INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mobil Investments Canada Inc.

v.

Canada

(ICSID Case No. ARB/15/6)

PROCEDURAL ORDER NO. 8
ORGANIZATION OF THE HEARING

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. Lindsay Gastrell

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21 June 2017

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I. INTRODUCTION

1. In accordance with paragraph 19.1 of Procedural Order No. 1 ("PO1"), on 20 June 2017, the President of the Tribunal held a pre-hearing conference call with the parties in order to discuss the organization of the oral hearing on jurisdiction, merits and quantum (the "Hearing"). The following persons joined the teleconference:

On behalf of the Tribunal
Sir Christopher Greenwood QC, President of the Tribunal

ICSID Secretariat
Ms. Lindsay Gastrell, Secretary of the Tribunal
Mr. Alex Kaplan, Legal Counsel

On behalf of the Claimant
Mr. Tom Sikora
Exxon Mobil Corporation

Ms. Stacey L. O'Dea
ExxonMobil Canada Ltd.

Mr. Kevin O'Gorman
Mr. Paul Neufeld
Mr. Denton Nichols
Mr. Rafic Bittar
Ms. Katie Connolly
Norton Rose Fulbright US LLP

On behalf of the Respondent
Mr. Mark A. Luz
Mr. Adam Douglas
Ms. Heather Squires
Ms. Michelle Hoffmann
Ms. Valantina Amalraj
Ms. Melissa Perrault
Ms. Darian Parsons
Trade Law Bureau

2. During the teleconference, the President of the Tribunal and the parties addressed the items set out in a draft of this Order, as well as other matters raised by the parties. Taking into account the parties' views and the provisions of Procedural Order No. 1 ("PO1"), the Tribunal issues the present Order.

II. LOGISTICAL ARRANGEMENTS

A. VENUE

3. The Hearing will be held in Conference Room MC4-800 (Level 4) of the World Bank Headquarters "MC Building", located at 1818 H Street N.W., Washington, D.C., 20433.

B. OTHER ARRANGEMENTS

4. The ICSID Secretariat, in consultation with the parties, will make the necessary logistical arrangements, including the designation of the parties' breakout rooms, set-up details, list of participants, transcription, recording, other technology, catering, etc.

III. HEARING SCHEDULE AND ALLOCATION OF TIME

5. The Hearing will be held on 24-28 July 2017.

A. DAILY SCHEDULE

6. On Monday, 24 July 2017, the Hearing will begin at 10:00 am and conclude at 6:00 pm, to allow the Members of the Tribunal to hold a brief meeting before the Hearing commences.

7. On Friday, 28 July 2017, the Hearing will begin at 9:00 am and conclude by 4:00 pm.

8. On all other Hearing days, the following schedule will apply:

- Start: 9:30 a.m.
- Breaks: one morning, one afternoon, 15 minutes each
- Lunch: 1 hour, in general around 12.30 p.m.
- End: 5:30 p.m.

9. The Tribunal may amend this schedule if necessary.

B. ALLOCATION OF TIME

10. The parties shall be allocated an equal amount of Hearing time.

11. The time allotted to the parties does not include breaks (30 minutes per day) and lunch (1 hour per day). Each party shall have a total of 14.5 hours, which allows time for Tribunal business each day.

12. The Secretary of the Tribunal will maintain Hearing time using the chess-clock method, and report the time used and remaining to the parties after each day of the Hearing. Time spent on Tribunal questions during oral arguments shall be counted toward the time of the party presenting that argument. Time spent on Tribunal questions to witnesses and experts shall not be counted toward the time of either party.

13. Any disagreement between the parties concerning Hearing time shall be dealt with outside sitting hours whenever possible and referred to the Tribunal only as a last resort.

C. HEARING TIMETABLE

14. Monday, 24 July 2017 will be dedicated to the parties' opening statements. On Tuesday, 25 July 2017, witness testimony will begin with the testimony of the Claimant's witnesses (see Section V.C. below). Friday, 28 July 2017 will be dedicated to the parties' closing statements.

15. The Parties will provide a proposed detailed Hearing Schedule at least 14 days before the Hearing.

IV. ORAL ARGUMENTS

16. The Claimant is to present first for both opening and closing statements.

17. Each party will inform the Secretariat of how much time it will allot to its opening statement and to its closing statement. In each case, the Claimant's presentation should

conclude before the lunch break, the timing of which may be adjusted so that the Respondent does not have more or less time in the afternoon than the Claimant had in the morning.

18. Up to one half hour per party may be reserved for rebuttal statements to opening or closing statements. The time taken for opening and closing statements shall be counted towards a party's overall time allocation.

19. If the Tribunal determines it would be helpful for its deliberations to provide a series of questions to the Parties in advance of opening statements, closing statements, or the submission of any post hearing briefs, these will be distributed to the Parties for consideration and without prejudice to the Parties' right to structure their arguments in the way they choose.

V. WITNESSES AND EXPERTS

A. APPEARANCE OF WITNESSES AND EXPERTS

20. In accordance with paragraphs 18.2 of PO1, each party shall be responsible for the appearance of its own witnesses and experts at the Hearing, except when the other party has waived cross-examination of a witness or expert and the Tribunal does not direct his or her appearance. A party's waiver of cross-examination of a witness or expert shall not be deemed an admission or acceptance by that party of the testimony of that witness or expert.

21. The Claimant has called the Respondent's witness, Jeff O'Keefe, and the Respondent's expert, Richard E. Walck, for cross-examination. The Respondent has called the Claimant's witnesses Paul Phelan, Krishnaswamy Sampath, Ryan Noseworthy, Paul Durdle and Robert Dunphy for cross-examination.

22. The Tribunal does not wish to call any witnesses or experts in addition to those named in para. 21 above.

B. APPEARANCE OF PROFESSOR DAN SAROOSHI

23. The parties disagreed over whether Professor Sarooshi should be called to give evidence. The Respondent had indicated to the Claimant on 1 June 2017 that it did not intend to require that Professor Sarooshi attend for the purposes of cross-examination. The Claimant informed the Respondent that it wished to call Professor Sarooshi to put to him, in direct examination, questions about the new authorities and legal arguments raised in the Rejoinder in criticism of his Report (CE1). The Respondent objected that the Claimant had no right to do so under paragraph 18 of PO1. The parties set out their arguments on this issue in a letter from the Claimant to the Tribunal, dated 15 June 2017, and a letter from the Respondent to the Tribunal, dated 19 June 2017. In addition, each party addressed oral argument to the President at the pre-hearing conference. The President reported to the other Members of the Tribunal on the comments made at the pre-hearing conference. The Tribunal is grateful to the parties for their full and reasoned arguments which it has carefully taken into account.

24. PO1 deals with the appearance of witnesses at the hearings in paragraph 18. Paragraph 18.9 provides that the same rules are applicable to experts. Paragraph 18 does not expressly address the issue of whether a party is entitled to call one of its own witnesses or experts to give oral testimony when the other party has indicated that it does not wish to call that witness or expert for cross-examination. Nevertheless, paragraph 18.7.2 provides that:

> *The disputing party summoning the witness may conduct a brief direct examination of the witness limited to: 1) establishing the identity of the witness; 2) ensuring that the witness is given the opportunity to correct any mistakes in the written statement; and 3) (to the extent necessary) putting to the witness any new facts and other evidence that have only come to light since the statement was submitted.*

Accordingly, even if a party is entitled to call a witness or expert to testify at the hearings when that witness or expert has not been required to attend for cross-examination, the scope for direct examination is very limited.

25. The Tribunal does not consider that the term "new facts and other evidence" encompasses legal authorities, still less legal arguments. It also notes that only one of the legal authorities referred to by the Claimant as "new" became public after Professor Sarooshi's expert report was submitted. The only new factual exhibits to which the Claimant refers as pertinent to Professor Sarooshi's report are R-287 and R-288 which are an exchange of correspondence between the ICSID Secretariat and the then counsel to the Claimant at the time of submission of the Application. They long predate Professor Sarooshi's report and are not "new facts" or "other evidence" that have only come to light since the report was submitted.

26. Accordingly, the Tribunal has decided that Professor Sarooshi should not be called to testify at the hearing. It will, of course take full account of Professor Sarooshi's report as part of the legal case advanced by the Claimant. The Claimant is free to respond in its arguments at the hearing to any criticism of the report made by the Respondent in the Rejoinder and to address the Tribunal on any of the authorities and legal arguments advanced by the Respondent in the Rejoinder in relation to points made in Professor Sarooshi's report.

C. ORDER OF WITNESSES AND EXPERTS

27. The Claimant's witnesses shall testify first, followed by the Respondent's witness and expert.

28. The parties have agreed that the Claimant's witnesses Paul Phelan and Ryan Noseworthy will be the first witnesses to testify at the Hearing, in the Claimant's preferred order. Otherwise, each party shall determine the order of appearance for the witnesses/expert for whom it has presented witness statements or an expert report.

29. As a general rule, each expert/witness should be available for examination half a day before and after the time at which his examination is scheduled.

D. EXAMINATION OF WITNESSES AND EXPERTS

30. Before testifying, each witness shall make the declaration contained in ICSID Arbitration Rule 35(2), and each expert shall make the declaration contained in ICSID Arbitration Rule 35(3).

31. The parties and the Tribunal confirm paragraphs 18.7 and 18.9 of PO1, which provides that the examination of each witness and expert shall proceed as follows:

> *18.7.2. The disputing party summoning the witness may conduct a brief direct examination of the witness limited to: 1) establishing the identity of the witness; 2) ensuring that the witness is given the opportunity to correct any mistakes in the written statement; and 3) (to the extent necessary) putting to the witness any new facts and other evidence that have only come to light since the statement was submitted;*
>
> *18.7.3. The disputing party adverse in interest to the witness may then cross-examine the witness;*
>
> *18.7.4. The disputing party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination, with re-cross examination with respect to any matters or issues arising out of the re-examination at the discretion of the disputing party adverse in interest to the witness; and*
>
> *18.7.5. The Tribunal may examine the witness at any time, either before, during or after examination by one of the disputing parties.*

32. While all direct examination must, in accordance with paragraph 18.7.2 of PO1, be brief, in its direct examination of Mr. Phelan, the Claimant may put questions to allow him to respond to certain points raised in Mr. Walck's second expert report. In its direct examination of Mr. Noseworthy, the Claimant may put questions to allow him to respond to Mr. Jeff O'Keefe's statement.

33. Upon request, the parties will be permitted to take a short break after the direct examination of a witness/expert before commencing cross-examination.

34. The scope of cross examination shall be limited to the scope of the witness's statements or expert reports and any answers given to questions in direct examination.

E. SEQUESTRATION OF WITNESSES

35. Except during their testimony, all fact witnesses shall be sequestered from the hearing room until the conclusion of their testimony. This rule shall not apply to Mr. Walck.

F. CROSS-EXAMINATION BUNDLES

36. Immediately before the cross-examination of a witness or expert, the cross-examining party shall provide a cross-examination bundle to the witness, the other party, each arbitrator, the Secretary, and the court reporter.

37. The provision of a cross-examination bundle shall not prevent a party from taking the witness to any other exhibit or authority on the record. However, cross-examination bundles should be as comprehensive as possible so that it is only necessary to take a witness to any another exhibit or authority in order to address an issue raised by an earlier answer.

38. Neither party may introduce a document during the examination or cross-examination of a witness or expert that is not already on the record.

VI. HEARING MATERIALS

A. DEMONSTRATIVE EXHIBITS

39. In accordance with paragraph 16.7 of PO1, the use of demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at the Hearing for opening and closing statements, provided they contain no new evidence.

40. Large monitors shall be placed around the room to display PowerPoint slides (rather than the small monitors on the tables).

41. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived.

42. The party submitting such exhibits shall provide them in hard copy to the other party, each Member of the Tribunal, the Tribunal Secretary, and the court reporter(s) at the Hearing.

The Parties shall provide to the Tribunal and opposing counsel such exhibits immediately prior to delivering their opening and closing statements.

43. In addition, as soon as possible after a Hearing, the parties shall produce electronic copies of all demonstrative exhibits used in the Hearing.

B. CORE BUNDLE AND TRIBUNAL MATERIALS

44. The parties shall prepare a joint core bundle of the most relevant documents from the record, not to exceed 30 documents.

45. The parties shall provide the core bundle, in hard copy and on a USB drive, which shall also include a composite hyperlinked index of all pleadings, exhibits, authorities and witness statements, to the Tribunal by 10 July 2017. Hard copy of the composite index should be sent at the same time.

46. The parties shall provide Mr. Rowley with one A5 hard copy of all pleadings, witness statements, expert reports and exhibits in the Hearing room.

47. The parties shall provide Dr. Griffith with one A5 copy of the parties' pleadings (without supporting documents), witness statements and expert reports. This copy should be spiral bound and not in ring binders.

48. The President does not require a separate set of pleadings for the hearing.

49. For documents that are not legible in A5 and/or greyscale, the parties are requested to provide each Member of the Tribunal with an A4 and/or colour copy. In particular, the Tribunal requests an A4 copy of the spreadsheets contained in Mr. Phelan's statements and colour A4 copies of Mr. Walck's reports.

C. ADDITIONAL EVIDENCE

50. The rules regarding the submission of additional documents and new evidence/exhibits at the Hearing are provided by paragraph 16.3 of PO1, which states:

> *16.3 Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party.*
>
> *16.3.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.*
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> *16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.*

51. Any such request for leave to introduce a new document shall be filed no later than 12 July 2017, and responses to such a request shall be filed no later than close of business EST on 13 July 2017.

VII. TRANSPARENCY

52. In accordance with paragraph 20.5 of PO1, the Hearing shall be public. Any individual(s) not identified in paragraph 9 of the Confidentiality Order may attend the Hearing through closed-circuit video link only.

53. At the request of one of the parties, the Tribunal shall hold *in camera* sessions to protect confidential information as defined in the Confidentiality Order. Where sessions are held *in camera*, the Tribunal shall make appropriate orders respecting the closed-circuit video link and witness exclusion from the Hearing. The video link will be closed for the testimony of all fact witnesses and Mr. Walck. For opening and closing statements, the Claimant or Respondent will indicate when the video link should be closed as needed.

54. In consultation with the parties and the Tribunal, ICSID will post an announcement on its website to provide the public with instructions on how to attend the Hearing.

55. Non-disputing NAFTA Parties may be present in the hearing room throughout the hearings (including *in camera* sessions) in accordance with paragraph 9(g) of the Confidentiality Order.

VIII. RECORDS OF THE HEARING

56. Real time court reporting services are to be provided by Mr. David Kasdan, with same day transcript delivery to the Tribunal and the parties *via* email.

57. An audio recording of the Hearing will be made, and the Secretary will provide the parties and the Tribunal with access to the audio file following the Hearing.

58. Paragraph 21.4 of PO1 shall govern the process of correcting the Hearing transcript.

59. The Parties agree to exchange corrected versions of the transcripts on a date to be determined at the close of the hearing, in the form of a mark-up to the Word versions of the transcripts.

60. The Parties are to submit to the Tribunal agreed upon corrected versions of the transcripts in PDF format, or describe the disagreements of the Parties, on a date to be determined at the close of the hearing.

61. The Parties agree to exchange redacted versions of the transcripts in the form of a mark-up to the Word versions of the transcripts, on a date to be determined at the close of the hearing.

62. The Parties are to submit to the Tribunal agreed upon redacted versions of the transcripts in PDF format, or describe the disagreements of the Parties, on a date to be determined at the close of the hearing.

IX. POST-HEARING MATTERS

A. POST-HEARING SUBMISSIONS

63. The Parties will take up the issue of post hearing submissions at the close of the hearing.

B. COST SUBMISSIONS

64. Each party may simultaneously file a Submission on the Costs of Arbitration on a date to be determined at the close of the hearing. The submission will provide a tabulation of fees, costs and expenses. Each Party may simultaneously file a Reply to the Submission on the Costs of Arbitration of the other party, if any, on a date to be determined at the close of the hearing.

X. OTHER MATTERS

65. On 15 June 2017, the Tribunal wrote to the Respondent in reference to footnote 62 of the Rejoinder concerning Professor Sarooshi's expert report.[1] The Tribunal requested that the Respondent set out for the record whether or not it intends to make any application with regard to the membership of the Tribunal or the participation of Professor Sarooshi. The Tribunal takes note of the fact that, during the pre-hearing conference call, the Respondent confirmed that it does not intend to challenge either of the members of the Tribunal referred to in paragraphs 2 and 3 of Professor Sarooshi's expert report on the basis of the matters referred to in those paragraphs, or to object to Professor Sarooshi's expert report being admitted into the record.

For the Tribunal,

[Redacted]

Sir Christopher Greenwood QC
President of the Tribunal
Date: 21 June 2017

[1] Footnote 19 states: "Canada must register is [its] objection to the inappropriate selection of Professor Sarooshi by the Claimant, whose close ties to members of this Tribunal could raise a perception of bias and unnecessarily taint the arbitration proceedings."