IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID CONVENTION BETWEEN

MOBIL INVESTMENTS CANADA INC.,

Claimant

-and-

CANADA,

Respondent.

ICSID CASE NO. ARB/15/6

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below. Consistent with the Tribunal's communication of October 2, 2017, the United States addresses in this submission the following question: "Is a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA?"

2. In creating Chapter Eleven's investor-State dispute settlement mechanism, the NAFTA Parties have specified the treaty obligations the breach of which may be submitted to arbitration. NAFTA Articles 1116(1) and 1117(1) provide a Party's consent to arbitrate only claims based on a breach of either Section A of Chapter Eleven, Article 1503(2) or, under certain circumstances, Article 1502(3)(a). Articles 1116(1) and 1117(1) do not provide consent to arbitrate disputes based on alleged breaches of obligations found in other articles or chapters of the NAFTA or alleged breaches of other treaties or other international obligations.[1]

[1] *See, e.g., Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, ¶ 246 (Mar. 24, 2016) ("[U]nder Article 1116, this Tribunal's jurisdiction is limited to claims of an 'investor' of one NAFTA Party … that another NAFTA Party has breached Section A (i.e. Articles 1101-1114) of Chapter 11 of the NAFTA … ."); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, ¶ 71 (Jan. 12, 2011) ("The Tribunal understands the obligation to 'take into account' other rules of international law to require it to respect the Vienna Convention's rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA."); *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, ¶ 60 (Nov. 22, 2002) ("Article 1116 concerning investor-State disputes, like the similar

3. The principle that "every treaty in force is binding on the parties to it and must be performed by them in good faith" is established in customary international law,[2] not in Section A of NAFTA Chapter Eleven. As such, claims alleging breach of the good faith principle do not fall within the limited jurisdictional grant afforded in Section B.[3]

4. Furthermore, it is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[4] As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability.[5]

5. Accordingly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation.[6] There is no specific treaty obligation under the NAFTA to repeal or cease enforcement of a measure in response to an adverse arbitral award or decision. Article 1135(1), which governs the types of remedies a tribunal may award, provides that a tribunal may award "only" monetary damages and interest (or restitution of property with an option to pay monetary damages instead). Article 1134, which governs a

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article 1117, states the extent of what the Parties have agreed to in respect of claims being submitted to arbitration against each of them by an investor of another Party. Other provisions may shed light on this article, but substantive terms of other provisions will not necessarily state obligations subject to dispute resolution unless they fall within the purview of article 1116."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part II, ch. B, ¶ 5 (Aug. 3, 2005) ("As interpreted by the Tribunal, its jurisdiction is here limited by Articles 1116-1117 NAFTA to deciding claims that the USA has breached an obligation under Section A of Chapter 11.").

[2] *See* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 1980.

[3] *See, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, 135-136, ¶¶ 270-271 (June 27) (holding, with respect to a claim based on customary international law duties alleged to be "implicit in the rule *pacta sunt servanda*," that "the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose").

[4] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105-106, ¶ 94 (Dec. 20).

[5] This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. *See, e.g.*, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Submission of the United States of America, ¶ 7 (July 25, 2014) ("It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not in itself a source of obligation where none would otherwise exist.'"); *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America, ¶ 6 (Apr. 19, 2013) (same); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 94 (Dec. 22, 2008) ("[C]ustomary international law does not impose a free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability. Absent a specific treaty obligation, a Claimant 'may not justifiably rely upon the principle of good faith' to support a claim."); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America, at 29 n.93 (Aug. 6, 2004) ("[Claimant] appears to argue that customary international law imposes a general obligation of 'good faith' independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that 'the principle of good faith . . . is not in itself a source of obligation where none would otherwise exist.'").

[6] *Land and Maritime Boundary (Cameroon v. Nigeria)*, 1998 I.C.J. 275, 297, ¶ 39 (June 11).

tribunal's authority to issue interim measures of protection, provides that "[a] tribunal may not … enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117." In either case, NAFTA tribunals have no authority to change domestic law or to require a NAFTA Party or any state or local government to change its laws or decisions.

Respectfully submitted,

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