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 ARTICLE 1128 SUBMISSIONS OF THE UNITED STATES AND MEXICO

ARBITRAL TRIBUNAL:

Sir Christopher Greenwood QC

Mr. J. William Rowley QC

Dr. Gavan Griffith QC

SECRETARY OF THE TRIBUNAL:

Ms. Lindsay Gastrell

14 December 2017

I.
INTRODUCTION

1. In this Reply, Mobil provides the following observations on the Article 1128 Submissions filed by the United States and Mexico in this arbitration:[1]

- The Article 1128 Submissions confirm that the obligations of the NAFTA must be interpreted and performed in good faith.
- The Article 1128 Submissions, to the extent they address hypothetical claims based on "free-standing" obligations under customary international law, are largely irrelevant to addressing the claim before this Tribunal. Mobil's claim is based on Canada's breach of obligations found in Article 1106(1), not on "free-standing obligations" that are separate and apart from the NAFTA.
- The Article 1128 Submissions' comments on the scope of consent to arbitration under the NAFTA cannot be understood as precluding the application of customary international law to define the obligations contained in Article 1106(1). Under NAFTA Article 1131(1), this Tribunal is not simply permitted, but actually required to apply customary international law rules—including those concerning good faith and cessation of internationally wrongful conduct—in deciding the dispute before it.

2. As a preface to this Reply, Mobil notes that neither the U.S. Submission nor the Mexico Submission addresses the interpretation of Articles 1116(2) or 1117(2). The Article 1128 Submissions are relevant, at most, to the first of Mobil's two alternative cases on limitations, which concerns Canada's failure to cease the violation of Article 1106(1) after the Mobil I Decision.[2] Moreover, the Submissions confirm that the United States and Mexico take no position on the application of the NAFTA to the facts of this case.[3] Accordingly, and respecting the Tribunal's limitation on the scope of this Reply,[4] Mobil will not elaborate upon its previously stated positions regarding the fact-specific nature of the limitations inquiry.[5]

---

[1] In this Reply, "U.S. Submission" means the Submission of the United States of America of 24 October 2017; "Mexico Submission" means the Submission of Mexico Pursuant to NAFTA Article 1128 of 7 November 2017; and "Article 1128 Submissions" or "Submissions" means collectively the U.S. Submission and the Mexico Submission.

[2] The Article 1128 Submissions do not address Mobil's primary case on limitations—which centers on the continuing nature of Canada's violation of Article 1106(1)—or Mobil's second alternative case on limitations—which centers on the enforcement of commitments or undertakings related to the Guidelines.

[3] U.S. Submission, ¶ 1 ("The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case[.]"); Mexico Submission, ¶ 1 ("Mexico takes no position on the facts of this dispute.").

[4] Letter from L. Gastrell (ICSID) to Mobil and Canada of 30 October 2017 (providing that "the scope should be limited to responding to the submissions of the United States and Mexico").

[5] **CL-92**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, Award of 22 August 2016, ¶¶ 229-230 (noting that *UPS* and similar tribunals followed an approach that "although legally sound, is very fact specific and depends on the circumstances of the case."); **RL-6**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Of Delaware Inc. v. Government of Canada*, Award of 31 March 2016, ¶ 265 (noting that "UPS involved its own set of facts"); **RL-61**, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, Interim Award of 25 October 2016, ¶ 166 (noting that the limitations "aspects of this case are heavily fact-specific" and "thus caution[ing] any reading of this Award that would give it wider

3. Nothing in this Reply should be understood as accepting that this Tribunal should accord the Article 1128 Submissions any special authority or weight. Only the Free Trade Commission ("FTC"), comprised of cabinet-level representatives of the NAFTA Parties, may issue interpretations of the NAFTA that are binding on a NAFTA tribunal.[6] No FTC interpretation has ever been issued on the matters raised in the Article 1128 Submissions filed in this arbitration. Further, for the reasons that Mobil presented in the written Memorial phase and during the hearing, the Article 1128 submissions should not be relied upon to find a subsequent "practice" or "agreement" for purposes of Article 31(3) of the Vienna Convention on the Law of Treaties ("VCLT").[7]

II.
THE ARTICLE 1128 SUBMISSIONS CONFIRM THAT NAFTA PARTIES MUST INTERPRET AND PERFORM THE NAFTA IN GOOD FAITH

4. The NAFTA must be interpreted in good faith. Article 102(2) provides that the "Parties shall interpret and apply the provisions of this Agreement . . . in accordance with applicable rules of international law."[8] The recent *Eli Lilly* tribunal correctly understood that this obligation encompasses "rules of interpretation of treaties,"[9] including the rule reflected in Article 31 of the VCLT: "A treaty shall be interpreted in ***good faith*** in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[10]

5. The U.S. Submission would appear to agree with this accepted rule, as shown by its quotation of the *Grand River* tribunal's observation that Article 102(2) "require[s] it to respect the Vienna Convention's rules governing treaty interpretation."[11]

6. The principle of good faith extends beyond the NAFTA Parties' interpretation of the NAFTA. As the *Canfor* tribunal recognized, good faith is not only "a basic principle for interpretation of a treaty," but "also a basic principle in the performance of a treaty by States" as reflected in Article 26 of the VCLT.[12] The *Canfor* tribunal went further, stating that "it is, in the Tribunal's view, a fundamental principle of international law that States Party to a treaty

---

'precedential' effects."). Note also **RL-3**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on Objections to Jurisdiction of 20 July 2006, ¶ 36 ("NAFTA arbitral awards … are rooted in their specific facts.").

[6] **CL-5**, NAFTA art. 1131(2), **CL-123**, NAFTA art. 2001.

[7] Mobil's Reply, ¶¶ 64-70; **C-402**, Claimant's Opening Presentation; **C-403**, Claimant's Closing Presentation. Even if an statement contained in the Article 1128 Submissions were deemed to reflect a subsequent "practice" or "agreement" of the NAFTA Parties, such a statement would only be "taken into account." **CL-35**, VCLT art. 31(3).

[8] **CL-5**, NAFTA art. 102(2)

[9] **CL-124**, *Eli Lilly and Company v. Government of Canada*, Award of 16 March 2017, ¶ 106 (Under "a plain reading" of Article 102(2), "the phrase 'applicable rules of international law' addresses not simply, for example, rules of interpretation of treaties, such as those reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('VCLT'), but also any other applicable rules of international law that may be relevant to the case before it.").

[10] **CL-35**, VCLT art. 31(1) (emphasis added).

[11] U.S. Submission, ¶ 1 n.1 (quoting **RL-33**, *Grand River*, Award of 12 January 2011, ¶ 71).

[12] **CL-125**, *Canfor Corporation v. United States of America*, Decision on Preliminary Question of 6 June 2006, ¶ 182.

must perform obligations in good faith and, therefore, would not intentionally take steps that would undermine performance of those treaty obligations."[13]

7. Both Article 1128 Submissions appear to concur that the NAFTA must be performed in good faith. The U.S. Submission notes that the good faith principle reflected in Article 26 of the VCLT "is established in customary international law" and that "it is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations[.]'"[14] Likewise, the Mexico Submission states that "Mexico agrees with Canada and the United States that the principle of good faith contained in Article 26 of the Vienna Convention on the Law of Treaties, must be observed in the creation and implementation of legal obligations[.]"[15]

III.
THE ARTICLE 1128 SUBMISSIONS DO NOT ADDRESS THE CLAIM BEFORE THIS TRIBUNAL

A. Mobil's claim is for breach of Article 1106(1)

8. In response to Canada's limitations defense, Mobil has argued that no time bar precludes this claim from being heard. While Mobil's alternative arguments regarding distinct breaches of Article 1106(1) reference and apply the customary international law rules of good faith and cessation in particular, these arguments do not alter the nature of Mobil's claim: Canada is in breach of Article 1106(1) of the NAFTA and should therefore pay compensation for losses due to that breach for the 2012-2015 time period.

9. In deciding Mobil's claim, this Tribunal must determine the scope of the obligations contained in NAFTA Article 1106(1). In Mobil's submission, the NAFTA Parties are bound to at least five obligations under Article 1106(1), each of which Canada has breached:

i. The NAFTA Parties shall not "impose" the performance requirements listed in Article 1106(1).[16]

---

[13] *Id.* at 323. The U.S. appears to echo this notion by citing to the Report of the International Law Commission Covering Its 16th Session: "("[A] treaty must be applied and observed not merely according to its letter, but in good faith" including also "abstain[ing] from acts which would inevitably affect [the Parties'] ability to perform the treaty.")." **CL-126**, *Grand River* Counter-Memorial of Respondent United States of America, fn. 338.

[14] U.S. Submission, ¶ 4 (quoting **RL-110**, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, ¶ 94; Mexico Submission, ¶ 3 (same). The U.S. has repeatedly affirmed this and related positions in various NAFTA submissions. In *ADF*, for example, the U.S. stated "the United States agrees with ADF that the customary international law rule of pacta sunt servanda holds that '[e]very treaty in force is binding on the parties to it and must be performed by them in good faith'" and "[t]he United States does not dispute that customary international law requires that treaties be interpreted in good faith; indeed, the United States has acknowledged as much by repeatedly citing Article 31(1) of the Vienna Convention." **RL-113**, *ADF Group Inc. v. United States of America*, Final Post-Hearing Submission of Respondent United States of America on Article 1105(1), p. 12-14.

[15] Mexico Submission, ¶ 3.

[16] *See e.g.*, Claimant's Memorial, ¶ 217: "On its face, Article 1106(1) prohibits NAFTA Parties from imposing or enforcing a requirement to purchase R&D/E&T services or goods in the territory, or according a preference to R&D/E&T services or goods provided in the territory."

ii. The NAFTA Parties shall not "enforce" the performance requirements listed in Article 1106(1).[17]

iii. The NAFTA Parties shall not "enforce any commitment or undertaking" to comply with the performance requirements listed in Article 1106(1).[18]

iv. The NAFTA Parties shall interpret and perform in good faith all obligations of Article 1106(1).[19]

v. The NAFTA Parties shall cease a violation of any obligation of Article 1106(1).[20]

10. The first three of the above-enumerated obligations (i.e., i, ii and iii) arise from the text of Article 1106(1).[21] The last two (i.e., iv and v) arise from the application of customary international law to the text of Article 1106(1).[22] (As shown in Part IV, *infra*, this Tribunal has the jurisdiction and the mandate to apply customary international law to the text of Article 1106(1)).

11. When the nature of Mobil's claim is thus considered, several statements contained in the Article 1128 Submissions, even if they are taken as correct, are not pertinent to the claim submitted to this Tribunal. The irrelevance of these statements is shown below.

B. Mobil's claim is <u>not</u> for breach of a principle of good faith separate and apart from the NAFTA

12. The Article 1128 Submissions quote from the International Court of Justice case of *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, where the ICJ stated

---

[17] *See id.*

[18] *See e.g.*, Claimant's Memorial, ¶ 251: "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."; Claimant's Post-Hearing Brief, ¶ 20: "Article 1106(1), in terms, imposes a further obligation on Canada not to enforce a 'commitment or undertaking' made by an investor that would otherwise be contrary to Canada's commitments relating to performance requirements."

[19] *See e.g.*, Claimant's Memorial, ¶ 216: "The starting point for the tribunal's analysis of Article 1106 should be Article 31(1) of the VCLT, which requires interpretation of a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'"; *See also* Claimant's Post-Hearing Brief, ¶ 9: "Canada's obligation to apply Article 1106(1) in good faith is contained in the treaty's requirement that the NAFTA accord with international law. This obligation is not disputed. Article 102(2) of the NAFTA states that '[t]he Parties shall interpret and apply the provisions of this Agreement [the NAFTA] ... in accordance with applicable rules of international law.'"

[20] *See e.g.*, Claimant's Post-Hearing Brief: "Article 1106(1) incorporates and contains within it an inherent obligation that if a State is in breach of the obligation not to enforce a law or regulation (such as the Guidelines) and the State continues to do so, then the State is also in breach of the obligation to cease under Article 1106(1)."

[21] **CL-5**, NAFTA art. 1106(1): "No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory . . . ."

[22] **CL-35**, VCLT art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."), art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); **CL-69**, U.N. Articles on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001, art. 30 ("The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing[.]").

that good faith "is not in itself a source of obligation where none would otherwise exist."[23] The U.S. Submission additionally observes that "customary international law does not impose a free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability. Accordingly, a claimant 'may not justifiably rely upon the principle of good faith' to support a claim, absent a specific treaty obligation."[24]

13. The Mexico Submission, quoting from Canada's Post-Hearing Submission, contains a similar statement: "'[T]here is no separate obligation to perform in good faith in NAFTA Chapter Eleven'" and "'a failure to do so cannot be alleged as a breach rising to a dispute under Section B thereof.'"[25]

14. None of the above statements pertain to Mobil's claim which—it bears repeating—is not based on a free-standing obligation to perform in good faith. Rather, Mobil's claim is that Canada has breached Article 1106(1) by, in part, failing to perform in good faith the obligations contained in that article.[26] As Canada admitted at the hearing, after the Mobil I Decision, it accepted that the Guidelines were unlawful.[27] They could no longer be imposed or enforced in good faith.[28]

C. Mobil's claim is <u>not</u> for breach of a duty to cease that is separate and apart from the NAFTA

15. The Article 1128 Submissions observe that "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."[29] In a similar vein, the Submissions observe that "[t]here 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."[30] The Submissions further refer to NAFTA

---

[23] **RL-110**, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, ¶ 94; U.S. Submission ¶ 4; Mexico Submission ¶ 3.

[24] U.S. Submission, ¶¶ 4-5 (quoting **RL-111**, *Land and Maritime Boundary (Cameroon v. Nigeria)*, Judgment of 11 June 1998, ¶ 39).

[25] Mexico Submission, ¶ 4 (quoting Canada's Post-Hearing Submission, ¶ 5).

[26] As affirmed in *Rainbow Warrior*, the principles of *pacta sunt servanda* and good faith—as codified in Article 26 of the Vienna Convention—are applicable in determining whether there has been a material breach of a treaty provision: "The customary Law of Treaties, as codified in the Vienna Convention, proclaimed in Article 26, under the title '*Pacta sunt servanda*' that ['']Every treaty in force is binding upon the parties to it and must be performed by them in good faith.['] This fundamental provision is applicable to the determination whether there have been violations of that principle, and in particular, whether material breaches of treaty obligations have been committed." **CL-127**, *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990, ¶ 75.

[27] Day 4 Hearing Transcript at 147: 8-16 ("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.").

[28] "[I]t is clear that refusal to fulfil [sic] a treaty obligation involves international responsibility." **CL-128**, *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (Second Phase) (1950)*, I.C.J. Reports 1950, p. 228.

[29] U.S. Submission, ¶ 5; Mexico Submission, ¶ 5.

[30] U.S. Submission, ¶ 5 (emphasis added); Mexico Submission, ¶ 5 (emphasis added).

Article 1135(1), which provides that a NAFTA tribunal may award only monetary damages or restitution of property.[31]

16. These statements are consistent with Mobil's arguments that upon receiving notice of the Mobil I Decision, Canada failed to perform Article 1106(1) in good faith by ceasing the enforcement of the Guidelines and related commitments and undertakings. Mobil has argued that the decision to continue enforcement of the Guidelines and related commitments or undertakings after the Mobil I Decision is a significant fact that triggered a new limitations period. However, Mobil's ***claim*** is not for breach of a "specific treaty obligation" to repeal the Guidelines or to cease their enforcement in response to an arbitral award or decision. Rather, Mobil's claim is for breach of the obligations contained in Article 1106(1) of the NAFTA. Article 1106(1) provides that "No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking . . .". [32] The NAFTA Parties' obligations to interpret and perform Article 1106(1) in good faith and to cease violating it are concomitant obligations of Article 1106(1). A breach of these obligations is a breach the NAFTA.

17. The significance of the Mobil I Decision is that it determined (for the first time) that the Guidelines were in breach of Article 1106(1) and, hence, Canada incurs liability under the NAFTA for their enforcement. Based on a sound application of customary international law to the obligations contained in Article 1106(1), the decision to enforce the Guidelines after the Mobil I Decision breached that provision and thereby triggered a new limitations period.

IV.

THIS TRIBUNAL HAS BOTH THE JURISDICTION AND THE MANDATE TO APPLY CUSTOMARY INTERNATIONAL LAW

18. As acknowledged in the Article 1128 Submissions, the NAFTA provides consent to arbitrate alleged breaches of obligations found in Section A of Chapter Eleven.[33] The U.S. Submission states a negative implication of this consent, which is that the NAFTA "do[es] not provide consent to arbitrate disputes based on . . . alleged breaches of other treaties or other international obligations."[34] The U.S. Submission adds that the good faith principle "is established in customary international law, not in Section A of NAFTA Chapter Eleven. As such, claims alleging breach of the good faith principle do not fall with the limited

[31] U.S. Submission, ¶ 5; Mexico Submission, ¶ 5.

[32] By its own terms, the prohibition of Article 1106 is not limited to the time when an obligation is first imposed, but also to subsequent acts of enforcement, i.e., no Party may "impose *or enforce*" the requirements listed in Article 1106(1).

[33] U.S. Submission, ¶ 2 ("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)."); Mexico Submission, ¶ 4 ("Under NAFTA Chapter Eleven, an investor of a Party may only claim, pursuant to NAFTA Article 1116 or Article 1117, a breach of an obligation in Section A of Chapter Eleven, Article 1503(2) (State Enterprises), or, under specific circumstances, Article 1502(3)(a) (Monopolies and State Enterprises).").

[34] U.S. Submission, ¶ 2.

jurisdictional grant afforded in Section B."[35] The Mexico Submission repeats the latter part of the foregoing statement.[36]

19. The above statements regarding the scope of a NAFTA tribunal's jurisdiction merely state the obvious, that a NAFTA tribunal lacks jurisdiction over a claim for an alleged breach of a *stand-alone principle of customary international law*. However, they cannot be understood to mean that a NAFTA tribunal lacks the jurisdiction to *apply principles of customary international law*. Such an assertion would not comport with the text of the NAFTA or controlling rules of treaty interpretation.

20. While Section A of the NAFTA sets forth the explicit obligations of the NAFTA Parties vis-à-vis investors, customary international law remains an essential reference in defining and giving content to those obligations. This is confirmed in NAFTA Article 1131(1), which provides that "[a] Tribunal established under [Section B] shall decide the issues in dispute in accordance with this Agreement and ***applicable rules of international law***."[37] As shown below, the "applicable rules of international law" include customary international law. Thus, NAFTA Chapter Eleven tribunals are not only permitted, but in fact required to apply customary international law to define the content of the obligations found in Section A of NAFTA Chapter Eleven and to decide alleged breaches thereof.

21. Multiple NAFTA tribunals have recognized that the "applicable rules of international law" that are referenced in Article 1131(1) encompass customary international law.

- As the *Eli Lilly* tribunal explained, "the proper limitation of the Tribunal's jurisdiction to alleged breaches of Section A of NAFTA Chapter Eleven does not require the Tribunal to ignore … relevant and applicable rules of international law, for purposes of assessing the claims before it."[38] On the contrary, the "relevant and applicable rules on State responsibility … as well as other relevant and applicable rules of international law … inform the interpretation and application of … Section A of NAFTA Chapter Eleven …."[39] The *Feldman* tribunal likewise observed that "general international law" "might become relevant … in complying with the requirement of Article 1113(1)" to decide issues in accordance with applicable rules of international law.[40]
- The *Corn Products International* tribunal reached a similar conclusion: "The rules on State responsibility (of which, it is accepted, the most authoritative statement is to be found in the ILC Articles) are in principle applicable under the NAFTA," save only "to the extent that they are ***excluded*** by provisions of the NAFTA as *lex specialis*."[41] The *Archer Daniels* tribunal explained this concept in similar terms: "Chapter Eleven of the

[35] *Id.* ¶ 3.

[36] Mexico Submission, ¶ 4 ("As the United States asserts, 'claims alleging breach of the good faith principle do not fall within the limited jurisdictional grant afforded in Section B.'").

[37] **CL-5**, NAFTA art. 1131(1) (emphasis added).

[38] **CL-124**, *Eli Lilly*, Award of 16 March 2017, ¶ 102.

[39] *Id.* ¶ 106.

[40] **CL-78**, *Marvin Roy Feldman Karpa v. United Mexican States*, Interim Decision on Preliminary Jurisdictional Issues of 6 December 2000, ¶ 61.

[41] **RL-65**, *Corn Products International, Inc. v. The United Mexican States*, Decision on Responsibility of 15 January 2008, ¶ 76 (emphasis added).

NAFTA constitutes *lex specialis* in respect of its express content, but customary international law continues to govern all matters not covered by Chapter Eleven. In the context of Chapter Eleven, customary international law … operates in a residual way."[42]

- The *Merrill & Ring*, *Thunderbird*, and *Methanex* tribunals accepted that international custom and the general principles of law recognized by civilized nations—being sources of international law enumerated in Article 38(1) of the Statute of the International Court of Justice—are applicable through Article 1131(1).[43]

22. Ultimately, therefore, it is "a matter for each tribunal constituted under Section B of NAFTA Chapter Eleven to evaluate, with the assistance of submissions of the parties on the matter, the precise scope of the phrase 'applicable rules of international law' in the circumstances of the case of which it is seised."[44] As part of its alternative case to establish that Articles 1116(2) and 1117(2) are satisfied, Mobil has referenced the customary international law rules of good faith and cessation of violations. These rules should be taken into account in the fact-specific determination of whether a new limitations period has been triggered by the Board's July 2012 decision.

23. Mobil's entire claim falls within the jurisdictional grant afforded in NAFTA Section B. No *lex specialis* provision of the NAFTA excludes the application of any customary international law rules referenced by Mobil, much less the rules of good faith and cessation of internationally wrongful conduct. This Tribunal possess the jurisdiction and mandate to apply them under Article 1131(1). The Article 1128 Submissions do not support a contrary conclusion.

V.
CONCLUSION

24. The Article 1128 Submissions do not point this Tribunal toward legal principles that are applicable to the present claim before this Tribunal. Moreover, for the purpose of this arbitration, this Tribunal—not the NAFTA Parties—is responsible for interpreting the NAFTA and applying that interpretation to the facts. If the applicable principles of international law are applied to the facts before it, for the reasons stated above, this Tribunal should find that Mobil's claim is within its jurisdiction, that Canada has breached Article 1106(1), and that Canada owes monetary damages in reparation for that breach.

25. As regards the forthcoming decision or award by the Tribunal on these matters, Mobil takes this opportunity to inform the Tribunal and the Secretary that Mobil and Canada recently entered into an agreement concerning the dispatch of the decision or award. Pursuant

---

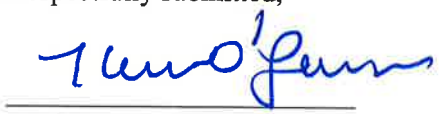
[42] **CL-36**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Award of 21 November 2007, ¶ 119.

[43] **RL-119**, *Merrill & Ring Forestry L. P. v. Government of Canada*, Award of 31 March 2010, ¶ 184 ("The meaning of international law can only be understood today with reference to Article 38(1) of the Statute of the International Court of Justice …."); **CL-129**, *International Thunderbird Gaming Corporation v. United Mexican States*, Award of 26 January 2006, ¶ 90 ("In particular, the Tribunal has regard to the sources of law listed in Article 38(1) of the Statute of the International Court of Justice …."); **CL-114**, *Methanex Corporation v. United States of America*, UNCITRAL, Award of 3 August 2005, Part II, Ch. B, ¶ 3 ("The Tribunal accepts the approach so far submitted by Methanex", by which "Methanex has rightly emphasised the reference in Article 1131(1) to 'applicable rules of international law', and in this respect Methanex relies on Article 38(1) of the Statute of the International Court of Justice.").

[44] **CL-124**, *Eli Lilly*, Award of 16 March 2017, ¶ 106.

to their agreement, the disputing parties jointly request that they receive one month's notice in advance of the date on which the decision or award is dispatched to them.

Respectfully submitted,



Kevin O'Gorman
Paul Neufeld
Denton Nichols
Rafic Bittar
NORTON ROSE FULBRIGHT US LLP
1301 McKinney Suite 5100
Houston, Texas 77010
United States of America

Katie Connolly
NORTON ROSE FULBRIGHT US LLP
799 9th Street NW Suite 1000
Washington, District of Columbia 20001
United States of America

Tom Sikora
EXXON MOBIL CORPORATION
1301 Fannin Street, Corp-FB-1460
Houston, Texas 77002
United States of America

Stacey L. O'Dea
EXXONMOBIL CANADA LTD.
Suite 1000, 100 New Gower Street
St. John's, Newfoundland and Labrador A1C6K3
Canada

Counsel for Claimant Mobil Investments Canada Inc.