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# Mobil v. Canada – Ratcheting Down the Scope of Treaty Reservations

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## Mobil v. Canada – Ratcheting Down the Scope of Treaty Reservations

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As part of States' efforts to strike a balance in their international investment agreements (IIAs) between the obligations they assume and the rights and policy space they wish to retain, some adjoin annexes to their treaties to protect their ability to take "Non-Conforming Measures" (NCMs). States have generally: used such annexes to make exceptions to non-discrimination obligations, market access restrictions and performance requirements; have included the ability to grandfather in NCMs existing at the time an IIA enters into force; and have provided for the ability to maintain, amend, and enact new NCMs in specifically identified sectors, sub-sectors, activities, or policy areas.

As with general exceptions (e.g., the essential security exception), and other carve-outs (e.g., provisions excluding tax matters from investor-State dispute settlement), the interpretation and application of these annexes safeguarding NCMs have important implications for the scope and effect of the treaty to which they are attached. One recent North American Free Trade Agreement (NAFTA) case, *Mobil v. Canada*,[1] highlights that issue and raises important questions for States to consider in connection with drafting and relying on their NCMs.

*Mobil v. Canada* arose out of a regime that the Canadian federal and provincial governments designed in the late 1980s in an attempt to ensure that investment in offshore oil reserves produced long-term benefits for sustainable growth and development in Canada. Specifically, they developed a legal scheme adopted in the 1987 "Accord Act" whereby investors engaging in development of the offshore resources are required by law to make "expenditures … for research and development" (R&D) and "for education and training" (E&T) in the local province.[2]

Canada listed the Accord Act as an NCM in the NAFTA, excepting it from the treaty's restrictions on performance requirements. The NAFTA also included as a protected NCM "any subordinate measure adopted or maintained under the authority of and consistent with the measure."[3]

In 2004, Canadian government officials adopted guidelines under the Accord Act that imposed stronger requirements on investors in the offshore oilfields to invest in R&D and E&T. After unsuccessfully challenging those guidelines under Canadian law, the claimants initiated a claim under the NAFTA, arguing that the new guidelines violated the NAFTA's prohibitions on performance requirements, and that they were not a protected subordinate measure under the treaty's carve-out for NCMs.

A majority of the tribunal agreed with the claimants and, in so doing, made findings with notable implications for the coverage provided by NCM protections.

First, the majority rejected Canada's argument that domestic law should govern the question of whether a subordinate measure is "consistent with" a scheduled NCM. Canada explained that its domestic courts had already found that the 2004 guidelines were consistent with and issued under the authority of the Accord Act, and asserted that such judicial holdings should similarly resolve the issue of "consistency" for the purposes of the NAFTA. The majority, however, took the position that a subordinate measure's consistency with the NCM under domestic law is *necessary* but *not sufficient* to save the subordinate measure under the treaty.

The majority of the tribunal reasoned that, under the NAFTA, when assessing the conformity of the subordinate measure with the reserved NCM, it would have to take into account not only the subordinate measure's consistency with the scheduled NCM itself, but also its consistency with *other subordinate measures* that had been issued pursuant to the scheduled NCM. Applying that test, the majority determined that although the 2004 guidelines may have been consistent with the scheduled NCM (the Accord Act), the 2004 guidelines were *not* consistent with other less demanding subordinate measures officials had previously issued pursuant to that Act when approving less demanding E&T and R&D commitments for the investment projects. In reaching that conclusion, the majority explained that, although "consistent with" did not mean "no more burdensome than", the 2004 guidelines imposed obligations on investors that went so far beyond previously issued guidelines and requirements that the 2004 guidelines should be viewed as being inconsistent with the earlier subordinate measures.

Importantly, by adopting that approach, the majority ratcheted down the broad reservations expressly set forth in the NAFTA. That, as well as the majority's willingness to look beyond domestic law regarding the meaning of "consistency", represents a potential expansion of liability under investment treaties in a manner unforeseen by States.

Nevertheless, there are elements of the case that may dampen that effect. For one, one of the arbitrators wrote a separate opinion dissenting from the majority's decision on the NCM, arguably reducing the persuasive force of the majority award. The majority itself also softened the force of its award when it added the caveat that consistency with "other subordinate measures" might not always be required, but that the relevance of other subordinate measures would depend on the facts of the particular case and the requirements of any relevant preexisting subordinate measures. The majority refrained, however, from trying to further dictate when its approach would or would not be appropriate in other disputes.

States that disagree with the *Mobil* majority's interpretation and application of the NAFTA's NCM provisions may wish to consider both issuing interpretive statements to clarify their understanding of how to approach such provisions in similar treaties, and using modified language in future agreements. These steps are consistent with the growing trend of governments to take steps to reduce uncertainty regarding the scope and meaning of their IIAs. While – in contrast to more infamous clauses such as the "fair and equitable treatment" requirement and essential security exception – there are not yet many cases dealing with the scope and meaning of NCMs, *Mobil* is an early signal of the issues that may increasingly arise regarding these treaty provisions that States can proactively address.

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[1] Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4.

[2] Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 37 (citing the Accord Act, section 45).

[3] North American Free Trade Agreement, 32 International Legal Materials 289, Annex I, 2(f)(ii), (1993).