

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND  
THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF  
OTHER STATES  
BETWEEN

MOBIL INVESTMENTS CANADA INC.,

*Claimant,*

– and –

THE GOVERNMENT OF CANADA,

*Respondent.*

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**REQUEST FOR ARBITRATION**

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New York, New York 10022  
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-and-

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January 16, 2015

*Counsel for Claimant Mobil Investments  
Canada Inc.*

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Pursuant to Article 36 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “Convention”), Rules 1 and 2 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”), and Articles 1116(1), 1117(1) and 1120(1)(a) of the North American Free Trade Agreement (“NAFTA”), Mobil Investments Canada Inc. (the “Claimant”), on its own behalf and on behalf of its enterprises ExxonMobil Canada Properties and ExxonMobil Canada Hibernia Company Ltd., hereby respectfully requests that the Secretary-General of the International Centre for Settlement of Investment Disputes (the “Centre”) register this arbitration against Respondent the government of Canada (“Canada”) concerning the claims stated herein.

## **I. INTRODUCTION**

1. When it became a party to NAFTA in 1994, Canada undertook a specific obligation with respect to petroleum development projects off the coasts of Newfoundland and Labrador. At that time, Canada had in place a local content requirement for such projects that was contrary to the NAFTA’s prohibition of performance requirements. Canada’s treaty partners allowed it to keep the local content requirement that existed in 1994, but they did so based on Canada’s explicit obligation not to put into place any new local content requirement or make the existing one in 1994 more restrictive.
2. Ten years later, Canada breached that obligation. In November 2004, the Canada-Newfoundland Offshore Petroleum Board (the “Board”) adopted Guidelines for Research and Development Expenditures (the “Guidelines”) that require investors in offshore petroleum projects to pay millions of dollars per year for research and development in the Province of Newfoundland and Labrador (the “Province”). The Guidelines also require investors to pay into a fund any moneys assessed that could not be spent on research and development. The Guidelines thus assure that, regardless of the commercial need for such expenditures or whether there are

- sufficient resources in the Province to absorb them, investors will have to pay out millions every year. The Guidelines are far more restrictive than the local content measures that existed in 1994 when Canada entered into the NAFTA, as they require expenditures several times greater than those made under the previous regime.
3. In November 2007, following unsuccessful attempts to negotiate a settlement with the Canadian Government and to challenge the Guidelines in the Canadian courts, Claimant filed a first NAFTA arbitration against Canada under the ICSID Arbitration (Additional Facility) Rules, ICSID Case No. ARB(AF)/07/4 (the “First NAFTA Arbitration”). Claimant argued that the Guidelines breached NAFTA Articles 1105 (minimum standard of treatment) and 1106 (prohibition of performance requirements).
  4. On May 22, 2012, the Tribunal in the First NAFTA Arbitration (the “First NAFTA Tribunal”) issued its Decision on Liability and Principles of Quantum (the “Decision on Liability”) (attached as **Annex A**). The First NAFTA Tribunal found unanimously that the Guidelines constituted a prohibited performance requirement under Article 1106. Decision on Liability, ¶¶ 210-246. A majority of the First NAFTA Tribunal rejected Canada’s argument that the Guidelines were covered by Canada’s Annex I reservation under Article 1108, and found that the Guidelines, as applied to Claimant’s investments in the Hibernia and Terra Nova offshore petroleum projects, violated Article 1106 of the NAFTA. *Id.* ¶¶ 247-413.
  5. The majority of the First NAFTA Tribunal found that the Guidelines “amount[] to a *continuing breach* resulting in ongoing damage to the Claimants’ interests in the investment.” Decision on Liability, ¶ 429 (emphasis added). As to damages, the majority held that only “actual damages” were compensable, “when there is sufficient evidence that a call for payment has been made or that damages have

otherwise occurred.” *Id.* ¶ 488. It declined to award damages in the Decision, and instead invited Claimant to submit further evidence of its actual damages, which the First NAFTA Tribunal would assess in a future award. *Id.* ¶¶ 474, 489.

6. Pursuant to the Decision on Liability, Claimant submitted evidence of its actual damages to the First NAFTA Tribunal, *i.e.* its share of (1) expenditures that would not have been made in the ordinary course of business in the absence of the Guidelines through the end of Quarter 1 of 2012 (with regard to Hibernia) and the end of 2011 (with regard to Terra Nova), and (2) Hibernia and Terra Nova’s outstanding obligations under the Guidelines as of April 30, 2012 (at Hibernia) and December 31, 2011 (at Terra Nova). The First NAFTA Tribunal held a hearing on damages in April 2013. The award on damages remains pending, as the First NAFTA Arbitration has been suspended since January 2014 to allow the Parties the opportunity to discuss a settlement of the dispute.
7. The Guidelines represent a “continuing breach” of NAFTA Article 1106. Decision on Liability, ¶ 429. As an investor in the Hibernia and Terra Nova Projects, Claimant has had to continue making expenditures that are not required in the ordinary course of business in order to fulfill its spending obligations under the Guidelines, and it remains liable for any shortfall in those spending obligations. As a result, Claimant has continued to incur damages since April 1, 2012 at Hibernia and January 1, 2012 at Terra Nova. The Guidelines’ continuing violation of the NAFTA will have caused “actual damages” estimated to be in excess of CAD\$20 million to Claimant and its enterprises from these dates through the date of a future award.

## **II. THE PARTIES**

### **A. The Claimant**

8. Claimant Mobil Investments Canada Inc. is a corporation organized under the laws of the State of Delaware, United States of America. It functions as a holding

company for the ExxonMobil group's investments in Canada. Its principal place of business is:

800 Bell Street  
Houston, Texas 77002  
United States of America

9. Through intermediary holding companies, Claimant controls interests in two petroleum development projects off the coasts of Newfoundland and Labrador: the Hibernia and Terra Nova projects. Those interests are directly held by the following two enterprises on whose behalf this Request is submitted: ExxonMobil Canada Properties and ExxonMobil Canada Hibernia Company Ltd.
10. ExxonMobil Canada Properties is a partnership organized under the laws of the Province of Alberta, Canada. Its principal place of business is:

237 4th Avenue S.W.  
P.O. Box 800  
Calgary, Alberta T2P 3M9  
Canada

Claimant indirectly owns and controls this enterprise.

11. ExxonMobil Canada Hibernia Company Ltd. is a corporation organized under the laws of Canada (the Canada Business Corporations Act). Its principal place of business is:

237 4th Avenue S.W.  
P.O. Box 800  
Calgary, Alberta T2P 3M9  
Canada

Claimant indirectly owns and controls this enterprise as well.

12. The Hibernia project is operated by the Hibernia Management and Development Company Ltd. ExxonMobil Canada Properties owns a 28.125% interest in the

Hibernia project, while ExxonMobil Canada Hibernia Company Ltd. owns a 5% interest.

13. The Terra Nova project is an unincorporated joint venture with other energy companies. ExxonMobil Canada Properties owns a 19% interest in the Terra Nova project.
14. As contemplated by Rule 18 of the Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), the following shall serve as agents, counsel and advocates for Claimant:

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15. For purposes of these proceedings, Claimant’s addresses of record shall be deemed to be those of its counsel of record and all communications shall be served on it through counsel.

**B. The Respondent**

16. Canada is a sovereign State which is a Party to the NAFTA and a Contracting State to the Convention.

17. Under Article 1137(2) of the NAFTA, delivery of notices and documents to the Government of Canada shall be made to the following address:

Office of the Deputy Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario K1A 0H8  
Canada

18. The following have been principal points of contact within the Government of Canada concerning this matter:

Adam Douglas, Esq.  
Mark Luz Esq.  
Trade Law Bureau (JLT)  
Department of Foreign Affairs and International Trade  
Lester B. Pearson Building  
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Canada  
Tel: +1 613 944 8009  
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adam.douglas@international.gc.ca  
mark.luz@international.gc.ca

### **III. CONSENT TO JURISDICTION OF THE CENTRE**

#### **A. Claimant's Consent**

19. Claimant has consented to the submission of this dispute to the jurisdiction of the Centre by the filing of this Request for Arbitration.

#### **B. Respondent's Consent**

20. The text of the agreement to refer this dispute to arbitration is set forth in the NAFTA. The NAFTA entered into force in 1994 and remains in force between the United States and Canada. (An excerpt from the U.S. State Department publication *Treaties in Force* (2013) showing that the NAFTA is in effect, as well as a copy of Chapter Eleven of the NAFTA, is attached as **Annex B.**)

21. In NAFTA Article 1122(1), Canada consented to submit to arbitration claims for breaches of a substantive obligation of Chapter Eleven of that treaty. Further, NAFTA Article 1122(2) states that “[t]he consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of . . . Chapter II of the ICSID Convention (Jurisdiction of the Centre) . . . for written consent of the parties.”
22. The temporal requirements set forth in Articles 1119 and 1120(1) have been met. *First*, Claimant has complied with Article 1119 by submitting its notice of intention to submit a claim to arbitration to Canada “at least 90 days before” filing this Request for Arbitration. (Documentation of the date of receipt of the notice of intent by the Canadian Government is attached as **Annex C**.) *Second*, Claimant has satisfied Article 1120(1), which states that a disputing investor may submit an arbitration claim “provided that six months have elapsed since the events giving rise to a claim.” More than six months have elapsed since the Guidelines were adopted in November 2004, and since April 1, 2012 (with regard to Hibernia) and January 1, 2012 (with regard to Terra Nova), when Claimant began to incur the actual damages that it will claim in this arbitration.
23. The conditions precedent to submission of a claim to arbitration, as provided for in Article 1121 of the NAFTA, have also been satisfied. Claimant and its enterprises have provided the requisite consent to arbitration and waiver in the form contemplated by Article 1121. (The consents and waivers are attached hereto as **Annex D**.)
24. Additionally, Article 1120(1)(a) provides that if both the disputing Party and the Party of the investor are parties to the Convention, the dispute may be submitted to the Centre for arbitration at the request of the investor. Claimant is an enterprise organized under the laws of the United States, and therefore is an investor of the United States under the definitions set out in Article 1139 of the

NAFTA. (A certificate of good standing issued by the Secretary of State of the State of Delaware is attached hereto as **Annex E.**) The United States ratified the Convention on June 10, 1966 and the Convention entered into force with respect to the United States on October 14, 1966. Canada ratified the Convention on November 1, 2013 and the Convention entered into force with respect to Canada on December 1, 2013. (Documentation showing that both Canada and the United States have ratified the Convention is attached as **Annex F.**) Therefore, each of the United States and Canada is a member of the Convention, and Claimant may submit its claim to arbitration to the Centre.

25. Canada's consent to arbitration and Claimant's filing of this Request for Arbitration thus form the agreement to arbitrate between the Parties to the dispute. The annexes to this Request for Arbitration establish and delimit the agreement to arbitrate between the Parties.

#### **IV. INTERNAL AUTHORIZATION TO MAKE THIS REQUEST**

26. Claimant has taken all necessary internal actions to authorize this Request for Arbitration. The boards of directors of Claimant and its subsidiaries have considered the matter and issued resolutions authorizing consent to arbitration and execution of the instruments necessary to make this request. (Resolutions of the boards and additional relevant documentation are included in **Annex D** hereto.) In addition, Claimant has, as reflected in **Annex D**, appointed the undersigned as attorneys in this matter, provided the appropriate notification to the Secretariat pursuant to Arbitration Rule 18(1), and specifically authorized the undersigned to file this Request. This Request has been fully authorized in accordance with the law and applicable corporate instruments.

#### **V. THE ISSUES IN DISPUTE**

27. The key issue in dispute is the amount of damages that Claimant has incurred since April 1, 2012 (at Hibernia) and January 1, 2012 (at Terra Nova). These

damages arise out of the Guidelines that the First NAFTA Tribunal found to represent a continuing violation of Article 1106 of the NAFTA. Decision on Liability, ¶ 429. By way of background to this issue, Claimant discusses below (i) Claimant's investments, the Hibernia and Terra Nova oil fields off the coast of Newfoundland and Labrador; (ii) the regulatory regime applicable to exploitation of those fields; (iii) the change in that regime effected by the Guidelines; and (iv) the breach of the NAFTA resulting from that change, and that actual damages that Claimant has incurred as a result. This section addresses each topic in turn.

**A. Hibernia and Terra Nova**

28. The Hibernia and Terra Nova fields off the coasts of Newfoundland and Labrador are two of the largest oil fields off Canada's east coast. They are also in one of the most technologically challenging locations in the world. Rough seas, seasonal conditions of extreme wind and cold, along with a constant iceberg threat in winter, complicate operations. To reach the productive hydrocarbon reserves deep underneath the seabed, advanced, directional drilling technology was required.
29. The Hibernia field was discovered in 1979. The Terra Nova field was discovered in 1984.

**B. The Existing Legal Framework**

- a. *The Accord Acts*
30. To create a legal regime for exploitation of these and other offshore fields, in 1985 the Canadian Federal Government and that of the Province entered into a Memorandum of Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing. Decision on Liability, ¶ 35. The Federal and Provincial Governments enacted parallel legislation implementing this agreement, known

- respectively as the “Federal Accord Act” and the “Provincial Accord Act” and collectively as the “Accord Acts.”<sup>1</sup> *Id.*
31. The Accord Acts govern the conduct of petroleum projects in the Newfoundland and Labrador offshore area. They establish the Canada-Newfoundland Offshore Petroleum Board (the “Board”) to regulate such projects.<sup>2</sup> Decision on Liability, ¶ 36.
32. To exploit a field in the area, project operators in the area must obtain a production operations authorization from the Board. Decision on Liability, ¶ 36. The Board can suspend or revoke an authorization if a company fails to comply with any condition on which the authorization had been granted.<sup>3</sup> *Id.*
33. An applicant for an authorization must submit a “benefits plan” to the Board for approval.<sup>4</sup> Decision on Liability, ¶ 37. Benefits plans under the Accord Acts specify the preferences that operators will give to local goods, services and workers.<sup>5</sup> Benefits plans must also “contain provisions intended to ensure that . . . expenditures shall be made for research and development to be carried out in the

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<sup>1</sup> *Canada-Newfoundland Atlantic Accord Implementation Act, 1987, c. 3; Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act, R.S.N.L. 1990, c. C-2.*

<sup>2</sup> *Federal Accord Act, s. 9; Provincial Accord Act, s. 9.*

<sup>3</sup> *Federal Accord Act, s. 138(5); Provincial Accord Act, s. 134(5).*

<sup>4</sup> *Federal Accord Act, s. 45(2); Provincial Accord Act, s. 45(2).*

<sup>5</sup> The Accord Acts define a benefits plan as a “plan for the employment of Canadians and, in particular, members of the labor force of the Province . . . for providing manufacturers, consultants, contractors and service companies in the Province and other parts of Canada with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan.” *Federal Accord Act, s. 45(1); Provincial Accord Act, s. 45(1).*

Province. . . .”<sup>6</sup> The Accord Acts do not specify any fixed amount or percentage of revenue to be spent on research and development. Decision on Liability, ¶ 39.

b. *The Hibernia Project and Approval of Its Benefits Plan*

34. In 1979, the Hibernia field was discovered. In 1985, Mobil Oil Canada, Ltd., as the operator of the project and on behalf of Gulf Canada Corporation, Petro-Canada Inc., Chevron Canada Resources Ltd. and Columbia Gas Development of Canada Ltd, applied for the exclusive right to develop the oil and gas in the Hibernia oilfield.
35. As part of the application process, the Hibernia project participants submitted a benefits plan and supplementary benefits plan to the Board for approval. The Board approved the Hibernia benefits plan in 1986.<sup>7</sup> Decision on Liability, ¶ 55. At no point did the plan contemplate a fixed percentage to be spent on local research and development. *Id.* ¶ 56.
36. In the period 1990 through 2003, the participants in the Hibernia project spent over CAD\$102 million on research and development in the Province. Decision on Liability, ¶ 60.

c. *The Terra Nova Project and Approval of Its Benefits Plan*

37. The Terra Nova oilfield was discovered in 1984. In 1996, a group of participants consisting of Petro-Canada, Mobil Oil Canada Properties, Husky Oil Operations Ltd., Murphy Oil Company Ltd. and Mosbacher Operating Ltd. applied for the exclusive right to develop the oil and gas in the Terra Nova oilfield.
38. As part of the application process, the Terra Nova project participants submitted a benefits plan to the Board for approval. The Terra Nova benefits plan was

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<sup>6</sup> *Federal Accord Act*, s. 45(3)(c); *Provincial Accord Act*, s. 45(3)(c).

<sup>7</sup> Board, *Decision 86.01* at 25.

approved by the Board in 1997.<sup>8</sup> Decision on Liability, ¶ 68. Like the Hibernia Benefits Plan, at no point did the Terra Nova plan require a fixed percentage to be spent on local research and development. *Id.* ¶ 395.

39. During the period 1997 through 2003, the participants in the Terra Nova project spent over CAD\$8 million on research and development in the Province.

**C. Canada Fundamentally Changed the Legal Framework in 2004**

40. In November 2004, the Board promulgated the new Guidelines, which the Tribunal in the First NAFTA Arbitration found to be “designed to be applied as a matter of legal obligation . . . to introduce an obligatory *expenditure* requirement.” Decision on Liability, ¶ 234 (emphasis in the original).
41. As the First NAFTA Tribunal found, the new Guidelines fundamentally differ from the requirements under the Accord Acts and the previously approved benefits plans. Decision on Liability, ¶¶ 398, 409-410. The Tribunal found that the Guidelines impermissibly altered the existing legal regime in three ways: (i) the Guidelines introduced “additional obligations with respect to the Hibernia and Terra Nova projects that are different in nature and degree than those previously applied to these investment projects” (*id.* ¶ 398; *see also id.* ¶¶ 393-397); (ii) the Guidelines substantially adjusted the regulatory framework and imposed significant additional amounts of “expenditures” (*id.* ¶¶ 400-401); and (iii) the Guidelines introduced a different form of Board oversight of operations (*id.* ¶¶ 403-404).
42. The Guidelines thus assure that, regardless of whether there is any commercial need for or sufficient resources in the Province to absorb the expenditures, project participants will be required to pay out millions of dollars per year in excess of what they would otherwise spend on local research and development. In fact,

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<sup>8</sup> Board, *Decision 97.02*.

since the Guidelines entered into force in 2004, Hibernia and Terra Nova's annual expenditure obligations have been assessed at:

	<b>Hibernia (CAD\$)</b>	<b>Terra Nova (CAD\$)</b>
<b>2004</b>	██████████	██████████
<b>2005</b>	██████████	██████████
<b>2006</b>	██████████	██████████
<b>2007</b>	██████████	██████████
<b>2008</b>	██████████	██████████
<b>2009</b>	██████████	██████████
<b>2010</b>	██████████	██████████
<b>2011</b>	██████████	██████████
<b>2012</b>	██████████	██████████
<b>2013</b>	██████████	██████████

43. These mandatory levels of expenditure stand in contrast to the measures in existence prior to the promulgation of the Guidelines in 2004. Although these measures contained an expenditure requirement, they did not impose any minimum expenditure levels and they allowed the project operators to identify potential areas of research and development based on commercial need, resources available in the Province and what appeared reasonable under the circumstances. Decision on Liability, ¶¶ 380-390, 395-398.

**D. A Tribunal has Held that the Guidelines Violate NAFTA Article 1106**

44. In November 2007, Claimant filed the First NAFTA Arbitration against Canada, claiming that the Guidelines breached NAFTA Articles 1105 (minimum standard of treatment) and 1106 (prohibition of performance requirements).
45. The Tribunal in the First NAFTA Arbitration found by a majority that the Guidelines violate Article 1106(1) of the NAFTA. Decision on Liability, ¶ 490. Article 1106(1) prohibits Canada from imposing or enforcing a requirement, in connection with the operation or conduct of an investment, “to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory.”<sup>9</sup>
46. The Guidelines require the Hibernia and Terra Nova project participants to spend a fixed percentage of the projects’ revenue on local services and goods for research and development. Decision on Liability, ¶ 242. On their face, and as held unanimously by the Tribunal in the First NAFTA Arbitration, the Guidelines constitute a prohibited performance requirement subject to and caught by Article 1106 of the NAFTA. *Id.* ¶¶ 211-225, 233-242, 246.
47. Moreover, a majority of the Tribunal held that the Guidelines are not protected by NAFTA Article 1108 and Annex I, which exclude from the application of Article 1106 any “existing non-conforming measure” that is included in Canada’s Schedule to Annex I to the NAFTA,<sup>10</sup> and any “subordinate measure

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<sup>9</sup> NAFTA, U.S.-Can.-Mex., U.S. Gov. Printing Office, *entered into force* Jan. 1, 1994, Art. 1106(1)(c). The performance requirement prohibition applies to *all* investments in Canada, not just those of U.S. or Mexican investors. *See* NAFTA, Art. 1101(1) (“This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party”).

<sup>10</sup> NAFTA, Art. 1108(1).

adopted . . . under the authority of and consistent with the measure.”<sup>11</sup> Canada had listed the Federal Accord Act’s benefits plans in its Schedule to Annex I.<sup>12</sup> However, the majority found that the Guidelines did not meet the test for a protected subordinate measure under Annex I, because the Guidelines introduce additional expenditure, reporting, oversight and administrative requirements that are “quantitatively and qualitatively different, and more burdensome from that which existed prior to the introduction of the 2004 Guidelines.” Decision on Liability, ¶ 409. As such, and as applied to Hibernia and Terra Nova, the Guidelines are “inconsistent” with the legal framework that existed in 1994. *Id.* ¶¶ 356-413.

48. Accordingly, the Guidelines are prohibited performance requirements that are not exempted by Canada’s Annex I reservation. Decision on Liability, ¶ 413. They violate Canada’s obligations under Article 1106(1). *Id.* ¶ 490(3).

**E. The Guidelines Continue to Violate NAFTA Article 1106 and Cause Claimant Ongoing Damage**

49. The Guidelines oblige Claimant to make additional expenditures that will continue over the life of the projects. Consequently, the Guidelines constitute a “continuing breach” that results in ongoing damage to Claimant’s investments. Decision on Liability, ¶ 429.
50. In the First NAFTA Arbitration, Claimant initially sought damages that would compensate its past losses and its future losses through the entire life of the projects. However, the First NAFTA Tribunal found that Claimant’s damages must be “actual” in order to be compensable. The Tribunal defined “actual

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<sup>11</sup> NAFTA, Annex I, § 2(f)(ii).

<sup>12</sup> As the Interpretative Note preceding the Parties’ Schedules explains, the Schedule “sets out, pursuant to Articles 1108(1) (Investment) . . . the reservations taken by that Party with respect to existing measures that do not conform with obligations imposed by: . . . (d) Article 1106 (Performance Requirements) . . .”

damages” as occurring “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.” Decision on Liability, ¶ 440.

51. Pursuant to the Decision on Liability, Claimant submitted evidence of the actual damages that it had incurred through the end of Quarter 1 of 2012 (with regard to Hibernia) and the end of 2011 (with regard to Terra Nova) for its share of the Hibernia and Terra Nova Projects’ (i) “incremental expenditures” (*i.e.* those expenditures that would not have been made in the ordinary course of business in the absence of the Guidelines) and (ii) “shortfall” (*i.e.* the Hibernia and Terra Nova Projects’ outstanding obligations under the Guidelines). The First NAFTA Tribunal held a hearing on damages in April 2012. The award on damages has not yet been issued because the Parties agreed to suspend the First NAFTA Arbitration in January 2014, in order to attempt to negotiate a settlement. Those negotiations have not been successful.
52. Since April 1, 2012 (at Hibernia) and January 1, 2012 (at Terra Nova), Claimant has continued to incur actual damages. As an investor in the Hibernia and Terra Nova Projects, (i) it has continued making expenditures that are not required in the ordinary course of business in order to fulfill its spending obligations under the Guidelines, and (ii) it remains liable for any shortfall in those spending obligations.
53. The Guidelines have not been amended since their entry into force in 2004, and remain in breach of NAFTA Article 1106’s prohibition of performance requirements (and outside the scope of Canada’s Annex I reservation) to this date.

## **VI. METHOD OF APPOINTMENT OF THE ARBITRAL TRIBUNAL**

54. Having regard to Article 1123 of the NAFTA, Article 37 of the Convention, Rule 3 of the Institution Rules and Rule 2 of the Arbitration Rules, Claimant

requests the constitution of a tribunal consisting of three arbitrators, one appointed by each Party, and the President of the Tribunal appointed by agreement of the Parties or, failing such agreement, by the Secretary-General of the Centre.

## **VII. RELIEF REQUESTED**

55. As a result of the actions and breaches of the Government of Canada described above, Claimant respectfully requests an award in its favor,
- a. Finding that Canada has breached its obligations under the NAFTA;
  - b. Directing Canada to pay damages in an amount to be proven at the hearing but which Claimant presently estimates to be in excess of CAD\$20 million since April 1, 2012 (with regard to Hibernia) and January 1, 2012 (with regard to Terra Nova) through the date of a future award;
  - c. Directing Canada to pay Claimant's interest and taxes on all sums awarded;
  - d. Directing Canada to pay Claimant's costs associated with these proceedings, including professional fees and disbursements;
  - e. Ordering such other and further relief as the Tribunal deems available and appropriate in the circumstances.

January 16, 2015

*Respectfully submitted,*

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