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)

AWARD

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

Date of dispatch to the Parties: 4 February 2020

THE TRIBUNAL
Composed as above,
After deliberation in accordance with Article 43(2) of the ICSID Arbitration Rules
Makes the following CONSENT AWARD:

I. PROCEDURAL HISTORY

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID") on the basis of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

2. On 16 January 2015, Mobil Investments Canada Inc. ("Mobil" or "Claimant") filed a Request for Arbitration with ICSID (the "Request").

3. Canada is the Respondent.

4. 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]

5. In the Request, Mobil claimed 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.

6. On 24 July 2015, the Claimant and Canada (the "Parties") informed ICSID that, pursuant to NAFTA Article 1123, the tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the Parties. Mobil appointed Mr. J. William Rowley, QC (a national of the United Kingdom and Canada) as arbitrator, and Canada appointed Dr. Gavan Griffith, QC (a national of Australia). Both arbitrators accepted their appointments. By agreement of the Parties, Sir Christopher

[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*").

Greenwood, QC (a national of the United Kingdom) was appointed President of the Tribunal, and he accepted his appointment on 11 September 2015.

7. A hearing was held in July 2017. For the purposes of the hearing, 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.

8. 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]

9. 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 contemplated that there would be two rounds of briefing.

10. 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. The Claimant also sought leave of the Tribunal to adduce further evidence regarding the precise date on which damages had been incurred during 2012.

11. 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.

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

13. On 9 August 2018, the Tribunal wrote to the Parties inviting them to file submissions on whether the Tribunal had the power to entertain the Claimant's claims for: (i) damages for actual losses allegedly incurred after 1 January 2016; and (ii) damages for future losses that would allegedly be incurred in the event that the C-NLOBP decides to continue enforcing the 2004 Guidelines against the Claimant. Further, if the Tribunal had such power, the Tribunal requested submissions on whether it should exercise such power in respect of either or both of the two categories of damages and the prejudice that would arise to the Claimant or Respondent if the Tribunal did or did not exercise such power.

[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.

14. The Tribunal set a deadline of 14 September 2018 for the Claimant's submission and of 28 September 2018 for that of the Respondent.

15. On 11 December 2018 the Tribunal issued Procedural Order No. 9 permitting the Claimant to: (i) amend its case to claim damages allegedly incurred between 1 January 2016 and a date to be determined by agreement of the Parties (the "cut-off date"); (ii) amend its case to claim damages in respect of alleged future losses likely to be incurred between the cut-off date and the end of life of the concessions; and (iii) to adduce fresh evidence in support of the two new claims. The Tribunal also ruled that the Respondent would be permitted to adduce fresh evidence in opposition of the two new claims.

16. After agreement by the Parties on certain procedural issues, the Tribunal issued Procedural Order No. 10 on 5 March 2019 setting out the procedural aspects and schedule for damages submissions and the hearing on quantum.

17. The Parties agreed to settle the dispute. A full and signed copy of the terms of the settlement was provided to the Secretary-General of ICSID and the Tribunal on January 8, 2020 (the "Settlement Agreement").

18. In their Settlement Agreement, the Parties requested that the Tribunal, in accordance with ICSID Rule 43(2) and NAFTA Article 1136, record the Settlement Agreement in the form of an Award, which will result in the formal and permanent discontinuance of the ICSID proceedings.

19. In light of the above, the Tribunal, in accordance with ICSID Arbitration Rule 43(2), and as requested by the Parties, shall record the Settlement Agreement in the form of an Award.

II. AWARD

20. Accordingly, the Tribunal unanimously decides that the terms of settlement agreed to by the Parties be recorded verbatim as an Award as follows:

> This Settlement Agreement ("**Agreement**") is made and entered into by and among Mobil Investments Canada Inc., a corporation incorporated under the laws of the State of Delaware, in the United States of America, and its Canadian subsidiaries, ExxonMobil Canada Ltd., ExxonMobil Canada Properties, and ExxonMobil Canada Resources Company (collectively "**ExxonMobil**"), and her Majesty the Queen in Right of Canada ("**Government of Canada**"). ExxonMobil and the Government of Canada are hereinafter referred to each as "**Party**" and collectively as "**Parties**".
>
> **WHEREAS**, to create a legal regime for exploitation of the Hibernia field and other offshore fields, in 1985 the Government of Canada and her Majesty in Right of Newfoundland and Labrador ("**Province**") entered into a Memorandum of Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing and enacted parallel legislation implementing this agreement, namely the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act* ("**Accord Acts**");

WHEREAS, the Accord Acts govern the conduct of petroleum projects offshore of the Province and established the Canada-Newfoundland and Labrador Offshore Petroleum Board ("**Board**") to regulate such projects;

WHEREAS, ExxonMobil Canada Properties and ExxonMobil Canada Resources Company own interests in the Hibernia Project, and ExxonMobil Canada Properties owns an interest in the Terra Nova Project, both of which are operating oil fields located offshore of the Province;

WHEREAS, on November 5, 2004, the Board issued Guidelines for Research and Development Expenditures, which require operators of offshore petroleum projects to spend a fixed percentage of revenues on research and development and education and training within the Province ("**R&D Obligations**");

WHEREAS, on January 16, 2015, Mobil Investments Canada Inc. issued to the Government of Canada a Request for Arbitration pursuant to Chapter Eleven of the North American Free Trade Agreement ("**NAFTA**") in which it claimed compensation for amounts it has incurred in complying with the R&D Obligations for the Hibernia Project and the Terra Nova Project (the "**Claim**");

WHEREAS, the Claim was registered by the International Centre for the Settlement of Investment Disputes ("**ICSID**") as ICSID Case No. ARB/15/6 and an arbitral tribunal was appointed ("**Tribunal**");

WHEREAS, the Tribunal issued a Decision on Jurisdiction and Admissibility on July 13, 2018 ordering the Parties to proceed to arguments on damages, and subsequently issued a Procedural Order No. 9 on December 11, 2018 on the scope of the damages phase, and a Procedural Order No. 10 on March 5, 2019 setting out procedural aspects and a schedule for the damages phase;

WHEREAS, on October 3, 2018, Mobil Investments Canada Inc. served a Notice of Intent to Submit a Claim to Arbitration to the Government of Canada pursuant to Chapter Eleven of the NAFTA in which it claimed compensation for amounts it has incurred in complying with the R&D Obligations for the Hibernia Project and the Terra Nova Project from 2016 until the end of the Projects' durations;

WHEREAS, the Parties wish to finally and irrevocably settle the Claim and any future claims with respect to the Guidelines for Research and Development Expenditures issued on November 5, 2004, with effect from April 1, 2004, and any revisions, amendments, reinterpretations or substitutions thereof ("**2004 Guidelines**"), and commitments made to adhere to the 2004 Guidelines (collectively "**Claims**");

NOW THEREFORE, in consideration of the mutual promises, undertakings and representations contained in this Agreement, the Parties agree as follows:

1. ExxonMobil hereby irrevocably and permanently withdraws the Request for Arbitration dated January 16, 2015 issued against the Government of Canada and the Notice of Intent to Submit a Claim to Arbitration dated October 3, 2018 served to the Government of Canada.

2. ExxonMobil hereby releases and forever discharges the Government of Canada from the Claim.

3. ExxonMobil, on its own behalf and on behalf of its Affiliates, hereby waives any right to bring a NAFTA Chapter Eleven claim or any other claim under any other treaty or domestic law against the Government of Canada, the Province or the Board with respect to the 2004 Guidelines, as applied to the Hibernia Project or Terra Nova Project or any commitment by ExxonMobil to adhere to the 2004 Guidelines as they are applied to the Hibernia Project or Terra Nova Project.

4. ExxonMobil shall not, on its own behalf or on behalf of its affiliates, directly or indirectly, individually or by, through, or with any third party, pursue, participate in or receive any benefit from any other claim, whether by arbitration or court proceeding, under treaty or domestic law, against the Government of Canada, the Province or the Board with respect to the 2004 Guidelines, or any commitment by ExxonMobil to adhere to the 2004 Guidelines, as they are applied to the Hibernia Project and Terra Nova Project.

5. Notwithstanding anything to the contrary, the waivers under articles 3 and 4 above, do not include any waiver of ExxonMobil's right to bring, participate in, or benefit from an action against the Board with respect to the administration or approval of expenditures under sections 3 (Eligibility Criteria) and 4 (Administrative Criteria and Expenditure Management) of the 2004 Guidelines.

6. ExxonMobil relies on the Canada-Newfoundland and Labrador Offshore Petroleum Board's implementation of an industry competitiveness measure in the form of a 0.5% ceiling on the R&D Benchmark as set out in the 2004 Guidelines. In consideration for the withdrawal, settlement and waiver of the Claims, ExxonMobil has received a credit of C$35 million to apply against R&D Obligations under the 2004 Guidelines.

7. ExxonMobil and the Government of Canada shall each bear their own legal costs and expenses arising from the Claim and shall pay in equal shares the fees and expenses of the Tribunal and of ICSID.

8. In accordance with NAFTA Annex 1137.4, ExxonMobil and the Government of Canada agree to the publication of the Consent Award.

9. The Parties hereby acknowledge that this Agreement constitutes a settlement of the Claim for the purpose of mitigating the costs and burdens of further litigation and that nothing contained herein constitutes an acknowledgment or admission

of liability in any way, and the Government of Canada expressly denies any liability or wrongdoing in connection with the Claim.

[signed]

Dr Gavan Griffith, QC
Arbitrator

Date: 28 January 2020

[signed]

Mr J. William Rowley, QC
Arbitrator

Date: 20 January 2020

[signed]

Sir Christopher Greenwood, GBE, CMG, QC
President of the Tribunal

Date: 21 January 2020