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

CLAIMANT'S REPLY TO CANADA'S POST-HEARING SUBMISSION

ARBITRAL TRIBUNAL:

Sir Christopher Greenwood QC

Mr. J. William Rowley QC

Dr. Gavan Griffith QC

SECRETARY OF THE TRIBUNAL:

Ms. Lindsay Gastrell

8 September 2017

I.
INTRODUCTION

1. At the hearing, Canada conceded that it did not have a good faith basis to enforce the Guidelines following the Mobil I Decision:

> "ARBITRATOR ROWLEY: Up until the Award in Mobil I, Canada considered that its Measure was entirely lawful and it could be enforced; yes?
>
> MR. DOUGLAS: Yes.
>
> ARBITRATOR ROWLEY: Following the Decision, as I understand it, Canada accepted that its Measure was unlawful. I'm right on that, am I not?
>
> MR. DOUGLAS: Correct." [1]

2. In light of the above, the Tribunal asked the parties whether a distinct breach by Canada occurred following the Mobil I Decision, whether a breach of the obligation to perform in good faith is a breach of the NAFTA, and whether an allegation as such is properly before the Tribunal.[2] Mobil has answered each of these questions affirmatively.

3. In addition to Mobil's primary argument that a continuing breach satisfies the limitations period of Articles 1116(2) and 1117(2), Mobil reiterated two alternative arguments in Part III of its Post-Hearing Brief, which identify distinct breaches of Article 1106(1) that occurred within three years of the present claim. First, the Board's decision to continue enforcement of performance requirements following the Mobil I Decision was a breach of its obligation to perform Article 1106(1) in good faith and to cease its unlawful conduct under the NAFTA. Second, the Board's enforcement of commitments contained in Operations Authorizations ("OAs") issued for Hibernia in 2012, and Terra Nova in 2014, were distinct breaches of the NAFTA's prohibition against such enforcement in Article 1106(1).

4. Both of Mobil's alternative arguments concern breaches within three years of the present claim and, hence, satisfy the limitations period of Articles 1116(2) and 1117(2).[3] Moreover, Mobil's arguments are not new—both were first raised in the written submission phase of the case.[4] Accordingly, Canada has had ample opportunity to respond.[5]

5. In contrast to Mobil's Post-Hearing Brief, Canada's principal argument in its Post-Hearing Submission is that no breach of good faith can be alleged because good faith is an "overarching principle" and "does not form an obligation where none otherwise exists."[6] Canada, however, does not squarely address the situation where an underlying obligation does exist, i.e., where a breach of an obligation to act in good faith *is a breach of an obligation under the NAFTA*.

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[1] Day 4 Hearing Transcript at 147: 8-16.

[2] Day 4 Hearing Transcript at 217: 14-218: 8.

[3] Mobil's Post-Hearing Brief, ¶¶ 19, 24.

[4] *See* Mobil's Memorial, ¶¶ 250-251; Mobil's Reply Memorial, ¶¶ 1, 33, and 94; and Section III.A below.

[5] *See also*, the discussion in Mobil's Post-Hearing Brief, ¶¶ 25-33.

[6] Canada's Post-Hearing Submission, ¶ 5.

II.
MOBIL'S CLAIM IS FOR BREACH OF ARTICLE 1106(1), WHICH CANADA MUST PERFORM IN GOOD FAITH BY CEASING ITS UNLAWFUL CONDUCT

6. Canada's submission on the question of whether "a breach of the obligation to perform in good faith [is] a breach of an obligation under the NAFTA"[7] amounts to its assertion that "there is no ***separate*** obligation to perform in good faith in NAFTA Chapter Eleven."[8] However, Mobil's argument does not concern a breach of a separate or stand-alone obligation to act in good faith. Rather, it is Mobil's submission that Canada has an obligation under the NAFTA, including Article 102(2), to perform Article 1106(1) in good faith and to cease conduct in violation of Article 1106(1).[9] While the NAFTA provides for monetary damages if the breach is not ceased—in accordance with the axiomatic principle of full reparation—the NAFTA does not merely include a remedy for unlawful conduct; it also includes an obligation to end it.

7. In this regard, Canada's submission misses the point of why the principle of good faith matters: Given that "[e]very treaty in force is binding upon the parties to it," all provisions of the NAFTA, including Article 1106(1), "must be performed by [Canada] in good faith."[10] Performing Article 1106(1) in good faith would require that Canada, after the Mobil I Decision, ***not*** "impose or enforce" the Guidelines and likewise ***not*** "enforce any commitment or undertaking" in connection with the Guidelines.[11] Instead, and in breach of its obligation to perform Article 1106(1) in good faith, Canada took the opposite course of action, i.e., Canada pursued the very conduct the Mobil I Decision determined was unlawful. In so doing, Canada also breached its concomitant obligation to ***cease*** its breach.[12]

8. In its Post-Hearing Submission, Canada does not refer to the obligation to cease its breach, but does rely on two ICJ decisions to argue that good faith is not relevant to a breach of NAFTA Chapter 11.[13] Neither case is of assistance to Canada. On the contrary, these cases confirm that Canada must perform Article 1106(1) of the NAFTA in good faith.

- In the first case cited by Canada, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Honduras objected that an application by Nicaragua to the ICJ under the American Treaty on Pacific Settlement (Pact of

[7] Day 4 Hearing Transcript at 218:4-11.

[8] Canada's Post-Hearing Submission, ¶ 5 (emphasis added).

[9] Mobil's Post-Hearing Brief, ¶ 9. In this regard, Canada's reliance on the notion that good faith "does not form an obligation where none otherwise exists" is entirely misplaced. In the present case, Canada violated Article 1106(1)(c) and the Mobil I Decision determined that Canada's conduct as such was unlawful. Canada accepted this was true but continued to enforce the Guidelines anyway in violation of Article 1106(1) (Day 4 Hearing Transcript at 147:8-16). Accordingly, Canada did not perform Article 1106(1) in good faith as required by the NAFTA. Whereas Canada argued in its Rejoinder on Costs in Mobil I that "the Board introduced the Guidelines in good faith based on its understanding of Canadian law" and that "Canada defended the claim that the Guidelines are inconsistent with the NAFTA in good faith," the same cannot be said of the Board's decision to enforce the Guidelines after the Mobil I Decision (**C-402**, Mobil I Rejoinder on Costs, 17 January 2014, ¶ 9).

[10] **CL-35**, Vienna Convention on the Law of Treaties, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[11] **CL-5**, NAFTA Article 1106(1).

[12] Mobil's Post Hearing Brief, Part III.A.

[13] Canada's Post-Hearing Submission, ¶¶ 3-4.

Bogota) was inadmissible because, among other reasons, Nicaragua had filed its application before conclusion of a multinational process to promote regional stability and conflict prevention.[14] Honduras contended that Nicaragua, by virtue of participating in this multinational process, was "precluded both by [the Pact of Bogota] and by elementary considerations of good faith from commencing" the ICJ procedure before the multinational process had concluded.[15] While the ICJ noted that the principle of good faith "is not in itself a source of obligation where none would otherwise exist," it understood Honduras to be making an objection under the Pact of Bogota, and the ICJ decided the objection on that basis.[16] Nothing in the ICJ's judgment suggests that Nicaragua did not have an obligation to perform its treaty obligations under the Pact of Bogota in good faith. Indeed, the judgment reaffirms that the principle of good faith is "'one of the basic principles governing the creation and **performance of legal obligations**'" in international law.[17]

- In the second case cited by Canada, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Nigeria contended that Cameroon's application to the ICJ concerning various boundary disputes infringed the principle of good faith because Cameroon had not disclosed its intention to make such an application while it engaged in bilateral discussions concerning the same disputes.[18] The ICJ did not accept Nigeria's position, noting that there was no relevant obligation in international law that Cameroon might have breached to which the obligation of good faith could have attached: "In the absence of any such obligation and of any infringement of Nigeria's corresponding rights," the ICJ concluded that "Nigeria may not justifiably rely upon the principle of good faith in support of its submissions."[19] That said, the ICJ again confirmed that "the principle of good faith is a well-established principle of international law . . . 'governing the creation and **performance of legal obligations** . . . .'"[20]

9. The ICJ cases above stand for the unremarkable proposition that States do not have a stand-alone obligation of good faith apart from a specific obligation found in international law or in a relevant treaty.[21] Yet these cases also confirm that States like Canada must perform their treaty obligations in good faith. As applied to this case, they support finding that the Board's 9 July 2012 decision to enforce the Guidelines constituted a breach of Canada's obligation to perform Article 1106(1) in good faith and to cease ongoing

[14] **RL-110**, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, ¶¶ 70-71, 77.

[15] *Id.* ¶ 77.

[16] *Id.* ¶ 94.

[17] *Id.* (quoting *Nuclear Tests Case (Australia & New Zealand v. France*, Judgment of 20 December 1974, I.C.J. Reports 1974, p. 268 ¶ 46, p. 473 ¶ 49)) (emphasis added).

[18] **RL-111**, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment on Preliminary Objections of 11 June 1998, ¶ 36.

[19] *Id.* ¶ 39.

[20] *Id.* ¶¶ 38-39 (quoting *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, ¶ 94) (emphasis added).

[21] The State party pleadings cited in footnote 7 of Canada's Post-Hearing Submission are to the same effect.

breaches of Article 1106(1). Accordingly, Mobil has argued that this is a distinct breach that is within the three-year limitations period of Articles 1116(2) and 1117(2).

III.
MOBIL'S ALLEGATIONS OF CANADA'S BREACH ARE PROPERLY BEFORE THIS TRIBUNAL

A. Mobil's alternative arguments are properly before the Tribunal

10. In its Memorial, Reply Memorial, and again in Section III of Mobil's Post-Hearing Brief, Mobil identified distinct breaches of Article 1106(1) occurring within three years of the present claim: the failure to perform Article 1106(1) in good faith by ceasing the breach of that article and the enforcement of commitments in OAs respectively issued for the Hibernia and Terra Nova Projects. Canada has had ample opportunity to address these arguments in its Counter-Memorial, Rejoinder, at the hearing, and now in two rounds of post-hearing submissions. As such, these arguments are properly before the Tribunal.

1. Mobil's argument that Canada breached its obligation to perform Article 1106(1) in good faith and cease its breach of Article 1106(1) following the Mobil I Decision was first raised in Mobil's Reply Memorial

11. Canada first raised its limitations defense in its Counter-Memorial.[22] In reply, Mobil argued that "[u]nder international law, Canada is required to cease [its] wrongful conduct and to offer appropriate assurances of non-repetition. Canada has done neither of these things."[23] Instead, as Mobil demonstrated, following the Mobil I Decision and "[c]ontrary to international law, Canada refused to cease applying the Guidelines to Mobil."[24] Mobil argued this refusal was evidenced by the 9 July 2012 letter from the Board to Mobil.[25] Furthermore, Mobil argued that Canada's invocation of a limitations defense was "simply an artifice to enable Canada to continue in its unlawful conduct." Finally, in the context of Mobil's abuse of right argument, also made in its Reply Memorial, Mobil argued that "Canada's conduct is contrary to good faith."[26]

12. In Canada's Rejoinder Memorial, Canada acknowledged Mobil's failure-to-cease argument. Specifically, Canada characterized Mobil's failure-to-cease argument as an attempt to address its time bar arguments "by inventing the new approach that . . . the 'alleged breach' at issue in this arbitration is not the adoption of the Guidelines by the Board in November 2004, but 'the express failure of Canada to cease applying the Guidelines to Mobil on the basis of the findings in the Decision.'"[27]

13. According to Canada, "That is <u>not</u> what NAFTA Chapter Eleven requires. There is no obligation on the part of a NAFTA Party vis à vis a claimant investor to remove a

[22] Canada's Counter-Memorial, ¶¶ 136-172.

[23] Mobil's Reply Memorial, ¶ 1.

[24] *Id.* ¶ 33.

[25] *Id.* ¶ 94.

[26] *Id.*

[27] Canada's Rejoinder Memorial, ¶ 64.

measure which has been found to violate NAFTA Chapter Eleven."[28] Mobil has replied to this objection. Canada's argument fails because the NAFTA requires Canada to apply 1106(1) "in accordance with the applicable rules of international law."[29] Accordingly, Canada has an obligation to perform Article 1106(1) in good faith and to cease enforcement.[30]

14. When a State assumes a treaty obligation, "the principle of good faith—which governs the performance of treaty obligations—imposes a general limitation on every right of the State so that **none may be exercised** in a manner incompatible with the bona fide execution of the obligation assumed."[31] In short, when performing its Article 1106(1) treaty obligations in good faith as required by the NAFTA, Canada is obligated to cease acts it knows are incompatible with those treaty obligations.[32] Moreover, and in any event, the duty to cease wrongful acts is an essential part of the treaty obligation of Article 1106(1).[33]

2. Mobil's argument that Canada breached its Article 1106(1) obligation not to "enforce any commitment or undertaking" was first raised in Mobil's Memorial

15. In its Memorial dated 11 March 2016, Mobil advanced the following argument in respect of Canada's obligation not to enforce any commitment or undertaking in violation of Article 1106(1):

> "As discussed above in paragraphs 114 to 120**, the Board has required each project operator to commit to compliance with the Guidelines as a condition to issuance of each POA/OA**, beginning immediately after the Guidelines' promulgation. . .
>
> Had either operator refused to abide by the Board's condition, it would have risked denial of an OA and termination of production operations. **The Board's demand that the operators agree to comply with the Guidelines as a condition for issuance of an OA constitutes the clearest evidence of the imposition of a requirement and enforcement of a commitment or undertaking in connection with the investments in the Hibernia and Terra Nova projects**."[34]

16. Mobil went on to note that "when informed of the Decision and its holding that the Guidelines breached Article 1106, the Board claimed instead that 'the validity of the Board's guidelines have been affirmed by the Courts and we will continue to verify an Operator's *obligation to ensure that research and development and education and training*

[28] *Id.* ¶ 32 (emphasis in original).

[29] **CL-5**, NAFTA, Article 102(2).

[30] Mobil's Post-Hearing Brief, ¶¶ 9-11.

[31] **CL-108**, Bin Cheng, *General Principles of Law As Applied by International Courts and Tribunals*, p. 124 (2006) (emphasis added).

[32] Mobil's Post-Hearing Brief, ¶¶ 11-14. *See also* **CL-69**, U.N. Articles on the Responsibility of States for Internationally Wrongful Acts, December 12, 2001, Article 30.

[33] Mobil's Post Hearing Brief, ¶¶ 11-12.

[34] Mobil's Memorial, ¶¶ 250-251 (emphasis added).

projects, initiatives and expenditures are aligned with the eligibility criteria and benchmarks established by these guidelines.'"[35]

17. Canada elected not to respond to Mobil's "commitment or undertaking" argument in its Counter-Memorial or Rejoinder. Indeed, the issue of enforcing a commitment or undertaking was again raised at the hearing.[36] Nevertheless, Canada has yet another opportunity to respond to these arguments in its post-hearing briefing.

18. Following the Mobil I Decision, two OAs were issued within three years of Mobil's present claim (in 2012 and 2014). Because each OA is issued for a discrete time period, they are separate and analytically distinct events, based on different operative facts, and as such constitute distinct breaches of Article 1106(1) that, under Mobil's alternative approach, are not time barred by Articles 1116(2) and 1117(2).[37]

B. Mobil's alternative arguments do not raise new "claims;" however, even if Mobil's alternative arguments for distinct breaches of Article 1106(1) were deemed new claims, these claims should be permitted as additional claims under the ICSID Convention

19. In this arbitration, Mobil has claimed that Canada is in breach of Article 1106(1) of the NAFTA and that Canada should pay compensation for losses due to that breach for the 2012-2015 time period. Mobil has also argued that no time bar precludes this claim from being heard. Mobil's alternative arguments regarding distinct breaches of Article 1106(1) occurring within three years of the present claim do not raise new "claims."

20. In investor-state arbitration, a claim is a request for relief due to a State's breach of one or more articles set out in the applicable treaty. In *EnCana v. Ecuador*, for example, the Tribunal defined EnCana's claims as "Ecuador's violation of the following Articles", including Article VIII regarding expropriation and the investor's loss by reason of that violation.[38] In the context of the NAFTA, a claim refers to a party's breach of one or more of the substantive provisions of Chapter 11 and the loss to the investor as a result of that breach.[39] One such provision is Article 1106(1)(c), which is the basis of Mobil's claim in these proceedings.[40]

21. As noted by Thomas Webster, "[t]o constitute an amendment to a claim, one would usually expect that the party filing the document change the structure of its case. The change may be by adding a new request for relief (such as a claim for breach of an additional provision of the agreement or the relevant treaty, as occurred in the *Methanex* case . . . . The change may involve the addition of a new party (and therefore new claims)."[41] Such

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[35] *Id.* ¶ 252 (emphasis in original).

[36] Day 4 Hearing Transcript at 142:8-20.

[37] Mobil's Post Hearing Brief, ¶ 24.

[38] **CL-109**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award of 3 February 2006, ¶ 107. See also **CL-110**, *Fereydoon Ghaffari v. The Islamic Republic of Iran*, Order of 15 September 1987, ¶ 4 (". . . the essence of the claim in this Case would not be changed by the proposed amendment. The claim remains a claim for compensation for the alleged expropriation of Mr. Ghaffari's ownership interest in an Iranian company.")

[39] **CL-5**, NAFTA, Article 1119(b).

[40] *Id.* at Article 1108(8), wherein the term provision is used in reference to Article 1106(1)(c).

[41] **CL-111**, Thomas H. Webster, *Handbook of Investment Arbitration*, p. 554-55. See also, footnote 47 below regarding *Methanex*.

revisions are not relevant to the present case: as in its pleadings, Mobil has presented arguments in its Post-Hearing Brief for breach of the NAFTA, Article 1106(1)(c).

22. The issue of whether a submission in a post-hearing brief constitutes a new claim has been previously addressed in *EnCana v Ecuador*. In *EnCana*, "[f]ollowing the filing of the post-hearing briefs, the Respondent wrote objecting that the Claimant had introduced new claims concerning, *inter alia*, the dismissal of most of the judges of the Constitutional Court and the Supreme Court and referring to statements made by the President of Ecuador in that regard."[42] The Tribunal noted, however, that the events discussed in EnCana's post hearing brief "were relied upon by EnCana not for the purpose of introducing a new claim or cause of action, but in order to inform the Tribunal of matters which might be of relevance **in relation to the claims which had already been identified when the arbitration proceedings were commenced**," namely, the alleged violation of Article VIII of the BIT concerning expropriation.[43] In the Tribunal's view this was quite different than "allowing what are in essence new claims or new causes of action, which in reality have no real relation to the events initially relied upon."[44]

23. As the *Himpurna* Tribunal has observed: "the fair and efficient administration of arbitral justice … militates against any unduly static or formalistic rule that would require parties to recommence proceedings every time the adversarial evolution of argument and evidence suggests the need for a different legal articulation of claims."[45]

24. In the present case, the legal arguments reiterated in Mobil's Post-Hearing Brief regard Mobil's claim that Canada breached Article 1106(1) as set out in Mobil's Request for Arbitration and its Memorial.[46] Mobil's arguments were first raised prior to the Post-Hearing Brief and do not involve new facts. But even if Mobil's *arguments* were new, they do not implicate new *claims* under the NAFTA. Nor has Canada been prejudiced by Mobil's alternative arguments since Canada has had the opportunity to respond.

25. In the US-Iran Tribunal case *Cal-Maine*, the Tribunal highlighted this point: "[T]he Tribunal does not believe that Respondents have been prejudiced by any change of theory so as to make such a change inappropriate. Moreover, Respondents were given the opportunity to and did in fact file post-hearing memorials."[47] Likewise, Canada has not been prejudiced by Mobil's alternative arguments: Canada has had the opportunity to respond to Mobil's arguments in pleadings, at the hearing, and now in post-hearing briefs.

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[42] **CL-109**, *EnCana*, ¶ 18.

[43] *Id.* ¶ 165 (emphasis added).

[44] *Id.* ¶ 164.

[45] **CL-112**, *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara* (UNCITRAL), Final Award of 4 May 1999, ¶ 58.

[46] Mobil's Request for Arbitration, 16 January 2015, ¶ 58; Mobil's Memorial, ¶ 323.

[47] **CL-113**, *Cal-Maine Foods, Inc. v. Iran*, Award of 31 May 1984, p. 60. *See also*, **CL-114**, *Methanex Corp. v. United States or America* (ICSID), Final Award on Jurisdiction & Merits of 3 August 2005, Part II-Chapter F - 1, ¶¶ 1-2, 9, ¶¶ 19-21. Both in its letter of 13 June 2004 and in its closing oral argument, Methanex sought, insofar as it was necessary, permission from the Tribunal to amend its claim to enable it to rely on the amended § 2262.6(c), i.e., a new measure under Article 1101. The Tribunal allowed the amendment, but only to the extent it made use of the statute as evidence of what had already been pled.

26. Even if Mobil's alternative arguments for distinct breaches of Article 1106(1) following the Mobil I Decision are deemed to involve new claims, such claims should be permitted. Mobil noticed the arbitration under both the NAFTA and, as authorized by Article 1120(1)(a), the ICSID Convention. Thus, all of the Convention's provisions apply in this proceeding, including the right to make additional and incidental claims. As a signatory of ICSID, Canada has consented to additional and incidental claims presented in accordance with the ICSID rules.

27. Under Article 46 of the ICSID Convention, the Tribunal shall, if requested, determine any incidental or additional claims arising directly out of the subject-matter of the dispute if the claims are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Tribunal. Mobil's alternative arguments for distinct breaches of Article 1106(1) are within the scope of consent of the parties and are otherwise within the jurisdiction of the Tribunal for all of the reasons that Mobil's primary arguments under Article 1106(1) are within the scope of consent of the parties and within the Tribunal's jurisdiction.

28. Moreover, if Mobil's alternative case is deemed to implicate additional claims, these claims arise directly out of the subject-matter of the dispute. Tribunals have interpreted "the subject-matter of the dispute" broadly. Claims are found to arise directly out of the subject-matter of the dispute if the claims arise: from the same investment, under the same treaty,[48] and from the same factual circumstances.[49] The additional claims in the present case, if any, would arise out of the same investments (Hibernia and Terra Nova), the same set of factual circumstances (the performance requirements in the Guidelines), and would be brought under the same treaty and indeed the same treaty article (Article 1106(1) of the NAFTA).

29. Assuming additional claims arise out of the subject matter of the dispute, the ICSID arbitration rules allow such claims to be heard even after the reply and rejoinder memorials if authorized by the Tribunal "upon justification" and "upon considering any objection of the other party."[50] ICSID Arbitration Rule 40(2) thus gives the Tribunal full discretion to allow additional and incidental claims as the Tribunal finds to be warranted by the circumstances.

30. The determinative question becomes whether, while balancing the benefits of finality and efficiency, there is prejudice to the non-moving party. In *Metalclad v. Mexico*, the Tribunal found no prejudice to the non-moving party where it "had ample notice and opportunity to address issues relating to the [additional claim]."[51]

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[48] **CL-115**, *Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic* (ICSID), Decision on Jurisdiction (Ancillary Claim) of 2 August 2004, ¶ 84.

[49] **CL-116**, *CMS Gas Transmission Co. v. the Argentine Republic* (ICSID), Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003, ¶ 118 ("the subject-matter of the dispute is the alleged loss by CMS of its investment in TGN caused, it is argued, by the breaches by the Republic of Argentina of its obligation under the BIT.").

[50] ICSID Arbitration Rule 40(2).

[51] **CL-62**, *Metaclad v. Mexico* (ICSID AF), Award of 30 August 2000, ¶¶ 68-69. *See also* **RL-3**, *Grand River*, ¶¶ 95-102 (granting an oral motion submitted by claimants' during rebuttal arguments - the final presentation at the hearing - to amend the claim so as to add related measures falling within NAFTA's three-year limitations provision); **CL-117**, *Bernhard Von Pezald and others v. Republic of Zimbabwe* (ICSID); *Border Timbers Limited and others v. Republic of Zimbabwe* (ICSID), Procedural Order No. 3 of 11 January 2013, ¶¶ 49-54 (allowing ancillary preliminary objections raised in the Rejoinder where there was no prejudice to the parties

31. The process in which Mobil's alternative case has been properly put before this Tribunal is both efficient and fair. As the merits have been briefed, both before and after the hearing, Canada is not prejudiced by the consideration of Mobil's alterative case. Indeed, to the extent additional claims are permitted at the Tribunal's discretion, these would be in relation to Canada's admitted breach of Article 1106(1) of the NAFTA.

IV.
CONCLUSION

32. Mobil maintains its primary argument on limitations. As determined by the Mobil I Decision, a loss due to the Guidelines is incurred only when a "payment or expenditure has transpired," or when there is "a call for payment or expenditure" and "a firm obligation to make payment."[52] Applying this determination of when loss is incurred, Mobil necessarily did not acquire knowledge that it had incurred any of the 2012-2015 losses due to the continuing application of the Guidelines until, at the earliest, 2012.

33. The claim is timely on Mobil's alternative case, as well, because analytically distinct events in breach of Article 1106(1) occurred within the limitations period.[53] Specifically, Canada's failure to perform Article 1106(1) in good faith by deciding to continue enforcement after the Mobil I Decision constituted a distinct breach of that article for purposes of the NAFTA limitation provisions.

34. Additionally, two OAs were issued within three years of the present claim. These OAs contained conditions by which the respective operators commit to comply with the Guidelines during the discrete term of the relevant OA. The Tribunal may award compensation for losses incurred by reason of the enforcement of the distinct commitments or undertakings in these OAs.

35. In conclusion, Mobil submits that a decision in this case that achieves substantive justice—by finding that the present claim is timely and not barred by *res judicata*—is also the correct result under the NAFTA and governing principles of international law. In contrast, the acceptance of Canada's arguments would give Canada *carte blanche* to breach the NAFTA for the remainder of the long life of the Hibernia and Terra Nova fields. Mobil thus respectfully requests that the Tribunal deny Canada's arguments on limitations and *res judicata*, confirm Canada's admitted breach of Article 1106(1), and hold Canada to its obligation to make full reparation to Mobil.

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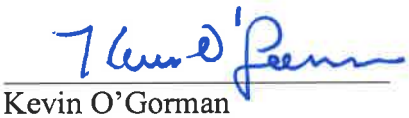
because there were no new facts and so no new evidentiary burden, both parties would have an opportunity to engage in further written pleadings, and refusing to consider whether the jurisdictional objection could lead to subsequent annulment).

[52] **C-1**, Mobil I Decision, ¶¶ 440, 469.

[53] See, e.g., the NAFTA case of *Bilcon* at para 266: "In the present case, the Tribunal finds it possible and appropriate, as did the tribunals in *Feldman*, *Mondev* and *Grand River*, to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits." (**RL-6**, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, Award on Jurisdiction and Liability, 17 March 2015).

Respectfully submitted,



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