

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE ICSID CONVENTION**

**BETWEEN:**

**MOBIL INVESTMENTS CANADA, INC.**

**Claimant**

**AND**

**GOVERNMENT OF CANADA**

**Respondent**

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**GOVERNMENT OF CANADA**

**SUBMISSION ON COSTS**

**September 15, 2017**

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## I. INTRODUCTION

1. In light of the unique circumstances surrounding this arbitration, Canada respectfully submits that the parties should bear their own legal costs and expenses and share equally the arbitration costs.

## II. THE TRIBUNAL HAS THE DISCRETION TO DETERMINE THE APPORTIONMENT OF COSTS

2. Article 1135(1) of the NAFTA grants the Tribunal authority to award costs in this arbitration in accordance with the applicable provisions of the arbitration rules. These proceedings are governed by the ICSID Convention, which gives the Tribunal broad discretion to decide how its and the parties' costs should be allocated. Article 61(2) of the Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.<sup>1</sup>

3. While the ICSID Convention gives the Tribunal broad discretion in the award of costs, previous ICSID and NAFTA tribunals have taken into account various factors when exercising that discretion, including where the parties raised legitimate arguments or the dispute involved novel or first instance issues.<sup>2</sup>

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<sup>1</sup> ICSID Convention, Article 61(2). The ICSID Convention contrasts with the UNCITRAL Arbitration Rules Article 40, which states “(1) Except as provided in paragraph 2, the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. (2) With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e) the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs, or may apportion such costs between the parties if it determines that apportionment is reasonable.”

<sup>2</sup> **RL-118**, Arthur W. Rovine, “Allocation of Costs in Recent ICSID Awards,” in *Practicing Virtue: Inside International Arbitration*, Caron et al. (eds.) (2015), pp. 658-688. See also, for example, **RL-24**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award, 19 June 2007, ¶ 125; **RL-33**, *Grand River Enterprises Six Nations, Ltd., at al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 247; **RL-119**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010, ¶ 270; **RL-120**, *ADF Group Inc., v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, ¶ 200; **RL-121**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 240.

### **III. WHILE MOBIL’S CLAIM IS DEFECTIVE AND SHOULD BE DISMISSED ENTIRELY, THE PARTIES SHOULD BEAR THEIR OWN LEGAL COSTS AND SHARE EQUALLY THE ARBITRATION COSTS DUE TO THE UNIQUE CIRCUMSTANCES SURROUNDING THIS CASE**

4. Canada maintains that this claim should be dismissed by the Tribunal on the basis of NAFTA Articles 1116(2) and 1117(2). When these provisions are applied as written, as interpreted by all NAFTA tribunals (save for one) and other investment tribunals interpreting similar provisions, and as intended by the NAFTA Parties, this claim must fail.<sup>3</sup> The Claimant’s argument that the Guidelines constitute a “continuing breach” which tolls the limitation period is an argument that has been consistently rejected by tribunals.<sup>4</sup> The argument is neither novel nor legitimate and the claim should be dismissed as outside the Tribunal’s jurisdiction.

5. Moreover, the Claimant’s impermissible attempt in its post-hearing briefs to contrive a new “alleged breach” within the limitation period in order to save its otherwise time-barred claim is without merit. The Claimant confirmed long ago that it first acquired knowledge of breach and loss when the Guidelines were promulgated in 2004 and that the limitation period started to run on that date.<sup>5</sup> The Claimant’s effort to alter these facts through argumentation in post-hearing submissions was not only outside the scope of the questions posed by the Tribunal, but is, in any event, unacceptable.

6. Canada also maintains that this claim is entirely inadmissible because of the *res judicata* effect of this identical claim having already been litigated before the Mobil/Murphy tribunal. The Claimant already sought to recover damages from Canada for the 2012-2015 period during the Mobil/Murphy arbitration based on the same cause of action and the tribunal in that case seized jurisdiction over the claim and determined that it was admissible. This is a textbook example of when the doctrine of *res judicata* is supposed to operate – Canada *has* been vexed twice for the same cause. While some of the issues raised under the doctrine of *res judicata* may have been novel in this case, the Claimant has only itself to blame for the outcome of the Mobil/Murphy

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<sup>3</sup> See Canada’s Counter-Memorial, ¶¶ 136-172; Canada’s Rejoinder Memorial, ¶¶ 41-132.

<sup>4</sup> See Canada’s Counter-Memorial, ¶¶ 152-167; Canada’s Rejoinder Memorial, ¶¶ 81-103.

<sup>5</sup> Canada’s Counter-Memorial, ¶¶ 144-151; Canada’s Rejoinder Memorial, ¶¶ 56-63; Canada’s Reply to the Claimant’s Post-Hearing Brief, ¶¶ 23-24.

arbitration because of its choice to present only a single damages model that was not only legally problematic, but that lacked foundation and was extremely speculative.

7. Finally, it is evident that the Claimant has made an excessive and inappropriate claim for damages in this case. Not only has the Claimant failed to establish why it should receive millions in compensation from Canada for spending beyond what the Guidelines require, it is clear from the evidence that the Claimant has leveraged R&D projects through the Hibernia project for the benefit of its global oil and gas operations, and seeks millions in damages for expenditures that will bring it direct value and benefit.

8. However, notwithstanding the fact that the Claimant's arguments are not legally correct or novel, Canada recognizes that there are unique circumstances surrounding this case such that it is appropriate for the parties to bear their own costs and share equally the costs of the arbitration. As the Tribunal stated at the hearing, "[t]his is a complicated case by any standard."<sup>6</sup> The fact that the Tribunal decided *sua sponte* on the second day of the hearing that it needed to address Canada's limitations and *res judicata* objections before considering the specifics of the damages claim confirms the unique circumstances of this case. In particular, the *obiter dictum* statement in the Mobil/Murphy Decision that the Claimant "can claim compensation in new NAFTA proceedings",<sup>7</sup> as this Tribunal recognized, "caused a great deal of expense and difficulty in these proceedings."<sup>8</sup> Furthermore, since the Mobil/Murphy tribunal decided that the parties should bear their own costs and expenses and share the arbitration costs equally,<sup>9</sup> it is fair and reasonable that this Tribunal do the same and decide that the parties bear their own costs in light of the unique circumstances surrounding this arbitration.

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<sup>6</sup> Hearing Transcript, Day 1, p. 12:15-16.

<sup>7</sup> C-1, Mobil/Murphy – Decision, ¶ 478.

<sup>8</sup> Hearing Transcript, Day 4, p. 200:4-6.

<sup>9</sup> C-2, Mobil/Murphy – Award, ¶¶ 176-177: ("This case involved novel and complex issues concerning the interpretation of the NAFTA and the quantification of damages. The Tribunal asked and addressed many questions in this respect, some of which were addressed to the other NAFTA Parties. Both Parties raised meritorious arguments, and presented their respective cases fairly and professionally, which ultimately lead to a majority opinion and dissent. The need for a second phase of the arbitration on the quantification of damages shows in itself the difficulties faced by the Tribunal. Ultimately, while the Claimants prevailed on the merits and were awarded damages on aspects of their claims, they were only partially successful in regard to these claims. Having considered all the circumstances of this arbitration, in the exercise of its discretion, the Tribunal has concluded that it is fair and appropriate that both sides bear the Arbitration Costs in equal share and that each side bears its own legal and other costs.").

September 15, 2017

*Mark A.*

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