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MOBIL INVESTMENTS CANADA INC.,

Disputing Investor,

– and –

THE GOVERNMENT OF CANADA,

Disputing Party.

NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION UNDER NAFTA CHAPTER ELEVEN

DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
United States of America

Counsel for Mobil Investments Canada Inc.

August 2, 2007

In accordance with Articles 1118 and 1119 of the North American Free Trade Agreement (the "NAFTA"), and with a view toward resolving this dispute amicably through consultation and negotiation, disputing investor Mobil Investments Canada Inc. respectfully provides the Government of Canada with this written notice of its intention to submit a claim to arbitration under Chapter Eleven of the NAFTA.

I. INTRODUCTION

1. When it entered into the 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 one existing in 1994 more restrictive.

2. Ten years later, Canada breached that obligation. In November 2004, the Canada-Newfoundland Offshore Petroleum 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 Guidelines require investors to pay any moneys assessed that could not be spent on research and development into a fund. The new Guidelines thus assure that, regardless of whether there is any 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.

3. The Guidelines are far more restrictive than the local content measures that existed in 1994. Those measures required some research and development expenditures in the Province, but did not specify any fixed amount. They therefore left it to the investors to decide how much to spend based on commercial need, resources available in the Province and what appeared reasonable under the circumstances. The expenditures required by the new Guidelines are several times greater than those made under the 1994 regime.

4. The Guidelines violate the NAFTA's prohibition of performance requirements and breach Canada's specific undertaking with respect to petroleum projects off the coasts of Newfoundland and Labrador. If not rescinded, the Guidelines' violation of the NAFTA will cause damage in excess of $40 million to the disputing investor and its enterprises.

II. NAMES AND ADDRESSES OF DISPUTING INVESTOR AND ITS ENTERPRISES

5. 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

6. Through intermediary holding companies, Mobil Investments Canada Inc. 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 notice is submitted under Articles 1117 and 1119(a) of the NAFTA: ExxonMobil Canada Properties and ExxonMobil Canada Hibernia Company Ltd. Mobil Investments Canada Inc. controls each of those two enterprises.

7. 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

8. 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

9. 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.

10. The Terra Nova project is operated by Petro-Canada. ExxonMobil Canada Properties owns a 22% interest in the Terra Nova project.

III. FACTUAL BACKGROUND

A. The Fields Off Newfoundland And Labrador

11. The Hibernia and Terra Nova fields off the coasts of Newfoundland and Labrador are in one of the most technologically challenging locations in the world. Rough seas, seasonal conditions of extreme wind and cold along with a constant stream of icebergs complicate operations. To reach the productive hydrocarbon reserves deep underneath the seabed, advanced, directional drilling technology was required.

12. The Hibernia field was discovered in 1979. The Terra Nova field was discovered in 1984. They are the two largest oil fields off Canada's east coast.

B. The Accord Acts

13. To create a legal regime for exploitation of these and other offshore fields, in 1985 the Canadian Federal Government and that of the Province of Newfoundland and Labrador entered into a Memorandum of Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing. 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."[1]

14. The Accord Acts govern the conduct of petroleum projects in the Newfoundland and Labrador offshore area. They also establish the Canada-Newfoundland Offshore Petroleum Board to regulate such projects.[2]

15. To exploit a field in the area, project operators in the area must obtain a production operations authorization from the Board. The Board can suspend or revoke an authorization if a company fails to comply with any condition on which the authorization had been granted.[3]

16. An applicant for an authorization must submit a "benefits plan" to the Board for approval.[4] Benefits plans under the Accord Acts specify the preferences that operators will give to local goods, services and workers.[5] Benefits plans must also "contain

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1 *Canada-Newfoundland Atlantic Accord Implementation Act*, 1987, c. 3 and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, R.S.N.L. 1990, c. C-2.

2 *Federal Accord Act*, s. 9; *Provincial Accord Act*, s. 9.

3 *Federal Accord Act*, s. 138(5); *Provincial Accord Act*, s. 134(5).

4 *Federal Accord Act*, s. 45(2); *Provincial Accord Act*, s. 45(2).

5 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).

provisions intended to ensure that … expenditures shall be made for research and development to be carried out in the Province ….”[6] The Accord Acts do not specify any fixed amount or percentage of revenue to be spent on research and development.

C. The Hibernia Project And Approval Of Its Benefits Plan

17. In 1979, when the Hibernia field was discovered, the interest participation in the block was shared among Mobil Oil Canada, Ltd., Gulf Canada Corporation, Petro-Canada Inc., Chevron Canada Resources Ltd. and Columbia Gas Development of Canada Ltd.[7] In 1985, Mobil Oil Canada, Ltd., as the operator of the project and on behalf of that same group of companies, applied for the exclusive right to develop the oil and gas in the Hibernia oilfield.

18. As part of the application process, the Hibernia project participants submitted a benefits plan and supplementary benefits plan to the Board for approval. The terms of the benefits plan were meticulously negotiated with the Board. The benefits plan contained detailed references to specific pieces of equipment and design engineering that the project participants planned to commission in the Province of Newfoundland and Labrador. By contrast, research and development was not addressed in any detail,

[6] *Federal Accord Act*, s. 45(3)(c); *Provincial Accord Act*, s. 45(3)(c).

[7] Board, *Decision 86.01* at 3.

although, consistent with the Accord Acts, the plan contained a general commitment to continue to promote local research and development.[8]

19. The Board approved the Hibernia benefits plan in 1986.[9] In its decision, the Board stated that it considered it more effective to "encourage the commitment of the Proponent to a series of basic principles" than to "attempt[] to negotiate specific requirements for the multitude of elements of which the project will consist."[10] The Hibernia benefits plan was later updated and re-approved by the Board several times and as recently as 2003, but the references to research and development expenditures were not materially altered.[11] None of these versions of the plan contemplated a fixed percentage to be spent on local research and development.

20. In 1990, the Governments of Canada and the Province of Newfoundland and the participants in the Hibernia project entered into a Framework Agreement that, like the benefits plan approved by the Board, contained meticulously negotiated local content requirements. The Framework Agreement contained no requirement of or even reference to expenditures on research and development.

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[8] *Id.,* at 25 (stating only the following as to strategy for achieving research and development benefits: "Continue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment.").

[9] *Id*.

[10] *Id*., at 8.

[11] Board, *Decisions 90.01, 97.01, 2000.01, 2003.01* and *2003.02*.

D. The Terra Nova Project And Approval Of Its Benefits Plan

21. 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 Canada Ltd. and Mosbacher Operating Ltd. applied for the exclusive right to develop the oil and gas in the Terra Nova oilfield.

22. As part of the application process, the Terra Nova project participants submitted a benefits plan to the Board for approval. Like the Hibernia benefits plan, the plan included a commitment to spend some money on local research and development, but did not specify a required amount.

23. The Terra Nova benefits plan was approved by the Board in 1997.[12] In its decision, the Board expressly acknowledged that "the relevant provisions of the Accord Acts do not prescribe levels of expenditure,"[13] though some expenditure is required. The Terra Nova benefits plan was later amended and re-approved by the Board in 2002, without requiring a fixed percentage to be spent on local research and development.[14]

E. Adoption Of The Guidelines In 2004

24. In recent years, the Government of the Province of Newfoundland and Labrador has increasingly taken the view that the benefits plans adopted by the Board were

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[12] Board, *Decision 97.02*.

[13] *Id*., s. 3.5.1.

[14] Board, *Decision 2002.01*.

inadequate. The Government of the Province of Newfoundland and Labrador stated the following in a 2006 press statement:

> "The time has come for these oil and gas companies to start sharing more of the tremendous financial benefits from our province's resources," added Premier Williams. "Indeed, the province has benefited from our oil and gas industry, but it is clear from the preliminary work we have done that our share is a mere pittance compared to that of the companies. In these times of extremely high oil prices where consumers are bearing the burden and companies are taking in exorbitant profits, the time has come for new arrangements for projects on a go-forward basis."[15]

The Government of the Province has increasingly encouraged the Board to put into place more robust local content requirements.

25. In November 2004, the Board promulgated the new Guidelines. Although entitled "Guidelines," the Board has made clear that these are requirements. The Board added a new condition to the production operations authorizations for the Hibernia and Terra Nova projects, mandating that "[t]he Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004."[16] In February 2005, the Board wrote to the Hibernia and Terra Nova project operators "to advise you of [your] current obligations under the

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15 Government of Newfoundland and Labrador, Press Release (July 12, 2006), online: <http://www.releases.gov.nl.ca/releases/2006/exec/0712n01.htm>.

16 Board, Production Operations Authorization, Hibernia Management and Development Co. Ltd. (Nov. 2, 2005) and the Board, Production Operations Authorization, Petro-Canada (Jan. 27, 2005).

Guidelines."[17] The Board's letters stated requirements that the project operators spend in the aggregate over $27 million for the period April 1, 2004 through December 31, 2005.[18]

26. The new Guidelines differ from the requirements under the Accord Acts and the previously approved benefits plans in two ways.

27. *First*, the Guidelines require operators to spend a fixed percentage of revenues on research and development within the Province, instead of leaving the amount to the discretion of the operator.[19] Given the production levels for Hibernia and Terra Nova, the Guidelines will require the expenditure of millions of dollars per year.

28. *Second,* the Guidelines establish a research and development fund for unspent amounts, which is nowhere contemplated in the Accord Acts or previously approved benefits plans.[20]

29. 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 for local research and development. These mandatory levels of expenditure stand in contrast to the 1994

[17] Letters, dated Feb. 18, 2005, from the Board to Hibernia Management and Development Company Ltd. and Petro-Canada.

[18] *Id.*

[19] Board, *Guidelines*, 2004, s. 2.

[20] *Id.*, s. 4.2.

measures, which allowed the project participants to decide how much to spend on research and development based on commercial need, resources available in the Province and what appeared reasonable under the circumstances. Notably, the expenditures required by the Guidelines are several times greater than those historically made under the 1994 measures.

30. In 2005, the project operators for Hibernia and Terra Nova brought a case before the Supreme Court of Newfoundland and Labrador Trial Division, arguing that the Board lacked authority to adopt the Guidelines. The application sought only injunctive and declaratory relief; it did not seek money damages. Applying a test of reasonableness, the Court held that the Board had the relevant authority, as a matter of national law.[21] An appeal is pending.

IV. LEGAL CLAIMS

A. The Guidelines Violate Article 1106(1)'s Prohibition On Performance Requirements

31. The Guidelines violate Article 1106(1) of the NAFTA, which prohibits the imposition of performance requirements. Specifically, that Article prohibits Canada from imposing or enforcing a requirement, in connection with the operation or conduct of an

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[21] *Hibernia and Petro-Canada v. C-NOPB*, [2007] NLTD 14, ¶¶ 83-92.

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."[22]

32. 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. On their face, the Guidelines violate the performance requirement prohibition.

33. The Guidelines further breach the obligation that Canada undertook in including a specific exception for the Federal Accord Act's benefits plans in its Annex I to the NAFTA. Article 1108(1) of the NAFTA provides that Article 1106 does not apply to:

> (a) any existing non-conforming measure that is maintained by
>
> > (i) a Party at the federal level, as set out in its Schedule to Annex I or III,
> >
> > (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, …;
>
> (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
>
> (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article[] … 1106 ….

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22 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").

34. Article 1108(1) has been described as a "ratchet rule." This means that, as Canada noted in contemporaneous publications, "[a]ll existing, non-conforming measures may not be amended to be made more restrictive in the future, and once liberalized may also not be made more restrictive"[23] and the measures listed in Annex I are "subject to a 'standstill' (*i.e.*, they can only be liberalized and not made more restrictive)."[24]

35. By listing an existing non-conforming measure in Annex I, a NAFTA Party agreed that it would not adopt any new measures of a similar effect or amend the existing measure to make it more onerous. Annex I reservations "are to be construed restrictively."[25]

36. Recognizing that requiring project operators to spend some money on local research and development would amount to a performance requirement prohibited under Article 1106, Canada listed the Federal Accord Act in its Schedule to Annex I.[26] In doing so, Canada specifically referenced the benefits plan and research and development expenditure requirements of that Act, which it described as follows:

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[23] Department of External Affairs, NAFTA, *Canadian Statement on Implementation*, Canada Gazette, Pt. 1 (1994) at 70.

[24] Department of External Affairs and International Trade of Canada, *NAFTA, What's It All About?* (1994) at 62.

[25] *In re Cross-Border Trucking Services*, NAFTA Secretariat File USA-MEX-98-2008-01, ¶ 237 (Final Report, NAFTA Ch. 20 Panel, Feb. 6, 2001).

[26] 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) …."

> A 'benefits plan" is a plan for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies 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 ….
>
> The … *Canada-Newfoundland Atlantic Accord Implementation Act* … also require[s] that the benefits plan ensure that: … (b) expenditures be made for research and development to be carried out in the province, and for education and training to be provided in the province ….

37. The Guidelines cannot be reconciled with the obligation Canada undertook concerning the Accord Acts. The Guidelines are not "existing non-conforming measures" within the meaning of Article 1108(1) because they did not exist in 1994 and could not have been listed in Annex I.[27] Nor could they be characterized as an amendment to the Accord Acts falling within Article 1108(1), because the Guidelines adopt stricter local content requirements than existed in 1994.[28]

38. Accordingly, the Guidelines are prohibited performance requirements that are not exempted by Canada's Annex I exception. They violate Canada's obligations under Article 1106(1). In addition, they breach Canada's obligations under Article 1105(1) of the NAFTA.

V. RELIEF REQUESTED

39. Mobil Investments Canada Inc. seeks, through consultations with Canada, the revocation of the Guidelines as irreconcilable with Canada's obligations under the

[27] NAFTA, Art. 1108(1)(a).

[28] NAFTA, Art. 1108(1)(c).

NAFTA. If the consultations are unsuccessful, Mobil Investments Canada Inc. will submit, in its own right and on behalf of the enterprises ExxonMobil Canada Properties and ExxonMobil Canada Hibernia Company Ltd., a claim for arbitration seeking damages for the present value of the amounts required to be paid under the Guidelines, along with costs and interest. It estimates those damages to be in excess of $40 million.

August 2, 2007

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

David W. Rivkin
Barton Legum
Anthea E. Roberts
Carmen Martinez Lopez
919 Third Avenue
New York, New York 10022
United States of America
1-212-909-6000 (Telephone)
1-212-909-6836 (Telecopier)
Counsel for Mobil Investments Canada Inc.

Toni D. Hennike
Gwendolyn Dawson
Stacy L. Feltham
MOBIL INVESTMENTS CANADA INC.
800 Bell Street
Houston, Texas 77002
United States of America
Of Counsel