INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

BETWEEN:

MOBIL INVESTMENTS CANADA INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. ARB/15/6)

PROCEDURAL ORDER NO. 9
DECISION ON SCOPE OF DAMAGES PHASE

Members of the Tribunal

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

Mr J. William Rowley, QC

Dr Gavan Griffith, QC

Secretary of the Tribunal

Ms Lindsay Gastrell

11 December 2018

I. PROCEDURAL HISTORY

1. The present case arises out of the Claimant's investment in the Hibernia and Terra Nova oil field development projects located off the coast of the Canadian province of Newfoundland and Labrador (together, the "Projects") and the application by the Canada-Newfoundland and Labrador Offshore Petroleum Board (the "C-NLOPB") of the Guidelines for Research and Development Expenditures (the "2004 Guidelines"), to the Projects. In an earlier arbitration involving the same disputing Parties[1] ("*Mobil I*"), the Claimant had challenged the application of the 2004 Guidelines to the Projects. The majority of the tribunal in *Mobil I* held that Canada had breached the performance requirement prohibition in NAFTA Article 1106 and awarded the claimants a portion of the damages they sought for expenditures incurred under the 2004 Guidelines during the period 2009 to 1 January 2012 (in respect of Terra Nova) and 1 May 2012 (with respect to Hibernia).[2]

2. On 16 January 2015, the Claimant commenced fresh proceedings ("*Mobil II*") claiming damages for the continued application by the C-NLOPB of the 2004 Guidelines after 1 January 2012 (Terra Nova) and 1 May 2012 (Hibernia). It adduced evidence in respect of damages allegedly sustained in respect of the period from those dates to 31 December 2015. The Claimant did not adduce evidence in respect of losses allegedly incurred after that date.

3. The Respondent maintained, *inter alia*, that the claims in *Mobil II* were barred by Articles 1116(2) and 1117(2) of NAFTA and by the doctrine of *res judicata.* The Respondent accepted that, if those arguments regarding jurisdiction and admissibility, were rejected, then it could not contest liability in view of the *Mobil I Decision* but it challenged the Claimant's arguments regarding the quantum of damages.

[1] Murphy Oil Co. was also a Claimant in *Mobil I* (hence the references in quotations from *Mobil I* to "the Claimants") but it has not participated in the present proceedings.
[2] *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Canada*, ICSID Case No. ARB(AF)/07/4: Decision on Liability and on Principles of Quantum, 22 May 2012 ("*Mobil I Decision*"); Award, 20 February 2015 ("*Mobil I Award*").

4. During the hearings in July 2017, the Tribunal decided that it would rule on the time bar and *res judicata* arguments and, only if those arguments were rejected, would it then consider the issue of damages.

5. On 13 July 2018, the Tribunal dispatched to the Parties[3] its Decision on Jurisdiction and Admissibility (the "*Mobil II Decision on Jurisdiction and Admissibility*") in which it rejected the Respondent's jurisdiction and admissibility arguments. The Tribunal stated that it would "proceed to post-hearing briefing on the remaining questions" and that it would "consult the Parties regarding the schedule for such pleading".[4]

6. Accordingly, the Secretary wrote to the Parties on 17 July 2018 inviting them to confer and agree upon a schedule for briefing the damages issues. That letter envisaged that there would be two rounds of briefing.

7. On 1 August 2018, the Claimant wrote to the Tribunal informing it that the Parties had been unable to agree and asking the Tribunal to permit the Claimant to adduce further evidence in respect of damages actually incurred by the Claimant after 31 December 2015, to "update" the evidentiary record in respect of other damages actually incurred and to submit evidence in respect of prospective future losses which would be incurred on the assumption that the C-NLOPB would continue to enforce the 2004 Guidelines until the end of the life of the Projects. In addition, the Claimant sought the leave of the Tribunal to adduce further evidence regarding the precise date on which damages had been incurred during 2012 in the event that Canada renewed its argument that it could only be held liable with regard to damages incurred after the C-NLOPB's letter to the Claimant dated 9 July 2012, in which the C-NLOPB had stated that it would continue to enforce the 2004 Guidelines notwithstanding the *Mobil I Decision*.[5] Finally, the Claimant proposed that the Tribunal set a schedule for the briefing on damages which would allow the Claimant to file its submissions after 31 August 2018, because on 31 July 2018 the Claimant had written to the C-NLOPB inviting it, in light of the *Mobil II Decision on Jurisdiction and Admissibility*, to cease enforcement of the

[3] The Decision had actually been completed in June but the Parties had requested thirty days notice of any forthcoming decision or award.
[4] *Mobil II Decision on Jurisdiction and Admissibility*, para. 213.
[5] Exhibit C-176.

2004 Guidelines with regard to the Claimant and requesting a response by the end of August 2018.[6]

8. By a letter of the same date, the Respondent opposed the Claimant's requests which it described as an abuse of procedure and asked that, if the Tribunal was not going to reject those requests out of hand, the Respondent should be given the opportunity to make detailed submissions thereon.

9. On 6 August 2018, the Claimant responded to the Respondent's letter of 1 August, denying that its requests were an abuse of process.

10. On 9 August 2018, the Tribunal wrote to the Parties inviting them to file submissions of the following matters:-

    (a) does the Tribunal have the power to entertain the Claimant's[7] claims for

        (i) damages for actual losses allegedly incurred after 1 January 2016;

        (ii) damages for future losses that would allegedly be incurred in the event that the Board decides to continue enforcing the 2004 Guidelines against the Claimant;

    (b) if the Tribunal has such power, whether it should exercise it in respect of either or both of the two categories of damages set out above. In particular, the Tribunal wishes to hear what prejudice the Claimant asserts would follow from a decision not to exercise that power and what prejudice Canada maintains it would suffer in the event that the Tribunal decided to allow the Claimant to pursue the claims.

11. The Tribunal's letter of 9 August 2018 also stated that the Tribunal considered that it would be better if it took its decision after it had heard the C-NLOPB's response to the letter from the Claimant of 31 July 2018. Accordingly, it set a deadline of 14 September 2018 for the Claimant's submission and of 28 September 2018 for that of the Respondent.

12. On 31 August 2018, the C-NLOPB replied to the Claimant's letter of 31 July 2018.[8]

[6] Exhibit C-405.
[7] The letter inadvertently referred to "the Claimants"; this mistake has been corrected in the extract set out in this Order.
[8] Exhibit C-407.

13. On 14 September 2018, the Claimant filed "Mobil's Brief on the Tribunal's Power to Entertain Mobil's Present and Future Damages and Whether the Tribunal should Exercise that Power" (the "*Claimant's Brief*").

14. On 28 September 2018, the Respondent filed its "Reply to the Claimant's September 14, 2018 Submission on Scope of Damages" (the "*Respondent's Brief*").

II. THE CORRESPONDENCE BETWEEN THE CLAIMANT AND THE CNLOPB

15. Before summarising the arguments of the Parties, the Tribunal considers that it is worth setting out in full the relevant parts of the correspondence between the Claimant and the C-NLOPB.

16. On 31 July 2018, Ms Carman Mullins, the President of ExxonMobil Canada Inc., wrote to the C-NLOPB on behalf of the Claimant in the following terms:

> …
>
> As you may be aware, on July 13, 2018, a Tribunal constituted under the North American Free Trade Agreement issued its *Decision on Jurisdiction and Admissibility* ("Mobil II Decision") in which it rejected Canada's objections to the claim of Mobil Investments Canada Inc. in connection with the Guidelines for Research and Development Expenditures of October 2004 ("Guidelines"). The Tribunal also spoke to Canada's duty to perform its obligations under the treaty in good faith, and to cease any continuing violation of the treaty. … The Tribunal has requested additional briefing from the parties on Mobil's damages in fairly short order.
>
> In light of the Mobil II Decision, Mobil expects the C-NLOPB will cease the enforcement of the Guidelines and related commitments and undertakings (such as those contained in project operations authorizations) with respect to Mobil's participation interests in the projects. On behalf of Mobil, we seek the C-NLOPB's confirmation and assurance of cessation. The C-NLOPB's assurance in this regard would obviate the need for Mobil to request future losses in connection with the Guidelines.
>
> We kindly request to receive the above-mentioned confirmation and assurance within a month of this letter, which is needed for the good order of the pending arbitration. In the event the C-NLOPB is unable to do so, then Mobil will regrettably assume that the C-NLOPB intends to continue to enforce the Guidelines with respect to these projects.[9]
>
> …

[9] Exhibit C-405.

17. On 31 August 2018, Mr Ed Williams, the Acting Chair and CEO of the C-NLOPB, replied as follows:

> …
>
> The C-NLOPB is not in a position to provide comment on your request within the 30-day period you have stipulated, and this fact should not be deemed a confirmation of the *status quo* approach to the Guidelines by the Board. The Board is reviewing how to administer the benefits obligations of ExxonMobil affiliates following the Tribunal's decision, and to that end is undertaking consultation with multiple stakeholders, including the federal and provincial governments, as well as the Hibernia Development Management Company ("HMDC") and Suncor Energy, who operate the Hibernia and Terra Nova projects respectively. As you are aware, the Board's primary regulation of these projects is through Operators via the issuance of authorizations and other compliance activities, and not through dealings with individual interest holders/project joint venture companies.
>
> Moreover, in 2010 HMDC confirmed, following approval of an amendment of the Hibernia Benefits Plan, that the Guidelines are applicable to all aspects of the Hibernia Project, including the Hibernia Southern Extension. Your request that the C-NLOPB "cease the enforcement of the Guidelines" against the Hibernia and Terra Nova projects runs directly counter to the 2008 decision of the Newfoundland and Labrador Court of Appeal in *Hibernia Management and Development Co. v. Canada-Newfoundland Offshore Petroleum Board*, which upheld the validity of the Guidelines and determined that their application was reasonable. Any non-application of the Guidelines would have significant implications for all projects in the Canada-Newfoundland and Labrador Offshore Area.
>
> The current applicability of the Guidelines to the Hibernia and Terra Nova projects is without prejudice to any future position of the C-NLOPB once it has had the opportunity to consult and come to a decision on a way forward.[10]

III. THE POSITIONS OF THE PARTIES

(1) The Claimant

18. The Claimant submits that the Tribunal should be guided by two key considerations:

> First, Canada is in conceded breach of the NAFTA and that this breach continues unabated. Second, the principle of full reparation merits the consideration and, if proved, the award of all of Mobil's damages in the current proceeding. … this Tribunal has the power to finally resolve the parties' entire dispute. Justice and fairness counsel the Tribunal to exercise that power.[11]

[10] Exhibit C-407.
[11] Claimant's Brief, para. 8.

19. The Claimant acknowledges that its initial claim was confined to damages actually incurred before 31 December 2015. It maintains, nevertheless, that the Tribunal has the power to receive evidence of losses actually incurred after that date and of losses that it can reasonably expect to incur in the future.[12]

20. According to the Claimant, that power follows, first, from the fact that Articles 25(1) and 42(1) of the ICSID Convention confer upon the Tribunal a broad jurisdiction to decide a "dispute" and contends that this jurisdiction extends to the dispute as it evolves. The Claimant contends that its claims for damages incurred since 1 January 2016 and for future damages arise out of the same subject-matter and are part of the same dispute as its original claim.[13]

21. Secondly, the Claimant points to Article 46 of the ICSID Convention and Arbitration Rule 40(1) as conferring a power to determine incidental or additional claims provided that they arise directly out of the subject-matter of the dispute.[14]

22. Thirdly, the Claimant relies upon Article 43 of the ICSID Convention and Arbitration Rules 34(2) and 38(2) as giving the Tribunal the power to admit evidence at any stage of the proceedings.[15]

23. Finally, the Claimant contends that Article 44 of the ICSID Convention and Arbitration Rule 19 confer upon the Tribunal a broad power to determine the procedure to be applied and that a tribunal also has an inherent power to that effect.[16]

24. The Claimant then maintains that the Tribunal should exercise its powers and allow the Claimant to advance claims for damages actually incurred since 1 January 2016 and for future losses on the ground that the principles of justice and full reparation, together with the need for efficient resolution of the dispute, militate in favour of doing so.[17]

25. The Claimant points out that, under international law, a State which violates its obligations is required to make full reparation. In the present case, that would include

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[12] Claimant's Brief, paras. 29-68.
[13] Claimant's Brief, paras. 31-41.
[14] Claimant's Brief, paras. 42-50.
[15] Claimant's Brief, paras. 51-59.
[16] Claimant's Brief, paras. 60-68.
[17] Claimant's Brief, paras. 69-88.

compensating the Claimant for its entire loss through to the end of the Projects' lives. According to the Claimant, the basis on which the Tribunal in its *Mobil II Decision on Jurisdiction and Admissibility* decided the time bar point leaves open the possibility that future claims may be held to be time barred, thus denying the Claimant the opportunity of securing the full reparation to which it is entitled.[18]

26. In addition, it says that the Parties should not be required to incur the additional expense and delay which the need to bring further proceedings would entail.[19] Moreover, the procedure proposed by the Claimant would, it maintains, cause no injustice to Canada while preventing what would be a serious injustice to the Claimant.[20]

27. Lastly, the Claimant maintains that the Tribunal should hear evidence relating to life-of-field damage which was not previously available.[21]

(2) The Respondent

28. The Respondent denies that the Tribunal has the power to grant the Claimant's requests. In the alternative, it argues that, if such a power exists, it should not be exercised.

29. The Respondent first contends that the doctrine of *res judicata* precludes the Claimant being permitted to bring a claim for future loss.[22] According to the Respondent, the *Mobil I* Tribunal held that only actual losses could be recovered. In this context, the Respondent refers to the *Mobil I Decision*, para 490(5), in which that tribunal held, as part of its conclusions, that "the Claimants are entitled to recover *damages incurred* as a result of the Respondent's breach provided that the Claimants submit evidence of any such damages no later than 60 days of receipt of this Decision and that the Tribunal finds such evidence persuasive" (emphasis added). This ruling is to be understood in light of para. 488, in which the *Mobil I* Tribunal observed that "damages shall only be compensated when there is sufficient evidence that a call for payment has been made or that damages have otherwise occurred (i.e. that they are 'actual')," and para. 469, where it stated that "damages are incurred and compensation is due when there is a firm obligation to make a payment and there is a call for payment or expenditure, or when a

[18] Claimants' Brief, paras. 70-72 and 76-78.
[19] Claimants' Brief, paras. 73-75.
[20] Claimants' Brief, paras., paras. 79-82 and 87-88.
[21] Claimants' Brief, paras. 83-86.
[22] Respondent's Brief, paras. 8-16.

payment or expenditure related to the implementation of the 2004 Guidelines has been made". The Respondent maintains that the *Mobil I* Tribunal then confirmed this approach in its Award, when it said that "the Majority emphasized in the Decision that the Claimants must prove 'that a call for payment has been made or that damages have otherwise occurred'".[23]

30. The Respondent rejects the argument that the Claimant might be denied full reparation on the ground that it has a right to compensation only in respect of actual damages , if it has to claim some of those actual damages in subsequent proceedings, that has no effect upon the *res judicata* nature of the *Mobil I* rulings.

31. In addition to its *res judicata* argument, the Respondent rejects the Claimant's arguments based upon the various provisions of the ICSID Convention and the Arbitration Rules. None of the provisions cited by the Claimant, it maintains, give the Tribunal the broad powers for which the Claimant contends. Moreover, the claims which the Claimant now seeks to adduce cannot be regarded as incidental or additional to the original claim.[24]

32. The Respondent also argues that, even if the Tribunal has power to do so, the facts are such that it should not exercise the power in the way proposed by the Claimant.[25] The Respondent advances several arguments to that effect.

33. First, it maintains that Procedural Order No. 1, paragraph 16.3 permits the introduction of additional evidence only in "exceptional circumstances". According to the Respondent there are no exceptional circumstances that would justify the introduction of fresh evidence at this stage, two years after the Claimant's Reply.[26] The Respondent rejects the suggestion that the *Mobil II Decision on Jurisdiction and Admissibility* created any such exceptional circumstance. It maintains that the request to adduce new evidence is untimely and that the information was available to the Claimant at a much earlier stage in the proceedings. In addition, the Respondent argues that the Claimant's request goes wholly outside the proper scope of post-hearing briefs.

[23] *Mobil I Award,* para. 28.
[24] Respondent's Brief, paras.47-67
[25] Respondent's Brief, paras. 17-46.
[26] Respondent's Brief, paras. 20-35.

34. Secondly, the Respondent contends that it would be seriously prejudiced if the argument on future damages is allowed to proceed. To grant the Claimant's request, it says, would seriously delay the proceedings, requiring extensive use of expert witnesses and running the risk that an award will be put off for years. It will also greatly add to the costs of the proceedings. It also maintains that there would be a serious risk of over-compensation and that the addition of a future damages claim would seriously prejudice the already complicated task of review of the Guidelines by the C-NLOPB.[27]

35. Thirdly, the Respondent submits that allowing the Claimant to adduce new evidence relating to damages allegedly "actually" incurred from 1 January 2016 would prejudice both the Respondent and the arbitration process by creating an open-ended process in which damages numbers are continually "updated" and allowing the Claimant to "delay the proceedings as more alleged damages accrue".[28] By contrast, deciding the existing 2012-2015 claim would limit the scope of future proceedings and make them more efficient.[29]

IV. THE ANALYSIS OF THE TRIBUNAL

36. The Tribunal is grateful to the Parties for their very careful and detailed submissions on the Claimant's proposed course of action. It considers that those submissions identify three distinct issues:-

    (1) Is a claim for future damages precluded by the Decision and Award of the *Mobil I* Tribunal under the doctrine of *res judicata* ?

    (2) To the extent that the matter is not *res judicata*, does the Tribunal have power to permit the Claimant to advance a claim: (a) for damages said to have been incurred between 1 January 2016 and some later date ahead of the issue of the Award in the present proceedings; and (b) for future losses, and to permit the Claimant to adduce new evidence in support of such claims ?

[27] Respondent's Brief, paras. 36-39.
[28] Respondent's Brief, para. 40.
[29] Respondent's Brief, paras. 40-48.

(3) To the extent that the Tribunal has such power, should it exercise that power to permit the Claimant to advance such claims and to adduce new evidence in support thereof ?

(1) Res Judicata

37. The test laid down in international law for determining whether or not a matter is *res judicata* is set out in paragraphs 191-195 of the *Mobil II Decision on Jurisdiction and Admissibility*. According to that test, the critical question is whether a matter has been determined, either expressly or by necessary implication, by a previous decision in proceedings between the same parties involving the same object and legal ground.[30]

38. Canada maintains that the *Mobil I Decision* determined that the Claimant can advance claims only for damages which have already accrued and not for future losses. According to Canada, the *Mobil II Decision on Jurisdiction and Admissibility* expressly recognized that this question had been settled by the earlier Tribunal.

39. The *Mobil I* Tribunal addressed the question of future damages in several different passages in its *Decision*. First, it held that –

> Article 1116(1) does not in our view, as a jurisdictional matter, preclude the Tribunal from deciding on appropriate compensation for future damages. However, this conclusion only determines *whether* a claim for damages is admissible. It does not determine *how* compensation for future damages is to be assessed or whether it is appropriate for this Tribunal to consider damages or make an award of compensation with regard to the future damages claimed in this particular case. These matters remain to be addressed.[31]

40. It then went on to hold that –

> The Majority of this Tribunal accepts that the Claimants do not have to prove the quantum of damages with absolute certainty. The Majority further accepts that no strict proof of the amount of future damages is required and that a "sufficient degree" of certainty or probability is sufficient. However, the amount claimed "must be probable and not merely possible".[32]

41. In applying that test, the *Mobil I* Tribunal said that "for the purposes of determining the quantum of damages, the Majority will consider any loss which is incurred, *i.e.* which

[30] *Mobil II Decision on Jurisdiction and Admissibility*, para. 191.
[31] *Mobil I Decision*, para. 429 (original emphasis).
[32] *Mobil I Decision*, para. 432

is actual, as of the date of the Award. In the Majority's view, actual damages occur when there is a firm obligation to make a payment and there is a call for payment or expenditure, or the occurrence of payment or expenditure has transpired."[33]

42. Having thus determined that it had jurisdiction to adjudicate upon a claim for future damages and laid down the test of probability to be applied, the *Mobil I* Tribunal applied that test to the claim for future damages which was before it –

> Turning to future damages, under the facts before us, we are not yet able to properly assess the Claimants' claim for future damages; too many critical questions remain open. Although the Majority recognizes that the Claimants are likely to incur a legal liability that would give rise to potentially compensable losses, the claim for such losses is not yet ripe for determination.[34]

43. The *Mobil I* Tribunal referred to some of the uncertainties in the evidence before it and commented –

> Ultimately, after undertaking a critical examination of these variables, the Majority considers that there is insufficient certainty and too many questions still remain unanswered to allow it to assess with sufficient certainty the amounts of damages incurred under the 2004 Guidelines for the 2010-2036 period. The Tribunal has applied the reasonable certainty standard discussed above, which has not led to a conclusion *per se*, but rather to a finding that there is too much *uncertainty* at this stage for the Tribunal to make a determination.[35]

44. Having reviewed the approach taken by other tribunals to the assessment of future damages, the *Mobil I* Tribunal observed that –

> … in considering and distinguishing the practice of other tribunals, the fact that the damages in this case will eventually be "actual" (thereby removing the necessity to forecast losses which has been present in other cases) is a decisive distinguishing factor.[36]

45. The *Mobil I* Tribunal then concluded –

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

[33] *Mobil I Decision*, para. 440.
[34] *Mobil I Decision*, para. 473.
[35] *Mobil I Decision*, para. 474.
[36] *Mobil I Decision*, para. 477

> that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings.[37]

46. The present Tribunal has already held that these passages do not support the view that the *Mobil I* Tribunal arrived at a definitive settlement of the claim for future losses so as to preclude any further claim in respect of losses suffered after 1 January 2012 (in respect of Terra Nova) and 1 May 2012 (with respect to Hibernia).[38] The question is whether the *Mobil I* Tribunal conclusively determined that the Claimant could bring further claims only in respect of damages as they became "actual" and not in respect of future losses.

47. The present Tribunal accepts that some of the comments by the *Mobil I* Tribunal support such a conclusion. It notes, in particular, that the *Mobil I* Tribunal distinguished the approach of other tribunals on the basis that "the damages in this case will eventually be 'actual'", something which it described as "a decisive distinguishing factor",[39] and that it then went on to observe that "the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings".[40] On balance, however, the present Tribunal does not consider that these remarks are sufficient to sustain the conclusion that the *Mobil I* Tribunal's *Decision* amounted to a definitive settlement that the Claimant was not entitled to damages for losses which have not accrued.

48. As has been seen, the *Mobil I* Tribunal held that Article 1116(1) of NAFTA did not preclude a claimant from bringing a claim for future losses which had not yet accrued and become "actual". On the contrary, it expressly upheld its jurisdiction over such claims.[41] It then laid down the test of reasonable certainty to be applied to such claims, highlighted the uncertainties in the evidence before it, while observing that the matter was "not strictly relevant", and concluded that "there is no basis to grant *at present* compensation for uncertain future damages".[42] This is not the language of decision and, indeed, the *Mobil I* Tribunal said that it was "not inclined" to award compensation

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[37] *Mobil I Decision*, para. 478.
[38] *Mobil II Decision on Jurisdiction and Admissibility*, paras. 197-206.
[39] *Mobil I Decision*, para. 477.
[40] *Mobil I Decision*, para. 478.
[41] *Mobil I Decision*, para. 429 (see para. 39, above).
[42] *Mobil I Decision*, para. 478.

for future losses, not that the Claimant could not recover for such losses until they had accrued.

49. This Tribunal has already commented that the reasoning of the *Mobil I* Tribunal in this part of its *Decision* "is not as clear as might be wished".[43] Clarity is important when the effect of a ruling may be to exclude a party from receiving compensation for losses caused by the other party's breach of its obligations. That is especially so, given that it is the long established principle of international law that a party is entitled to full reparation which will, so far as possible, put it in the position it would have occupied had the breach not occurred.[44] It is true that the Respondent's present contention is that the effect of the *Mobil I Decision* is more limited, in that the Claimant would not be excluded from such compensation but merely required to claim for it only as it became "actual". However, even if one leaves aside the possibility that the Respondent might be able to frustrate future claims by relying on the time bar provisions (a matter considered below), the requirements of Articles 1116(2) and 1117(2) would in any event necessitate the bringing of a fresh claim every three years, so that for the Claimant to recover its losses for the period 2012 to 2036[45] (assuming that the Guidelines continued to be enforced) would require it to bring no fewer than eight claims for "actual" damages.

50. The *Mobil I* Tribunal could, of course, have made such a decision and, if it had done so, then the present Tribunal would have been bound by it. However, the consequences of such a decision mean that the present Tribunal should be particularly careful to ensure that the *Mobil I* Tribunal had in fact decided – either expressly or by *necessary* implication – to exclude the possibility of a claim for anything other than damages which had actually accrued. The language of the *Mobil I Decision* and of the subsequent *Award* contains nothing which amounts to an express decision to that effect.

51. Nor is the present Tribunal persuaded that anything in the *Decision* or *Award* necessarily imply such a restrictive decision. The statement that "the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have

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[43] *Mobil II Decision on Jurisdiction and Admissibility*, para. 196.
[44] ILC *Articles on State Responsibility*, Article 35; *Factory at Chorzów,* PCIJ Series A, No. 17, p. 48.
[45] The date mentioned by the *Mobil I* Tribunal. If the lifetime of the concessions extends to 2040, as suggested in the present proceedings, nine or ten distinct sets of proceedings would be required.

accrued but are not actual in the current proceedings"[46] is not, in our view, sufficiently clear that it is necessary to imply that the Claimant cannot bring a claim in respect of any other type of losses.

52. We would add that, insofar as it is suggested that the *Mobil II Decision on Jurisdiction and Admissibility* itself precludes the Claimant from bringing a claim in respect for future losses, that is not the case. It is true that the *Mobil II Decision on Jurisdiction and Admissibility* states that "unlike the position in *Mobil I* ... the present case is concerned solely with a claim for damages which it is said have already become 'actual'; there is no claim in respect of future losses"[47] and later that "the only difference [between *Mobil I* and *Mobil II*] is that the claim for damages allegedly sustained during the period 2012 to 2015 was there advanced as a claim for future losses and is here put forward as a claim for damages already incurred".[48] But both of those statements are descriptive rather than prescriptive. The first statement was an accurate description of the extent of the claim advanced at that point in time in the present proceedings and in no way precludes the Claimant from amending its claim; the Tribunal will consider below whether it has the power to permit such an amendment and, if so, whether it should exercise that power so as to permit it. The second statement was, and remains, an accurate description of the different bases on which the Claimant advances its claim for damages for the period 2012 to 2015 in the present proceedings and in the *Mobil I* proceedings.

53. The Respondent's *res judicata* argument in respect of future losses is therefore rejected.

(2) The Extent of the Tribunal's Powers

54. By itself, the decision that the doctrine of *res judicata* does not preclude the Claimant from advancing a claim in respect of future losses does not mean that the Tribunal can, or should, admit such a claim at this stage of the proceedings. There is no doubt that the Claimant did not advance a claim for future losses in its Request for Arbitration or at any stage in the present proceedings prior to the *Mobil II Decision on Jurisdiction*

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[46] *Mobil I Decision*, para. 478.
[47] *Mobil II Decision on Jurisdiction and Admissibility*, para. 81.
[48] *Mobil II Decision on Jurisdiction and Admissibility*, para. 176.

and Admissibility. On the contrary, it expressly denied that it was seeking to advance such a claim.[49]

55. When the Claimant sought, following the receipt of the *Mobil II Decision on Jurisdiction and Admissibility*, to advance a claim for future losses, it was, therefore, seeking to amend its claim in a significant manner. The same is true with regard to the Claimant's request to advance a claim in respect of damages actually incurred between 1 January 2016 and the date of the final award in the present case, albeit that this latter request is less far-reaching.

56. The question, therefore, is whether the Tribunal has the power to allow the Claimant to amend its case in such a fashion at this stage of the proceedings. We have concluded that such a power does exist. The relevant provisions of NAFTA Chapter XI and of the ICSID Convention (specifically Articles 25 and 42(1)) give the Tribunal jurisdiction over the whole of the dispute and Article 46 of the ICSID Convention and Arbitration Rule 40(1) give the Tribunal power to determine incidental or additional claims arising out of a dispute that is already before it. In addition, we agree with the Claimant that an ICSID tribunal has an inherent power to regulate the conduct of the case before it so long as it remains within the scope of the jurisdiction conferred upon it by the ICSID Convention and, in the present case, NAFTA Chapter XI.

57. So far as the Respondent's argument based upon Procedural Order No. 1 is concerned, the Tribunal considers that the terms of that Order do not fetter its discretion to permit the Claimant to amend its claim if the efficient conduct of the proceedings so requires. Nor is that discretion limited by what had originally been seen as the scope of the post-hearing briefs.

(3) The Exercise of the Tribunal's Powers

58. The more difficult question is whether the Tribunal should exercise that power and allow the Claimant to amend its claim in the manner requested. The Tribunal is conscious that the Claimant is seeking to make a substantial change in its case comparatively late in the day. In the end, however, the Tribunal has concluded that the arguments in favour of permitting it to do so outweigh those against.

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[49] See, e.g., the statement by counsel for the Claimant at Transcript, 28 July 2017, p. 912.

59. In arriving at that conclusion, the Tribunal takes as its starting point that the 2004 Guidelines are a violation of Canada's obligations under NAFTA and were identified as such by the *Mobil I* Tribunal in its *Decision* of May 2012. That decision is binding on the Respondent and is accepted as such. Yet, more than six and a half years after the *Mobil I Decision* was given, the 2004 Guidelines are still being applied to the Claimant and are still occasioning it losses for which, as a matter of principle, it is entitled to receive reparation.

60. In those circumstances, the Tribunal considers that there is an overwhelming case for permitting the Claimant to amend its case so as to pursue its claim in respect of "actual" damages incurred between 1 January 2016 and the date of the award (or an earlier date to be determined). These damages were occasioned by events which took place after the commencement of the existing proceedings and no such claim could have been brought in 2015.

61. The Tribunal accepts that this decision will make the present proceedings more protracted and more expensive than they would otherwise have been. However, the delay and additional expense which allowing the Claimant to amend, so as to advance a claim for actual damages incurred after 1 January 2016, would occasion would be nothing as compared with the additional time and expense involved if the Claimant was compelled to bring proceedings. Nor does the Tribunal accept the Respondent's submission that allowing a claim for damages incurred after 1 January 2016 would permit the Claimant indefinitely to delay the proceedings by repeatedly adducing evidence of fresh losses.[50] The risk of which the Respondent writes can easily be addressed by the imposition of a cut-off date. Moreover, it would not be in the interests of the Claimant to delay the issue of an award in this way.

62. The Tribunal cannot see any prejudice to the Respondent in requiring it to defend this claim in the present proceedings, rather than in a separate, future case. Indeed, the cost to the Respondent is likely to be lower.

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[50] Respondent's Brief, para. 40.

63. The Tribunal has therefore decided to permit the Claimant to pursue a claim for damages already incurred after 1 January 2016. It will consider the cut-off date after it has discussed the issue of the claim for future losses.

64. The Claimant's request to be allowed to pursue a claim for future losses is more difficult. This request entails a far more substantial change and has serious implications for the evidence and expert reports which are likely to be needed. Nevertheless, the Tribunal has concluded that the efficient and cost-effective resolution of the dispute between the Parties militates in favour of granting the Claimant's request.

65. Again, the starting point is that the application of the Guidelines to the Claimant has been held to be a breach of Canada's obligations under NAFTA. The suggestion that the Respondent will be prejudiced by having to defend a case for future losses has to be seen in the light of that fact. It is, and has been ever since 2012, open to the Respondent to cease that violation and the Claimant has twice written to the C-NLOPB inviting it to do so.

66. The C-NLOPB's initial reaction was a flat refusal to reconsider the application of the Guidelines, notwithstanding the binding decision of the *Mobil I* Tribunal.[51] Even after the present Tribunal had reaffirmed the decision in *Mobil I* and made clear that the Claimant's new claim for damages incurred during the period 2012 to 2015 was not barred either by the doctrine of *res judicata* or the provisions of NAFTA Articles 1116(2) and 1117(2), the C-NLOPB responded with a reply that was, at best, non-committal.[52] In its letter of 31 August 2018, the C-NLOPB said only that it was reviewing the matter with its stakeholders. Three months after that letter was written, the Tribunal has not been shown any sign of progress in that review. Whatever the status of the C-NLOPB under the laws of Canada and Newfoundland and Labrador, for purposes of international law it is plainly an organ of the Respondent for whose acts the Respondent is internationally responsible.

67. While the Tribunal has endeavoured to give the Respondent time to digest the *Mobil II Decision on Jurisdiction and Admissibility* and to decide on the appropriate course to adopt for the future, it has to recognize its duty to conduct the present proceedings and

[51] Letter from the C-NLOPB to Mobil, 9 July 2012, Exhibit C-176.
[52] Letter from the C-NLOPB to Mobil, 31 August 2018, Exhibit C-405, quoted in paragraph 17, above.

ensure that the dispute between the Parties is resolved in as efficient and cost-effective manner as possible. It must, therefore, take decisions about the next phase of the proceedings on the basis that there is, as yet, no sign of any decision that the Respondent will cease to apply the Guidelines to the Claimant.[53]

68. On that basis, the Tribunal is faced with the following options. On the one hand, it could decline to permit the Claimant to amend its claim, proceed with determining the quantum of damages proved already to have occurred, and leave the Claimant to pursue further proceedings (possibly multiple further proceedings) before another tribunal (or tribunals) in respect of its future losses. Alternatively, the Tribunal could allow the Claimant to amend its case and hear the entirety of the dispute (apart from those matters already decided in *Mobil I*) in the present proceedings.

69. In encouraging the Tribunal to adopt the latter course, the Claimant contends that the basis on which the Tribunal decided in the *Mobil II Decision on Jurisdiction and Admissibility* that the claim for actual damages incurred after the cut-off dates adopted in *Mobil I* was not barred by NAFTA Articles 1116(2) and 1117(2) might not prevent future claims from being barred by those provisions and certainly would not prevent the Respondent from raising such an argument in future proceedings.[54]

70. The Tribunal notes that the Respondent has said little about this point. It has discussed in its Brief how future proceedings might benefit from a ruling in the present case on certain issues of causation,[55] a stance which is hardly reconcilable with a readiness to take the time bar point in any such proceedings. At the same time, it has not repudiated any intention to raise such a defence in the future. Most importantly, the Respondent has not argued that it would be prejudiced if the amendment was allowed because that would deprive it of a time bar defence in future proceedings.

71. The Tribunal considers, however, that it is neither appropriate nor necessary for it to respond to the question whether the reasoning in paragraphs 171-173 of the *Mobil II Decision on Jurisdiction and Admissibility* would be held by another tribunal to preclude future proceedings. That is because it has concluded that, in any event, the

[53] The Respondent admits that "there is no timeline on when and how the Board will proceed", Respondent's Brief, para. 39.
[54] Claimant's Brief, paras. 20 and 71-72.
[55] Respondent's Brief, paras.41-44.

efficient resolution of the dispute would be better served by hearing all of the Claimant's damages claims in the one set of proceedings.

72. As with the amendment to allow a more extensive claim in respect of actual damages, the delay and additional expense, though significant, are outweighed by the consideration that far greater delay and expense would be involved in requiring the Claimant to bring separate future proceedings. The Tribunal is not persuaded that the effect of a decision by it on the causation issues and other matters already raised in respect of the existing damages claim would lead to such a cost saving in future proceedings as to balance, let alone outweigh, the savings involved in dealing with the entire dispute in one case.

73. Nor is the Tribunal persuaded that permitting the amendment would cause significant prejudice to the Respondent. In the end, the expenditure of time and money would almost certainly be less for both Parties. Nor is the Respondent being compelled to answer a case it would not have had to answer at some stage in any event.

74. The Tribunal understands the Respondent's complaint that it would suffer the prejudice of having to respond to a claim which would necessarily involve a significant degree of uncertainty but the answer lies in the Respondent's own hands. If it does not wish to have to defend a claim in respect of losses which would be incurred if the Guidelines continued to be enforced, then it can cease the enforcement of those Guidelines. To date it has refused to do so and the Respondent cannot take refuge in the uncertainty which may result from the choice of the C-NLOPB, whose actions are attributable to the Respondent in international law, to continue enforcement pending the outcome of a review which has no "timeline". Nor is the Tribunal persuaded that any "complication" of that review which might arise as a result of allowing the amendment (and it has some difficulty seeing what complication allowing the amendment would occasion the review by the C-NLOPB) outweighs the prejudice which would be caused the Claimant by compelling it to bring a further case or cases.

V. THE ORGANIZATION OF THE NEXT PHASE

75. The decision to allow the Claimant to amend its claims so as to add: (a) a claim for actual damages incurred after 1 January 2016; and (b) for future losses, and to adduce evidence in support of both claims necessitates a number of decisions regarding the

conduct of the next phase of the proceedings. The Tribunal considers that the Parties should consult regarding the timetable for the remainder of the proceedings. It wishes, however, that, in doing so, they bear in mind both what has already been said in this Order and the following points.

76. First, in giving leave to the Claimant to adduce fresh evidence in support of its new claims, the Tribunal is not allowing it to adduce fresh evidence in respect of losses already allegedly sustained before 31 December 2015. The Claimant has had ample opportunity to put before the Tribunal its evidence regarding the existence, causation and quantum of those losses. If, however, the Respondent intends to take a point about the date from which a claim for damages can be made in 2012 (see paragraph 7, above), then the Claimant may adduce evidence of the precise date in 2012 on which a particular item of damage was suffered.

77. Secondly, the cut-off date for the new claim for losses which have allegedly become "actual" after 1 January 2016 is bound up with the way in which the claim for alleged future losses is to be handled. The Tribunal hopes that the Parties will be able to agree on a cut-off date for the claim for alleged actual losses. If they cannot, it will decide on such a date, which must be one that allows the Respondent a proper opportunity to respond in its final written pleading.

78. Thirdly, the Respondent must be allowed a proper opportunity to respond to the whole of the new case. Accordingly, it is also permitted to adduce fresh evidence in respect of the new claims (though not in respect of the claim for damages for the period to 31 December 2015). Moreover, the pleading schedule must be such as to permit the Respondent a proper opportunity of setting out its defence.

79. Lastly, and in the light of the point made in paragraph 78, above, the Tribunal considers that each Party should be permitted to submit two rounds of written argument. The Claimant should set out its entire case in respect of the two new claims in its first pleading, with all the supporting evidence. The Respondent's first pleading should contain all of its responsive case and be accompanied by the supporting evidence. The second round of pleadings should be confined to responsive points and new evidence should be adduced only in response to evidence or arguments submitted by the other

Party which could not reasonably have been anticipated. The Tribunal is also willing to consider holding a hearing on quantum.

VI. DECISION

80. For the reasons set out above, the Tribunal decides that:-

(1) The Claimant shall be permitted to amend its case to claim damages allegedly incurred between 1 January 2016 and a date to be determined by agreement or, failing agreement, after the Tribunal has heard the submissions of the Parties regarding the schedule;

(2) The Claimant shall be permitted to amend its case to claim damages in respect of alleged future losses likely to be incurred between the cut-off date referred to in paragraph 80(1) and the end of life of the concessions;

(3) Within the limits set out in paragraph 76 and 79, above, the Claimant shall be permitted to adduce fresh evidence in support of these two new claims;

(4) Within the limits set out in paragraph 78 and 79, above, the Respondent shall be permitted to adduce fresh evidence in opposition to the two new claims; and

(5) The Parties are invited to agree a schedule for the pleadings for the remainder of the case and to revert to the Tribunal no later than 15 January 2019 regarding this matter.

For the Tribunal

[signed]

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Sir Christopher Greenwood, GBE, CMG, QC
President