



School of International Arbitration

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International Arbitration Case Law

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International Arbitration Case Law

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Award Name and Date: Mobil Investments Canada Inc. v. Government of Canada (ICSID Case No. ARB/15/6) – Decision on Jurisdiction and Admissibility – 13 July 2018

Case Report by: Gabriela Karaivanova**, Editor Ignacio Torterola***

Summary: Claimant seeks damages caused by the continued application of the 2004 Canadian Guidelines from 2012 until the end of 2015 with respect to Terra Nova and Hibernia Oil Projects. In addition to contesting the jurisdiction of the Tribunal and the admissibility of the claim, Canada contests the damages claimed by Mobil. The Tribunal rejects Canada’s arguments and considers that the decision of the Board to continue enforcing the 2004 Guidelines notwithstanding the decision of the Mobil I Tribunal was an act separate and distinct from the promulgation of the 2004 Guidelines with respect to the three-year limitation period for claims.

Main Issues: Whether Mobil’s present claim is time barred with respect to the time limit set by Article 1116(2) of NAFTA. Whether Mobil’s claim is barred by the doctrine of *res judicata* as a result of the decision and award in the Mobil I proceedings. Finally, whether the losses claimed by Mobil were caused by the enforcement of the 2004 Guidelines during the relevant period.

Tribunal: Mr J. William Rowley (Arbitrator); Dr Gavan Griffith (Arbitrator); Sir Christopher Greenwood (President of the Tribunal).

Claimant's Counsel: Mr Kevin O’Gorman, Mr Paul Neufeld, Mr Denton Nichols, Ms Katie Connolly (Norton Rose Fulbright US LLP); Mr Tom Sikora (Exxon Mobil Corporation) and Ms Stacey L. O’Dea (ExxonMobil Canada Ltd.).

Respondent's Counsel: Mr Mark Luz, Mr Adam Douglas, Ms Heather Squires, Ms Melissa Perrault, Ms Valentine Amalraj, Ms Michelle Hoffmann (Trade Law Bureau)

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Digest:

1. Relevant facts

The Claimant is Mobil Investments Canada Inc. (“Mobil”), a company incorporated in Delaware, United States of America (“United States”) (¶ 1). Mobil is an indirect subsidiary of Exxon Mobil Corporation, a publicly traded energy company incorporated in New Jersey, United States. The Claimant brings its claims on its own behalf and on behalf of two subsidiaries: (a) ExxonMobil Canada Resources Company, a corporation organized under the laws of Nova Scotia, Canada; and (b) ExxonMobil Canada Properties, a partnership organized under the laws of the Province of Alberta, Canada (¶ 2). The Respondent is Canada (¶ 3).

The dispute 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”) (¶ 6).

In an earlier arbitration involving the same disputing Parties (“Mobil I”), the Claimant challenged Canada’s implementation in 2004 of the Guidelines for Research and Development Expenditures (the “2004 Guidelines”), which introduced mandatory research and development (“R&D”) expenditure requirements relating to the Projects (¶ 6). 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 (¶ 6).

In this proceeding, the Claimant seeks damages for expenditures it allegedly incurred in 2012-2015 as a result of Canada’s continued enforcement of the 2004 Guidelines. Unlike the position in Mobil I, therefore, the present case is concerned solely with a claim for damages which it is said to have already become “actual”; there is no claim in respect of future losses (¶ 82).

2. Procedural History

Claimant filed a Request for Arbitration with ICSID on 16 January 2015, which was registered by ICSID on 18 February 2015 (¶¶ 7-9). The Tribunal was constituted on 11 September 2015 (¶ 12). The first session was held by teleconference on 3 November 2015 (¶ 13). The Parties submitted their final comments on 11 and 12 November 2015 (¶ 15).

On 24 November 2015, the Tribunal issued Procedural Order No. 1, which provided, *inter alia*, that the applicable Arbitration Rules were those in effect from 10 April 2006, that the procedural language was English, and that the place of proceedings was Washington, D.C. (¶ 16). On the same date, the Tribunal issued Procedural Order No. 2, governing the confidentiality of the proceedings (¶ 17).

On 11 March 2016, the Claimant submitted its Memorial on the Merits (the “Memorial”), accompanied by witness statements from eight witnesses, 352 factual exhibits and 68 legal authorities (¶ 19). On 30 June 2016, the Respondent submitted its Counter-Memorial on the

Merits (the “Counter-Memorial”), together with an expert report, 238 factual exhibits and 45 legal authorities (¶ 21).

On 23 September 2016, the Claimant filed its Reply on the Merits (the “Reply”), together with five witness statements, an expert report, a further 43 factual exhibits and a further 23 legal authorities (¶ 23). On 16 December 2016, the Respondent filed its Rejoinder on the Merits (the “Rejoinder”), together with a witness statement, a second report from its expert, a further 58 factual exhibits and a further 59 legal authorities (¶ 27).

The Tribunal held the hearing on jurisdiction, merits and quantum from 24 July to 28 July 2017 at the World Bank Headquarters in Washington D.C. (the “Hearing”) (¶ 42). The Parties submitted their post-hearing briefs on 11 August 2017 and replies on 8 September 2017 (¶ 45). The United States filed its submission on 24 October 2017 (¶ 45). Mexico filed its submission on 7 November 2017 (¶ 45). The Parties’ observations on those submissions were filed on 14 December 2017 (¶ 46).

3. Positions of the Parties

3.1. Claimant’s Position

The Mobil I Tribunal having awarded Mobil damages in respect of the Terra Nova Project up to 1 January 2012 and in respect of Hibernia up to 1 May 2012, in the present proceedings, Mobil seeks damages caused by the continued application of the 2004 Guidelines from those dates until the end of 2015 (¶ 81). Mobil initially claimed 20,845,708 Canadian dollars as compensation, together with 54,209 Canadian dollars as the cost of letters of credit which it alleges it was obliged to place or maintain during the period to which its claims relate (¶ 84). That claim was later reduced, and in its Rejoinder, Mobil claims 19,883,897 Canadian dollars, together with pre-award and post-award interest and costs (¶ 84).

3.1.1. Articles 1116(2) and 1117(2) are a matter of admissibility

Mobil denies that the time limits in Articles 1116(2) and 1117(2) amount to a jurisdictional requirement and contends that they are, instead, a matter of admissibility. Consequently, the burden of proof is on Canada, rather than on Mobil (¶110). According to Mobil, the requirements of Articles 1116(2) and 1117(2) have to be interpreted in light of the object and purpose of the NAFTA and the fundamental condition of fairness (¶ 111). To bar Mobil from recovery in the present proceedings, given what occurred in the Mobil I proceedings, and what was said by the Mobil I Tribunal in paragraph 478 of its Decision, would be grossly unfair (¶ 111).

3.1.2. The enforcement of the 2004 Guidelines is a continuing breach and time does not begin to run for the purposes of a limitation period until the breach in question ceases to exist

Mobil’s principal argument, which is supported by the expert report of Professor Sarooshi, is that the enforcement of the 2004 Guidelines is a continuing breach and, according to Professor Sarooshi (whose views Mobil adopts), “there is good authority that where there is a continuing breach, then time does not begin to run for the purposes of a limitation period until the breach in question ceases to exist” (¶ 112).

Mobil also advances an alternative argument to the effect that the letter of 9 July 2012, by which the Board made clear that it would continue to enforce the 2004 Guidelines notwithstanding the *Mobil I* Decision, and/or the adoption in 2012 (Hibernia) and 2014 (Terra Nova) of new operating agreements which required compliance with the 2004 Guidelines amounted to new breaches with the result that the three-year limitation period began to run afresh (¶ 116).

3.1.3. The res judicata doctrine is not applicable because the Mobil I Tribunal did not decide the question of damages for the period 2012 to 2015

Mobil accepts that the doctrine of *res judicata* is a well-established principle of international law. Nevertheless, according to Mobil, the second part of this test is not satisfied, because the *Mobil I* Tribunal did not decide the question of damages for the period 2012 to 2015 (¶¶ 180-181).

3.2. Respondent's position

3.2.1. Articles 1116(2) and 1117(2) lay down a jurisdictional requirement

Canada dismisses the sentence in the *Mobil I* Decision that Mobil would be able to claim for future losses in subsequent proceedings (¶ 109). Since Articles 1116(2) and 1117(2) lay down a jurisdictional requirement, Canada maintains that statements made by the *Mobil I* Tribunal cannot operate to confer upon the present Tribunal a jurisdiction which NAFTA does not grant to it (¶ 109).

3.2.2. A claim must be brought within three years of the date on which the investor acquires knowledge of the alleged breach

According to Canada, an essential part of those procedures is the requirement, in Articles 1116(2) and 1117(2) that a claim must be brought within three years of the date on which the investor (or, under Article 1117, the enterprise on whose behalf the investor claims) first acquires knowledge (or should first have acquired knowledge) of the alleged breach and of the fact that the investor (or enterprise) has incurred loss or damage (¶ 97). In this regard, Canada relies on the award in *Methanex v. United States* (¶ 98). In the present case, Canada argues, the relevant breach is the promulgation of the 2004 Guidelines, a fact of which Mobil became aware on 5 November 2004, with the result that the three-year limitation period expired on 5 November 2007 (¶ 100).

Canada maintains that Mobil's alternative argument that the time limit starts to run from the moment when the Board made clear, in its letter of 9 July 2012, that it would continue to enforce the Guidelines notwithstanding the *Mobil I* Decision is artificial (¶ 108). The breach is still the 2004 Guidelines (¶ 108). Canada's refusal to revoke or cease to enforce the Guidelines following the *Mobil I* Decision is irrelevant, because a Chapter 11 Tribunal has power only to award monetary damages or restitution of property (NAFTA Article 1135) and may not order a NAFTA Party to repeal or cease to enforce a measure (¶ 108).

In addition, Canada emphasizes the fact that the position of the three NAFTA States has to be taken into account by the Tribunal because of Article 31(3) (b) of the Vienna Convention on the Law of Treaties, 1969 (¶ 103). According to Canada, while the Vienna Convention is not,

as such, applicable to NAFTA, it is generally agreed that its provisions on interpretation reflect customary international law and are therefore of general application (¶ 103).

3.2.3. *Mobil's claim is barred by the doctrine of res judicata*

Canada refers to the passage in Mobil's Memorial indicating that Mobil's claim in the present proceedings was identical to that advanced in the *Mobil I* proceedings, with the same cause of action and a claim for the same relief (¶ 176). Therefore, Canada contends that Mobil's claim is barred by the doctrine of *res judicata*. According to Canada, Mobil has already advanced, in the *Mobil I* proceedings, a claim for damages allegedly caused by the 2004 Guidelines in the period covered by its present claim (¶ 89). Canada maintains that the *Mobil I* Tribunal considered and rejected that claim and that its decision is binding upon Mobil (¶ 89).

Canada's argument was developed in much greater detail in the Rejoinder. Canada there sets out what it regards as the two branches of *res judicata*: (a) issue estoppel, which "prevents re-litigation of specific issues that were decided upon by a previous tribunal"; and (b) cause of action estoppel, which "has the broader effect of barring a second claim based on an identical cause of action or subject-matter as was previously adjudicated" (¶ 177).

4. Tribunal's analysis

The Tribunal rejected Canada's arguments that the claim is barred by the doctrine of *res judicata* and by the Articles 1116(2) and 1117(2). It further decided to proceed to post-hearing briefing on the remaining questions and to issue an award thereon. The Tribunal also decided that the question of costs will be reserved to be dealt with in the final award (¶ 213).

4.1.1. *Whether Articles 1116(2) and 1117(2) lay down a jurisdictional requirement*

The Tribunal does not consider it necessary to decide this question. Whether the requirement that a claim be brought within the three-year period stipulated in the two provisions is treated as a matter of jurisdiction or admissibility, the practical consequences in the present case are the same (¶ 136).

4.1.2. *Whether Mobil's claim is barred by the doctrine of res judicata*

According to the Tribunal, there is no doubt that there is an identity of parties between the present case and Mobil I (¶ 194). Furthermore, it was clear that the claim presently advanced by Mobil was also advanced by it in the *Mobil I* proceedings, since Mobil asked the *Mobil I* Tribunal to award it damages for the same period for which it seeks damages in the present proceedings and in respect of the same losses (¶ 194). The only difference is that in the present case the damages are sought for losses which, in the words of the Mobil I Tribunal are now "actual", whereas they were found not to be "actual" at the time of the Mobil I decision (¶ 194).

Nevertheless, on a close reading of Part VIII of the Decision, there are several factors which the present Tribunal considers show that the Mobil I Tribunal did not in fact arrive at a definitive settlement of the claim (¶ 197). First, that Tribunal said on more than one occasion that it was not making a final determination (¶ 198). Secondly, the *Mobil I* Tribunal said that the claim for future damages was "not yet ripe for determination" (¶ 200). The Tribunal

cannot, therefore, accept Canada's principal argument based on the "issue estoppel" branch of *res judicata* (¶ 206).

Furthermore, the Tribunal is not persuaded by Canada's alternative argument based on what it terms the "cause of action" branch of *res judicata* (¶¶ 207-208). This argument, which was first advanced in Canada's Rejoinder, is that even if a prior tribunal did not definitively decide on a claim, if that claim was put before it and the tribunal held that it possessed jurisdiction, the same claim based on the same cause of action cannot be advanced before a later tribunal (¶ 207). According to the Tribunal, this argument runs counter to a long line of authority namely the International Court of Justice which has consistently insisted that a matter must have been decided by the earlier judgment in order to give rise to a *res judicata* (¶ 208).

Finally, the Tribunal considers that Canada's alternative argument does not reflect the principles on which the International Court said, in its 2007 Bosnia Judgment, the international law doctrine of *res judicata* rests (¶ 211). The stability of legal relations is not threatened by allowing a litigant to pursue a claim when the previous tribunal had expressly stated that that claim was not yet ripe for determination and should be pursued in later proceedings (¶ 211).

The Tribunal therefore rejects Canada's *res judicata* argument (¶ 212).

4.1.3. Whether Mobil's Claim is barred by Articles 1116(2) and 1117(2)

For the Tribunal it is important to identify precisely what it is of which the investor or enterprise must acquire knowledge in order for the limitation period in Articles 1116(2) and 1117(2) to begin to run (¶ 148). First, there must be knowledge of the alleged breach (¶ 148). Secondly, there must be knowledge that the investor or enterprise has suffered loss or damage as a result of that alleged breach (¶ 148). According to the Tribunal, Canada's approach overlooks a number of important considerations (¶ 149). First, it misunderstands the nature of the breach on which Mobil's claim is based, namely it is a breach of Canada's obligations under Article 1106 of NAFTA (¶ 150).

While the imposition of the 2004 Guidelines took place on 5 November 2004, their enforcement was a different matter (¶ 152). Due to the challenge brought by Mobil in the Canadian courts, it was not until 19 February 2009, when the Supreme Court of Canada dismissed Mobil's petition for leave to appeal and thus ended the challenge in the Canadian courts, that the Guidelines were actually enforced (albeit with retrospective effect) against Mobil or that Mobil could have acquired knowledge that they would be enforced (¶ 152). Canada's approach, which elides the promulgation of the 2004 Guidelines with their subsequent enforcement, is thus an over-simplification (¶ 152).

Secondly, the Tribunal consider that Canada's approach fails to take proper account of the fact that the limitation period starts to run only when the investor or enterprise has not only acquired (or ought to have acquired) knowledge of the alleged breach but also has acquired (or ought to have acquired) knowledge that it has incurred loss or damage as a result (¶ 153).

The Tribunal considers that Canada's response, regarding the lack of power to order any remedy other than monetary damages, confuses the right with the remedy (¶ 164). It is true that Article 1135 confers no power on a Chapter Eleven tribunal to order that an offending

measure be repealed or that it cease to be enforced (¶ 164). But that does not mean that the State which has adopted such a measure is not under such an obligation, only that such an obligation cannot be derived from the decision of the tribunal (¶ 164).

Finally, the Tribunal considers that the decision of the Board to continue enforcing the 2004 Guidelines notwithstanding the decision of the *Mobil I* Tribunal was an act separate and distinct from the promulgation of the 2004 Guidelines and their enforcement until that date itself (¶ 172). The Tribunal accordingly concludes that the claim is properly before it (¶ 174).