of incurring the <i>losses</i> at issue in this proceeding.<sup>8</sup> Thus, if Articles 1116(2) and 1117(2) have any application to this case, then the limitation period "runs from the <i>later</i> of these events[.]"<sup>9</sup> Mobil did not acquire and could not have acquired knowledge of the 2012-to-2015 losses at issue in this proceeding back in 2010.<sup>10</sup> Thus, documents concerning the amendment to the Hibernia Benefits Plan in</p>	<p>documents are relevant and material to the case, which Canada has established.</p> <p>Second, the requested documents are relevant to evaluating the Claimant's assertion that it "first acquired" knowledge that the Guidelines would continue to operate beyond the date of the Mobil/Murphy Decision on July 9, 2012. The amendment of the Hibernia Benefits Plan permanently affixed as part of the Hibernia Benefits Plan the 2004 Guidelines. The Claimant's understanding of the nature of that transaction between it and the Province, and what it meant for the operation of the Hibernia project is relevant and material to evaluating the Claimant's assertion that it "first acquired" knowledge as to ongoing application of the 2004 Guidelines only on July 9, 2012.</p> <p>Third, the Claimant's argument concerning the "not a waiver" note is off-point. Canada</p>	

<sup>7</sup> CE-1, Expert Report of Professor Dan Sarooshi, ¶ 99.

<sup>8</sup> NAFTA Article 1116(2) ("An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach *and knowledge that the investor has incurred loss or damage.*" (emphasis added)), Article 1117(2) (same, for an investor making a claim on behalf of an enterprise).

<sup>9</sup> CL-83, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award of June 8, 2009, ¶ 347 (emphasis added).

<sup>10</sup> Mobil's Reply Memorial, ¶¶ 78-80.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
		<p>dispute regarding NAFTA Article 1116(2) and 1117(2).</p>	<p>2010 are immaterial to the outcome of Canada's limitation defense.</p> <p>Additionally, the request should be denied for the following reason not mentioned in Canada's request. When in 2010 HMDC confirmed the application of the Guidelines in connection with the Hibernia Benefits Plan amendment, it expressly noted that its confirmation was "not a waiver of any right that a Hibernia owner may have under the NAFTA and is without prejudice" to the Mobil I Arbitration, which was then ongoing.<sup>11</sup></p> <p style="text-align: center;"><b><u>Foreseeability</u></b></p> <p>Canada's purported need for the requested documents was entirely foreseeable at the time of its first round of requests for production issued on March 29, 2016, which included 104 separate requests for production. Further, there is no indication that Canada decided to assert a limitations defense only after it issued its first round of document requests. The defense of limitations is an affirmative one on which</p>	<p>has not alleged in its statement of relevance and materiality that the amendment constitutes a waiver of the Claimant's NAFTA rights. Further, the relevance of the note, if any, to the issue of when the Claimant "first acquired" knowledge with regard to the application of the 2004 Guidelines to the Hibernia project cannot be foreclosed at this stage. The only issue is whether the requested documents are relevant and material, which Canada has established.</p> <p><b><u>Foreseeability:</u></b></p> <p>Canada agrees that pursuant to Procedural Order No. 1, Canada's request for documents should be limited to documents that were not reasonably foreseen as relevant and material at the time of its first request for documents.</p> <p>First, Canada's position on limitations as explained in its Counter-Memorial is that the Claimant "first acquired" knowledge as to the application of the 2004 Guidelines when the 2004 Guidelines were first propagated in</p>	

<sup>11</sup> R-21, Letter from Paul Leonard, HMDC to Max Ruelokke (November 16, 2010).

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p>Canada bears the burden of proof.<sup>12</sup> Before it raised this defense in its Counter Memorial, Canada had the opportunity to seek from Mobil any documents it might need to satisfy its evidentiary burden, including documents concerning the knowledge elements of NAFTA Articles 1116(2) and 1117(2). Because Canada already had its first bite at the apple, it should be barred from making this late request now.<sup>13</sup></p> <p style="text-align: center;"><b><u>Canada's Possession</u></b></p> <p>Canada already has documents responsive to this request. For instance, the proponent of the Hibernia Southern Extension project, HMDC, submitted an application for an amendment to the Hibernia Benefits Plan.<sup>14</sup> Canada has not alleged that this application, among other responsive documents in its possession, fails to reveal the "knowledge</p>	<p>2004.<sup>15</sup> Canada is not seeking documents at this time in support of that assertion.</p> <p>Second, Canada is seeking a limited range of documents relating specifically to the argument that the Claimant has raised in response to Canada's limitations defense for the first time in its Reply Memorial. The Claimant has argued as an alternative argument in its Reply Memorial that what is relevant is not the date when the 2004 Guidelines were adopted, and rather when the Claimant "first acquired" knowledge of the fact that the 2004 Guidelines would apply throughout the lifetimes of the Hibernia and Terra Nova projects. In furtherance of this argument, the Claimant has raised one interaction between the Board and the Claimant, namely the July 9, 2012 letter, as triggering such knowledge. In response, Canada is seeking documents with respect to another transaction between the</p>	

<sup>12</sup> Mobil's Reply Memorial, ¶ 35, ¶ 42. See also CL-70, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Relation to Harmac Motion of February 24, 2000, ¶ 11 ("Canada has the burden of proof of showing factual predicate to [the Article 1116(2)] defense").

<sup>13</sup> Procedural Order No. 1, § 15.2. Mobil notes that Canada specifically requested that this provision be included in the Procedural Order. See Letter from Mark Luz (Canada) to Martina Polasek (ICSID) of October 2, 2015. This circumstance makes it especially inappropriate to relieve Canada of the effects of this provision.

<sup>14</sup> C-NLOPB, Staff Analysis: Hibernia Benefits Plan Amendment Hibernia Southern Extension Project (September 2, 2010), p. 4, available at <http://www.cnlopb.ca/news/pdfs/hibsaben.pdf?lbisphpreq=1>.

<sup>15</sup> Canada's Counter-Memorial, ¶ 167.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p>and understanding of the obligations HMDC undertook in 2010 when the Hibernia benefits plan was amended and the context surrounding that amendment[.]”</p>	<p>Board and the Claimant, namely the amendment of the Hibernia Benefits Plan, to evaluate the impact of that transaction on the Claimant's knowledge. This is relevant and material to test the veracity of a counter-argument that was presented for the first time in the Claimant's Reply Memorial.</p> <p>Third, it is the Claimant's position that it is Canada's burden to prove when the Claimant “first acquired” knowledge. Even if the Claimant were right, which it is not, then Canada's alleged burden can only be discharged if the Claimant produces the requested documents to evidence its actual knowledge.</p> <p><b><u>Canada's possession:</u></b></p> <p>Canada confirms that it is not seeking from the Claimant any documents that are already in its possession. As the matter at issue is when the Claimant “first acquired” knowledge, a number of documents, including internal communications, forecasts, and notes, that would not be in Canada's possession may be responsive to the request.</p>	
2.	Documents confirming payment	The requested documents are relevant and material for the following reasons:	<b><u>Canada's Possession</u></b>	<b><u>Canada's possession:</u></b>	This request is granted.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
	<p>by the Claimant of royalties in May 2016 and which evidence the amount of such payment specifically arising from "the incremental expenditures awarded in the Mobil I arbitration", including how such amounts were calculated in accordance with applicable royalty agreements and/or regulations.</p>	<p>The Claimant has argued that it will repay to the Province any benefit arising from R&amp;D and E&amp;T royalty deductions it receives as compensation in this arbitration. The Claimant has argued that for this reason this Tribunal ought not to deduct the benefits accruing to it in the form of royalty deductions from any Award made to it. In support of these arguments, the Claimant has alleged for the first time in its Reply Memorial that it repaid the Province in May 2016 for the royalty deductions it took with respect to R&amp;D and E&amp;T expenditures at issue in the Mobil/Murphy arbitration by paying royalties on the compensation (award) it received in the Mobil/Murphy arbitration (Phelan 2, ¶ 27). However, the Claimant has not disclosed the financial savings it realized from the deductions on royalties it took during the years 2004-2012, nor has it disclosed the actual amount of royalties it allegedly paid in May 2016 to the</p>	<p>Canada already possesses the documents confirming Mr. Phelan's testimony that the Province received an increased payment of royalties to compensate for the incremental expenditures awarded in the Mobil I Arbitration.<sup>16</sup> Canada fails to explain why obtaining the corroborating documents from Provincial authorities would be "impossible," as Canada puts it, particularly given that it represented repeatedly (including recently) that the Province purportedly cooperated with it in searching for documents.<sup>17</sup> Because the requested documents are already in Canada's possession, custody, or control, and it would not be unreasonably burdensome for Canada to produce such documents, this request should be denied.<sup>18</sup></p> <p style="text-align: center;"><b><u>Relevance and Materiality</u></b></p>	<p>First, the Claimant is incorrect in stating that Canada already possesses documents confirming Mr. Phelan's testimony. Mr. Phelan discusses the alleged repayment in only one paragraph in his witness statement and no exhibits are cited by Mr. Phelan in support of any assertion in that paragraph.</p> <p>Second, Mr. Phelan's witness statement simply states that an "increased payment of royalties in effect compensated the Provincial government for the incremental expenditures awarded in the Mobil[/Murphy] Arbitration" and "Mobil was not left "overcompensated" as a result of the Mobil[/Murphy] Majority's decision not to reduce the award based on provincial royalty deductions."<sup>24</sup> This leaves Canada with a number of questions, including for example, the precise amount of royalty payment savings that were enjoyed by the Claimant and the amount that was allegedly repaid to the Province, and whether any</p>	

<sup>16</sup> CW-9, Second Witness Statement of Paul Phelan ("Phelan Statement II"), ¶ 27.

<sup>17</sup> C-371, Letter from Meaghan McConnell (Province of Newfoundland and Labrador) to Mark Luz (Government of Canada), dated September 16, 2016 (responding to Canada's request to perform a search for documents responsive to one of Mobil's requests for production concerning Provincial royalties).

<sup>18</sup> IBA Rule of Evidence, Art. 3.3(c). See also Procedural Order No. 1, § 28.1(a) (IBA Rules shall be followed as guidelines on the exchange of documents).

<sup>24</sup> CW-9, Second Witness Statement of Paul Phelan, ¶ 27.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
		<p>Province based on the Mobil/Murphy award and how such amounts were calculated.</p> <p>Without the requested financial information, it will be impossible for Canada to confirm whether the Claimant has in fact repaid the Province, in full or in part, for the benefits that accrued to it that were not accounted for by the Mobil/Murphy Tribunal, including how such "repayment" compares to the financial benefits of having made the deductions in the first place. The requested documents are relevant and material to ascertaining whether the Claimant has, in fact, fully "repaid" the Province to date, does not engage in "double-dipping" and is not overcompensated by the Tribunal in the event of a damages award.</p>	<p>According to Canada, the purpose of this request is to "confirm" Mobil's repayment to the Province in respect of compensation awarded through the Mobil I Arbitration. As explained above, Canada already has documentation that would confirm this fact. Canada fails to state why any additional responsive documents, to the extent they may exist, are relevant or material to any issue in dispute in this arbitration.</p> <p style="text-align: center;"><b><u>Foreseeability</u></b></p> <p>Canada's purported need for the requested documents was entirely foreseeable at the time of its first round of requests for production on March 29, 2016. During the Mobil I Arbitration, Mobil pledged to compensate the Province for any incremental expenditures for which it would be compensated in that proceeding. Thus, when Canada paid Mobil in respect of the Mobil I Award in April 2016,<sup>19</sup> Mobil's pledge to compensate the Province was</p>	<p>interest was paid or whether any accounting was made for the delay between when the Claimant benefited from the royalty deductions and when the Claimant repaid the Province.</p> <p>Third, Canada faces certain barriers attaining some types of detailed or specific information from the Province with respect to royalties.</p> <p>With respect to the specific amount of royalties that were paid, Canada's understanding is that pursuant to the Hibernia Royalty Agreement with respect to the Hibernia project<sup>25</sup>, and pursuant to the Royalty Regulations with respect to the Terra Nova project<sup>26</sup>, the Province cannot disclose certain types of detailed and/or specific information to Canada without the Claimant's consent.</p> <p>With respect to the royalty savings that the Claimant accrued from the R&amp;D and E&amp;T expenditures it was compensated for by the Mobil/Murphy tribunal, as explained by the</p>	

<sup>19</sup> C-391, Global Affairs Canada, "Update on Mobil Investments Canada Inc. and Murphy Oil Corp." (Apr. 4, 2016).

<sup>25</sup> C-193, Hibernia Southern Extension Benefits Agreement (Feb. 16, 2010), ¶ 6.1.

<sup>26</sup> CL-61, Newfoundland and Labrador Regulation 71/03 (the "Royalty Regulations, 2003"). s. 47.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p>triggered. Indeed, it raised this matter in the Counter Memorial of June 30, 2016.<sup>20</sup> Canada could have sought documents concerning Mobil's payment to the Province at the time of its first round of requests that contained 104 separate requests for production, yet did not do so. Because Canada did not timely seek documents concerning Mobil's payment to the Province, it should be barred from making this late request now.<sup>21</sup></p> <p style="text-align: center;"><b><u>Res Judicata</u></b></p> <p>Canada's document request is made in furtherance of its attempt to reopen the Mobil I Majority's decision that compensation should not be reduced due to the possible deductibility of incremental expenditures from Provincial royalty</p>	<p>Province in a letter provided by the Province and filed by the Claimant as an exhibit, "Mobil self-assesses which expenditures qualify as an eligible cost [for royalty deduction purposes] and does not provide additional documentation (unless requested), [and as such] Mobil is likely the sole party in possession of information regarding the quantum of Mobil's R&amp;D and E&amp;T expenditures and whether these amounts were submitted as royalty costs".<sup>27</sup> Canada has enclosed with this Redfern Schedule Exhibit R-239, which demonstrates the type of information that the Claimant provides to the Province for the purpose of its royalty deductions.<sup>28</sup> This document demonstrates that it is impossible to extract any relevant information about specific R&amp;D and E&amp;T expenditures submitted for royalty deductions from the documents that the Claimant has produced thus far and that the requested documents are</p>	

<sup>20</sup> Canada's Counter Memorial, ¶ 237 (noting that Mobil "agreed to repay the Province the amount of its [royalty] savings so as to avoid a 'double dip'").

<sup>21</sup> Procedural Order No. 1, § 15.2.

<sup>27</sup> C-371, Letter from Meaghan McConnell, Province of Newfoundland and Labrador to Mark Luz, Government of Canada (Sep. 16, 2016), p. 2.

<sup>28</sup> R-0239, Letter from [REDACTED], Exxon Mobil Canada to Wayne Andrews, Natural Resources, attaching 2005 Annual Hibernia Royalty Reconciliation (May 29, 2005).

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p>obligations.<sup>22</sup> As Canada's attempt is foreclosed by the doctrine of <i>res judicata</i>,<sup>23</sup> the requested documents bear no relevance or materiality to the outcome of this issue. The Tribunal should not countenance Canada's collateral attack on the Mobil I Award by allowing this document request.</p>	<p>necessary for Canada to adequately present its case.</p> <p>Fourth, the Claimant has not identified any difficulties it would face in obliging this narrow request that relates to documents its witness Mr. Phelan has presumably reviewed recently in order to make his assertion that the Claimant was not ultimately left overcompensated by the Mobil/Murphy tribunal's decision.</p> <p><b>Relevance and Materiality:</b></p> <p>The Claimant's objection on the basis of 'relevance and materiality' is entirely repetitive of its objection on the basis of 'possession', so Canada repeats its above arguments here.</p> <p>As stated in Canada's original statement of relevance and materiality for this document request, the requested documents are relevant and material to the assessment of whether the Claimant has in fact repaid its royalty savings such that there has been no overcompensation. This is relevant and</p>	

<sup>22</sup> C-2, Mobil I Award, ¶¶ 147-150 ("For several different reasons, the Majority finds that there should be no deduction to the Claimants' compensation to reflect deductions made under the royalty regime applicable to the Projects."); Canada's Counter Memorial, ¶¶ 234-241 (acknowledging that Mobil I Tribunal "did not deduct the royalty payment savings" yet arguing for such a deduction in this proceeding).

<sup>23</sup> Mobil's Reply Memorial, ¶¶ 164-166.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
				<p>material to any possible assessment of quantum of damages because the Claimant is asking that this Tribunal treat the issue in the same manner that the Mobil/Murphy tribunal did despite the availability of new evidence.</p> <p><b>Foreseeability:</b></p> <p>First, this document request is narrow and limited to a specific payment alleged to have been made by the Claimant. The Claimant did not make this payment to the Province until after Canada had already made its first request for documents and the tribunal had already issued an order on it. As such, it was impossible for Canada to request documents relating to the payment any earlier.</p> <p>Second, Canada did not make a broad request with respect to repayment of royalty savings in its first request for documents because as stated in Canada's Counter-Memorial, "[t]o the best of Canada's knowledge, ... the Claimant ha[d] to date not repaid any monies to the Province".<sup>29</sup> Thus, there were no relevant and material</p>	

<sup>29</sup> Canada's Counter-Memorial, ¶ 237.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
				<p>documents that it could have sought in relation to repayment.</p> <p><b>Res Judicata:</b></p> <p>Canada and the Claimant agree that <i>res judicata</i> is a general principle of international law. However, the scope of the doctrine, the manner in which it applies to this arbitration, and what claims and issues are barred from reconsideration as a result are live issues before this Tribunal that cannot be predetermined and foreclosed by the Tribunal at this stage.</p>	
3.	<p>Documents evidencing the year for which Claimant submitted the 2009 "Young Innovators Award" expenditure as an eligible expenditure for royalty deductions.</p>	<p>The Claimant asserts that the Province of Newfoundland and Labrador might treat "incremental" R&amp;D and E&amp;T expenditures differently from "ordinary course" R&amp;D and E&amp;T expenditures when it conducts royalty audits (Phelan II, ¶ 37). 2009 was the first year in which the Mobil/Murphy Tribunal found a compensable "incremental" expenditure at the Terra Nova project, the "Young Innovators Award" (the only R&amp;D and E&amp;T expenditure deemed to be "incremental" for the 2009 year at Terra Nova). The Terra Nova audit for 2009 has been completed and there is no evidence to</p>	<p><b><u>Canada's Possession</u></b></p> <p>Terra Nova's 2009 contribution to the Young Innovator's Award was submitted as an eligible cost against royalty obligations in 2010, as deductions to Provincial royalty obligations are submitted on a cash basis.<sup>30</sup> Canada already possesses the documents confirming Mr. Phelan's testimony to this effect. It fails to explain why obtaining the corroborating documents from Provincial authorities would not be possible, particularly given the Province's purported</p>	<p><b><u>Canada's Possession:</u></b></p> <p>First, as the Claimant is well aware, the information it provides to the Province for royalty audits is primarily numerical data. This data is not grouped into specific R&amp;D or E&amp;T expenditures and it is not possible to examine the data submitted by the Claimant and identify which transactions relate to which R&amp;D and E&amp;T expenditures. To illustrate the impossibility of extracting any relevant information from this data, Canada has enclosed with its responses a copy of the type of information that the Claimant</p>	<p>This request has been withdrawn, so no decision is now required.</p>

<sup>30</sup> CW-9, Phelan Statement II, ¶ 20.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
		<p>suggest that the Claimant did not successfully use the Young Innovators Award as a deduction to its royalty payments (see C-0371, "Letter from Meaghan McConnell (Province of Newfoundland and Labrador) to Mark Luz (Government of Canada)"). Yet, the Claimant's witness now testifies for the first time that he "expects" that the Claimant submitted this expenditure as an offset to its royalty payments in 2010 rather than 2009 (Phelan II, ¶ 20)), despite the fact that the Claimant sought documents from Canada concerning the treatment of its incremental spending at Terra Nova in 2009 (Procedural Order No. 5, Claimant's Document Request No. 1) and despite the fact that the Mobil/Murphy Award stated that this expenditure was undertaken by Terra Nova in 2009 (Mobil/Murphy Award, ¶89). The requested documents are relevant and</p>	<p>cooperation in searching for documents.<sup>31</sup> Because the requested documents are already in Canada's possession, custody, or control, and it would not be unreasonably burdensome for Canada to produce such documents, this request should be denied.<sup>32</sup></p> <p style="text-align: center;"><b><u>Relevance and Materiality</u></b></p> <p>Terra Nova's 2009 contribution to the Young Innovator's Award was awarded as an incremental expenditure in the Mobil I Award, and is not at issue in this proceeding concerning losses incurred from early 2012 through 2015.<sup>33</sup> Canada fails to explain why knowing "precisely when the Claimant submitted the [2009] Young Innovators Award as an offset to its royalty payments" is relevant and material to the outcome of any issue in dispute in this arbitration.</p>	<p>provides to the Province.<sup>39</sup> Thus, the manner in which the Claimant has grouped expenditures in this arbitration is quite distinct from the manner in which expenditures are presented to the Province for the purpose of royalty deduction audits. As explained in the letter provided by the Province and filed by the Claimant as an exhibit, "Mobil self-assesses which expenditures qualify as an eligible cost [for royalty deduction purposes] and does not provide additional documentation (unless requested), [and as such] Mobil is likely the sole party in possession of information regarding the quantum of Mobil's R&amp;D and E&amp;T expenditures and whether these amounts were submitted as royalty costs".<sup>40</sup> Thus, the question of when the Terra Nova contribution was submitted to the Province as an eligible royalty deduction cannot be</p>	

<sup>31</sup> C-371, Letter from Meaghan McConnell (Province of Newfoundland and Labrador) to Mark Luz (Government of Canada), dated September 16, 2016 (responding to Canada's request to perform a search for documents responsive to one of Mobil's July 15, 2016 requests for production concerning Provincial royalties).

<sup>32</sup> IBA Rule of Evidence, Art. 3.3(c). See also Procedural Order No. 1, § 28.1(a) (IBA Rules shall be followed as guidelines on the exchange of documents).

<sup>33</sup> C-2, Mobil I Award, ¶¶ 89-93, ¶ 129. For clarity, Mobil claims subsequent contributions to the Terra Nova Young Innovators' Award during the 2012-2015 period at issue in this proceeding.

<sup>39</sup> R-0239, Letter from ██████████, Exxon Mobil Canada to Wayne Andrews, Natural Resources, attaching 2005 Annual Hibernia Royalty Reconciliation (May 29, 2005).

<sup>40</sup> C-371, Letter from Meaghan McConnell, Province of Newfoundland and Labrador to Mark Luz, Government of Canada (Sep. 16, 2016), p. 2.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
		<p>material to confirm precisely when the Claimant submitted the Young Innovators Award as an offset to its royalty payments.</p>	<p>Further, Canada does not appear to dispute Mr. Phelan's testimony that eligible costs against Terra Nova royalty obligations are submitted on a cash basis, and therefore Terra Nova's 2009 contribution to the Young Innovator's Award was actually submitted in 2010.<sup>34</sup></p> <p style="text-align: center;"><b><u>Foreseeability</u></b></p> <p>Canada's purported need for the requested documents was entirely foreseeable at the time of its first round of requests for production of March 29, 2016. Since the Mobil I Arbitration, Canada has been on notice that Terra Nova's 2009 contribution to the Young Innovators' Award was claimed as an eligible cost against provincial royalty obligations. Canada did not ask for documents concerning this particular matter, despite having asked for other documents concerning expenditures to offset Terra Nova royalty obligations.<sup>35</sup> Canada should</p>	<p>answered by the Province. The information is solely in the Claimant's possession.</p> <p>Second, the Claimant has not identified any difficulties it would face in obliging this narrow request that concerns documents its witness Mr. Phelan has presumably reviewed recently in order to state his expectation that the expenditure was submitted as an eligible cost in 2010 and not 2009.<sup>41</sup></p> <p><b><u>Relevance and Materiality:</u></b></p> <p>First, as Canada explained in its initial statement of relevance and materiality, whether the incremental expenditure entitled the "Young Innovators Award" was submitted as an eligible cost in 2009 or 2010 is relevant and material because the Claimant alleges that the Province will treat incremental spending as a separate category of expenditure under the royalty regimes. The 2009 audit at Terra Nova is now complete so the requested documents are relevant and material to assessing the</p>	

<sup>34</sup> CW-9, Phelan Statement II, ¶ 20.

<sup>35</sup> Procedural Order No. 4, attaching Redfern Schedule of Canada's March 29, 2016 Requests for Production (Canada's request no. 8).

<sup>41</sup> CW-9, Second Witness Statement of Paul Phelan, ¶ 20.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p>be barred from making this late request now.<sup>36</sup></p> <p style="text-align: center;"><b><u>Res Judicata</u></b></p> <p>Canada's document request is made in furtherance of its attempt to reopen the Mobil I Majority's decision that compensation should not be reduced due to the possible deductibility of incremental expenditures from provincial royalty obligations.<sup>37</sup> As Canada's attempt is foreclosed by the doctrine of <i>res judicata</i>,<sup>38</sup> the requested documents bear no relevance or materiality to the outcome of this issue.</p>	<p>Claimant's allegation. If this cost was submitted in 2009 (in-line with the Mobil/Murphy tribunal's treatment of it as a 2009 expenditure<sup>42</sup>) and was successfully used by the Claimant as an eligible cost under the Terra Nova royalty regime then the Claimant's argument that incremental expenditures will be treated differently is wrong.</p> <p>The Claimant's witness has stated in his second witness statement that he "expects" that this cost was actually submitted as any eligible royalty cost in 2010 and not 2009.</p> <p>Canada is willing to withdraw this document request if the Claimant provides confirmation that this cost was submitted to the Province as an eligible cost for royalty deductions only in 2010 and not in 2009. The Claimant's witness has only testified that he "expects" that the cost was submitted in 2010 and does not appear to confirm the</p>	

<sup>36</sup> Procedural Order No. 1, § 15.2.

<sup>37</sup> C-2, Mobil I Award, ¶¶ 147-150 ("For several different reasons, the Majority finds that there should be no deduction to the Claimants' compensation to reflect deductions made under the royalty regime applicable to the Projects."); Canada's Counter Memorial, ¶¶ 234-241 (acknowledging that Mobil I Tribunal "did not deduct the royalty payment savings" yet arguing for such a deduction in this proceeding).

<sup>38</sup> Mobil's Reply Memorial, ¶¶ 164-166.

<sup>42</sup> C-2, Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada (ICSID Case No. ARB(AF)/07/4) Award dated February 20, 2015, ¶89.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
				<p>matter. It would be surprising if the "Young Innovators Award" cost was only submitted in 2010 and not in 2009 because the Claimant has previously argued before this tribunal<sup>43</sup> that documents concerning the Province's treatment of 2009 R&amp;D and E&amp;T expenditures at the Terra Nova project were relevant and material to the question of the Province's treatment of "incremental" expenditures. The "Young Innovators Award" was the only 2009 expenditure at Terra Nova deemed to be "incremental" by the Mobil/Murphy tribunal.</p> <p><b>Foreseeability:</b></p> <p>First, this document request is narrow and limited to that which is necessary to deduce in what year a single specifically identified expenditure was submitted to the Province as an eligible cost for royalty deductions. As the Claimant's witness admits and the Mobil/Murphy tribunal found, this expenditure was "incurred in 2009"<sup>44</sup>, and disagreement between the parties as to the year in which the payment was submitted as an eligible cost did not arise until the</p>	

<sup>43</sup> Procedural Order No. 5, Document Request No. 1, Claimant's Statement of Relevance and Materiality.

<sup>44</sup> CW-9, Second Witness Statement of Paul Phelan, ¶ 20.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
				<p>Claimant unexpectedly presented through its witness that despite the expenditure having been incurred in 2009, it was not actually paid nor submitted as an eligible cost until 2010.</p> <p>Second, more broadly, prior to the Claimant's filing of its Reply Memorial, along with the second witness statement of Mr. Phelan, Canada had no reason to anticipate that there was a disconnect between the year in which the Claimant "incurred" an expense for the purpose of its NAFTA claims and the year in which the Claimant submitted an expense as an eligible cost for the purpose of royalty deductions. The Claimant has not suggested otherwise in its objections. Canada cannot be expected to be familiar with all of the business practices of the Claimant.</p> <p><b><u>Res Judicata:</u></b></p> <p>Canada and the Claimant agree that <i>res judicata</i> is a general principle in international law. However, the scope of the doctrine, the manner in which it applies to this arbitration, and what claims and issues are barred from reconsideration as a result are critical and live issues before this</p>	

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
				tribunal that cannot be predetermined and foreclosed by the tribunal at this stage.	
4.	Documents concerning the rationale or justification for undertaking the "Gas Utilization Study (WAG Pilot)" expenditure at Hibernia, including, but not limited to, documents concerning potential recoverability of such expenditures from Canada under NAFTA Chapter 11, actual or potential tax savings or credits, deductions to royalty payments,	<p>This is a resubmission of Canada's document request #47 included in Canada's Redfern Schedule dated March 29, 2016. Canada respectfully requests that the Tribunal reconsider its previous order from May 18, 2016 concerning this request (Procedural Order No. 4, Redfern, Canada's Document Request No. 47).</p> <p>First, in its Reply Memorial, the Claimant filed as exhibits three documents concerning the Gas Utilization Study that were not in the possession of Canada and that Canada only saw for the first time after the Claimant filed its Reply Memorial (see C-386, C-387, C-388) (Phelan II, ¶¶ 93-94). The Claimant was thus in possession of documents concerning this expenditure that Canada was not previously given and Canada should have been allowed to review previously. It is unfair to compel Canada to respond to allegations relating to the Gas Utilization</p>	<p><b><u>Mootness</u></b></p> <p>Canada's request to have this document request reconsidered is moot. As explained below, Mobil already searched for and produced documents responsive to this request in accordance with its offer to do so, notwithstanding the Tribunal's ruling denying this document request.</p> <p>On March 29, 2016, Canada served 83 separate requests for production concerning the "rationale or justification" for each incremental expenditure claimed by Mobil in this proceeding, including the WAG Pilot (also known as the Gas Utilization Study).<sup>45</sup> While Mobil initially objected to producing documents on any of these requests, Mobil and Canada conferred in an effort to find a compromise.<sup>46</sup> Mobil offered to produce responsive documents held by five identified custodians, including Mr. Ryan Noseworthy (who led the team conducting the WAG Pilot and has provided testimony</p>	<p><b><u>Mootness and Relevance and Materiality:</u></b></p> <p>Canada is willing to withdraw this document request if the Claimant provides confirmation that it has produced all responsive documents dated from 1 February 2009 onwards from the files of Messrs. Sampath, Swett, Noseworthy, Durdle and Dunphy, and those in the possession, custody or control of URC. The Claimant produced documents from the files of these 5 witnesses for those dates for all of the other R&amp;D and E&amp;T expenditures that are at issue in this arbitration. Further, the Claimant previously voluntarily agreed to produce the documents in the possession, custody or control of URC.</p> <p><b><u>Specificity and Burden:</u></b></p> <p>Canada will limit its document request to those in the possession, custody or control of URC, and to documents contained in the files of Messrs Sampath, Swett,</p>	This request has been withdrawn, so no decision is now required.

<sup>45</sup> See Procedural Order No. 4, attaching Redfern Schedule of Canada's March 29, 2016 Requests for Production (Canada's requests nos. 22 through 104).

<sup>46</sup> Letter from Mark Luz (Canada) to Martina Polasek and Kendra Magraw (ICSID) of May 3, 2016.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
	offsets to Claimant's NPI, utilization of outcomes in other projects inside or outside the Province, returns on the expenditure goodwill, transfer of the expenditure into the Province from another jurisdiction, or any other actual or potential gain arising out of the expenditure.	<p>Study based only on documents the Claimant selects to disclose.</p> <p>Second, the Gas Utilization Study is a significant multi-year R&amp;D expenditure that originated at URC in Houston and is designed to increase oil production at the Hibernia project by ██████████ barrels of oil. While certain initial expenditures in 2010 and 2011 relating to this R&amp;D expenditure were deemed compensable by the Mobil/Murphy tribunal (e.g. the construction of a laboratory at Memorial University), since that time, the Claimant has leveraged this R&amp;D investment into a major activity of enhanced oil recovery at the Hibernia field (see Canada Counter-Memorial, ¶ 223). The requested documents are thus relevant and material to ascertaining whether the Gas Utilization Study is a compensable expenditure in this arbitration.</p> <p>Finally, at ██████████ the Gas Utilization Study is the largest expenditure for which</p>	<p>about the WAG Pilot).<sup>47</sup> For the WAG Pilot expenditure in particular, Mobil additionally offered to search for responsive documents held by ExxonMobil Upstream Research Company ("URC") (which Canada alleges, without foundation, had something to do with the origins of the WAG Pilot), and to search for any documents dating as far back as February 2009.<sup>48</sup> Mobil's offer was conditioned on Canada's agreement not to make an unrestricted "second round" request for documents on this expenditure, though Mobil was not opposed to Canada seeking a limited "second round" of requests for additional responsive documents possibly held by any of the other five identified custodians.<sup>49</sup> Even though Canada apparently did not accept this conditional offer, Mobil maintained its position when the parties' differences over</p>	<p>Noseworthy, Durdle and Dunphy. Canada will further limit its document request to documents dated from 1 February 2009 onwards.</p> <p><b><u>Res Judicata</u></b></p> <p>Canada and the Claimant agree that <i>res judicata</i> is a general principle in international law. However, the scope of the doctrine, the manner in which it applies to this arbitration, and what claims and issues are barred from reconsideration as a result are critical and live issues before this tribunal that cannot be predetermined and foreclosed by the tribunal at this stage.</p>	

<sup>47</sup> Letter of Kevin O'Gorman (Mobil) to Martina Polasek and Kendra Magraw (ICSID) of May 12, 2016. Upon request, Mobil will provide to the Tribunal the prior email correspondence between the parties concerning the matters contained in this letter.

<sup>48</sup> *Id.* Note also Letter from Adam Douglas (Canada) to Martina Polasek and Kendra Magraw (ICSID) of May 5, 2016.

<sup>49</sup> Letter of Kevin O'Gorman (Mobil) to Martina Polasek and Kendra Magraw (ICSID) of May 12, 2016. Mobil opposed an unrestricted "second round" of document requests because it "would enable Canada to raise in its Rejoinder Memorial new arguments based on 'second round' documents that neither Mobil nor its witnesses would have the opportunity to address during the Memorial stage." *Id.*

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL’S OBJECTIONS	CANADA’S RESPONSE TO MOBIL’S OBJECTIONS	DECISION OF THE TRIBUNAL
		<p>the Claimant seeks compensation in this arbitration (Noseworthy II, ¶¶19-32; Phelan II, ¶¶ 93-94). It is also the only expenditure for which the Tribunal has declined to order the production of documents. The requested documents are necessary for Canada to fully present its case and challenge the ██████ in compensation sought in connection with this expenditure. Without the production of documents Canada will be unfairly prejudiced in its ability to challenge some or all of this expenditure as non-compensable.</p>	<p>document requests were submitted to the Tribunal for resolution.<sup>50</sup></p> <p>Before the parties reached a compromise on these issues, on May 18, the Tribunal ruled on those requests seeking documents concerning the “rationale or justification” of the incremental expenditures, ordering that Mobil produce in accordance with its offer on all of the individual requests except for the WAG Pilot. Notwithstanding the Tribunal’s denial of Canada’s document request concerning the WAG Pilot, Mobil informed Canada by email on May 27, 2016 that it would produce documents concerning this request, as well.<sup>51</sup></p> <p>Given that Mobil fulfilled its offer to search for and produce documents, Canada’s attempt to reassert this document request, which is identical to the previous one, must be denied.</p> <p>Canada implies, wrongly, that Mobil “select[ively] disclose[d]” documents in response to Canada’s prior request. This accusation is untrue. As explained above,</p>		

<sup>50</sup> Letter of Kevin O’Gorman (Mobil) to Martina Polasek and Kendra Magraw (ICSID) of May 12, 2016.

<sup>51</sup> Appendix A to Canada’s Counter Memorial, at A-32 (acknowledging that Mobil produced responsive documents “[d]espite the Tribunal’s ruling”); Email from Kevin O’Gorman (Mobil) to Mark Luz (Canada) of May 27, 2016. Upon request, Mobil will provide this email to the Tribunal.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL'S OBJECTIONS	CANADA'S RESPONSE TO MOBIL'S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p>Mobil produced the documents that its search yielded.<sup>52</sup> The three factual exhibits that Canada references<sup>53</sup> reflect cost breakdowns of the WAG Pilot expenditure; they were not responsive to Canada's request seeking documents concerning the "rationale or justification" for this expenditure.</p> <p>In the end, Canada has ample evidence to assess the incremental nature of the WAG Pilot expenditure. Indeed, in Appendix A to its Counter Memorial, Canada references no fewer than eighteen separate exhibits in response to Mobil's claim for this expenditure.<sup>54</sup> It also has the benefit of Mr. Noseworthy's witness statements concerning the WAG Pilot in this arbitration, not to mention his testimony in the Mobil I Arbitration regarding this expenditure. Canada's speculative request for additional documents should not be allowed.</p>		

<sup>52</sup> No documents were withheld on the basis of any privilege. Upon request, Mobil can provide its Privilege Log of June 1, 2016.

<sup>53</sup> *I.e.*, C-386, C-387, C-388.

<sup>54</sup> Appendix A to Canada's Counter Memorial, at A-31 through A-36.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL’S OBJECTIONS	CANADA’S RESPONSE TO MOBIL’S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p style="text-align: center;"><b><u>Relevance and Materiality</u></b></p> <p>As explained above, Mobil already provided Canada with the documents responsive to this request that were created in or after February 2009 and were found in the custody of either Mr. Noseworthy or URC. Given the voluminous production already provided to Canada, any other potentially responsive documents in the possession of custodians besides Mr. Noteworthy or URC, if they even exist, would likely have little relevance or materiality to the incremental nature of the WAG Pilot expenditure.</p> <p>As for Canada’s attempt to obtain pre-February 2009 documents, the Mobil I Majority already held that the possibility that “preparatory work for this project may have been carried out in 2008” was neither significant nor relevant “for determining whether or not this spending was incremental[.]”<sup>55</sup> Canada provides no reason that might warrant re-opening this decision that pre-February 2009 activities are irrelevant.</p>		

<sup>55</sup> C-2, Mobil I Award, ¶ 63.

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			<p style="text-align: center;"><b><u>Specificity/Burden</u></b></p> <p>Canada fails to provide a date range for which it is reasserting this document request or to identify custodians or entities believed to have responsive documents. Further, Canada does not identify which entity's or person's "rationale or justification" is being sought. As such, it does not comply with the requirements of Article 3.3(a) of the IBA Rules regarding specificity and descriptiveness. Given the lack of specificity and descriptiveness, the resulting burden on Mobil to respond to this overbroad request runs afoul of Article 9.2(c) of the IBA Rules, as it constitutes an "unreasonable burden to produce the requested evidence."</p> <p style="text-align: center;"><b><u>Res Judicata</u></b></p> <p>Canada's document request is made in furtherance of its attempt to reopen the Mobil I Majority's decision that the WAG Pilot expenditure is incremental.<sup>56</sup> As Canada's arguments against the incremental nature of the WAG Pilot are foreclosed by</p>		

<sup>56</sup> C-2, Mobil I Award, ¶¶ 62-63.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	MOBIL’S OBJECTIONS	CANADA’S RESPONSE TO MOBIL’S OBJECTIONS	DECISION OF THE TRIBUNAL
			<p>the doctrine of <i>res judicata</i>,<sup>57</sup> the requested documents bear no relevance or materiality to the outcome of this issue. The Tribunal should not countenance Canada’s collateral attack on the Mobil I Award by allowing this document request.</p>		
5.	<p>Documents concerning the rationale for HMDC and/or the Claimant’s “change of view” as to the probability of HMDC funding the “Seabird Activity and Aviation Operations Study”.</p>	<p>The requested documents are relevant and material to ascertaining the process by which the Claimant self-assesses the probability of HMDC funding various expenditures and how it decides whether a particular expenditure is to be claimed in this arbitration as “ordinary course” or “incremental”. The Claimant testified initially that this study was incremental and claimed it as damages in this arbitration, but has now determined that it was undertaken in the ordinary course of business. (See Phelan II ¶¶7-8, Durdle II ¶¶ 3, 24-26. See Claimant’s initial defense of this study at Durdle I, ¶¶ 31-32). The rationale behind such decision-making is relevant and</p>	<p style="text-align: center;"><b><u>Mootness</u></b></p> <p>In his second witness statement, Mr. Durdle explains his view regarding the expenditure known as the “Seabird Activity and Aviation Operations Study.”<sup>58</sup> Following Mr. Durdle’s guidance, Mobil no longer claims compensation in respect of this expenditure.<sup>59</sup> Thus, the parties’ differences over this unclaimed expenditure are moot, and further documents concerning it will not assist the Tribunal in deciding any claim before it.</p> <p style="text-align: center;"><b><u>Relevance and Materiality</u></b></p>	<p><b><u>Mootness:</u></b></p> <p>As Canada explained in its initial statement of relevance and materiality, Canada is not seeking documents in relation to this expenditure for the purpose of challenging this specific expenditure, and rather for the purpose of understanding the Claimant’s methodology for its self-assessments as to whether expenditures are “incremental” or “ordinary course”.</p> <p><b><u>Relevance and Materiality:</u></b></p> <p>Canada and the Claimant agree that <i>res judicata</i> is a general principle in international law. However, the scope of the</p>	<p>This request is denied.</p>

<sup>57</sup> Appendix A to Mobil’s Reply Memorial, p. 105.

<sup>58</sup> CW-12, Second Witness Statement of Paul Durdle, ¶¶ 24-26.

<sup>59</sup> CW-9, Phelan Statement II, ¶¶ 7-8.

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		<p>material for Canada's defense that the methodology for making such determinations can be subjective, arbitrary and/or self-serving.</p>	<p>Despite the mootness of the "Seabird Activity and Aviation Operations Study" expenditure, Canada contends that the documents it now seeks may reveal the "methodology" for determining which expenditures are incremental. Canada's explanation is unavailing. The "methodology" for identifying incremental expenditures was established in the Mobil I Arbitration.<sup>60</sup> The documents requested by Canada are neither relevant nor material to elucidating the legal principles of quantum enunciated in the Mobil I Decision and Award.</p> <p style="text-align: center;"><b><u>Foreseeability</u></b></p> <p>Canada claims that it needs the requested documents to show how Mobil "decides whether a particular expenditure is to be claimed in this arbitration as 'ordinary course' or 'incremental'." Canada's purported need for documents concerning this subject was entirely foreseeable at the time of its first round of requests for production on March 29, 2016. Based on Mobil's Memorial, and having previously</p>	<p>doctrine, the manner in which it applies to this arbitration, and what claims and issues are barred from reconsideration as a result are critical and live issues before this tribunal that cannot be predetermined and foreclosed by the tribunal at this stage.</p> <p>It is the Claimant's position that (i) the Mobil/Murphy tribunal established a specific methodology for classifying expenditures as "incremental" or "ordinary course" and (ii) the methodology established is binding upon the parties in this arbitration. At this stage, the tribunal cannot predetermine that the parties are bound to a particular methodology for classification and foreclose all issues between the parties related to that matter.</p> <p>Second, even accepting the Claimant's theory that a specific method was established by the Mobil/Murphy tribunal as to identification of "incremental" expenditures, and that the method is binding on the parties, the requested documents are relevant and material to the question of how that method is applied by the Claimant in practice. Whether the Claimant is applying</p>	

<sup>60</sup> C-1, Mobil I Decision, ¶ 440; C-2, Mobil I Award, ¶ 52.

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			<p>participated in the Mobil I Arbitration, Canada knew that the incremental nature of the claimed expenditures would be a material issue in this proceeding. Canada could have sought documents concerning the "methodology" for determining which expenditures were incremental. Canada did not do so, and therefore it should be barred from making this late request now.<sup>61</sup></p>	<p>the method in a manner that is objective, not self-serving and not risky would still be relevant and material to evaluating the reliability of the Claimant's classification of expenditures as "incremental" as opposed to "ordinary course". Details matter because according to the Claimant, the methodology that is applicable largely allows the Claimant to self-assess whether a given expenditure is "incremental" or "ordinary course".</p> <p><b>Foreseeability:</b></p> <p>First, this document request is narrow and limited to specific treatment regarding an identified single expenditure. The treatment in question (that is, re-classifying an expenditure that was initially classified as "incremental" as "ordinary course") did not take place until Canada had already made its first request for documents and the Tribunal had already issued an order on it. As such, it was impossible for Canada to request documents relating to this treatment any earlier.</p> <p>Second, the Claimant's arguments in its Memorial centered on the idea that the</p>	

<sup>61</sup> Procedural Order No. 1, § 15.2.

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				<p>Claimant had pursued all of the incremental expenditures at issue with knowledge from the very inception of the projects that the R&amp;D or E&amp;T was “incremental”. Thus, Canada’s document requests focused on the “rationale or justification” for undertaking the various projects at issue.<sup>62</sup> However, this unexpected change in classification confirmed for the first time that this is not always the case, and that the classification actually happens haphazardly at various times throughout the course of projects. The documents concerning the Claimant’s methodology for classification are therefore relevant and material.</p>	
6.	<p>Documents related to the ██████████ deduction to Claimant’s claim regarding the “H2S Corrosion and Materials Laboratory and Basic Research on</p>	<p>Since providing his initial statement on February 11, 2016, Mr. Sampath has conceded that “a portion of these expenditures [relating to the H2S Study] may have been incurred in the ordinary course” (Sampath II, ¶ 117), in addition to those elements of the H2S Study that Claimant previously acknowledged were “ordinary course” (Sampath I, ¶ 101). In light of this reassessment and in light of the</p>	<p><b><u>Mootness</u></b></p> <p>The Mobil I Majority held that “the Claimants may claim whatever portion of the H2S spending they believe is incremental, in later proceedings.”<sup>63</sup> For this arbitration, Mr. Sampath extracted the cost components of certain expenditures relating to the Terra Nova H<sub>2</sub>S Souring</p>	<p><b><u>Mootness:</u></b></p> <p>Canada is willing to withdraw this document request if the Claimant provides confirmation that all documents responsive to this request have already been produced by the Claimant.</p> <p>As Canada has not received a single document evidencing internal communications/discussions or in-person</p>	<p>This request has been withdrawn, so no decision is now required.</p>

<sup>62</sup> Procedural Order No. 4, Document Request Nos. 22-104.

<sup>63</sup> C-2, Mobil I Award, ¶ 164.

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	H2S Souring" expenditure.	Mobil/Murphy tribunal's previous conclusion that aspects of the H2S study were not "incremental," the requested documents are relevant and material to ascertaining the process by which the Claimant designates various aspects of the H2S Study as being "incremental" versus "ordinary course" spending by Suncor.	Control Program that were incremental. <sup>64</sup> Mobil has submitted Mr. Sampath's worksheet in support of his calculation, <sup>65</sup> and also Mr. Phelan's revised back-up spreadsheet reflecting this calculation. <sup>66</sup> Thus, Canada already has the documents responsive to this request, rendering it moot.	meetings leading up to and culminating in the decision to modify the amount of damages sought in relation to this expenditure, or a privilege log, it appears unlikely that Canada already has all of the documents that are responsive to this request. The document that the Claimant has provided simply contains a series of numbers with no explanation as to how Mr. Sampath arrived at his re-characterization/re-calculation.	
7.	Documents concerning the presentation Mr. Sampath made at URC headquarters "about the Guidelines and HMDC's need for new R&D proposals", the "R&D proposals	For the first time in its Reply Memorial, the Claimant has argued that the involvement of ExxonMobil Upstream Research Company (URC) in R&D is not necessarily indicative of ExxonMobil's interest in the underlying R&D (Sampath II, ¶ 32). Mr. Sampath states that "how URC became involved with some HMDC-funded projects is relevant" to understanding why URC's involvement does not suggest that ExxonMobil would have pursued the R&D in question	<b><u>Relevance and Materiality</u></b> This request seeks documents on a matter that is neither relevant nor material to the issues before this Tribunal. As in the Mobil I Arbitration, this Tribunal is faced with assessing Mobil's losses. <sup>67</sup> Canada contends that understanding "how and why URC became involved in some of HMDC's R&D projects" may be "indicative of whether a given R&D expenditure is	<b><u>Relevance and Materiality:</u></b> First, the Claimant's entire objection is based on the assumption that the Claimant's theory of the case will be ultimately accepted by the Tribunal. Canada and the Claimant agree that <i>res judicata</i> is a general principle in international law. However, the scope of the doctrine, the manner in which it applies to this arbitration, and what claims and issues are barred from reconsideration	This request is denied.

<sup>64</sup> CW-10, Second Witness Statement of Krishnaswamy Sampath, ¶¶ 116-117.<sup>65</sup> C-366, K. Sampath, Estimation of incremental and 'ordinary course' expenditures (Undated).<sup>66</sup> CW-9, Phelan Statement II, Annex M (Revised).<sup>67</sup> C-2, Mobil I Award, ¶ 32 (noting that the Mobil I Majority was faced with "assessing the Claimants' losses").

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	<p>from URC personnel" that were received by Mr. Sampath subsequent to his presentation at URC headquarters, and any correspondence, arrangements or agreements with URC arising therefrom, including budgetary allocations.</p>	<p>irrespective of the Guidelines (Sampath II, ¶ 32). However, URC's involvement with R&amp;D projects claimed in this arbitration and whether such involvement speaks to the proper classification of such expenditures as an "ordinary course" or "incremental" expenditure is in dispute between the parties.</p> <p>In his explanation as to how URC became involved in such projects, Mr. Sampath explains that he "delivered a presentation [in Houston] about the "Guidelines and HMDC's need for new R&amp;D proposals" (Sampath II, ¶ 35), but does not provide a copy thereof. Mr. Sampath further notes that he "received a number of R&amp;D proposals from URC personnel who had heard about HMDC's call for proposals" (Sampath II, ¶ 37). However, Mr. Sampath does not clarify which specific R&amp;D proposals were received in this manner, what the understanding of those who were submitting proposals were, and/or what arrangements were made with URC regarding the R&amp;D concerned.</p> <p>The requested documents are relevant and material to ascertaining what arrangements</p>	<p>incremental or ordinary course." In fact, the Mobil I Arbitration settled that incremental expenditures are those that Mobil would not have incurred in the ordinary course of business but for the Guidelines. Accordingly, "the mere fact that an expenditure may be beneficial to the Claimants or Projects does not definitively answer whether it was undertaken as a result of the Guidelines or not" since "[a]ny sensible investor would not choose to make an expenditure that was wholly superfluous to the investment."<sup>68</sup> In light of this binding Mobil I tribunal decision, Canada fails to provide a logical explanation for why the "contemporaneous motivations" of URC or any other entity might bear on whether HMDC and, by extension, Mobil incurred a given expenditure in the ordinary course of business.</p> <p style="text-align: center;"><b><u>Foreseeability</u></b></p> <p>Canada's purported need for the requested documents was entirely foreseeable at the time of its first round of requests for production on March 29, 2016. During the</p>	<p>as a result are critical and live issues before this tribunal that cannot be predetermined and foreclosed by the tribunal at this stage. It is the Claimant's position that benefits accrued to the Claimant, the projects, or the other project owners are wholly irrelevant to the question of whether an expenditure is compensable or not. This validity of the Claimant's position cannot be predetermined and foreclosed by the Tribunal at this stage.</p> <p>Second, as Canada explained in its initial statement of relevance and materiality, the documents sought are relevant to Canada's argument that the Claimant should not be compensated for its R&amp;D and E&amp;T expenditures because the Claimant or other entities in its corporate chain would have pursued the underlying R&amp;D and E&amp;T expenditures irrespective of the application of the 2004 Guidelines to the Hibernia and Terra Nova projects, and/or significantly benefit from them. The Claimant has not disputed the fact that the requested documents are relevant and material to Canada's arguments.</p>	

<sup>68</sup> C-2, Mobil I Award, ¶ 51.

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		<p>actually ensued from this alleged request for assistance and what the contemporaneous motivations were on the side of both HMDC and URC, including whether there was an intention to leverage the Hibernia project to advance ExxonMobil’s worldwide research interests (see Canada’s Counter Memorial ¶¶ 226-228, Appendix A).</p> <p>The requested documents are relevant and material to understanding how and why URC became involved in some of HMDC’s R&amp;D projects, which according to the Claimant, is relevant to ascertaining if URC’s involvement is indicative of whether a given R&amp;D expenditure is incremental or ordinary course.</p>	<p>Mobil I Arbitration, Canada alleged that URC’s possible involvement in HMDC’s R&amp;D activity signifies that it was undertaken in the ordinary course of business.<sup>69</sup> Canada repeated this allegation in connection with its first round of document requests<sup>70</sup> and in the Counter Memorial itself.<sup>71</sup> Because Canada did not make this document request when it had the opportunity to do so, despite having foreseen this alleged issue, it should be barred from making this late request now.<sup>72</sup></p> <p style="text-align: center;"><b><u>Res Judicata</u></b></p> <p>Canada’s document request is made in furtherance of its attempt to reopen the Mobil I Majority’s decision that the incremental nature of claimed expenditures does not depend on showing that no benefits</p>	<p>Third, the question of what motivated the pursuit of specific R&amp;D and E&amp;T expenditures is relevant to the question of whether or not the Claimant incurred the particular expenditures as a result of the Guidelines. As such, even accepting the Claimant’s theory of the case, the requested documents are relevant and material.</p> <p><b><u>Foreseeability:</u></b></p> <p>Canada sought documents concerning the “rationale or justification”<sup>75</sup> for the pursuit of every expenditure for which damages are sought in this arbitration. On the basis of documents that were obtained through those requests, Canada argued in its Counter-Memorial that URC and the ExxonMobil corporate chain were benefitting from the expenditures identified as “incremental” by the Claimant in the arbitration. In response, the Claimant offered in its Reply Memorial</p>	

<sup>69</sup> C-2, Mobil I Award, ¶ 61.

<sup>70</sup> Procedural Order No. 4, attaching Redfern Schedule of Canada’s March 29, 2016 Requests for Production, p. 44 n.36 (claiming that “the Gas Utilization Study was initiated at the Claimant’s Upstream Research Facility in Houston in at least 2008”); Letter from Adam Douglas (Canada) to Martina Polasek and Kendra Magraw (ICSID) of May 5, 2016.

<sup>71</sup> Canada’s Counter Memorial, ¶¶ 226-228.

<sup>72</sup> Procedural Order No. 1, § 15.2.

<sup>75</sup> Procedural Order No. 4, Document Request Nos. 22-104.

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			<p>accrued to the Projects' owners, including Mobil.<sup>73</sup> As Canada's arguments are foreclosed by the doctrine of <i>res judicata</i>,<sup>74</sup> the requested documents bear no relevance or materiality to the outcome of this issue. The Tribunal should not countenance Canada's collateral attack on the Mobil I Award by allowing this document request.</p>	<p>a different explanation (as explained in Canada's initial statement of relevance and materiality) as to why documents may show the involvement of URC. This is Canada's first opportunity to request documents concerning the explanation provided in response. The request is limited to specific statements in a witness statement that was filed by the Claimant with its Reply Memorial. Responsive documents are necessary for Canada to evaluate the veracity of the Claimant's explanation.</p> <p><b><u>Res Judicata:</u></b></p> <p>Canada and the Claimant agree that <i>res judicata</i> is a general principle in international law. However, the scope of the doctrine, the manner in which it applies to this arbitration, and what claims and issues are barred from reconsideration as a result are critical and live issues before this tribunal that cannot be predetermined and foreclosed by the tribunal at this stage.</p>	

<sup>73</sup> C-2, Mobil I Award, ¶ 51.

<sup>74</sup> Mobil's Reply Memorial, ¶ 150 (citing C-2, Mobil I Award, ¶ 51).