

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

MOBIL INVESTMENTS CANADA INC. AND MURPHY OIL CORPORATION,

Claimant/Investor,

-and-

THE GOVERNMENT OF CANADA,

Respondent/Party.

SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

1. On July 8, 2010, the governments of the United States and Mexico submitted views to the Tribunal in the above-captioned arbitration pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”). On October 26, 2010, the Tribunal invited the governments of the United States and Mexico to “assist the Tribunal in providing clarifications concerning paragraph 3 of the submission of the United Mexican States and paragraph 5 of the submission of the United States of America,” and posed two sets of questions:

As a matter of law, is the determination of whether a subordinate measure is “consistent with the measure” to be assessed by reference to (i) the national law governing the measure under the authority of which the subordinate measure has been adopted, or (ii) the law of the NAFTA, or (iii) both? If it is or includes the law of the NAFTA, what is the standard by which such assessment is made, and the available sources thereof?

As a matter of (i) national law, and/or (ii) the law of the NAFTA, can a subordinate measure be “consistent with the measure” if it imposes additional and/or more onerous burdens on a legal or natural person who is subject to the subordinate measure?

2. Views of the United States on these questions are hereby submitted pursuant to Article 1128. The United States does not take a position in this submission regarding how the interpretations it offers below apply to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Question 1

3. In the determination of whether a subordinate measure is “consistent with the measure” under which it was authorized, both the law of the NAFTA and national law are relevant.

4. NAFTA Article 1131 provides that a tribunal under Chapter 11 shall “decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” With respect to the scope of non-conforming measure reservations in general, NAFTA Article 1132 permits a disputing Party to request that the NAFTA Free Trade Commission (“FTC”) issue a binding interpretation on the issue of whether a challenged measure in a NAFTA Chapter 11 arbitration falls within the scope of a reservation or exception under Annex I.¹ When a disputing Party does not seek an FTC interpretation pursuant to Article 1132, as in this case, the Tribunal must resolve any dispute over the scope of a reservation or exception under Annex I. In doing so, a Tribunal should apply standard treaty interpretation principles and interpret terms “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,” unless a “special meaning” was intended to apply to a term, in which case that “special meaning” shall be given effect. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (“VCLT”), Arts. 31(1), 31(4).²

5. “Consistent” is not defined in the NAFTA. The ordinary meaning of the term “consistent” is “in accord,” “compatible,” or “without contradiction.”³ The term “measure” is provided with a “special meaning” in the NAFTA, defined in Article 201(1) as “any law, regulation, procedure, requirement or practice,” and the meaning of the “Measures” element of Annex I reservations is specified in Annex I(2)(f), as discussed below.

¹ Interpretations of Annex II, III, and IV are also permitted and the same principles apply to these annexes where the relevant.

² While the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the “authoritative guide” to treaty law and practice. See Letter from Secretary of State Rogers to President Nixon Transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, *reprinted in* 65 DEPT OF ST. BULL. 684, 685 (1971). The International Court of Justice has determined that VCLT Art. 31 is reflective of customary international law. See, e.g., *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1059 (Judgment of Dec. 13, 1999).

³The Oxford English Dictionary defines “consistent” in its “usual and current sense” as “agreeing or according in substance or form; congruous, compatible.” 3 OXFORD ENGLISH DICTIONARY (2nd Ed.) 773 (1989). Webster’s similarly defines “consistent” as “coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 484 (1981).

6. A subordinate measure must be both authorized by and consistent with the “measure” in order to fall within the relevant reservation listed in Annex I.⁴ Because a measure is taken by a Party under its national law, the Tribunal must look to the national law context under which the subordinate measure in question was adopted or maintained to determine whether it is in fact authorized under and consistent with the relevant measure.

7. Whether a subordinate measure is consistent with a measure is also a question of the NAFTA because, when viewed in the context of NAFTA Article 1108 and Annex I, a “subordinate measure” falls within the definition of a “measure” that has been exempted from conforming to certain NAFTA obligations. Pursuant to NAFTA Article 1108(1)(a), each NAFTA Party has taken “reservations and exceptions” with respect to existing measures that do not conform with certain NAFTA articles. According to Article 1108 (1)-(2), each Party was to set out in its Schedule to Annex I “any existing non-conforming measure” for which it was taking a reservation to articles 1102 (national treatment), 1103 (most-favored nation treatment), 1106 (performance requirements), or 1107 (senior management and board of directors). *See also* NAFTA Annex I(1). “Existing” is defined under NAFTA Article 201(1) to mean “in effect on the date of entry into force of this Agreement.” Also exempted from one or more of the four obligations listed above are “the continuation or prompt renewal of any nonconforming measure” listed in Annex I or III and amendments to those non-conforming measures “to the extent that the amendment does not decrease the conformity of the measure” with the listed obligations. NAFTA Art. 1108(1)(b)-(c). Parties have also reserved in Annex II “sectors, subsectors, or activities” that are exempt from the four NAFTA obligations, but which are not subject to the requirement that amendments may not “decrease the conformity” of the measure (Article 1108(1)(c)).

8. Reflecting the Parties’ desire to promote transparency, which is one of the key objectives of the NAFTA (*see* NAFTA Art. 102(1)), Annex I(1) provides for the scheduling of exceptions “with respect to existing measures that do not conform with obligations imposed by” any of the four obligations to which non-conforming measure entries may be taken. Annex I(2) further requires Parties to elaborate certain “elements” of the reservation, including the relevant economic sector, sub-sector, and industry classification (¶(a)-(c)); the obligation from which the measure is reserved (¶(d)); the level of government taking the reservation (¶(e)), the measure itself (¶(f)); the description of any liberalization commitments for, and remaining non-conforming aspects of, the reserved measure (¶(g)); and the phase-out commitment, if any was made (¶(h)). Thus, in Annex I, the Parties not only describe the existing non-conforming measures for which they are taking reservations, but also identify the non-conforming aspects of those measures the Parties committed to partially liberalize as of the entry into force of the Agreement. Annex I(3) also sets out certain rules of interpretation for construing reservations, including rules of priority for considering the different elements, specifying

⁴ As set forth in the views of the United States submitted to the Tribunal on July 8, 2010, such subordinate measures may be adopted after entry into force of the NAFTA.

that “all elements of the reservation shall be considered” and that the “reservation shall be interpreted in light of the relevant provisions of the Chapters against which the reservation is taken.”

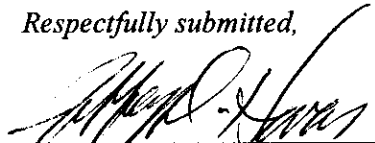
9. Read in context, then, and in light of the object and purpose of the NAFTA, the consistency of a subordinate measure with the reserved measure must be determined by reference both to the national law governing the measure and the NAFTA. For the NAFTA, considerations in relevant cases would include the context of the reservation the Parties negotiated, including the NAFTA obligation from which the listed measure is reserved and the degree of the reserved measure’s and subordinate measure’s non-conformity with that obligation, in light of the other elements of the reservation that would be relevant.

Question 2

10. Regarding the Tribunal’s second question, the extent to which the imposition of “additional and/or more onerous burdens” would impact the analysis of whether a subordinate measure is “consistent with” an existing non-conforming measure reserved in Annex I, we note that the phrase, “additional and/or more onerous burdens,” is not found in the NAFTA. As described above in Question 1, the answer to this question in a specific case would be determined by reference to (i) the domestic legal context of the measure; (ii) the particular elements of the non-conforming measure entry and the subordinate measure, including, *inter alia*, the extent of nonconformity of each with the obligation against which the measure is reserved; and (iii) the specific facts and circumstances of the case. Such a determination would be difficult to make in the abstract or as a general rule.

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Respectfully submitted,



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