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

GOVERNMENT OF CANADA

POST-HEARING SUBMISSION

August 11, 2017

Trade Law Bureau
Government of Canada
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1. At the end of the hearing on July 28, 2017, the Tribunal posed two questions to the disputing parties regarding the obligation of good faith in international law:

> [F]irst of all, is a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA? And, secondly, is an allegation of such a breach properly before us? For example, I don't recall it being pleaded as such, but can it be said to have been pleaded in the pleading that is before us on abuse of process?[1]

2. Pursuant to the Tribunal's instructions, Canada files this post-hearing submission in response to the Tribunal's two questions.

I. A breach of the obligation to perform in good faith is not a breach of an obligation under the NAFTA

3. Article 26 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") provides that "[e]ach treaty in force is binding upon the parties to it and must be performed by them in good faith."[2] This reflects the general international law principle of *pacta sunt servanda*.[3] The principle of good faith is an auxiliary principle that controls the application of other, more substantive rules. It controls the interpretation and implementation of treaties under the *Vienna Convention*, but it does not define the specific content of treaty obligations. This view was expressed by the International Court of Justice ("ICJ") in the *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*:

> The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" (Nuclear Tests, Z.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist.[4]

4. This principle was repeated by the ICJ in the *Case Concerning the Land and Maritime Boundary Case between Cameroon and Nigeria (Cameroon v. Nigeria)*. In that case, Nigeria contended that Cameroon violated the principle of good faith by secretly planning to invoke the ICJ's compulsory jurisdiction even while it maintained bilateral contact with Nigeria on border

[1] Hearing Transcript, July 28, 2017, p. 218:4-11.

[2] **CL-35**, *Vienna Convention on the Law of Treaties*, May 23, 1969, 1115 U.N.T.S. 31, 27 January 1980, Article 26.

[3] **RL-109**, Ian Brownlie, *Principles of Public International Law*, (Oxford University Press: 2008), 7th ed., p. 620.

[4] **RL-110**, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 1988, 20 December 1988, ¶ 94.

issues.[5] The Court rejected Nigeria's position and repeated the holding in the *Case Concerning Border and Transborder Armed Actions* case cited above. It further noted that:

> In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submission.[6]

5. The principle of good faith is thus an overarching principle to be applied to the interpretation and application of a specific legal rule. It does not form an obligation where none otherwise exists. Canada and the United States have expressed this position in previous NAFTA arbitrations.[7] As there is no separate obligation to perform in good faith in NAFTA Chapter Eleven, a failure to do so cannot be alleged as a breach rising to a dispute under Section B thereof.

II. An allegation of a breach of the obligation to perform in good faith is not properly before this Tribunal

6. The question of whether the obligation to perform the NAFTA in good faith has been breached and whether such a breach constitutes a breach of the NAFTA is not a question before this Tribunal. The Claimant has never alleged that Canada breached the obligation to perform the NAFTA in good faith in any of its pleadings, nor has it alleged that such a breach constitutes a

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[5] **RL-111**, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* Preliminary Objections, Judgment, I.C.J. Reports 1998, 11 June 1998, p. 296.

[6] **RL-111**, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* Preliminary Objections, Judgment, I.C.J. Reports 1998, 11 June 1998, p. 297.

[7] **RL-112**, *United Parcel Service of America v. Government of Canada* (UNCITRAL) Counter-Memorial (Merits Phase), 22 June 2005, ¶ 922: ("'Good faith' is indeed a fundamental principle, but it is an auxiliary principle that controls the application of other, more substantive rules. Thus it controls the implementation of treaties under the *Vienna Convention*, but it does not define the specific content of treaty obligations."); **RL-71**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Submission of the United States of America, 25 July 2014, ¶ 7: ("The principle of 'good faith,' moreover, is not a separate element of the minimum standard of treatment embodied in the Agreement. It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal treaty obligations,' but 'it is not in itself a source of obligation where none would otherwise exist.'"); **RL-17**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 19 April 2013, ¶ 6: ("Finally, the principle of 'good faith' is not a separate element of the minimum standard of treatment embodied in the Agreement. 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'."); **RL-113**, *ADF Group Inc., v. United States of America* (ICSID Case No. ARB(AF)/00/1) Final Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, 1 August 2002, pp. 11-12: ("ADF's attempt to find in customary international law a *general* obligation of 'good faith…subsumed in the Article 1105(1) obligations undertaken by the U.S. in respect of investors and their investments' is similarly without support.").

breach of the NAFTA. The principle of good faith at international law and its relationship to NAFTA Chapter Eleven did not arise in the proceedings until the Tribunal posed the question to the disputing parties at the very end of the hearing on July 28, 2017.[8]

7. At that time, the disputing parties were asked whether the Claimant had alleged a breach of the obligation to perform the NAFTA in good faith under its allegations concerning abuse of right.[9] A review of the five paragraphs the Claimant dedicates to its abuse of right argument in its Reply Memorial[10] demonstrates the answer to be, unequivocally, "no". In its Reply Memorial, the Claimant argues that Canada's invocation of the limitation period is an abuse of right because Canada "attempts to manipulate Articles 1116(2) and 1117(2) to achieve a result that is contrary to international law."[11] The Claimant's argument is that Articles 1116(2) and 1117(2) should not be applied in this case. Nowhere does the Claimant allege that Canada has breached the obligation at international law to perform the NAFTA in good faith. Nor does it explain how such a breach could constitute a violation of NAFTA Chapter Eleven itself.

8. Whether the application of Chapter Eleven's limitation period constitutes an abuse of right is a fundamentally different question than whether there has been a breach of good faith at international law. The Claimant does not refer to Article 26 of the *Vienna Convention* or the principle of *pacta sunt servanda*, and nor do any of the cases it relies upon discuss these obligations. The Claimant's sole argument is that the application of Articles 1116(2) and 1117(2) in this case would constitute an abuse of right, which is a separate matter altogether.

9. Canada does not agree that the application of Articles 1116(2) and 1117(2) in this case constitutes an abuse of right for the reasons explained in its Rejoinder.[12] Canada did not address Article 26 of the *Vienna Convention* or the general international law principle of good faith in its Rejoinder or at the hearing because it was never raised by the Claimant. For this reason, an

[8] Hearing Transcript, July 28, 2017, p. 218:4-11.

[9] Arbitrator Rowley's question mentioned "abuse of process" as opposed to "abuse of right". Given that the Claimant has only ever characterized its arguments as abuse of right, Canada understands Arbitrator Rowley's question as referring to the Claimant's arguments concerning abuse of right.

[10] Claimant's Reply Memorial, ¶¶ 90-94.

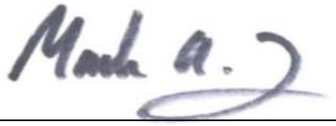
[11] Claimant's Reply Memorial, ¶ 94.

[12] Canada's Rejoinder, ¶¶ 124-130.

allegation that the obligation to perform in good faith has been breached and whether such a breach constitutes a breach of NAFTA Chapter Eleven is not properly before this Tribunal. Any attempt by the Claimant to argue otherwise raises a claim that is both untimely and outside the jurisdiction of this Tribunal.[13]

August 11, 2017

Respectfully submitted on behalf of Canada,



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[13] Article 46 of the ICSID Convention provides that "except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute **provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre**." Arbitration Rule 40(2) further provides that "[a]n incidental or additional claim **shall be presented not later than in the reply** and a counter-claim no later than the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding." (emphasis added).