IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

MOBIL INVESTMENTS CANADA INC. AND MURPHY OIL CORPORATION

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

REPLY OF THE GOVERNMENT OF CANADA TO THE JULY 8, 2010 ARTICLE 1128 SUBMISSIONS OF THE GOVERNMENTS OF THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

September 1, 2010

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I. INTRODUCTION

1. The Claimants argue that the 2004 Guidelines for Research and Development Expenditures issued by the Canada-Newfoundland and Labrador Offshore Petroleum Board ("Guidelines") breach Article 1106 of the NAFTA. Canada responded that, even if the Guidelines are inconsistent with Article 1106, which they are not, they cannot breach that Article because they are reserved.

2. Canada listed the Atlantic Accord Implementation Acts in Annex I, thus reserving them from Article 1106.[1] Article 2(f)(ii) of the Interpretative Note to Annex I extends the reservation for listed measures to "any subordinate measure adopted or maintained under the authority of and consistent with the measure." Since the Guidelines are subordinate to the Acts, they are also reserved from Article 1106.

3. The Claimants have neither challenged that the Atlantic Accord Implementation Acts are reserved from Article 1106 nor that the Guidelines are subordinate to them. Instead, the Claimants noted that the Guidelines were adopted after the NAFTA entered into force and argued that the NAFTA only reserves subordinate measures adopted before this time.[2] Canada responded that the Claimants' interpretation is inconsistent with the text of the NAFTA, its context, the NAFTA drafting convention and the Treaty's object and purpose.[3]

II. THE NAFTA PARTIES AGREE THAT SUBORDINATE MEASURES ADOPTED AFTER THE TREATY ENTERED INTO FORCE ARE RESERVED

4. Both the United States and Mexico agree with Canada that the reservation for existing measures includes subordinate measures adopted after the treaty entered into force. In its submission under Article 1128 of the Agreement, Mexico stated that

[1] Article 1108(1)(a) states: "Articles 1102, 1103, 1106 and 1107 do 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, ..."

[2] Claimants' Reply Memorial, ¶¶ 85-105.

[3] Counter Memorial, ¶¶ 214-240; Rejoinder, ¶¶ 74-115.

"subordinate measures that are adopted *after* the NAFTA entered into force are covered by the reservations in Articles 1108(1)(a)(i) and (ii) ..."[4] Mexico relied on the "use of the phrase 'adopted or maintained' and its variations throughout the NAFTA."[5]

5. Similarly, the United States confirmed that "each measure listed on a Party's [Annex I] Schedule pursuant to Article 1108(1) includes ... any new subordinate measures – *i.e.* subordinate measures that come into effect after entry into force – that are "adopted" by a Party."[6] The United States reached this conclusion after a thorough review of the text and context, as well as the drafting conventions employed by the NAFTA parties.

III. THE AGREEMENT OF THE NAFTA PARTIES IS AN "AUTHENTIC INTERPRETATION" OF THE TREATY

6. Article 31 of the Vienna Convention on the Law of Treaties, which reflects customary international law,[7] describes the general rules for the interpretation of treaties. Article 31(3)(a) provides:

> (3) There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

7. The Article does not limit the form of the "subsequent agreement." The chairman of the drafting committee of the Vienna Convention later confirmed that "[t]he interpretive agreement may be in simplified form, may be realized by an exchange of notes or even by concordant oral declarations."[8] In *Canadian Cattlemen for Free Trade v*

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[4] Submission of the United Mexican States, 8 July 2010, ¶ 3.

[5] *Ibid.*

[6] Submission of the United States of America, 8 July 2010, ¶ 5.

[7] **RA-28**, *Methanex Corporation. v. United States of America*, (UNCITRAL) Final Award, 3 August 2005, Part IV, Chapter B, p. 14, ¶ 29; **RA-136**, *Canadian Cattlemen for Fair Trade v. United States of America*, (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 181-182 (hereinafter "*CCFT*").

[8] **RA-157**, Yasseen, Mustafa, "L'interprétation des traités d'après la Convention de Vienne," 151 Recueil des Cours 1, 45 (1976 III) ("L'accord interprétatif peut être en forme simplifiée, peut se réaliser par un échange de notes ou même par des déclarations orales concordantes. ") (translation of counsel). See also **RA-151**, Roberts, Anthea, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, The American Journal of International Law, Vol. 104:179, p. 199 (hereinafter "*Roberts*") ("The

United States, the NAFTA tribunal implied that two Article 1128 submissions agreeing with a respondent's pleadings would constitute an agreement for the purposes of Article 31(3)(a).[9] The United States and Canada have previously supported this conclusion.[10] Hence, by agreeing with Canada's pleadings in this arbitration, the submissions of the United States and Mexico have created an agreement within the meaning of Article 31(3)(a) of the Vienna Convention.

8. Article 31(3)(a) directs that the agreement of the NAFTA parties on the scope of the reservation for subordinate measures "shall be taken into account." In its commentary on the Article, the International Law Commission emphasized that such an agreement "represents an *authentic interpretation* by the Parties which *must* be read into the treaty for purposes of its interpretation."[11] This view was subsequently endorsed by the

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agreement need not be binding or in treaty form...[but] may be more or less formal, ranging from a jointly signed document to a series of acts or communications.").

[9] **RA-136**, *CCFT*, ¶ 185-187 ("Respondent argues that the formal process of interpretation under Article 1131(2) is not the only means available to the NAFTA Parties of reaching a 'subsequent agreement.' On this point, the Tribunal agrees with the Respondent. But has a 'subsequent agreement' been reached on this issue by the NAFTA Parties by other means? The Respondent maintains that there is such a 'subsequent agreement,' and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico's Article 1128 submission in this arbitration; and to Canada's statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the *Myers* case. All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a 'subsequent agreement' by the NAFTA Parties. Although there is no evidence on the record that any of the NAFTA Parties has voiced a discordant view on this issue, the Tribunal is mindful that there is limited experience thus far with many of the subtleties and implications of Chapter Eleven of the NAFTA. *Too, the Tribunal notes the absence of any Article 1128 submission by Canada before this Tribunal* [emphasis added].")

[10] **RA-143**, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, (ICSID ARB(AF)/98/3), Response of the United States of America to the June 27 and July 2, 2002 Submissions of the Governments of Canada and Mexico Pursuant to NAFTA Article 1128, 19 July 2002, p. 2 (hereinafter "*Loewen – Response of the United States to Article 1128 Submissions*") ("In accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties, this agreement among the three NAFTA Parties as to the proper interpretation of Article 1120 "shall be taken into account" for purposes of interpreting the NAFTA"); **RA-146**, *Merrill & Ring Forestry L.P., v. Government of Canada*, (UNCITRAL) Hearing on Jurisdiction and the Merits, Oral Argument of Canada, 23 May 2009, pp. 1503-1504 ("[T]ake a look at what the three NAFTA Parties have agreed to. They have specifically said that a continuing course of conduct does not renew the limitation period under 1116(2) or 1117(2). [...] This Tribunal should give considerable weight to the interpretation that was agreed by the three NAFTA Parties. Under Vienna Convention, Article 31(3), this is something the Tribunal should take into account...").

[11] **RA-158**, United Nations, *Yearbook of the International Law Commission 1996* (New York: 1967), (U.N. General Assembly Doc. A/CN.4/SEA.A/1966/Add.1), Vol. II, p. 221, ¶ 14 (hereinafter "*Yearbook of the International Law Commission*"), emphasis added.

International Court of Justice in the *Kasikili/Sedudu Island Case*.[12] Even when NAFTA tribunals have not explicitly acknowledged that there is an agreement for the purposes of Article 31(3)(a) of the Vienna Convention, they have consistently adopted the common positions of NAFTA parties advanced in Article 1128 submissions.[13]

IV. THE AGREEMENT OF THE NAFTA PARTIES IS ALSO "SUBSEQUENT PRACTICE" WHICH HAS "CONSIDERABLE WEIGHT"

9. Even if they do not constitute a "subsequent agreement" for the purposes of Article 31(3)(a) of the Vienna Convention, the Article 1128 submissions and Canada's pleadings constitute "subsequent practice" that establishes agreement, for the purposes of

[12] **RA-142**, *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, I.C.J. Rep. 1045, ¶ 49. The court cited the Commission statement with approval before finding there was no agreement between the parties on the interpretation of the 1890 Anglo-German treaty establishing the boundary between Namibia and Botswana (hereinafter "*Case Concerning Kasikili/Sedudu Island*").

[13] For example: **RA-147**, *Methanex Corporation. v. United States of America*, (UNCITRAL) Jurisdictional Award, 7 August 2002, ¶ 147 (finding that measures "relating to" an investment mean something more than mere "affecting" an investment); **RA-148**, *Methanex Corporation v. United States of America*, (UNCITRAL) Post-Hearing Submission of Respondent United States of America, 20 July 2001, pp. 1-7; **RA-149**, *Methanex Corporation v. United States of America*, (UNCITRAL) Second Submission of Canada Pursuant to NAFTA Article 1128, 30 April 2001, ¶¶ 22-23, **RA-150**, *Methanex Corporation v. United States of America*, (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 15 May 2001, ¶ 7; **RA-26**, *The Loewen Group Inc. and Raymond Loewen v. United States of America*, (ICSID ARB(AF)/98/3) Award on the Merits, 26 June 2003, ¶ 235 (finding that the ICSID convention cannot supply the applicable law); **RA-143**, *Loewen – Response of the United States to Article 1128 Submissions*, pp. 1-3; **RA-145**, *The Loewen Group Inc. and Raymond Loewen v. United States of America*, (ICSID ARB(AF)/98/3) Submission of the Government of Mexico Pursuant to NAFTA Article 1128, 2 July 2002, ¶ 22; **RA-144**, *The Loewen Group Inc. and Raymond Loewen v. United States of America*, (ICSID ARB(AF)/98/3) Second Submission of the Government of Canada Pursuant to NAFTA Article 1128, 27 June 2002, ¶¶ 6-9; **RA-154**, *United Parcel Service of America Inc. v. Canada*, (UNCITRAL), Award on Jurisdiction, 22 November 2002, ¶ 83-92 (there is no rule of customary international law prohibiting or regulating anticompetitive behaviour); **RA-153**, *United Parcel Service of America Inc. v. Canada*, (UNCITRAL), Reply of the Government of Canada to the United States' and Mexico's Submission under Article 1128 on Canada's Preliminary Jurisdictional Objections, 21 May 2002, ¶ 16; **RA-156**, *United Parcel Service of America Inc. v. Canada*, (UNCITRAL), Second Submission of the United States of America under Article 1128, 13 May 2002, ¶ 12; **RA-155**, *United Parcel Service of America Inc. v. Canada*, (UNCITRAL), Mexico's Submission under NAFTA Article 1128, 14 May 2002, ¶¶ 21-32; **RA-138**, *Marvin Roy Feldman Karpa v. United Mexican States*, (ICSID ARB (AF)/99/01), Preliminary Award on Jurisdiction, 6 December 2000, ¶¶ 44-45 (Notice of arbitration constitutes the "claim" for time limitation period purposes under Article 1117:2); **RA-137**, *Marvin Roy Feldman Karpa v. United Mexican States*, (ICSID ARB (AF)/99/01), Counter-Memorial [of Mexico] on Preliminary Questions, ¶ 189; **RA-139**, *Marvin Roy Feldman Karpa v. United Mexican States*, (ICSID ARB (AF)/99/01), Second Submission of Canada Pursuant to Article 1128, 28 June 2001, ¶¶ 12, 13, 15; **RA-140**, *Marvin Roy Feldman Karpa v. United Mexican States*, (ICSID ARB (AF)/99/01), Submission of the United States of America Regarding Preliminary Issues, 6 October 2000, ¶¶ 14, 18.

Article 31(3)(b). That Article states that "there shall be taken into account," in addition to a "subsequent agreement:"

> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

10. "Subsequent practice" is a "concordant, common and consistent"[14] sequence of acts or pronouncements that "is sufficient to establish a discernible pattern implying the agreement of the parties regarding [a treaty's] interpretation."[15] The Article 1128 submissions and Canada's pleadings satisfy this definition. Commentary has recognized that the intervention by other NAFTA parties to support a respondent state's pleadings will constitute "subsequent practice" for the purpose of Article 31(3)(b) of the Vienna Convention.[16] In *Canadian Cattlemen for Fair Trade*, the NAFTA tribunal found subsequent practice, for the purposes of Article 31(3)(b), from the submissions of the United States as respondent in the arbitration and its Article 1128 submission in another NAFTA arbitration, Mexico's Article 1128 submission, and Canada's statements when implementing the NAFTA and as respondent in another NAFTA arbitration.[17]

11. Article 31(3)(b) of the Vienna Convention directs that the "subsequent practice" represented by the Article 1128 submissions and Canada's pleadings "shall be taken into account." Commentary has emphasized that it must be given "considerable weight."[18] Indeed, the International Law Commission explained that "[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious." According to the Commission, "it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of

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[14] **RA-152**, Sinclair, Ian, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press: 1984), p. 137.

[15] **RA-141**, *Japan - Taxes on Alcoholic Beverages*, (1996) WTO Report of the Appellate Body, Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 12-13.

[16] **RA-151**, *Roberts*, p. 219 ("Where interventions by all of the other treaty parties support interpretations by the respondent state, this subsequent practice constitutes good evidence of an agreement on interpretations and thus should be given considerable weight.").

[17] **RA-136**, *CCFT* at ¶¶ 186-189.

[18] **RA-151**, *Roberts*, p. 219 ("Where interventions by all of the other treaty parties support interpretations by the respondent state, this subsequent practice constitutes good evidence of an agreement on interpretations and thus should be given considerable weight.")

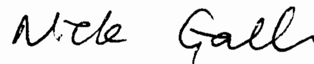
interpretation is well-established in the jurisprudence of international tribunals."[19] These comments were endorsed by the International Court of Justice in the *Kasikili/Sedudu Island Case*.[20]

V. CONCLUSION

12. All three NAFTA parties agree that a measure subordinate to a measure listed in Annex I is also reserved, even if it is adopted after the NAFTA entered into force. This agreement is an "authentic interpretation" of the NAFTA or, at the very least, subsequent practice which must be given "considerable weight." Consequently, together with Canada's submissions, the Article 1128 submissions effectively confirm that the Guidelines are reserved from Article 1106, even though they were adopted after the NAFTA entered into force.

September 1, 2010

Respectfully submitted
on behalf of Canada,



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[19] **RA-158**, *Yearbook of the International Law Commission*, pp. 221-222, ¶ 15.

[20] **RA-142**, *Kasikili/Sedudu Island Case*, ¶¶ 49, 55, 62-63, 68. The Court endorsed the Commission's comments before finding there was no subsequent practice establishing an agreement.