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

GOVERNMENT OF CANADA

Respondent

ICSID Case No. ARB/15/6

GOVERNMENT OF CANADA

RESPONSE TO THE ARTICLE 1128 SUBMISSIONS OF THE UNITED STATES AND MEXICO

December 14, 2017

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I. INTRODUCTION

1. On October 24, 2017 and November 7, 2017, pursuant to NAFTA Article 1128, the United States and Mexico respectively made non-disputing Party submissions on the following question posed by the Tribunal at the end of the hearing on July 28, 2017: "Is a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA?"[1]

2. The submissions of the United States and Mexico both confirm Canada's position in its two post-hearing submissions dated August 11, 2017 and September 8, 2017: (i) a breach of the obligation to perform in good faith is not a breach of NAFTA Chapter Eleven, and (ii) there is no obligation under NAFTA Chapter Eleven to cease application of a measure found by a tribunal to be a breach of that chapter.[2] The concordant views of the NAFTA Parties should be considered decisive on both issues.

3. The Tribunal should reject the Claimant's impermissible attempt to circumvent the application of NAFTA Articles 1116(2) and 1117(2) by relying on an alleged obligation of good faith owed to investors. The Claimant's argument that Canada has breached the obligation of good faith and the alleged obligation on Canada to cease application of the 2004 Guidelines is a distraction from what is fundamentally at issue before this Tribunal: NAFTA Chapter Eleven does not permit an investor to challenge a measure that is more than a decade old and the Mobil/Murphy tribunal's Decision does not change that critical limitation on this Tribunal's jurisdiction. The Tribunal should accept the concordant views of the NAFTA Parties regarding good faith and cessation under NAFTA Chapter Eleven and uphold Canada's limitations period jurisdictional objection.

[1] Submission of the United States of America, dated October 24, 2017 ("United States 1128 Submission"); Submission of Mexico Pursuant to NAFTA Article 1128, dated November 7, 2017 ("Mexico 1128 Submission").

[2] The fact that the United States and Mexico made Article 1128 submissions on these issues only after it was raised by the Tribunal at the end of the hearing serves to support Canada's argument that the question regarding good faith is not properly before this Tribunal. Canada maintains its objection that the Tribunal cannot consider the Claimant's arguments with respect to good faith (Canada's Post-Hearing Submission, dated August 11, 2017, ¶¶ 6-7 ("Canada's Post-Hearing Submission")).

II. THE NAFTA PARTIES AGREE THAT A BREACH OF THE OBLIGATION TO PERFORM IN GOOD FAITH IS NOT A BREACH OF AN OBLIGATION UNDER NAFTA CHAPTER ELEVEN

4. Both the United States and Mexico agree with Canada[3] that the principle of good faith cannot be used to create new obligations under Section A of Chapter Eleven. In its submission, the United States notes that "a claimant 'may not justifiably rely upon the principle of good faith' to support a claim, absent a specific treaty obligation."[4] The United States further writes that:

> [I]t 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."[5]

5. In its submission, Mexico agrees with both Canada and the United States, noting that:

> Mexico agrees with Canada and the United States that the principle of good faith… must be observed in the creation and implementation of legal obligations, but "it is not in itself a source of obligation where none would otherwise exist."[6]

6. All three NAFTA Parties accordingly agree that an alleged failure to perform in good faith "cannot be alleged as a breach rising to a dispute under Section B thereof"[7] and "claims alleging breach of the good faith principle do not fall within the limited jurisdictional grant afforded in Section B."[8] The Claimant's argument that "a breach of an obligation to act in good faith *is a breach of an obligation under the NAFTA*"[9] has no support from the Parties to the treaty.

7. All three NAFTA Parties also disagree with the Claimant's argument that "the NAFTA does not merely include a remedy for unlawful conduct; it also includes an obligation to end it"[10] and that "following the Mobil[/Murphy] decision, Canada was required to cease enforcing the

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

[4] United States 1128 Submission, ¶ 5.

[5] United States 1128 Submission, ¶ 4.

[6] Mexico 1128 Submission, ¶ 3.

[7] Mexico 1128 Submission, ¶ 4.

[8] United States 1128 Submission, ¶ 3.

[9] Claimant's Reply to Canada's Post-Hearing Submission, dated September 8, 2017 ("Claimant's Reply to Canada's Post-Hearing Submission"), ¶ 5 (emphasis in original).

[10] Claimant's Reply to Canada's Post-Hearing Submission, ¶ 6.

Guidelines as part of its obligations under Article 1106(1)"[11] such that the limitations period under Articles 1116(2) and 1117(2) of the NAFTA is "re-triggered".[12]

8. The three NAFTA Parties agree 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."[13] Like Canada, both the United States and Mexico emphasized that this would be contrary to the mechanism which the NAFTA established with respect to remedies for breaches of the treaty. As noted by the United States, NAFTA Article 1134 prohibits a tribunal from enjoining the application of a measure.[14] Further, as is made clear in Article 1135(1)(a), "*only*" monetary damages and applicable interest may be awarded if a tribunal finds a breach of an obligation in Section A.[15] These provisions preclude a Chapter Eleven tribunal from recommending or ordering that the offending measure be ceased. In light of these limitations on the power of arbitral tribunals, it would be inappropriate for this Tribunal to find that a NAFTA Party has, because of the principle of good faith, an indirect obligation to cease the enforcement of a measure following a tribunal decision or award. In short, the Tribunal should refrain from using the principle of good faith to indirectly import into Chapter Eleven a requirement that the text of Chapter Eleven does not contemplate.

9. The NAFTA Parties' concordant position on this issue is buttressed by the fact that Article 2018(2) expressly does contemplate cessation of the measure as a means of resolving a dispute between the NAFTA Parties. That Article provides that "[w]herever possible, the resolution shall be *non-implementation or removal of a measure not conforming with this Agreement* or causing nullification or impairment in the sense of Annex 2004 or, failing such a resolution, compensation". The NAFTA Parties included cessation of the measure as a way of resolving disputes between each other but expressly chose *not* to include it as a way in which disputes between the NAFTA Parties

[11] Claimant's Post-Hearing Brief, dated August 11, 2017 ("Claimant's Post-Hearing Brief"), ¶ 13.

[12] Claimant's Post-Hearing Brief, ¶ 14.

[13] United States 1128 Submission, ¶ 5; Mexico 1128 Submission, ¶ 5; Canada's Reply to the Claimant's Post-Hearing Brief, dated September 8, 2017, ¶ 14.

[14] United States 1128 Submission at ¶ 5. Article 1134 provides: ("A Tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 1116 or 1117. For the purposes of this paragraph, an order includes a recommendation.")

[15] United States 1128 Submission, ¶ 5; Mexico 1128 Submission, ¶ 5.

and investors could be resolved under Chapter Eleven. Accepting the Claimant's argument would achieve indirectly that which is unavailable directly and would impermissibly read into Chapter Eleven a remedy that is exclusively available to the NAFTA Parties under Article 2018(2).

III. THE CONCORDANT VIEWS OF THE THREE NAFTA PARTIES SHOULD BE AFFORDED SIGNIFICANT WEIGHT BY THIS TRIBUNAL

10. As Canada noted in its previous submissions,[16] Article 31(3) of the Vienna Convention on the Law of Treaties ("VCLT") provides that in interpreting a treaty, a Tribunal "shall…take[ ] 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"[17] and "(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[18] The use of the word "shall" in VCLT Article 31(3) indicates the mandatory nature of this provision.

11. Regardless of whether the concordant views of the NAFTA Parties in this case strictly fall into the category of subsequent agreement or subsequent practice, the fact that all three treaty parties share the same position on the Tribunal's question pertaining to the parties' obligations vis-à-vis an investor under Chapter Eleven cannot be ignored by the Tribunal. Subsequent agreement and subsequent practice of the treaty parties regarding the interpretation of the NAFTA and the application of its provisions must be taken into consideration by a NAFTA tribunal and given considerable weight. Past tribunals have done so,[19] and this Tribunal should

[16] Canada's Counter-Memorial, ¶¶ 161-162; Canada's Rejoinder Memorial, ¶¶ 105-123.

[17] **CL-35**, *Vienna Convention on the Law of Treaties* (1969) ("VCLT"), Article 31(3)(a).

[18] **CL-35**, *Vienna Convention on the Law of Treaties* (1969) ("VCLT"), Article 31(3)(b).

[19] See e.g., **RL-23**, *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 181-189; **RL-24**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007, ¶¶ 106-108. 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. For example, see: **RL-2**, *Methanex Corporation. v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 147; **RL-118**, *The Loewen Group Inc. and Raymond Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 235; **RL-119**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶¶ 83-92; **CL-78**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB (AF)/99/01) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶¶ 44-45 (Notice of arbitration constitutes the "claim" for time limitation period purposes under Article 1117(2)); **C-1**, *Mobil Investments, Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 291-295, 302-303, 346-350, 374. *See also* **RL-68**, Anthea

do the same here, especially given the serious ramifications for all three NAFTA Parties if the Tribunal were to (wrongly) decide that there is an obligation of good faith owed to an investor under Chapter Eleven to repeal or cease enforcement of a measure in response to an adverse arbitral award or decision and that failure to do so restarts the limitations period in Articles 1116(2) and 1117(2).

IV. CONCLUSION

12. The NAFTA Parties agree that they have only consented to arbitrate specific obligations outlined in Section A of Chapter Eleven of the NAFTA with investors, that there is no obligation in Chapter Eleven requiring the NAFTA Parties to modify or cease application of measures found by a tribunal to be a breach, and that the principle of good faith cannot create such an obligation that can be subject to investor-State arbitration. The answer to the Tribunal's question "Is a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA?" has received an unequivocal answer of "no" from the NAFTA Parties.

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Respectfully submitted on behalf of Canada,

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Roberts, *Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States*, The American Journal of International Law, Vol. 104:179, 2010.