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# Performance Requirement Prohibitions in International Investment Law

Alexandre Genest



# Performance Requirement Prohibitions in International Investment Law

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## **Legend**

AANZFTA: ASEAN - Australia - New Zealand FTA

ADM: Archer Daniels Midland

ASEAN: Association of Southeast Asian Nations

BIPA: Bilateral Investment Promotion and Protection Agreement

BITs: bilateral investment treaties

CACM: Central American Common Market (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua)

CAFTA-DR - U.S. FTA: the FTA between the Dominican Republic, Central America and the United States

CECA: Comprehensive Economic Cooperation Agreement

CEPA: Comprehensive Economic Partnership Agreement

CERTA Investment Protocol: Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement

CETA: Canada - EU Comprehensive Economic and Trade Agreement

CPI: Corn Products International, Inc.

CUSFTA: Canada - United States Free Trade Agreement

DRC: Democratic Republic of Congo

E&T: education and training

EB: established base

EC: European Community

ECT: Energy Charter Treaty

EFTA: European Free Trade Association

EPA: Economic Partnership Agreement

EPRs: export performance requirements

EU: European Union

FCN: Friendship, Commerce and Navigation

FDI: foreign direct investment

FET: fair and equitable treatment

FHWA: Federal Highway Administration of the U.S. Department of Transportation

FIPA: Foreign Investment Promotion and Protection Agreement

FIRA: Foreign Investment Review Act

FIT: feed-in tariff

FTA: free trade agreement

GATS: General Agreement on Trade in Services

GATT: General Agreement on Tariffs and Trade

HCOMs: Host Country Operational Measures

HFCS: high fructose corn syrup

IGOs: intergovernmental organisations

IAs: international investment agreements

IISD: International Institute for Sustainable Development

ISDS: investor-State dispute settlement

JVRs: joint venture requirements

LCRs: local content requirements

LERs: local equity requirements

LFB: lower fee base

LSRs: local sourcing requirements

LTR: the 2006 Law on Television and Radio Broadcasting of Ukraine

LICIT: Labor industry Coalition for international Trade

MFN: most-favoured nation

MNCs: multinational corporations

MSEs: multi-sourced equivalent norms

NAFTA: North American Free Trade Agreement

NGOs: non-governmental organisations

OECD: Organisation for Economic Co-operation and Development

OPIC: Overseas Private Investment Corporation

P4 Agreement: Trans-pacific Strategic Economic Partnership Agreement between Brunei Darussalam, Chile, New Zealand and Singapore

PCB: Polychlorinated biphenyl

PRPs: performance requirement prohibitions

R&D: research and development

RBPs: restrictive business practices

SAFTA: Singapore - Australia Free Trade Agreement

SCM Agreement: WTO Agreement on Subsidies and Countervailing Measures

SDMI: S.D, Myers, Inc.

SLA: Softwood Lumber Agreement

STAA: Surface Transportation Assistance Act

TIPs: treaties with investment provisions

TLIA: Tate & Lyle Ingredients Americas, Inc

TPP: Trans-Pacific Partnership

TRA: Trade Relations Agreement

TRIMs: Trade-Related Investment Measures

UFB: upper fee base

UNCTAD: United Nations Conference on Trade and Development

UNCTC: United Nations Centre on Transnational Corporations

USTR: United States Trade Representative

VCLT: Vienna Convention on the Law of Treaties

VDOT: Virginia's Department of Transportation

WGTI: WTO Working Group on the Relationship Between Trade and Investment

WTO: World Trade Organization

WTO GPA: WTO Agreement on Government Procurement



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## **I. General Introduction**

### **A. The Issue Addressed in this Thesis: the Prohibition of Performance Requirements in International Investment Agreements**

Performance requirement prohibitions (“PRPs”), labelled “the least understood of the substantive prohibitions set forth” in international investment agreements (“IIAs”), emerged only in the 1970s and 1980s, much later than venerable substantive protection standards such as the minimum standard of treatment, the fair and equitable treatment (“FET”) standard and the protection against expropriation without compensation, whose roots can be traced back to the 19<sup>th</sup> century or even earlier.<sup>1</sup>

This thesis focuses on providing answers to two research questions: first, how do States prohibit performance requirements in IIAs? And second, how should PRPs in IIAs be interpreted and applied?

### **B. The Objective of this Thesis**

The goal of this thesis is to chart an approach to PRPs in IIAs that does justice to their complex wording and to their specific and broader context essential to properly understanding, interpreting and applying them. This thesis aims at elaborating a comprehensive analytical framework that provides an overview of drafting options that States have resorted to in prohibiting performance requirements and in narrowing the scope and applicability of such prohibitions where necessary; such analytical framework also aspires at situating PRPs within their proper historical and bilateral, regional and multilateral treaty-making contexts.

The issue at the heart of this thesis consists of the treaty practice of States when prohibiting performance requirements in IIAs and the interpretation and application of PRPs once disputes between investors and States arise in relation with PRPs in IIAs. This thesis proposes a unitary understanding of PRPs in IIAs through the demonstration of a number of findings. First, the WTO Agreement on Trade-Related Investment Measures (“TRIMs”),<sup>2</sup> the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”)<sup>3</sup> and PRPs in IIAs share common

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<sup>1</sup> Barton Legum, “Understanding Performance Requirement Prohibitions in Investment Treaties” in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007* (Martinus Nijhoff, 2008) 53, 55-56.

<sup>2</sup> Agreement on Trade Related Investment Measures, 15 April 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, 1868 U.N.T.S. 186 (“TRIMs Agreement”).

<sup>3</sup> Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay

origins and must be understood in an interconnected fashion. The General Agreement on Tariffs and Trade (“GATT”)<sup>4</sup> Uruguay Round of negotiations provided a platform that produced terms of art and settled meanings for terms that were subsequently widely and consistently reproduced within a large number of PRPs in IIAs. Second, the U.S. BIT Programme has proven highly influential for PRPs in IIAs and can provide numerous insights into the evolution of PRPs in IIAs. Third, PRPs in IIAs systematically reproduce prior models of PRPs or PRPs within other IIAs and must be understood through the identification of such drafting patterns. Fourth, the drafting of PRPs in IIAs has evolved considerably and multiple recurring techniques have been developed to fine-tune their scope and coverage, their applicability and also their inapplicability. Fifth, the drafting of PRPs and of reservations thereto present numerous complexities and related interpretative challenges. Sixth, intended disruptiveness of most-favoured nation (“MFN”) treatment clauses will cause unanticipated havoc in the application of PRPs in IIAs.

### **C. The Relevance of this Thesis**

#### **1. Analyses of How PRPs in IIAs are Drafted, Interpreted and Applied are Anecdotal**

While a great number of research endeavours have focused on performance requirements, few studies survey PRPs at length.<sup>5</sup> A number of international law textbooks, chapters, publications and theses address PRPs in IIAs, but allot only a few lines or pages to the topic.<sup>6</sup> Professor

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Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14 [“SCM Agreement”].

<sup>4</sup> General Agreement on Tariffs and Trade, 15 April 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187 (“GATT”).

<sup>5</sup> Asia-Pacific Economic Cooperation (“APEC”) and UNCTAD, *Handbook for Negotiators of International Investment Agreements* (December 2012) 86-90; Aaron Cosbey, “Everyone’s Doing It: The Acceptance, Effectiveness and Legality of Performance Requirements” 6(1) *Investment Treaty News* (IISD) (February 2015) 9-11; Andrew Newcombe and Lluís Paradell, “Transfer Rights, Performance Requirements and Transparency” in *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 416-429; Suzy H. Nikièma, “Performance Requirements in Investment Treaties,” *IISD Best Practices Series* (30 December 2014); UNCTAD, *World Investment Report 1996: Investment, Trade and International Policy Arrangements*, UN Doc UNCTAD/DTCI/32 (1996) 134, 148-149, 156, 162; UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, UN Doc. No. UNCTAD/ITE/IIA/2003/7 (2003) 4-5; WTO and UNCTAD, “Scope and Definition Provisions in International Agreements (Part I)” in *Trade-Related Investment Measures and Other Performance Requirements – Joint Study by the WTO and UNCTAD Secretariats*, Committee on Trade-Related Investment Measures, WTO Doc G/C/W/307 (2001); J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat, May 2013) 193-204.

<sup>6</sup> Stefan D Amarasinha and Juliane Kokott, “Multilateral Investment Rules Revisited” in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008) 145, 151-152; Rémi Bachand, “Étude comparative des accords et traités d’investissement dans les Amériques: existe-t-il une alternative au modèle ALENA?” 1(2) *Continentalisation, Notes et Études* (January 2001) 4-5; Freya Baetens, “The Kyoto Protocol Assessed Through the Lens of Investor-State Arbitration: Reconciling Climate Change and Investment Protection Objectives” in Marie-Claire Cordonier-Segger, Markus W. Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 701-703; Nathalie Bernasconi-Osterwalder and others,

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Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford Scholarship Online, 2011) 34-38; Peter Muchlinski, "Policy Issues" in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008) 31-35; OECD, *International Investment Perspectives 2004* (OECD, 2005) 116, 118, 120; OECD, *Policy Framework for Investment: a Review of Good Practices* (OECD, 2006) 28-29; Mohamed Oudebji, "Les accords internationaux sur l'investissement (AI) et l'Accord sur les MIC dans le contexte Africain" 5 *TDM* (2006) 8, 12-13, 17; Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making* (IISD, 2004) 33-35; Patrick L. Robinson, "Criteria to Test the Development Friendliness of International Investment Agreements" 7(1) *Transnational Corporations* (April 1998) 87-88; Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection" in 269 *Hague Academy of International*

Collins contributed significantly to our knowledge of PRPs. His recently published book provides a helpful overview of a number of PRPs that appear in IIAs.<sup>7</sup> Nevertheless, the debate over performance requirements and the theoretical frameworks about performance requirements have centred on whether they should be allowed or prohibited and not on how treaty provisions that prohibit performance requirements should be drafted or how PRPs in IIAs should be interpreted or applied. This thesis has surveyed the existing literature on TRIMs and PRPs and has made use of it where possible. However, the existing literature has yet to produce scholarly schools of thoughts on drafting, interpreting or applying PRPs with which one could engage. Only arbitral tribunals have formulated views on such matters. This thesis engages fully with such views, in a critical manner where necessary, while inserting itself within the mainstream of scholarly research in the field of international investment law.

With an estimated 3,304 IIAs signed by the end of 2015 (2,946 bilateral investment treaties (“BITs”) and 358 treaties with investment provisions (“TIPs”)),<sup>8</sup> the area in which one may unearth PRPs is extremely vast. Nevertheless, no attempt has been undertaken to date to conduct an in-depth, systematic analysis of PRPs within a large number of IIAs: studies that discuss PRPs identify drafting patterns, but mention only a limited number of scattered examples which stunt the taking stock of the spread, frequency, recurrence and interconnectedness of PRPs in IIAs. This thesis demonstrates that a number of clear drafting patterns emerge among sampled PRPs, that States have resorted to multiple clauses and

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*Law Collected Courses* (1997, Martinus-Nijhoff) 326, 363-368; Jeswald W. Salacuse, *The Law of Investment Treaties* (OUP, 2010) 130-131, 329-333; Jeswald W. Salacuse, “Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain” in Norbert Horn and Stefan Michael Kröll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International, 2004) 56, 66, 73-75; Pierre Sauvé, Americo Beviglia Zampetti, “International Investment” in Andrew T. Guzman and Alan O. Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar, 2007) 223-225; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge Books Online, 2010) 111-112, 141-142, 271; Muthucumaraswamy Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000) 334-337; Wenhua Shan, *The Legal Protection of Foreign Investment: a Comparative Study* (Hart, 2012) 706-707; Wenhua Shan, “The Protection of Foreign Investment” in K.B. Brown and D.V. Snyder (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l’Académie Internationale de Droit Comparé* (Springer, 2012) 488-489; Sūryaprasāda Subedi, *International Investment Law: Reconciling Policy and Principle*, 2<sup>nd</sup> ed (Hart, 2012) 36-38; Anastasia Telesetsky, “A New Investment Deal in Asia and Africa: Land Leases to Foreign Investors” in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, 2011) 556-557; Friedl Weiss, “Trade and Investment” in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008) 198-203, 209-210, 219; Jacob Werksman, Kevin A. Baumert and Navroz K. Dubash, “Will International Investment Rules Obstruct Climate Protection Policies? An Examination of the Clean Development Mechanism” 3 *International Environmental Agreements: Politics, Law and Economics* 59 (2003) 68, 75, 80.

<sup>7</sup> David Collins, *Performance Requirements and Investment Incentives Under International Economic Law* (Edward Elgar, 2015) 116-131.

<sup>8</sup> UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges*, UN Doc UNCTAD/WIR/2016.

techniques to enlarge or confine the applicability of their PRPs, and that the specific wording of PRPs and exceptions, exclusions and/or reservations thereto must be strictly adhered to.

## **2. The Interpretation of PRPs by Arbitral Tribunals is Underdeveloped and Generally Unsatisfactory**

PRPs fall squarely within public international law and the law of treaties more generally. Interpreting and applying PRPs are therefore rooted in rules of treaty interpretation and the various elements set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>9</sup> must be exploited to their fullest in providing guidance while accounting for the specific nature of each PRP. As will be demonstrated in this thesis, PRPs within distinct IIAs share common origins and have evolved in close relation to one another. Treaty interpretation rules call for their coherent interpretation and application<sup>10</sup> while remaining fully attuned to their respective textual, contextual and purposive specificities in order to avoid “gloss[ing] over differences” between PRPs.<sup>11</sup>

This approach contrasts sharply with the remissness of arbitral tribunals having dealt with PRPs to date, which has proven harmful to a proper understanding of PRPs and to their consistent and predictable application; their interpretative methodologies reveal shortcomings, detrimental patterns and a lack of comprehensiveness. The few analyses of arbitral awards having dealt with PRPs prove summary in nature and do not challenge the assertions, assumptions, underpinnings or the outcomes of such arbitral awards.<sup>12</sup>

The decisions of arbitral tribunals to date have given the unfortunate impression that each PRP exists in a vacuum. The “hit or miss” interpretations, the lack of consistency and continuity, and

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<sup>9</sup> *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) [the “VCLT”].

<sup>10</sup> Tomer Broude and Yuval Shany, “The International Law and Policy of Multi-Sourced Equivalent Norms” in Tomer Broude and Yuval Shany (eds), *Multi-sourced Equivalent Norms In International Law*, Hart (2011) 14; Ulf Linderfalk, “Cross-Fertilisation in International Law,” 84(3) *Nordic J. of Int’l L.* 428 (2015) 436, 445-446.

<sup>11</sup> Anne-Marie Carstens, “Interpreting Transplanted Treaty Rules” in Andrea Bianchi, Daniel Peat, Matthew Windsor (eds), *Interpretation in international law*, Oxford University Press (2015) 234, 237.

<sup>12</sup> See e.g., R. Doak Bishop and William Russell, “Survey of Arbitration Awards Under Chapter 11 of the North American Free Trade Agreement” 19(6) *Journal of International Arbitration* 505 (2002) 551-556; Charles H. Brower II, “*Mobil Investments Canada, Inc. and Murphy Oil Corp. v Canada*, High Court, 22 May 2012” in *A contribution by the ITA Board of Reporters* (Kluwer Law International, 2013) 8 p.; Charles H. Brower II, “*S.D. Myers, Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc.*, [2004] F.C. 38” 98(2) *American Journal of International Law* (2004) 339-348; Collins (n 7) 132-140; Barton Legum and Megi Medzmariashvili, “Chapter 30: Performance Requirements” in Meg N. Kinnear, Geraldine R. Fischer and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 415-430; Rajeev Sharma, “Jurisprudence of NAFTA Article 1106: the Prohibition Against Performance Requirements” in Todd Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational Publishers, 2004) 77-93.

the occasionally misguided and staunch refusal to look beyond the wording of treaty provisions have created a poorly endowed body of jurisprudence in respect of PRPs.

This thesis contends in particular that the arbitral tribunals having interpreted and applied PRPs in IIAs misunderstood PRPs, exceptions to PRPs and reservations to PRPs. For example, the *Mobil & Murphy* Tribunal under the NAFTA (1992)<sup>13</sup> and the *Lemire* Tribunal under the Ukraine - U.S. BIT (1994)<sup>14</sup> opted for sharply contrasting yet equally misguided methods: the *Mobil & Murphy* Tribunal deliberately chose to ignore highly relevant additional sources of information pertaining to PRPs, while the approach of the *Lemire* Tribunal proved conveniently oblivious as to the clear wording and operation of the PRP at issue.

The casual pleadings by disputing parties and analyses by arbitral tribunals on PRP may reflect the initial relative unimportance of PRPs as a basis for holding a respondent State liable in overall disputes. In all arbitrations except for *Mobil & Murphy v Canada*, the PRP proved a secondary issue given that a finding of liability could be argued more effectively on other, better-known treaty provisions. NAFTA Article 1106 constituted the sole basis for State liability and for the award of damages only in *Mobil & Murphy v Canada*. Disputing parties had submitted the most in-depth arguments on a PRP and the Tribunal produced the most detailed reasons regarding a PRP to date. By contrast, the *ADM* Tribunal<sup>15</sup> and the *Cargill v Mexico* Tribunal<sup>16</sup> did not even bother considering whether their findings of violations of NAFTA Article 1106 entailed compensable damages, and instead focused their assessments of damages on other breached NAFTA provisions.

The recurring lack of interest in PRPs likely has already vanished following the award of more than CDN\$ 17 million plus interest in damages on the basis of NAFTA Article 1106 alone in *Mobil & Murphy v Canada*.<sup>17</sup> As an example of such heightened interest, Mobil filed a Request for Arbitration seeking an award that would order Canada to pay damages in excess of CDN\$

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<sup>13</sup> *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012); *North American Free Trade Agreement*, U.S. - Can. - Mex., signed 17 December 1992, entered into force 1 January 1994, 32 I.L.M. 289 (1993) (the “NAFTA”).

<sup>14</sup> *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010).

<sup>15</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007) paras 261, 269, 295.

<sup>16</sup> *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) paras 431, 520, 540.

<sup>17</sup> *Attorney General of Canada v Mobil Investments Canada Inc. and Murphy Oil Corporation*, Application to the Ontario Superior Court of Justice for an Order Setting Aside the arbitral award made on 20 February 2015 in *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4 (19 May 2015).

20 million from 2012 onward in relation with a continuing violation of NAFTA Article 1106,<sup>18</sup> while Murphy submitted a Notice of Intent to submit a NAFTA Chapter 11 claim similarly seeking CDN\$ 5 million in damages.<sup>19</sup>

### 3. The Application of MFN Treatment Clauses to PRPs Remains Unexplored

Heeding the specific language of each given treaty provision, MFN treatment clauses act as streams of undefined international obligations that originate outside of the basic treaty and whose existence may precede or follow that of MFN treatment clauses.<sup>20</sup> MFN treatment clauses multilateralise and harmonise substantive investor protection instruments by elevating investor protection by a host State to the highest level conferred by any of its IIAs.<sup>21</sup> However, a growing number of arbitral tribunals have demurred to the wholesale application of MFN treatment clauses. This trend began with investor-State dispute settlement (“ISDS”) and is now spreading to substantive investor protection standards. Arbitral tribunals have thus opened the door to a number of unpredictable exclusions with uncertain contours that may preclude the applicability of MFN treatment clauses in respect of substantive protection standards, including PRPs.

Issues that might arise in relation with the application of MFN treatment clauses to substantive protection standards such as PRPs have been left largely unexplored. This thesis will draw from a hypothetical example to underline implications of MFN treatment clauses for PRPs. In analysing these implications, this thesis will appraise the application of MFN treatment clauses to substantive protection standards such as PRPs. Two assumptions are made for purposes of exploring such topic on the basis that “no less favourable” treatment within MFN treatment clauses of IIAs is meant to ensure equality of competitive opportunities between investors of different States.<sup>22</sup> First, it is assumed that an IIA which comprises a PRP grants investors more favourable treatment than an IIA without a PRP. Second, it is assumed that a PRP which

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<sup>18</sup> *Mobil Investments Canada Inc. v Canada*, ICSID Case No. ARB/15/6, Notice of Intent with Annexes (16 October 2014); *Mobil Investments Canada Inc. v Canada*, ICSID Case No. ARB/15/6, Request for Arbitration (16 January 2015).

<sup>19</sup> *Murphy Oil Corporation vs Government of Canada*, Notice of Intent to Submit A Claim to Arbitration Under NAFTA Chapter Eleven (16 October 2014).

<sup>20</sup> Pia Acconci, “Most-Favoured-Nation Treatment” in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008) 365, 402, quoted in Patrick Dumberry, “The Importation of the FET Standard through MFN Clauses: An Empirical Study of BITs” *ICSID Review* (forthcoming) 3.

<sup>21</sup> Dumberry (n 20) 4, citing Stephan Schill, *The Multilateralization of International Investment Law* (CUP, 2009) 142.

<sup>22</sup> Study Group on the Most-Favoured-Nation clause, *Final Report, Annex to the Report of the International Law Commission*, 67 UNGAOR Supp. (No 10), UN Doc A/70/10 (14 August 2015) paras 74-75.



imposes greater constraints on a State's ability to adopt performance requirements confers more favourable treatment to investors than does a PRP that provides for fewer and narrower disciplines in respect of a State's power to impose performance requirement.

#### **D. The Scope of this Thesis**

##### **1. Exhaustive Overview of PRPs Within the IIAs of six Countries and Within Model BITs**

This thesis does not aim at completing an exhaustive analysis of the occurrences and variations of PRPs in all IIAs given the several hundreds of IIAs that could possibly comprise PRPs and the thousands of IIAs that would need to be consulted in order to determine whether they comprise PRPs. This thesis undertakes the first attempt at developing a detailed typology and analysis of PRPs in IIAs. This thesis exhaustively appraises the treaty practice of six States in order to provide additional insights as to the practice of States in drafting PRPs and the problems that may arise with their interpretation and application.

First, the United States included a PRP in every BIT Model from 1981 onward and in all of its IIAs. The United States also made multiple submissions on performance requirement in the GATT forum. This thesis therefore closely scrutinises the American treaty practice on PRPs. Second, Canada's treaty practice was singled out for being at the heart of the elaboration of PRPs since the mid-1980s. Canada and the United States negotiated Article 1603 of the Canada - United States Free Trade Agreement ("CUSFTA")<sup>23</sup> before replacing it with NAFTA Article 1106. NAFTA Article 1106 influenced a large number of subsequent PRPs and has generated all but one of the publicly available arbitral awards dealing with PRPs. Canada has included PRPs in its Foreign Investment Promotion and Protection Agreement ("FIPA") Models and in a large number of its IIAs.

Third, India's IIAs were added on the basis of having signed a large number of IIAs, of having developed a sophisticated approach to BITs as witnessed by its detailed Model Bilateral Investment Promotion and Protection Agreement ("BIPA"), and of ensuring that at least one Asian country formed part of the sample of IIAs more closely analysed. Moreover, the tension between the opposing views on performance requirements of the United States and India shaped the GATT Uruguay Round of negotiations on performance requirements. Their

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<sup>23</sup> *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, Ottawa, 22 December 1987 and 2 January 1988, Washington, 23 December 1987 and Palm Springs, 2 January 1988, 27 I.L.M. 281 (1988) ("CUSFTA"), which includes a PRP in Article 1603. The CUSFTA applied between Canada and the United States prior to and was superseded for the greater part by the NAFTA.

respective treaty practice regarding PRPs could provide insights as to potentially diverging approaches to PRPs. Fourth, France was selected for having developed a unique, consistent, across the board and long-established practice of including PRPs in its BITs, as well as to ensure that the treaty practice of at least one European country formed part of the sample of IIAs comprehensively studied. Fifth, Australia was chosen for having developed an elaborate practice of signing BITs and various kinds of FTAs, for having recent and elaborate iterations of PRPs and for ensuring that the treaty practice of at least one Australasian country formed part of the sample of IIAs comprehensively studied. Sixth, Chile was identified on the basis that it had developed an elaborate practice of signing BITs and various kinds of FTAs, that it has recent, detailed and variable iterations of PRPs, and that the treaty practice of at least one Latin American country should form part of the sample of IIAs comprehensively studied.

Accordingly, this thesis surveys a total of 414 publicly available IIAs entered into as of 1 May 2016<sup>24</sup> by six countries: the United States, Australia, Canada, Chile, France and India (63 American IIAs; 37 Australian IIAs; 50 Canadian IIAs; 81 Chilean IIAs; 107 French IIAs; 76 Indian IIAs). Care was given to avoiding the double-counting of IIAs between these same countries. Within this sample of 414 IIAs, 196 IIAs comprise treaty provisions which regulate performance requirements one way or another (United States: 60; Australia: 9; Canada: 40; Chile: 19; France: 64; India: 4). This thesis also scrutinises the publicly available Model BITs of 44 countries, two non-governmental organisations (“NGOs”) and three intergovernmental organisations (“IGOs”), while focusing on the few Model BITs that comprise PRPs that have proven extremely influential in the development and spread of PRPs in IIAs. This sample provides the basis for the analysis of PRPs in IIAs that was undertaken in this thesis.

## **2. Comprehensive Analysis of State Submissions on Performance Requirements and Subsidies in the GATT Uruguay Round of Negotiations**

For the first time, this thesis charts the evolution of PRPs over time and draws upon a number of State submissions produced within the multilateral trade context in order to shed greater light as to the meaning and scope of PRPs in IIAs. Multilateral, bilateral and regional treaty provisions on performance requirements apply to the same matter and often between States parties to both a given bilateral or regional IIA and to the TRIMs Agreement and the SCM Agreement. Accordingly, the documentation pertaining to performance requirements in the context of the multilateral GATT Uruguay Round of negotiations can provide insights in interpreting and applying PRPs in IIAs and understanding the inner-workings and purposes of performance

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<sup>24</sup> UNCTAD, *International Investment Agreements Navigator*, <<http://investmentpolicyhub.unctad.org/IIA>> accessed 31 May 2016.

requirements. The articulation of the disciplines on performance requirements included within the TRIMs Agreement and the SCM Agreement can also help improve our understanding of PRPs in IIAs by comparing and contrasting the language of various treaty provisions. Moreover, PRPs in IIAs may simultaneously apply alongside PRPs in IIAs to a given situation; therefore, a comprehensive understanding of PRPs mandates the study of bilateral and regional as well as multilateral disciplines on performance requirements.

### **3. Comprehensive Analysis of all Arbitral Awards Having Interpreted and Applied PRPs in IIAs**

PRPs have played a critical role in a limited number of investor-State disputes to date. Their application to unforeseen situations may raise similarly unforeseen dilemmas pertaining to the interpretation or application of PRPs. This thesis conducts the first critical and in-depth analysis of all arbitral awards which have decided claims based on PRPs within IIAs. Such analysis will provide guidance and caution over pitfalls that arise when interpreting and applying PRPs. Only two PRPs have been interpreted by arbitral tribunals thus far: Article II(6) of the Ukraine - U.S. BIT (1994) and Article 1106 of the NAFTA (1992). This thesis expounds on the facts, measures at issue and (where available) disputing party submissions and critically assesses decisions of arbitral tribunals in respect of these two PRPs. Article II(6) of the Ukraine - U.S. BIT forms part of the first-generation, open-ended PRPs and its interpretation will therefore be scrutinised first. NAFTA Article 1106 signalled the end of open-ended PRPs and constituted the main inspiration for PRPs with elaborate and exhaustive lists of performance requirements; its interpretation will therefore be appraised second. The analysis of arbitral awards will be conducted with a view to providing insights into critical interpretative and application issues of relevance to PRPs in IIAs generally.

### **4. The Applicability of MFN Treatment Clauses to PRPs**

This thesis explores two scenarios in which the application of MFN treatment clauses to PRPs in IIAs can upend treaty rules applicable to performance requirements: first, invoking MFN treatment clauses to override narrower and more permissive PRPs with more State-constraining PRPs that better shield investors and investments from performance requirements; and second, relying upon MFN treatment clauses to import a PRP within an IIA absent any language regarding performance requirements in such IIA. These two scenarios would notably include instances where MFN treatment clauses would serve to import more State-constraining PRPs from prior IIAs into subsequent IIAs that include more permissive PRPs or no PRP; hence this thesis will also analyse the issue of antecedent third treaties.

This thesis therefore explores the following questions: can MFN treatment clauses serve to override a more permissive PRP with a more State-constraining PRP that better shields investors and investments from performance requirements? Can MFN treatment clauses serve to import a PRP within an IIA absent any language regarding performance requirements in such IIA? Can MFN treatment clauses serve to import prior and more State-constraining PRPs from an older IIA into a more recent IIA so as to override its more recent, but more permissive PRP?

To date, no arbitral tribunal has applied MFN treatment clauses to PRPs. As a result, this thesis explores arbitral awards dealing more generally with the relationship between MFN treatment clauses and substantive investor treaty protections in order to assess how arbitral tribunals might apply MFN treatment clauses to PRPs in the future.

By way of summary, this thesis implements a conventional legal analysis by resorting to detailed and comparative textual analyses of PRPs in IIAs, while factoring in the purposes that underlie PRPs, the origins of such treaty provisions, principles of treaty interpretation and interpretations of PRPs by arbitral tribunals. Every PRP quoted in this thesis was carefully reviewed and analysed and every IIA forming part of surveyed treaty practice was reviewed to determine whether or not it comprised a PRP of its own. This conventional legal analysis which implements standards methodologies for legal research yields a detailed typology of PRPs in IIAs, a better understanding of the policy choices that orient the decision to prohibit or allow performance requirements, and a helpful analytical framework for drafting, interpreting and/or applying PRPs in IIAs.

## **E. Overview of this Thesis**

This thesis notably provides an overview of variations of PRPs in IIAs. The exercise of identifying and cataloguing differences among the wide array of PRPs allows us to chart their “measure of difference” while isolating their “core of equivalence.”<sup>25</sup> Part II sets out performance requirements and their general objectives, the closely related concept of TRIMs, the ubiquitously concomitant investment incentives and the reasons that have compelled a number of States to prohibit performance requirements.

Part III explains why systemic integration and cross-fertilisation are needed to develop a proper understanding of PRPs in IIAs and begins by highlighting that PRPs constitute multi-sourced equivalent norms (“MSENs”) and transplanted treaty rules. Part III also ascertains the role that Model BITs and pioneering IIAs have played in the drafting of PRPs, and notably the influence

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<sup>25</sup> Broude and Shany (n 10) 9.

of the American approach toward PRPs. The United States and France actively sought the prohibition of performance requirements outside of the GATT during the 1980s and early 1990s. Their Model BITs comprise PRPs that made their way, integrally or with alterations, into nearly all American and French BITs. Moreover, PRPs within American IIAs (including the NAFTA) reverberated throughout a large number of non-American IIAs. Part III further explains that PRPs in IIAs should be understood in a systemic manner and together with the TRIMs Agreement and the SCM Agreement due to their shared origins, their interconnectedness and their mutually reinforcing influence. Finally, Part III discusses Articles 31 and 32 of the VCLT, critically appraises the interpretation of PRPs made by prior arbitral tribunals, and calls upon arbitral tribunals to make full use of means identified in such provisions when interpreting and applying PRPs in IIAs, to the extent that disputing party submissions allow them to conduct such analysis.

Part IV of this thesis aims at developing a comprehensive typology and analysis of PRPs in surveyed IIAs that highlights the most frequently recurring variations and prevalent prototypes. Part IV first covers non-binding PRPs with narrow coverage. The second section of Part IV discusses the applicability of the GATT to performance requirements, the GATT Uruguay Round of negotiations on TRIMs, and the disciplines applicable to performance requirements under the TRIMs Agreement. The second section then shifts its focus to PRPs which incorporate in whole or in part the TRIMs Agreement, as well as to interpretation and application issues that arise in respect of such PRPs. The third section of Part IV expands on the interpretative challenge posed by open-ended PRPs in IIAs signed by the United States, France and India and fleshes out the content and outer limits of such open-ended PRPs by resorting to lists of performance requirements submitted by these same States during the GATT Uruguay Round of negotiations. The third section of Part IV further discusses the interpretation of open-ended PRPs and critically assesses the interpretation and application of the PRP at issue carried out by the arbitral tribunal in *Lemire v Ukraine*.

The fourth section of Part IV focuses on detailed and exhaustive PRPs in IIAs, the paradigm shift that followed Article 1106 of the NAFTA (1992), the prevalent prototypes and their pervasiveness. The fourth section of Part IV also proposes a working list of performance requirements used in PRPs of IIAs whose terms have acquired settled meanings. The fourth section of Part IV then maps out the practice of prohibiting detailed lists of mandatory performance requirements in PRPs of IIAs and complements such analysis by taking stock of arbitral awards having interpreted and applied PRPs in relation to specific performance requirements that lied at the heart of PRP-based disputes to date.

The fifth section of Part IV analyses PRPs and their (in)applicability to advantage-conditioning performance requirements. The fifth section begins with an analysis of the scope and coverage of disciplines applicable to advantage-conditioning performance requirements under the TRIMs Agreement and the SCM Agreement. The fifth section then moves onto advantage-conditioning performance requirements under PRPs in IIAs. The fifth section draws upon the interpretation of the term “benefit” as used in the SCM Agreement and carried out in the context of WTO dispute settlement in order to shed greater light upon the meaning of the term “advantage” in the TRIMs Agreement and in PRPs of IIAs. This section also takes a closer look at the interpretation and application of prohibitions of advantage-conditioning performance requirements and notably the meaning assigned to the term “advantage” by arbitral tribunals. The sixth section of Part IV identifies PRPs that appear in one of or in both trade and investment chapters of TIPs and inquires into the reasons that could explain opting for one or more PRPs within a single TIP or for a PRP only in a State-to-State, trade-driven chapter.

Part V of this thesis delves into multiple recurring features that modulate the scope and coverage of PRPs in surveyed IIAs, including clarifying provisions, exceptions, exclusions, exemptions or reservations. In doing so, Part V contrasts, PRPs that apply to all investments with PRPs that apply only to investments of covered investors, as well as PRPs that apply to pre-establishment and post-establishment phases of an investment with PRPs that applies to a limited number of investment phases. Part V also critically assesses the need for a connection between an investment and a performance requirement and arbitral awards having decided on such connection issues. Part V then appraises how the opposition between the characteristics of measures and their effects played out in arbitral awards on PRPs.

Part V also investigates the drafting options of States in order to modulate and tailor the breadth and applicability of their PRPs and to ensure that States retain sufficient regulatory latitude in order to achieve critical policy-making objectives. Finally, Part V analyses interpretation and application issues that arise in respect of two types of restrictions to PRPs: provisions that exempt government procurement in whole or in part from disciplines on performance requirements, and reservations that shield sensitive non-conforming measures or strategically important sectors from PRPs.

Part VI of this thesis anticipates on the consequences of variations in scope and coverage between various PRPs by appraising their disruptive broadening by virtue of MFN treatment clauses. Part VI assesses the currently straightforward applicability of MFN treatment clauses to substantive protection standards and identifies foreseeable cracks in such consensus that could complicate the application of MFN treatment clauses to PRPs.

Part VII sets out the findings of this thesis and formulates proposals that can help interpret and apply existing PRPs and draft future PRPs in a more deliberate and informed way.

## **II. Characteristics and General Objectives of Performance Requirements and PRPs**

The concept of “‘performance requirement’ is not an unambiguous term,” its meaning likely to shift depending notably on the industry sector at issue and on whether goods or services are concerned.<sup>26</sup> This part will first appraise scholarly and non-treaty-based attempts at defining the expression “performance requirement.” Since characterising a measure as a performance requirement hinges on “not only the nature, but the end-purpose of a government measure,”<sup>27</sup> this part will identify, in a second section, the legion of purposes pursued through performance requirements. The third section of this part will analyse the congenitally dual purposes of PRPs: ensuring the operational freedom of investors and lasting trade benefits for home States that export goods, services and capital. The fourth section highlights the near inseparability of advantages and performance requirements as part of a quid pro quo.

### **A. Conceptual Characteristics of Performance Requirements and the Absence of a Universally Accepted Definition**

Performance requirements influence the quantity, quality and location of investment<sup>28</sup> by increasing or reducing its profitability, by altering its risks, by modifying the location and scale of production or by affecting an investor’s import or export decisions.<sup>29</sup> They amount to investment measures because of their application in connection with authorising an investor to establish, acquire, expand or operate an investment in a host country or as pre-conditions to the granting of an advantage to an investor.<sup>30</sup> Performance requirements act as investment disincentives

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<sup>26</sup> Government of Norway, *Comments on the Model for Future Investment Agreements – English Translation*, 19 December 2007, 25; Government of Norway, *Comments on the Individual Provisions of the Model Agreement*, 13 May 2015, 12.

<sup>27</sup> OECD Secretariat, *Conceptual Framework for the Study on International Investment Incentives and Disincentives*, DAF/IME/79.28 (19 November 1979) para 16.

<sup>28</sup> Stephen E. Guisinger, “Do Performance Requirements and Investment Incentives Work?” 9(1) *World Economy* 79 (1986), 81.

<sup>29</sup> OECD, *Framework – Investment Disincentives* (n 27) paras 9-11; Dallas Deluca, “Trade-Related Investment Measures: U.S. Efforts to Shape a Pro-Business World Legal System (The Andrew Wellington Cordier Essay)” 48(1) *Journal of International Affairs* 251 (Summer, 1994), 253, 264; Guisinger (n 28) 81; Theodore H. Moran and Charles S. Pearson, “Tread Carefully in the Field of TRIP Measures” 11(1) *The World Economy* 119 (March 1988), 119; A.E. Safarian, “Investment-Related Trade Issues” in William R. Cline (ed), *Trade Policy in the 1980s* (Institute for International Economics 1983) 613.

<sup>30</sup> European Communities (“EC”), *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/8 (23 June 1987) 1-2; OECD Secretariat, *Note on Trade-Related Investment Measures for the Working Party of The Trade Committee*,

when they compel an investor to conduct its activities contrary to its own best interests.<sup>31</sup> Performance requirements can be understood as “a special category of [investment] disincentives that direct an investor to buy from or sell to certain markets.”<sup>32</sup>

Performance requirements impose specific operational undertakings upon investors and/or their investments<sup>33</sup> with a view to serving specific national objectives of the host State.<sup>34</sup> Performance requirements act as policy instruments for achieving broadly-defined economic and developmental objectives, especially industrial and technological development objectives.<sup>35</sup> Although performance requirements were initially construed as imposed upon foreign investors,<sup>36</sup> the concept now encompasses any condition imposed on domestic or foreign investors in a discriminatory or non-discriminatory fashion.<sup>37</sup> Performance requirements may prescribe the use of inputs or outputs,<sup>38</sup> that purchases be made from specific sources or that

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TC/WP(87)37 (6 April 1987) (“**OECD, First Note on TRIMs**”) 4-5, 7, quoting a 1982 study by the United States Department of Treasury; United States, *Communication to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/24 (24 January 1990) 9; Konrad von Moltke and Howard Mann, *A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* (IISD 2005) 9.

<sup>31</sup> David Greenaway, “Trade Related Investment Measures and Development Strategy” 45(2) *Kyklos* 139-159 (1992), 139-140. See also: OECD, *First Note on TRIMs* (n 30) 4-5; Theodore H. Moran and Charles S. Pearson, *Trade Related Investment Performance Requirements* (study for the Overseas Private Investment Corporation (“OPIC”), March 1987) 9.

<sup>32</sup> Guisinger (n 28) 81; Moran and Pearson, “Careful With TRIPs” (n 29), 120; OECD, *First Note on TRIMs* (n 30) 9.

<sup>33</sup> United States Department of Commerce (Bureau of Economic Analysis), *U.S. Direct Investments Abroad, 1977 Benchmark Survey Data*, U.S. Government Printing Office (April 1981) 8; WTO Secretariat, *The Impact of Investment Incentives and Performance Requirements on International Trade*, Working Group on the Relationship between Trade and Investment, WTO Doc WT/WGTI/W/56, 30 September 1998, para 14.

<sup>34</sup> Office of Int’l Finance and Investment, Industry and Trade Admin., U.S. Dept. of Commerce, *Incentives and Performance Requirements for Foreign Direct Investments in Selected Countries* 1 (1978), as quoted in Mark P. Jacobsen, “Mexico’s Computer Decree: the Problem of Performance Requirements and a U.S. Response” 14 *Law & Pol’y Int’l Bus.* 1159 (1982-1983), 1181 fn 169; United States, *Investment Performance Requirements and Incentives*, Note for the GATT Consultative Group of Eighteen’s Fourteenth Meeting, 25-27 March 1981, CG.18/W/51 (17 March 1981) 3; C. Fred Bergsten, *Host Country Policies: Performance Requirements*, Report to the Task Force on Private Foreign Investment of the IMF-World Bank Joint Development Committee, DC/TF/PFI/80-3 (January 25, 1980) 1; UNCTAD, *FDI & Performance Requirements* (n 5) 2.

<sup>35</sup> India, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/18 (11 September 1989) para 19.

<sup>36</sup> William E. Coughlin, “The U.S. Bilateral Investment Treaty: An Answer to Performance Requirements?” in Bart S. Fisher and Jeff Turner (eds), *Regulating the Multinational Enterprise: National and International Challenges* (Praeger, 1983) 133, quoting International Trade Administration, U.S. Dept. of Commerce, *The Use of Investment Incentives and Performance Requirements by Foreign Governments* (1981) 7.

<sup>37</sup> UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*, UN Doc UNCTAD/WIR/2003 (2003) 119.

<sup>38</sup> Kenneth J. Vandavelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010) 419.



sales be made to specific markets.<sup>39</sup>

To some extent, all investment policies inherently distort FDI flows among countries and therefore distort trade and production patterns.<sup>40</sup> Performance requirements have been described as “the unique barrier that links trade and investment.”<sup>41</sup> One way of narrowing the field and refining the analysis has consisted of distinguishing between investment measures which merely affect trade remotely or indirectly and investment measures which effectively distort and/or restrict trade by focusing directly on trade considerations such as exports or imports.<sup>42</sup> The broader concept of performance requirements therefore encompasses TRIMs, a more limited group of measures which basically aim at increasing the exports generated by an investment or the proportion of local inputs used by an investment.

Beyond these general characteristics common to most definitions of performance requirements, one must underline the inescapable conclusion that “there is no commonly accepted definition of either TRIMs or performance requirements.”<sup>43</sup> The multiplication of concepts often add to the prevalent confusion since they do not carry universally recognised meanings.<sup>44</sup>

Attempts at defining performance requirements do not reflect strictly economic or empirical considerations, but rather expediency, practicality and political feasibility, with a view to developing a “workable definition.”<sup>45</sup> Definitions lack comprehensiveness and definitiveness and are not meant to provide a “rigid definitional framework:” they often serve merely as a starting

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<sup>39</sup> Guisinger (n 28) 81.

<sup>40</sup> India Submission 18 (n 35) para 9; Mohamed Ariff, “TRIMs: a North-South Divide or a Non-issue?” 12(3) *The World Economy* 347 (1989) 347; Keith E. Maskus and Denise R. Eby, “Developing New Rules and Disciplines on Trade-Related Investment Measures” 13(4) *The World Economy* 523 (December 1990) 528.

<sup>41</sup> Coughlin (n 36) 140.

<sup>42</sup> WTO and UNCTAD (n 5) para 15; Switzerland, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/16 (7 July 1989) 2; Safarian (n 29) 613; Bergsten, *Performance Requirements* (n 34) 1-2; Edward M. Graham, “Fred Bergsten as an Early Architect of an International Regime for Foreign Direct Investment,” ch. 6 in Michael Mussa (ed), *C. Fred Bergsten and the World Economy* (Peterson Institute for International Economics 2006) 119.

<sup>43</sup> Theodore H. Moran, “The Impact of TRIMs on Trade and Development” 1(1) *Transnational Corporations* 55 (February 1992), 55; UNCTC and UNCTAD (study prepared by Theodore H. Moran), *The Impact of Trade-Related Investment Measures on Trade and Development*, UN Sales No. E.91 II.A.19 (1991) 11; WTO and UNCTAD (n 5) paras 11, 15.

<sup>44</sup> For example, this thesis will avoid using the unnecessarily confusing expressions “host-country operational measures,” “trade-related performance requirements” and “trade-related investment performance (TRIP) requirements”: UNCTAD, “Host Country Operational Measures” in *UNCTAD Series on Issues in International Investment Agreements*, UN Doc UNCTAD/ITE/IIT/26 (2001) 1, 5-8; Guisinger (n 28) 80-81; Moran and Pearson, “Careful With TRIPs” (n 29) 119; Moran and Pearson, *TRPRs OPIC* (n 31) 5.

<sup>45</sup> Moran and Pearson, *TRPRs OPIC* (n 31) 7.

point to ground analyses and to calibrate survey and data collection efforts.<sup>46</sup> Definitions often skip the conceptual implications and put forward illustrative lists based on a list of priority considerations and accompanied by concrete examples of the measures entertained.<sup>47</sup>

In this respect, this thesis follows the lead of GATT Members during the negotiation of the TRIMs Agreement by defining performance requirements mainly by resorting to illustrative lists of measures described as performance requirements and by providing concrete examples of such performance requirements.

## **B. General Objectives of Performance Requirements**

The myriad measures that can be grouped under the designation of “performance requirements” have been invoked as policy instruments in order to achieve numerous objectives pertaining directly or indirectly to trade. Generally speaking, States adopt performance requirements with a view to maximising the beneficial impacts of FDI on the economy, to bolstering, diversifying and expanding a State’s industrial base notably through new products or processes, and to increasing the generation of value added from FDI.<sup>48</sup>

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<sup>46</sup> OECD, *First Note on TRIMs* (n 30) 26.

<sup>47</sup> WTO and UNCTAD (n 5) para 15; OECD, *Framework – Investment Disincentives* (n 27) paras 8, 15;

<sup>48</sup> Cosbey (n 5) 9-11; Deluca (n 29) 251; India and others, *Communication to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/25 (20 March 1990) paras 5-6; India and others, *Communication to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures: Draft Declaration on Trade-Related Investment Measures*, MTN.GNG/NG12/W/26 (13 June 1990) 2-3; Cho Joong-Wan, “Foreign Direct Investment: Determinants, Trends in Flows and Promotion Policies” Ch. 5 in *Investment Promotion and Enterprise Development Bulletin for Asia and the Pacific No. 1*, UN Economic and Social Commission for Asia and the Pacific (UNESCAP), UN Doc ST/ESCAP/2259 (2003) 105; Nagesh Kumar, “Use and Effectiveness of Performance Requirements: What can be Learnt From the Experiences of Developed and Developing Countries?” in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives*, UN Doc UNCTAD/ITE/IIA/2003/4 (2003) 60; Nagesh Kumar, “Performance Requirements as Tools of Development Policy: Lessons From Developed and Developing Countries,” ch. 9 in Kevin Gallagher and Alice H. Amsden (eds), *Putting Development First: the Importance of Policy Space in the WTO and IFIs* (Zed Books, 2005) 179-180; Labor Industry Coalition for international Trade (“LICIT”), “Performance Requirements: A Study of the Incidence and Impact of Trade-Related Performance Requirements, and an Analysis of International Law (March 1981)” in *U.S. Policy Toward International Investment: Hearings Before the Subcommittee on International Economic Policy of the Committee on Foreign Relations, United States Senate, 97th Cong., 1st Sess.* (30 July, 28 September and 28 October 1981) (“**U.S. Senate Investment Policy Hearings**”) 56, 65; Rachel McCulloch and Robert F. Owen, “Linking Negotiations on Trade and Foreign Direct Investment,” in David B. Audretsch and Charles P. Kindleberger (eds), *The Multinational Corporation in the 1980s* (MIT Press, 1983) 335-336; Moran and Pearson, “Careful With TRIPs” (n 29) 119; Moran and Pearson, *TRPRs OPIC* (n 31) 5-6, 9; M. Narasimham, *Performance Criteria Stipulated by Host Countries*, Report to the Task Force on Private Foreign Investment of the IMF-World Bank Joint Development Committee, DC/TF/PFI/80-1 (January 8, 1980) 2; OECD Secretariat, *Notes on Trade-Related Investment Measures for the Working Party of The Trade Committee*, TC/WP(87)78 (21 August 1987) (“**OECD, Second Note on TRIMs**”) para 8; Patricia M. Robin, “The BIT Won’t Bite: The American Bilateral Investment Treaty Program” 33 *Am. U. L. Rev.* 931-958 (1984) 950; Paul Streeten, “The Multinational Enterprise and the Theory of Development

Performance requirements are undeniably mercantilist in nature. Many performance requirements aim at reducing imports and increasing local production as substitution, regardless of the cost of such a policy to the host State or to other States.<sup>49</sup> Simply put, many performance requirements aim at improving a State's balance of payments and foreign exchange reserves through the reduction of imports and the increase of exports.<sup>50</sup> Performance requirements can also be understood as instruments through which a host State attempts to appropriate "excess rents" of foreign investments.<sup>51</sup>

Performance requirements may also aim to achieve objectives beyond trade. Side effects on imports or exports do not always fully explain the motivations behind such measures.<sup>52</sup> In the 1970s, developing countries challenged the neo-classical/traditional economic understanding that international investment flows reflect properly functioning free-market competition for fear that in the absence of corrective measures, the wealth generated by FDI would find its way back to the States of origin, designated as "home States," of multinational corporations ("MNCs") and other foreign investors.<sup>53</sup> Such challenge rested on the view that industry sectors in which international investment is concentrated are often characterised by oligopolistic market structures and by barriers to the entry of competitors.<sup>54</sup> Faced with such imperfect market conditions, numerous host States thus embarked on pro-active agendas using performance

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Policy" 1(10) *World Development* (October 1973) 1, 2; UNCTAD, *FDI & Performance Requirements* (n 5) 7; Feng Wang, *International Law and the Evolving Legal Regime of Foreign Direct Investment - A Developing Country's Perspective*, thesis submitted to the Faculty of Law in conformity with the requirements for the degree of Master of Laws (Queen's University, 2000) 118-122; Allan W. Wolff, "Prepared Statement on behalf of the LICIT" in *U.S. Senate Investment Policy Hearings* (defined in this same footnote above) 36.

<sup>49</sup> Graham (n 42) 121.

<sup>50</sup> Japanese Ministry of Economy, Trade and Industry ("METI"), "Chapter 9: Trade-Related Investment Measures," in *2014 Report on Compliance by Major Trading Trade Partners with Trade Agreements – WTO, FTA/EPA, BIT*, 503; Nagesh Kumar, "Performance Requirements as Tools of Development Policy: Lessons From Developed and Developing Countries" in Kevin Gallagher and Alice H. Amsden (eds), *Putting Development First: the Importance of Policy Space in the WTO and IFIs*, Zed Books (2005) 180; OECD, *Second Note on TRIMs* (n 48) para 8; UNCTAD, *WIR 2003* (n 37) 119.

<sup>51</sup> Graham (n 42) 121; Theodore H. Moran, "The Product Cycle Model of Foreign Direct Investment and Developing Country Welfare" 6(4) *Journal of International Management* 297 (2000) 310; Peter J. Buckley, "Government Policy Responses to Strategic Rent-Seeking Transnational Corporations" 5(2) *Transnational Corporations* (August 1996), 2. Rents can be defined as excess or above-normal profits beyond the minimum necessary to ensure that a business venture or entity remains in operation: see James A. Brander, "Rationales for Strategic Trade and Industrial Policy," in Paul R. Krugman (ed), *Strategic Trade Policy and the New International Economics* (MIT Press, 1986) 26.

<sup>52</sup> GATT Secretariat, *Note on the Meeting of 13-17 June 1988, GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/7 (12 July 1988) para 40.

<sup>53</sup> "Prepared Statement of C. Fred Bergsten" in *U.S. Senate Investment Policy Hearings* (n 48) 13, 18; Kenneth J. Vandavelde, "Sustainable Liberalism and the International Investment Regime" 19 *Mich. J. Int'l L.* 373 (1998) 391.

<sup>54</sup> McCulloch and Owen (n 48) 336; WTO and UNCTAD (n 43) 39, 60-61.

requirements to enrol FDI in their pursuit of social and economic objectives.<sup>55</sup>

Most notably, States may use performance requirements in response to two types of market imperfections. First, market externality imperfections reflecting a host State's failure to fully capitalise on externalities<sup>56</sup> generated by economic activities of foreign investors. A host State may impose performance requirements as instruments to improve its capacity to absorb spillovers from foreign investors (such as their technological and production know-how), for example by improving the number and skillset of local jobs, local employment and local training requirements, as well as local R&D requirements. Performance requirements can also help foster additional linkages between foreign investors and the local economy by creating backward linkages, i.e., commercial relations between subsidiaries of foreign investors in a host State and local suppliers of inputs (components, accessories or services) that such subsidiaries need in order to produce their goods or deliver their services.<sup>57</sup>

Second, performance requirements can also serve to counter market power imperfections manifested by the control that parent MNCs may exert by over the operations of their subsidiaries through restrictive business practices ("RBPs").<sup>58</sup> MNCs orchestrate global production strategies by allocating tasks to specific subsidiaries which do not always correspond to market conditions or economic competitiveness that prevail in their respective host States.<sup>59</sup>

For example, export performance requirements ("EPRs") may be aimed at counteracting a subsidiary's orders from MNC headquarters not to export its production meant to supply the host State's domestic market. As another example, local content requirements ("LCRs") and local sourcing requirements ("LSRs") may be aimed at encouraging the substitutive use of domestic product components or accessories by a subsidiary which is otherwise ordered to import goods produced within its MNC's network abroad. As a third example, technology transfer requirements may aim at combating restrictions placed upon a subsidiary by its MNC which prevent the use of the MNC's most advanced technologies in the subsidiary's host

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<sup>55</sup> Bergsten (n 53) 14.

<sup>56</sup> Externalities arise when foreign investors generate benefits, such as technological and production know-how, that they cannot fully internalise or make use of, some of which may therefore "spill over" into a host State's economy: see Luosha Du, Ann Harrison and Gary H. Jefferson, "Testing for Horizontal and Vertical Foreign Investment Spillovers in China, 1998–2007" 23(3) *Journal of Asian Economics* 234 (2012) 234; UNCTAD, *World Investment Report 2001: Promoting Linkages*, UN Doc UNCTAD/WIR/2001 (2001) 129.

<sup>57</sup> Du, Harrison and Jefferson (n 56) 235.

<sup>58</sup> McCulloch and Owen (n 48) 336; OECD, *Second Note on TRIMs* (n 48) para 8; UNCTAD (n 37) 119.

<sup>59</sup> India Submission 18 (n 35) paras 13-17.

State.<sup>60</sup>

Finally, infant industry considerations have served to justify reliance on performance requirements to the benefit of domestic producers. The infant-industry argument rests on protecting first entrants by delaying the entry of outside competitors onto the domestic market created by first entrants while they recover their start-up costs associated with learning production processes and while they create a local sales base.<sup>61</sup> For example, enacting LCRs and LSRs could guarantee nascent local suppliers a market share and shield them from the competitive pressures of mature worldwide suppliers.

### **C. The Ubiquitous Presence of Advantages Alongside Performance Requirements**

While States impose performance requirements as standalone mandatory requirements, they also directly condition the conferral of investment incentives upon compliance with performance requirements. This section explains the intricate relationship between investment incentives (referred to as “advantages” in the TRIMs Agreement and in IIAs) and performance requirements. Investment incentives and performance requirements are highly correlated.<sup>62</sup> Investment incentives are used as part of wider efforts to redress the balance of payments, to encourage the development of specific regions, to create or maintain jobs, and/or to accelerate industrialisation.<sup>63</sup> Host States strive to improve their industrial expertise by counting on the contribution of foreign-owned subsidiaries within their borders while they do not dispose of their own domestic firms with comparable expertise. Foreign subsidiaries that operate in host States are owned by or related to parent corporations located in home States where the major and most advanced production processes in a given industry sector take place. As a result, host States face an uphill battle when they try to convince foreign investors to undertake some of

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<sup>60</sup> McCulloch and Owen (n 48) 336; “Answer of C. Fred Bergsten during the Statement of Allan W. Wolff” in *U.S. Senate Investment Policy Hearings* (n 48) 45-46. See also LICIT (n 48), 65; Bergsten, *Performance Requirements* (n 34) 7; GATT Secretariat, *Note on the Meeting of 29-30 January 1990, GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/15 (19 February 1990) para 68.

<sup>61</sup> Bergsten (n 60) 45-46; LICIT (n 48), 65; Theodore H. Moran, “Strategic Trade Theory and the Use of Performance Requirements to Negotiate With Multinational Corporations in the Third World: Exploring a ‘New’ Political Economy of North-South Relations in Trade and Foreign Investment” 7(1) *Int’l Trade Journal* 45 (1992) 74-76; Wang (n 48) 118-119; Moran, “Product Cycle” (n 51) 305; OECD, *Second Note on TRIMs* (n 48) para 8; UNCTC and UNCTAD (n 43) 33-34, 64.

<sup>62</sup> Greenaway (n 31) 143-145, 157; David Greenaway, “Trade Related Investment Measures: Political Economy Aspects and Issues for GATT” 13(3) *The World Economy* 367 (September 1990) 371-372, 374, 376, 378; A.E. Safarian, “Effectiveness of Policies,” ch. 11 in Stephen Young (ed), *Multinational Enterprise and Public Policy: A Study of the Industrial Countries* (Edward Elgar, 1993), 438-439.

<sup>63</sup> Haim Levy and Marshall Sarrat, “Investment and Incentives and the Allocation of Resources,” 23(3) *Economic Development and Cultural Change* 431 (1975).

their more sophisticated operations in the host State's territory.<sup>64</sup> Investment incentives influence the location of FDI by increasing the attractiveness of host States offering them.<sup>65</sup> Host States must offer foreign investors "more-than-compensating incentives to invest"<sup>66</sup> for them to relocate their more value-added operations within their borders. Host States impose performance requirements that may sometimes induce costs for investors<sup>67</sup> in part in order to recoup part of the cost of investment incentives.<sup>68</sup> Host States thus trigger a bargaining process between a host State and a foreign investor.<sup>69</sup> While incentive and performance requirement packages<sup>70</sup> can be negotiated on a case-by-case basis, States can also set out such packages in regulations that condition the conferral of incentives on compliance with specified performance requirements.<sup>71</sup>

#### **D. Prohibiting Performance Requirements Aims at Ensuring the Operational Freedom of Investors and Lasting Trade Benefits for Home States**

Trade and FDI have become inseparable as a result of the operations of MNCs: MNCs scatter

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<sup>64</sup> UNCTC and UNCTAD (n 43) 40.

<sup>65</sup> Graham (n 42) 120; Ari Kokko, "Globalization and FDI policies" in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives*, UN Doc UNCTAD/ITE/IIA/2003/4 (2003) 30-31; Theodore H. Moran, "How Does FDI Affect Host Country Development? Using Industry Case Studies to Make Reliable Generalizations," in Theodore H. Moran, Edward M. Graham and Magnus Blomström (eds), *Does Foreign Direct Investment Promote Development?* (Institute for International Economics, 2005) 308-309; Theodore H. Moran, *Strategy and Tactics for the Doha Round: Capturing the Benefits of Foreign Direct Investment* (Asian Development Bank, 2002) 40-42; Theodore H. Moran, "Foreign Direct Investment and Development: A Reassessment of the Evidence and Policy Implications," in Marie-France Houde, Catherine Yannaca-Small, Eudes Brophy (eds), *Foreign Direct Investment, Development and Corporate Responsibility* (OECD, 1999) 46; Theodore H. Moran, Edward M. Graham and Magnus Blomström, "Conclusions and Implications for FDI Policy in Developing Countries, New Methods of Research, and a Future Research Agenda," in Theodore H. Moran, Edward M. Graham and Magnus Blomström (eds), *Does Foreign Direct Investment Promote Development?* (Institute for International Economics, 2005) 382.

<sup>66</sup> Moran and Pearson, "Careful With TRIPs" (n 29) 120; Moran and Pearson, *TRIPs OPIC* (n 31) 9-10, 22.

<sup>67</sup> GATT, *Note on TRIMs* (n 60) para 10; Charles Oman, *Policy Competition for Foreign Direct Investment: a Study of Competition Among Governments to Attract FDI* (OECD Development Centre, 2000) 21.

<sup>68</sup> Dani Rodrik, "Imperfect Competition, Scale Economies, and Trade Policy in Developing Countries" in Robert E. Baldwin (ed), *Trade Policy Issues and Empirical Analysis* (University of Chicago Press, 1988) 114; Greenaway (n 31) 148; Greenaway, "Political Economy of TRIMs" (n 62) 374-375.

<sup>69</sup> Bergsten, *Performance Requirements* (n 34) 2; McCulloch and Owen (n 48) 335-336; Moran and Pearson, "Careful With TRIPs" (n 29) 120; Moran, "Strategic Trade and Performance Requirements" (n 61) 79, fn 59.

<sup>70</sup> OECD Secretariat, *Notes on Trade-Related Investment Measures for the Working Party of The Trade Committee*, TC/WP(88)30 (1st revision) (8 July 1988) ("OECD, **Third Note on TRIMs**") para 8; UNCTAD, *WIR 1996* (n 5) 131-132; Greenaway (n 31) 145, 151; Ariff (n 40) 352.

<sup>71</sup> Greenaway (n 31) 139; Theodore H. Moran, "Shaping a Future for Foreign Direct Investment in the Third World" 11(1) *Washington Quarterly* 119 (1988), 125; OECD, *Second Note on TRIMs* (n 48) 4; Safarian (n 29) 621-622; A.E. Safarian, *Governments and Multinationals: Policies in the Developed Countries*, British-North American Committee (1983) 67.

various operations within their production chains in different countries according to cost-benefit considerations and in order to avail themselves of the best options in terms of production and sale. In some instances, MNCs engage in transactions that fall within trade policies of States (the cross-border sales of goods or services), while in others MNCs opt for cross-border investment (notably by purchasing production or sales facilities within different States), with the resulting FDI flows falling within investment policies of States. MNCs thus contributed to the creation of integrated cross-border trade and investment networks.

The convergence of trade and investment within operations of MNCs prompted a similar convergence within State policies. Performance requirements and their prohibition in a number of IIAs provide examples of such convergence. Performance requirements initially became a concern on the basis of trade considerations from the vantage point of home States (as opposed to that of their investors abroad). Home States realised that they had much to gain from increased outward FDI.<sup>72</sup> If guaranteed operational freedom, subsidiaries of MNCs abroad would likely choose, as suppliers of product components or accessories or as service providers, corporations related through their common MNC links and located in the home States of MNC subsidiaries abroad. Such purchases would increase exports originating in the home State and stimulate outward-oriented domestic production of home States.

The following remarks stem from documentation pertaining to the American foreign investment policy, but they reflect a reality shared by all capital-exporting countries. The United States considered that additional American outward FDI would spur American exports to and economic activity in developing countries, that the interests of all countries mandated free-flowing FDI, and that such openness toward FDI would foster the growth of international trade.<sup>73</sup> The American approach to IIAs clearly insisted on the interconnectedness of investment and trade.<sup>74</sup> American

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<sup>72</sup> Wayne Sachs, "The 'New' US BITs" 2 *Int'l. Tax & Bus. Lwyr.* 192 (1984) 195.

<sup>73</sup> *ibid.*

<sup>74</sup> "Statement of Deputy United States Trade Representative Ambassador Alan Holmer" in *Hearing on Bilateral Investment Treaties and Tax Treaties, Committee on Foreign Relations, United States Senate, 99th Cong., 2nd Sess. (9 August 1988) ("1988 U.S. Senate Hearings on BITs")* 10; "Statement of Assistant Secretary of State for Economic and Business Affairs Daniel K. Tarullo" in *Bilateral Investment Treaties With the Czech and Slovak Federal Republic, the Peoples' Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and two Protocols to Treaties With Finland and Ireland: Hearing Before the Committee on Foreign Relations, United States Senate, 102nd Cong., 2nd Sess. (4 August 1992)* 7; "Statement of Assistant Secretary of State for Economic and Business Affairs Daniel K. Tarullo" in *Bilateral Treaties Concerning the Encouragement and Reciprocal Protection of Investment: Treaty doc. 104-19--Albania; Treaty doc. 103-36--Belarus; Treaty doc. 103-38--Estonia; Treaty doc. 104-13--Georgia; Treaty doc. 103-35--Jamaica; Treaty doc. 104-12--Latvia; Treaty doc. 104-10--Mongolia; Treaty doc. 104-14--Trinidad/Tobago; and Treaty Doc. 103-37--Ukraine: Hearings Before the Committee on Foreign Relations, United States Senate, 104th Cong., 1st Sess. (30 November 1995) ("1995 U.S. Senate Hearings on BITs")* 6.

IAs also serve American commercial interests and are also meant to generate trade benefits.<sup>75</sup>

The American policy towards performance requirements underlines “investment and trade as two sides of the same coin” and that “the ability to invest in manufacturing, sales and service operations is a primary vehicle of trade.”<sup>76</sup> Outward FDI generates significant demand for home-State exports of goods and services,<sup>77</sup> since foreign subsidiaries are the “best customers” of home-State exporters.<sup>78</sup> Establishing foreign subsidiaries and having “on-site presences” proved essential for providing the necessary services in the insurance, banking and computer sectors abroad and for maximising sales and distribution networks.<sup>79</sup>

Prohibiting performance requirements gained traction in the United States at the same time as an increase in American outward FDI during the 1970s.<sup>80</sup> From the vantage point of the neo-classical economic theory embraced among others by the United States,<sup>81</sup> performance requirements clearly distort trade and investment flows, negatively impact global and host State welfare (through misallocation of resources and nullification of international comparative advantage)<sup>82</sup> and potentially disrupt investment decisions compared to business-as-usual scenarios.<sup>83</sup> The United States considered that some performance requirements (and notably

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<sup>75</sup> “Statement of Asst. Sec. of State McAllister” in *1992 U.S. Senate Hearings on BITs* (n 74) 3.

<sup>76</sup> Prepared Statement of Rowland H. Thomas, Jr., on Behalf of the American Electronics Association (“AEA”) in *U.S. Senate Investment Policy Hearings* (n 48) 22, 23.

<sup>77</sup> “Statement of Asst. USTR Bale” in *Bilateral Investment Treaties with Panama 99-14, Senegal 99-15, Haiti 99-16, Zaire 99-17, Morocco 99-18, Turkey 99-19, Cameroon 99-22, Bangladesh 99-23, Egypt 99-24 and Grenada 99-25: Hearings Before the Committee on Foreign Relations*, United States Senate, 99th Cong., 2nd Sess. (11 August 1986) (“**1986 U.S. Senate Hearings on BITs**”) 5, 10-11; Holmer (n 74) 3.

<sup>78</sup> Bale (n 77) 10-11; “Statement of Emergency Committee for American Trade Executive Vice-Chairman Robert L. McNeill” in *1986 U.S. Senate Hearings on BITs* (n 77) 50; “Statement of National Foreign Trade Council (“NFTC”) President Richard W. Roberts” in *1986 U.S. Senate Hearings on BITs* (n 77) 52, 54; McAllister (1992) (n 75) 3, 6; “Responses of U.S. State Dept. to Sen. Pell” in *Bilateral investment treaties with Argentina, Treaty doc. 103-2, Armenia, Treaty doc. 103-11, Bulgaria, Treaty doc. 103-3, Ecuador, Treaty doc. 103-15, Kazakhstan, Treaty doc. 103-12, Kyrgyzstan, Treaty doc. 103-13, Moldova, Treaty doc. 103-14, and Romania, Treaty doc. 102-36: hearing before the Committee on Foreign Relations*, United States Senate, 103rd Cong., 1st Sess. (10 September 1993) (“**1993 U.S. Senate Hearings on BITs**”) 31, 40. See also: Tarullo (1992) (n 74) 7; see also “Appendix – Statement of Jerry J. Jasinowski, President of the National Association of Manufacturers” in *1993 U.S. Senate Hearings on BITs* (n 78) 15; Tarullo (1995) (n 74) 6.

<sup>79</sup> Tarullo (1992) (n 74) 7; “Questions by Sen. Thompson and Replies by Robert D. Hormats” in *1995 U.S. Senate Hearings on BITs* (n 74) 37.

<sup>80</sup> Coughlin (n 36) 129; Robin (n 48) 946; Bale (n 77) 5.

<sup>81</sup> Bergsten (n 53) 2, 13-14; Bale (n 77) 5; UNCTC and UNCTAD (n 43) 32-34; Robin (n 48) 932, 946, 949; Helen Shapiro and Lance Taylor, “The State and Industrial Strategy” 18(6) *World Development* 861 (1990) 863, 866-867; Klaus Stegemann, “Policy Rivalry among Industrial States: What Can We Learn from Models of Strategic Trade Policy?” 43(1) *International Organization* (January 1989) 73; Vandeveld (n 53) 391.

<sup>82</sup> Just like performance requirements, PRPs also reflect mercantilism: home States oppose performance requirements by host States because they reduce their exports: see Graham (n 42) 121.

<sup>83</sup> “Statement of Harvey E. Bale, Jr., Assistant U.S. Trade Representative for Investment Policy, Office of the U.S. Trade Representative” in *U.S. Senate Investment Policy Hearings* (n 48) 180, 181; “Prepared



LCRs) can cancel out the positive effects of outward FDI for a home State by reducing both home-State exports and host-State imports.<sup>84</sup> American labour and industry representatives expressed concerns over trade-distorting performance requirements due to their negative effects on home States which include “direct transfers of investment, jobs and production to the country which imposes them – and away from other countries.”<sup>85</sup> Performance requirements were criticised as “a new form of beggar-thy-neighbour policy” whose alleged and at best minimal increase the economic welfare of the host State imposing them would come at the expense of other countries.<sup>86</sup> Performance requirements were also viewed as threats to America’s manufacturing base.<sup>87</sup> The United States considered that performance requirements (notably LCRs, EPRs and technology transfer requirements) can deprive American producers of foreign market access, increased exports, and of the repatriation of specialised knowledge acquired thanks to increased commercial activity in host States.<sup>88</sup>

The United States aimed at eliminating performance requirements for both trade and investment considerations. Performance requirements reduce balance of trade benefits generated by FDI that would otherwise accrue to home States by reducing American exports that can reach American subsidiaries abroad and domestic markets of host States.<sup>89</sup> Performance requirements further distort FDI flows.<sup>90</sup> Performance requirements therefore became a home-State/foreign subsidiary issue as well as a trade/investment issue. While export ambitions of home States originally drove PRPs, performance requirements fall on a fault line common to trade and to investment policies by causing potential distortions to both trade and investment.<sup>91</sup>

PRPs in American IIAs, in the same way as was noted for Article 1106 of the NAFTA (1992) and more generally in the same way as most if not all PRPs in IIAs, are meant to achieve two

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Statement of U.S. Trade Representative William E. Brock” in *Oversight of U.S. Trade Policy – Part 1 of 2: Joint Hearing Between the Subcommittee on International Trade and the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, 97<sup>th</sup> Cong., 1<sup>st</sup> sess.* (8-9 July 1981) 21, 24; “Prepared Statement of Treas. Sec. Donald T. Regan” in *Oversight of U.S. Trade Policy – Part 2 of 2: Joint Hearing Between the Subcommittee on International Trade and the Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs, 97<sup>th</sup> Cong., 1<sup>st</sup> sess.* (13 and 28 July 1981); 212-213; “Statement of Asst. Sec. of Commerce Raymond J. Waldmann” in *U.S. Senate Investment Policy Hearings* (n 48) 190; UNCTC and UNCTAD (n 43) 32-34.

<sup>84</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 40; Kenneth J. Vandeveld, *U.S. International Investment Agreements* (OUP, 2009) 387.

<sup>85</sup> LICIT (n 48) 54.

<sup>86</sup> *ibid* 54, 56; Jacobsen (n 34) 1183.

<sup>87</sup> LICIT (n 48) 77.

<sup>88</sup> “Statement of Ambassador Charlene Barshefsky” in *1993 U.S. Senate Hearings on BITs* (n 78) 20.

<sup>89</sup> “Statement of Asst. Sec. of State McAllister” in *1988 U.S. Senate Hearings on BITs and Tax Treaties* (n 74) 4; Guisinger (n 28) 80.

<sup>90</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 40.

<sup>91</sup> Vandeveld (n 84) 387.

distinct objectives: first, PRPs are meant to eliminate trade-distorting performance requirements, and second, PRPs eliminate performance requirements which hinder entrepreneurial autonomy and side-line investors' best judgment and business-as-usual decision-making in exchange for politically-motivated objectives.<sup>92</sup> PRPs in IIAs aim at addressing the dual distorting impact of performance requirements on both investment and trade.<sup>93</sup> PRPs are meant to do so in a number of ways: first, by increasing foreign market access for foreign investors and home-State exports; second, by preventing the compulsory export of production by investors; third, by eliminating host-State import restrictions on investors; and fourth, by freeing investors to source their inputs from producers based abroad (instead of using low-quality and overpriced domestic substitutes).<sup>94</sup>

The previous overview depicted the main features and objectives of performance requirements. This depiction highlighted characteristics common to all performance requirements, but also that different types of performance requirements exist and that objectives vary among these different categories of performance requirements. The previous overview also explained the main motivations for prohibiting performance requirements. While numerous justifications exist for prohibiting performance requirements, these same justifications underpin all PRPs within the surveyed IIAs. The following part focuses on the reasons that explain the numerous shared traits of PRPs within the surveyed IIAs reflect and their similar or identical wordings, in addition to the common purposes that drive these PRPs and to the fact that they apply to the same sets of measures.

### **III. Systemic Integration and Cross-Fertilisation for a Proper Understanding of PRPs in IIAs**

This part develops these three main ideas in turn. First, PRPs systematically reproduce a pre-

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<sup>92</sup> "Prepared Statement of Donald Abelson, USTR Office" in *1995 U.S. Senate Hearings on BITs* (n 74) 11-12; "Statement of Daniel Price" in *1995 U.S. Senate Hearings on BITs* (n 74) 30; LICIT (n 48) 54; Wolff (n 48) 36; *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Supplemental Memorial of the Investor – Initial Phase (14 April 2000) para 81, quoting Daniel Price.

<sup>93</sup> "Reply by Asst. USTR Bale to Sen. Evans" in *1986 U.S. Senate Hearings on BITs* (n 77) 21; McAllister (1988) (n 89) 8; Vandavelde (n 84) 72-74.

<sup>94</sup> Bale (n 83) 180; "U.S. State Dept. Responses to Sen. Pell" (n 78) 21; Tarullo (1992) (n 74) 3, 4, 7; Tarullo (1995) (n 74) 8; "Prepared Statement of Dep. Asst. Sec. of State Bay" in *Consideration of Pending Treaties – Hearings Before the Committee on Foreign Relations of the United States Senate*, S. Hrg 106-660, 106th Cong., 2nd Sess. (12-13 September 2000) ("**2000 U.S. Senate Hearings on BITs**") 50-51; "Statement of Dep. Asst. USTR Papovich" in *2000 U.S. Senate Hearings on BITs* (defined in this same footnote) 73; Jeffrey Lang, "Keynote Address: The International Regulation of Foreign Direct Investment: Obstacles & Evolution" 31 *Cornell Int'l L.J.* 455 (1998) 457; Robin (n 48) 941; Sachs (n 72) 194, 208; Vandavelde (n 84) 67-68, quoting "Opening Remarks by Senator Hagel" in *2000 U.S. Senate Hearings on BITs* (defined in this same footnote) 40.

existing PRP from a prior IIA or Model BIT. Second, the U.S. BIT Programme proved highly influential for PRPs in IIAs. Third, the TRIMs Agreement, the SCM Agreement and PRPs in IIAs are joined at the hip. These three ideas justify cross-fertilisation and systemic integration when interpreting and applying PRPs in IIAs. The fourth section of this part critically appraises the interpretation of PRPs made by prior arbitral tribunals and recommends that the interpretation of PRPs in IIAs reflect and enhance these synergies.

Cross-fertilisation can be defined as the process of understanding legal expressions through analysing the relationships and interactions between the various manifestations of such legal expressions.<sup>95</sup> The “principle of systematic integration” stands for interpreting international obligations by reference to their wider normative environment.<sup>96</sup> Cross-fertilisation and systemic integration between PRPs scattered in autonomous and seemingly unrelated treaties can be justified in substantive terms (through the origins, content and wording of PRPs) and methodological terms (through treaty interpretation rules), which highlight the close interrelatedness and interconnectedness between PRPs found within a great number of IIAs and whose understanding can be improved by drawing up commonalities and differences.<sup>97</sup>

#### **A. PRPs Must be Understood in a Systemic Fashion: PRPs as MSENs and Transplanted Treaty Rules**

In substantive terms, PRPs can first be likened through their common substantive content and can be characterised as treaty-based “legal utterances” (or terms of art) and as “multi-sourced equivalent norms (MSENs).”<sup>98</sup> PRPs share many common features, while many are even identically worded. Moreover, PRPs address the same concerns, they propose similar solutions and “point in the same direction,” and distinct PRPs can prove binding upon the same States and/or investors. Pooling the analysis of the various kinds of treaties (bilateral, regional, multilateral investment and/or trade treaties) in which the related concepts “performance requirements” and “TRIMs” are used can enhance our understanding of PRPs by providing us with numerous helpful insights.

Along similar substantive lines, PRPs in IIAs can be construed as “transplanted treaty rules:” “transplantation” can be defined as the incorporation of pre-existing treaty rules into a

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<sup>95</sup> Linderfalk (n 10) 433-434.

<sup>96</sup> ILC Study Group on Fragmentation, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group* (finalised by Martti Koskenniemi) (13 April 2006) (A/6N.4/L.682), as corrected UN Doc. A/CN.4/L.682/Corr.1 (11 August 2006) paras 413, 415, 419.

<sup>97</sup> Linderfalk (n 10) 428, 433-434.

<sup>98</sup> Broude and Shany (n 10) 2, 4-5; Linderfalk (n 10), 431-432.

subsequent treaty between different parties.<sup>99</sup> Transplanted treaty rules can be traced back to “source rules,” i.e. the original treaty rules from which transplanted treaty rules are derived.<sup>100</sup> With respect to PRPs in IIAs, source rules consist of one or more of the following: the TRIMs Agreement and related negotiating documents produced during the Uruguay Round, Article 3 of the SCM Agreement pertaining to prohibited subsidies (when conditioned to LCRs or EPRs), previously signed BITs and TIPs which include PRPs, as well as the U.S. BIT Programme, related U.S. Model BITs and Model BITs of other countries, NGOs or IGOs.

Negotiating State Parties resort to transplanted PRPs in order to ensure legal uniformity of PRPs under international law, in order to improve the efficiency of negotiations and in order to avoid rehashing controversial topics and risking an uncertain outcome.<sup>101</sup> Heightened difficulties can be encountered when interpreting PRPs far removed from the source rules and thus isolated from additional materials that could shed light onto their meaning, purpose and scope and coverage: source treaty provisions are debated more extensively and generate greater scrutiny than subsequent transplanted treaty rules, which often give rise to little discussion or negotiation.<sup>102</sup> Moreover, there is a risk that transplanted PRPs are incorporated into IIAs without a comprehensive awareness by all Parties to the IIAs as to their ramifications and subtleties; that is especially true when a sharp contrast exists between the respective prior experiences of Parties with drafting and having to comply with PRPs.<sup>103</sup> Acknowledging an otherwise undisclosed transplantation when interpreting transplanted PRPs can help improve the interpretation of PRPs and provide us with insights that only the identification of the exact origins of PRPs can yield.<sup>104</sup>

## **B. PRPs in IIAs Systematically Replicate PRPs of Model BITs and/or of Previous IIAs**

### **1. The Few Model BITs that Comprise PRPs, as Well as the PRPs of Pioneering IIAs, Have Proven Extremely Influential**

PRPs appear only in a handful of Model BITs. Based on the Model BITs made available by

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<sup>99</sup> Carstens (n 11) 229.

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.* 229, 232-233.

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.* 233-234; see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, *I.C.J. Reports 1980*, Separate Opinion of Judge Ago, 160, 162 quoted in Carstens (n 11) 242.

UNCTAD,<sup>105</sup> the Model BITs of only six countries (out of 44)<sup>106</sup> and one NGO<sup>107</sup> comprise PRPs. The Model BITs of one NGO<sup>108</sup> and two IGOs<sup>109</sup> reject PRPs. Nevertheless, as will be discussed in greater detail below, some of the few Model BITs to comprise PRPs, especially those of Canada, France and the United States, as well as Article 1106 of the NAFTA (1992) and Article V(2) of the Canada - Ukraine FIPA (1994) have been extremely influential in the development and spread of PRPs in IIAs and multiple instances of transplanted PRPs can be identified. Negotiating BITs on the basis of a model BIT is reminiscent of transplantation, with the difference that the source rule of a PRP included in such a BIT could be traced back to the PRP of a model BIT.<sup>110</sup>

## 2. The U.S. BIT Programme, Spearhead of PRPs

This section shows that the U.S. BIT Programme was meant to create new rules of international law and to influence its development, and that to this end, the United States deliberately attempted to sign uniform BITs. The U.S. BIT Programme proved highly influential for the development of PRPs in IIAs. While France also included its own distinct type of PRPs in its BITs starting in the early 1980s, the French approach to PRPs did not repeat itself among surveyed IIAs beyond French IIAs. By comparison, many PRPs in IIAs, both American and non-American, find their origins in pre-existing PRPs from prior American IIAs or Model BITs.

### a) *The U.S. BIT Programme Created and Exerted a Profound Influence on International Law*

The contribution of American outward FDI to American exports legitimised the interest in investment matters of the United States Trade Representative (“USTR”) who exercised oversight jurisdiction over the U.S. BIT Programme from its very beginnings.<sup>111</sup> The USTR

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<sup>105</sup> UNCTAD (n 24).

<sup>106</sup> Canada Model FIPA (2004); Canada Model FIPA (2012, revised in 2014); France Model BIT (1998); France Model BIT (undated); Italy Model BIT (2003); Kenya Model BIT (2003); Norway Draft Model BIT (2007); Norway Draft Model BIT (2015); U.S. Model BIT (1994); U.S. Model BIT (1998); U.S. Model BIT (2004); U.S. Model BIT (2012).

<sup>107</sup> Consumer Unity & Trust Society (“CUTS”), Centre for International Trade, Economics and Environment, “International Agreement on Investment” in *Multilateralisation of Sovereignty--Proposals for Multilateral Frameworks for Investment, Annex* (CUTS, June 1998) 85-119.

<sup>108</sup> Asian-African Legal Consultative Committee (“AALCC”), “Asian-african Legal Consultative Committee Revised Draft of Model Agreements for Promotion and Protection of Investments” in *Models for Bilateral Agreements on Promotion and Protection of Investments: Report of the Committee* (AALCC, 1985) Article 3(ii) of Model B.

<sup>109</sup> Caribbean Community Secretariat, *Guidelines for use in the Negotiation of Bilateral Treaties* (1984); Southern African Development Community, *SADC Model Bilateral Investment Treaty Template with Commentary* (2012), Articles 20 and 21.

<sup>110</sup> Carstens (n 11) 232.

<sup>111</sup> Bale (n 83) 180, 181, 184; “U.S. State Dept. Responses to Sen. Pell” (n 78) 23.

completed the first version of a U.S. Model BIT in December 1981, announced it in January 1982 and which came in handy as soon as January 1982 when BIT negotiations were launched in earnest.<sup>112</sup> The United States developed multiple Model BITs in quick succession, especially in the early years of the U.S. BIT Programme, in response to a constant feedback loop provided by unfolding BIT negotiations from the 1980s onward: American Model BITs were produced in 1983, 1984, 1987, 1991, 1994, 2004<sup>113</sup> and 2012.<sup>114</sup> The United States began referring to the PRP as a “core provision” of its BITs in the course of signing American BITs from the end of the 1980s onward.<sup>115</sup> For instance, the submittal letter accompanying the Sri Lanka - U.S. BIT enumerated six main objectives of BITs, adding as second objective freedom from performance requirements.<sup>116</sup> The United States considered PRPs as one of “six basic guarantees” within its BITs.<sup>117</sup> The United States confirmed that PRPs constituted a key objective of its BIT Programme and made it clear that it sought to include PRPs in all of its BITs.<sup>118</sup>

American BITs were negotiated in three waves: first, from 1980-1982 to 1986, second from 1989 to 1999, and third from 2004 onward, when FTAs with investment chapters became the norm and BITs the exception.<sup>119</sup> American BITs included PRPs from their inception; PRPs followed a curve of increasing complexity *via* exceptions and increasing detail.<sup>120</sup> The U.S. BIT Programme primarily aimed at creating a body of State practice that supported, reaffirmed and amplified American views on the protection of foreign investment under international law,<sup>121</sup> that locked-in key host countries, and that contributed to bringing about a “pro-investment consensus” which would reverberate notably on the GATT Uruguay Round of negotiations and

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<sup>112</sup> Bale (n 93) 20-21; K. Scott Gudgeon, “United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards” 4 *Int'l Tax & Bus. Law* 105 (1986) 105-106 and fn 4; Kathleen Kunzer, “Developing a Model Bilateral Investment Treaty” 15 *Law & Pol'y Int'l Bus.* 273 (1983) 273; Robin (n 48) 933; Kenneth J. Vandavelde, “The Bilateral Investment Treaty Program of the United States” 21 *Cornell Int'l L.J.* 201 (1988) 210; Kenneth J. Vandavelde, “U.S. Bilateral Investment Treaties: The Second Wave” 14 *Mich. J. Int'l L.* 621 (1992-1993) 626-627; Vandavelde (n 84) 1-2.

<sup>113</sup> Vandavelde (n 84) 2.

<sup>114</sup> See U.S. State Dept., “Bilateral Investment Treaties and Related Agreements,” online: <<http://www.state.gov/e/eb/afd/bit/index.htm>>, accessed 1 January 2017.

<sup>115</sup> Vandavelde (n 84) 4.

<sup>116</sup> Vandavelde (n 84) 52-53.

<sup>117</sup> “Statement by Sen. Thompson” in 1995 *U.S. Senate Hearings on BITs* (n 74) 1; U.S. Senate Committee on Foreign Relations, *Executive Report 106-23 Recommending Advice and Consent to the Ratification of the Bilateral Investment Treaties With Azerbaijan, Bahrain, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Uzbekistan and a Protocol Amending the Bilateral Investment Treaty With Panama*, 106th Cong., 2<sup>nd</sup> Sess. (4 October 2000) 16; Bay (n 94) 47.

<sup>118</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 16, 40.

<sup>119</sup> Vandavelde (n 84) 30-31.

<sup>120</sup> *ibid* 4.

<sup>121</sup> McAllister (1988) (n 89) 5; “U.S. State Dept. Responses to Sen. Pell” (n 78) 15, 17, 21, 33; Tarullo (1995) (n 74) 7; Price (n 92) 31; Papovich (n 94) 73; Deluca (n 29) 261-262, 265-269; Gudgeon (n 112) 133-135; Lang (n 94) 457; Sachs (n 72) 195, 211; Vandavelde, “U.S. BIT Program” (n 112) 210, 212; Vandavelde (n 84) 31, 34-35, 68.

on NAFTA negotiations.

*b) The U.S. BIT Programme Uncompromisingly Strove for a Uniform Outcome*

The United States sought to avoid departures from the Model BIT and adopted an intransigent negotiating stance in the hope of creating a uniform body of State practice through its BITs.<sup>122</sup> It entered into BITs only when the outcome would closely resemble its Model; few variations among BITs were anticipated when the United States began its implementation of the U.S. BIT Programme<sup>123</sup> and the United States eventually concluded many BITs with very similar content.<sup>124</sup> In order to ensure the greatest conformity possible between its BITs and its Model BITs and to leave the main text of the BIT unchanged, the United States would place clarifications, altering language and other departures from the Model BIT in protocols to BITs.<sup>125</sup> Through their bilateral negotiations, the United States was “advocating global standards, not *ad hoc* standards for each country” and sought the same standards regardless of the signatory country.<sup>126</sup>

The United States rejected opting for greater flexibility in its U.S. Model BIT. It refused to prioritise provisions on dispute settlement, transfer of funds and expropriation while sacrificing rights of establishment and PRPs. The United States viewed all principles enshrined in its Model BIT (including its PRP) as crucial to fostering an attractive and secure investment climate for its outward FDI and to ensuring that outward FDI would be “free to flow to its most efficient use.”<sup>127</sup> The United States were interested in negotiating BITs with States who would depart as little as possible from its Model.<sup>128</sup>

For example, the U.S. BITs with Congo (Brazzaville), Sri Lanka, and the Czech and Slovak Federal Republics adopted the PRP that appeared in the relevant U.S. Model BIT,<sup>129</sup> and both the Grenada - U.S. BIT (1985) and the Congo (Brazzaville) - U.S. BIT (1990)<sup>130</sup> were negotiated at lightning speed and simply integrated the relevant U.S. Model BIT unchanged. U.S. BITs signed with Eastern European countries and former Soviet republics followed the same trend.<sup>131</sup> The consistent formulation of PRPs in American IIAs likely contributed to their growing

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<sup>122</sup> Vandeveldel (n 84) 32.

<sup>123</sup> Sachs (n 72) 193 fn 9; Vandeveldel, “The U.S. BIT Program” (n 112) 212; Vandeveldel (n 84) 1.

<sup>124</sup> Price (n 92) 31.

<sup>125</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 32.

<sup>126</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 31-32.

<sup>127</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 28.

<sup>128</sup> See Tarullo (1992) (n 74) 10; “U.S. State Dept. Responses to Sen. Pell” (n 78) 23, 26.

<sup>129</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 40.

<sup>130</sup> “Statement of Kenneth J. Vandeveldel” in 1992 U.S. Senate Hearings on BITs (n 74) 69.

<sup>131</sup> *ibid* 68-73.

influence.

### **C. The TRIMs Agreement, the SCM Agreement and PRPs in IIAs are Joined at the Hip**

This section investigates how GATT/WTO disciplines on performance requirements came to evolve at the same time as the highly influential PRPs in American BITs during the 1980s and early 1990s. First, the slow and unfulfilling progress made in the GATT forum fuelled bilateral American negotiations on performance requirements. Second, negotiations on subsidies during the GATT Uruguay Round addressed preoccupations very similar to those on TRIMs.

#### **1. Limited Achievements in the Multilateral GATT Forum Fuelled Intertwined Bilateral American Negotiations on Performance Requirements**

In 1981-1982, the United States deployed interwoven efforts through multilateral and bilateral avenues.<sup>132</sup> American policymakers viewed international law, including American Treaties of Friendship, Commerce and Navigation (“FCN”)<sup>133</sup> as inadequate for addressing investment incentives and performance requirements.<sup>134</sup> The United States announced its intention of negotiating “new multilateral disciplines” in the GATT forum,<sup>135</sup> as well as drumming up the prospect of dispute settlement under existing rules,<sup>136</sup> to curb the use of performance requirements.<sup>137</sup> The first such discussions occurred in March 1981 at the behest of the United States.<sup>138</sup>

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<sup>132</sup> LICIT (n 48) 75, 77; Regan (n 83) 212-213; Wolff (n 48) 38; Coughlin (n 36) 130; Deluca (n 29) 257; Jacobsen (n 34) 1194-1195.

<sup>133</sup> Coughlin (n 36) 130; Kunzer (n 112) 276-277; Eleanor Roberts Lewis, “The United States-Poland Treaty Concerning Business and Economic Relations: new Themes and Variations in the U.S. Bilateral Investment Treaty Program” 22(3) *Law & Pol. Int’l Bus.* 527 (Summer 1991) 528; Robin (n 48) 933 fn 13, 941; Sachs (n 72) 195-196, 208; Vandeveld, “U.S. BIT Program” (n 112) 203-205; Vandeveld (n 53) 382-384.

<sup>134</sup> Brock (n 83) 8, 11.

<sup>135</sup> Bale (n 83) 180, 182; Waldmann (n 83) 196; “Statement of Asst. Sec. of State Hormats” in *U.S. Senate Investment Policy Hearings* (n 48) 232-233.

<sup>136</sup> Bergsten (n 53) 14, 16; “Prepared Statement of Comm. Sec. Malcolm Baldrige” in *U.S. Senate Trade Policy Oversight Hearings Part 1* (n 83) 53; “Statement of Asst. Treas. Sec. Marc E. Leland” in *U.S. Senate Investment Policy Hearings* (n 48) 219, 220-221; Hormats (n 135) 224, 232; Wolff (n 48) 36; Waldmann (n 83) 190; “Prepared Statement of Sen. Heinz” in *U.S. Senate Trade Policy Oversight Hearings Part 1* (n 83) 5, 7; “Prepared Statement of State Sec. Alexander M. Haig, Jr.” in *U.S. Senate Trade Policy Oversight Hearings Part 2* (n 83) 188; “Statement of NFTC President Richard W. Roberts” in *U.S. Senate Investment Policy Hearings* (n 48) 170-171.

<sup>137</sup> Brock (n 83) 24.

<sup>138</sup> GATT Secretariat, *Note on the Consultative Group of Eighteen Fourteenth Meeting, 25-27 March 1981*, CG.18/14 (28 April 1981) para 48; United States, *Note for the GATT G-18* (n 34).



The implementation of the U.S. BIT Programme, launched in 1977,<sup>139</sup> started producing tangible results in 1982,<sup>140</sup> at the same time as American efforts to discuss performance requirements within the GATT sputtered.<sup>141</sup> The United States considered multilateral disciplines on performance requirements as the most desirable outcome and thus prioritised this option.<sup>142</sup> BITs comprising PRPs were launched with the hope that they would pave the way to a multilateral agreement on performance requirements.<sup>143</sup>

The United States played a “leading and perhaps exclusive role” in drawing attention to performance requirements.<sup>144</sup> Developing countries, and notably the Group of 77 opposed addressing performance requirements within the GATT and saw the American offensive on performance requirements as an assault onto their sovereignty over investment matters.<sup>145</sup> Moreover, developing countries insisted on situating performance requirements within “the broader context of social and economic policy objectives” and of development,<sup>146</sup> notably in matters of industry, technology and exports, in order to address their balance-of-payments concerns,<sup>147</sup> and in matters of economic restructuring, production diversification, local employment promotion or technological upgrading of the economy.<sup>148</sup> Developing countries construed GATT jurisdiction as restricted to measures explicitly restrictive of trade in goods; performance requirements should therefore not be disciplined under the GATT since they focus on production and investment while affecting trade only residually and marginally.<sup>149</sup> Moreover, the European Community and Japan clearly expressed that performance requirements did not

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<sup>139</sup> Vandeveld, “U.S. BIT Program” (n 112) 209; Vandeveld (n 84) 33.

<sup>140</sup> Vandeveld, “The Second Wave” (n 112) 627.

<sup>141</sup> Bale (n 93) 21; Coughlin (n 36) 129; Deluca (n 29) 251-252, 257, 272.

<sup>142</sup> Bale (n 93) 21-22.

<sup>143</sup> Bergsten (n 60) 40-41, 43.

<sup>144</sup> Waldmann (n 83) 195.

<sup>145</sup> John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (WTO, 1995) 15-16; Deluca (n 29), 263-264; Graham (n 42) 122; GATT Preparatory Committee, *Report to the GATT Council*, PREP.COM(82)L/5395 (26 October 1982) 23; GATT Secretariat, *Past Discussions in GATT on Trade-Related Investment Measures – Note by the Secretariat to the GATT Group of Negotiations on Goods – Negotiating Group*, MTN.GNG/NG12/W/3 (21 May 1987) 1; Coughlin (n 36) 133-134; Guisinger (n 28) 79-80; India and others, *GATT Communication 25* (n 48) 2-3. See also GATT Secretariat, *Note on the Meeting of 22-26 October 1990, GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/22 (23 November 1990), paras 4 & 9 (India), para 5 (Nigeria), para 6 (China and Egypt), para 11 (Philippines), para 13 (Malaysia), para 22 (Colombia), para 33 (China).

<sup>146</sup> McCulloch and Owen (n 48) 349-350, 353; GATT, *Note on TRIMs* (October 1990) (n 145) paras 10-11 (Philippines), para 13 (Malaysia), para 25(iv) (Australia).

<sup>147</sup> India Submission 18 (n 35) paras 13, 19; see also: India and others, *GATT Communication 25* (n 48); India and others, *GATT Communication 26* (n 48) 2; GATT Secretariat, *Meeting of 29-30 March 1990 – Note by the Secretariat, GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/16 (27 April 1990) 14 p.

<sup>148</sup> Singapore, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/17 (28 July 1989) para 4.

<sup>149</sup> Coughlin (n 36) 135.

constitute a high priority for the GATT Secretariat.<sup>150</sup> As a result, multilateral efforts to discipline performance requirements faltered early on.<sup>151</sup>

Nevertheless, the United States nearly single-handedly inserted investment matters into the Uruguay Round negotiating mandate in July 1986,<sup>152</sup> with Brazil and India exhibiting the strongest opposition to addressing performance requirements within the GATT.<sup>153</sup> The result consisted of a lukewarm negotiating mandate:

Trade-related investment measures

Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.<sup>154</sup>

States thus prioritised further analysis of the applicability of existing GATT rules to performance requirements and confined optional negotiations to potentially adverse trade effects of what subsequently became known as TRIMs. Many States reiterated their opposition to addressing investment matters within the GATT<sup>155</sup> and their refusal of any disciplines over performance requirements, since their creation fell outside the negotiating mandate.<sup>156</sup> The lack of proof regarding the adverse trade effects of performance requirements constituted a stumbling block to achieving comprehensive multilateral disciplines on performance requirements.<sup>157</sup> At the same time, the United States was signing multiple IIAs with PRPs, thus linking WTO disciplines on performance requirements and PRPs in IIAs from their inception.

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<sup>150</sup> Graham (n 42) 122.

<sup>151</sup> Bale (n 83) 180, 185; Bergsten (n 53) 17; GATT, *Note on G-18 14th Meeting* (n 138) para 50.

<sup>152</sup> Holmer (n 74) 9; Croome (n 145) 28-31; Colombia and Switzerland, *Communication on Draft Ministerial Declaration to GATT Preparatory Committee*, PREP.COM(86)W/47/Rev.2 (30 July 1986) 9.

<sup>153</sup> Croome (n 145) 31-32.

<sup>154</sup> GATT, *Ministerial Declaration on the Uruguay Round*, Multilateral Trade Negotiations, MIN. DEC (20 September 1986) 8.

<sup>155</sup> GATT Secretariat, *Summary Record of the Seventh Meeting on 20 September 1986*, GATT Contracting Parties, Session at Ministerial Level, MIN(86)/SR/7 (22 October 1986) 3-5 (Brazil, Cuba, India, Nicaragua and Peru).

<sup>156</sup> GATT Group of Negotiations on Goods, *Report to the Trade Negotiations Committee meeting at Ministerial level, December 1988*, MTN.GNG/13 (22 November 1988) para 79; India and others, *GATT Communication 25* (n 48) para 4; GATT Group of Negotiations on Goods, *Fifteenth meeting: 19 and 20 December 1989*, MTN.GNG/21 (23 January 1990), para 19; GATT, *Note on Trims* (April 1990) (n 147) para 3.

<sup>157</sup> GATT Secretariat, *Investment Performance Requirements*, Note for the Consultative Group of Eighteen, CG.18/W/64 (15 October 1981) 5-7, paras 7, 10; GATT, *Note on G-18 14th Meeting* (n 138) para 50.

## 2. GATT Uruguay Round of Negotiations on Subsidies Addressed Preoccupations Very Similar to Those on TRIMs

Article XVI of the GATT on subsidies, predecessor to the SCM Agreement, is reminiscent of the objectives that shaped Uruguay Round negotiations on TRIMs, as it applies to subsidies that increase exports or reduce imports of the State adopting such subsidies. GATT Uruguay Round negotiations on subsidies were meant to improve GATT disciplines with respect to subsidies “that affect international trade.” Some GATT Members highlighted the close connection between TRIMs and subsidies and called for a coherent approach during GATT negotiations.<sup>158</sup> Singapore noted a “deliberate mixing up of subsidies and incentives during the discussions on TRIMs.”<sup>159</sup>

Aspirations similar to those pursued in respect of TRIMs were voiced at the very beginning of the GATT Uruguay Round of negotiations on subsidies: a number of delegations supported the enlargement of prohibited subsidies to “other trade distorting subsidies” and supported the prohibition and/or strengthening of disciplines regarding all export subsidies and import substitution measures.<sup>160</sup> Numerous GATT Members maintained their support for prohibiting export subsidies and “other trade-related subsidies,” more specifically subsidies conditioned upon EPRs or LCRs (viewed as “clearly trade-distorting” subsidies), all along the negotiations.<sup>161</sup> GATT Members needed to “accept the basic premise that subsidies should not be used in ways that distort comparative advantage and increase exports or reduce imports.”<sup>162</sup>

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<sup>158</sup> GATT, *Note on TRIMs* (n 60) para 10 (Switzerland); GATT, *Note on TRIMs* (October 1990) (n 145) para 7 (Hungary), para 24 (Australia).

<sup>159</sup> Singapore (n 148) paras 7-8.

<sup>160</sup> GATT Secretariat, *Meeting of 1-2 June 1988 – Note by the Secretariat to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/7 (8 June 1988) paras 5, 8.

<sup>161</sup> Australia, *Elements of the Framework for Negotiations – Submission to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/32 (30 November 1989) 2; Canada, *Framework for Negotiations – Communication to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/25 (28 June 1989) 1-2; Switzerland, *Elements of the Negotiating Framework – Communication to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/26 (13 September 1989) 2; Japan, *Elements of the Framework for Negotiations – Submission to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/27 (6 October 1989) 1; United States, *Communication to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/20 (15 June 1988) 3-4; GATT Secretariat, *Meeting of Meeting of 30 November – 1 December 1989 – Note by the Secretariat to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/15 (10 January 1990) para. 4; United States, *Elements of the Framework for Negotiations – Submission to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/29 (22 November 1989) 2.

<sup>162</sup> Canada, *Statement Made by the Delegation of Canada at the Meeting Held on 28-29 June 1988 to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*,

The United States further advocated for prohibiting “trade-related subsidies” notably when such subsidies would be granted based on meeting any of the following conditions: LCRs; requirements to generate a net trade balance; manufacturing requirements; technology transfer requirements, and EPRs.<sup>163</sup>

Many GATT Members expressed the view that they could not agree to outright prohibitions of subsidies without providing for differential treatment in respect of developing countries.<sup>164</sup> Delegations of numerous Members raised the same developmental concerns as the ones raised in the context of TRIMs negotiations.<sup>165</sup> Restricting the use of subsidies proved controversial during the Uruguay Round: many States considered that their prohibition, even limited, “would amount to interference into their sovereignty.”<sup>166</sup>

Uruguay Round negotiations on subsidies therefore clearly reflected the close connection between the TRIMs Agreement, the SCM Agreement and PRPs in IIAs and the presence of investment incentives/advantages/benefits alongside performance requirements.

#### **D. Articles 31 and 32 of the VCLT and Maximising Interpretative Gateways to a Comprehensive Understanding of PRPs**

This section takes stock of treaty interpretation rules under the VCLT and appraises how they should operate in respect of PRPs in IIAs. This section begins by evaluating the use of Articles 31 and 32 of the VCLT by arbitral tribunals having decided claims of PRP breaches. This

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MTN.GNG/NG10/W/22 (7 July 1988) 2.

<sup>163</sup> U.S. Submission on Subsidies (n 161) 4.

<sup>164</sup> GATT Secretariat, *Meeting of 26-27 September 1989 – Note by the Secretariat to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/13 (16 October 1989), para 5.

<sup>165</sup> GATT Secretariat, *Developments in the Uruguay Round – Note by the Secretariat*, Committee on Trade and Development Sixty-First Session (11-12 June 1987), COM.TD/W/449 (26 May 1987) para 51; GATT GNG Report (1988) (n 156) para 85; GATT, *Note on Subsidies* (1989) (n 164) para 11; see also Brazil, *Communication to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/24 (10 November 1988) 9-10, 13; Korea, *Statement Made by the Delegation of Korea at the Meeting of 1-2 June 1988 to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/21 (17 June 1988) paras 4-5; Canada GATT Statement on Subsidies (n 162) 3; European Community, *Elements of the Negotiating Framework – Submission to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/31 (27 November 1989) 9-10; India, *Elements of the Framework for Negotiations – Submission to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/W/33 (30 November 1989), para 7; Japan Submission on Subsidies (n 161) 4; Switzerland Submission on Subsidies (n 161) 6-8.

<sup>166</sup> GATT, *Note on Subsidies* (1989) (n 164) para 7; GATT Secretariat, *Meeting of 27-28 March 1990 – Note by the Secretariat to the Group of Negotiations on Goods (GATT) – Negotiating Group on Subsidies and Countervailing Measures*, MTN.GNG/NG10/17 (10 April 1990), paras 4, 12; India Submission on Subsidies (n 165) 3.

section then considers what the context of PRPs in IIAs could amount to. This section next moves onto assessing how systemic integration could play out when interpreting and applying PRPs in IIAs. Thereafter this section fleshes out supplementary means that could help interpret PRPs in IIAs and what could come into play as part of the circumstances of their conclusion. Finally, this section will point to multiple indicators that reinforce the need for a systemic interpretation and application of PRPs in IIAs and for a cross-fertilisation with GATT/WTO disciplines.

Although all arbitral tribunals having considered PRPs acknowledged the central role played by Articles 31 and 32 of the VCLT,<sup>167</sup> none of them made full use of the elements at their disposal pursuant to Article 31 of the VCLT, let alone Article 32, in order to elucidate the meaning of terms used in PRPs, their context or their object and purpose. In *CPI v Mexico*, the Tribunal allotted only two paragraphs to the PRP at issue (NAFTA Article 1106), underlining that claimant Corn Products International, Inc. (“CPI”) “freely admitted” that its alleged violation of Article 1106 was “without precedent” and deciding that CPI clearly had “not made out its case” under Article 1106.<sup>168</sup> However, as will be demonstrated, CPI’s claim was not “without precedent” and although it was put forward in a summary fashion, it was far from baseless; quite the contrary. Based on what can be gleaned from the Tribunal’s Decision, neither disputing party put forward diligently researched arguments on the PRP at issue: CPI provided no detail regarding its alleged violation, while Mexico did nothing other than characterise CPI’s claim as “fanciful.”<sup>169</sup> The palpable lack of seriousness demonstrated by the disputing parties to the alleged violation of NAFTA Article 1106 is startling.

In *Cargill v Mexico*, Cargill, Inc. (“Cargill”) invoked the award in *ADF v United States* as support for its alleged violation of Article 1106 of the NAFTA.<sup>170</sup> However, the *ADF* Tribunal provided no support nor guidance to Cargill’s argument as NAFTA Article 1106 was not discussed by the Tribunal other than to acknowledge the United States’ acquiescence to the argument that the measures at issue would likely have had breached NAFTA Article 1106 were it not for a reservation under NAFTA Article 1108. The *Cargill v Mexico* Tribunal noted the paucity of

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<sup>167</sup> *S.D. Myers Inc. v Canada*, UNCITRAL, First Partial Award (13 November 2000) paras 200-202; *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Interim Award (26 June 2000) paras 66-69; *ADM* (n 15) para 195; *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008) para 76; *Cargill v Mexico* (n 16) paras 133-134, 315; *ADF Group Inc. v United States of America*, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003) paras 147-149; *Merrill & Ring Forestry L.P. v The Government of Canada*, UNCITRAL, ICSID Administered Case, Award (31 March 2010) paras 84, 183 (albeit in respect of NAFTA Articles 1102 and 1105); *Lemire* (n 14) paras 508-509; *Mobil & Murphy* (n 13) paras 174, 210, 227, 232.

<sup>168</sup> *CPI* (n 167) paras 5, 57, 79-80.

<sup>169</sup> *ibid* para 70.

<sup>170</sup> *Cargill v Mexico* (n 16) para 309.

interpretative guidance in respect of a small and infrequent number of claims in respect of NAFTA Article 1106.<sup>171</sup> The Tribunal may have been prevented from conducting an in-depth analysis of performance requirements by the meagre submissions of disputing parties on this issue.

In *Lemire v Ukraine*, the Tribunal disregarded the clear language and ordinary meaning of the terms used in the PRP at issue in order to avoid finding that a sensitive and critical cultural measure had breached the PRP.<sup>172</sup> The Tribunal hastily asserted compatibility between the respective purposes arbitrarily assigned to the cultural measure and the PRP without invoking any evidence or authorities to support its interpretation. The Tribunal aimed at excluding cultural measures from the scope of the PRP even though the relevant IIA provided for no exception, exclusion or reservation to its broadly-worded, open-ended PRP.

### 1. The Context of PRPs in IIAs

In order to properly understand PRPs, one must establish the context that saw PRPs emerge and the characteristics that bind PRPs together.<sup>173</sup> Article 31(1) of the VCLT, which refers to “the terms of the treaty in their context,” allows for the consideration of additional related treaties and materials when interpreting a treaty provision.<sup>174</sup> Although it has been suggested that Article 31(2) VCLT assigns a somewhat narrow meaning to the term “context,”<sup>175</sup> the WTO Appellate Body has preferred a broader understanding of “context.”<sup>176</sup> Moreover, the VCLT does not exhaustively define the term “context” as used in Article 31 of the VCLT.<sup>177</sup> Caution is nevertheless warranted not to infinitely expand such context.<sup>178</sup> Referring to Articles 31 and 32 of the VCLT, the *ADF* Tribunal spoke of the need to relate a NAFTA provision to its context, which primarily consists of other relevant NAFTA provisions and of NAFTA’s overall structure, while elucidating “the real shape and content of the bargain actually struck by the three sovereign Parties” as embodied within a specific NAFTA provision.<sup>179</sup> By contrast, the approach of the

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<sup>171</sup> *ibid* para 313.

<sup>172</sup> *Lemire* (n 14) paras 499-511.

<sup>173</sup> Linderfalk (n 10) 445-446.

<sup>174</sup> See J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP, 2012) para 3.55.

<sup>175</sup> Carstens (n 11) 237.

<sup>176</sup> Isabelle Van Damme, “Treaty Interpretation by the WTO Appellate Body” 21(3) *Eur. J. Int’l. L.* 605 (2010) 626-627.

<sup>177</sup> *ibid* 634.

<sup>178</sup> See Weeramantry (n 174) para 3.55: context as used in Article 31 of the VCLT (...) “does not have the wide-ranging meaning it has for scholars; for diligent scholars, for whom the world is a vast manifold of interrelated events, everything is context’,” quoted from Mahnoush H. Arsanjani and W. Michael Reisman, “Interpreting Treaties for the Benefit of Third Parties: The ‘Salvors’ Doctrine’ and the Use of Legislative History in Investment Treaties” 104 *Amer. J Int’l L* 597 (2010) 599.

<sup>179</sup> *ADF* (n 167) paras 147, 149.

*S.D. Myers* Tribunal offers a glimpse of a broad interpretative approach when it stated that in order to interpret the term “expropriation” in NAFTA Article 1110, the Tribunal had to consider “the whole body of state practice, treaties and judicial interpretations of that term in international law cases.”<sup>180</sup> The *S.D. Myers* Tribunal also considered that interpreting the expression “like circumstances” under NAFTA Article 1102 compelled the Tribunal to consider the “legal context” of the NAFTA, which included legal principles affirmed in related international instruments.<sup>181</sup> An interpretative approach that accurately takes into account the context of a given PRP must look beyond its IIA to normatively connected PRPs within other IIAs, as well as to the TRIMs Agreement and SCM Agreement and related documentation produced during the GATT Uruguay Round of negotiations.

Unfortunately, most arbitral tribunals faced with the interpretation of a PRP either ignored or restrictively defined its context: the *ADF* and *S.D. Myers* Tribunals did not refer to the context of the PRP at issue (NAFTA Article 1106). In *Mobil & Murphy v Canada*, Canada had recommended a holistic approach to individual performance requirements enumerated in the PRP at issue (NAFTA Article 1106), which need to be “understood in their economic policy context and in the context of the NAFTA and other international treaties.”<sup>182</sup> Disputing parties cited numerous policy documents and international legal instruments that could have shed additional light onto NAFTA Article 1106.<sup>183</sup> Instead, the Tribunal narrowly circumscribed the context of the relevant performance requirement within NAFTA Article 1106 in support of its interpretation and refused to consider anything other than the NAFTA itself and an English dictionary.<sup>184</sup> The Tribunal should have engaged more with the documentation submitted by the disputing parties in order to better ascertain the meaning of terms used in NAFTA Article 1106.

## 2. Applying the “Principle of Systematic Integration” to PRPs in IIAs

None of the arbitral tribunals having decided alleged breaches of PRPs considered the principle of systematic integration. The reference to relevant rules of international law applicable in the relations between State Parties to a given treaty in Article 31(3)(c) of the VCLT is often viewed as embodying the “principle of systematic integration.” The expression “shall be taken into account” in Article 31(3)(c) of the VCLT accomplishes “a systemic function” by “linking

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<sup>180</sup> *S.D. Myers* (n 167), para 280.

<sup>181</sup> *S.D. Myers* (n 167) paras 247, 250.

<sup>182</sup> *Mobil & Murphy* (n 13), Counter-Memorial of Canada (1 December 2009) para 154.

<sup>183</sup> *Mobil & Murphy (Majority)* (n 13) para 226; see also: *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 161-182.

<sup>184</sup> *Mobil & Murphy* (n 13) paras 220-224.

specialised parts to each other.”<sup>185</sup> The principle of systemic integration does not mean that an arbitral tribunal seized of a dispute regarding a specific PRP can extend its jurisdiction beyond the confines of the IIA at issue; indeed, while one may draw parallels between the PRP of an IIA and the GATT-WTO rules, one must nevertheless avoid interpreting such PRP in a way that would amount to applying other rules of international law in its place.<sup>186</sup>

Rather, the principle of systemic integration merely means that “other” rules of international law (notably other treaties) forming part of the normative environment relevant to a given PRP should be taken in consideration when interpreting and applying such PRP.<sup>187</sup> Considering similar PRPs, many of which were drafted and/or negotiated around the same time and involved the same State Parties, can help better grasp the meaning and purpose of a given PRP. Indeed, analogous treaties may help elucidate the “justifiable meaning” of the PRP at issue.<sup>188</sup>

Article 31(3)(c) of the VCLT limits the array of relevant rules that can be considered by resorting to the expression “applicable in the relations between the parties.”<sup>189</sup> In the great majority of cases, this pre-condition presents no obstacle to considering GATT-WTO materials while interpreting PRP in IIAs subject to the Parties to IIAs being GATT-WTO Members. While this limiting language could prevent considering analogous PRPs from other IIAs between State Parties that are not also Parties to the IIA whose PRP is being interpreted, such other IIAs could be considered if they substantiate the Parties’ common understanding of the terms used in the PRP at issue.<sup>190</sup> Article 31(3)(c) of the VCLT can thus act as a gateway to the GATT, to the TRIMs Agreement, to the SCM Agreement and to the hefty documentation that preceded their signature, when interpreting PRPs of IIAs.

In *Mobil & Murphy v Canada*, the TRIMs Agreement, the SCM Agreement and the CUSFTA could have been considered pursuant to Article 31(3)(c) of the VCLT as “relevant rules of international law applicable in the relations between” the NAFTA Parties. However, the Tribunal erroneously declared that these materials offered no interpretative assistance and therefore did

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<sup>185</sup> *ILC Study Group on Fragmentation* (n 96) para 473.

<sup>186</sup> Philippe Sands, Jeffery Commission, “Treaty, Custom And Time: Interpretation/Application?” in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Nijhoff, 2010) 41.

<sup>187</sup> Article 31(3)(c) of the VCLT does not impose temporal limitations when considering “any relevant rules of international law;” the principle of contemporaneity was left aside: *ILC Study Group on Fragmentation* (n 96) paras 423, 426, 431-432.

<sup>188</sup> *ibid* paras 464, 475-478.

<sup>189</sup> Carstens (n 11) 238.

<sup>190</sup> Carstens (n 11) 239, quoting *ILC Study Group on Fragmentation* (n 96) 15. See also Richard Gardiner, “The Vienna Convention Rules on Treaty Interpretation” in Duncan B Hollis (ed), *Oxford Guide to Treaties* (OUP, 2012) 475, 499; *ILC Study Group on Fragmentation* (n 96) para 472.



not consider whether any of these materials fell within Article 31(3)(c) of the VCLT.<sup>191</sup>

### 3. Supplementary Means of Interpretation and Circumstances of Conclusion of PRPs in IIAs

Article 32 of the VCLT enumerates the preparatory work (or *travaux préparatoires*) and the circumstances of conclusion of the treaty at issue as part of a non-limitative list of extrinsic, supplementary materials that can be turned to in order to confirm or clarify the meaning of the treaty provisions at issue. IIAs often do not leave much by way of preparatory work mentioned in Article 32 of the VCLT and when they do, deriving any clear indication of sometimes contradictory and often changing draft versions constitutes a perilous exercise.<sup>192</sup> The lack of *travaux préparatoires* regarding IIAs with PRPs acts as an invitation to extend beyond their realm and to explore documentation related to their source rules: the TRIMs Agreement, the SCM Agreement, prior IIAs with PRPs and U.S. BITs and Model BITs.<sup>193</sup> As part of the Uruguay Round, GATT Members and the GATT Secretariat produced a significant amount of negotiating documents of various kinds on performance requirements. Such documents can provide numerous insights into the views of States on performance requirements and into the meaning of PRPs in IIAs. Such written submissions can improve our understanding of the contours and inner-workings of performance requirements, TRIMs and other related concepts, and the options available to States when prohibiting performance requirements. Moreover, the large number of States involved in the GATT Uruguay Round of negotiations on TRIMs and subsidies, the fact that Parties to subsequent IIAs were most of the time involved in the Uruguay Round of negotiations, and the sharing and accessibility of GATT documentation between GATT States justify assuming that Parties to subsequent IIAs were at the very least aware of such documentation and that such documentation has played a formative role in negotiating PRPs within such IIAs, not only by informing the understanding of PRPs by Parties, but also by conferring settled meanings upon terms of art used to refer to performance requirements.<sup>194</sup>

The circumstances surrounding the conclusion of treaties mentioned in Article 32 of the VCLT can be interpreted broadly in respect of PRPs in IIAs and can notably open the door to a historical and contemporaneous analysis of PRPs: this ground serves as further justification for investigating the efforts undertaken by the United States, intergovernmental organisations and the GATT-WTO and its Members during the 1970s, 1980s and 1990s in respect of performance requirements.

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<sup>191</sup> *Mobil & Murphy* (n 13) paras 228-231.

<sup>192</sup> *ibid* para 228.

<sup>193</sup> Carstens (n 11) 244.

<sup>194</sup> Carstens (n 11) 244.

Article 1131(1) of the NAFTA (1992) mandates that it not be read in isolation from public international law, including international trade law.<sup>195</sup> In *S.D. Myers v Canada*, Dissenting Arbitrator Schwartz further considered that the drafters of the NAFTA used standard phrases from other BITs with the intent that “they would have their standard meaning, or something very close to it.”<sup>196</sup> Numerous concepts and legal terms included in the NAFTA originated in the GATT-WTO system; the GATT-WTO case law can “provide considerable guidance,”<sup>197</sup> and the TRIMs Agreement and NAFTA Article 1106 exhibit clear similarities.<sup>198</sup> The interconnectedness between PRPs of IIAs and the GATT-WTO system occurs with even greater clarity when PRPs, as does NAFTA Article 1106(6), provide for exceptions to justify necessary measures using language strongly reminiscent of the general exceptions under GATT Article XX,<sup>199</sup> or when (as discussed in greater detail below) PRPs of IIAs merely incorporate the TRIMs Agreement.

Given the lingering ambiguity and obscurity surrounding PRPs, it is advisable to resort to supplementary means of interpretations and to investigate more closely the circumstances surrounding the conclusion of IIAs. For instance, investment-related treaties often serve similar purposes and use similar language; taking into account general drafting trends among treaties that serve similar purposes can shed some light on the meaning of specific terms and is considered an “accepted and established practice.”<sup>200</sup> Moreover, despite complications related to the timing of supplementary means of interpretation when compared to the treaty under interpretation, there exists a margin of appreciation within which supplementary means of interpretation prior and subsequent to the drafting of the treaty under interpretation can be taken into consideration, granted that the appropriate interpretative safeguards regarding relevance are applied.<sup>201</sup>

By contrast, none of the arbitral tribunals invoked Article 32 of the VCLT, even if only to confirm the meaning of terms used within PRPs. In *Mobil & Murphy v Canada*, the Tribunal formulated

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<sup>195</sup> *S.D. Myers Inc. v. Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, concurring except with respect to performance requirements, in the partial award of the tribunal (12 November 2000) para 66; *ADM* (n 15) para 195.

<sup>196</sup> *S.D. Myers – Dissent* (n 197) para 59.

<sup>197</sup> *S.D. Myers – Dissent* (n 197) para 70. For example, the *S.D. Myers* Tribunal relied on a GATT Panel Report as support for the proposition that the Tribunal must look at the substance and not only the form of a measure when deciding upon a violation of NAFTA Article 1106: see *S.D. Myers – Majority* (n 167) paras 273-275.

<sup>198</sup> *ibid* para 190.

<sup>199</sup> In *re Cross-Border Trucking Services (Mexico v United States)*, Secretariat File No. USA-MEX-98-2008-01, Final Report of the NAFTA Arbitral Panel (6 February 2001) [*Cross-Border Trucking Report*], the arbitral panel and disputing parties referred to the GATT-WTO history, jurisprudence and doctrine when interpreting NAFTA provisions analogous to GATT provisions, including NAFTA Article 2101 and GATT Article XX: see *Cross-Border Trucking Report* paras 260, 262, 269, 289.

<sup>200</sup> See Weeramantry (n 174) paras 5.32-5.34.

<sup>201</sup> See *ibid* paras 5.62-5.73.

pointed criticisms with respect to supplementary means of interpretation before peremptorily rejecting them altogether due to their limited or non-existent relevance and assistance.<sup>202</sup> Ultimately, the Tribunal considered that the conditions of Article 32 of the VCLT for considering supplementary means of interpretation – ambiguous or obscure meaning or manifestly absurd or unreasonable result – were not met.<sup>203</sup> However, the Tribunal did not need to meet either of these criteria to broaden its analysis and could have turned to such resources if only to confirm its interpretation. Moreover, a broader interpretative context and approach would have better served the Tribunal, regardless of the outcome. The Tribunal expressed numerous concerns regarding supplementary means of interpretation and extraneous materials. The Tribunal stated that the materials invoked by Canada “are not the NAFTA,”<sup>204</sup> that they did not involve “entirely the same parties to the negotiation,”<sup>205</sup> that they raised inter-temporal discontinuities, that their influence on drafting and negotiating the NAFTA was not substantiated, and that their purposes were “not identical to that of the NAFTA.”<sup>206</sup> However, these legitimate concerns should not lead to discarding supplementary means of interpretation altogether. Rather, these concerns should be used to grant supplementary means of interpretation an impact proportional to their relevance. Moreover, the Tribunal impliedly recognised the usefulness of supplementary means of interpretation when it called upon such means to confirm its preordained interpretation.<sup>207</sup>

#### 4. Terms of Art and the Settled Meaning of Terms Used in PRPs

Article 31(1) of the VCLT refers to the “ordinary meaning” of terms used in a treaty. It has been suggested that the ordinary meaning could serve as a gateway to source rules when interpreting transplanted treaty rules. It is arguably permissible to determine the ordinary meaning of terms used in the PRP of an IIA by referring to the TRIMs Agreement, the SCM Agreement and related GATT Uruguay Round negotiating documents produced by GATT Members, as well as to other IIAs that use identical terms. Their pervasiveness makes it appropriate to assume that Parties to IIAs that comprise PRPs were fully aware of such instruments when negotiating these IIAs, and that they also deliberately used widely disseminated expressions as terms of art carrying settled meanings.<sup>208</sup> Although the expression

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<sup>202</sup> *Mobil & Murphy (Majority)* (n 13) paras 229-232.

<sup>203</sup> *ibid* paras 229- 232.

<sup>204</sup> *ibid* para 230.

<sup>205</sup> *ibid* para 230.

<sup>206</sup> *ibid* para 230.

<sup>207</sup> *ibid* para 296.

<sup>208</sup> Carstens (n 11) 236; Pieter Bekker and Thomas Innes, “The Under-Appreciated Role of Curial Settlement in International Law Norm-Making: Using Transnational Law and Diffusion Studies to Re-Assess the Status of Prior Decisions” in Cedric Ryngaert and others (eds), *What’s Wrong with International Law? Liber Amicorum A.H.A. Soons* (Brill, 2015) 385, 399-401; Zachary Douglas, “The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails” 2 *Journal of International Dispute*

“ordinary meaning” has traditionally been interpreted more narrowly and might not offer the most solid grounds for a broad inquiry into the meaning of terms used in PRPs,<sup>209</sup> Article 31(1) of the VCLT sets the terms of a treaty as a “starting point,” not as a limitation: the different interpretive instruments identified in Article 31 extend beyond the text of the treaty at issue, are expressed in mandatory terms and form part of a unified method of interpretation that must be applied in its entirety.<sup>210</sup> The VCLT framework therefore affords sufficient interpretative flexibility to consider PRPs within their proper context and in relation to all relevant rules of international law.<sup>211</sup>

Article 31(4) of the VCLT, which provides that a term can be assigned a special meaning if it can be proven that the Parties to a treaty so intended, provides an additional line of inquiry as to the meaning of terms used in PRPs of IIAs. Article 31(4) of the VCLT offers untried interpretative potential. However, the high evidentiary burden mandated by Article 31(4) of the VCLT renders it very difficult to prove that States Parties to a given treaty intended a special meaning in the absence of direct evidence of such a meaning (such as a definition in the treaty itself). Joint interpretations, exchanges of letters or preparatory work could potentially indicate that given terms carry a specific meaning, but those sources may more likely amount to context allowing to identify the ordinary meaning of such terms.<sup>212</sup>

Rather than insisting on establishing special meanings as construed under Article 31(4) of the VCLT for terms used in PRPs, one can more easily ascertain that such terms have undoubtedly acquired settled meanings that could amount to ordinary meanings under Article 31(1) of the VCLT in the specific context of IIAs and of GATT/WTO agreements and documentation. This thesis notably demonstrates that multilateral trade negotiations produced definitional efforts that equipped negotiators of IIAs with an elaborate vocabulary and settled meanings for terms of art that feature in all PRPs surveyed for purposes of this thesis.

## **5. All Signs Point to a Systemic Interpretation and Application of PRPs in IIAs and to a Cross-Fertilisation with GATT/WTO Disciplines**

Fully reaping the insights to be derived from the nature of PRPs as “legal utterances,” MSENs and transplanted treaty rules through the framework of Articles 31 and 32 of the VCLT constitutes a delicate task. These Articles essentially restrict recourse to interpretative means

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*Settlement* (2011) 97, 101, 110.

<sup>209</sup> *ibid* 237.

<sup>210</sup> Douglas (n 208) 109; Van Damme (n 176) 620.

<sup>211</sup> Carstens (n 11) 240.

<sup>212</sup> Carstens (n 11) 240; Gardiner (n 190) 294-297.

extraneous to the treaty at issue.<sup>213</sup> However, pigeon-holing the various instruments is helpful to the interpretation of PRPs in IIAs into concepts such as context, relevant rules applicable between State Parties or supplementary means of interpretation may not constitute the most vital of exercises since “interpretation pursuant to the customary rules codified in Article 31 ... is ultimately a holistic exercise that should not be mechanically sub-divided into rigid components’.”<sup>214</sup>

A proper understanding of PRPs in IIAs compels consideration of the U.S. BIT Programme and multilateral trade documentation pertaining to the TRIMs Agreement and the SCM Agreement. Provided that textual/contextual/purposive/substantive differences are duly taken into account, the documentation pertaining to performance requirements and produced prior to, during and after the GATT Uruguay Round of negotiations and the entry into force of the TRIMs Agreement and the SCM Agreement can provide valuable help in interpreting and applying PRPs and understanding the inner-workings and purposes of performance requirements.

The same is true for the highly influential U.S. BIT Programme: the United States articulated rationales against performance requirements through congressional hearings and formulated elaborate and influential PRPs which set a tone that was subsequently reproduced in many IIAs that comprise PRPs. By contrast, even by 1998, performance requirements had generated no noticeable interest among Member States of the European Community, India or Turkey in the context of their IIAs: none of them mentioned performance requirements in overviews of their IIAs before the WTO Working Group on the Relationship Between Trade and Investment (“WGTI”).<sup>215</sup> In 2002, the European Community barely acknowledged that performance requirements could affect the establishment of FDI.<sup>216</sup> This thesis did not set out to focus on the U.S. BIT Programme; rather, it could not identify another comparably insightful and influential source of information on performance requirements.

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<sup>213</sup> Carstens (n 11) 229-231, 235-236.

<sup>214</sup> Van Damme (n 176) 626-627, quoting *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts)* (12 September 2005), WT/DS269/AB/R, WT/DS286/AB/R, para 176.

<sup>215</sup> European Community, *Identification of Common Features and Differences of Existing International Investment Instruments From the Perspective of the European Community and its Member States – Communication to the Working Group on the Relationship Between Trade and Investment*, WT/WGTI/W/30 (27 March 1998); India, *Stocktaking of India Bilateral Agreements for the Promotion and Protection of Investments – Communication to the Working Group on the Relationship Between Trade and Investment*, WT/WGTI/W/71 (13 April 1999), 4 p; Turkey, *Turkey's Experience with Bilateral Investment Treaties – Communication to the Working Group on the Relationship Between Trade and Investment*, WT/WGTI/W/51 (18 September 1998). All three are available at <<http://docsonline.wto.org>>.

<sup>216</sup> European Community, *Concept Paper on Modalities of Pre-Establishment – Communication to the Working Group on the Relationship Between Trade and Investment*, WT/WGTI/W/121 (27 June 2002) 6, Annex, <<http://docsonline.wto.org>>.

Many instances provide support for developing a systemic understanding of PRPs within different IIAs, regardless of which basis in Articles 31 or 32 of the VCLT is invoked for their consideration. First, both Canada and the United States drew from the U.S. BIT Programme for shedding light onto NAFTA Article 1106: Canada readily admitted that its origins can be traced back and likened to PRPs contained in many U.S. BITs from the 1980s.<sup>217</sup> Second, the United States confirmed that with respect to investment, their U.S. BITs pursued the same objectives as their FTAs and more particularly as the NAFTA,<sup>218</sup> and such objectives included prohibiting “trade and investment distorting” performance requirements.<sup>219</sup> Third, the U.S. Department of State further acknowledged the influence of BITs from other OECD countries and of the GATT Uruguay Round of negotiations as providing ongoing feedback loops pursuant to which the United States periodically adjusts its Model BIT.<sup>220</sup> Fourth, Canada’s Statement of Implementation of the NAFTA clearly recognises the mutual influence and the interconnectedness between the WTO Agreements resulting from the Uruguay Round and the NAFTA, noting that they “cover much of the same ground,” that “the two sets of rules are largely complementary and mutually reinforcing,” and that each outcome fed on the progress made and understandings developed in the other’s negotiating process.<sup>221</sup> Fifth, the U.S. Department of State expressed the view that the definition of a term in a subsequent BIT can “influence interpretation of a similar term in previous treaties” where such previous BITs leave such similar term undefined, since all U.S. BITs are linked by underlying U.S. Model BITs.<sup>222</sup> Sixth, Canada has previously relied on 13 U.S. BITs which replicated the PRP from the relevant U.S. Model BIT, as well as on 5 Japanese BITs for purposes of interpreting NAFTA Article 1106.<sup>223</sup> Seventh, in its Draft Model BIT released in May 2015, Norway clearly linked PRPs in IIAs with the TRIMs Agreement and the GATS<sup>224</sup> and clearly promoted consistent WTO and BIT negotiating strategies in respect of performance requirements, with a view to ensuring that Norway negotiate PRPs that at least meet the demands voiced by Norway in WTO

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<sup>217</sup> *Pope & Talbot* (n 167) – Counter-Memorial of Canada (29 March 2000) paras 299-302 and fn 279, 281; *Merrill & Ring* (n 167) – Counter-Memorial of Canada (13 May 2008) paras 695-696 and fn 757.

<sup>218</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 34.

<sup>219</sup> Lang (n 94) 459-460.

<sup>220</sup> Papovich (n 94) 7.

<sup>221</sup> Dept. of External Affairs, *North American Free Trade Agreement, Canadian Statement on Implementation*, Canada Gazette (1 January 1994) 75.

<sup>222</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 32.

<sup>223</sup> See *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 173-175.

<sup>224</sup> *General Agreement on Trade in Services* (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183 (1994) (“GATS”). This thesis does not analyse the applicability of the GATS to performance requirements nor does it investigate the application of disciplines on performance requirements to trade in services. This area, which falls outside the scope of this thesis, admittedly requires additional research.

negotiations.<sup>225</sup>

#### **IV. Typology and Analysis of PRPs in IIAs**

This part proposes an overview and a detailed analysis of the various types of PRPs encountered in the IIAs surveyed for purposes of this thesis. It discusses non-binding PRPs with narrow coverage first. Second, this part analyses performance requirements under the GATT, the GATT Uruguay Round of negotiations on TRIMs, the TRIMs Agreement and PRPs that incorporate the TRIMs Agreement, as well as the interpretation and application issues that arise in respect of such PRPs. Third, this part surveys open-ended PRPs in IIAs and proposes to clarify the precise measures that such PRPs would prohibit. To do so, the third section makes use of submissions made by GATT Members during the Uruguay Round to spell out and circumscribe the scope of open-ended PRPs in American, French and Indian BITs. This section also critically appraises the sole arbitral award having interpreted and applied an open-ended PRP in *Lemire v Ukraine*.

Fourth, this part scrutinises detailed and exhaustive PRPs in IIAs, the emerging patterns and their widespread repetition. This part also defines 14 categories of measures systematically referred to as performance requirements, identifies the terms of art and the settled meanings that they have acquired, and provides examples where available. This part then critically assesses interpretations by arbitral tribunals to date of performance requirements specifically prohibited within detailed and exhaustive PRPs.

Fifth, this part investigates the prohibition of advantage-conditioning performance requirements. That fifth section will kick off its analysis with the TRIMs Agreement and the SCM Agreement. The fifth section then moves onto advantage-conditioning performance requirements under PRPs in IIAs. The fifth section differentiates between PRPs that omit advantage-conditioning performance requirements, PRPs that prohibit them by incorporating the TRIMs Agreement, PRPs of American and Canadian IIAs with EU Member States that are accompanied by clarifying statements, PRPs that exclude advantage-conditioning performance requirements from their scope, as well as PRPs that prohibit a narrower list of advantage-conditioning performance requirements than the mandatory performance requirements that they prohibit. The fifth section derives guidance from the interpretation of the term “benefit” under the SCM Agreement in order to improve our understanding of the term “advantage” in the TRIMs Agreement and in PRPs of IIAs. The fifth section then identifies a number of measures that

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<sup>225</sup> Norway (2007) (n 26) 24-25; Government of Norway (2015) (n 26) 11-12.

would arguably amount to advantages while concluding with an appraisal of arbitral awards having considered advantages in the context of PRPs in IIAs.

Finally, this part discusses the practice of prohibiting performance requirements in trade-related chapters of TIPs, in investment chapters of TIPs or in both. This section reflects on the practice by certain States of providing for PRPs in trade treaty instruments as an illustration of the dual nature of PRPs (both trade- and investment-driven) as well as of the dual interests (those of home States and those of investors) that they set out to protect.

### **A. Non-Binding PRPs With Narrow Coverage**

The PRP “generally has been one of the most difficult BIT provisions on which to reach agreement”<sup>226</sup> and their quality within the first ten U.S. BITs has been euphemistically described as variable.<sup>227</sup> In spite of American best efforts, PRPs in a number of U.S. BITs signed between 1982 and 1990 underwent significant alterations when compared with corresponding U.S. Model BITs.<sup>228</sup> American diplomatic efforts against performance requirements sputtered early on as seven of its first ten U.S. BITs, entered into respectively with Egypt, Haiti,<sup>229</sup> Zaire (renamed Democratic Republic of Congo (“DRC”) in 1997 (“Zaire/DRC”)), Morocco, Turkey, Bangladesh and Tunisia provided only for “best effort” commitments to avoid performance requirements.<sup>230</sup> American BIT negotiations were then suspended for three years while the U.S. Senate formulated its advice and consent to ratification of U.S. BITs signed between 1982 and 1986. During this process, the U.S. Senate expressed concern at the lack of conformity of PRPs within such U.S. BITs with the PRPs found within corresponding U.S. Model BITs and at their lack of compulsoriness.<sup>231</sup>

The United States signed its first BIT with Egypt on 29 September 1982<sup>232</sup> which comprises a PRP deprived of any binding character as Article II(6) of the Egypt - U.S. BIT (1982) amounts to a “best efforts” provision:<sup>233</sup>

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<sup>226</sup> Vandevelde, “The Second Wave” (n 112) 674, 677.

<sup>227</sup> Bale (n 93) 22.

<sup>228</sup> Sachs (n 72) 224.

<sup>229</sup> The BIT with Haiti was signed, but never entered into force: see Vandevelde (n 84) 38.

<sup>230</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 45; “Statement of Kenneth J. Vandevelde before the U.S. Senate” (n 130) 70; Gudgeon (n 112) 127; Sachs (n 72) 208; Vandevelde, “The Second Wave” (n 112) 674.

<sup>231</sup> “Question by Sen. Pressler” in *1988 U.S. Senate Hearings on BITs and Tax Treaties* (n 74) 30-31; “Statement of Kenneth J. Vandevelde before the U.S. Senate” (n 130) 70; Vandevelde, “The Second Wave” (n 112) 674.

<sup>232</sup> Kunzer (n 112) 274.

<sup>233</sup> Robin (n 48) 949 fn 125.



In the context of its national economic policies and objectives, each Party shall seek to avoid the imposition of performance requirements of the investment of nationals and companies of the other Party. [Emphasis added.]

Article II(7) of the Haiti - U.S. BIT (1983) incorporates a very similar provision. Pursuant to Article II(7) of the U.S. - Zaire/DRC BIT (1984), State Parties “endeavor to avoid imposing” LCRs or EPRs.<sup>234</sup> Zaire/DRC refused to prohibit performance requirements since these were used by Zaire/DRC in its pursuit of development objectives. As a result, the United States had to agree to non-binding “best effort” language in Article II(7) the U.S. - Zaire/DRC BIT. Moreover, the PRP in Article II(7) the U.S. - Zaire/DRC BIT is not open-ended: rather, it is limited to LCRs and EPRs. Article II(7) of the U.S. - Zaire/DRC BIT further recalls the importance of “national economic policies and goals,” and Zaire/DRC insisted on adding a sentence which explicitly preserves the right to impose import restrictions on goods.<sup>235</sup>

The PRP in Article II(5) of the Morocco - U.S. BIT (1985) is particularly weak: it uses non-binding “best effort” language, it is limited to LCRs and EPRs, and it is “without prejudice to the general import programs and the national economic policy” of each Party. Article II(7) of the Turkey - U.S. BIT (1985) is also limited to non-binding “best effort” language.<sup>236</sup> Article II (6) of the Bangladesh - U.S. BIT (1986) resorts to a hortatory “shall seek to avoid” formulation and recalls that a State adopts performance requirements “in the context of its national economic policies and objectives.” Bangladesh strongly insisted that attracting FDI was meant to “generate foreign exchange and to utilise local resources” and Bangladesh had to preserve its right to impose performance requirements to in order to achieve such purposes.<sup>237</sup> The PRP in Article II(6) of the Tunisia - U.S. BIT (1990) also provides for hortatory language and a “best effort” commitment to eliminate performance requirements;<sup>238</sup> the United States took solace from the fact that although Tunisia was unwilling to commit to an outright prohibition of performance requirements, Tunisia had apparently eliminated all of its performance requirements at the time of signing the BIT.<sup>239</sup>

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<sup>234</sup> Article II(7) of the U.S. - Zaire/DRC BIT (1984).

<sup>235</sup> U.S. - Zaire/DRC BIT (1984): Letter of Submittal from the Department of State to the President, 26 February 1986, 99th Cong., 2nd Sess.

<sup>236</sup> Turkey - U.S. BIT (1985): Letter of Submittal from the Department of State to the President, 19 February 1986, 99th Cong., 1st Sess., Senate Treaty Doc. 99-19.

<sup>237</sup> Bangladesh - U.S. BIT (1986): Letter of Submittal from the Department of State to the President, 9 May 1986, 99th Senate, 1st Sess.

<sup>238</sup> Tunisia BIT - U.S. (1990): Letter of Submittal from the Department of State to the President, 24 April 1991, 102nd Cong., 1st Sess., Senate Treaty Doc. 102-6.

<sup>239</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 26, 40, 45; “Statement of Kenneth J. Vandeveld before the U.S. Senate” (n 130) 70.

The U.S. State Department inaccurately portrayed the discrepancies between the PRP within the corresponding U.S. Model BIT and the PRPs within the Morocco - U.S. BIT (1985), the U.S. - Zaire/DRC BIT (1984), the Turkey - U.S. BIT (1985), the Bangladesh - U.S. BIT (1986) and the Tunisia - U.S. BIT (1990) as “not represent[ing] major substantive departures from text” and as “differ[ing] in minor respects from the U.S. model text.” Contradicting itself, the State Department conceded that variations within its PRPs constituted one of the “most noteworthy changes” and admitted that these countries, as well as Haiti<sup>240</sup> and Senegal,<sup>241</sup> wished “to retain the right to use some limited local content/export incentives or requirements as part of their national economic development policies.”<sup>242</sup>

Aside from comprising non-binding PRPs, the seven U.S. BITs entered into respectively with Egypt, Haiti, Zaire/DRC, Morocco, Turkey, Bangladesh and Tunisia nevertheless comprise separate provisions on transfers that compel State Parties to authorise unfettered financial transfers in and out of State Parties. The United States secured binding prohibitions of remittance restrictions separately from their PRPs.

## **B. PRPs & TRIMs**

### **1. The Applicability of the GATT to Performance Requirements and the GATT-FIRA Panel Report**

TRIMs were “not precisely defined”<sup>243</sup> under the GATT. The lack of explicit applicability of GATT rules to performance requirements could have opened the door to a proliferation of performance requirements.<sup>244</sup> Since the United States viewed performance requirements as trade distortions “contrary to the spirit, if not the letter of the GATT,”<sup>245</sup> a few observers called for “test cases” in order to determine and clarify the applicability of existing GATT rules to performance requirements, to spur the development of international law on performance requirements, and to

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<sup>240</sup> Article II(7) of the Haiti - U.S. BIT (1983) also used hortatory “shall seek to avoid” language in its PRP, but the U.S. BIT with Haiti never entered into force.

<sup>241</sup> Nevertheless, as seen below, Article II(8) of the Senegal - U.S. BIT (1983) sets forth a compulsory PRP with open-ended language as to its scope.

<sup>242</sup> Turkey - U.S. BIT Letter of Submittal (n 236); Morocco - U.S. BIT: Letter of Submittal from the Department of State to the President, 20 February 1986, 99th Cong., 2nd Sess; Tunisia BIT - U.S. BIT Letter of Submittal (n 238).

<sup>243</sup> Nordic Countries, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/6 (15 June 1987) 1.

<sup>244</sup> Leland (n 136) 219, 223.

<sup>245</sup> Edward M. Graham and Paul Krugman, “Current US Policy” in Stephen Young (ed), *Multinationals and Public Policy Vol. 2* (Edward Elgar, 2004) 138, 146.

“put the world community on notice about the U.S. position on performance requirements.”<sup>246</sup>

The United States therefore initiated dispute settlement proceedings under the GATT in order to obtain a decision confirming that performance requirements violate GATT disciplines. The United States targeted Canada’s then Foreign Investment Review Act (“FIRA”), enacted in 1973, as a mechanism used to impose a significant number of trade-distorting performance requirements on foreign and especially American investors. As a leading recipient of outward American FDI,<sup>247</sup> Canada was setting a bad precedent for other countries to follow; moreover, the United States was having a hard time convincing other countries to move away from performance requirements while Canada was still imposing them.<sup>248</sup>

The GATT-FIRA Panel<sup>249</sup> was tasked with examining Canada’s practice of entering into agreements with foreign investors which required of investors that they favour the purchase of Canadian goods and that they comply with specified export targets.<sup>250</sup> The FIRA conditioned approvals of acquisitions of Canadian investments or new investments to whether such transaction would prove of “significant benefit to Canada.” Written undertakings by foreign investors constituted one of five factors that could be taken into account for assessing benefits to Canada. The FIRA did not make such undertakings mandatory, but over time foreign investors routinely submitted such undertakings alongside large investment proposals. Most of the undertakings reflected the outcome of prior negotiations between foreign investors and Canada; undertakings would relate to employment, local R&D, participation of Canadian shareholders and/or management personnel to proposed investment, as well as purchasing, manufacturing and/or export practices.<sup>251</sup> Undertakings needed not follow any prescribed formula or content and varied on a case-by-case basis. Although voluntarily provided, local

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<sup>246</sup> Bale (n 83) 180, 182, 189; Jacobsen (n 34) 1194-1195; Leland (n 136) 224; LICIT (n 48) 75, 77.

<sup>247</sup> LICIT (n 48) 62-63.

<sup>248</sup> Leland (n 136) 223; Bale (n 83) 180, 188.

<sup>249</sup> GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, GATT Doc L/5504, adopted February 7, 1984, BISD 30S/140, paras 1.1, 1.3, 1.4.

<sup>250</sup> For more on the GATT – FIRA case, see: GATT Secretariat, *Note on TRIMs (1987)* (n 145) 4-8; Emily F. Carasco, “The Foreign Investment Review Agency (FIRA) and the General Agreement on Tariffs and Trade (GATT): incompatible?” 13(2) *Georgia J. Int’l & Comp. L.* 441 (Spring 1983); Brian Derrah, “Canada and the Challenge of Foreign Investment: the First Decade of Foreign Investment Review” 7(3) *Dalhousie Law Journal* 194 (October 1983) 228-231; Graham (n 42) 123; Sanam Salem Haghighi, *A Proposal for an Agreement on Investment in the Framework of the World Trade Organization*, thesis in partial fulfillment of the degree of Master of Laws (LL.M), Institute of Comparative Law, Graduate Faculty of Law, McGill University (1999), 28-31; UNCTC and UNCTAD (n 43) Appendix A – GATT – FIRA; Elizabeth Smythe, “Your Place or Mine? States, International Organization and the Negotiation of Investment Rules” 7(3) *Transnational Corporations* (December 1998) 85, 96; Martha Lara de Sterlini, “The Agreement on Trade-Related Investment Measures” in Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) 444-445; Wang (n 48) 110-117; Singapore (n 148) para 13.

<sup>251</sup> *GATT-FIRA Panel Report* (n 249), paras 2.2-2.4

content or export undertakings became legally binding and enforceable following the approval of the investment. However, the Canadian government never sought a remedial order from Canadian courts and instead opted for deferral, waiver or replacement of undertakings should investors fail to live up to their commitments.<sup>252</sup>

The GATT-FIRA Panel began by finding that manufacturing requirements fell outside of its terms of reference and were therefore not examined.<sup>253</sup> The GATT-FIRA Panel then assessed undertakings to purchase goods of Canadian origin or from Canadian sources in light of the national treatment rule enshrined in GATT Article III:4 which states that requirements affecting the sale, purchase, transportation, distribution or use of imported products must afford imported products treatment no less favourable than that afforded to domestic products. The GATT-FIRA Panel found that the judicially enforceable written undertakings provided by foreign investors constituted “requirements” for purposes of GATT Article III:4. The GATT-FIRA Panel recalled that GATT Article III:1 forbids GATT Members from using internal measures to afford protection to domestic production. The GATT-FIRA Panel decided that unqualified undertakings to purchase goods of Canadian origin, as well as undertakings to purchase from Canadian suppliers subject to their availability on competitive terms, impaired the purchase of imported goods and afforded them treatment less favourable than that afforded to domestic goods in violation of GATT Article III:4.<sup>254</sup> The GATT-FIRA Panel further ruled that the local purchase undertakings could not be justified under the exception provided by Article XX(d) of the GATT since they did not prove necessary to secure compliance with the FIRA. The GATT-FIRA Panel considered that foreign investments could generate significant benefits to Canada even in the absence of local purchase undertakings.<sup>255</sup> In respect of undertakings to export specified quantities or proportions, the GATT-FIRA Panel found that no GATT provision forbids requirements to export production and to sell it onto foreign instead of domestic markets, nor does the GATT compel GATT Members to prevent dumping. Accordingly, the GATT-FIRA Panel decided that a GATT Member could impose EPRs onto privately-owned investors without violating the GATT.<sup>256</sup> In a nutshell, GATT rules prohibited LCRs, but not EPRs.

## **2. Performance Requirements Under the TRIMs Agreement**

This section delves into the scope and coverage of disciplines applicable to performance requirements under the TRIMs Agreement. This section explains how GATT Members

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<sup>252</sup> *ibid* paras 2.10-2.11.

<sup>253</sup> *ibid* para 5.3.

<sup>254</sup> *ibid* paras 5.4-5.11.

<sup>255</sup> *ibid* para 5.20.

<sup>256</sup> *ibid* para 5.18.

compromised on a list-driven concept of TRIMs in a pragmatic attempt to circumvent the thorny issues arising from assigning specific effects or purposes of performance requirements. This part also assesses the assertion that the TRIMs Agreement did not create new disciplines, but merely clarified the applicability of GATT Articles III (national treatment) and XI (quantitative restriction) to performance requirements. This section also appraises the Illustrative List annexed to the TRIMs Agreement so as to better understand which performance requirements are explicitly prohibited under the TRIMs Agreement.

a) *The Endorsement of TRIMs as a Political Compromise*

Given the blurry meaning of performance requirements and TRIMs, attempts to define TRIMs beyond a strict understanding of direct trade-relatedness occurred with consistency over time.<sup>257</sup> Recasting performance requirements as trade-driven measures under the TRIMs concept, an “artificial construct,”<sup>258</sup> was made necessary by the trade-defined multilateral negotiating platform offered by the GATT.<sup>259</sup> The creation of GATT/WTO disciplines could succeed only in respect of performance requirements that would fall within the jurisdiction of the GATT by demonstrably distorting and/or restricting trade.<sup>260</sup>

The negotiation of such disciplines, spearheaded by the United States, revealed a wide spectrum of hardly reconcilable positions among GATT Members. Some GATT Members, notably India, refused outright the notion of disciplining investment matters in the GATT forum.<sup>261</sup> India considered that performance requirements comprise, but extend largely beyond TRIMs that would consist of trade policy measures meant to directly tackle imports and exports and which cause direct trade effects.<sup>262</sup>

Intermediary definitions of TRIMs, including those of the European Communities (“EC”), Japan and Switzerland, focused on “inherently trade-distorting”<sup>263</sup> investment measures having a direct

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<sup>257</sup> GATT, *G-18 Note on Performance Requirements* (n 157) 5 (para 6), quoting a September 1980 report by the Task Force on Private Foreign Investment of the Joint Development Committee established by the IMF and the World Bank; Narasimham (n 48) 1-2; OECD, *Framework – Investment Disincentives* (n 27) para 19.

<sup>258</sup> Deluca (n 29), 253.

<sup>259</sup> India Submission 18 (n 35) paras 3, 20.

<sup>260</sup> Switzerland (n 42) 2.

<sup>261</sup> GATT Group of Negotiations on Goods, *Sixteenth meeting: 9 April 1990*, MTN.GNG/22 (8 May 1990) 6-7; Deluca (n 29), 274.

<sup>262</sup> India Submission 18 (n 35) para 23.

<sup>263</sup> European Communities, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/22 (16 November 1989) 3; GATT, *Note on TRIMs* (October 1990) (n 145) para 30 (EC).

and substantial effect on international trading patterns<sup>264</sup> and impacting “the business behaviour of the investor during the production process.”<sup>265</sup>

Other GATT Members, notably the United States, embraced an all-encompassing prohibition of all performance requirements under GATT rules, whether directly or indirectly related to trade. The United States defined TRIMs more expansively as measures “likely to impact trade” and/or that have trade motivations<sup>266</sup> and as measures that artificially altered imports or exports of the State adopting such measures.<sup>267</sup> The United States equated TRIMs with performance requirements.<sup>268</sup>

These definitions demonstrate the lack of unanimity and consistency in defining TRIMs. It is apparent that the notion of TRIMs as enshrined in the TRIMs Agreement reflects a political compromise rather than a settled understanding of performance requirements related to trade. Even if agreement had been reached around notions such as “direct impact on trade” as guidance for prohibiting performance requirements, the dilemma would then have shifted to the threshold for determining that measures impact international trade directly, while further leaving unresolved the measurement of such impact. The separation line between performance requirements directly related to trade and those indirectly related to trade rested on inconclusive empirical assessments of their sometimes subtle impacts on trade and therefore provided shaky grounds for defining the outer reaches of or the differences between TRIMs and performance requirements.

The definition of TRIMs used in the GATT forum needed to translate into “operational solutions.”<sup>269</sup> GATT Members predictably failed in finding an “operational definition” for the

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<sup>264</sup> European Communities, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/10 (24 May 1988) 3; GATT GNG Report (1988) (n 156) para 79; Japan, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/7 (23 June 1987) 1, 3; Japan, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/12 (9 June 1988) 5, 8-12; Japan, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/20 (13 September 1989) 5-6. See also Greenaway (n 31) 140; Moran and Pearson, *TRPRs OPIC* (n 31) 7; OECD, *First Note on TRIMs* (n 30) paras 4, 7; OECD, *First Note on TRIMs* (n 30) paras 4, 7, 12.

<sup>265</sup> Switzerland (n 42) 3.

<sup>266</sup> United States, *Trade-Related Aspects of Foreign Direct Investment*, Submission to the OECD Working Party of the Trade Committee, TC/WP(87)7 (1987), quoted in OECD, *First Note on TRIMs* (n 30) 5-6.

<sup>267</sup> United States, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/4 (11 June 1987) 1; United States, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/14 (6 February 1989) 3.

<sup>268</sup> U.S. Submission 14 (n 267) 18-20.

<sup>269</sup> Switzerland (n 42) 2.

expression “inherently trade distorting.”<sup>270</sup> Agreeing on examples of performance requirements that cause trade distorting effects proved easier.<sup>271</sup> The following section investigates the alternative approach that GATT Members chose: identifying TRIMs by relying on illustrative lists of measures<sup>272</sup> “which had a direct and significant restrictive or distorting effect on trade, and which had a direct link to existing GATT Articles.”<sup>273</sup>

*b) Scope and Coverage of the TRIMs Agreement and of PRPs Which Incorporate the TRIMs Agreement*

The TRIMs Agreement makes no attempt at defining TRIMs.<sup>274</sup> Article 1 of the TRIMs Agreement explicitly restricts its application to investment measures related to trade in goods, thereby excluding any application to trade in services. Disciplines under the TRIMs Agreement essentially reaffirm GATT Articles III (National Treatment) and XI (General Elimination of Quantitative Restrictions) while making explicit the applicability of such GATT provisions to TRIMs.<sup>275</sup> Article 2(1) of the TRIMs Agreement prohibits TRIMs by referring to GATT Article III for internal measures and GATT Article XI for border measures.<sup>276</sup> The TRIMs Agreement thus does not apply to performance requirements equally applicable to goods of domestic and foreign investors.<sup>277</sup> Article 3 of the TRIMs Agreement clearly states that GATT exceptions can apply to validate TRIMs that would otherwise violate the TRIMs Agreement.<sup>278</sup> Most notably, GATT Article III:8 would therefore provide for an exception authorising TRIMs in the context of government procurement, while GATT Article XX potentially provides a number of justifications for TRIMs that would otherwise violate the TRIMs Agreement.

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<sup>270</sup> GATT, *Note on Trims* (April 1990) (n 147) para 39.

<sup>271</sup> Switzerland (n 42) 2.

<sup>272</sup> Greenaway, “Political Economy of TRIMs” (n 62) 368; UNCTAD, “HCOMs” (n 44) 8.

<sup>273</sup> GATT, *Note on Uruguay Round* (1987) (n 165) paras 49, 52; GATT GNG Report (1988) (n 156) para 79; Japan Submission 7 (n 264) 2; Nordic Countries (n 243) 1; GATT, *Note on TRIMs* (n 60) para 13 (Hong Kong).

<sup>274</sup> de Sterlini (n 250) 449; *India – Certain Measures Relating to Solar Cells and Solar Modules* (24 February 2016), WTO Doc WT/DS456/R (Panel Report), <<http://docsonline.wto.org>> (India—Solar Cells), para 7.59; *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan)* (19 December 2012), WTO Doc WT/DS412/R (Panel Report) and *Canada – Measures Relating to the Feed-in Tariff Program (Complaint by the European Union)* (19 December 2012), WTO Doc WT/DS426/R (Panel Report), <<http://docsonline.wto.org>> (Canada—FIT Panel), para 7.108.

<sup>275</sup> Holger P. Hestermeyer and Laura Nielsen, “The Legality of Local Content Measures under WTO Law” 48(3) *Journal of World Trade* 553 (2014) 575; Patrick Low and Arvind Subramanian, “TRIMs in the Uruguay Round: An Unfinished Business?” in Will Martin and L. Alan Winters (eds), *The Uruguay Round and the Developing Economies* (World Bank Discussion Papers 307, 1995) 416.

<sup>276</sup> de Sterlini (n 250) 449-450.

<sup>277</sup> Moran and Pearson, *TRPRs OPIC* (n 31) 5.

<sup>278</sup> GATT Secretariat, *A Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions – Note by the Secretariat*, GATT Committee on Trade and Development, COM.TD/W/510 (2 November 1994) 24-25.

Article 2(2) of the TRIMs Agreement and Article 1 of the Illustrative List deem two TRIMs to be inconsistent with GATT Article III:4: LCRs and trade-balancing requirements, provided that they discriminate against imported goods by comparison with domestic products. Article 2(2) of the TRIMs Agreement and Article 2 of the Illustrative List deem three different types of TRIMs inconsistent with GATT Article XI:1: trade-balancing requirements and foreign exchange access restrictions, both depicted as import restrictions, as well as export restrictions. Article 2(a) of the Illustrative List further prohibits general import restrictions. These performance requirements, as well as general import restrictions, are explicitly prohibited both when they are mandatory and when imposed as conditions for obtaining an advantage.<sup>279</sup> Accordingly, performance requirements enumerated in the TRIMs Agreement can therefore nevertheless be adopted if they do not discriminate between foreign and national products and if they do not amount to quantitative restrictions.

Many performance requirements are thus not explicitly subject to the disciplines instituted by the TRIMs Agreement,<sup>280</sup> including: EPRs;<sup>281</sup> local equity requirements (“LERs”) (along with joint venture requirements (“JVRs”) and foreign ownership limitations); technology transfer requirements, licensing requirements and R&D requirements; foreign exchange earning requirements; remittance restrictions; manufacturing requirements; manufacturing limitations; local employment and/or training requirements; investment localisation requirements; domestic sales requirements, and product mandating requirements. However, the Illustrative List to the TRIMs Agreement is not exhaustive.<sup>282</sup> Although prohibited measures would extend beyond the Illustrative List extends only insofar as such measures violate the broader underlying obligations of GATT Articles III or XI,<sup>283</sup> an open-ended illustrative list increases insecurity as to the scope of disciplines under the TRIMs Agreement.

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<sup>279</sup> Andrea Bjorklund, “NAFTA Chapter 11,” in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford Commentaries on International Law) (OUP, 2013) 486; Canada, *Submission to the WTO Working Group on the Relationship between Trade and Investment*, WTO Doc WT/WGTI/W/19 (11 December 1997) 2; “U.S. State Dept. Responses to Sen. Pell” (n 78) 33; UNCTAD, *FDI & Performance Requirements* (n 5) 2-3; UNCTAD, “HCOMs” (n 44) 2-3, 12-14.

<sup>280</sup> “Statement of the U.S. Council for International Business – the Multilateral Agreement on Investment (MAI) – Summary and Recommendations” in *1995 U.S. Senate Hearings on BITs* (n 74) 48; Graham and Krugman (n 245) 138-139.

<sup>281</sup> Nagesh Kumar, “WTO Regime, Host Country Policies and Global Patterns of MNE Activity: Recent Quantitative Studies and India's Strategic Response” 36(1) *Economic and Political Weekly* 39 (6 January 2001) 47.

<sup>282</sup> de Sterlini (n 250) 449; GATT, *Note on TRIMs* (October 1990) (n 145) para 7 (Hungary), paras 19, 28 (Mexico), paras 23, 25 (Australia).

<sup>283</sup> India—Solar Cells (n 274), fn 212; Canada – *Certain Measures Affecting the Renewable Energy Generation Sector and Canada – Measures Relating to the Feed-In Tariff Program—Reports of the Appellate Body* (6 May 2013), WT/DS412/AB/R and WT/DS426/AB/R <<http://docsonline.wto.org>> (Canada—FIT ABR), para 5.103.



### 3. PRPs That Incorporate the TRIMs Agreement

PRPs become explicitly “multi-sourced” and equivalence is established with an outside source in instances where IIAs directly refer to and/or incorporate the TRIMs Agreement.<sup>284</sup> There is little doubt that the direct incorporation of the TRIMs Agreement within an IIA in order to prohibit certain performance requirements provides an additional clear instance of treaty rule transplantation. Thirteen of the surveyed IIAs<sup>285</sup> reiterate, incorporate or refer specifically to the TRIMs Agreement, although as will be shown, they go about it in slightly different ways.

PRPs which incorporate the TRIMs Agreement in its entirety or refer to its disciplines in general terms raise an interesting question: are such TRIMs limited to those explicitly prohibited in the TRIMs Agreement’s Illustrative List? Rather, it appears that absent wording to the contrary, the non-limitative and non-exhaustive nature of the TRIMs Agreement’s Illustrative List is also incorporated into PRPs that incorporate the TRIMs Agreement, provided of course that any performance requirement thus challenged would need to violate GATT Article III:4 or XI:1. Such PRPs could therefore potentially apply to performance requirements beyond the ones enumerated in the TRIMs Agreement’s Illustrative List.

Article 9 of the Canada - China FIPA (2012) incorporates and makes part of the FIPA Article 2 and the Annex to the TRIMs Agreement, thereby prohibiting the same mandatory and advantage-conditioning performance requirements than those prohibited under the TRIMs Agreement. Article 6.23 of the India - Singapore Comprehensive Economic Cooperation Agreement (“CECA”) (2005) incorporates all provisions of the TRIMs Agreement within the CECA.

Article 14.9(1) of the Australia - Japan Economic Partnership Agreement (“EPA”) (2014), Article 12.6 of the Australia - Malaysia FTA (2012) and Article 5 of ASEAN - Australia - New Zealand FTA (“AANZFTA”) Chapter 11 (Investment) (2009) incorporate the TRIMs Agreement in the same way by prohibiting any measure which is inconsistent with the TRIMs Agreement. Such drafting suggests that measures inconsistent with the TRIMs Agreement, but not explicitly

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<sup>284</sup> Broude and Shany (n 10) 8; WTO and UNCTAD (n 5) para 26.

<sup>285</sup> American IIAs: Article 11(1) of Chapter IV (Development of Investment Relations) to the U.S. - Vietnam Trade Relations Agreement (“TRA”) (2000). Australian TIPs: Article 14.9(1) of the Australia - Japan EPA (2014); Article 12.6 of the Australia - Malaysia FTA (2012); Article 5 of ASEAN - Australia - New Zealand FTA (“AANZFTA”) Chapter 11 (Investment) (2009); Article 5 of the Energy Charter Treaty (“ECT”) (1994). Canadian TIPs: Article V(2) of the Canada - Thailand FIPA (1997); Article VI of the Canada - Costa Rica FIPA (1998); Article 9(1) of the Canada - Kuwait FIPA (2011); Article 9 of the Canada - China FIPA (2012); Article 9(1) of the Canada - Mali FIPA (2014). Chilean BITs: Article 3(2)(b) of the Brazil - Chile BIT (2015). Indian TIPs: Article 6.23 of the India - Singapore CECA (2005); Article 10.5(3) of the India - Korea CEPA (2009).

enumerated in its Illustrative List would nevertheless be prohibited under Article 12.6. Articles 5(1) and 5(2) of the Energy Charter Treaty (“ECT”) (1994) reproduce the exact same disciplines as those set forth in the TRIMs Agreement and refer to Articles III and XI of the GATT, but not to the TRIMs Agreement, most likely because the TRIMs Agreement had not yet been signed.

Article 11(1) of Chapter IV (Development of Investment Relations) to the U.S. - Vietnam Trade Relations Agreement (“TRA”) (2000) provides for a PRP that applies to TRIMs referred to in Annex I of the U.S. - Vietnam TRA (2000) which reproduces the TRIMs Agreement’s Illustrative List. The wording of Annex I reiterates unchanged the open-ended language of the TRIMs Agreement’s Illustrative List, while also reiterating the need to violate GATT Articles III:4 or XI:1. It would therefore appear as though this PRP could extend beyond the measures explicitly identified in Annex I.

Some PRPs appear to have been drafted with a view to incorporating a prohibition limited to the performance requirements explicitly laid out in the Illustrative List to the TRIMs Agreement. Article VI of the Canada - Costa Rica FIPA (1998) prohibits imposing performance requirements “set forth” in the TRIMs Agreement. This formulation suggests that only the performance requirements explicitly enumerated in the Illustrative List of the TRIMs Agreement are prohibited and that Article VI applies to a closed set of measures.

In a provision on the scope of application of the BIT, Article 3(2)(b) of the Brazil - Chile BIT (2015) merely provides, for greater certainty, that nothing in the BIT limits in any way rights and benefits conferred upon covered investors by municipal law and international law, including by the TRIMs Agreement. This formulation rings strange since the TRIMs Agreement constitutes an agreement between States and does not directly confer rights upon investors; one wonders whether it can operate so as to incorporate the disciplines prohibiting the performance requirements enumerated in the TRIMs Agreement.

A number of PRPs that incorporate the TRIMs Agreement also prohibit additional performance requirements. Article V(2) of the Canada - Thailand FIPA (1997) prohibits performance requirements enumerated in the TRIMs Agreement and further prohibits technology transfer requirements in connection with the establishment or acquisition of an investment or the enforcement of such requirements in connection with the subsequent regulation of an investment. Article 9(1) of the Canada - Mali FIPA (2014) and Article 9(1) of the Canada - Kuwait FIPA (2011) reiterate the TRIMs Agreement and incorporate all of its provisions into their respective FIPAs. Both Article 9(2) of the Canada - Kuwait FIPA (2011) and Article 9(2) of the Canada - Mali FIPA (2014) further prohibit mandatory EPRs, LCRs, technology transfer

requirements and product mandating requirements. In addition to the incorporation of the TRIMs Agreement under Article 11(1) of Chapter IV (Development of Investment Relations) to the U.S. - Vietnam TRA (2000), Article 7 of Chapter IV separately prohibits technology transfer requirements.

Article 10.5(3) of the India - Korea Comprehensive Economic Partnership Agreement (“CEPA”) (2009) attempts an impossible reconciliation between the PRP in Article 10.5 and the TRIMs Agreement. Article 10.5(3) states that nothing in Article 10.5 of the India-Korea CEPA must be construed so as to derogate from the State Parties’ rights and obligations under the TRIMs Agreement. However, Article 10.5(1) of the India - Korea CEPA prohibits the same list of mandatory performance requirements as does NAFTA Article 1106(1), a list that prohibits many measures not prohibited under the TRIMs Agreement. Moreover, Article 10.5(2) of the India - Korea CEPA prohibits many more advantage-conditioning performance requirements than those set out in the TRIMs Agreement. The only possible effective interpretation of Article 10.5(3) consists of equating the verb “derogate” with “diminish”; accordingly, the PRP under Articles 10.5(1) and 10.5(2) of the India - Korea CEPA cannot diminish the rights and obligations of State Parties under the TRIMs Agreement, but it can increase such rights and obligations.

### **C. Open-Ended PRPs in IIAs**

State submissions on performance requirements made in a multilateral trade context can improve our understanding of PRPs in IIAs notably when attempting to accomplish the following: first, unfurling the undefined expression “performance requirements,” and second, fleshing out open-ended expressions such as “any other similar requirements.” The following subsections canvass BITs signed by the United States and France which use such open-ended expressions and then proceeds to exploring their outer-contours by turning notably to submissions made by India, the United States and the EC on performance requirements during the GATT Uruguay Round of negotiations.

India signed only one BIT that comprises a PRP: Article 4(4) of the India - Kuwait BIT (2001) provides that investments must not be subject to “additional performance requirements.” The following analysis of U.S. and French BITs will in turn help shed greater light onto the meaning of this undefined, open-ended and broad expression.

## 1. First-Generation PRPs in American BITs (1982-1995)

The first U.S. Model BIT to be published in 1983<sup>286</sup> contained the first standalone PRP, “[a] uniquely U.S. provision.”<sup>287</sup> Article II(7) of the 1983 U.S. Model BIT reads as follows:

7. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments owned by nationals or companies of the other Party, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements. [Emphasis added.]

Prior draft versions of the original U.S. Model BIT comprised an additional limiting clause worded as follows: “and which potentially or actually have an adverse effect on the trade and/or investments of the nationals or companies of the other Party.”<sup>288</sup> The United States appears to have opted for a broadly-worded PRP by deleting such limiting language or any explicit reference to trade or adverse effects. The PRP within the 1983 U.S. Model BIT singles out two performance requirements: LCRs and EPRs, while leaving the door wide open for reading-in by analogy a number of additionally prohibited performance requirements in combination with the undefined expression “performance requirements”.

Article II(5) of the 1984 U.S. Model BIT reproduces in a substantively identical fashion the PRP found in Article II(7) of the 1983 U.S. Model BIT with one inconsequential change: the omission of the terms “by nationals or companies of the other Party.” Article II(5) of the 1987 U.S. BIT Model, Article II(5) of the 1991 U.S. BIT Model and Article II(5) of the 1992 U.S. BIT Model all reproduced the same PRP as that found in Article II(5) of the 1984 U.S. Model BIT.<sup>289</sup> The 1983 and 1984 U.S. Model BITs, and by extension the revised versions of 1987, 1991 and 1992, take “a broad approach to performance requirements” according to the U.S. State Department.<sup>290</sup> In 1992, the U.S. State Department viewed “the core rights” of its BIT Model, including freedom from performance requirements, as having been marginally improved through the successive versions of its Model BIT and as having remained unchanged for the most part.<sup>291</sup>

The following subsections presents and discusses the open-ended wording of PRPs in 21

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<sup>286</sup> Kunzer (n 112) 273, A-5.

<sup>287</sup> Coughlin (n 36) 131; Deluca (n 29) 272.

<sup>288</sup> The deletion of this limiting clause aimed at providing U.S. treaty negotiators with greater bargaining power by allowing them to reintegrate such limiting clause in exchange for additional concessions: see Coughlin (n 36) 141 fn 6.

<sup>289</sup> Vandeveld (n 84) 387-388.

<sup>290</sup> Supplementary Protocol (1986) to the Egypt - U.S. BIT (1982): Letter of Submittal from the Department of State to the President, 20 May 1986, 99th Cong., 2nd Sess., Senate Treaty Doc. 99-24.

<sup>291</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 31.

American BITs, attempts within a number of American BITs to circumscribe such open-ended wording, and subsequent statements intended to clarify the reach of such PRPs while blurring their meaning and scope.

*a) American BITs With PRPs That Reproduce PRPs from U.S. Model BITs*

PRPs in 21 American BITs signed between 1982 and 1995 include identically-worded PRPs which replicate the prohibition of mandatory performance requirements found in the 1983 and 1984 U.S. Model BITs (and whose PRPs were themselves replicated in the 1987, 1991 and 1992 U.S. Model BITs).<sup>292</sup> These PRPs make use of concise and non-limitative illustrative lists of prohibited mandatory performance requirements which explicitly mention LCRs and EPRs and leaved uncharted the outer contours of such open-ended prohibitions; they also omit any reference to advantage-conditioning performance requirements.

*b) Attempts in American BITs to Address the Open-Ended Broadness of PRPs*

The broadness of the expression “performance requirements” poses serious problems of unpredictability as to which measures could ultimately fall within the scope of an open-ended PRP. This unpredictability was detected prior to the signature of the Argentina - U.S. BIT (1991): Argentina and the United States agreed to deploy their best efforts in avoiding a misinterpretation of the PRP (Article II(5)) which would “adversely affect” Argentina’s privatisation process in progress at the time of signing the BIT.<sup>293</sup> Argentina wished to preserve unabated its free rein in imposing operational and other restrictions, such as the mandatory provision of specified services, upon new owners of public utilities and other previously State-

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<sup>292</sup> Article II(8) of the Senegal - U.S. BIT (1983); Article II(7) of the Cameroon - U.S. BIT (1986); Article II(5) of the Grenada - U.S. BIT (1986); Article II(5) of the People’s Republic of the Congo (Brazzaville) (“Congo (Brazzaville)”) - U.S. BIT (1990); Article II(4) of the Poland - U.S. BIT (1990); Article II(5) of the Czech and Slovak Federal Republic - U.S. BIT (1991); Article II(5) of the Argentina - U.S. BIT (1991); Article II(5) of the Sri Lanka - U.S. BIT (1991); Article II(5) of the Kazakhstan - U.S. BIT (1992); Article II(5) of the Romania - U.S. BIT (1992); Article II(5) of the Armenia - U.S. BIT (1992); Article II(5) of the Bulgaria - U.S. BIT (1992); Article II(5) of the Kyrgyzstan - U.S. BIT (1993); Article II(6) of the Moldova - U.S. BIT (1993); Article II(6) of the Ecuador - U.S. BIT (1993); Article II(5) of the Jamaica - U.S. BIT (1994) (as discussed in greater detail below, a divergent sentence is added in respect of advantage-conditioning performance requirements); Article II(6) of the Estonia - U.S. BIT (1994); Article II(6) of the Ukraine - U.S. BIT (1994); Article II(5) of the Mongolia - U.S. BIT (1994); Article II(6) of the Latvia - U.S. BIT (1995); Article II(6) of the Lithuania - U.S. BIT (1995). Four additional U.S. BITs use similarly open-ended language, but they simply provide for hortatory, non-binding commitments: see Article II(6) of the Bangladesh - U.S. BIT (1986) and Article II(7) of the Haiti - U.S. BIT (signed in 1983, but not in force) (“performance requirements”); Article II(7) of the Turkey - U.S. BIT (1985) and Article II(6) of the Tunisia - U.S. BIT (1990) (“performance requirements” and “any other similar requirements”).

<sup>293</sup> Argentina - U.S. BIT (1991), Protocol, paras 9, 11, as discussed in Vandeveld, “The Second Wave” (n 112) 689.

owned assets.<sup>294</sup> However, the United States refused to spell out the delimitations of the concept of performance requirements through reliance on an exhaustive list of measures. As a result, Argentina could not ascertain which measures, adopted as part of the privatisation process could, would or would not fall within the PRP. The Protocol therefore recalls exchanges between the Parties over Argentina's concerns and their shared understanding that the PRP should not hinder Argentina's privatisation process.<sup>295</sup>

The broadness of such open-ended PRPs soon proved unsatisfactory for other State Parties: for example, paragraph 7 of the Supplementary Protocol (1986) to the Egypt - U.S. BIT (1982) later modified Article II(5) of the BIT by defining "performance requirements" as limited to LCRs and EPRs, the two examples mentioned in Article II(5), thus emptying the terms "any other similar requirements" of any meaning.<sup>296</sup> In an ineffectual attempt to constrain the scope and applicability of the PRP in Article II(8) of the Senegal - U.S. BIT (1983), paragraph 3 of the Protocol to the Senegal - U.S. BIT acknowledges that the domestic sourcing of locally competitive goods or services can contribute to the economic objectives of the Parties.<sup>297</sup>

*c) Rejecting Haphazard Attempts at Narrowing the Scope of Open-Ended PRPs in American BITs*

It has been suggested on occasion that wide-ranging formulas should be read so as to comprise a limitation to performance requirements related to trade. For example, BITs based on the 1992 U.S. BIT Model, which include the Estonia - U.S. BIT (1994), the Latvia - U.S. BIT (1995) and the Lithuania - U.S. (1995) BITs, were described as providing for open-ended PRPs effectively limited to trade-distorting performance requirements.<sup>298</sup> It has been stated that PRPs were meant to prevent host States from imposing upon American investors "inefficient and trade distorting practices,"<sup>299</sup> yet such trade-focused language is nowhere reflected in any American PRP. Instead of being meant to narrow the scope of such PRPs, the expression "inefficient and trade distorting practices" seems to have been used during U.S. Senate hearings<sup>300</sup> in an attempt to discuss the coverage of PRPs more concretely. Moreover, even if the expressions "other similar requirements" or "performance requirements" were intended to be limited to

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<sup>294</sup> Vandeveld, "The Second Wave" (n 112) 689.

<sup>295</sup> *ibid.*

<sup>296</sup> Coughlin (n 36) 132; Deluca (n 29) 272; Sachs (n 72) 224.

<sup>297</sup> Gudgeon (n 112) 127; Senegal - U.S. BIT (1983): Letter of Transmittal from the White House to the United States Senate, 5 March 1986, 99th Cong., 2nd Sess., Senate Treaty Doc. 99-15.

<sup>298</sup> U.S. Sen. Comm. on For. Rel., *Executive Report on Ratifying BITs (2000)* (n 117) 16.

<sup>299</sup> Tarullo (1992) (n 74) 3, 4, 7; "U.S. State Dept. Responses to Sen. Pell" (n 78) 21; Tarullo (1995) (n 74) 8. See also: Bay (n 94) 51; Papovich (n 94) 73.

<sup>300</sup> "Questions by Sen. Pell and Replies by Daniel Price" in *1995 U.S. Senate Hearings on BITs* (n 74) 32.

TRIMs (as opposed to an allegedly broader notion of performance requirements), the United States insisted that all performance requirements it put forward during the GATT Uruguay Round of negotiations caused significant adverse trade effects and equated TRIMs with performance requirements.<sup>301</sup> Adopting a narrower interpretation would in effect limit prohibited requirements only to the ones specifically enumerated within open-ended PRPs of American BITs and deprive their open-ended and broad terms of any useful effect.

Scattered statements which arbitrarily narrow open-ended PRPs in American BITs appear to amount to impromptu attempts at providing examples of performance requirements that would be subject to such open-ended PRPs. For instance, PRPs within eight American BITs, i.e. those signed with Turkey, Egypt, Morocco, Zaire/DRC, Senegal, Bangladesh, Cameroon and Grenada, allegedly applied only to four “investment measures:” LCRs, EPRs, LERs, and remittance restrictions.<sup>302</sup> Along the same lines, PRPs of the nine American BITs (those with Albania, Belarus (not in force), Estonia, Georgia, Jamaica, Latvia, Mongolia, Trinidad and Tobago and Ukraine) allegedly apply only to LCRs/LSRs, EPRs, technology transfer requirements, to domestic sales requirements and to foreign exchange earning requirements.<sup>303</sup> These attempts at clarifying open-ended PRPs within the aforementioned American BITs by narrowing their scope rest on no explicit rationale nor do they find support on any authority or statement attributable to the United States or to any signatory State.

Regrettably, when the question was raised as to who would determine the “inefficient and trade-distorting” character of a measure in order to decide the applicability of a PRP to a specific measure, the issues of defining the expression “performance requirements” or clarifying what the expression “any other similar requirements” stands for were swept under the carpet. Instead, reference was made to the “detailed list” approach subsequently put forward in the PRP of the 1994 U.S. Model BIT.<sup>304</sup> However, one cannot contend that open-ended PRPs within American BITs should be equated to detailed and exhaustive lists of performance requirements included in PRPs of subsequent American IIAs. On the contrary, subsequent PRPs with more specific coverage should be viewed as a tightening and a reduction of coverage compared with intentionally and admittedly broader prior PRPs.<sup>305</sup>

It is true that most PRPs in BITs signed from 1994 onward, and beginning with the Georgia -

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<sup>301</sup> U.S. Submission 14 (n 267) 18-20.

<sup>302</sup> Holmer (n 74) 10.

<sup>303</sup> Price (n 92) 30.

<sup>304</sup> “Questions by Sen. Pell and Replies by Daniel Price” in *1995 U.S. Senate Hearings on BITs* (n 74) 32-33.

<sup>305</sup> Supplementary Protocol (1986) to the Egypt - U.S. BIT (1982): Letter of Submittal (n 290).

U.S. BIT (1994), gave more concrete form to the goal of eliminating “inefficient and trade distorting practices” by enumerating the specific types of prohibited performance requirements. This drafting practice rendered moot the interpretative task of delimitating the contours of the expression “performance requirements” and the need for concepts such as “inefficient and trade distorting practices.”<sup>306</sup> However, none of these alleviations apply to open-ended PRPs within first-generation American BITs.

## 2. Open-Ended PRPs in French BITs

### a) France’s Model PRP

France has produced two publicly available Model BITs: one dated 1998<sup>307</sup> and another undated.<sup>308</sup> The PRPs in both French Model BITs are identical and show that France has opted for an altogether unique approach to prohibiting performance requirements. The PRP can be found in the FET provision of each Model BIT (Article 4 of France’s 1998 Model BIT and Article 3 of France’s undated Model BIT). France’s Model PRP reads as follows:

En particulier, bien que non exclusivement, sont considérées comme des entraves de droit ou de fait au traitement juste et équitable, toute restriction à l’achat et au transport de matières premières et de matières auxiliaires, d’énergie et de combustibles, ainsi que de moyens de production et d’exploitation de tout genre, toute entrave à la vente et au transport des produits à l’intérieur du pays et à l’étranger, ainsi que toutes autres mesures ayant un effet analogue.

Drawing from the PRP appearing in the Protocol regarding Article 3 of the Ethiopia - France BIT (2003), available in both English and French, France’s PRP Model can be translated as follows:

In particular though not exclusively, shall be considered as *de jure* or *de facto* impediments to fair and equitable treatment any restriction on the purchase or transport of raw materials and auxiliary materials, energy and fuels, as well as the means of production and operation of all types, any hindrance of the sale or transport of products within the country and abroad, as well as any other measures that have a similar effect.

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<sup>306</sup> “Questions by Sen. Pell and Replies by Daniel Price” in *1995 U.S. Senate Hearings on BITs* (n 74) 32-33.

<sup>307</sup> “Accord entre le Gouvernement de la République française et le Gouvernement \_\_\_\_\_ sur l’encouragement et la protection réciproques des investissements” in UNCTAD, *International Investment Instruments: A Compendium, Vol. V: Regional Integration, Bilateral and Non-governmental Instruments* (UNCTAD/DITE/2, 2000), 283.

<sup>308</sup> “Projet d’accord entre le Gouvernement de la République française et le Gouvernement \_\_\_\_\_ sur l’encouragement et la protection réciproques des investissements” in UNCTAD, *International Investment Instruments: A Compendium, Vol. III: Regional Integration, Bilateral and Non-governmental Instruments* (UNCTAD/DTCI/30, 1996), 159.



France's Model PRP characterises performance requirements as one category of measures that breach the guarantee of FET. It is broadly worded and is couched in words that differ from those usually used to evoke performance requirements explicitly. France's Model PRP is also not written in prohibitive terms; rather, it declares that the targeted measures breach the duty to provide for FET. The generic language used in the PRPs within France's BITs might explain why they have rarely been discussed in analyses of PRPs.<sup>309</sup> Moreover, specifying that measures deemed to violate FET include restrictions on the purchase or the transportation of raw materials, auxiliary materials, energy, fuels, means of production and means of operation of all types gives a deceitful impression of narrowness while in fact the Model PRP displays a broad scope of application. This broadness is reinforced by preceding such enumeration with the terms "though not exclusively" and by the one aspect reminiscent of the terminology used in first-generation American PRPs: the open-ended nature of France's Model PRP in that it further prohibits "any other measures that have a similar effect" to those of the depicted measures.

The measures prohibited in France's Model PRP consist of two broad categories: first, restrictions on the purchase or transport of raw materials and auxiliary materials, energy and fuels, as well as of means of production and operation of all types; and second, any hindrances of the sale or transport of products within the country and abroad. Restrictions on or hindrances of purchases, sales or transportation encompass performance requirements applicable to purchases or sales of investors and would therefore include LCRs, EPRs, trade-balancing requirements, export restrictions, foreign exchange restrictions (including foreign exchange earning or neutrality requirements), domestic sales requirements and product mandating requirements. In addition, France's Model PRP prohibits measures that would produce similar effects to the measures that fall within these two already broadly depicted categories.

*b) 64 French BITs with Open-Ended PRPs*

Forty-eight of France's 64 BITs that include PRPs replicate the text from France's Model BIT: 28 BITs signed between 1989 and 2007 incorporate PRPs identical to France's PRP Model.<sup>310</sup>

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<sup>309</sup> See the absence of French BITs in for example APEC & UNCTAD, Handbook (n 2) 86-90. However, see UNCTAD, "HCOMs" (n 44) 37-38 and Collins (n 7) 127-128 for a discussion of PRPs in French BITs.

<sup>310</sup> Article 4 of the Djibouti - France BIT (2007); Article 4 of the France - Senegal BIT (2007); Article 4 of the France - Seychelles BIT (2007); Article 3 of the Bahrain - France BIT (2004); Article 4 of the Bosnia and Herzegovina - France BIT (2003); Article 4 of the France - Tajikistan BIT (2002); Article 3 of the France - Zimbabwe BIT (2001); Article 3 of the Cambodia - France BIT (2000); Article 3 of the Dominican Republic - France BIT (1999); Article 3 of the Azerbaijan - France BIT (1998); Article 3 of the France - Namibia BIT (1998); Article 4 of the France - Nicaragua BIT (1998); Article 3 of the France - Macedonia BIT (1998); Article 4 of the France - Guatemala BIT (1998); Article 3 of the France - Georgia BIT (1997); Article 3 of the France - Moldova BIT (1997); Article 3 of the Croatia - France BIT (1996); Article 3 of the Armenia - France BIT (1995); Article 3 of the France - South Africa BIT (1995) (very nearly identical, with

Between 1983 and 2002, France signed an additional 20 BITs whose PRPs are nearly identical to France's PRP Model: three French BITs comprise PRPs in which only a few inconsequential words were added or deleted without altering the substance of the PRP,<sup>311</sup> while 17 French BITs comprise PRPs which are worded in the same way as France's Model PRP, but appear in a Protocol, an Annex or an Exchange of Letters appended to the BIT.<sup>312</sup>

The remaining 16 BITs of France comprise PRPs that differ from France's PRP Model while retaining the Model PRP's open-ended language by reiterating nearly identical open-ended expressions to the Model PRP's "as well as any other measures that have a similar effect." Within these 16 BITs, three include PRPs which differ from France's Model PRP by providing much more comprehensive protection to investors against performance requirements and a wide array of other measures; in addition to such broad coverage, all three PRPs reiterate the prohibition of "any other measures that have a similar effect."<sup>313</sup> Within these same 16 BITs with PRPs that differ from France's Model PRPs, 11 include PRPs limit their prohibition of purchase or transportation restrictions and/or sale or transportation hindrances by adding an additional criterion that they also be arbitrary, unfair and/or discriminatory.<sup>314</sup> The final 2 of 16 French BITs

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a few identical words appearing at the end rather than at the beginning); Article 3 of the Albania - France BIT (1995); Article 3 of the France - Oman BIT (1994); Article 4 of the Ecuador - France BIT (1994); Article 3 of the France - Kyrgyzstan BIT (1994); Article 3 of the France - Ukraine BIT (1994); Article 3 of the France - Turkmenistan BIT (1994); Article 3 of the France - Uzbekistan BIT (1993); Article 3 of the France - Mongolia BIT (1991); Article 3 of the Bolivia - France BIT (1989).

<sup>311</sup> France - Saudi Arabia BIT (2002), Protocol regarding Article 2; Article 3 of the France - Peru BIT (1993); France - Viet Nam BIT (1992), Article 1 of the Exchange of Letters dated 26 May 1992.

<sup>312</sup> Ethiopia - France BIT (2003), Protocol regarding Article 3; Article 2 of the Protocol to the France - Mozambique BIT (2002); France - Kazakhstan BIT (1998), Protocol regarding Article 3; France - Slovenia BIT (1998), Protocol regarding Article 4; Article 1 of the Protocol to the Cuba - France BIT (1997); Annex to the France - Qatar BIT (1996); France - Uruguay BIT (1993), Protocol regarding Article 3; France - Latvia BIT (1992), Exchange of Letters dated 15 May 1992; France - Lithuania BIT (1992), Exchange of Letters dated 23 April 1992; France - Romania BIT (1995), Protocol regarding Article 3; Article 1 of the Protocol to the France - Lao People's Democratic Republic ("Lao PDR") BIT (1989); Article 1(a) of the Protocol to the France - Kuwait BIT (1989); Article 1(a) of the Protocol to the France - Haiti BIT (1984); France - Yemen BIT (1984), Article 3 of the Exchange of Letters dated 27 April 1984; Costa Rica - France BIT (1984), Article 1(a) of the Exchange of Letters dated 8 March 1984; France - Israel BIT (1983), Article 1(a) of the Exchange of Letters dated 9 June 1983; Exchange of Letters No 1 dated 2 May 1983 pertaining to the France - Nepal BIT (1983).

<sup>313</sup> Article 3 of the France - Madagascar BIT (2003) further deems the unusually broad category of measures which can affect, directly or indirectly, investments of covered investors to breach FET; Article 3 of the France - Zambia BIT (2002) prohibits "any restriction to free movement [*sic*], purchase and sale of goods and services;" Article 3 of the France - Uganda BIT (2003) uses a treaty provision worded identically to Article 3 of the France - Zambia BIT (2002). Perhaps the comprehensiveness of these three treaty provisions renders inappropriate their labelling as PRPs, but it is suggested that at the very least they prohibit all performance requirements that hinder the free movement, purchase and sale of goods and services.

<sup>314</sup> Article 3 of the France - Venezuela BIT (2001) ("arbitrary and discriminatory"); Article 4 of the France - Honduras BIT (1998) ("discriminatory"); Article 1 of the Exchange of Letters dated 28 November 1996 pertaining to the France - Lebanon BIT (1996) ("discriminatory"); Article 1(a) of Annexed Letter 1 to the France - Pakistan BIT dated 1 June 1983 ("discriminatory"); Exchange of Letters 13 January 1996

which differ from France's Model PRP adopt a different approach: performance requirements and any other measures of equivalent or analogous effect are viewed as "less favourable treatment" within national treatment and/or MFN treatment provisions.<sup>315</sup>

### **3. GATT Uruguay Round Submissions as Tools for Expounding the Content and Outer Contours of Open-Ended PRPs in American, French and Indian BITs**

The attempts at defining TRIMs during the GATT Uruguay Round of negotiations simultaneously defined performance requirements.<sup>316</sup> The notions of performance requirements and TRIMs might have proven elastic. However, the concentric core of what amounts to TRIMs and the outer edges of what constitutes performance requirements have remained the same among all proposed definitions.

This section evolves toward a working definition of performance requirements by identifying the measures most frequently identified as such. In doing so, a number of consistent findings can be derived from lists of performance requirements elaborated by GATT Members and by the OECD. First, this section sets forth and focuses on a narrower list of measures unanimously regarded as TRIMs. Second, this section discusses in detail the finding that the United States, the EC, India and the OECD each identified the same 11 measures as performance requirements as part of the GATT Uruguay Round negotiations on TRIMs. Given that a significant number of American and French BITs with open-ended PRPs, as well as the India - Kuwait BIT (2001), were negotiated at the same time as or within a few years following the conclusion of the GATT Uruguay Round, one would expect that France, India and the United States were referring to performance requirements explicitly identified in their respective submissions made during the GATT Uruguay Round of negotiations on TRIMs when using in their respective PRPs undefined expressions such as "performance requirements" and open-ended expressions such as "any other similar requirements," or "any other measures that have a similar effect."

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pertaining to the France - Morocco BIT ("abusive or discriminatory"); Article 1(a) of the Second Letter dated 5 November 1982 pertaining to the France - Panama BIT ("abusive or discriminatory"); Article 3 of the France - Philippines BIT (1994) ("unfair"); Article 3 of the France - Trinidad and Tobago BIT (1993) ("unreasonable or discriminatory"); Protocol regarding Article 3 of the Chile - France BIT (1992) ("discriminatory") and Exchange of Letters to the Estonia - France BIT dated 14 May 1992 ("discriminatory"); Article 2 of the Protocol to the France - United Arab Emirates BIT (1991) ("unfair and discriminatory").

<sup>315</sup> Article 4 of the France - Iran BIT (2003) and Exchange of Letters No 3 regarding the Bangladesh - France BIT (1985).

<sup>316</sup> OECD, *First Note on TRIMs* (n 30) para 23.

a) *Clearly (and Directly) Trade-Related Performance Requirements: LCRs, EPRs and Trade-Balancing Requirements*

First, LCRs and EPRs constitute “the most obvious generic examples” of performance requirements and have been consistently identified as such since the end of the 1970s.<sup>317</sup> A third type of measure, import-export (or trade) balancing requirements essentially blend LCRs and EPRs into a single measure and exhibit clear trade-relatedness by imposing either export increases or import reductions.<sup>318</sup> LCRs are identified in all studies on performance requirements.<sup>319</sup> LCRs and EPRs were still considered the most prevalent TRIMs at the turn of the 1990s.<sup>320</sup> Numerous GATT Members singled out LCRs and EPRs as the two main categories of performance requirements<sup>321</sup> described as “directly related to trade”<sup>322</sup> and as having “a direct impact on ... trade”<sup>323</sup> and “a direct and significant restrictive or distorting effect on trade.”<sup>324</sup>

The EC,<sup>325</sup> Japan,<sup>326</sup> Nordic Countries (Finland, Iceland, Norway and Sweden),<sup>327</sup> Switzerland<sup>328</sup> and the United States<sup>329</sup> all identified LCRs, EPRs and trade-balancing requirements as TRIMs aside from additional performance requirements. Even India acknowledged that LCRs, EPRs and trade-balancing requirements directly impact trade.<sup>330</sup>

The OECD,<sup>331</sup> UNCTAD,<sup>332</sup> the WTO Secretariat<sup>333</sup> and scholars<sup>334</sup> all identify LCRs, EPRs and

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<sup>317</sup> GATT, *G-18 Note on Performance Requirements* (n 157) para 6; Bergsten, *Performance Requirements* (n 34) 1-2; Narasimham (n 48) 1-2.

<sup>318</sup> India Submission 18 (n 35) para 23; LICIT (n 48) 56.

<sup>319</sup> OECD, *Third Note on TRIMs* (n 70) para 13.

<sup>320</sup> David Greenaway, “Why are we Negotiating on TRIMs?,” in David Greenaway and others (eds), *Global Protectionism*, Macmillan (1991) 154, 155-163; Greenaway, “Political Economy of TRIMs” (n 62) 372, 376; see also: Graham and Krugman (n 245) 463-490.

<sup>321</sup> Bergsten (n 53) 13, 15.

<sup>322</sup> Bergsten (n 53) 13, 15.

<sup>323</sup> Bale (n 83) 180, 185.

<sup>324</sup> GATT, *Note on Uruguay Round (1987)* (n 165) para 49.

<sup>325</sup> EC Submission 10 (n 264) para 3.

<sup>326</sup> Japan Submission 20 (n 264) 5-6.

<sup>327</sup> Nordic Countries (n 243) 1-2; Nordic Countries, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/23 (22 November 1989), para 12; GATT, *Note on Trims* (April 1990) (n 147) para 29 (views of the Nordic Countries).

<sup>328</sup> Switzerland Submission 16 (n 42) 3. Singapore opined that the Swiss proposal “simply treats TRIMs as if they are subsidies.” Singapore (n 148) para 17.

<sup>329</sup> U.S., *Trade & FDI* (n 266), quoted in OECD, *First Note on TRIMs* (n 30) 5-6; U.S. Submission 4 (n 267) 3-5; U.S. Submission 14 (n 267) 5, 9, 11, 16-20. See also: Bale (n 83) 180, 185; Brock (n 83) 21, 24. See also: “U.S. State Dept. Responses to Sen. Pell” (n 78); Tarullo (1992) (n 74) 7; Papovich (n 94) 73. The United States developed an additional list of TRIMs in 1989 which reiterated all previously mentioned measures but for domestic sales requirements: see UNCTC and UNCTAD (n 43) 23-24.

<sup>330</sup> India Submission 18 (n 35) para 23.

<sup>331</sup> OECD, *First Note on TRIMs* (n 30) paras 4-12, 23-24; OECD, *Second Note on TRIMs* (n 48) para 10;

trade-balancing requirements as performance requirements. These three measures constitute the unquestionable core to both performance requirements and TRIMs. The following section will show that efforts that led to identifying these three categories of measures also revealed that an additional set of measures were consistently put forward as part of negotiations over performance requirements.

*b) The American/European/Indian/OECD List of Performance Requirements*

As part of the GATT Uruguay Round of negotiations on TRIMs, the European Communities (“EC”),<sup>335</sup> India<sup>336</sup> and the United States<sup>337</sup> identified between 1987 and 1989 the same 11 performance requirements:

- 1) LCRs;
- 2) EPRs;
- 3) Trade balancing requirements;
- 4) LERs;
- 5) Technology transfer, licensing and local R&D requirements;<sup>338</sup>

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OECD, *Third Note on TRIMs* (n 70) paras 7, 13-27.

<sup>332</sup> UNCTC, *Transnational Corporations in World Development: Third Survey* (United Nations, 1983) 63; UNCTAD, *WIR 1996* (n 5) 179; see also UNCTAD, “HCOMs” (n 44) 2-3, 8-9, 12-14.

<sup>333</sup> WTO and UNCTAD (n 5) para 15.

<sup>334</sup> Coughlin (n 36) 133; McCulloch and Owen (n 48) 335-336; Safarian (n 29) 613; Greenaway (n 31) 141-142; Greenaway, “Political Economy of TRIMs” (n 62) 369-371; Greenaway, “Why Negotiate on TRIMs” (n 320) 148; Kumar, “Effectiveness of Performance Requirements” (n 48) 60-61.

<sup>335</sup> EC Submission 10 (n 264) para 3.

<sup>336</sup> India Submission 18 (n 35) paras 11, 16, 20-21, 23.

<sup>337</sup> U.S., *Trade & FDI* (n 266), quoted in OECD, *First Note on TRIMs* (n 30) 5-6; U.S. Submission 4 (n 267) 3-5; U.S. Submission 14 (n 267) 5, 9, 11, 16-20. The United States developed an additional list of TRIMs in 1989 which reiterated all previously mentioned measures but for domestic sales requirements: see UNCTC and UNCTAD (n 43) 23-24. The American definition of performance requirements and later TRIMs expanded continuously during the 1970s and 1980s, originally targeting five performance requirements (LCRs, EPRs, a broad and vague category titled “import restrictions,” local employment requirements and LERs – see David W. Loree, Stephen E. Guisinger, “Policy and Non-Policy Determinants of U.S. Equity Foreign Direct Investment” 26(2) *Journal of International Business Studies* 281 (1995) 286 – for LERs, see also Bergsten (n 53) 13, 15. In 1981-1982, the United States broadened its list of “trade-related performance requirements” to seven types of measures, shedding import restrictions and adding technology transfer, licensing and royalty requirements, investment localisation requirements and remittance restrictions: see Bale (n 83) 180-181, 185; Frank G. Yukmanic (U.S. Dept. of Treasury), *Performance Requirements: the General Debate and a Review of Latin American Practices*, August 1982, quoted in OECD, *First Note on TRIMs* (n 30) 7-8. The United States also additionally identified a number of general and vague categories of measures unhelpful to fleshing out performance requirements further.

<sup>338</sup> Both the EC and the United States define local R&D requirements as a subset of technology transfer requirements: see U.S. Submission 4 (n 267) 2; United States, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*,

- 6) Foreign exchange restrictions;
- 7) Remittance restrictions;
- 8) Manufacturing requirements;
- 9) Manufacturing limitations;
- 10) Product mandating requirements; and
- 11) Domestic sales requirements.

The OECD<sup>339</sup> identified the same 11 performance requirements as the EC, India and the United States. The 11 measures identified as performance requirements by the United States, the EC, India and the OECD show remarkable equivalence and contribute to shaping a common and settled meaning for the expressions “performance requirements,” “any other measures that have a similar effect” or “any other similar requirements” used in open-ended PRPs of IIAs. One would expect that France, India and the United States were referring to these 11 performance requirements when using, in their respective PRPs, open-ended expressions such as “any other similar requirements,” or “any other measures that have a similar effect” and undefined expressions such as “performance requirements.”

One can conclude that the precise contents or the outer limits of PRPs that make use of undefined expressions are not inherently clear or easily spelled out. This complexity may partially explain why States moved away from vague and open-ended PRPs and opted instead for enumerating specifically prohibited performance requirements within exhaustive PRPs.

#### **4. The *Cargill v Poland* Tribunal and the *Lemire* Tribunal’s Interpretations of Open-Ended PRPs**

At the moment of writing these lines, *Cargill v Poland*<sup>340</sup> and *Lemire v Ukraine* were the only publicly disclosed investment arbitrations that led arbitral tribunals to interpret PRPs within IIAs other than the NAFTA (1992).

The *Cargill v Poland* underlines the discomfort of tribunals with the actual wording of PRPs and the tendency to read-in unwritten criteria in addition to those set out in a given PRP. In *Cargill v Poland*, the successive Polish Sugar Laws of 1994, 1996 and 2001 (and, subsequently to

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MTN.GNG/NG12/W/9 (9 February 1988) 5; EC Submission 10 (n 264) para 3 (item xii).

<sup>339</sup> OECD, *First Note on TRIMs* (n 30) paras 4-12, 23-24; OECD, *Second Note on TRIMs* (n 48) para 10; OECD, *Third Note on TRIMs* (n 70) paras 7, 13-27.

<sup>340</sup> *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008), paras 532-554 (Article II(4) of the Poland - U.S BIT (1990)).

Poland's accession to the EU, the relevant EU regulation) stipulated that production of isoglucose (also known as high fructose corn syrup ("HFCS")) beyond a given threshold (and referred to as "Quota C" production) had to be exported outside of Poland.<sup>341</sup> The Tribunal concluded that the measures at issue constituted a performance requirement (an EPR).<sup>342</sup> Instead of focusing on the wording of the applicable PRP (Article II(4) of the Poland - U.S. BIT (1990)), the Tribunal reached this finding by relying on a generic definition of performance requirements provided by UNCTAD.<sup>343</sup> While the outcome may have been the right one, the method of straying away from the treaty provision being interpreted and applied does not follow the approach set out in Article 31 of the VCLT.

At the same time, the Tribunal concluded that the measures at issue did not breach the applicable PRP (Article II(4) of the Poland - U.S. BIT (1990)) since the EPR was not imposed as "a condition of establishment, expansion or maintenance of investments." The investments under consideration were admittedly already established when the EPR was adopted, but the Tribunal appears to have narrowly construed the references in Article II(4) to performance requirements as conditions of maintenance or expansion of investments.<sup>344</sup> The Tribunal concluded that that since the quotas and the EPR were not in place at the time of rendering its decision, while the claimant still maintained its investment in Poland at that time, then the EPR could not be viewed as a condition for the maintenance of the investment.

The Tribunal then decided that for a performance requirement to be imposed as a condition of expansion of an investment, that performance requirement had to hinder the expansion of the investment.<sup>345</sup> That unwritten additional criterion unduly restricted the scope of Article II(4) of the Poland - U.S. BIT (1990) and led the Tribunal to conclude that the claimant had failed to demonstrate that its decision not to export its Quota C production was due to the EPR. Instead, the Tribunal decided that the claimant did not export its Quota C production based on commercial considerations; therefore, the EPR did not condition the expansion of claimant's investment.<sup>346</sup> The Tribunal did not entertain the idea that the claimant could and would have sold its Quota C production domestically had it not been compelled to export it and that therefore its expansion had been thwarted by the obligation to export instead of selling its production domestically.

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<sup>341</sup> *ibid* paras 77, 81, 115.

<sup>342</sup> *ibid* paras 544-545.

<sup>343</sup> *ibid* para 541.

<sup>344</sup> *ibid* paras 550, 554.

<sup>345</sup> *ibid* para 550.

<sup>346</sup> *ibid* paras 553-554.

The *Lemire v Ukraine* arbitration demonstrates the perils of assigning “purposes” to an open-ended PRP and to the measure at issue as a “method” of delimitating and determining the scope and applicability of a PRP.

In *Lemire v Ukraine*, Claimant Joseph Charles Lemire, a national of the United States (“Lemire”), was the majority shareholder of a licensed radio station in Ukraine. Among other alleged violations, Lemire alleged that Article 9.1 of the 2006 Law on Television and Radio Broadcasting (the “LTR”) imposed an LCR to the effect that 50% of the broadcasting time of each radio organisation had to consist of music produced in Ukraine (the “Radio Broadcasting LCR”). “Music produced in Ukraine” included any music where the author, the composer or the performer was Ukrainian.<sup>347</sup>

Claimant Lemire argued that Article 9.1 of the LTR amounted to an LCR prohibited by Article II(6) of the Ukraine - U.S. BIT (1994), an open-ended PRP which reiterates unchanged the previously discussed PRP from the corresponding U.S. Model BIT. Faced with a broad and open-ended PRP unmitigated by reservations or exceptions, the *Lemire* Tribunal opted for a roughhewn reasoning that belied its intent of granting regulatory flexibility to Ukraine in implementing cultural policies, a considerably sensitive matter of national sovereignty. The Tribunal accordingly framed the question as whether Article II(6) of the Ukraine - U.S. BIT, an open-ended PRP applicable notably to LCRs, applies to a “cultural restriction” such as the Radio Broadcasting LCR.<sup>348</sup> The Tribunal had to divert its analysis away from the clear language of the PRP, which undoubtedly prohibits LCRs, and the translucent nature of the Radio Broadcasting LCR in order to avoid finding a breach of Article II(6) of the Ukraine - U.S. BIT. The Tribunal set the tone with an unwarranted and inappropriate analysis that the Tribunal itself qualified as “really *obiter dicta*” under the FET standard, even though claimant Lemire had not alleged that the Radio Broadcasting LCR violated the FET standard.<sup>349</sup> The Tribunal affirmed Ukraine’s inherent right, as a sovereign State, “to regulate its affairs and adopt laws in order to protect the common good of its people”<sup>350</sup> and asserted a “high measure of deference”<sup>351</sup> in respect thereof made even more compelling with respect to regulations affecting “deeply felt cultural or linguistic traits of the community.”<sup>352</sup> The Tribunal added a second line of justification for Ukraine’s measure within its *obiter dicta* relating to the FET standard: protecting national culture is a concern shared and acted upon by many States

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<sup>347</sup> *Lemire* (n 14), para 501.

<sup>348</sup> *ibid* para 507.

<sup>349</sup> *ibid* para 507.

<sup>350</sup> *ibid* 505.

<sup>351</sup> *S.D. Myers – Majority* (n 167), para 263.

<sup>352</sup> *Lemire* (n 14), para 505.



around the world. The Tribunal considered that “a rule cannot be said to be unfair, inadequate, inequitable or discriminatory, when it has been adopted by many countries around the world.”<sup>353</sup> Underlining the non-discriminatory application to all broadcasters of the Radio Broadcasting LCR, the Tribunal ended its *obiter dicta* by declaring the Radio Broadcasting LCR compatible with the FET standard under the Ukraine - U.S. BIT.<sup>354</sup> These remarks thus clearly indicated where the Tribunal stood in its appreciation of the legitimacy of Radio Broadcasting LCR prior to having undertaken its analysis under the PRP.

Ironically, the *Lemire* Tribunal kicked off its analysis of Article II(6) of the Ukraine - U.S. BIT by insisting that the starting point of its analysis lied in the “ordinary meaning” of the terms used in the PRP.<sup>355</sup> The Tribunal unconvincingly described the Radio Broadcasting LCR as mandating that 50% of the music broadcast by radio stations be authored, produced or composed by Ukrainians without specifically mandating that goods or services be purchased locally, in an attempt to view the Radio Broadcasting LCR as compatible with Article II(6) of the Ukraine - U.S. BIT. However, the Tribunal recognised the limited persuasive effect of its depiction of the Radio Broadcasting LCR given that the authors, composers and producers of Ukrainian music are effectively located in Ukraine.<sup>356</sup> The Tribunal hastened to add that the terms of the PRP should be assigned an ordinary meaning in light of the object and purpose of the Ukraine - U.S. BIT<sup>357</sup> and shifted its focus onto the object and purpose of Article II(6) of the Ukraine - U.S. BIT in order to construct a “correct interpretation.”<sup>358</sup>

The *Lemire* Tribunal invoked no authorities as support for assigning an object and purpose to the PRP at issue; its interpretation of Article II(6) of the Ukraine - U.S. BIT, which it construed as “trade-related” and as aimed at avoiding the imposition of “[LCRs] as a protection of local industries against competing imports” rested solely on the preamble of the Ukraine - U.S. BIT.<sup>359</sup> However, the preamble to the Ukraine - U.S. BIT does not even mention the term “trade” and its goal of promoting greater economic cooperation is qualified by a reference to cross-border bilateral investment. These elements of the preamble to the Ukraine - U.S. BIT do not lend support to restricting the scope Article II(6) of the Ukraine - U.S. BIT to performance requirements directly related to trade. The *Lemire* Tribunal then erroneously characterised

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<sup>353</sup> *ibid* para 506.

<sup>354</sup> *ibid* para 506.

<sup>355</sup> *ibid* paras 508-509.

<sup>356</sup> *ibid* para 509.

<sup>357</sup> *ibid* para 508.

<sup>358</sup> *ibid* para 510.

<sup>359</sup> *ibid* para 510.

Article II(6) of the Ukraine - U.S. BIT as a “local content rule.”<sup>360</sup> by its illustrative and open-ended language, Article II(6) of the Ukraine - U.S. BIT is an open-ended PRP that applies to a much larger number of performance requirements than LCRs and which is not inherently limited to performance requirements directly related to trade.

Having assigned a “purpose” to Article II(6) of the Ukraine - U.S. BIT, the *Lemire* Tribunal compared such “purpose” with that of the Radio Broadcasting LCR, purportedly intended “to promote Ukraine’s cultural inheritance” and not “to protect local industries and restrict imports.”<sup>361</sup> Having deemed compatible the respective purposes of the Radio Broadcasting LCR and of Article II(6) of the Ukraine - U.S. BIT, the Tribunal decided that the Radio Broadcasting LCR did not violate the PRP: the Tribunal disregarded the terms of the PRP, but even by narrowing the PRP’s scope to requirements that “goods or services must be purchased locally,” the Radio Broadcasting LCR still amounted to a prohibited performance requirement and could not be validated even by overemphasising its purposes.<sup>362</sup>

The Tribunal hastily asserted compatibility between the respective purposes arbitrarily assigned to the Radio Broadcasting LCR and to Article II(6) of the Ukraine - U.S. BIT without invoking any evidence or authorities to support its interpretation. This compatibility of purposes justified finding that no violation of the PRP had occurred,<sup>363</sup> obscured the clear incompatibility between the Radio Broadcasting LCR and the PRP, and avoided the second-guessing of Ukrainian cultural policy-making by holding it liable for attempting to preserve its cultural identity. Although plausible, the Tribunal cited no support for its determination of the purpose underlying the Radio Broadcasting LCR. Moreover, the nobleness of Ukraine’s objectives cannot whitewash the true nature of the Radio Broadcasting LCR: a performance requirement clearly prohibited by the PRP at issue cannot be validated and excluded from the scope of such PRP on the grounds that such performance requirement aims at achieving important, legitimate and/or sensitive public policy purposes.<sup>364</sup> One should resist calls to insist on the positive objectives of certain performance requirements as exculpatory justifications when these performance requirements are specifically prohibited.<sup>365</sup> Preserving performance requirements deemed critical should be achieved through specific exceptions, exclusions or reservations. The understandably delicate

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<sup>360</sup> *ibid* para 511.

<sup>361</sup> *ibid* para 510.

<sup>362</sup> *ibid* para 511.

<sup>363</sup> *ibid* para 511.

<sup>364</sup> GATT, *Note on Trims* (April 1990) (n 147) paras 32, 36, 42.

<sup>365</sup> For an example of a country that recommends discarding negative trade effects on the basis of positive objectives, see: GATT Secretariat, *Note on the Meeting of 26 November 1987, GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/5 (14 December 1987) para 21.

position of the *Lemire* Tribunal provides a compelling explanation for why broadly-worded PRPs with unfettered applicability were progressively abandoned by the United States to be replaced by detailed PRPs applicable to a limited number of explicitly identified performance requirements and confined by a number of exceptions, exclusions and reservations, and for why this more comprehensive approach to performance requirements was reproduced with much greater frequency.

#### **D. Detailed and Exhaustive PRPs in IIAs**

##### **1. Prohibiting Detailed Lists of Mandatory Performance Requirements: the Widespread Recurrence of a Limited Number of Patterns**

Article 1106 of the NAFTA (1992) signalled a more elaborate and complex approach to PRPs. The NAFTA was negotiated and signed at the same time as GATT Uruguay Round negotiations on TRIMs were taking place. Negotiations on TRIMs influenced NAFTA Article 1106, which in turn greatly influenced the 1994 U.S. Model BIT, the Canada - Ukraine FIPA (1994),<sup>366</sup> the 2004 U.S. Model BIT and the 2004 Canada Model FIPA, as well as the 2012 U.S. Model BIT and the 2012 Canada Model FIPA. All seven instruments provide for detailed and exhaustive lists of prohibited performance requirements. As will be detailed below, the IIAs that follow any of these PRPs also comprise a plethora of treaty provisions that impact the scope and coverage and the interpretation of their PRPs. A great number of American and Canadian IIAs reproduce NAFTA Article 1106, Article VI of the 1994 U.S. Model BIT, Article V(2) of the Canada - Ukraine FIPA (1994), Article 8(1) of the 2004 U.S. Model BIT or Article 7(1) of the 2004 Canada Model FIPA, while these model and treaty PRPs also widely influenced PRPs of IIAs between States other than Canada or the United States.

Forty-six of the IIAs currently surveyed comprise PRPs that apply to the same list of seven mandatory performance requirements as does NAFTA Article 1106(1): EPRs and export restrictions, LCRs, LSRs, trade-balancing requirements, restrictions on domestic sales of goods or services which link such sales to the volume or value of exports or to foreign exchange earnings (“domestic sales restrictions”), technology transfer requirements and product mandating requirements. Seven Canadian FTAs,<sup>367</sup> four Chilean IIAs<sup>368</sup> and one Indian IIA<sup>369</sup>

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<sup>366</sup> The Canada - Ukraine FIPA (1994) is the first IIA that Canada signed following the NAFTA and set the tone for numerous subsequent Canadian FIPAs.

<sup>367</sup> Article G-06(1) of the Canada - Chile FTA (1996); Article 807(1) of the Canada - Peru FTA (2008); Article 807(1) of the Canada - Colombia FTA (2008); Article 9.07(1) of the Canada - Panama FTA (2008); Article 10.7(1) of the Canada - Honduras FTA (2013); Article 8.8(1) of the Canada - Korea FTA (2014); Article 8.5(1) of the Canada - EU CETA (2014).

<sup>368</sup> Article 9-07(1)(c) of the Chile - Mexico FTA (1998); Article 10.7(1)(c) of the Chile - Korea FTA (2003);

use language nearly identical to that of NAFTA Article 1106(1). PRPs in 12 Canadian FIPAs<sup>370</sup> that reproduce the 2004 Canada Model FIPA apply to the same mandatory performance requirements and exhibit a single difference compared with the NAFTA: they prohibit EPRs and export restrictions only in respect of goods and not services. PRPs in 22 of the currently inventoried IIAs<sup>371</sup> whose PRPs are based on Article 8 of the 2004 U.S. Model BIT apply to the same mandatory performance requirements and exhibit two differences compared with the NAFTA: first, their prohibition of LSRs applies only in respect of goods and not services, and second, their prohibition of mandatory product mandating requirements uses different language than that of the NAFTA, but with the same intended meaning.<sup>372</sup>

Many IIAs prohibit a more limited range of mandatory performance requirements than those prohibited by the NAFTA. Article V(2) of the Canada - Ukraine FIPA (1994) prohibits the imposition of EPRs and export restrictions (in respect of goods only), LCRs, LSRs, trade-balancing requirements and technology transfer requirements, but does not prohibit domestic sales restrictions or product mandating requirements contrary to the NAFTA. Thirteen Canadian FIPAs replicate the narrower list of prohibited mandatory performance requirements put forward in the Canada - Ukraine FIPA.<sup>373</sup> Among Canadian IIAs, only the Canada - Venezuela FIPA

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Article 9.6(1)(c) of the Chile - Colombia FTA (2006); Article 77(1)(c) of the Chile - Japan EPA (2007).

<sup>369</sup> Article 10.5(1) of the India - Korea CEPA (2009).

<sup>370</sup> Article 7(1) of the Canada - Peru FIPA (2006); Article 10(1) of the Benin - Canada FIPA (2013); Article 9(1) of the Canada - Tanzania FIPA (2013); Article 9(1) of the Cameroon - Canada FIPA (2014); Article 9(1) of the Canada - Nigeria FIPA (2014); Article 9(1) of the Canada - Serbia FIPA (2014); Article 9(1) of the Canada - Senegal FIPA (2014); Article 9(1) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(1) of the Burkina Faso - Canada FIPA (2014); Article 9(1) of the Canada - Guinea FIPA (2014); Article 9(1) of the Canada - Hong Kong, China FIPA (2016). Article 7(1) of the Canada - Jordan FIPA (2009) prohibits the same performance requirements as NAFTA Article 1106, but its prohibition of mandatory performance requirements applies only to covered investors.

<sup>371</sup> American FTAs: Article 15.8(1)(c) and (g) of the Singapore - U.S. FTA (2003); Article 10.5(1)(c) and (g) of the Chile - U.S. FTA (2003); Article 11.9(1)(c) and (g) of the Australia - U.S. FTA (2004); Article 10.8(1)(c) and (g) of the Morocco - U.S. FTA (2004); Article 10.9(1)(c) and (g) of the CAFTA-DR - U.S. FTA (2004); Article 10.9(1)(c) and (g) of the Colombia - U.S. FTA (2006); Article 10.8(1)(c) and (g) of the Oman - U.S. FTA (2006); Article 10.9(1)(c) and (g) of the Peru - U.S. FTA (2006); Article 10.9(1)(c) and (g) of the Panama - U.S. FTA (2007); Article 11.8(1)(c) and (g) of the Korea - U.S. FTA (2007); Article 9.10(1)(c) and (g) of the Trans-Pacific Partnership ("TPP") (2015). American BITs: Article 8(1)(c) of the U.S. - Uruguay BIT (2005); Article 8(1)(c) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 14.9(2)(c) and (g) of the Australia - Japan EPA (2014) (the prohibition of product mandating requirements is stylistically altered); Article 11.9(1)(c) and (g) of the Australia - Korea FTA (2014); Article 5(1)(c) and (g) of the Singapore - Australia Free Trade Agreement (2003) ("SAFTA"), Revised Chapter 8 (Investment) (2011); Article 7(1)(c) and (g) of the Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement (2011) ("CERTA Investment Protocol"); Article 10.7(1)(c) and (g) of the Australia - Chile FTA (2008). Chilean Agreements: Article 10.8(1)(c) and (g) of the Pacific Alliance Protocol (2014); Article 11.6(1)(c) of the Chile - Peru FTA (2006), but it reproduces NAFTA's wording for product mandating requirements; Article 10.5(1)(c) and (g) of the Chile - U.S. FTA (2003).

<sup>372</sup> Vandeveldt (n 84) 404. Article 9(1)(g) of the 2012 Canada Model FIPA also opted for a redrafted prohibition of product mandating requirements, as does Article 8.5(1) of the Canada - EU CETA (2014).

<sup>373</sup> Article V(2) of the Canada - Trinidad and Tobago FIPA (1995); Article V(2) of the Canada - Philippines FIPA (1995); Article V(2) of the Canada - South Africa FIPA (1995); Article V(2) of the Canada - Ecuador

(1996) comprises a PRP that does not replicate a previously existing PRP model. Article II(6) of the Annex to the Canada - Venezuela FIPA (1996) applies only to goods and not services and prohibits LCRs, trade-balancing requirements, foreign exchange restrictions, export restrictions and technology transfer requirements. Article VI of the Chile - Dominican Republic BIT (2000) prohibits four performance requirements: EPRs and export restrictions, LCRs, LSRs and trade-balancing requirements. This PRP focuses on performance requirements most closely related to trade.

A number of IIAs prohibit a greater number of mandatory performance requirements than those prohibited by the NAFTA. Article VI of the 1994 U.S. Model BIT prohibits the following mandatory measures: LCRs and LSRs; trade-balancing requirements; EPRs and export restrictions; domestic sales restrictions; technology transfer requirements; and, on top of what the NAFTA prohibits, R&D requirements. Article VI of the 1994 U.S. Model BIT does not address product mandating requirements on a standalone basis, but does add to its prohibition of EPRs and export restrictions requirements to export a particular type, level or percentage of products or services to a specific market region. Thirteen American BITs comprise PRPs which replicate the PRP found in the 1994 U.S. Model BIT: six American BITs reproduce an identical PRP to that found in the 1994 U.S. Model BIT,<sup>374</sup> while seven additional American BITs reproduce the PRP from the 1994 U.S. Model BIT with minor stylistic changes.<sup>375</sup> Article 89(1) of the India - Japan CEPA (2011) prohibits the same mandatory performance requirements as those enumerated in NAFTA Article 1106(1), but further prohibits export restrictions and requirements to appoint high-ranking employees of a given nationality.

Article 8(1) of the 2012 U.S. Model BIT is the same as Article 8(1) of the 2004 U.S. Model BIT, except that it further prohibits, under Article 8(1)(h), requirements to purchase, use, or accord a preference to a “technology of the Party or of persons of the Party,” as well as requirements which prevent from purchasing, using or granting a preference to a particular technology; Article 9.10(1)(h) of the TPP (2015) is the only treaty provision that reproduces Article 8(1)(h). Article

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FIPA (1996); Article V(2) of the Canada - Panama FIPA (1996); Article V(2) of the Canada - Egypt FIPA (1996); Article V(2) of the Barbados - Canada FIPA (1996); Article VI of the Canada - Croatia FIPA (1997); Article VI of the Canada - Lebanon FIPA (1997); Article V(2) of the Armenia - Canada FIPA (1997); Article VI of the Canada - Uruguay FIPA (1997); Article V(2) of the Canada - Latvia FIPA (2009); Article V(2) of the Canada - Romania FIPA (2009).

<sup>374</sup> Article VI of the Georgia - U.S. BIT (1994); Article VI of the U.S. - Uzbekistan BIT (1994) (signed, but not in force); Article VI of the Honduras - U.S. BIT (1995); Article VII of the Croatia - U.S. BIT (1996); Article VI of the Azerbaijan - U.S. BIT (1997); Article VI of the El Salvador - U.S. BIT (1999) (signed, but not in force).

<sup>375</sup> Article VI of the Trinidad and Tobago - U.S. BIT (1994); Article VI of the Albania - U.S. BIT (1995); Article VI of the Nicaragua - U.S. BIT (1995) (signed, but not in force); Article VI of the Jordan - U.S. BIT (1997); Article VI of the Bolivia - U.S. BIT (1998); Article VI of the Mozambique - U.S. BIT (1998); Article 6 of the Bahrain - U.S. BIT (1999).

9.10(1)(i) of the TPP goes a step farther and prohibits requirements of a given rate or amount of royalty or a given duration in license contracts.<sup>376</sup>

Following the approach set out in all American BITs signed prior to the NAFTA, at a time when negotiating binding PRPs proved very difficult,<sup>377</sup> all American, Canadian, French and Indian Model BITs include standalone disciplines on free transfers that ensure unfettered transfers and prohibit remittance restrictions.<sup>378</sup> One can logically infer and assume that a large number of IIAs that comprise detailed and exhaustive PRPs (perhaps even all of them) followed the lead of Article 1109 of the NAFTA by ensuring unfettered transfers and prohibiting remittance restrictions separately from their PRPs.

The previously discussed American, EC, Indian and OECD GATT Uruguay Round submissions identify LERs as a performance requirement. The NAFTA prohibits LERs, but within its national treatment provision (Article 1102(4)(a)) and not as part of its PRP. None of the Model BITs of Canada, France, the United States or India explicitly prohibits LERs either as part of their PRPs or in a distinct provision. American, Canadian, French and Indian BITs that comprise PRPs appear to logically follow these Model BITs by making no explicit reference to LERs.<sup>379</sup> The United States, Canada, France and India have chosen not to prohibit LERs explicitly in their IIAs that include detailed and exhaustive PRPs.

Accounting for variations as to the precise number and formulation of prohibited performance requirements, the great majority of PRPs within surveyed IIAs remain very close to the standard set by NAFTA Article 1106 and rely upon very similar wording. This show of near-uniformity reinforces the need for a systemic understanding of PRPs within IIAs and for interpreting PRPs in accordance with their shared terms of art and settled meanings, but also heightens the need

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<sup>376</sup> Article 9.10(3)(h) of the TPP (2015) provides an exception specific to these two additional prohibitions.

<sup>377</sup> Article V of the Egypt - U.S. BIT (1982); Article VI of the Panama - U.S. BIT (1982); Article V of the Haiti - U.S. BIT (1983); Article V of the Senegal - U.S. BIT (1983); Article V of the U.S. - Zaire/DRC BIT (1984); Article IV of the Morocco - U.S. BIT (1985); Article IV of the Turkey - U.S. BIT (1985); Article V of the Bangladesh - U.S. BIT (1986); Article V of the Cameroon - U.S. BIT (1986); Article IV of the Grenada - U.S. BIT (1986); Article IV of the Congo (Brazzaville) - U.S. BIT (1990); Article V of the Poland - U.S. BIT (1990); Article IV of the Tunisia - U.S. BIT (1990); Article IV of the Argentina - U.S. BIT (1991); Article V of the Czech and Slovak Federal Republic - U.S. BIT (1991); Article IV of the Sri Lanka - U.S. BIT (1991); Article IV of the Armenia - U.S. BIT (1992); Article IV of the Bulgaria - U.S. BIT (1992); Article IV of the Romania - U.S. BIT (1992); Article IV of the Russia - U.S. BIT (1992).

<sup>378</sup> Article V of the 1983 U.S. Model BIT reproduced in Kunzer (n 112) A-7; Article V of the U.S. Model BIT (1994); Article 7 of the 2004 U.S. Model BIT; Article 7 of the 2012 U.S. Model BIT; Article 14 of the 2004 Canada Model FIPA; Article 11 of the 2012 Canada Model FIPA; Article 6 of French Model BIT (undated); Article 7 of the French Model BIT (1998); Article 7 of the India Model BIT (2003); Article 6 of the India Model BIT (2015).

<sup>379</sup> For example, the Egypt - U.S. BIT (1982), the Rwanda - U.S. BIT (2008), the Canada - Ukraine FIPA (1994), the Cameroon - Canada FIPA (2014), the Armenia - France BIT (1995), the France - Senegal BIT (2007) and the India - Korea CEPA (2009) do not explicitly prohibit LERs.

to remain vigilant in respect of slight variations specific to any given PRP.

## **2. A Working List of Performance Requirements Whose Terms of art Have Acquired Settled Meanings: Definitions and Examples**

This section explains the settled meanings which have crystallised over time in respect of the 14 categories of measures consistently construed as performance requirements and provides illustrative examples for each of them. These settled meanings should be carefully considered when interpreting and applying PRPs in IIAs in order to assign the proper scope, breadth and specificity to terms of art used within PRPs. This section also resorts to examples of such measures and to treaty provisions, when available among those surveyed, that apply to a specific performance requirement in order to increase familiarity with the relevant wording used in respect of each such requirement.

UNCTAD and its predecessor the UNCTC identified 12 measures as performance requirements:<sup>380</sup>

- 1) LCRs/LSRs;
- 2) EPRs;
- 3) Trade-balancing requirements;
- 4) Export controls;
- 5) LERs and JVRs;
- 6) Technology transfer and/or local R&D requirements;
- 7) Foreign exchange earning requirements;
- 8) Manufacturing requirements,
- 9) Product mandating requirements;
- 10) Domestic sales requirements;
- 11) Local employment and/or employee training requirements; and
- 12) Investment localisation requirements.

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<sup>380</sup> UNCTC (n 332) 63; Moran, "Impact of TRIMs" (n 43) 55; UNCTC and UNCTAD (n 43) 2, 11-12; UNCTAD, *WIR 1996* (n 5) 179; UNCTAD, "HCOMs" (n 44) 2-3, 8-9, 12-14; UNCTAD, *FDI & Performance Requirements* (n 5) 2-3; WTO and UNCTAD (n 5) para 15. All performance requirements recurrently identified by economists and analysts are included within UNCTAD's 12 performance requirements: see Coughlin (n 36) 133; Greenaway (n 31) 141-142; Greenaway, "Political Economy of TRIMs" (n 62) 369-371; Greenaway, "Why Negotiate on TRIMs" (n 320) 148; Kumar, "Effectiveness of Performance Requirements" (n 48) 60-61; McCulloch and Owen (n 48) 335-336; Safarian (n 29) 613.

A number of remarks can be formulated on the basis of a comparison between the American/EC/Indian/OECD list on one hand and the UNCTAD list on the other hand. First, and contrary to UNCTAD, the United States did not reiterate previously mentioned investment localisation requirements or local employment and/or employee training requirements in its 1987 and 1989 definitions, nor did the EC, India or the OECD label such measures as performance requirements. Moreover, contrary to UNCTAD, the American/EC/Indian/OECD list of performance requirements does not include LSRs (although they do mention LCRs), foreign exchange earning requirements (although they do mention foreign exchange restrictions) or export controls or restrictions (although they do include EPRs). Second, and contrary to the American/EC/Indian/OECD list of performance requirements, UNCTAD did not include in its own list of performance requirements remittance restrictions, foreign exchange restrictions (while mentioning foreign exchange earning requirements), manufacturing limitations (while mentioning manufacturing requirements) and technology licensing requirements, but also excluded an overly broad category of measures described as import restrictions of capital goods, spare parts and manufacturing inputs.<sup>381</sup>

By combining the American/EC/Indian/OECD list and the UNCTAD list, one arrives at 14 categories of measures consistently construed as performance requirements by States, IGOs and/or scholars which have acquired settled meanings:

- 1) LCRs/LSRs;
- 2) EPRs;
- 3) Trade-balancing requirements;
- 4) Export controls or restrictions;
- 5) Local employment and employee training requirements;
- 6) LERs and JVRs;
- 7) Technology transfer, licensing and local R&D requirements;
- 8) Foreign exchange restrictions and/or earning requirements;
- 9) Remittance restrictions;
- 10) Investment localisation requirements;
- 11) Manufacturing requirements;

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<sup>381</sup> UNCTAD, *WIR 1996* (n 5) 176, 179.



- 12) Manufacturing limitations;
- 13) Domestic sales requirements; and
- 14) Product mandating requirements.

a) *LCRs/LSRs*

LCRs/LSRs are sometimes referred to as “import-substitution,”<sup>382</sup> “minimum value-added,”<sup>383</sup> “domestic value-added”<sup>384</sup> or “local sourcing”<sup>385</sup> requirements; their effects can be likened to those of import quotas.<sup>386</sup> LCRs/LSRs essentially ask that investors carry out in or purchase from within the host State a specified percentage or amount of investors’ production;<sup>387</sup> LCRs/LSRs limit imports directly or indirectly through requirements to use a proportion or type of local inputs.<sup>388</sup> LCRs/LSRs cause effects similar to import restrictions, since the compulsory use of local products will reduce the import of foreign products which likely enjoy a comparative advantage (otherwise the LCR/LSR would prove redundant as the investor would voluntarily source locally).<sup>389</sup> LCRs/LSRs can help retain within a host State rents generated by subsidiaries of MNCs which would otherwise tend to repatriate such rents back to the MNCs’ home States.<sup>390</sup>

LCRs/LSRs can kick-start and accelerate changes in the operational patterns of host-State subsidiaries of MNCs by shifting their attention onto affordable opportunities within a host State, such as resorting to local suppliers of product components, accessories or services at advantageous prices, instead of importing same and ignoring or not seeking out local alternatives.<sup>391</sup> LCRs/LSRs can be adopted for structural adjustment purposes; moreover,

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<sup>382</sup> Yukmanic (n 337) 7-8. The expression “import substitution requirements” appears to have been used as an equivalent to LCRs: EC Submission 10 (n 264) para 3; U.S. Submission 9 (n 338) 3.

<sup>383</sup> Coughlin (n 36) 133.

<sup>384</sup> Value-added requirements and LCRs are synonymous to a large extent: see Graham (n 42) 121.

<sup>385</sup> OECD, *First Note on TRIMs* (n 30) para 12; U.S. Submission 9 (n 338) 3.

<sup>386</sup> Gary Clyde Hufbauer and others, *Local Content Requirements: A Global Problem* (Peterson Institute for International Economics 2013) 3; Bale (n 83) 180, 181; see also Bergsten (n 53) 13, 15; LICIT (n 48) 56.

<sup>387</sup> LICIT (n 48) 56; EC Submission 8 (n 30) 2; Nordic Countries (n 243) 1-2; Nordic Countries Submission 23 (n 327) 4; U.S. Submission 9 (n 338) 3; Jan-Christoph Kuntze and Tom Moerenhout, *Local Content Requirements and the Renewable Energy Industry – a Good Match?* (International Centre for Trade and Sustainable Development (“ICTSD”), June 2013) 5.

<sup>388</sup> OECD, *First Note on TRIMs* (n 30) para 12.

<sup>389</sup> Japan Submission 7 (n 264) 3-4; Nordic Countries (n 243) 1-2; WTO and UNCTAD, “Evidence on the Use, the Policy Objectives, and the Impact of Trade-Related Investment Measures and Other Performance Requirements,” Part II in *Trade-Related Investment Measures and Other Performance Requirements – Joint Study by the WTO and UNCTAD Secretariats*, Committee on Trade-Related Investment Measures, WTO Doc G/C/W/307/Add.1, 2002, para 63.

<sup>390</sup> UNCTC and UNCTAD (n 43) 36-37.

<sup>391</sup> Kumar, “Effectiveness of Performance Requirements” (n 48) 65.

LCRs/LSRs can generate positive trade effects, such as broadening the domestic market, intensify technology transfer and diffusion, contribute to the training of local employees, improve the comparative advantage of the host State, provide opportunities for local producers to perfect production methods necessary for supplying its domestic corporations with requisite components and accessories.<sup>392</sup>

Article 1(a) of the Illustrative List to the TRIMs Agreement puts forward three variations of prohibited LCRs/LSRs: LCRs/LSRs that impose the purchase or use of specific domestic products, LCRs/LSRs that require the purchase or use of a specified volume or value of domestic products, and LCRs/LSRs that mandate that a specified proportion (volume or value) of an enterprise's local production be of a domestic origin or source. As further examples of treaty provisions that prohibit LCRs/LSRs, NAFTA Articles 1106(1)(b) and (c) and 1106(3)(a) and (b) prohibit mandatory and advantage-conditioning requirements to "achieve a given level or percentage of domestic content," mandatory requirements to "purchase, use or accord a preference to goods produced or services provided" in a host State's territory, as well as advantage-conditioning requirements "purchase, use or accord a preference to goods produced" in a host State's territory.

LCRs/LSRs include requirements to use domestic raw materials and natural resources and to process them domestically, local manufacturing requirements,<sup>393</sup> requirements to purchase components and inputs domestically, as well as requirements to use local service providers.<sup>394</sup> Japan mentioned three examples of LCRs/LSRs: first, requirements that products of investors comply with a local content ratio in respect of their inputs and/or product components; second, requirements that products must comprise specific components to be procured domestically; third, requirements that investors manufacture components or parts of products locally, thus effectively compelling local sourcing.<sup>395</sup> India formulated two similar examples of LCRs: first, requirements that investors manufacture its product components or parts locally, and second that investors procure their product components or parts from vendors having manufactured them locally.<sup>396</sup> The United States provided example of an LCR whereby a foreign investor in the automotive sector must comply with the requirement that 25% of the value of each car produced must originate from inputs produced in the host State.<sup>397</sup>

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<sup>392</sup> GATT, *Note on TRIMs (1988)* (n 52) para 40.

<sup>393</sup> EC Submission 8 (n 30) 2.

<sup>394</sup> UNCTC (n 332) 63.

<sup>395</sup> Japan Submission 12 (n 264) 8-9.

<sup>396</sup> India Submission 18 (n 35) para 30.

<sup>397</sup> U.S. Submission 9 (n 338) 3.

States adopt LCRs/LSRs in order to increase industrialisation, to create local employment, to favour local companies in their infancy by assuring them of demand for their products,<sup>398</sup> notably in high-tech sectors such as information technology and renewable energy, to increase the creation of added value locally, and to ensure that local companies can supply large foreign or domestic investment projects (creation of backward linkages).<sup>399</sup> LCRs/LSRs occurred with the greatest frequency in the computer/electronics/informatics/software and automotive sectors<sup>400</sup> during the 1970s, 1980s and 1990s, while most recently LCRs/LSRs have often been used in renewable energy programmes,<sup>401</sup> although no exhaustive global study of the use of LCRs has been undertaken, making the assessment of their recurrence a hazardous exercise.<sup>402</sup> One estimate numbered more than 117 new LCRs/LSRs proposed or adopted between 2008 and 2013.<sup>403</sup>

Two examples of LCRs/LSRs can serve to illustrate this type of measures more concretely: first, Indonesia's 1993 car programme which conditioned tax and customs duty advantages upon

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<sup>398</sup> UNCTAD, "HCOMs" (n 44) 5; UNCTAD, *WIR 2001* (n 56) 169.

<sup>399</sup> Hufbauer and others, *LCRs* (n 386) 2; Oliver Johnson, *Exploring the Effectiveness of Local Content Requirements in Promoting Solar PV Manufacturing in India*, Discussion Paper 11/2013 (German Development Institute, 2013) 10.

<sup>400</sup> U.S. Submission 9 (n 338) 3; LICIT (n 48) 58-59. See also, *inter alia*: Bernard M. Hoekman and Michel M. Kosteki, "Trade in Goods" in *The Political Economy of the World Trading System* (OUP, 2001) 201-205; Kumar, "Effectiveness of Performance Requirements" (n 48) 62-63; Theodore H. Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Peterson Institute for International Economics, 1998) 51, 53-59, 132-135; Moran, "FDI: a Reassessment" (n 65) 46; Theodore H. Moran, *How to Investigate the Impact of Foreign Direct Investment on Development and use the Results to Guide Policy*, *Brookings Trade Forum* (January 2007) 6; Theodore H. Moran, *Parental Supervision: the New Paradigm for Foreign Direct Investment and Development* (Institute for International Economics, 2001) 33-35, 39; Moran, *Strategy for the Doha Round* (n 65) 10; Moran, "FDI and Host Country Development" (n 65) 285-286, 288; OECD, *Foreign Direct Investment and Economic Development*, Communication to the Working Group on the Relationship between Trade and Investment (WGTI), WTO Doc WT/WGTI/W/26 (1998) 24, 52; Garry Pursell, "The Australian Experience with Local Content Programs in the Auto Industry Some Lessons for India and other Developing Countries" 35(2) *Journal of World Trade* 379 (2001); UNCTAD, *Elimination of TRIMs: The Experience of Selected Developing Countries*, UN Doc UNCTAD/ITE/IIA/2007/6 (2007) 77-78, 133, 141-142.

<sup>401</sup> Hufbauer and others, *LCRs* (n 386) xi, 63-76, 93-108; Kuntze and Moerenhout, *LCRS and Renewables* (n 387) 4, 21-30; Johnson (n 399) 14-24. See also, *inter alia*: European Commission, *Trade and Investment Barriers Report 2013*, COM(2013) 103 final (28 February 2013) 10; Michael Stephen Hanni and others, "Foreign direct investment in renewable energy: trends, drivers and determinants" 20(2) *Transnational Corporations* (August 2011), 58-59; Jacob Funk Kirkegaard, Thilo Hanemann, Lutz Weischer, "It Should be a Breeze: Harnessing the Potential of Open Trade and Investment Flows in the Wind Energy Industry," *Working Paper Series WP 09-14* (World Resource Institute and Peterson Institute for International Economics, 2009) 20-23; Jacob Funk Kirkegaard and others, "Towards a Sunny Future? Global Integration in the Solar Industry," *Working Paper Series WP 10-6* (World Resource Institute and Peterson Institute for International Economics, May 2010) 34; WTI Advisors, *Local Content Requirements & the Green Economy*, Study prepared for the Ad hoc Expert Group Meeting on Domestic Requirements and Support Measures in Green Sectors: Economic and Environmental Effectiveness and Implications for Trade (13-14 June 2013), 58 p.

<sup>402</sup> UNCTAD, *WIR 2001* (n 56) 167, 193 and fn 4.

<sup>403</sup> Hufbauer and others, *LCRs* (n 386) xx-xxi, 5-6.

compliance with LCRs which stipulated that finished cars had to incorporate a specified percentage of domestic content.<sup>404</sup> Second, the Canadian Province of Ontario's feed-in tariff programme ("FIT Programme"), launched in 2009, imposed LCRs as conditions for concluding FIT Programme electricity purchase contracts that provided guaranteed fixed prices over 20 or 40 years: a certain percentage of the wind turbines or solar panels used to generate the purchased electricity had to be produced in Ontario.<sup>405</sup>

b) EPRs

EPRs entail the export of a specified proportion, percentage or minimum amount of goods produced locally by reference to value or quantity of local production or to a proportion of an investor's imports.<sup>406</sup> EPRs notably aim at increasing the amount of foreign exchange acquired by a host State.<sup>407</sup> EPRs can serve to improve the integration of local producers into the global production networks of MNCs, to indirectly compel the use of world-calibre technology and production processes, and to increase the opportunities for local producers to capture spillovers.<sup>408</sup>

As an example of treaty provision prohibiting EPRs, NAFTA Article 1106(1)(a) prohibits requirements "to export a given level or percentage of goods or services." The United States provided two examples of EPRs.<sup>409</sup> First, an investor producing machinery equipment intends to build a plant in a host State in order to circumvent import tariffs; the investor plans on exporting 5-10% of its local production. The host States notifies the investor that fiscal incentives would be available upon exporting 25% of its production, while export 50% of its production would entitle the investor to a five-year tax exemption. Second, flourishing domestic sales convince an investor to expand its local production capabilities by building a second food processing plant. The investor intends to export 25% of increased production; however, host State authorities caution the investor that regulatory approvals needed for building the second plant will be

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<sup>404</sup> *Indonesia – Certain Measures Affecting the Automobile Industry – Reports of the Panel*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4 <<http://docsonline.wto.org>> (Indonesia—Autos), paras 14.58, 14.75-14.87.

<sup>405</sup> Canada—FIT Panel (n 274), paras 6.72, 7.121, 7.154–7.155, 7.166-7.167, 8.2, 8.4, 8.5, 8.6, 8.8, 8.9; Canada—FIT ABR (n 283), paras 4.17-4.23, 5.85, 6.1(b)(v) of WT/DS412/AB/R and paras 5.33, 5.89, 6.1(a)(i), 6.1(a)(vi) of WT/DS426/AB/R.

<sup>406</sup> EC Submission 8 (n 30) 2; EC Submission 10 (n 264) para 3; Japan Submission 7 (n 264) 4; Japan Submission 12 (n 264) 10; Nordic Countries (n 243) para 3; Nordic Countries Submission 23 (n 327) para 12; OECD, *First Note on TRIMs* (n 30) para 14; U.S. Submission 9 (n 338) 2; LICIT (n 48) 56; Mark G. Herander and Christopher R. Thomas, "Export Performance and Export-Import Linkage Requirements" 101(3) *Quarterly Journal of Economics* (August 1986) 591, 591-592.

<sup>407</sup> UNCTAD, "HCOMs" (n 44) 5-6.

<sup>408</sup> Kumar, "Effectiveness of Performance Requirements" (n 48) 67-68.

<sup>409</sup> U.S. Submission 9 (n 338) 2.

issued only if the investor exports 50% of its increased production.

By imposing EPRs on foreign investors, a host State indirectly reduces their supply onto its domestic market and therefore lessens foreign competitive pressure on local producers.<sup>410</sup> The EC consider that restrictions on the right to develop local distribution systems could amount to an indirect EPR, since they limit local sales and therefore compel the investor to export more of its production than otherwise contemplated.<sup>411</sup>

### c) *Trade-Balancing Requirements*

While some definitions distinguish EPRs from trade-balancing requirements,<sup>412</sup> many definitions of EPRs also include trade-balancing requirements (or export-import linkage requirements),<sup>413</sup> which consist of limiting imports of investors to a proportion or equivalent quantity of their exports notably through requirements that investors generate sufficient foreign exchange earnings with their exports in order to cover, in whole or in part, or exceed their foreign exchange expenses incurred by importing inputs in the host State. Trade-balancing requirements aim at eliminating adverse effects of foreign investment on the host State's balance of payments or overcoming foreign exchange shortages<sup>414</sup> and are sometimes subsumed into EPRs since they are said to cause effects very similar to those of EPRs by compelling investors to increase exports.<sup>415</sup> Trade-balancing requirements have been described as indirect EPRs.<sup>416</sup> Trade-balancing requirements can also act as import restrictions or indirect LCRs since they can compel investors to limit imports to the level of their exports by increasing the local sourcing of their inputs.<sup>417</sup>

Article 1(b) of the Illustrative List to the TRIMs Agreement provides an example of trade-balancing requirements as measures that limit an enterprise's purchase or use of imported products to an amount based on the volume or value of that enterprise's export of local

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<sup>410</sup> Wang (n 48) 119.

<sup>411</sup> EC Submission 8 (n 30) 2.

<sup>412</sup> EC Submission 8 (n 30), 2; EC Submission 10 (n 264) para 3; Japan Submission 7 (n 264) 5; Japan Submission 12 (n 264) 11; U.S. Submission 9 (n 338) 4; Herander and Thomas (n 406) 591-592; WTO Secretariat, *The Impact of Investment Incentives and Performance Requirements on International Trade*, Working Group on the Relationship between Trade and Investment, WTO Doc WT/WGTI/W/56, 30 September 1998, paras 28-29; UNCTAD, "HCOMs" (n 44) 5; WTO and UNCTAD (n 389) paras 65-66, 69. See also: India and others, *GATT Communication 25* (n 48) para 8; GATT, *Note on Trims* (April 1990) (n 147) para 3.

<sup>413</sup> India Submission 18 (n 35) para 23; Japan Submission 7 (n 264) 5; Nordic Countries Submission 23 (n 327) para 12; OECD, *First Note on TRIMs* (n 30) para 14.

<sup>414</sup> India and others, *GATT Communication 25* (n 48) para 8; U.S. Submission 9 (n 338) 4.

<sup>415</sup> Nordic Countries Submission 23 (n 327) para 12.

<sup>416</sup> Kumar, "Effectiveness of Performance Requirements" (n 48) 60-61.

<sup>417</sup> India Submission 18 (n 35) para 23; Japan Submission 7 (n 264) 5; LICIT (n 48) 56.

products. Article 2(a) of the Illustrative List to the TRIMs Agreement provides a further example of trade-balancing requirements as measures which restrict imports to an amount based on the volume or value of local production that the enterprise exports. NAFTA Articles 1106(1)(d) and 1106(3)(c) prohibit mandatory and advantage-conditioning requirements that “relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment.”

The United States provided an example of a trade-balancing requirement.<sup>418</sup> An investor intends to build a tractor-producing plant in a host State for the exclusive purpose of supplying its domestic market. The investor must import tractor transmissions from its home State while multiple components would be imported from a number of third States. The host State conditions the approval of the project on the requirement that the investor pay for its imports with foreign exchange generated by its exports. The investor considers its export target unattainable during the first years of operating its tractor plant. The investor would consequently be unable to import the necessary components, thus delaying and complicating production. The investor invites its suppliers abroad to establish production facilities in the host State so as to secure its access to vital production inputs. Failing such relocation of production, the investor would need to turn to other local suppliers.

EPRs and trade-balancing requirements were common in the automobile and computer industries in the 1960s,<sup>419</sup> the 1970s and 1980s<sup>420</sup> and have subsisted well into the 1990s and 2000s.<sup>421</sup> Numerous countries, including Brazil, Chile, China, India Malaysia, Mexico and Thailand, have resorted to them.<sup>422</sup>

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<sup>418</sup> U.S. Submission 9 (n 338) 4.

<sup>419</sup> Dani Rodrik, “Taking Trade Policy Seriously: Export Subsidization as a Case Study in Policy Effectiveness” *NBER Working Paper No. 4567* (December 1993) 13-14; Dani Rodrik, “Trade and Industrial Policy Reform in Developing Countries: a Review of Recent Theory and Evidence,” *NBER Working Paper No. 4417* (August 1993) 23 (EPRs in Korea in the 1960s).

<sup>420</sup> Herander and Thomas (n 406) 592; C. Fred Bergsten, “Coming Investment Wars” 53 *Foreign Aff.* 135 (1974-1975) 141-142; Theodore H. Moran, “Enhancing the Contribution of FDI to Development: a new Agenda for the Corporate Social Responsibility Community, International Labour and Civil Society, Aid Donors and Multilateral Financial Institutions” 20(1) *Transnational Corporations* 69 (April 2011), 78; Theodore H. Moran, *Foreign Direct Investment and Development: Launching a Second Generation of Policy Research: Avoiding the Mistakes of the First, Reevaluating Policies for Developed and Developing Countries* (Peterson Institute for International Economics, 2011) 38, 69; Theodore H. Moran, “The United Nations and Transnational Corporations: a Review and a Perspective” 18(2) *Transnational Corporations* 91 (August 2009), 103; Moran, *New Policy Agenda* (n 400) 53-59.

<sup>421</sup> Guoqiang Long, “China’s Policies on FDI: Review and Evaluation,” in Theodore H. Moran, Edward M. Graham and Magnus Blomström (eds), *Does Foreign Direct Investment Promote Development?* (Institute for International Economics, 2005) 322, 325-327, 335.

<sup>422</sup> Kumar, “Effectiveness of Performance Requirements” (n 48) 68.

*d) Export Controls or Restrictions*

During the Cold War, export restrictions (also referred to as export controls) were imposed for military security or related foreign policy concerns, notably to prevent adversaries from acquiring sensitive military equipment or coveted goods or services; over time, export restrictions have been contemplated beyond military or security-related equipment and for purposes other than simply denying adversaries access to specific goods or services, such as avoiding technology transfers that could strengthen adversaries and weaken employment prospects by increasing foreign competition.<sup>423</sup> Export restrictions can notably link the quantity of authorised exports to the sales on the host State's market.<sup>424</sup> The EC considered that product mandating requirements amounted to export restrictions, since they forbid the export by investors of specified products from third countries.<sup>425</sup> Japan considered that domestic sales requirements constituted export restrictions since they prevented the export of goods that instead had to be sold on the host State's domestic market.<sup>426</sup>

Export restrictions are infrequent and have more often been analysed from the vantage point of home States rather than host States since their circumvention can constitute a primary motivation for investing abroad.<sup>427</sup>

Article 2(c) of the Illustrative List to the TRIMs Agreement prohibits three types of restrictions on an enterprise's exports or sale for exports: first, restrictions on the export of specified products; second, export restrictions based on the volume or value of products; third, export restrictions based on a proportion of volume or value of that enterprise's local production. NAFTA Article 1106(1)(a) provides a further example by prohibiting requirements "to export a given level or percentage of goods or services."

*e) Local Equity Requirements ("LERs"), Joint Venture Requirements ("JVRs") and/or Foreign Ownership Limitations*

LERs stipulate that local investors hold or control a specified proportion of the equity of a corporation created by foreign investors; inversely, LERs may cap foreign-owned equity of

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<sup>423</sup> UNCTAD, *WIR 1996* (n 5) 118, 181; UNCTAD, "Investment-Related Trade Measures" in *UNCTAD Series on Issues in International Investment Agreements*, UN Doc UNCTAD/ITE/IIT/10 (vol. IV) (1999) 8, 27-28.

<sup>424</sup> UNCTAD, *WIR 1996* (n 5) 179; see also UNCTAD, "HCOMs" (n 44) 2-3, 8-9, 12-14; UNCTAD, *FDI & Performance Requirements* (n 5) 2-3; Bjorklund (n 279) 486.

<sup>425</sup> EC Submission 22 (n 263) 5.

<sup>426</sup> Japan Submission 12 (n 264) 11.

<sup>427</sup> UNCTAD, *WIR 1996* (n 5) 181; UNCTAD, "IRTMs" (n 423) 3, 5-6, 8.

domestic corporations.<sup>428</sup> LERs may increase the percentage of local ownership over the duration of an investment and may specify which contributions are computed within foreign and local equity percentages (for example, whether making a certain technology available counts as part of a foreign investor's equity share in a corporation).<sup>429</sup> LERs can serve to increase the proportion of profits generated by an investment which will be attributed to domestic corporations.<sup>430</sup> LERs often occur through joint ventures and have alternatively been referred to as minority foreign ownership requirements,<sup>431</sup> foreign ownership limitations<sup>432</sup> or in some instances majority domestic equity requirements.<sup>433</sup>

LERs aim at preserving and strengthening partial or majority local management control over foreign investments; they may also contribute to technology transfers and can also be used to address national security concerns.<sup>434</sup> LERs can serve to increase exposure to and absorption of know-how held by foreign investors, as well as developing local entrepreneurial management expertise.<sup>435</sup> LERs were frequently imposed in the 1970s, 1980s and 1990s, notably in the automotive and computer sectors and notably in Brazil, China, India, Korea, Mexico, Nigeria and Venezuela.<sup>436</sup> It has been suggested that LCRs, EPRs and LERs would prove more effective in improving a host State's access to foreign technology than technology transfer requirements.<sup>437</sup>

The United States provided two examples of LERs.<sup>438</sup> First, a foreign investor is looking to establish a corporation dedicated to producing industrial machinery. The host State conditions its approval of the foreign investment to the creation of a joint venture with a local partner which will oversee the investment. The local partner must hold at least 40% of the joint venture's equity; the local partner's equity share will be increased to 51% after 5 years.

Second, a foreign investor in pharmaceuticals is willing to operate through a joint venture with a local partner, but insists on preserving a majority ownership in the joint venture for quality

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<sup>428</sup> EC Submission 10 (n 264) para 3.

<sup>429</sup> U.S. Submission 9 (n 338) 11.

<sup>430</sup> Kumar, "Effectiveness of Performance Requirements" (n 48) 69.

<sup>431</sup> Bergsten (n 53) 13, 15.

<sup>432</sup> Bale (n 83) 180, 185.

<sup>433</sup> AEA (n 76) 23.

<sup>434</sup> India and others, *GATT Communication 25* (n 48) 5; UNCTAD, "HCOMs" (n 44) 5.

<sup>435</sup> Kumar, "Effectiveness of Performance Requirements" (n 48) 69.

<sup>436</sup> Cosby (n 5) 9-11; Moran, "FDI and Host Country Development" (n 65) 46, 49, 66; Moran, *Parental Supervision* (n 393) 33-39; Dani Rodrik, "What's so Special About China's Exports?," *NBER Working paper* No. 11947 (2006), 17-20; Moran, *Strategy for the Doha Round* (n 65) 10 (JVRs in Brazil and Mexico's computer sectors); Long (n 421) 318, 321, 334-336.

<sup>437</sup> Kumar, "Effectiveness of Performance Requirements" (n 48) 70.

<sup>438</sup> U.S. Submission 9 (n 338) 11.



control purposes. The host State normally imposes a 49% foreign ownership limitation in its corporations, but ultimately relents after having extracted from the foreign investor commitments to transfer technology into the host State and to undertake R&D activities in the host State.

f) *Technology Transfer, Licensing and/or Local R&D Requirements*

Technology transfer requirements compel investors to using production or processing techniques that entail superior technology to that otherwise contemplated by the investor in the host State.<sup>439</sup> They can be construed as requirements to introduce new products or high-level technology onto the host State market<sup>440</sup> or as entailing the commitment to use specific proprietary methods or processes.<sup>441</sup> The host State will often compel the investor to enter into a technology licensing agreement which will stipulate the conditions (including royalty caps) for the supply of technological products or proprietary knowledge or processes.<sup>442</sup> The host State may also order a foreign investor to produce technologically advanced components in the host State instead of importing such components, thus engendering a technology transfer to the host State.<sup>443</sup> Technology transfer requirements may also take the form of local R&D requirements which impose upon investors to conduct a specified minimum amount of R&D in the host State.<sup>444</sup> Host States use technology transfer and licensing requirements with a view to acquiring advanced technology that would otherwise elude the host States and to diffuse related production know-how; host States may also merely use such requirements in order to improve their bargaining position vis-à-vis foreign investors, notably by requesting access to technology unrelated to proposed investments through licensing agreements to the benefit of domestic corporations.<sup>445</sup>

NAFTA Article 1106(1)(f) provides an example of treaty provision that prohibits requirements “to transfer technology, a production process or other proprietary knowledge to a person in its territory.” The United States provided an example that illustrates both a technology transfer requirement and a technology licensing requirement: a foreign investor in the computer sector wishes to build a mini-computer production facility whose output would be both sold on the domestic market and exported. The host State requires that the foreign investor transfer the

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<sup>439</sup> Japan Submission 7 (n 264) 5; U.S. Submission 9 (n 338) 5.

<sup>440</sup> Bale (n 83) 180, 185.

<sup>441</sup> OECD, *First Note on TRIMs* (n 30) para 12.

<sup>442</sup> Japan Submission 7 (n 264) 5; U.S. Submission 9 (n 338) 5; UNCTAD, “Transfer of Technology” in *UNCTAD Series on Issues in International Investment Agreements*, UN Doc UNCTAD/ITE/IIT/28 (2001) 24.

<sup>443</sup> Japan Submission 12 (n 264) 11.

<sup>444</sup> EC Submission 10 (n 264) 3.

<sup>445</sup> India and others, *GATT Communication 25* (n 48) 6; UNCTAD, “HCOMs” (n 44) 5.

technology needed to produce the high-speed circuit components within the mini-computers as a condition for authorising the foreign investor's project.<sup>446</sup> The United States provided a further example of a technology licensing requirement: a foreign investor in the chemicals sector contemplates setting up a subsidiary that would build a plant to produce solvents for waste disposal. The solvent plant will import sophisticated ingredients and will source other components from the domestic market. Unsettled by the quantity of necessary imports, the host State conditions its approval of the solvent plant to the foreign investor's agreement to license its technology for producing agricultural fertilisers to a State-owned enterprise. The host State's condition casts doubt's on the foreign investor's resolve to go forward with its investment since the agricultural fertiliser technology has no connection with the contemplated investment and since the foreign investor already produces those same agricultural fertilisers in a nearby State for domestic sales and export.<sup>447</sup>

The United States also provided an example of a local R&D requirement: a foreign investor in the computer sector wishes to build a mini-computer production facility whose output would be both sold on the domestic market and exported. The host State requires that the foreign investor conduct a minimum amount of R&D in the host State over the entire duration of the project.<sup>448</sup> Mandatory technology licensing requirements have been used from the 1960s and 1970s onward, notably in the automotive and computer sectors and notably in Japan and Korea,<sup>449</sup> in China,<sup>450</sup> in Brazil and Malaysia<sup>451</sup> and in India.<sup>452</sup>

#### *g) Foreign Exchange Restrictions and/or Earning Requirements*

Foreign exchange restrictions limit an investor's access to foreign currency and correspondingly

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<sup>446</sup> U.S. Submission 9 (n 338) 5.

<sup>447</sup> *ibid.*

<sup>448</sup> *ibid.*

<sup>449</sup> Moran, *New Policy Agenda* (n 400) 127-131, 160-162; Moran, "FDI: a Reassessment" (n 65) 46-47; Kamal Saggi, *Trade, Foreign Direct Investment, and International Technology Transfer: A Survey*, prepared for the World Bank and the WTO Working Group on the Relationship between Trade and Investment, WTO Doc WT/WGTI/W/88 (19 September 2000) 22; WTO Secretariat, *Report on the Meeting of 8 June 2000 of the Working Group on the Relationship between Trade and Investment - Note by the Secretariat*, WTO Doc WT/WGTI/M/11, 24 July 2000, para 18.

<sup>450</sup> Long (n 421) 321, 334-336; UNCTAD, *WIR 2001* (n 56) 175.

<sup>451</sup> OECD, *Foreign Direct Investment and Economic Development: Lessons from Six Emerging Economies* (OECD, 1998) 60-62, 74-75. For more information on technology transfer requirements, see notably: Ari Kokko, Magnus Blomstrom, "Policies to Encourage Inflows of Technology Through Foreign Multinationals" in Stephen Young (ed), *Multinationals and Public Policy Vol. 2* (Edward Elgar, 2004) 237-246; UNCTAD (n 37) 129-134; UNCTC and UNCTAD (n 43) 24 Table 8.

<sup>452</sup> Vudayagiri N. Balasubramanyam, *Foreign Direct Investment in Developing Countries: Determinants and Impacts*, Paper presented at the Conference entitled "New Horizons and Policy Challenges for Foreign Direct Investment in the 21st Century" in Mexico City (26-27 November 2001), OECD Global Forum on International Investment, 5-6.

reduce an investor's import capacity since an investor needs foreign currency to purchase its imports.<sup>453</sup> Restrictions which condition an investor's access to foreign exchange upon foreign-exchange inflows attributable to that same investor,<sup>454</sup> or which obligate an investor to use only the foreign exchange generated by its exports in order to purchase imports essentially amount to trade-balancing requirements and closely resemble EPRs.<sup>455</sup> Foreign exchange neutrality requirements have been referred to as indirect EPRs.<sup>456</sup> Foreign exchange restrictions aim at easing pressures on a host State's balance of payments.<sup>457</sup> Foreign exchange access restrictions reduce the availability of foreign currency necessary for an enterprise to pay for goods from abroad and therefore restrain an enterprise's ability to import and to a certain extent can be construed as import quotas.

Article 2(b) of the Illustrative List to the TRIMs Agreement describes foreign exchange access restrictions as measures which restrict an enterprise's access to foreign exchange to an amount based on the foreign exchange inflows attributable to that enterprise. NAFTA Articles 1106(1)(d) and (e) and 1106(3)(c) and (d) indirectly prohibit foreign exchange access restrictions and earnings requirements by prohibiting mandatory and advantage-conditioning requirements that correlate imports to the foreign exchange inflows of an investment or that correlate domestic sales of goods or services to the foreign exchange earnings of an investment.

The United States provided a trade-balancing requirement as example of a foreign exchange restriction: a foreign investor intends to establish a subsidiary in a host State in order to produce agricultural machinery which will depend in part on importing a number of components. The host State notifies the foreign investor that due to the balance-of-payment deficit, the host State must impose a requirement that 50% of the foreign investor's necessary foreign exchange must originate from its exports.<sup>458</sup>

#### *h) Remittance Restrictions*

Remittance restrictions limit a foreign investor's ability to repatriate profit, dividends, royalties, capital and other investment-related funds.<sup>459</sup> Remittance restrictions share the same objective

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<sup>453</sup> EC Submission 8 (n 30) 5; EC Submission 22 (n 263) 4; U.S. Submission 14 (n 267) 5, 8.

<sup>454</sup> UNCTAD, *FDI & Performance Requirements* (n 5) 2-3; UNCTAD, "HCOMs" (n 44) 3, 5, 12.

<sup>455</sup> EC Submission 8 (n 30) 2, 4, 6; EC Submission 10 (n 264) 2; U.S. Submission 9 (n 338) 8; U.S. Submission 14 (n 267) 11, 14.

<sup>456</sup> Kumar, "Effectiveness of Performance Requirements" (n 48) 60-61.

<sup>457</sup> India and others, *GATT Communication 25* (n 48) para 8.

<sup>458</sup> U.S. Submission 9 (n 338) 8.

<sup>459</sup> EC Submission 10 (n 264) 3; U.S. Submission 4 (n 267) 3, 5; McCulloch and Owen (n 48) 335-336; UNCTAD, *FDI & Performance Requirements* (n 5) 2; UNCTAD, "HCOMs" (n 44) 5; UNCTAD, *WIR 1996* (n 5) 178.

as that of foreign exchange restrictions: improving a host State's balance of payments.<sup>460</sup>

The United States provides two examples of remittance restrictions.<sup>461</sup> First, a foreign investor is planning to invest through a joint venture in the construction of a plant that would produce road construction machinery to supply the host State's domestic market and other countries in the region. The host State conditions approval of the investment on a requirement that the investor limit annual profit repatriation to 20% of the original value of the investment and that the investor's total profit repatriation over the life of the investment does not exceed the original value of the investment.

Second, a foreign investor intends to establish a subsidiary in a host State in order to produce agricultural machinery which will depend in part on importing a number of components. The host State notifies the foreign investor that annual profit remittances are capped at 15% of imported equity capital, while investment capital may be repatriated over a period of at least three years which begins two years after the original investment was made.

*i) Local Employment and/or Training Requirements*

Local employment and/or training requirements are imposed to correct (regional and/or ethnic) unevenness in hiring practices, to increase the skillfulness of local employees and indirectly to increase the number of skilled workers in the host State.<sup>462</sup>

Local employment requirements can notably consist of imposing minimum thresholds for different ethnic groups that must be met at any or every employment level within targeted corporations; for example, since 1971 Malaysia has imposed employment requirements with a view to increasing the number of workers belonging to the Bumiputera ethnic group.<sup>463</sup> South Africa similarly required that corporations submit employment equity plans consisting notably of initiatives to increase employment for individuals from disadvantaged designated groups.<sup>464</sup>

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<sup>460</sup> India and others, *GATT Communication 25* (n 48) para 8.

<sup>461</sup> U.S. Submission 9 (n 338) 8.

<sup>462</sup> UNCTAD, *FDI & Performance Requirements* (n 5) 30-32.

<sup>463</sup> "Bumiputera" means "sons of the soil" and refers to indigenous Malaysians, as opposed to ethnic Chinese and Indian populations that live in Malaysia. UNCTAD, *FDI & Performance Requirements* (n 5) 137, 143. While the New Economic Policy (NEP) officially ended in the 1990s, a number of its policies, including local employment requirements, continued as part of new programmes, notably the National Development Policy (NDP) for 1991-2000 and the National Vision Policy (NVP) for 2001-2010: Trang Tran, *The Impact of Affirmative Action and Equity Regulations on Malaysia's Manufacturing Firms*, World Bank Paper (June 2013) <[http://conference.iza.org/conference\\_files/worldb2014/tran\\_t8194.pdf](http://conference.iza.org/conference_files/worldb2014/tran_t8194.pdf)> accessed 12 February 2017, 2-3.

<sup>464</sup> UNCTAD, *FDI & Performance Requirements* (n 5) 201. Under the Employment Equity Act, the expression "designated groups" is defined to mean black people, women and people with disabilities; the

Local employee training requirements can notably take the form of compulsory contributions to skills or human resources development funds and have been imposed notably by Malaysia and South Africa.<sup>465</sup> Local employment and training requirements have further been adopted by Angola, Cameroon, Equatorial Guinea and Nigeria.<sup>466</sup>

*j) Investment Localisation Requirements*

Performance requirements can also serve as regional development tools: in instances where goods or services produced in or supplied from disadvantaged areas cannot overcome competitive shortcomings, host States may compel investors displaying more advanced production capabilities to locate their activities in such areas instead of directly subsidising production in disadvantaged areas over long periods.<sup>467</sup>

For example, through its Regional Selective Assistance (“RSA”) programme in place since the 1970s, the United Kingdom has attributed discretionary grants to corporations located in disadvantaged regions plagued notably by high unemployment.<sup>468</sup> As a further example, Mexico made use of localisation requirements as part of its Programme for Promoting the Manufacturing of Electronic Computer Systems, Their Main Modules and Their Peripheral Equipment, known as the 1981 Computing Programme: one of the numerous eligibility requirements in order to access incentives consisted of establishing operations anywhere but in areas of maximum industrial concentration.<sup>469</sup>

*k) Manufacturing Requirements*

Manufacturing requirements stipulate that an investor manufacture specified goods (products or components) in the host State, with a view to replacing imports by local production;

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expression “black people” is in turn defined as “a generic term which means Africans, Coloureds and Indians”: section 1 of the Employment Equity Act, 1998, as amended.

<sup>465</sup> Konrad von Moltke, Howard Mann, *Towards A Southern Agenda on International Investment: Discussion Paper on the Role of International Investment Agreements* (IISD May 2004) 26-27; UNCTAD, *FDI & Performance Requirements* (n 5) 31, 147, 166, 200.

<sup>466</sup> P. Peek, P. Gantès, *Skills Shortages in the Global Oil and Gas Industry: How to Close the Gap (Part I)*, Centre de recherches entreprises et sociétés (CRES) (December 2008) 72-75.

<sup>467</sup> Brazil and India, *The Mandated Review of the TRIMs Agreement – Paragraph 12(b) of the Doha Ministerial Declaration – Implementation-related issues and concerns (tired 40) – Communication to the Council for Trade in Goods and to the Committee on Trade-Related Investment Measures*, WTO Doc G/C/W/428 and G/TRIMS/W/25 (9 October 2002), para 7; UNCTAD, *FDI & Performance Requirements* (n 5) 7.

<sup>468</sup> Chiara Criscuolo and others, “The Causal Effects of an Industrial Policy,” *SERC Discussion Paper No. 98* (2012), 52 p.

<sup>469</sup> Wilson Peres Nunez, *Foreign Direct Investment and Industrial Development in Mexico* (OECD, 1990), 87-89.

manufacturing requirements generate the same effects as LCRs.<sup>470</sup>

Manufacturing requirements closely resemble LCRs since they can entail a requirement to produce components locally; they differ from classical LCRs by imposing manufacturing as opposed to purchasing obligations and by targeting specific components instead of asking that a percentage of production be undertaken locally.<sup>471</sup>

The United States provided an example of a manufacturing requirement: a foreign investor in pharmaceuticals wishes to open up a subsidiary in a host State. The host State conditions its approval of the subsidiary on a commitment by the foreign investor to produce low-cost, generic consumer drugs for supplying the domestic market.<sup>472</sup>

#### *l) Manufacturing Limitations*

Manufacturing limitations may positively compel investors to produce locally only specified goods; they may alternatively restrict or prohibit foreign investors from producing specified goods with a view to entrusting the exclusive production of such goods to local producers.<sup>473</sup> By prohibiting or restricting the production of certain goods, manufacturing limitations also act as export restrictions since they force investors to forego production potentially destined to be exported.<sup>474</sup>

The United States provided an example of a manufacturing limitation: a host State notifies would-be high-technology foreign investors that it has conditioned access to its large domestic market on the following manufacturing limitation: foreign investors are barred from manufacturing or importing high-technology goods produced or soon to be produced by domestic corporations.<sup>475</sup>

#### *m) Domestic Sales Requirements*

Domestic sales requirements compel investors to sell a certain proportion or a set value of their output on the host State's domestic market; the compulsoriness of such requirements is generally made necessary because prices on the domestic market are lower and thus less

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<sup>470</sup> EC Submission 10 (n 264) 2-3; EC Submission 22 (n 263) 4; U.S. Submission 9 (n 338) 9; U.S. Submission 14 (n 267) 5.

<sup>471</sup> EC Submission 8 (n 30) 2; U.S. Submission 14 (n 267) 5.

<sup>472</sup> U.S. Submission 9 (n 338) 9.

<sup>473</sup> EC Submission 8 (n 30) 1-2; EC Submission 10 (n 264) 3-4; EC Submission 22 (n 263) 4-5, 7; India Submission 18 (n 35) para 20; U.S. Submission 4 (n 267) 3; U.S. Submission 9 (n 338) 9; U.S. Submission 14 (n 267) 5, 9, 16-17.

<sup>474</sup> U.S. Submission 14 (n 267) 5, 16.

<sup>475</sup> U.S. Submission 9 (n 338) 9.

attractive than those on world markets.<sup>476</sup> A host State resorts to domestic sales requirements with a view to guaranteeing availability of specified products on its domestic market at set prices.

The United States provided the following example of a domestic sales requirement: A foreign investor intends to take over an operating copper mine. The host State conditions its approval of the acquisition on the foreign investor entering into a production-sharing arrangement pursuant to which the foreign investor will dedicate half of its production to supplying a State-owned enterprise at discounted prices.<sup>477</sup>

The NAFTA does not prohibit domestic sales requirements, but rather mandatory and advantage-conditioning restrictions on domestic sales of goods or services in the host State that relate such sales to the exports or foreign exchange earnings of an investment (Articles 1106(1)(e) and 1106(3)(d)).

#### *n) Product Mandating Requirements*

Product mandating requirements compel investors to assign to a designated plant or operation the exclusive right to manufacture specified products or to provide specified services, with the output mandatorily destined to supply specified markets, whether national, regional or global; alternatively, product mandating may simply require that investors export a specified quantity or proportion of its output to a designated market, in which case they closely resemble EPRs.<sup>478</sup>

Product mandating requirements amount to restrictions on the choice of goods that investors can produce and/or on the geographic market that investors can supply, by forcing investors to commit to produce specific components or goods and to sell to designated areas, often to the worldwide market.<sup>479</sup>

The United States provided two examples of product mandating requirements.<sup>480</sup> First, a foreign automobile manufacturer intends to build a light-truck factory to supply the domestic market of its host State. The host State informs the foreign manufacturer that its factory project will be

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<sup>476</sup> EC Submission 10 (n 264) 2; EC Submission 22 (n 263) 4; India Submission 18 (n 35) para 21; India and others, *GATT Communication 25* (n 48) 5; Japan Submission 7 (n 264) 5; Japan Submission 12 (n 264) 11; Japan Submission 20 (n 264) 5; U.S. Submission 9 (n 338) 6; U.S. Submission 14 (n 267) 16.

<sup>477</sup> U.S. Submission 9 (n 338) 6.

<sup>478</sup> EC Submission 8 (n 30) 2-3; EC Submission 10 (n 264) 3; India Submission 18 (n 35) para 21; India and others, *GATT Communication 25* (n 48) 5; Japan Submission 12 (n 264) 12; Japan Submission 20 (n 264) 6; U.S. Submission 4 (n 267) 4-5; U.S. Submission 9 (n 338) 10; UNCTAD, *FDI & Performance Requirements* (n 5) 2-3; UNCTAD, "HCOMs" (n 44) 2-3, 12-14; Bjorklund (n 279) 486.

<sup>479</sup> OECD, *First Note on TRIMs* (n 30) paras 4, 12.

<sup>480</sup> U.S. Submission 9 (n 338) 10.

approved only if the foreign manufacturer incorporates into its factory a production line of passenger cars for export to a third country. Second, a foreign-owned, electronics-manufacturing corporation decides to expand into microchip production. The host State subjects its approval of such endeavour to the corporation's commitment that it export 50% of its production to a designated region.

NAFTA Article 1106(1)(g) prohibits mandatory requirements "to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market;" Article 8(1)(g) of the 2004 U.S. Model BIT opted for a slightly reformulated provision that prohibits mandatory requirements "to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market." Article 8(1)(g) of the 2012 U.S. Model BIT reiterated this revised formulation.

This section analysed measures generally recognised as performance requirements. This section also reviewed the terms of art with settled meanings that are widely disseminated within PRPs. The following discusses arbitral awards that have applied NAFTA Article 1106 with a view to shedding greater light on interpretive efforts to date.

### **3. Interpreting Specifically Prohibited Performance Requirements**

This section analyses the interpretation and application of NAFTA Article 1106 by arbitral tribunals to date and focuses on the nature and functioning of the measures alleged to have violated NAFTA Article 1106 on the basis that they constituted one of the following prohibited performance requirements: LCRs, EPRs and export restrictions, domestic sales restrictions and LSRs. This section also explains and where necessary critically assesses the methodology and end-result of relevant arbitral awards and decisions.

#### *a) The Application of Detailed PRPs to LCRs*

In *S.D. Myers v Canada*, claimant S.D, Myers, Inc. ("SDMI"), an American corporation, conducted Polychlorinated biphenyl ("PCB") remediation among other activities.<sup>481</sup> SDMI incorporated S.D. Myers (Canada), Inc. ("Myers Canada") under the Canada Business Corporations Act in 1993 with a view to remedying Canadian PCB waste at SDMI's facility in the United States. PCBs have been used for insulation mainly in electrical equipment and have a very slow biodegrading rate; their elimination requires either incineration at very high

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<sup>481</sup> *S.D. Myers* – Majority (n 167), paras 1-2.



temperatures or chemical processing.<sup>482</sup> PCB remediation consists of removing PCBs from electrical equipment, decontaminating and recycling the electrical components and destroying the PCBs.<sup>483</sup> In 1990, Canada adopted the PCB Waste Export Regulations, which banned the export of PCB waste from Canada to all countries other than the United States. The PCB Waste Export Regulations allowed exports to the United States only if previously approved by the American Environmental Protection Agency (“EPA”).<sup>484</sup> On October 26, 1995 the American EPA issued an “enforcement discretion” allowing SDMI to import PCB waste from Canada during a period of approximately two years.<sup>485</sup> In November 1995, the Minister of the Environment of Canada signed an Interim Order banning the exports of PCBs from Canada and requiring that PCB wastes be managed in Canada.<sup>486</sup> In February 1996 the Interim Order became a Final Order (together the “PCB Export Ban”).<sup>487</sup> As a result of measures adopted by Canada, PCB waste could not be exported from Canada to the United States from November 1995 to February 1997 when Canada re-authorized PCB exports to the United States.<sup>488</sup> SDMI argued that the PCB Export Ban effectively forced SDMI to dispose of PCB waste in Canada, which amounted to a mandatory LCR and a mandatory LSR, in violation of NAFTA Articles 1106(1)(b) and (c).<sup>489</sup>

The *S.D. Myers* Majority decided that the PCB Export Ban did not breach NAFTA Article 1106 on the grounds that there existed no performance requirement in the first place (an aspect discussed in greater detail in the later section entitled “existence of a ‘requirement’”),<sup>490</sup> while Professor Bryan P. Schwartz dissented solely to the extent that he found a breach of NAFTA Article 1106.<sup>491</sup> Dissenting Arbitrator Schwartz opined that the “practical effect” of the PCB Export Ban imposed an LCR in violation of NAFTA Article 1106(1)(b): the PCB Export Ban effectively meant that SDMI could undertake remediation of PCB waste found in Canada only if the physical destruction of PCB waste occurred in Canada, which amounted to mandating that the service of destroying PCB waste consist of Canadian content.<sup>492</sup> By its very design, the PCB Export Ban did not amount to an LCR, and one would need to focus solely on its effects to characterise it as such, thus converting the PRP into potential catchall provision. The derogatory character of the PCB Export Ban would be more fittingly addressed under other substantive

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<sup>482</sup> *ibid* para 94.

<sup>483</sup> *ibid* para 91.

<sup>484</sup> *ibid* para 100.

<sup>485</sup> *ibid* para 118.

<sup>486</sup> *ibid* para 123.

<sup>487</sup> *ibid* para 126.

<sup>488</sup> *ibid* para 127.

<sup>489</sup> *ibid* para 140, 270-271.

<sup>490</sup> *ibid* paras 323.

<sup>491</sup> *S.D. Myers – Dissent* (n 197) para 4.

<sup>492</sup> *ibid* para 193.

treaty protection standards. Dissenting Arbitrator Schwartz suggested that the PCB Export Ban might also have violated NAFTA Article 1106(1)(c) by necessarily implying the purchase of various goods and services from local suppliers and the hiring of local employees. However, Dissenting Arbitrator Schwartz left undecided the applicability of NAFTA Article 1106(1)(c) due to lack of evidence.<sup>493</sup>

*b) The Application of Detailed PRPs to EPRs and Export Restrictions*

In *Pope & Talbot v Canada*, Pope & Talbot, an American corporation wholly owned a Canadian subsidiary (“Pope & Talbot International Ltd.”) which in turn wholly owned Canadian subsidiary Pope & Talbot Ltd. (“Pope & Talbot Canada”). Pope & Talbot Canada manufactured and sold softwood lumber and exported the greater part of its sales to the United States. Canada and the United States entered into the Softwood Lumber Agreement (the “SLA”) in 1996. The SLA established limits on softwood lumber exports from four provinces of Canada (Alberta, British Columbia, Ontario and Quebec) to the United States. Article 2.1 of the SLA required that Canada place softwood lumber on its Export Control List under the Exports and Permits Act. As a result, softwood lumber exports to the United States mandated an export permit.<sup>494</sup>

Article 2.2 of the SLA established a three-tiered system governing softwood lumber exports to the United States: (1) under the Established Base (“EB”), 14.7 billion board feet could be exported free of charge; (2) the Lower Fee Base (“LFB”) imposed a fee of USD50 per thousand board feet for exports between 14.7 billion board feet and 15.35 billion board feet; and (3) the Upper Fee Base (“UFB”) imposed a fee of USD100 per thousand board feet for exports beyond 15.35 billion board feet. In accordance with Article 2.4 of the SLA, Canada would annually divide up the EB and LFB amounts among softwood lumber exporters by allocating export permits.<sup>495</sup>

On June 21, 1996 Canada implemented the SLA by adopting the Softwood Lumber Export Permit Fees Regulations (the “Export Control Regime”) which introduced: (1) the payment of an administrative fee for the issuance of a softwood lumber export permit to the United States regarding exports in the EB bracket, and (2) pursuant to the SLA, the payment of a USD50 fee regarding every thousand board feet of exports in the LFB bracket and a USD100 fee regarding every thousand board feet of exports in the UFB bracket.<sup>496</sup>

Pope & Talbot argued that Canada’s Export Control Regime imposed EPRs or export

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<sup>493</sup> *ibid* para 197.

<sup>494</sup> *ibid* para 30.

<sup>495</sup> *ibid*.

<sup>496</sup> *ibid* para 34.

restrictions contrary to NAFTA Article 1106(1)(a), notably by imposing a lower than business-as-usual export level and thus an export restriction due to export fees imposed on lumber falling within the LFB and UFB brackets.<sup>497</sup> Pope & Talbot argued that NAFTA Article 1106(1)(a), which states “to export at a given level,” prohibits requirements which result in an upward or downward change in export amounts compared to what an investment would have otherwise exported were prohibited.<sup>498</sup>

Canada argued that NAFTA Article 1106(1)(a) prohibits only EPRs and not export restrictions, that the Export Control Regime did not require Pope & Talbot Canada to increase its exports and therefore that it could not be prohibited by NAFTA Article 1106(1)(a).<sup>499</sup> Canada further argued that NAFTA Article 1106(1)(a), by using the expression “a given level or percentage of goods or services,” entails a “prescribed or identifiable level of export,” as supported by the dictionary definition of “given.”<sup>500</sup> The Investor’s attempt to subject the Export Control Regime to NAFTA Article 1106 “clearly conflict[ed] with the ordinary meaning” of NAFTA Article 1106.<sup>501</sup> With respect to NAFTA Article 1106 as a whole, Canada considered that the general aim of performance requirements is to reduce imports or increase exports, to raise foreign exchange earnings and to create jobs in the export sector without exposing domestic producers to additional competition.<sup>502</sup>

The *Pope & Talbot* Tribunal decided that no violation of NAFTA Article 1106(1)(a) had taken place.<sup>503</sup> The Export Control Regime did not impose or enforce an EPR or an export restriction and simply established a three-tiered system governing the fees applicable to softwood lumber exports to the United States: the EB fee-free and the LFB brackets, each for their specified and distinct amounts of exports, and the UFB higher fee bracket for unlimited amounts beyond the EB and LFB amounts.<sup>504</sup> The Tribunal agreed with Canada and made an unhelpful *obiter dictum* pronouncement to the effect that all performance requirements prohibited under NAFTA Article 1106 generally aim at raising foreign exchange earnings, increasing employment in the export sector and increasing exports.<sup>505</sup> Nevertheless, the Tribunal refused to endorse its own general

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<sup>497</sup> *ibid* paras 45, 47; *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Memorial of the Investor – Initial Phase (28 January 2000) para 120.

<sup>498</sup> *Pope & Talbot* (n 167) para 59; *Pope & Talbot – Investor Supplemental Memorial* (n 92) para 86; *Pope & Talbot – Investor Memorial* (n 490), para 125.

<sup>499</sup> *Pope & Talbot* (n 167) paras 53-54; *Pope & Talbot – Counter-Memorial of Canada* (n 217), paras 259-260, 306-307, 319-320.

<sup>500</sup> *Pope & Talbot – Counter-Memorial of Canada* (n 217) para 271.

<sup>501</sup> *Pope & Talbot* (n 167) para 56; *Pope & Talbot – Counter-Memorial of Canada* (n 217) para 264.

<sup>502</sup> *Pope & Talbot – Counter-Memorial of Canada* (n 217) para 304.

<sup>503</sup> *Pope & Talbot* (n 167) para 76.

<sup>504</sup> *ibid* para 75.

<sup>505</sup> *ibid* para 74.

understanding of performance requirements in its ruling on NAFTA Article 1106(1)(a). The Tribunal underlined that the wording of NAFTA Article 1106(1)(a) is not expressly circumscribed to requirements imposing a higher level or percentage of exports and that NAFTA Article 1106(1)(a) applies to requirements imposing any level or percentage of exports, including export restrictions.<sup>506</sup>

The Tribunal's decision lends support to the view that within a single PRP, purposes underlying the prohibition of certain performance requirements may vary from one another and that not all prohibited performance requirements are equally trade-driven, import-related or export-related. A single PRP may prohibit directly trade-related performance requirements and indirectly and remotely trade-related performance requirements. Accordingly, PRPs are better understood when each prohibited performance requirement is considered separately from other enumerated performance requirements and when overarching statements as to purposes or the nature of performance requirements are avoided.

In *Merrill & Ring v Canada*, claimant Merrill & Ring Forestry L.P. ("Merrill & Ring") alleged violations of NAFTA Chapter 11 resulting from Canada's implementation of its Log Export Regime and its application to Merrill & Ring's operations in British Columbia. Merrill & Ring focused its grievances on log surplus testing procedures and advertising requirements Merrill & Ring had to carry out prior to receiving authorisation for removing or exporting logs.<sup>507</sup>

Merrill & Ring argued that Canada had violated NAFTA Article 1106(1)(a) by requiring as a precondition for export approval the prior advertisement for sale of logs from remote areas; advertised amounts had to fall between a minimum (2,800 m<sup>3</sup>) and a maximum (15,000 m<sup>3</sup>) amount. According to Merrill & Ring, the advertisement precondition for export approval meant that any advertised logs falling outside those levels could not be exported and that this amounted to a requirement to export at a given level.<sup>508</sup> Canada denied that the prior advertisement requirement had any connection with exports or that it obligated Merrill & Ring to export at a given level.<sup>509</sup> Canada further relied on a general *obiter dictum* statement by the *Pope & Talbot* Tribunal in order to argue that all performance requirements prohibited under NAFTA Article 1106 are "designed to oblige an investor to export more than it otherwise would have exported."<sup>510</sup>

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<sup>506</sup> *Pope & Talbot* (n 167) para 74.

<sup>507</sup> *ibid* para 28.

<sup>508</sup> *ibid* paras 98, 114.

<sup>509</sup> *ibid* para 107.

<sup>510</sup> *Merrill & Ring* – Counter-Memorial of Canada (n 217) para 696, quoting *Pope & Talbot* (n 167) para 99

The *Merrill & Ring* Tribunal found Merrill & Ring’s position “difficult to reconcile with the terms” of NAFTA Article 1106(1)(a).<sup>511</sup> By comparison, the Tribunal found Canada’s argument convincing in that a requirement related to the advertisement of goods, which amounts to one of many conditions that must be complied with for obtaining an export permit, cannot amount to an export restriction. Spurred on by Canada’s “persuasive argument,”<sup>512</sup> the Tribunal stated that by their very terms, all performance requirements enumerated in NAFTA Article 1106 “are related to the export of goods and services and the conditions under which such exports are made”<sup>513</sup> and are “designed to restrict or enhance exports.”<sup>514</sup> The Tribunal went a step further and decided that a requirement “needs to be directly and specifically connected to exports”<sup>515</sup> to qualify as a performance requirement under NAFTA Article 1106. The Tribunal wrongly narrowed the scope of NAFTA Article 1106 to export-related measures in spite of Article 1106’s undisputed application to LCRs, LSRs, technology transfer requirements and product-mandating requirements which are not meant to increase or reduce exports.

Both the *Pope & Talbot* and the *Merrill & Ring* Tribunals made unfortunate pronouncements that lumped all performance requirements into a one-dimensional pool of export-driven trade policy instruments, while clearly some performance requirements prohibited under NAFTA Article 1106 relate only remotely and indirectly to exports, imports or even to trade. These statements obscure the distinct and settled meanings of the various performance requirements prohibited under NAFTA Article 1106.

c) *The Application of Detailed PRPs to Domestic Sales Restrictions*

In *Pope & Talbot v Canada*, Pope & Talbot argued convolutedly that Canada related Pope & Talbot Canada’s sales of lumber bound for the United States to American customers in Canada to its United States-bound export volumes by allegedly reducing sales below business-as-usual levels using a “punitive export permit fee” which allegedly reduced exports, an export-based restriction on domestic sales in violation of NAFTA Articles 1106(1)(e) and 1106(3)(d).<sup>516</sup> Canada counter-argued that the Export Control Regime did not limit Pope & Talbot Canada’s sales in Canada in any way.<sup>517</sup>

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<sup>511</sup> *Merrill & Ring* (n 167) para 114.

<sup>512</sup> *ibid* para 113.

<sup>513</sup> *ibid* para 113.

<sup>514</sup> *ibid* para 115.

<sup>515</sup> *ibid* para 117.

<sup>516</sup> *Pope & Talbot* (n 167) paras 45, 48.

<sup>517</sup> *ibid* para 55; *Pope & Talbot* – Counter-Memorial of Canada (n 217) paras 262, 290.

The *Pope & Talbot* Tribunal rejected both of Pope & Talbot's claims based on NAFTA Articles 1106(1)(e) and 1106(3)(d).<sup>518</sup> The Tribunal pointed to the identical text of both provisions and noted that "sales of goods in its territory" meant in this case sales of softwood lumber in Canada for use or consumption within Canada.<sup>519</sup> The Tribunal decided that "sales of goods in its territory" does not cover sales of softwood lumber for export to the United States, even where title to the goods was transferred to the American purchaser while the lumber was still in Canada, or where it was sold to a Canadian party for export to the United States. Rather, such instances amounted to "exports" within the meaning of NAFTA Articles 1106(1)(e) and 1106(3)(d), and not to "sales."<sup>520</sup>

The Tribunal criticised Pope & Talbot for using the terms "exports" and "sales" interchangeably and for ignoring the distinction between domestic sales and sales for export. Pope & Talbot's approach led to "relating or comparing 'exports' to 'exports'," while the requirements envisioned by NAFTA Articles 1106(1)(e) and 1106(3)(d) must restrict domestic sales by relating them to exports or foreign exchange earnings. Pope & Talbot's approach did "violence to the text of Articles 1106(1)(e) and 1106(3)(d), standing those provisions on their head."<sup>521</sup>

In *Merrill & Ring v Canada*, Merrill & Ring argued that Canada had imposed an export-based restriction on its domestic sales in violation of NAFTA Article 1106(1)(e) by relating its sales of logs from remote areas to the volume of its exports. Merrill & Ring convolutedly argued that the minimum (2,800 m<sup>3</sup>) and maximum (15,000 m<sup>3</sup>) advertisement volumes of logs from remote areas resulted in volume restrictions linked to Merrill & Ring's exports, which would then somehow translate in some form of restriction on its domestic sales.<sup>522</sup> The *Merrill & Ring* Tribunal found Merrill & Ring's position "difficult to understand."<sup>523</sup> The Tribunal summarised Merrill & Ring's argument as identifying the existence of a restriction on its domestic sales of logs related to the volume of its exports through export volume "restrictions" allegedly resulting from the minimum and maximum volume log advertisement requirements.<sup>524</sup> The Tribunal rejected Merrill & Ring's allegation and held that Merrill & Ring could sell as many logs on the Canadian domestic market as it wished and that the level of such sales was in no way related to minimum or maximum volume log advertisement requirements, which needed to be complied

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<sup>518</sup> *Pope & Talbot* (n 167) para 80.

<sup>519</sup> *ibid* paras 77-78.

<sup>520</sup> *ibid* para 78.

<sup>521</sup> *ibid* para 79.

<sup>522</sup> *Merrill & Ring* (n 167) paras 101, 119.

<sup>523</sup> *ibid* para 119.

<sup>524</sup> *ibid* para 119.

with solely in order to acquire log export permits.<sup>525</sup>

d) *The Application of Detailed PRPs to LSRs*

In *Merrill & Ring v Canada*, the claimant alleged that Canada had imposed LSRs in violation of NAFTA Article 1106(1)(c) by requiring to cut, sort, boom, deck and/or scale its logs in accordance with the specifications of the “Coast Domestic Market End Use Sort Description,” including “normal log market practices” (an undefined expression) and the requirement to scale timber rafts metrically. According to Merrill & Ring, these cutting, sorting and scaling requirements accorded a preference to goods that met domestic market requirements and a preference to local service providers that were hired to carry out these requirements, in breach of NAFTA Article 1106(1)(c).<sup>526</sup>

Canada denied having accorded any preference to Canadian-produced logs in violation of NAFTA Article 1106(1)(c), adding somewhat jeeringly that the logs were produced in Canada simply because they grew there.<sup>527</sup> Moreover, Canada argued that its requirement that logs be scaled in conformity with the metric system had no connection with the manufacture or sale of logs. Canada explained that the measurement of logs in “board feet,” prevalent in the United States Pacific Northwest, differs from the measurement system in Canada, which relies on cubic or linear meters, and that the measurement system applicable to logs must conform to local market requirements.<sup>528</sup> Canada also denied that Merrill & Ring was compelled to accord a preference to Canadian service suppliers in having its logs metrically scaled: Merrill & Ring was free to hire service suppliers from outside Canada. Hiring Canadians to accomplish such work stemmed from a purely commercial decision and not from a requirement.<sup>529</sup>

With respect to claimant Merrill & Ring’s first alleged violation of NAFTA Article 1106(1)(c), the *Merrill & Ring* Tribunal found the claimant’s allegation “difficult to reconcile with the terms of the provision.” The Tribunal decided that the requirement to cut, sort and scale logs in accordance with the “Coast Domestic Market End Use Sort Description” did not amount to an LSR.<sup>530</sup> Indeed, the Tribunal noted that scaling according to the metric system constituted a measure simply related to the measurement system used throughout Canada.<sup>531</sup> With respect to Merrill & Ring’s second alleged violation of NAFTA Article 1106(1)(c), the Tribunal held that Canada had

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<sup>525</sup> *ibid* para 119.

<sup>526</sup> *ibid* paras 45, 99-100, 115.

<sup>527</sup> *ibid* para 107.

<sup>528</sup> *ibid* para 40.

<sup>529</sup> *ibid* para 109.

<sup>530</sup> *ibid* para 115.

<sup>531</sup> *ibid* para 116.

convincingly demonstrated that the claimant could have hired service providers outside of Canada and that hiring Canadian service providers was primarily motivated by business considerations and the higher cost of hiring outside of Canada.<sup>532</sup>

However, the *Merrill & Ring* Tribunal erroneously considered the absence of intent to restrict or enhance exports as grounds for concluding that the cutting, sorting and scaling requirements did not constitute an LSR.<sup>533</sup> Similarly, the Tribunal erroneously considered the remote and indirect connection between the exports of claimant's investment and the (alleged and non-existent) requirement to resort to Canadian service providers for cutting, sorting and scaling logs as grounds for concluding that there existed no LSR.<sup>534</sup> The Tribunal made an erroneous general pronouncement when declaring that a measure "needs to be directly and specifically connected to exports" in order to qualify as any of the performance requirements prohibited under NAFTA Article 1106.<sup>535</sup> The lack of direct and specific connection between the measures at issue and the exports of a claimant's investment is irrelevant in order to determine whether prohibitions of LSRs such as NAFTA Article 1106(1)(c) are breached. Moreover, many other performance requirements prohibited under NAFTA Article 1106, such as LCRs, product mandating requirements and technology transfer requirements, have nothing to do with exports.

In *Mobil & Murphy v Canada*, the claimants, Mobil Investments Canada Inc. and Murphy Oil Corporation ("Mobil and Murphy"), two Delaware corporations, had invested in the Hibernia and Terra Nova offshore petroleum projects (the "Projects"), located off the coast of the Province of Newfoundland and Labrador ("Province") in Canada. The Projects were governed by parallel provincial and federal legislation (together, the "Accord Acts")<sup>536</sup> that created the Canada-Newfoundland Offshore Petroleum Board (the "Board"). The Claimants, like any other prospective offshore oil operator, had to submit benefits plans containing provisions ensuring that research and development ("R&D") and education and training ("E&T") expenditures would be made in the Province. The Accord Acts granted the Board discretionary power to issue guidelines regarding benefits plans.<sup>537</sup> In 2004, the Board adopted the Guidelines for Research and Development Expenditures (the "2004 Guidelines"), which were at the heart of the dispute before the Tribunal.<sup>538</sup> The 2004 Guidelines departed from previous guidelines, notably by

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<sup>532</sup> *ibid* para 118.

<sup>533</sup> *ibid* para 115.

<sup>534</sup> *ibid* para 118.

<sup>535</sup> *ibid* para 117.

<sup>536</sup> Nearly identical, both Accord Acts were deemed covered by Canada's reservation: *Mobil & Murphy (Majority)* (n 13) paras 35, 248 and fn 272.

<sup>537</sup> *ibid* paras 37–8.

<sup>538</sup> *ibid* para 45.



imposing compulsory fixed amounts for R&D expenditures in the Province.<sup>539</sup> Mobil and Murphy alleged that the 2004 Guidelines compelled them to spend fixed amounts for R&D activities in the Province as a condition of operating their investments in the Projects and that this local R&D requirement constituted an LSR in violation of NAFTA Article 1106(1)(c).<sup>540</sup>

The *Mobil & Murphy* Tribunal unanimously decided that the 2004 Guidelines violated NAFTA Article 1106(1)(c).<sup>541</sup> Even though Mobil and Murphy's claim rested only on the local R&D expenditure requirements imposed by the 2004 Guidelines, the Tribunal framed the main interpretative question as whether the term "services," as used in NAFTA Article 1106(1)(c), encompasses R&D and E&T.

In its submissions, Canada referred to a consistent differentiation between LCRs and LSRs on one hand and R&D and E&T requirements on the other hand.<sup>542</sup> Canada argued that NAFTA Article 1106(1)(c) applies only to a "closed set of performance requirements that would otherwise reduce the cross-border flow and importation of goods and services,"<sup>543</sup> which therefore would have excluded R&D requirements aimed at "increasing the knowledge base of the country."<sup>544</sup> Canada argued that while the TRIMs Agreement prohibits LCRs and LSRs, it does not specify R&D requirements.<sup>545</sup> Canada further quoted UNCTAD which had construed NAFTA Article 1106 as permitting R&D requirements and which identified numerous other IIAs which also permitted R&D requirements.<sup>546</sup> Along the same lines, LCRs and LSRs should not include E&T requirements whose largely differing and non-trade purposes<sup>547</sup> warranted tailored treatment under IIAs and which were generally authorised by IIAs according to UNCTAD.<sup>548</sup> Canada also invoked the varying economic policy objectives as grounds for distinguishing LCRs and LSRs from R&D and E&T requirements: neither R&D nor E&T requirements serve as instruments to reduce imports or protecting the domestic market to the benefit of local goods producers or service providers.<sup>549</sup> Canada was effectively arguing that LCRs and LSRs and

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<sup>539</sup> *ibid* para 46.

<sup>540</sup> *ibid* paras 100-101.

<sup>541</sup> *ibid* para 490(2).

<sup>542</sup> *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 161-162, 171.

<sup>543</sup> *Mobil & Murphy (Majority)* (n 13) para 222.

<sup>544</sup> *ibid* para 222; *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 169-170.

<sup>545</sup> *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 162-164.

<sup>546</sup> *Mobil & Murphy* – Counter-Memorial of Canada (n 182) para 165, quoting UNCTAD, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D*, UN Doc UNCTAD/WIR/2005 (2005) 229.

<sup>547</sup> To correct shortcomings of the labour market, to compel corporations to undertake more training and development activities and to foster increased resources in more specialised and complex activities: see *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 165, 170, quoting notably UNCTAD, *FDI & Performance Requirements* (n 5) 30.

<sup>548</sup> *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 167, 176.

<sup>549</sup> *Mobil & Murphy* – Counter-Memorial of Canada (n 182) para 168.

R&D and E&T requirements had to be understood on the basis of their respective settled meanings, that the settled meanings of LCRs and LSRs had never been intended to encompass R&D and E&T requirements and that States have clearly distinguished between these different types of requirements.

The *Mobil & Murphy* Tribunal rejected Canada's approach and stated that excluding R&D and E&T from the term "services" "... because the form of transmission is not always cross-border" demanded assigning "a special meaning" to the term "services" that the NAFTA text did not reflect.<sup>550</sup> The *Mobil & Murphy* Tribunal simply justified its interpretation with a dictionary-driven ordinary meaning, a narrowly-construed context and with the trade-liberalising and investment-increasing objects and purposes of the NAFTA as set forth in Articles 102(1)(a) and 102(1)(c).<sup>551</sup>

The Tribunal incorrectly isolated the term "services" from the rest of NAFTA Article 1106(1) and decontextualised such term before framing its ordinary meaning in an overly broad manner, mainly by relying on dictionary definitions of the term.<sup>552</sup> The Tribunal decided that the ordinary meaning of the term "services" in NAFTA Article 1106(1)(c) "is broad enough to encompass R&D and E&T."<sup>553</sup> The Tribunal considered that R&D and E&T "may be seen as mainstream forms of service sector activity," that "there is nothing inherent in the term 'services' in NAFTA Article 1106(1) that necessarily excludes R&D and E&T,"<sup>554</sup> and that R&D and E&T "fit into that broad definitional category of economic activity."<sup>555</sup>

Drawing further support for its interpretation from the context of NAFTA Article 1106(1)(c), the Tribunal limited such context to considering the use of the term "services" within the NAFTA. The Tribunal zeroed in on the use of the term "services" within the Common Classification System for services regarding Government procurement (NAFTA Appendix 1001.1b-2-B) and noted that the Common Classification System suggests a broad definition for the term "services" that explicitly mentions E&T and R&D services.<sup>556</sup>

The Tribunal further inferred from NAFTA Article 1106(4) that the Parties to the NAFTA excluded R&D and E&T requirements from the prohibition of advantage-conditioning performance requirements under NAFTA Article 1106(3),<sup>557</sup> but not from Article 1106(1).

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<sup>550</sup> *Mobil & Murphy (Majority)* (n 13) para 222.

<sup>551</sup> *ibid* para 225.

<sup>552</sup> *ibid* paras 177, 216-218.

<sup>553</sup> *ibid* para 216.

<sup>554</sup> *ibid* para 216.

<sup>555</sup> *ibid* para 218.

<sup>556</sup> *ibid* paras 220-221.

<sup>557</sup> *ibid* paras 223-224.

However, the Tribunal did not point out that within Article 1106(4), NAFTA Parties distinguished between “provid[ing] a service,” “train[ing] or employ[ing] workers,” and “carry[ing] out research and development,” distinctions that suggest that the term “service” does not automatically include R&D or E&T and that its meaning does not enjoy the clarity that the Tribunal willingly assigned to it using a minimalistic contextual approach.

By contrast with the wording of the NAFTA, Article VI(f) of the 1994 U.S. Model BIT, as well as the 13 American BITs that reproduce such provision, specifically prohibit local R&D requirements in addition to prohibiting LSRs. The prohibition of local R&D requirements was subsequently omitted from Article 8(1) of the 2004 U.S. Model BIT and from the previously discussed 20 IIAs that reproduce such provision, since the United States was unsure whether its own practice complied with such prohibition.<sup>558</sup> It is obvious that the United States and the other State Parties to these 20 IIAs did not remove the prohibition of mandatory local R&D requirements on the basis that they considered it redundant in the presence of prohibitions of LSRs. Rather, these State Parties did not wish to prohibit mandatory local R&D requirements. Arguing that their prohibitions of LSRs also prohibit mandatory local R&D requirements could not be easily reconciled with their intent.

With its decision, the *Mobil & Murphy* Tribunal incorrectly transformed the prohibition of LSRs into a catchall provision, ignored its clear delimitations and also ignored the respective settled meanings of LSRs, R&D requirements and E&T requirements that differentiate one such set of measures from another. Instead, the 2004 Guidelines should not have fallen within the scope of mandatory performance requirements prohibited under NAFTA Article 1106(1) as they do not amount to LSRs. Canada should have been allowed to adopt the 2004 Guidelines under NAFTA Article 1106(1).

### **E. Prohibiting Advantages Conditioned Upon Performance Requirements**

It has been argued that in instances where subsidiaries abroad deliberately accept performance requirements prior to or simultaneously to their investment decision, prohibiting performance requirements is unnecessary,<sup>559</sup> especially if such subsidiaries receive compensating investment incentives, since MNCs and their subsidiaries abroad can then be assumed to have calculated that complying with performance requirements would net them benefits.<sup>560</sup>

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<sup>558</sup> Vandeveld (n 84) 392.

<sup>559</sup> Singapore (n 148) para 9.

<sup>560</sup> Bergsten (n 53) 14-15; Claude G. B. Fontheim and R. M. Godbaw, “Trade Related Performance Requirements under the GATT-MTN System and US Law” 14 *Law and Policy in International Business*

However, acceptance of performance requirements by targeted investors would cover only the effects incurred by the targeted investors and would do nothing to mitigate the adverse impacts on the trade interests of the home States of such investors or on third States.<sup>561</sup> Welfare losses caused by performance requirements (notably through reduced exports) are then mainly felt by home States and not by the targeted subsidiaries abroad,<sup>562</sup> as well as by other investors in a competitive relationship with recipients of advantages. The EC and a number of other States shared these concerns and unequivocally asserted that agreement by an investor to comply with TRIMs does nothing to mitigate the adverse trade effects incurred by home or third States or by other investors by virtue of such TRIMs.<sup>563</sup> Prohibiting advantage-conditioning performance requirements therefore appear as a rational means for home States to protect their interests at stake in relation with outward FDI.<sup>564</sup>

This section first investigates the disciplining of advantage-conditioning performance requirements under the TRIMs Agreement and the SCM Agreement. Second, this section surveys the various approaches that PRPs in IIAs have espoused in respect of advantage-conditioning performance requirements. Third, this section attempts to define the notion of “advantage” as used in PRPs of IIAs by drawing from the notion of “advantage” under the TRIMs Agreement the notion of “benefit” under the SCM Agreement. Finally, this section appraises the interpretation of the term “advantage” by arbitral tribunals having applied prohibitions of advantage-conditioning performance requirements.

### **1. Scope and Coverage of Disciplines Applicable to Advantage-Conditioning Performance Requirements Under the TRIMs Agreement and the SCM Agreement**

This section analyses the scope and coverage of disciplines applicable to advantage-conditioning performance requirements under the TRIMs Agreement and the WTO SCM Agreement taking into account the fact that disciplines applicable to mandatory performance requirements under the TRIMs Agreement have been previously discussed. This section then scrutinises the contiguous concepts of “advantages” (TRIMs Agreement, PRPs in IIAs) and “benefits” (the SCM Agreement). This section also explores the interconnection between the notions of advantage and benefit and how the notion of benefit in the SCM Agreement can help interpret the term “advantage” used in the TRIMs Agreement and in PRPs of IIAs.

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129-180 (1982-1983), 131; Graham (n 42) 122, fn 10; Gudgeon (n 112) 105, 127; Jacobsen (n 34) 1182; McCulloch and Owen (n 48) 335-336; Dani Rodrik, “Industrial Policy for the Twenty-first Century,” *paper prepared for UNIDO* (September 2004), 11.

<sup>561</sup> EC Submission 10 (n 264) para 5; see also: GATT, *Note on TRIMs* (1987) (n 365) para 16.

<sup>562</sup> Bergsten, “Investment Wars” (n 420) 144; Wolff (n 48) 41, 43; Barshefsky (n 88) 20.

<sup>563</sup> EC Submission 10 (n 264) para 5; see also: GATT, *Note on TRIMs* (1987) (n 365) para 16.

<sup>564</sup> Bergsten, “Investment Wars” (n 420) 146-147.

The TRIMs Agreement and the SCM Agreement specifically prohibit conditioning the receipt of an advantage on compliance with enumerated performance requirements, albeit both in respect of goods only. A clear complementarity and a convergence of concerns exist between the TRIMs Agreement and the SCM Agreement.<sup>565</sup> Articles 1 and 2 of the TRIMs Agreement's Illustrative List explicitly prohibit identified TRIMs (LCRs, trade-balancing requirements, foreign exchange restrictions, export restrictions and import restrictions) "compliance with which is necessary to obtain an advantage," while the SCM Agreement prohibits two advantage-conditioning performance requirements. Article 3.1(a) of the SCM Agreement prohibits subsidies contingent upon EPRs, while Article 3.1(b) of the SCM Agreement prohibits subsidies contingent upon LCRs. While TRIMs Agreement also prohibits advantage-conditioning LCRs, it fell short of explicitly prohibiting advantage-conditioning EPRs, its disciplines having been confined to export restrictions. The SCM Agreement therefore increases the scope of WTO disciplines applicable to performance requirements beyond the reach of the TRIMs Agreement in respect of advantage-conditioning EPRs, while mandatory EPRs that do not condition the grant of incentives are not prohibited under WTO Agreements.

During the GATT Uruguay Round of negotiations, some GATT Members pointed to the fact that the proposed prohibited subsidies were already prohibited under GATT Articles III (subsidies contingent on LCRs) and XVI:4 (subsidies contingent on EPRs), while States supporting such prohibitions argued that improved clarity and certainty nevertheless warranted their designation as prohibited subsidies.<sup>566</sup>

## **2. The Regulation of Advantage-Conditioning Performance Requirements by PRPs in IIAs**

### *a) PRPs Which Remain Silent in Respect of Advantage-conditioning Performance Requirements*

During the GATT Uruguay Round of negotiations, the EC pointed out that not prohibiting performance requirements when they act as conditions for the receipt of investment incentives would provide States with a loophole to PRPs, and that performance requirements should be

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<sup>565</sup> See *Indonesia — Certain Measures Affecting the Automobile Industry*, WTO Panel Report, [*Indonesia—Autos*], circulated 2 July 1998, paras. 14.50–14.52: "[w]e consider that the SCM and TRIMs Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The TRIMs Agreement and the SCM Agreement may have overlapping coverage in that they may both apply to a single legislative act, but they have different focus, and they impose different types of obligations." See also Graham (n 42) 123.

<sup>566</sup> GATT, *Note on Subsidies* (1989) (n 164) para 6.

prohibited regardless of whether they are mandatory or condition the conferral of advantages.<sup>567</sup> The United States considered that combining performance requirements with incentives would only exacerbate their trade-distorting effect<sup>568</sup> and originally called for international disciplines applicable to both sets of measures.<sup>569</sup> And yet, a great number of PRPs in IIAs do not explicitly address performance requirements imposed as conditions for the receipt of advantages. What are the implications of such silence? Given the frequent presence of advantages alongside performance requirements, this question can significantly impact the scope of advantage-silent PRPs depending on how this question is answered. This question can notably be answered in two ways. First, performance requirements imposed as conditions for the receipt of an advantage are not prohibited in the absence of explicit reference to the term “advantage.” Second and alternatively, such performance requirements are prohibited in spite of the absence of reference to advantages in a PRP. Advantage-conditioning performance requirements could be prohibited by advantage-silent PRPs notably if such PRPs use wording that refers to the establishment, expansion, operation, conduct or maintenance of investments, since advantage-conditioning performance requirements may indeed fall within such scenarios of investment-related activities. Advantage-conditioning performance requirements could also fall within the broad expression “any other similar requirements” or “*toutes autres mesures ayant un effet analogue*” in instances where PRPs use such wordings and where PRPs do not restrict their applicability to specific activities of an investment that would not encompass advantage-conditioning performance requirements.

All of France’s 64 BITs which comprise PRPs are silent with respect to advantage-conditioning performance requirements. Perhaps the predominant French approach, which consists of framing the PRP as a subcategory of FET, may provide sufficient breadth to encompass advantage-conditioning performance requirements, at least in respect of the 48 French BITs whose PRPs replicate the PRP from France’s Model BIT (see above), and in respect of the three similarly-constructed French BITs whose PRPs provide more comprehensive protection to investors than the PRP from France’s Model BIT (see above). While it might be more difficult, in respect of the 13 French BITs with PRPs which prohibit only arbitrary, unfair, abusive and/or discriminatory Performance Requirements (11 as part of FET, one as part of national treatment and one as part of MFN treatment), to argue that advantage-conditioning performance requirements are arbitrary, unfair, abusive and/or discriminatory to the point of breaching such BIT provisions, nothing would explicitly prevent such PRPs from applying to advantage-

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<sup>567</sup> GATT, *Note on TRIMs* (n 60) para 5.

<sup>568</sup> GATT, *Note on TRIMs* (n 60) para 55.

<sup>569</sup> Bale (n 83) 180, 181; Waldmann (n 83) 190; Brock (n 83) 21, 24.

conditioning performance requirements in the same way as they would apply to mandatory ones. Accordingly, the 64 French BITs with PRPs would in principle apply to advantage-conditioning performance requirements.

The previously discussed 21 American BITs with practically identically-worded PRPs signed between 1982 and 1995 prohibit the imposition of performance requirements as conditions for the establishment, expansion or maintenance of investments, but make no mention of advantages conditioned on compliance with performance requirements. Among those 21 American BITs, nine address performance requirements as conditions for the receipt of an advantage in IIA sections distinct from the PRP text itself.<sup>570</sup> First, paragraph 2 of the Agreed Minutes to the Panama - U.S. BIT (1982), which was meant to clarify the intent of the PRP and forms an “integral part” of the BIT, acknowledges the existence of Panama’s incentive laws which confer benefits to companies having signed contracts with the Government of Panama and pursuant to which these companies agree to comply with performance requirements stated in such contracts. Paragraph 2 does not impose any obligation upon Panama to terminate its incentive laws or to remove performance requirements from contracts entered into or to be signed in the future.<sup>571</sup> Interpreting such “clarifying language” so as to make the PRP inapplicable to advantage-conditioning performance requirements may render the PRP meaningless and would constitute the most significant discrepancy compared to the corresponding U.S. Model BIT.<sup>572</sup> However, such “clarifying language” falls short of explicitly authorising advantage-conditioning performance requirements.

Second, the PRP included in the Sri Lanka - U.S. BIT (1991) departed from the U.S. Model BIT via paragraph 4 of its Protocol, which acknowledged Sri Lankan laws that grant incentives to investors on compliance with EPRs or technology transfer requirements.<sup>573</sup> Paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991) ambiguously and implicitly suggests that the otherwise broad and open-ended PRP does not apply to performance requirements imposed as conditions for the receipt of an advantage.<sup>574</sup> The U.S. State Department stated that paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991) was meant to clarify “the U.S. position that such incentive-based commitments are not to be considered performance requirements” for

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<sup>570</sup> The Panama - U.S. BIT (1982); the Poland - U.S. BIT (1990); the Czech and Slovak Federal Republic - U.S. BIT (1991); the Sri Lanka - U.S. BIT (1991); the Romania - U.S. BIT (1992); the Bulgaria - U.S. BIT (1992); the Estonia - U.S. BIT (1994); the Latvia - U.S. BIT (1995); the Lithuania - U.S. BIT (1995).

<sup>571</sup> Agreed Minutes to the Panama - U.S. BIT, as discussed in Vandeveldel, “The Second Wave” (n 112) 676-677; see also “Statement of Kenneth J. Vandeveldel before the U.S. Senate” (n 130) 71.

<sup>572</sup> Sachs (n 72) 208-209. See also: Gudgeon (n 112) 127 and fn 80; Vandeveldel (n 84) 38, 40.

<sup>573</sup> “Statement of Kenneth J. Vandeveldel before the U.S. Senate” (n 130) 71; Vandeveldel, “The Second Wave” (n 112) 676-677.

<sup>574</sup> Paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991), as discussed in Vandeveldel, “The Second Wave” (n 112) 674, 676-677. See also “U.S. State Dept. Responses to Sen. Pell” (n 78) 26, 40.

purposes of the PRP since “[s]uch incentives are acceptable parts of any country's economic policy and are also used quite extensively in the United States.”<sup>575</sup> Nevertheless, the United States viewed the Sri Lankan incentive programme as a potential barrier to American FDI; the United States and Sri Lanka therefore agreed in the Protocol that either Party to the BIT could request consultations aimed at eliminating adverse effects brought about by such incentive laws.<sup>576</sup>

The United States appears to have construed the faltering language in the Panama - U.S. BIT (1982) and the Sri Lanka - U.S. BIT (1991) as rendering their PRPs inapplicable to advantage-conditioning performance requirements. The U.S. Department of State seems to have partially approved interpreting PRPs in BITs signed before 1992 restrictively and as inapplicable to advantage-conditioning performance requirements. The U.S. State Department considered that most tax matters fell outside of the scope of these same 21 American BITs signed between 1982 and 1995, and that as a result, those U.S. BITs do not prohibit performance requirements imposed as conditions for granting tax incentives.<sup>577</sup> These comments were construed as meaning that these same 21 American BITs did not prohibit advantage-conditioning performance requirements.<sup>578</sup>

As will be seen in greater detail in the following section, the other eight U.S. BITs to explicitly address advantage-conditioning performance requirements within a treaty instrument external to their PRPs were signed respectively with Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia. The PRPs of these eight BITs also do not apply to advantage-conditioning performance requirements.

Article V(2) of the Canada - Ukraine FIPA (1994) applies only to mandatory performance requirements and does not explicitly address performance requirements imposed as conditions for the receipt of advantages. Moreover, Article VI(2)(b) of the Canada - Ukraine FIPA (1994) excludes from its PRPs “subsidies or grants provided by a government or a state enterprise, including government-supported loans, guarantees and insurance.” Fourteen Canadian FIPAs replicate this same silence regarding advantage-conditioning performance requirements and this same exclusion of subsidies or grants from their PRPs.<sup>579</sup> Silence and exclusion could

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<sup>575</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 44; Vandeveld (n 84) 399.

<sup>576</sup> Paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991); see: Vandeveld, “The Second Wave” (n 112) 676; Vandeveld (n 84) 399.

<sup>577</sup> “U.S. State Dept. Responses to Sen. Pell” (n 78) 34.

<sup>578</sup> Vandeveld (n 84) 393.

<sup>579</sup> Articles V(2) and VI(2)(b) of the Canada - Trinidad and Tobago FIPA (1995); Articles V(2) and VI(2)(b) of the Canada - Philippines FIPA (1995); Articles V(2) and VI(2)(b) of the Canada - South Africa FIPA (1995); Articles V(2) and VI(2)(b) of the Canada - Ecuador FIPA (1996); Articles II(6) and II(8)(b) of the



translate into inapplicability of these 15 PRPs to advantage-conditioning performance requirements. However, as will be explained below, the term “advantage” is broader than subsidies and grants combined. Some advantage-conditioning performance requirements could conceivably still fall within the scope of the PRPs while not being excluded since they would not amount to subsidies or grants. These 15 Canadian FIPAs therefore remain ambiguous and do not explicitly exclude the application of their PRPs to all instances of advantage-conditioning performance requirements. By comparison, and as will be seen in the following section, two Canadian FIPAs (with Latvia and Romania) clearly render their PRPs inapplicable to advantage-conditioning performance requirements in order to address concerns of the European Commission.

*b) PRPs Which incorporate the TRIMs Agreement Prohibit Advantage-Conditioning Performance Requirements Unless Specified Otherwise*

PRPs which simply incorporate the TRIMs Agreement or its Illustrative List in their entirety incorporate by the same token the TRIMs Agreement’s prohibition of advantage-conditioning performance requirements. Article 14.9(1) of the Australia - Japan EPA (2014) also incorporates the TRIMs Agreement’s prohibition of advantage-conditioning performance requirements by committing State Parties not to apply any measure inconsistent with the TRIMs Agreement “in connection with investment activities of an investor.”

Article VI of the Canada - Costa Rica FIPA (1998), Article 12.6 of the Australia - Malaysia FTA (2012) and Article 5 of AANZFTA (2009) Chapter 11 (Investment) also prohibit advantage-conditioning performance requirements, so long as such requirements are “in connection with the establishment, acquisition or subsequent regulation of an investment” (Canadian IIA) or “in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment” (Australian IIAs).

Article 14.9(2) of the Australia - Japan EPA (2014) further prohibits “[w]ithout prejudice to paragraph 1” (which incorporates the TRIMs Agreement) the same detailed list of prohibited mandatory performance requirements as the ones enumerated in NAFTA Article 1106(1). The only way to reconcile the two subsections of Article 14.9 of the Australia - Japan EPA (2014)

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Annex to the Canada - Venezuela FIPA (1996); Articles V(2) and VI(2)(b) of the Canada - Panama FIPA (1996); Articles V(2) and VI(2)(b) of the Canada - Egypt FIPA (1996); Articles V(2) and VI(2)(b) of the Barbados - Canada FIPA (1996); Articles V(2) and VI(2)(b) of the Canada - Thailand FIPA (1997); Article VI of the Canada - Croatia FIPA (1997) and Article III(5)(b) of Annex I thereto; Article VI of the Canada - Lebanon FIPA (1997) and Article III(5)(b) of Annex I thereto; Articles V(2) and VI(2)(b) of the Armenia - Canada FIPA (1997); Article VI of the Canada - Uruguay FIPA (1997) and Article III(5)(b) of Annex I thereto; Article VI of the Canada - Costa Rica FIPA (1998) and Article III(5)(b) of Annex I thereto.

consists of considering advantage-conditioning performance requirements prohibited under the TRIMs Agreement as prohibited under Article 14.9(1) and to consider the mandatory performance requirements explicitly enumerated in Article 14.9(2), including those not prohibited under the TRIMs Agreement, as prohibited.

Article 6.2(5) of the India - Singapore CECA (2005) directly contradicts the prohibition of advantage-conditioning performance requirements enumerated in the TRIMs Agreement by specifying that nothing in Chapter 6 (Investment) applies to subsidies or grants provided by a State Party or to any conditions attached to their receipt. This contradiction could perhaps be resolved in favour of circumscribing the application of the TRIMs Agreement to mandatory performance requirements enumerated therein by resorting to Article 6.16(2)(a) of the India - Singapore CECA (2005), which specifies that the PRP (Article 6.23) does not apply to exceptions specified by the Parties. A negative inference that would make its PRP inapplicable to advantage-conditioning performance requirements could further be drawn from the absence of an exclusion of the PRP from its exception rendering the investment chapter inapplicable to subsidies or grants; by comparison, Article 10.2(6) of the India - Korea CEPA (2009) provides for the same exception that renders its investment chapter inapplicable to subsidies or grants, but excludes its PRP (Article 10.5) from this exception.

Article 9(3) of the Canada - Kuwait FIPA (2011) and Article 9(3) of the Canada - Mali FIPA (2014) provide “[f]or greater certainty” that the enumerated mandatory performance requirements prohibited under their respective Articles 9(2) (EPRs and export restrictions, LCRs, technology transfer requirements and product mandating requirements) are not prohibited when they are imposed as conditions for the receipt of advantages. Articles 9(3) of the Canada - Kuwait FIPA (2011) and of the Canada - Mali FIPA (2014) bring about a partial and unaddressed contradiction at least in respect of LCRs and export restrictions, since Article 9(1) of the Canada - Kuwait FIPA (2011) and Article 9(3) of the Canada - Mali FIPA (2014) incorporate in full the TRIMs Agreement into the FIPA and since advantage-conditioning LCRs and export restrictions are prohibited under the TRIMs Agreement. An additional source of conflict stems from Article 16(6) of the Canada - Kuwait FIPA (2011) and Article 16(7) of the Canada - Mali FIPA (2014), which render a number of provisions within their respective FIPAs inapplicable to “subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance:” Article 16(6) of the Canada - Kuwait FIPA (2011) and Article 16(7) of the Canada - Mali FIPA (2014) do not render their respective PRPs inapplicable to grants or subsidies, hence subsidies or grants, which arguably amount to advantages as understood under the TRIMs Agreement, from the ambit of their respective PRPs which incorporate the TRIMs Agreement.

c) *American and Canadian IIAs That Address Concerns of the European Commission in Respect of Advantage-conditioning Performance Requirements*

In September 2003, the United States, the European Commission and eight European countries on the verge of joining the European Union (Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and the Slovak Republic) reached an understanding according to which identical Additional Protocols were entered into by the United States separately with these eight countries in order to ensure the compatibility with EU law of these eight BITs.<sup>580</sup> These eight BITs did not address advantage-conditioning performance requirements within their PRPs. The European Commission requested identical exchanges of letters between the United States and each of the eight BIT Parties that would “interpret” each of the eight PRPs with a view to confirming their mutual understanding that the eight PRPs do not apply to performance requirements imposed as conditions for the receipt or continued receipt of an advantage.<sup>581</sup> These exchanges of letters simply aimed at “making explicit,” through an “interpretation,” what many other American BITs provide for in writing.<sup>582</sup>

Article V(2) of the Canada - Latvia FIPA (2009) and Article V(2) of the Canada - Romania FIPA (2009) prohibit listed mandatory performance requirements and do not refer to advantages. Article V(4) of the Canada - Latvia FIPA (2009) and Article V(4) of the Canada - Romania FIPA (2009) explicitly address advantages and concerns pertaining to the accession of Latvia and Romania to the EU by clearly declaring that their respective PRPs do not “... extend to conditions for the receipt or continued receipt of an advantage, such as any advantage resulting from the establishment of a marketing organisation for agricultural products and its market stabilizing effects.” This outcome is reinforced by the fact that Article VI(2)(b) of the Canada - Latvia FIPA (2009) and Article VI(2)(b) of the Canada - Romania FIPA (2009) clearly render their respective PRPs inapplicable to “subsidies or grants provided by a government or a state enterprise, including government-supported loans, guarantees and insurance.”

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<sup>580</sup> Vandeveld (n 84) 78-79. Bulgaria and Romania joined the EU on 1 January 2007, while the remaining six countries joined the EU on 1 May 2004.

<sup>581</sup> Article II(B) of the *Understanding Concerning Certain U.S. Bilateral Investment Treaties, United States Senate Executive Report 108-13 – Protocols Amending Existing Bilateral Investment Treaties With new European Union Member Nations*, 108th Cong., 2nd Sess. (4 May 2004) 7; see e.g., *Exchange of Letters Between the Embassy of the United States of America to Latvia and the Ministry of Foreign Affairs of the Republic of Latvia*, 11 December 2003 reproduced in *Additional Investment Protocol With the Republic of Latvia*, United States Senate, 108th Cong., 2nd Sess., Treaty Doc. 108–20 (2004).

<sup>582</sup> See e.g., *Letter of Submittal from the Secretary of State to the American President in respect of the Additional Protocol Between the Government of the United States of America and the Government of the Republic of Latvia to the Treaty for the Encouragement and Reciprocal Protection of Investment of January 13, 1995, signed at Brussels on September 22, 2003*, 108th Congress, 2nd Session, Treaty Doc. 108–20, U.S. Government Printing Office (2004), at VI. See also Vandeveld (n 84) 398-399.

d) *Explicitly Excluding Advantage-Conditioning Performance Requirements from PRPs*

A number of PRPs in American BITs clearly state their inapplicability to at least some advantage-conditioning performance requirements. For example, the final sentence of Article II(5) of the Jamaica - U.S. BIT (1994) states that nothing in the PRP can preclude State Parties from “providing benefits and incentives” on the condition that investments carry out EPRs. The U.S. Department of State described such additional sentences not as a change of policy, but rather as a clarification of what had been the intention under prior U.S. Model BITs and prior U.S. BITs and as “clarifying what is implicit in this paragraph – that this agreement does not preclude such measures as a condition for receipt of an advantage.”<sup>583</sup> It is worth noting that the views of the U.S. State Department, which considered all advantage-conditioning performance requirements as excluded from the scope of the PRP in the Jamaica - U.S. BIT (1994), extend far beyond the limitation set out in Article II(5) to the Jamaica - U.S. BIT (1994), which explicitly excludes from the PRP’s scope only EPRs that condition the conferral of “benefits and incentives.”

Article VI *in fine* of the 1994 U.S. Model BIT stipulates that prohibited requirements “do not include conditions for the receipt or continued receipt of an advantage.” Thirteen American BITs authorise advantage-conditioning performance requirements in the same way as does Article VI of the 1994 U.S. Model BIT.<sup>584</sup> The United States and signatory State Parties to these 13 BITs can accordingly lawfully secure an investor’s acceptance of a performance requirement by conferring an advantage in return. Similarly, the last sentence of Article VI of the Bolivia - U.S. BIT (1998) and Article 1 of the Protocol to the Bolivia - U.S. BIT (1998) clearly acknowledge the preserved right of Parties to impose performance requirements as conditions for the receipt of an advantage, including in the context of government procurement.

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<sup>583</sup> Jamaica - U.S. BIT (1994): Letter of Submittal from the Department of State to the President, Washington, 7 September 1994, 103rd Cong. 2nd Sess., Senate Treaty Doc. 103-35, 1994; Vandeveld (n 84) 390.

<sup>584</sup> Article VI of the Georgia - U.S. BIT (1994); Article VI of the U.S. - Uzbekistan BIT (signed in 1994, but not in force); Article VI of the Albania - U.S. BIT (1995); Article VI of the Honduras - U.S. BIT (1995); Article VII of the Croatia - U.S. BIT (1996); Article VI of the Jordan - U.S. BIT (1997); Article VI of the Azerbaijan - U.S. BIT (1997); Article VI of the Bolivia - U.S. BIT (1998); Article VI of the Mozambique - U.S. BIT (1998); Article VI of the El Salvador - U.S. BIT (signed in 1999, but not in force); Article VI of the Bahrain - U.S. BIT (1999). Article VI of the Trinidad and Tobago - U.S. BIT (1994) and Article VI of the Nicaragua - U.S. BIT (signed in 1995, but not in force) also follow the 1994 U.S. Model BIT in respect of advantage-conditioning performance requirements, except that the exclusion of advantage-conditioning performance requirements comes in a separate paragraph and such paragraph refers to benefits and incentives in lieu of advantages.

e) *Replicating the NAFTA Approach: Prohibiting Limited Lists of Advantage-Conditioning Performance Requirements*

The fact that a number of PRPs explicitly prohibit advantage-conditioning performance requirements even in instances where complying with such requirements may turn out to be profitable for complying investors suggests a favourable bias toward the interests of home State exporters of goods and services compared with the interests of home-State foreign investors abroad. This pro-trade and pro-export bias may be explained by the significant trade deficits of some home States, such as the United States, and the fact that more and more PRPs form part of FTAs whose approval by elected officials and their constituents hinges upon the ability of FTAs to increase home State exports.<sup>585</sup>

NAFTA Article 1106(3)<sup>586</sup> prohibits a lesser number of advantage-conditioning performance requirements compared to prohibited mandatory performance requirements: LCRs, LSRs in respect of goods, trade-balancing requirements and domestic sales restrictions. The four performance requirements in NAFTA Article 1106(3) are identically worded as four of the seven performance requirements found in Article 1106(1). Accordingly, EPRs and export restrictions, technology transfer requirements and product mandating requirements can lawfully condition the receipt of an advantage.<sup>587</sup> Thirty-one IIAs among those surveyed follow the exact same approach to advantage-conditioning performance requirements.<sup>588</sup> American BIT negotiators explained during negotiations that the significant trade-distortedness of these four types of performance requirements warranted their prohibition even when imposed as a condition for the

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<sup>585</sup> Vandeveldel (n 84) 394.

<sup>586</sup> Article 8(2) of the 2004 U.S. Model BIT, Article 8(2) of the 2012 U.S. Model BIT and Article 9(3) of the 2012 Canada Model FIPA prohibit advantage-conditioning performance requirements in the same manner.

<sup>587</sup> *Pope & Talbot* (n 167) para 72.

<sup>588</sup> American FTAs: Article 15.8(2) of the Singapore - U.S. FTA (2003); Article 10.8(2) of the Morocco - U.S. FTA (2004); Article 10.9(2) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(2) of the Oman - U.S. FTA (2006); Article 10.9(2) of the Peru - U.S. FTA (2006); Article 10.9(2) of the Colombia - U.S. FTA (2006); Article 10.9(2) of the Panama - U.S. FTA (2007); Article 11.8(2) of the Korea - U.S. FTA (2007). American BITs: Article 8(2) of the U.S. - Uruguay BIT (2005); Article 8(2) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 11.9(2) of the Australia - U.S. FTA (2004); Article 10.7(2) of the Australia - Chile FTA (2008); Article 5(2) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(2) of the CERTA Investment Protocol (2011); Article 14.9(3) of the Australia - Japan EPA (2014); Article 11.9(2) of the Australia - Korea FTA (2014). Canadian TIPS: Article G-06(3) of the Canada - Chile FTA (1996); Article 807(3) of the Canada - Colombia FTA (2008); Article 807(3) of the Canada - Peru FTA (2008); Article 9.07(3) of the Canada - Panama FTA (2008); Article 10.7(3) of the Canada - Honduras FTA (2013); Article 8.8(3) of the Canada - Korea FTA (2014); Article 8.5(2) of the Canada - EU CETA (2014); Article 9.10(2) of the TPP (2015). Chilean Agreements: Article 9-07(3) of the Chile - Mexico FTA (1998); Article 10.5(2) of the Chile - U.S. FTA (2003); Article 10.7(3) of the Chile - Korea FTA (2003); Article 9.6(2) of the Chile - Colombia FTA (2006); Article 11.6(2) of the Chile - Peru FTA (2006); Article 77(2) of the Chile - Japan EPA (2007); Article 10.8(2) of the Pacific Alliance Protocol (2014).

receipt of an advantage.<sup>589</sup> Ten Canadian FIPAs<sup>590</sup> reproduce Article 7(3) of the 2004 Canada Model FIPA itself the same as NAFTA Article 1106(3).

Other IIAs yield seemingly irreconcilable provisions that confuse the authorised/prohibited status of advantage-conditioning performance requirements. Pursuant to Article 16(9) of the Canada - Tanzania FIPA (2013), Tanzania preserves its right to grant special incentives to its nationals and companies with the avowed objective of “strengthen[ing] the capacity of national entrepreneurs.” Tanzania commits to progressively eliminating such special incentives after having strengthened the capacity of local industries. Article 16(9) renders Article 4 (National Treatment) inapplicable to such special incentives on the condition that these incentives “do not significantly affect the investments and activities of investors of the other Party.” However, Article 16(9) says nothing about Article 9 (the PRP); the absence of explicit exclusion of such special incentives from the scope of the PRP raises serious doubts as to whether the exception in their favour should prevail over the explicit prohibition of enumerated advantage-conditioning performance requirements under Article 9(3).

A number of IIAs go farther than NAFTA Article 1106(3) and prohibit a greater number of advantage-conditioning performance requirements. For example, Article 10.5(2) of the India - Korea CEPA (2009) prohibits advantage-conditioning EPRs, LCRs, LSRs in respect of both goods and services, trade-balancing requirements and domestic sales restrictions, while Article 89(2) of the India - Japan CEPA (2011) prohibits advantage-conditioning EPRs, LCRs, LSRs in respect of both goods and services, trade-balancing requirements, domestic sales restrictions, export restrictions and requirements to appoint high-ranking employees of a given nationality.

Since both Canada and the United States, as well as their respective signatory partner countries, considered it necessary to explicitly exclude advantage-conditioning performance requirements from their PRPs, the straightforward wording of advantage-silent PRPs in American, Canadian and French IIAs suggests that such PRPs cannot be deemed inapplicable to advantage-conditioning performance requirements on that basis alone and in the absence of explicit language to that effect, either in the PRP itself or in an instrument forming part of the IIA or accompanying it. As a result, proving the existence of an advantage conferred in relation with the imposition of a performance requirement should not automatically exclude such

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<sup>589</sup> Vandeveldel (n 84) 394.

<sup>590</sup> Article 7(3) of the Canada - Peru FIPA (2006); Article 7(3) of the Canada - Jordan FIPA (2009); Article 10(3) of the Benin - Canada FIPA (2013); Article 9(3) of the Canada - Tanzania FIPA (2013); Article 9(3) of the Canada - Serbia FIPA (2014); Article 9(3) of the Canada - Senegal FIPA (2014); Article 9(3) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(3) of the Burkina Faso - Canada FIPA (2014); Article 9(3) of the Canada - Guinea FIPA (2014); Article 9(3) of the Canada - Hong Kong, China FIPA (2016).

performance requirement from the scope of advantage-silent PRPs. Rather, one should consider whether the wording of a given PRP would encompass advantage-conditioning performance requirements, notably by considering them imposed as conditions for the establishment, operation, maintenance, expansion, sale or disposition of an investment.

The U.S. Department of State, when commenting the Additional Protocols entered into with the European Commission regarding eight U.S. BITs, considered that the silence of American BITs in respect of advantages reflected the standard policy of considering advantage-conditioning performance requirements as a valid and legitimate policy-making exercise. However, it is difficult to identify such a purportedly clear approach in the absence of a clear authorisation of advantage-conditioning performance requirements within PRPs whose wording and scope could be interpreted as applicable to advantage-conditioning performance requirements.

### **3. Defining Contiguous Concepts: Advantages Under the TRIMs Agreement and in PRPs of IIAs and Benefits under the SCM Agreement**

PRPs which address advantage-conditioning performance requirements within surveyed IIAs uniformly use the term “advantage,” yet none of these IIAs provides a definition for such term, and nor does the TRIMs Agreement.<sup>591</sup> Article 3.1 of the SCM Agreement only prohibits LCRs and EPRs that are contingent upon subsidies as defined under Article 1 of the SCM Agreement. The jurisprudential definition of the term “benefit” for purposes of the SCM Agreement can improve our understanding of the term “advantage” used in the TRIMs Agreement and within PRPs of IIAs.

Article 1 of the SCM Agreement narrows down the definition of the term “subsidy” by requiring the presence of two elements: first, a financial contribution (a term itself defined in a limited fashion) or income or price support as defined by GATT Article XVI, and second, a benefit. It is submitted that the term “advantage” is clearly reminiscent of the concept of “benefit” as used under Article 1 of the SCM Agreement since its shape or form is not narrowed by any additional criteria, either in the TRIMs Agreement or in PRPs of IIAs that make use of the concept of advantage. Moreover, WTO dispute settlement panels and the Appellate Body have equated “conferring a benefit” with “providing an advantage.”<sup>592</sup> The EC considered that advantages for purposes of an agreement on TRIMs are broader than the concept of subsidies, since the undefined notion of advantage is not constrained by the additional criteria of financial

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<sup>591</sup> de Sterlini (n 250) 449.

<sup>592</sup> Canada—FIT ABR (n 283), para 5.148; Canada—FIT Panel (n 274), para 7.271.

contributions or income or price support.<sup>593</sup>

In line with the plain and simple wording of Article 1.1(b) of the SCM Agreement, which limits itself to stating: “a benefit is thereby conferred,” the benefit test should remain simple and focus on its alleged recipients in light of the recipients’ position in the marketplace with and without the advantage.<sup>594</sup> The benefit test could also be formulated as whether a benefit or an advantage “makes the recipient ‘better off’ than it would otherwise have been,” absent that benefit or advantage.<sup>595</sup> According to the WTO Appellate Body, a benefit requires the existence of an advantage that places its recipient in a more advantageous position than that provided by the market absent the advantage,<sup>596</sup> such a test has been coined “the private market test.”<sup>597</sup> A lengthy list of measures could amount to advantages based on such a test. In *Pope & Talbot v Canada*, the claimant argued that the undefined term “advantage” used in NAFTA Article 1106(3) has a special meaning when used in trade agreements and defined “advantage” as “a more favourable or improved position or a ‘superior position’” by relying upon a WTO Appellate Body report.<sup>598</sup>

#### **4. Interpreting and Applying Prohibitions of Advantage-Conditioning Performance Requirements and the Term “Advantage”**

Advantages consist of a wide array of measures. In two recent disputes, WTO dispute settlement panels decided that mere participation in State-run renewable energy programmes which guarantee long-term purchases of electricity at fixed economically beneficial rates constitutes an advantage.<sup>599</sup>

Many arbitral tribunals interpreted the term “advantage” as used in NAFTA Article 1106 and. In *Pope & Talbot v Canada*, the claimant argued that the Export Control Regime imposed conditions upon the receipt of the fee-free (EB) and reduced-fee (LBF) export quotas, both of

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<sup>593</sup> GATT, *Note on TRIMs* (n 60) para 5.

<sup>594</sup> Canada—FIT ABR (n 283), para 5.148; Canada—FIT Panel (n 274), para 7.271.

<sup>595</sup> Canada—FIT ABR (n 283), para 5.130 and fn 624, citing *Canada—Measures Affecting the Export of Civilian Aircraft* (Complaints by Canada and Brazil) (1999), WTO Doc WT/DS70/AB/R (Appellate Body Report) <docsonline.wto.org> (Canada – Aircraft ABR), para 157.

<sup>596</sup> Rajib Pal, “Has the Appellate Body’s Decision in Canada—Renewable Energy / Canada—Feed-in Tariff Program Opened the Door for Production Subsidies?” 17(1) *J Int’l Econ L* 125 (2014) 131, citing Canada – Aircraft ABR (n 595), para 149.

<sup>597</sup> Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints*, Cambridge University Press (2014), 60.

<sup>598</sup> *Pope & Talbot – Investor Memorial* (n 497) para 105, citing *Brazil – Export Financing Programme for Aircraft – Report of the Appellate Body* (2 August 1999), WT/DS46/AB/R, para 177.

<sup>599</sup> Canada—FIT Panel (n 274), paras 7.164-7.165; India—Solar Cells (n 274), paras 7.70-7.72.



which allegedly constituted “advantages” under NAFTA Article 1106(3).<sup>600</sup> The claimant therefore argued that Canada had conferred an advantage by granting softwood producers export fee-free or reduced export fee amounts of lumber on certain conditions.<sup>601</sup> Canada ultimately acknowledged that the right to export fee-free constituted an advantage.<sup>602</sup> The *Pope & Talbot* Tribunal agreed with the view commonly held by disputing parties.<sup>603</sup>

At the time of initiating their respective arbitrations, Archer Daniels Midland (“ADM”) and Tate & Lyle Ingredients Americas, Inc (“TLIA”),<sup>604</sup> CPI and Cargill (the “Sweetener Claimants”) were all American corporations that manufactured and distributed HFCS in Mexico. The Sweetener Claimants challenged the same measures within the same timeframe. The Sweetener Claimants sold most of their HFCS to Mexican soft drink bottlers and competed with domestic cane sugar producers as a sweetener for soft drinks.<sup>605</sup> HFCS quickly gained a competitive edge over cane sugar due to its lower production cost, the consistency of its quality and a greater ease for storage and distribution.<sup>606</sup> Once HFCS became available in Mexico during the 1990’s, Mexican soft drink producers started replacing cane sugar with HFCS to the point where in 1997 HFCS occupied a 25% market share, up from 0% in 1991.<sup>607</sup> By 2001 the use of HFCS by the soft drink industry had grown substantially, which significantly reduced domestic sugar consumption in Mexico.<sup>608</sup>

On December 30, 2001 the Mexican Congress amended the Ley del Impuesto Especial sobre Producción y Servicios, (the “IEPS Amendment”) and imposed a 20% excise tax on soft drinks and on services used to transfer and distribute soft drinks that use any sweetener other than cane sugar (the “Sweetener Excise Tax”).<sup>609</sup> When the IEPS Amendment was being introduced before Congress, a Representative of the Mexican Congress stated clearly that the IEPS Amendment was aimed at protecting the domestic cane sugar industry from HFCS.<sup>610</sup> The Sweetener Excise Tax applied to soft drinks that used any sweetener other than cane sugar (most notably HFCS), while soft drinks sweetened exclusively with cane sugar were exempted, the whole in order to protect the domestic cane sugar industry from HFCS.<sup>611</sup> The obligation to

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<sup>600</sup> *Pope & Talbot* (n 167) para 48.

<sup>601</sup> *Pope & Talbot* – Investor Memorial (n 497) para 109.

<sup>602</sup> *Pope & Talbot* – Counter-Memorial of Canada (n 217), paras 325, 348, 351.

<sup>603</sup> *Pope & Talbot* (n 167) para 73.

<sup>604</sup> *ADM* (n 15).

<sup>605</sup> *ADM* (n 15) paras 40, 48-49, 70; *Cargill v Mexico* (n 16) paras 1, 6, 66-67; *CPI* (n 167) para 2.

<sup>606</sup> *ADM* (n 15) para 40; *Cargill v Mexico* (n 16) para 57; *CPI* (n 167) para 26.

<sup>607</sup> *ADM* (n 15) para 49.

<sup>608</sup> *ibid* para 70.

<sup>609</sup> *ibid* para 2; *Cargill v Mexico* (n 16) paras 2, 105; *CPI* (n 167) paras 3, 40.

<sup>610</sup> *ADM* (n 15) para 80; *Cargill v Mexico* (n 16) para 106; *CPI* (n 167) paras 42, 101.

<sup>611</sup> *ADM* (n 15) paras 80, 82; *Cargill v Mexico* (n 16) paras 105-106; *CPI* (n 167) paras 3, 40, 42, 101.

pay the Sweetener Excise Tax was incumbent upon Mexican bottlers when selling or importing soft drinks that comprised a sweetener other than cane sugar and/or upon purchasing services used to transfer and distribute same products.<sup>612</sup>

The Sweetener Excise Tax effectively translated into a 400% increase of the HFCS purchase price.<sup>613</sup> The Sweetener Claimants argued that immediately following the entry into force of the Sweetener Excise Tax, Mexican soft drink bottlers replaced HFCS with cane sugar as a sweetener in order to avoid paying the Sweetener Excise Tax, destroying the Sweetener Claimants' market share.<sup>614</sup> By 2001, HFCS had become the predominant sweetener used by the Mexican soft drink industry; within a year of its advent in 2002, the Sweetener Excise Tax had virtually excluded HFCS from the Mexican soft drink market.<sup>615</sup>

The Sweetener Claimants argued that the exemption from the Sweetener Excise Tax constituted an advantage conditioned on the use of domestic cane sugar in soft drink production, which amounted to according a preference to goods produced in Mexico, in violation of NAFTA Article 1106(3).<sup>616</sup> Mexico conceded, in *ADM v Mexico*, that exemption from the Sweetener Excise Tax constituted an advantage in favour of Mexican bottlers that used only cane sugar to sweeten their soft drinks,<sup>617</sup> but denied that NAFTA Article 1106(3) could apply to the Sweetener Excise Tax.<sup>618</sup>

The *ADM* Tribunal found a breach of NAFTA Article 1106 and considered that Mexico conferred an advantage to Mexican cane sugar producers by conditioning the exemption from the Sweetener Excise Tax (the "Sweetener Tax Exemption Advantage") upon the use of cane sugar as a soft drink sweetener, thus placing foreign HFCS producers at a competitive disadvantage compared to Mexican cane sugar producers.<sup>619</sup> The *ADM* Tribunal thus characterised the Sweetener Excise Tax as an LCR and an LSR by exposing the almost exclusively domestic origin of cane sugar consumed in Mexico.<sup>620</sup> The *ADM* Tribunal concluded that based on the essentially domestic nature of the Mexican cane sugar industry,<sup>621</sup> and based on the underlying protectionist intent of the Sweetener Excise Tax and of the Sweetener Tax Exemption

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<sup>612</sup> *CPI* (n 167) para 44; see also *ADM* (n 15) paras 103, 108, 215, 217; see also *Cargill v Mexico* (n 16) paras 306, 317, 319.

<sup>613</sup> *Cargill v Mexico* (n 16) paras 107-108.

<sup>614</sup> *ADM* (n 15) para 100; *CPI* (n 167) paras 4, 44, 46; *Cargill v Mexico* (n 16) paras 107-108.

<sup>615</sup> *Cargill v Mexico* (n 16) para 122; *CPI* (n 167) para 44.

<sup>616</sup> *ADM* (n 15) paras 3, 101, 103, 215-216, 218; *CPI* (n 167) paras 5, 57; *Cargill v Mexico* (n 16) para 306.

<sup>617</sup> *ADM* (n 15) para 218.

<sup>618</sup> *ibid* paras 108, 217-218.

<sup>619</sup> *ibid* paras 222, 304.

<sup>620</sup> *ibid* paras 223, 227.

<sup>621</sup> *ibid* paras 3, 101, 103, 225-226.

Advantage, the requirement of using only cane sugar as a soft drink sweetener in order to benefit from the Sweetener Tax Exemption Advantage discriminated against the HFCS industry, including the claimants and their investment, in violation of NAFTA Article 1106(3)(a) or (b).<sup>622</sup>

In *Cargill v Mexico*, Cargill argued that the Sweetener Excise Tax violated NAFTA Article 1106(3)(b) because the Sweetener Tax Exemption Advantage was conditioned on the LSR of using domestic cane sugar.<sup>623</sup> Mexico did not deny the existence of an advantage<sup>624</sup> and the *Cargill v Mexico* Tribunal held that the Sweetener Tax Exemption Advantage constituted an advantage under NAFTA Article 1106(3) whose receipt was conditioned upon the performance requirement to use domestically produced cane sugar in violation of NAFTA Article 1106(3), but did not specify which subparagraph of NAFTA Article 1106(3) had thus been violated.<sup>625</sup> In *CPI v Mexico*, the *CPI* Tribunal did not pronounce itself on the existence of an advantage and limited itself to succinctly rejecting the alleged breach of NAFTA Article 1106.<sup>626</sup>

The notion of advantage is broad and its interpretation has yet to face any difficulties in the context of investor-State arbitration. The arbitral tribunals in the previously discussed disputes rightly concluded that an advantage existed in the disputes before them and this conclusion flowed naturally from the lack of factual ambiguity. This thesis suggests that should any difficulties arise in the future, arbitral tribunals may turn to the interpretation of the term “benefit” carried out by WTO dispute settlement panels and the Appellate Body when deciding disputes under the SCM Agreement for guidance. It is true that the WTO dispute settlement body faces its own set of challenges related notably to the complexity of the relevant provisions of the SCM Agreement and to the intricate fact patterns of trade disputes. Nevertheless, as discussed above, WTO jurisprudence can help flesh out basic tests to guide arbitral tribunals when tasked with determining if a given investor received an advantage. The criteria for establishing the existence of an advantage should remain simple and focus on its alleged recipients in light of the recipients’ position in the marketplace with and without the alleged advantage. The criteria for ascertaining the conferral of an advantage could consist of determining whether an advantage makes its recipient “better off” than without the advantage.

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<sup>622</sup> *ibid* paras 227, 304.

<sup>623</sup> *Cargill v Mexico* (n 16) para 306.

<sup>624</sup> *ibid* para 307.

<sup>625</sup> *ibid* paras 318-319, 552, 557.

<sup>626</sup> *ibid* paras 9, 79-80.

## **F. PRPs in Trade and/or Investment Chapters of TIPs**

### **1. TIPs with two PRPs Reflect Dual Trade and Investment Concerns**

The dual and variable trade/investment nature of performance requirements renders them ill fitted for uniform disciplining. The investment-driven purposes of BITs can act as straitjackets onto PRPs which address multiple trade concerns alongside investment concerns. At the same time, aggregating a wide variety of performance requirements into the same PRP, which consequently exhibits an overall trade and investment nature, may lead to the better known performance requirements directly related to trade obfuscating the remote and indirect relation to trade of other performance requirements. PRPs should not be confined to the investment objectives of BITs or to the trade concerns of their most obvious trade-related performance requirements. PRPs should be construed in a way that accounts for the varying degrees of trade or investment relatedness of the distinct measures that they prohibit.

Disciplining performance requirements in TIPs lends itself to adopting two separate PRPs. A number of States have opted for two PRPs in their TIPs: they prohibit a number of performance requirements directly related to trade in their trade-focused chapters while prohibiting the same performance requirements directly related to trade, along with other performance requirements, in their investment-focused chapters. Following the lead of the NAFTA in this respect, 14 TIPs<sup>627</sup> among those surveyed prohibit performance requirements in two distinct chapters: first, in a chapter focused on trade in goods and market access, and second, in a chapter focused on investment. Exhibiting a different approach, six TIPs<sup>628</sup> do not comprise an investment chapter, but nevertheless prohibit performance requirements in their respective trade chapters.

The 15 previously identified TIPs (including the NAFTA) that prohibit performance requirements in both trade and investment chapters prohibit a larger number of mandatory performance requirements in their investment chapters than those contemplated by the PRPs in their respective trade chapters. They also prohibit advantage-conditioning performance requirements only in their investment chapters. Trade-chapter PRPs and investment-chapter PRPs both target EPRs, LCRs, LSRs (although this requirement is strangely limited to goods in the

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<sup>627</sup> The Canada - Chile FTA (1996); the Chile - U.S. FTA (2003); the Morocco - U.S. FTA (2004); the Australia - U.S. FTA (2004); the CAFTA-DR - U.S. FTA (2004); the Chile - Colombia FTA (2006); the Colombia - U.S. FTA (2006); the Oman - U.S. FTA (2006); the Peru - U.S. FTA (2006); the Korea - U.S. FTA (2007); the Panama - U.S. FTA (2007); the Australia - Chile FTA (2008); the Pacific Alliance Protocol between Chile, Colombia, Mexico and Peru (2014); the TPP (2015).

<sup>628</sup> Article 13 of the Israel - U.S. FTA (1985); Articles 2.4 and 2.8(2)(b) of the Bahrain - U.S. FTA (2004); Articles 3.4 and 3.8(2)(b) of the Chile - Panama FTA (2006); Article 3.6(2)(a) of the Chile - Vietnam FTA (2011); Article 3.6(4)(b) of the Chile - Hong Kong FTA (2012); Article 3.8(2)(b) of the Chile - Thailand FTA (2013).

investment-chapter PRPs)<sup>629</sup> and trade-balancing requirements. Contrary to their trade-chapter PRPs, the investment-chapter PRPs do not specify import substitution, but in addition to the performance requirements targeted in trade-chapter PRPs, investment-chapter PRPs prohibit domestic sales restrictions, technology transfer requirements and product mandating requirements.

In the same way as does NAFTA Article 318, 16 TIPs<sup>630</sup> among those surveyed define performance requirements as one of five requirements: EPRs, import substitution requirements, LSRs, LCRs and trade-balancing requirements. This list of prohibited performance requirements is clearly predicated on their trade-relatedness. Somewhat incoherently however, all but the trade-balancing requirements (silent as to goods or services) are drafted as encompassing measures applicable to goods and to services, even though this definition of performance requirements forms part of chapters focused solely on trade in goods. Of these 16 TIPs, the 10 American FTAs and the TPP (2015) exclude from their definitions four measures that would otherwise have fallen within EPRs and import substitution requirements: the requirement to subsequently export an imported good; the requirement to use an imported component for producing a good to be subsequently exported; the requirement that an imported component be substituted by an identical or similar component for use in producing a good to be subsequently exported; and the requirement that an imported good be substituted by an identical or similar good to be subsequently exported. By contrast, three Chilean TIPs<sup>631</sup> have left the expression “performance requirement” undefined and therefore do not properly delineate the open-ended scope of their trade-chapter PRPs.

Eighteen TIPs<sup>632</sup> prohibit conditioning import licenses on compliance with a performance

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<sup>629</sup> Except for Article G-06(1)(c) of the Canada - Chile FTA (1996), which applies to both goods and services.

<sup>630</sup> Article C-18 of the Canada - Chile FTA (1996); Article 3.24 of the Chile - U.S. FTA (2003); Article 2.12 of the Bahrain - U.S. FTA (2004); Article 2.11 of the Morocco - U.S. FTA (2004); Article 2.13(11) of the Australia - U.S. FTA (2004); Article 3.31 of the CAFTA-DR - U.S. FTA (2004); Article 3.16 of the Chile - Panama FTA (2006); Article 2.22 of the Colombia - U.S. FTA (2006); Article 2.12 of the Oman - U.S. FTA (2006); Article 2.22 of the Peru - U.S. FTA (2006); Article 3.32 of the Panama - U.S. FTA (2007); Article 2.15 of the Korea - U.S. FTA (2007); Article 3.1(j) of the Australia - Chile FTA (2008); Article 3.1 of the Chile - Vietnam FTA (2011); Article 3.1 of the Pacific Alliance Protocol (2014); Article 2.1 of the TPP (2015).

<sup>631</sup> The Chile - Colombia FTA (2006); the Chile - Hong Kong FTA (2012); the Chile - Thailand FTA (2013).

<sup>632</sup> Article 3.11(2)(b) of the Chile - U.S. FTA (2003); Article 2.8(2)(b) of the Bahrain - U.S. FTA (2004); Article 2.8(2)(b) of the Morocco - U.S. FTA (2004); Article 2.9(2) of the Australia - U.S. FTA (2004); Article 3.8(2)(b) of the CAFTA-DR - U.S. FTA (2004); Article 3.4(2)(b) of the Chile - Colombia FTA (2006); Article 3.8(2)(b) of the Chile - Panama FTA (2006); Article 2.8(2)(b) of the Oman - U.S. FTA (2006); Article 2.8(2)(b) of the Peru - U.S. FTA (2006); Article 2.8(2)(b) of the Colombia - U.S. FTA (2006); Article 3.8(2)(b) of the Panama - U.S. FTA (2007); Article 3.9(2)(b) of the Australia - Chile FTA (2008); Article 2.8(2)(b) of the Korea - U.S. FTA (2007); Article 3.6(2)(a) of the Chile - Vietnam FTA (2011); Article 3.6(4)(b) of the Chile - Hong Kong FTA (2012); Article 3.8(2)(b) of the Chile - Thailand FTA (2013); Article

requirement, a scenario unaddressed in the NAFTA and in the Canada - Chile FTA (1996). In the same way as does NAFTA Article 304, 13 TIPs<sup>633</sup> prohibit conditioning the waiver of customs duties upon the implicit or explicit compliance with performance requirements.

Article 13 of the Israel - U.S. FTA (1985) bears the heading “trade-related performance requirements” and prohibits mandatory EPRs and LCRs as a condition of establishment, expansion or maintenance of investments by State Party investors, as well as advantage-conditioning LCRs. One can easily ascertain its palpable focus on performance requirements most egregiously related to trade.

By drawing up two different PRPs within a single TIP, a number of State Parties clearly differentiated between performance requirements directly related to trade listed in trade-chapter PRPs and performance requirements indirectly or remotely related to trade that are prohibited in their investment-chapter PRPs. The approach of creating trade-chapter PRPs and investment-chapter PRPs has the merit of greater clarity, can facilitate their interpretation and application and better addresses the interests of home States at stake in relation to performance requirements by giving States access to dispute settlement mechanisms.

## **2. Conflicting Interests of Home States and Their Outward Investors Warrant State-to-State Disciplines on Directly Trade-Related Performance Requirements**

The unilateral initiatives of the United States against performance requirements<sup>634</sup> clearly

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3.6(2)(b) of the Pacific Alliance Protocol (2014); Article 2.10(2)(b) of the TPP (2015).

<sup>633</sup> Article C-03 of the Canada - Chile FTA (1996); Article 3.6 of the Chile - U.S. FTA (2003); Article 2.4 of the Bahrain - U.S. FTA (2004); Article 3.4 of the CAFTA-DR - U.S. FTA (2004); Article 2.4 of the Morocco - U.S. FTA (2004); Article 3.4 of the Chile - Panama FTA (2006); Article 2.4 of the Oman - U.S. FTA (2006); Article 2.4 of the Peru - U.S. FTA (2006); Article 2.4 of the Colombia - U.S. FTA (2006); Article 3.4 of the Panama - U.S. FTA (2007); Article 2.4 of the Korea - U.S. FTA (2007); Article 3.11 of the Pacific Alliance Protocol (2014); Article 2.5 of the TPP (2015).

<sup>634</sup> In the early 1980s, the Overseas Private Investment Corporation (“OPIC”) could refuse to insure American FDI abroad when bound by performance requirements that substantially reduce trade benefits accruing to the United States as a result of such FDI. Refusing insurance coverage was aimed at deterring American FDI from flowing into host States whose performance requirements reduced American exports: see Coughlin (n 36) 135; Jacobsen (n 34) 1191-1192 and fn 239; see also Roberts (n 136) 175. Section 212(c) of the Caribbean Basin Economic Recovery Act (CBERA) of 1983 enabled the President to confer unilateral preferential trade and tax benefits upon CBERA candidate countries drawing negative inferences from the reliance by candidate countries on distortive export subsidies, EPRs or LCRs: see U.S. House of Representatives, Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes Part I of II*, 111th Congress, 2nd Session, U.S. Doc No WMCP: 111-6, 2010 Edition (December 2010), U.S. Government Printing Office, 25-27; United States International Trade Commission (“ITC”), *Caribbean Basin Economic Recovery Act: Impact on U.S. Industries and Consumers and on Beneficiary Countries*, 21st Report 2011–12, Investigation No. 332-227, USITC Publication 4428 (September 2013), i, ix, 1-1, 1-4, 1-5. Section 203(d) of the Andean Trade Preference Act (ATPA), enacted on December 4, 1991, identically enabled the American President to factor-in the use of distortive export subsidies, LCRs or EPRs upon considering whether a country should receive ATPA

expressed concerns only over the harmful trade impacts of a select number of closely trade-related performance requirements from the vantage point of the United States as a home State and especially as an exporter of goods and services. These examples suggest that addressing performance requirements directly related to trade through State-to-State negotiations, disciplines and dispute settlement could prove more in line with the predominant motivations for disciplining such measures in the first place.

Interests of home States and those of their outward investors may be at odds when assessing host-State performance requirements.<sup>635</sup> For example, in the 1970s, 1980s and even beyond, American subsidiaries in host States and host States cooperated on performance requirements to the detriment of the United States as a home State.<sup>636</sup> As a result of such cooperation, American MNCs that had concluded contracts with host States binding them to comply with performance requirements in exchange for advantages feared the entry into such markets of new, performance requirement-free competitors.<sup>637</sup> For example, the Argentina - U.S. BIT (1991) comprises a PRP whose temporal applicability was adjusted in order to assuage the fears of first-mover American MNCs and notwithstanding that the immediate application of the PRP would have been much more in line with American interests.<sup>638</sup> The Protocol to the Argentina - U.S. BIT (1991) provides that Argentina could “maintain, but not intensify” existing performance requirements in the automotive industry for eight years following the entry into

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benefits: see U.S. House of Representatives, *Compilation of Trade Statutes* (defined in this same footnote above) 41-44; United States International Trade Commission (“ITC”), *Andean Trade Preference Act: Impact on U.S. Industries and Consumers and on Drug Crop Eradication and Crop Substitution, 2013 Sixteenth Report, 2013*, Investigation No. 332-352, USITC Publication 4486 (September 2014), 1-2. The United States Generalized System of Preferences (GSP) Renewal Act of 1984 conditioned eligibility to the U.S. GSP *inter alia* on the extent to which developing countries had “reduce[d] distorting investment practices and policies (including [EPRs]):” see Ronald Arun Nair, “The Role of India’s Foreign Investment Laws in Controlling Activities of Multinational Corporations” 14 *Syracuse J. Int’l L. & Comm.* 519 (1988) 542-543, fn 139, 141. Pursuant to the 1984 U.S. Trade and Tariff Act amendment of Section 301 of the 1974 U. S. Trade Act, the President may act against any country which burdens or restricts American trade by adopting trade-related performance requirements, and according to Section 307(b) of the U.S. Trade and Tariff Act of 1984, the USTR may undertake consultations with or retaliation against a country which imposes EPRs that adversely affect the United States: see Moran and Pearson, “Careful With TRIPs” (n 29) 129-130; Moran and Pearson, *TRPRs OPIC* (n 31) 58-59; Nair (679) 545-546, fn 150.

<sup>635</sup> Ariff (n 40) 352; Bergsten (n 60) 41, 43; Greenaway, “Political Economy of TRIMs” (n 62) 374-375; Greenaway (n 31) 148; Jacobsen (n 34) 1182-1183; Moran and Pearson, *TRPRs OPIC* (n 31) 59-60; David Robertson, *Investment Incentives in Home and Host Countries*, Report to the Task Force on Private Foreign Investment of the IMF-World Bank Joint Development Committee, DC/TF/PFI/80-5 (January 25, 1980) 1, 26; UNCTC and UNCTAD (n 43) 54, 61.

<sup>636</sup> Bergsten, “Investment Wars” (n 420) 143; Jacobsen (n 34) 1181-1184; Moran, “FDI and Host Country Development” (n 65) 285; Theodore H. Moran, “FDI and Development: What is the Role of International Rules and Regulations?” 12(2) *Transnational Corporations* (August 2003) 1, 8-9; Moran, Graham and Blomström (n 65) 383.

<sup>637</sup> Coughlin (n 36) 137.

<sup>638</sup> Argentina - U.S. BIT (1991): Letter of Submittal from the Department of State to the President, 13 January 1993, 103rd Cong., 1st Sess., Senate Treaty Doc. 103-2; paras 9, 11 of the Protocol to the Argentina - U.S. BIT (1991), as discussed in Vandeveld, “The Second Wave” (n 112) 674, 689.

force of the BIT. Argentina also had to apply residual performance requirements so as to not competitively disadvantage existing investments compared with new automotive investments.<sup>639</sup> This specification was meant to appease the Ford Motor Company which had made large-scale investments prior to the conclusion of the BIT.<sup>640</sup> Had the Protocol to the Argentina - U.S. BIT (1991) not deferred the application of its PRP, investors establishing themselves after the BIT's entry into force would have benefitted from the protection of the PRP upon first investing in Argentina. They never would have had to organise their activities in accordance with economically suboptimal performance requirements. Ford needed time to restructure its operations in order to respond to the Argentinian market's changing competitive pressures following Argentina's removal of performance requirements and related investment incentives.

Trade interests of home States figure prominently in PRPs, at least in respect of LCRs/LSRs, EPRs, export restrictions and trade-balancing requirements. Trade considerations therefore constitute an essential and definitional component of such performance requirements. Non-trade driven measures should therefore not fall within the meaning of LCRs/LSRs, EPRs or trade-balancing requirements.

PRPs should therefore not be framed or construed solely by reference to the investors that must comply with performance requirements. The harm caused by directly trade-related performance requirements is often felt by home States of targeted investors and not by targeted investors themselves. PRPs should therefore be drafted and interpreted so as to address the negative impacts of performance requirements on the party effectively injured, including home States of targeted investors. The fact that only States can institute disputes over disciplines on performance requirements in trade chapters of TIPs adds clarity as to their purpose, their scope and their interpretation.

## **V. Recurring Features that Modulate the Scope and Coverage of PRPs in IIAs**

This part draws from the survey of IIAs covered in this thesis to identify and analyse patterns in the drafting and structuring of PRPs that alter their scope and coverage. The first section distinguishes between two notable trends within PRPs in respect of investments and investors: PRPs that apply to investments and investors originating from any State (State Parties and non-Party States) as well as to domestic investments and investors, and PRPs that apply only to investments and investors originating from State Parties.

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<sup>639</sup> Paragraph 9 of the Protocol to the Argentina - U.S. BIT (1991).

<sup>640</sup> Vandeveld, "The Second Wave" (n 112) 689.



Second, this part appraises whether the applicability of PRPs hinges on a connection between an investment and a performance requirement, whether some PRPs apply only to specific phases of an investment, and whether some PRPs distinguish between or apply equally to the pre-establishment and post-establishment phases of an investment. This second section will briefly touch upon the only pronouncement by an arbitral tribunal to have discussed the link between a performance requirement and a given phase of an investment as a condition for the applicability of a PRP.

Third, this part identifies a number of PRPs whose very wording may defeat the original purpose sought when prohibiting advantage-conditioning performance requirements. This third section also appraises erroneous arbitral interpretations of the expression “in connection with” in NAFTA Article 1106(3) and the danger that such interpretations could deprive prohibitions of advantage-conditioning performance requirements of any effectiveness.

Fourth, this part analyses PRPs that consider commitments or undertakings as performance requirements when seeking to achieve any of the enumerated performance requirement objectives. This fourth section assesses the impact of distinguishing between *de facto* and *de jure* performance requirements in decisions of arbitral tribunals. This fourth section also tackles how arbitral tribunals approached the idea that substance should prevail over form and how they balanced the inherent characteristics of a measure with its effects when deciding whether a measure constitutes a performance requirement. Finally, this fourth section weighs the importance granted by arbitral tribunals to the statements, encapsulated in NAFTA Article 1106(5), that PRPs are exhaustive and apply only to specifically enumerated requirements.

Fifth, this part investigates mechanisms used to ensure that specific performance requirements remain lawful in the presence of PRPs. More often than not, IIAs comprise a number of recurring provisions that ensure their PRP’s inapplicability to measures deemed sufficiently important to warrant explicit assurances. This fifth section singles out multiple mechanisms that achieve this.

Sixth, this part analyses underlines the critical importance for States to retain sufficient latitude for imposing performance requirements as part of government procurement and analyses the features of treaty provisions drafted to ensure that the wholesale application of PRPs to procurement. This sixth section discusses an arbitral award that applied the corresponding NAFTA provisions. The seventh section will investigate the closely related disciplines on performance requirements within TIP chapters focused on government procurement, in which the term “offsets” replaces the expression “performance requirements,” and their links with

similar GATT-WTO treaty instruments.

Finally, this part highlights the crucial importance of reservations in striking the appropriate balance between ensuring a stable regulatory framework for investors and preserving sufficient policy-making flexibility for States. The eighth section scrutinises the inner-workings of reservations that shield measures that existed at the time of an IIA's signature. This eighth section also raises questions as to the significant unpredictability that could ensue from a number of Canadian FIPAs whose reservations open the door to validating measures beyond those explicitly set out in Annexes. This eighth section then turns to sectoral reservations that shield existing and future non-conforming measures from PRPs and points to a limited number of noteworthy departures from the NAFTA approach. This eighth sections ends with a critical appraisal of the sole arbitral award having conducted an in-depth analysis of reservations and with a warning that the complex practical implications of reservations leave the door open to considerable uncertainty.

## **A. PRPs, Investments and Investors**

This section distinguishes between PRPs that apply to all investments and investors and PRPs that apply only to covered investments and investors.

### **1. PRPs Applicable to All Investments**

Thirty-one of the currently surveyed IIAs<sup>641</sup> specify that their PRPs apply to all investments in

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<sup>641</sup> American FTAs: Articles 10.1(1)(c), 10.5(1) and 10.5(2) of the Chile - U.S. FTA (2003); Articles 15.2(c), 15.8(1) and 15.8(2) of the Singapore - U.S. FTA (2003); Articles 11.1(1)(c), 11.9(1) and 11.9(2) of the Australia - U.S. FTA (2004); Articles 10.1(c), 10.8(1) and 10.8(2) of the Morocco - U.S. FTA (2004); Articles 10.1(c), 10.9(1) and 10.9(2) of the CAFTA-DR - U.S. FTA (2004); Articles 10.1(1)(c), 10.8(1) and 10.8(2) of the Oman - U.S. FTA (2006); Articles 10.1(1)(c), 10.9(1) and 10.9(2) of the Peru - U.S. FTA (2006); Articles 10.1(1)(c), 10.9(1) and 10.9(2) of the Colombia - U.S. FTA (2006); Articles 10.1(1)(c), 10.9(1) and 10.9(2) of the Panama - U.S. FTA (2007); Articles 11.1(1)(c), 11.8(1) and 11.8(2) of the Korea - U.S. FTA (2007). American BITs: Articles 2(1)(c), 8(1) and 8(2) of the U.S. - Uruguay BIT (2005); Articles 2(1)(c), 8(1) and 8(2) of the Rwanda - U.S. BIT (2008). Australian IIAs: Articles 10.2(1)(c), 10.7(1) and 10.7(2) of the Australia - Chile FTA (2008); Articles 3(1)(c), 7(1) and 7(2) of the CERTA Investment Protocol (2011); Articles 2(1)(b), 9(1) and 9(2) of SAFTA Revised Chapter 8 (Investment) (2011); Articles 14.1(1)(c), 14.9(2) and 14.9(3) of the Australia - Japan EPA (2014); Articles 11.1(1)(c), 11.9(1) and 11.9(2) of the Australia - Korea FTA (2014). Canadian FTAs: Articles G-01(1)(c), G-06(1) and G-06(3) of the Canada - Chile FTA (1996); Articles 801(1)(c), 807(1) and 807(3) of the Canada - Peru FTA (2008); Articles 801(1)(c), 807(1) and 807(3) of the Canada - Colombia FTA (2008); Articles 9.02(1)(c), 9.07(1) and 9.07(3) of the Canada - Panama FTA (2008); Articles 10.2(1)(c), 10.7(1) and 10.7(3) of the Canada - Honduras FTA (2013); Articles 8.1(1)(c), 8.8(1) and 8.8(3) of the Canada - Korea FTA (2014); Article 8.2(1)(c), 8.5(1) and 8.5(2) of the Canada - European Union ("EU") Comprehensive Economic and Trade Agreement ("CETA") (2014) (refers to "any investments" instead of non-Party investors); Articles 9.2(1)(c), 9.10(1) and 9.10(2) of the TPP (2015). Chilean IIAs: Articles 9-02.1(c), 9-07(1) and 9-07(3) of the Chile - Mexico FTA (1998); Articles 10.2(1)(c), 10.7(1) and 10.7(3) of the Chile - Korea FTA (2003); Articles 9.1(1)(c), 9.6(1) and 9.6(2) of the Chile - Colombia FTA (2006); Articles 11.1(1)(c), 11.6(1) and 11.6(2) of

the territories of the relevant State Parties (and not only to investments by investors of other State Parties), thus reproducing NAFTA Article 1101(1)(c).<sup>642</sup> NAFTA Articles 1106(1) and 1106(3)<sup>643</sup> further provide that their prohibitions of mandatory and advantage-conditioning performance requirements apply to investments by both investors of a Party and investors of a non-Party; 41 IIAs among those currently surveyed (the 31 previously identified IIAs in addition to 10 Canadian FIPAs<sup>644</sup> which do not reproduce NAFTA Article 1101(1)(c)) similarly render their PRPs applicable to non-Party investors. The PRPs in France's 64 BITs that include such provisions do not refer to investors or investments and prohibit the measures in and of themselves, regardless of which investor they apply to; they would accordingly apply to any investment by any investor in the host State's territory. Pursuant to such treaty provisions, the imposition of a performance requirement is a breach *per se* since a State Party cannot impose performance requirements on covered investors, on its own domestic investors or on third-State investors even if all such investors are treated equally upon the imposition of a performance requirement.

A State can impose performance requirements not only onto foreign investors, but also onto purely domestic investors. Arguments in favour of their prohibition resonate in the same way for both foreign and domestic investors.<sup>645</sup> Rendering a PRP applicable to all investments and investors, as opposed to only covered investments by covered investors, aims at achieving objectives in addition to investor protection that go beyond the interests of investors directly affected by performance requirements. It aims more particularly at serving the economic development interests of home States. The State more likely to act as a home State in a cross-border investment relationship may wish to draft the PRP in a way that ensures that the PRP fully serves to promote its exports. To do so, the PRP must remove any home-State export restrictive measure that a host State can impose on any investor (domestic, from the home-

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the Chile - Peru FTA (2006); Articles 72(1)(c), 77(1) and 77(2) of the Chile - Japan EPA (2007); Articles 10.2(1)(c), 10.8(1) and 10.8(2) of the Pacific Alliance Protocol (2014).

<sup>642</sup> Article 2(1)(c) of the 2004 U.S. Model BIT, Article 2(1)(c) of the 2012 U.S. Model BIT and Article 2(1)(c) of the 2012 Canada Model FIPA essentially reproduce NAFTA Article 1101(1)(c).

<sup>643</sup> Article 8(1) and 8(2) of the 2004 U.S. Model BIT, Articles 7(1) and 7(3) of the 2004 Canada Model FIPA, Article 8(1) and 8(2) of the 2012 U.S. Model BIT and Article 9(1) and 9(3) of the 2012 Canada Model FIPA opt for the same approach as that of the NAFTA.

<sup>644</sup> Canadian FIPAs: Articles 7(1) and 7(3) of the Canada - Peru FIPA (2006); Article 10(1) and 10(3) of the Benin - Canada FIPA (2013); Article 9(1) and 9(3) of the Canada - Tanzania FIPA (2013); Article 9(1) and 9(3) of the Canada - Senegal FIPA (2014); Article 9(2) of the Canada - Mali FIPA (2014); Article 9(1) and 9(3) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(1) and 9(3) of the Canada - Guinea FIPA (2014). Article 9(1) and 9(3) of the Canada - Nigeria FIPA (2014) and Article 9(1) and 9(3) of the Canada - Serbia FIPA (2014) render their PRPs applicable to a covered investment "or any other investment." Article 9(1) of the Burkina Faso - Canada FIPA (2015) renders its mandatory PRP applicable to a covered investment "or any other investment," while its advantage-conditioning PRP under Article 9(3) applies to investments by investors of the other Party or by non-Party investors.

<sup>645</sup> Bergsten, *Performance Requirements* (n 34) 4.

State or from a third State) in the host State. Unhindered investors in the host State Party (for example, State B), whether bearing the nationality of the host State (State B), of the home State Party (for example, State A) or of a third non-Party State (State C), may elect to import goods or services from home State Party A if given freedom of choice thanks to the PRP's broad application within the IIA entered into by State A and State B, thus increasing the exports of home State Party A.<sup>646</sup>

For example, in *ADM*, *CPI* and *Cargill*, the obligation of paying Mexico's Sweetener Excise Tax rested with Mexican soft drink bottlers and arose when they sold or imported soft drinks that comprised a sweetener other than cane sugar and/or upon purchasing services used to transfer and distribute same products. Immediately following the entry into force of the Sweetener Excise Tax, Mexican soft drink bottlers began replacing HFCS (imported from the United States) with domestically-produced cane sugar as a sweetener in order to avoid paying the Sweetener Excise Tax. Within a year of its advent, the Sweetener Excise Tax had virtually excluded HFCS from the Mexican soft drink market. The Sweetener Excise Tax acted as an LCR/LSR which conditioned an advantage (the exemption from the Sweetener Excise Tax). NAFTA Article 1106(3) set out to prohibit those types of measures. The prohibition of the Sweetener Excise Tax meant the preservation of American exports as a home State to Mexico as a host State.

Rendering a PRP applicable to all investors and investments also aims at avoiding that covered investors and investments be placed at a disadvantage as a result of prohibiting advantage-conditioning performance requirements. PRPs applicable to all investors and investments make it impossible for host States to offer to any investor advantages in exchange for compliance with performance requirements. If a PRP were applicable only to covered investors or investments, nothing would prevent a host State from making compliance with performance requirements profitable for a non-covered investor or investment, thus harming the competitiveness of covered investors or investments.<sup>647</sup>

## **2. PRPs Applicable Only to Covered Investments and Investors**

By contrast, a host State may prefer to retain greater discretion to impose performance requirements. One way of achieving this is to narrow the applicability of a PRP to covered investors and investments. Contrary to NAFTA Article 1101(1)(c), Article V(2) of the Canada - Ukraine FIPA (1994) does not apply to all investments and applies instead to "an investment," a term defined under Article 1(f) as made by an investor of one State Party in the territory of

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<sup>646</sup> Vandeveldel (n 84) 391.

<sup>647</sup> Vandeveldel (n 84) 392.

another State Party. Twenty-one Canadian FIPAs followed the Canada - Ukraine FIPA (1994) in this respect.<sup>648</sup> Based on their identical definitions of the term “investment,” the open-ended PRPs of the 21 American BITs signed between 1982 and 1995 which replicate the PRP found in the 1983 or 1984 U.S. Model BITs apply to investments in one Party made by investors of the other Party. Similarly, Article VI of the 1994 U.S. Model BIT and the 13 American BITs with identical PRPs<sup>649</sup> apply only to “a covered investment” by a covered investor. Three Indian IIAs<sup>650</sup> also provide that their respective PRPs apply only to covered investments from covered investors.

IIAs surveyed in this section show a 60/40 split in favour of rendering their PRPs applicable to all investments (103 IIAs) by comparison with limiting their applicability only to covered investments and investors (60 IIAs).

## **B. Activities to Which PRPs Apply and the “Connection” Prerequisite**

This section explores the wording that specifies which types of activities are governed by PRPs in IIAs. This section also evaluates whether there is a need for measures to be “in connection with” an investment, and if so, with which investment (i.e., that of the claimant investor or that of a third investor) in order to qualify as performance requirements under PRPs in IIAs. NAFTA Article 1106(1)<sup>651</sup> deems the prohibitions of mandatory performance requirements applicable “in connection with” a number of specified phases of an investment: the establishment, acquisition, expansion, management, conduct or operation” of an investment. The only arbitral pronouncement regarding such issue was made by Dissenting Arbitrator Schwartz in *S.D. Myers v Canada*, who deemed the PCB Export Ban (and the implied requirement that PCB

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<sup>648</sup> The Canada - Trinidad and Tobago FIPA (1995); the Canada - Philippines FIPA (1995); the Canada - South Africa FIPA (1995); the Canada - Ecuador FIPA (1996); the Canada - Venezuela FIPA (1996); the Canada - Panama FIPA (1996); the Canada - Egypt FIPA (1996); the Barbados - Canada FIPA (1996); the Canada - Thailand FIPA (1997); the Canada - Croatia FIPA (1997); the Canada - Lebanon FIPA (1997); the Armenia - Canada FIPA (1997); the Canada - Uruguay FIPA (1997); the Canada - Costa Rica FIPA (1998); the Canada - Latvia FIPA (2009); the Canada - Romania FIPA (2009); the Canada - Jordan FIPA (2009); the Canada - Kuwait FIPA (2011); the Canada - China FIPA (2012); the Cameroon - Canada FIPA (2014); the Canada - Hong Kong, China FIPA (2016).

<sup>649</sup> Article VI of the Georgia - U.S. BIT (1994); Article VI of the U.S. - Uzbekistan BIT (signed in 1994, but not in force); Article VI of the Trinidad and Tobago - U.S. BIT (1994); Article VI of the Albania - U.S. BIT (1995); Article VI of the Honduras - U.S. BIT (1995); Article VI of the Nicaragua - U.S. BIT (signed in 1995, but not in force); Article VII of the Croatia - U.S. BIT (1996); Article VI of the Jordan - U.S. BIT (1997); Article VI of the Azerbaijan - U.S. BIT (1997); Article VI of the Bolivia - U.S. BIT (1998); Article VI of the Mozambique - U.S. BIT (1998); Article VI of the El Salvador - U.S. BIT (signed in 1999, but not in force); Article VI of the Bahrain - U.S. BIT (1999).

<sup>650</sup> Article 6.2(1) of the India - Singapore CECA (2005); Articles 10.2(1), 10.5(1), 10.5(2) of the India - Korea CEPA (2009); Articles 83(1), 89(1) of the India - Japan CEPA (2011).

<sup>651</sup> Article 7(1) of the 2004 Canada Model FIPA and Article 9(1) of the 2012 Canada Model FIPA reproduce the same approach, as do other IIAs which reproduce NAFTA Article 1106(1).

remediation take place in Canada) “in connection with” the expansion of claimant SDMI’s operations in Canada on the basis that the PCB Export Ban was imposed in response to SDMI’s push to expand its operations into Canada.<sup>652</sup>

PRPs in the previously discussed 21 American BITs that replicate the PRP within the 1983 and 1984 U.S. Model BITs apply to the establishment, expansion or maintenance of an investment. Article VI of the 1994 U.S. Model BIT and the previously discussed 13 American BITs that reproduce its wording prohibit mandatory performance requirements “as a condition for” the same phases as the ones targeted by NAFTA Article 1106(1), as well as performance requirements imposed as commitments or undertakings in connection with the receipt of a governmental permission or authorisation. Article 8(1) of the 2004 U.S. Model BIT and the previously discussed 20 IIAs that reproduce its wording apply to the same phases of investment as those identified in NAFTA Article 1106(1), but further apply to mandatory performance requirements in connection with “the sale or other disposition of an investment.”<sup>653</sup> Article V(2) of the Canada - Ukraine FIPA (1994) and IIAs that reproduce its wording prohibit the imposition of enumerated mandatory performance requirements “in connection with permitting the establishment or acquisition” or with the subsequent regulation of an investment. Article VI of the Chile - Dominican Republic BIT (2000) prohibits performance requirements imposed upon the establishment, expansion, management or acquisition of an investment. The PRPs previously described, as well as PRPs that reproduce such wording, thus apply to both pre-establishment and post-establishment phases of an investment and to most of its spheres of activity.

By contrast, a number of PRPs opted instead for a narrower applicability. PRPs in French BITs that reproduce the French Model apply to purchase or transport restrictions and to sale or transport hindrances, which suggests that French PRPs apply only to the post-establishment phases of an investment. As a further example, Article 4(4) of the India - Kuwait BIT (2001) starts out as a seemingly broad PRP, but ends up constraining India or Kuwait in a lessened fashion through added qualifying elements. Article 4(4) of the India - Kuwait BIT (2001) qualifies the undefined and open-ended expression “additional performance requirements” by prohibiting only performance requirements that investments are “subjected to” once they are established (post-establishment PRP) and only those requirements that may “hinder or restrict” the expansion or maintenance of established investments that are subjected to such requirements, that may “adversely affect” such investments or that may “be considered as detrimental to their

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<sup>652</sup> *S.D. Myers – Dissent* (n 197) para 196.

<sup>653</sup> Article 9.10(1) of the TPP (2015) also reproduces this approach.

viability.” A host State is therefore free to condition the establishment of investments upon compliance with any performance requirement; only once the host State attempts to regulate already established investments is such State prevented from imposing performance requirements. The post-establishment PRP under Article 4(4) is nevertheless quite far-reaching; it essentially prohibits any performance requirement proven harmful to established investments that are subjected to such performance requirements.

By comparison, other PRPs may apply only to the pre-establishment phase of an investment. For example, Article II(4) of the Panama - U.S. BIT (1982) prohibits performance requirements only when they are imposed as a condition for the establishment<sup>654</sup> of an investment by a covered investor and remains silent in respect of performance requirements imposed once an investment is already established. Article II(4) of the Panama - U.S. BIT (1982) therefore provides for a PRP applicable to new investments upon their establishment, but not to existing investments or to their subsequent expansion or operation.<sup>655</sup>

NAFTA Article 1106(3)<sup>656</sup> and a great number of prohibitions of advantage-conditioning performance requirements opt for a much simpler text by simply applying to requirements which “condition the receipt or continued receipt of an advantage, in connection with an investment.” NAFTA Article 1106(3) and similarly drafted prohibitions of advantage-conditioning performance requirements therefore apply when the investment receiving an advantage must also comply with the requirement.<sup>657</sup>

The prohibitions of advantage-conditioning performance requirements under Article 8(2) of the 2004 U.S. Model BIT, the previously discussed 20 IIAs that reproduce its wording and Article 8(2) of the 2012 U.S. Model BIT are more detailed and less expansive than that found in NAFTA Article 1106(3), since they reiterate the same applicability as that put forward in respect of mandatory performance requirements: in order to be prohibited, enumerated performance requirements must condition advantages “in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition” of an investment.<sup>658</sup> Article 8.5(2) of the Canada - EU CETA (2014) proceeds in the same way, minus sale or disposition.

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<sup>654</sup> Sachs (n 72) 208-209.

<sup>655</sup> Deluca (n 29) 272; Sachs (n 72) 208.

<sup>656</sup> Article 7(3) of the 2004 Canada Model FIPA and Article 9(3) of the 2012 Canada Model FIPA reproduce the same approach.

<sup>657</sup> *Pope & Talbot* – Counter-Memorial of Canada (n 217), paras 342-344.

<sup>658</sup> Article 9.10(2) of the TPP (2015) also reproduces this approach.

## **C. The Looming Ineffectiveness of Disciplines on Advantage-Conditioning Performance Requirements**

This section highlights the differences in wording between prohibitions of mandatory performance requirements and prohibitions of advantage-conditioning performance requirements, which opt for comparatively simpler and shorter formulations. In analysing advantage-conditioning performance requirements, this section identifies a number of PRPs whose very wording may defeat the original purpose sought when prohibiting advantage-conditioning performance requirements by focusing unduly onto the investor made to comply with such performance requirements. This section also appraises erroneous arbitral interpretations of the expression “in connection with” in NAFTA Article 1106(3) and will explain how they risk depriving prohibitions of advantage-conditioning performance requirements of any effectiveness. This investigation will prove just as useful for NAFTA Article 1106 as for the plethora of PRPs that use the expression “in connection with.”

### **1. Prohibitions of Advantage-Conditioning Performance Requirements Whose Very Wording Deprive them of any Effectiveness**

Some IIAs prohibit advantage-conditioning performance requirements in ways that deprive them of any effectiveness. For example, Article 9(3) of the Cameroon - Canada FIPA (2014) reproduces the NAFTA approach, but provides that a State Party may not adopt advantage-conditioning performance requirement “without the investor’s consent.” Similarly, Article 9(3) of the Canada - Nigeria FIPA (2014) provides that a State Party may not adopt enumerated advantage-conditioning performance requirements “without an undertaking of the investor.” Prohibitions of advantage-conditioning performance requirements made subject to the absence of a complying investor’s consent face at least three difficulties. First, by their very essence, advantage-conditioning performance requirements apply on a voluntary basis and are not mandatory. Investors who seek to receive a State-conferred advantage freely choose to comply with conditioning performance requirements and would do so only if the related advantage renders such compliance profitable. Advantage-conditioning performance requirements will therefore always apply with the complying investor’s consent or undertaking to comply with such measures.

Second, prohibiting advantage-conditioning performance requirements only in the absence of a complying investor’s consent amounts to validating advantage-conditioning performance requirements altogether. These two provisions read as a double negative: “may not, without ... [the investor’s consent or undertaking]” and therefore can also read as “may, with ... [the



investor's consent or undertaking].” The investor's explicit willingness to comply with a performance requirement authorises a State Party to condition an advantage on that basis.

Third, prohibitions of advantage-conditioning performance requirements are not intended to protect complying investors who receive advantages or to grant the right for investors to receive unencumbered advantages. They mean to achieve a level playing field among all investors in a host State by ensuring their equal treatment and by removing the conferral of State advantages and the imposition of State conditions that alter the competitive conditions between them. Prohibiting advantage-conditioning performance requirements only in the absence of a complying investor's consent achieves nothing from the vantage point of third investors who do not receive such advantage and who compete with the advantage-recipient investor. Third investors are the ones who incur losses or damages when a State imposes advantage-conditioning performance requirements that give a competitive edge to their rival advantage-recipient investors. These prohibitions merely legalise the competitive disadvantage that causes a loss or damage to these third investors.

## **2. The Erroneous Arbitral Interpretations of “in Connection With” in NAFTA Article 1106(3)**

The expression “in connection with” has sparked a recurrent debate surrounding its precise implications within NAFTA Article 1106: does the performance requirement have to be connected to the claimant's investment or can the performance requirement be connected to the investment of another investor?

In *ADM v Mexico*, the Tribunal framed the question to be decided as whether NAFTA Article 1106(3) applies to all investors in a Party's territory (in this case Mexico) or only to investors of the other NAFTA Parties.<sup>659</sup> The Tribunal linked the interpretation of NAFTA Article 1106(3) to the scope and coverage of NAFTA Chapter 11 laid out in Article 1101(1)(c), which states that NAFTA Article 1106 applies to measures adopted or maintained by a Party relating to all NAFTA and non-NAFTA investments in the territory of the Party, including a State Party's own investors; however, the Tribunal wrongly narrowed NAFTA Article 1106 to investments by “any investor from the NAFTA region.”<sup>660</sup> Moreover, the Tribunal avoided answering its own question and decided instead that the receipt of the Sweetener Tax Exemption Advantage was in connection with the investments of claimants ADM and TLIA in Mexico since the Sweetener Tax

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<sup>659</sup> *ADM* (n 15) para 218.

<sup>660</sup> *ibid* para 221.

Exemption Advantage had a detrimental impact on their investment's profitability.<sup>661</sup>

In *Cargill v Mexico*, the Tribunal identified the meaning of the expression "in connection with" as the main question it faced in interpreting NAFTA Article 1106(3).<sup>662</sup> The Tribunal formulated various iterations of the "central question" to be decided.<sup>663</sup> The Tribunal went on to hold that the Sweetener Tax Exemption Advantage constituted an advantage under NAFTA Article 1106(3) whose receipt, conditioned upon the performance requirement to use domestically produced cane sugar in violation of NAFTA Article 1106(3), was "in connection with" the operation of claimant's investment (Cargill de Mexico)<sup>664</sup> given that the Sweetener Tax Exemption Advantage was "integrally related"<sup>665</sup> to Cargill de Mexico. The Tribunal based this connection on the Sweetener Excise Tax's design aimed at restricting or even eliminating the sale by Cargill and its investment Cargill de Mexico of HFCS to Mexican soft drink bottlers.<sup>666</sup> The Tribunal therefore held that Mexico had violated NAFTA Article 1106(3) without specifying which paragraph thereof had thus been violated.<sup>667</sup>

Both the *ADM* and the *Cargill v Mexico* Tribunals therefore misconstrued NAFTA Article 1106(3) by mandating a connection between a claimant's investment and the performance requirement at issue: it is inaccurate to equate the "investment" that must be connected to an advantage under NAFTA Article 1106(3) with the "investment" of the claimant investor.

A close reading of NAFTA Article 1106(3) indicates that "an advantage" can be connected to "an investment" of "an investor" of a NAFTA Party or of a non-NAFTA Party. NAFTA Article 1101(1)(c) plainly indicates that NAFTA Article 1006 applies to all investments and not only to investments made by investors of NAFTA Parties. NAFTA Article 1106 thus clearly prohibits performance requirements connected to investments made either by covered Party investors or non-Party investors, as do 39 previously discussed IIAs that follow the NAFTA in this respect.

Let's take a scenario whereby an advantage-conditioning performance requirement applies to a non-NAFTA investor. Let's assume that the non-NAFTA investor benefits from the advantage enough to offset any cost related to complying with the advantage-conditioning performance requirement. Investments of NAFTA investors that compete with this non-NAFTA investor are not connected to this non-NAFTA investor's investment, yet let's assume that this loss of

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<sup>661</sup> *ADM* (n 15) para 227.

<sup>662</sup> *Cargill v Mexico* (n 16) para 314.

<sup>663</sup> *ibid* paras 308, 313, 316.

<sup>664</sup> *ibid* para 318.

<sup>665</sup> *ibid* para 317.

<sup>666</sup> *ibid* para 317.

<sup>667</sup> *ibid* paras 319, 552, 557.

competitiveness have caused them losses or damages. Could it be said that NAFTA Parties intended to leave investors of NAFTA Parties in a comparatively disadvantageous situation to that of non-NAFTA investors? Moreover, what would be the purpose served by NAFTA Article 1106(3) in such a scenario if only non-NAFTA investors whose investment is connected to the advantage-conditioning performance requirement could claim protection, when in fact they could not bring a claim due to lack of standing under NAFTA Articles 1116 or 1117, and when the advantage conferred would render them highly unlikely to bring such a claim?

Under ISDS provisions of IIAs, only covered investors can submit claims of breaches to arbitration. Interpreting NAFTA Article 1106(3) in conformity with its plain wording and so as to give it *effet utile* would confer NAFTA investors the ability to challenge an advantage-conditioning performance requirement connected to a non-NAFTA investor's investment, even when such advantage-conditioning performance requirement is not connected to the investment of complaining NAFTA investors, so long as complaining NAFTA investors "incurred loss or damage by reason of, or arising out of, that breach" as stipulated for example in ISDS-related NAFTA Articles 1116 and 1117.

By logical extension, the language of NAFTA Article 1106 and similarly worded PRPs in other IIAs also allow claimant investors to challenge performance requirements connected to the investment of another covered investor.<sup>668</sup> Otherwise, a claimant investor could never complain under NAFTA Article 1106(3) of a performance requirement acting as a condition for an advantage conferred to another investor even though such advantage causes loss or damage to the claimant investor, notably by detrimentally altering the competitive relationship between the recipient investor and the claimant investor.

Unfortunately and erroneously, the *Cargill v Mexico* Tribunal construed the "in connection with" element in NAFTA Article 1106(3) in the same way as the standing test for bringing a claim under NAFTA Articles 1116 or 1117. In both *ADM v Mexico* and *Cargill v Mexico*, it should have sufficed to decide that the Sweetener Tax Exemption Advantage was connected with (domestic) investments of Mexican soft drink bottling companies for the Sweetener Tax Exemption Advantage to be challenged by claimants ADM, TLIA and Cargill, so long as ADM and Cargill could link their damages or losses to the Sweetener Tax Exemption Advantage and the performance requirement that conditioned its receipt. By insisting on connecting the Sweetener Tax Exemption Advantage to the respective investments of ADM and Cargill as claimants, the *ADM* and *Cargill* Tribunals needlessly narrowed the scope and coverage of NAFTA Article

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<sup>668</sup> *Pope & Talbot* – Investor Memorial (n 497) paras 99-100.

1106(3).

In *CPI v Mexico*, the Tribunal predicated its decision that the challenged Sweetener Excise Tax did not constitute a performance requirement and its rejection of the claim under NAFTA Article 1106 notably on concluding that Mexico had imposed no requirement on claimant CPI upon enacting the Sweetener Excise Tax. Mexico had required no increased investment, no increase in local procurement and no hiring of local employees from CPI, nor did any measure of Mexico prescribe any level for the domestic sales, exports, imports or foreign exchange earnings of CPI.<sup>669</sup> The Tribunal did recognise that the intent and effect of the Sweetener Excise Tax was to reduce CPI's customer base; however, the Sweetener Excise Tax applied only to soft drink bottlers and therefore CPI could not challenge the Sweetener Excise Tax. The Tribunal wrongly construed NAFTA Article 1106 as mandating the direct applicability of a challenged performance requirement to the claimant's investment.

#### **D. The Existence of a "Requirement" as a Condition for the Applicability of PRPs in IIAs**

This section scrutinises how arbitral tribunals grappled with *de facto* and *de jure* performance requirements, whether substance should prevail over form in analysing measures allegedly amounting to prohibited performance requirements, and whether "incidentally adverse effects" of measures should suffice for characterising them as performance requirements. This section also weighs the importance granted by arbitral tribunals to the statement, encapsulated in NAFTA Article 1106(5), that NAFTA Article 1106 is exhaustive.

##### **1. Commitments or Undertakings as Performance Requirements**

NAFTA Article 1106(1), specifies that State Parties may not impose any requirement or enforce any commitment or undertaking to achieve any of the enumerated performance requirement objectives. Article VI of the 1994 U.S. Model BIT,<sup>670</sup> Article V(2) of the Canada - Ukraine FIPA (1994), Article 8(1) of the 2004 U.S. Model BIT, Article 7(1) of the 2004 Canada Model FIPA, Article 8(1) of the 2012 U.S. Model BIT and Article 9(1) of the 2012 Canada Model FIPA, along with all IIAs that reproduce any of these PRPs, also reiterate the dual applicability to requirements imposed or commitments or undertakings enforced.<sup>671</sup>

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<sup>669</sup> *ibid* paras 9, 80.

<sup>670</sup> Article VI of the 1994 U.S. Model BIT uses the verbs "mandate or enforce" (in lieu of "impose"), an inconsequential change: see Vandevelde (n 84) 389.

<sup>671</sup> Article VI of the 1994 U.S. Model BIT further provides that "any requirement" includes any commitment

A number of IIAs comprise provisions aimed at narrowing the instances where measures are subject to their prohibition of mandatory performance requirements. Some of these treaty provisions likely echoed and responded to the GATT-FIRA Panel finding that judicially enforceable written undertakings provided by foreign investors constituted “requirements” for purposes of GATT Article III:4.<sup>672</sup> For example, Article 8(5) of the 2004 U.S. Model BIT, Article 8(5) of the 2012 U.S. Model BIT and the twenty-eight IIAs among those surveyed that reproduce this same provision specify that the enforcement by a State Party of any commitment, undertaking, or requirement entered into between private parties and that was not imposed by a Party is not prohibited under its PRP, a scenario not explicitly addressed in the NAFTA.<sup>673</sup>

## 2. The Notion of “Requirement” According to Arbitral Tribunals

Arbitral tribunals have had to grapple with what a “requirement” consists of exactly. In *S.D. Myers v Canada*, the *S.D. Myers* Majority found that the PCB Export Ban did not amount to a “requirement” as per NAFTA Article 1106, notably given that the PCB Export Ban “was not cast in the form of express conditions attached to a regulatory approval.”<sup>674</sup> Looking beyond form, focusing on the “substance and effect” of the PCB Export Ban and relying on the “literal wording” of NAFTA Article 1106, the Majority decided that Canada did not impose on SDMI a “requirement” under NAFTA Article 1106.<sup>675</sup> As a result, the Majority concluded that SDMI’s claim was “not a ‘performance requirements’ case.”<sup>676</sup>

In *Pope & Talbot v Canada*, the Tribunal decided that no violation of NAFTA Article 1106(1)(a)

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or undertaking “in connection with the receipt of a governmental permission or authorization.”

<sup>672</sup> *GATT-FIRA Panel Report* (n 249), paras 5.4-5.11.

<sup>673</sup> American FTAs: Annex 15B of the Singapore - U.S. FTA (2003); Article 10.8(5) of the Morocco - U.S. FTA (2004); Article 10.9(5) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(5) of the Oman - U.S. FTA (2006); Article 10.9(5) of the Peru - U.S. FTA (2006); Article 10.9(5) of the Colombia - U.S. FTA (2006); Article 10.9(5) of the Panama - U.S. FTA (2007); Article 11.8(5) of the Korea - U.S. FTA (2007). American BITs: Article 8(5) of the U.S. - Uruguay BIT (2005); Article 8(5) of the Rwanda - U.S. BIT (2008). Australian Agreements: Note at the end of Article 14.9 of the Australia - Japan EPA (2014); Article 11.9(10) of the Australia - Korea FTA (2014); Article 5(5) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(9) of the CERTA Investment Protocol (2011); Article 10.7(5) of the Australia - Chile FTA (2008); Article 11.9(5) of the Australia - U.S. FTA (2004). Article 11.9(10) of the Australia - Korea FTA (2014) specifies that private parties include designated monopolies or state enterprises which are not exercising delegated government authority. Canadian FTAs: Article 807(6) of the Canada - Colombia FTA (2008); Article 9.07(7) of the Canada - Panama FTA (2008); Article 10.7(6) of the Canada - Honduras FTA (2013); Article 8.8(8) of the Canada - Korea FTA (2014); Article 9.10(6) of the TPP (2015). Chilean Agreements: Article 10.8(10) of the Pacific Alliance Protocol (2014); Article 9.6(4) of the Chile - Colombia FTA (2006); Article 11.6(5) of the Chile - Peru FTA (2006); Article 10.7(8) of the Chile - Korea FTA (2003); Article 10.5(5) of the Chile - U.S. FTA (2003); Article 9-07(7) of the Chile - Mexico FTA (1998); Footnote 2 to Article G-06 of the Canada - Chile FTA (1996).

<sup>674</sup> *S.D. Myers* – Majority (n 167) para 273. Dissenting Arbitrator Schwartz discarded this finding by the *S.D. Myers* Majority despite agreeing with it: see *S.D. Myers* – Dissent (n 197) para 192.

<sup>675</sup> *S.D. Myers* – Majority (n 167) paras 273-274, 277.

<sup>676</sup> *S.D. Myers* – Majority (n 167) para 278.

had taken place<sup>677</sup> on the basis that the Export Control Regime did not impose or enforce a requirement to export below or above a given amount.<sup>678</sup> Although the Export Control Regime may have discouraged exports to the United States, the Tribunal distinguished export deterrence attributable to a government measure from an EPR or an export restriction imposed or enforced in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment.<sup>679</sup> In *Mobil & Murphy v Canada*, the Tribunal determined that a measure had to exhibit “a degree of legal obligation” and a “degree of compulsion”<sup>680</sup> in order to constitute a requirement for purposes of NAFTA Article 1106(1).

In *CPI v Mexico*, the Tribunal predicated its decision that the challenged Sweetener Excise Tax did not constitute a performance requirement and its rejection of the claim under NAFTA Article 1106 notably upon concluding that the Sweetener Excise Tax did not impose a mandatory requirement. In addition to concluding that the Sweetener Excise Tax applied to soft drink bottlers and not to HFCS producers such as claimant CPI, the Tribunal insisted that the Sweetener Excise Tax was not even mandatory for soft drink bottlers without elaborating any further.<sup>681</sup> However, the Sweetener Tax Exemption Advantage was designed precisely to persuade Mexican soft drink bottlers to replace HFCS with cane sugar as the only means to avoid paying the Sweetener Excise Tax. Mexico did not impose a mandatory performance requirement, but it did condition the receipt of the Sweetener Tax Exemption Advantage upon the use by Mexican soft drink bottlers of (domestically produced) cane sugar instead of (foreign-produced) HFCS. The lack of mandatory nature of the Sweetener Excise Tax might have sufficed to prevent the application of NAFTA Article 1106(1). Nevertheless, the requirement of using of cane sugar instead of HFCS clearly acted as an advantage-conditioning performance requirement prohibited under NAFTA Article 1106(3).

In *Merrill & Ring v Canada*, Canada argued, and the Tribunal agreed, that nothing in its Log Export Regime amounted to the imposition or enforcement of a requirement, commitment or undertaking as construed under NAFTA Article 1106: nothing compelled Merrill & Ring to increase or limit its log exports, Merrill & Ring remained free at all times to sale any amount of logs both on the domestic and on foreign markets, and Merrill & Ring could freely retain service suppliers in Canada or abroad in order to carry out the log cutting, sorting and measuring

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<sup>677</sup> *Pope & Talbot* (n 167) para 76.

<sup>678</sup> *Pope & Talbot* (n 167) para 75.

<sup>679</sup> *Pope & Talbot* (n 167) para 75.

<sup>680</sup> *Merrill & Ring* (n 167) para 234.

<sup>681</sup> *CPI* (n 167) paras 9, 80.

requirements.<sup>682</sup>

These pronouncements by arbitral tribunals lend support to the correct guiding notion that a measure must clearly compel the achievement of precisely what a prohibited performance requirement consists of. The equivalence between a given measure's effects and those normally attributable to prohibited performance requirements provides insufficient grounds for characterising a given measure as a prohibited performance requirement. In addition to its effects, a given measure's purpose and its nature as a requirement, or as a condition attached to the granting of an advantage, must correspond to those of a prohibited performance requirement as outlined in a given PRP.

### **3. The Unavailing *De Facto* vs. *de Jure* Conundrum, Incidental Effects and Explicit Limitations to Performance Requirements set Forth**

PRPs of French BITs that reproduce the French Model make use of the *de jure* and *de facto* concepts and state that "shall be considered as *de jure* or *de facto* impediments to [FET]" any of the enumerated restrictions and any measures of analogous effect. Article 3.1(a) of the SCM Agreement applies to both *de jure* and *de facto* subsidies contingent upon EPRs,<sup>683</sup> in addition to prohibiting subsidies contingent upon EPRs and LCRs *per se*, regardless of their effects.<sup>684</sup>

By contrast, 42 IIAs<sup>685</sup> among IIAs surveyed comprise PRPs that reiterate the statement found

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<sup>682</sup> *Merrill & Ring* (n 167) paras 106, 108, 109, 118-119.

<sup>683</sup> Footnote 4 to Article 3.1(a) of the SCM Agreement; EC Submission 31 (n 165) 2.

<sup>684</sup> Switzerland Submission 26 (n 161) 2.

<sup>685</sup> American FTAs: Article 10.5(4) of the Chile - U.S. FTA (2003); Article 15.8(4) of the Singapore - U.S. FTA (2003); Article 10.8(4) of the Morocco - U.S. FTA (2004); Article 10.9(4) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(4) of the Oman - U.S. FTA (2006); Article 10.9(4) of the Peru - U.S. FTA (2006); Article 10.9(4) of the Colombia - U.S. FTA (2006); Article 10.9(4) of the Panama - U.S. FTA (2007); Article 11.8(3)(4) of the Korea - U.S. FTA (2007). American BITs: Article 8(4) of the U.S. - Uruguay BIT (2005); Article 8(4) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 14.9(8) of the Australia - Japan EPA (2014); Article 11.9(9) of the Australia - Korea FTA (2014); Article 5(4) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(8) of the CERTA Investment Protocol (2011); Article 10.7(4) of the Australia - Chile FTA (2008); Article 11.9(4) of the Australia - U.S. FTA (2004). Canadian FIPAs: Article 7(5) of the Canada - Peru FIPA (2006); Article 7(5) of the Canada - Jordan FIPA (2009) and Article 10(5) of the Benin - Canada FIPA (2013); Article 9(5) of the Canada - Tanzania FIPA (2013); Article 9(5) of the Cameroon - Canada FIPA (2014); Article 9(5) of the Canada - Nigeria FIPA (2014); Article 9(5) of the Canada - Serbia FIPA (2014); Article 9(5) of the Canada - Senegal FIPA (2014); Article 9(5) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(5) of the Burkina Faso - Canada FIPA (2014); Article 9(5) of the Canada - Guinea FIPA (2014); Article 9(5) of the Canada - Hong Kong, China FIPA (2016). Canadian TIPs: Article G-06(5) of the Canada - Chile FTA (1996); Article 807(5) of the Canada - Peru FTA (2008); Article 807(5) of the Canada - Colombia FTA (2008); Article 9.07(6) of the Canada - Panama FTA (2008); Article 10.7(5) of the Canada - Honduras FTA (2013); Article 8.8(7) of the Canada - Korea FTA (2014); Article 9.10(5) of the TPP (2015). Chilean Agreements: Article 10.8(9) of the Pacific Alliance Protocol (2014); Article 77(4) of the Chile - Japan EPA (2007); Article 9.6(4) of the Chile - Colombia FTA (2006); Article 11.6(4) of the Chile - Peru FTA (2006); Article 10.7(5) of the Chile - Korea FTA (2003); Article 9-07(5) of the Chile - Mexico FTA (1998).

in NAFTA Article 1106(5)<sup>686</sup> and specify that their PRPs apply only to the mandatory and advantage-conditioning performance requirements explicitly set out. These PRPs make no mention of *de facto* or *de jure* performance requirements.

In *Pope & Talbot v Canada*, the Tribunal characterised NAFTA Article 1106(5) as vital to the interpretation of NAFTA Articles 1106(1) and 1106(3), which cannot “be broadened beyond their express terms” and which accordingly include limited lists respectively of seven mandatory and four advantage-conditioning requirements.<sup>687</sup> In *S.D. Myers v Canada*, the Tribunal insisted on the necessity that a measure “fall squarely” within the requirements enumerated in NAFTA Articles 1106(1) and 1106(3); despite noting that the PCB Export Ban related to the “conduct or operation” of Myers Canada, the *S.D. Myers* Majority decided that the prohibitions of LCRs and LSRs “clearly do not apply” to export bans.<sup>688</sup>

In *Merrill & Ring v Canada*, the Tribunal deemed “convincing” the arbitral awards of the *Pope & Talbot* and *S.D. Myers* Tribunals to the extent that they both underlined that NAFTA Article 1106(5) warranted interpreting NAFTA Articles 1106(1) and 1106(3) within the limits of the requirements specifically enumerated.<sup>689</sup> In spite of noting that the log cutting, sorting and scaling requirements may have some “incidentally adverse effect” on Merrill & Ring’s exports, the *Merrill & Ring* Tribunal decided that NAFTA Article 1106(1) does not capture measures which affect exports only indirectly or incidentally.<sup>690</sup> While the Tribunal mistakenly considered that a requirement “needs to be directly and specifically connected to exports”<sup>691</sup> to qualify as a performance requirement under NAFTA Article 1106 (since clearly not all performance requirements enumerated in NAFTA Article 1106 relate to exports), this decision shows that detailed and exhaustive PRPs apply only to measures whose true nature corresponds to the settled meaning of one of the specifically prohibited performance requirements, and not to measures whose effects may incidentally resemble those of prohibited performance requirements.

By contrast, in *Mobil & Murphy v Canada*, the Tribunal was “mindful” of the importance of NAFTA Article 1106(5) in restricting the scope of NAFTA Articles 1106(1) and 1106(3), the

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<sup>686</sup> NAFTA Article 1106(5) is also reproduced in Article 8(4) of the 2004 U.S. Model BIT, in Article 7(5) of the 2004 Canada Model FIPA, in Article 8(4) of the 2012 U.S. Model BIT and in Article 9(5) of the 2012 Canada Model FIPA.

<sup>687</sup> *Pope & Talbot* (n 167) paras 57, 70-71; see also *Pope & Talbot* – Counter-Memorial of Canada (n 217) para 295.

<sup>688</sup> *S.D. Myers* – Majority (n 167) paras 154, 272, 275-276.

<sup>689</sup> *Merrill & Ring* (n 167) para 111.

<sup>690</sup> *Merrill & Ring* (n 167) paras 117, 120.

<sup>691</sup> *Merrill & Ring* (n 167) para 117.



Tribunal stated that Article 1106(5) “does not provide guidance on interpreting the exact coverage of the enumerated performance requirements.”<sup>692</sup> While it is true that NAFTA Article 1106(5) does not provide detailed indications as to the application or interpretation of the prohibition of mandatory and advantage-conditioning performance requirements, it clearly indicates that the priority should consist of determining whether a challenged measure constitutes a prohibited performance requirement and not whether its effects amount to those of a prohibited performance requirement. If stretched out too broadly, the notion of *de facto* performance requirements can nullify the intended predictability and the settled meaning of PRPs relying on detailed and exhaustive lists of performance requirements in order to clarify their scope and coverage.

While identifying performance requirements could theoretically be done by reference to the characteristics of measures themselves or to their effects,<sup>693</sup> the difficulty of basing a definition or the existence of a performance requirement on effects lies in pinpointing the diverse and erratic effects of investment measures on trade.<sup>694</sup> Moreover, some performance requirements generate trade-distorting effects only in the presence of certain trade or macroeconomic conditions; conversely, the absence of such conditions may mean the absence of trade-distorting effects in relation with those same performance requirements.<sup>695</sup>

A large number of GATT Members accordingly argued during the GATT Uruguay Round of negotiations that no measure causes “inherently trade restrictive and distorting”<sup>696</sup> effects, and that such effects cannot be assumed and must be proven on a case-by-case basis.<sup>697</sup> Moreover, numerous States considered that incontrovertible empirical proof as to the trade effects of performance requirements was not indispensable to justifying their prohibition. It was further argued that the adverse trade effects of investment measures deemed to amount to TRIMs should be self-evident and accepted as a valid general proposition.<sup>698</sup> This approach ultimately won the day and paved the way for drawing up lists of prohibited performance requirements. States set aside the analysis of the trade effects of investment measures as part of the definitional exercise of TRIMs and focused instead on identifying a list of measures that States would agree to prohibit without having to subsequently assess the trade impact of a given measure in order to determine whether it indeed ran afoul of trade disciplines or not. One

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<sup>692</sup> *Mobil & Murphy (Majority)* (n 13) paras 189-191, 225 and fn 247.

<sup>693</sup> Moran and Pearson, *TRPRs OPIC* (n 31) 7.

<sup>694</sup> Switzerland Submission (n 42) 2.

<sup>695</sup> India Submission 18 (n 35) para 11; see also Switzerland Submission (n 42) 2.

<sup>696</sup> India and others, *GATT Communication 25* (n 48) 2; GATT, *Note on TRIMs* (1987) (n 365) para 17.

<sup>697</sup> GATT, *Note on Subsidies* (1989) (n 164) para. 7; GATT GNG Report (1988) (n 156) para 82; GATT, *Note on TRIMs* (October 1990) (n 145) para 11 (Philippines), para 13 (Malaysia), para 25(iii) (Australia).

<sup>698</sup> GATT, *Note on TRIMs* (1987) (n 365) para 16.

can thus clearly see that States moved away from considering effects of performance requirements in order to focus instead on their essential features and characteristics, which led to developing a settled meaning for each specifically prohibited performance requirement.

In *Mobil & Murphy v Canada*, Canada had argued that the local R&D requirement within the 2004 Guidelines “only incidentally result[ed] in the purchase, use or accord of preference to local services.”<sup>699</sup> The Tribunal distinguished the arbitral awards rendered in *Merrill & Ring v Canada* and *Pope & Talbot v Canada* based on its assessment that the local R&D spending requirements constituted a “central feature of the 2004 Guidelines, and not an ancillary objective or consequence,”<sup>700</sup> and that the 2004 Guidelines did not impose only “incidental effects with respect to the purchase, use or accordance of a preference to local goods or services.”<sup>701</sup> The Tribunal decided that the “central purpose of the 2004 Guidelines [...] is to require expenditures in the Province”<sup>702</sup> and that the 2004 Guidelines were aimed at “introduc[ing] an obligatory *expenditure* requirement.”<sup>703</sup>

In reaching such a decision, the Tribunal misconstrued NAFTA Article 1106(1)(c) and disregarded its own previous characterisation of the 2004 Guidelines. The Tribunal had initially found that the 2004 Guidelines had been adopted for two main reasons: first, as a means to create “a lasting economic legacy for the people of the Province of NL”<sup>704</sup> through the improvement of the intellectual capital and human resources of the Province, and second, in order to combat significant decreases in R&D spending by Mobil and Murphy over the 1997-2001 period.<sup>705</sup> The Tribunal then disregarded these purposes, stating that the purpose of a measure was irrelevant under NAFTA Article 1106(1)(c): so long as a measure required an investor to utilise domestic sources of R&D, it “rather clearly” consisted of a prohibited LSR.<sup>706</sup> The Tribunal considered that neither the “furtherance of economic policy objectives”<sup>707</sup> nor a policy purpose that exceeded “strictly economic”<sup>708</sup> objectives, using measures that aimed at “[p]romoting economic development and improving the skills and education of Canadians”<sup>709</sup> would justify excluding such measures from the scope of NAFTA Article 1106(1).

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<sup>699</sup> *Mobil & Murphy (Majority)* (n 13) para 194.

<sup>700</sup> *ibid* para 242.

<sup>701</sup> *ibid* para 240.

<sup>702</sup> *ibid* para 239.

<sup>703</sup> *ibid* para 234. Emphasis in the original.

<sup>704</sup> *ibid* para 46.

<sup>705</sup> *ibid* para 60, 74.

<sup>706</sup> *ibid* para 222.

<sup>707</sup> *ibid* para 222.

<sup>708</sup> *ibid* para 222.

<sup>709</sup> *ibid* para 222.

The Tribunal expressed reluctance at obscuring the text of NAFTA Article 1106(1) and the true nature of the 2004 Guidelines by grandiloquent statements as to the criticalness and nobleness of the 2004 Guidelines. However, the Tribunal's willingness to focus on the nuts and bolts of the measure at issue and its effects eclipsed its true nature as a local R&D requirement and its clear differentiation from LCRs and LSRs.

In reaching its decision that the 2004 Guidelines violated NAFTA Article 1106, the Tribunal discarded its own recognition that ways could be envisioned for Mobil and Murphy to comply with the local R&D requirement without directly purchasing domestic goods or services.<sup>710</sup> Construing the 2004 Guidelines in such a way would have made them fall outside the scope of NAFTA Article 1106(1)(c). Alongside this recognition, the Tribunal amplified its insistence on the effects of the 2004 Guidelines to reach the conclusion that, "in practice"<sup>711</sup> and in accordance with "the realities of commercial and related activities,"<sup>712</sup> the "hypothetical alternative spending examples"<sup>713</sup> that Mobil and Murphy could undertake to implement the 2004 Guidelines in compliance with NAFTA Article 1106 had not distracted the Tribunal from spending examples that would be caught by NAFTA Article 1106. The Tribunal "in practice ... failed to see how ... in reality" Mobil and Murphy could comply with a requirement to spend millions of dollars on R&D locally without "in practice being required to purchase, use, or accord a preference to domestic goods or services."<sup>714</sup> The numerous possibilities of complying with the local R&D requirement without directly purchasing domestic goods or services should have conclusively tipped the Tribunal off on the nature of the 2004 Guidelines as local R&D requirements that accordingly do not amount to LSRs. The Tribunal accorded too much weight to effects and incidental aspects of the 2004 Guidelines instead of identifying its true nature by reference to its essential characteristics and features.

### **E. Ensuring the Continued Lawfulness of Specific Performance Requirements**

This section investigates mechanisms used to ensure that specific performance requirements remain lawful in the presence of PRPs. This section singles out numerous mechanisms that achieve this and analyses: provisions included out of an abundance of caution; provisions that endorse the continued application of technology transfer requirements; provisions that permit conditioning the qualification to export promotion and foreign aid programmes and to preferential tariffs or quotas upon compliance with performance requirements; exceptions to

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<sup>710</sup> *ibid* paras 237, 239.

<sup>711</sup> *ibid* paras 237.

<sup>712</sup> *ibid* paras 238.

<sup>713</sup> *ibid* paras 238.

<sup>714</sup> *ibid* paras 238.

disciplines on performance requirements akin to GATT Article XX; exceptions to PRPs aimed at favouring aboriginal peoples and/or socially or economically disadvantaged minorities; the exemption of cultural industries from PRPs; the carving out of taxation measures from PRPs; and miscellaneous exclusions to PRPs in line with varying national or regional interests.

## 1. “Clarifying” Provisions

NAFTA Article 1106(4)<sup>715</sup> and the 43 IIAs among those currently surveyed that reiterate such a provision in respect of their PRPs ensure that their State Parties can impose the following advantage-conditioning performance requirements: local R&D requirements, local employment and training requirements, investment localisation requirements, service supply requirements and construction or expansion requirements.<sup>716</sup> Two of these IIAs<sup>717</sup> explicitly ensure the lawfulness of these same requirements when mandatorily-imposed; four FTAs<sup>718</sup> ensure the lawfulness of mandatory employee training requirements and one TIP<sup>719</sup> validates mandatory local employment or employee training requirements, subject to their compliance with the

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<sup>715</sup> NAFTA Article 1106(4) is identically reproduced in Article 8(3)(a) of the 2004 U.S. Model BIT, in Article 8(3)(a) of the 2012 U.S. Model BIT, in Article 7(4) of the 2004 Canada Model FIPA and in Article 9(4)(a) of the 2012 Canada Model FIPA.

<sup>716</sup> American FTAs: Article 15.8(3)(a) of the Singapore - U.S. FTA (2003); Article 10.8(3)(a) of the Morocco - U.S. FTA (2004); Article 10.9(3)(a) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(3)(a) of the Oman - U.S. FTA (2006); Article 10.9(3)(a) of the Peru - U.S. FTA (2006); Article 10.9(3)(a) of the Colombia - U.S. FTA (2006); Article 10.9(3)(a) of the Panama - U.S. FTA (2007); Article 11.8(3)(a) of the Korea - U.S. FTA (2007). American BITs: Article 8(3)(a) of the U.S. - Uruguay BIT (2005); Article 8(3)(a) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 14.9(4) of the Australia - Japan EPA (2014); Article 11.9(3) of the Australia - Korea FTA (2014); Article 5(3)(a) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(3) of the CERTA Investment Protocol (2011); Article 10.7(3)(a) of the Australia - Chile FTA (2008); Article 11.9(3)(a) of the Australia - U.S. FTA (2004). Canadian FIPAs: Article 7(4) of the Canada - Peru FIPA (2006); Article 7(4) of the Canada - Jordan FIPA (2009); Article 10(4)(a) of the Benin - Canada FIPA (2013); Article 9(4)(a) of the Canada - Tanzania FIPA (2013); Article 9(4)(a) of the Cameroon - Canada FIPA (2014); Article 9(4)(a) of the Canada - Nigeria FIPA (2014); Article 9(4)(a) of the Canada - Serbia FIPA (2014); Article 9(4)(a) of the Canada - Senegal FIPA (2014); Article 9(4)(a) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(4)(a) of the Burkina Faso - Canada FIPA (2014); Article 9(4)(a) of the Canada - Guinea FIPA (2014); Article 9(4)(a) of the Canada - Hong Kong, China FIPA (2016). Canadian TIPs: Article G-06(4) of the Canada - Chile FTA (1996); Article 807(4) of the Canada - Peru FTA (2008); Article 807(4)(a) of the Canada - Colombia FTA (2008); Article 9.07(4) of the Canada - Panama FTA (2008); Article 10.7(4) of the Canada - Honduras FTA (2013); Article 8.8(4) of the Canada - Korea FTA (2014); Article 8.5(3) of the Canada - EU CETA (2014); Article 9.10(3)(a) of the TPP (2015). Chilean Agreements: Article 9-07(4) of the Chile - Mexico FTA (1998); Article 10.5(3)(a) of the Chile - U.S. FTA (2003); Article 10.7(4) of the Chile - Korea FTA (2003); Article 9.6(3)(a) of the Chile - Colombia FTA (2006); Article 11.6(3)(a) of the Chile - Peru FTA (2006); Article 77(3)(a) of the Chile - Japan EPA (2007); Article 10.8(3) of the Pacific Alliance Protocol (2014). Article 10.7(4) of the Chile - Korea FTA (2003) adds as safeguard that the TRIMs Agreement would prevail in respect of any inconsistency between such requirements and the TRIMs Agreement.

<sup>717</sup> Footnote 5 to Article 11.8(3)(a) of the Korea - U.S. FTA (2007); Footnote 40 to Article 11.9(3) of the Australia - Korea FTA (2014).

<sup>718</sup> Footnote 4 to Article 807(1)(f) of the Canada - Colombia FTA (2008); footnote 7 to Article 10.9(1)(f) of the Peru - U.S. FTA (2006); footnote 7 to Article 10.9(1)(f) of the Colombia - U.S. FTA (2006); footnote 13 to Article 8(1)(f) of the Rwanda - U.S. BIT (2008).

<sup>719</sup> Article 9.10(4) of the TPP (2015).

prohibition of mandatory technology transfer requirements. NAFTA Article 1106(4) focuses on advantage-conditioning (as opposed to mandatory) performance requirements notably since Canada and the United States offered R&D tax credits and local R&D was rarely directed through mandatory requirements; moreover, the provision merely aimed at removing any doubt that a NAFTA Party could impose advantage-conditioning R&D requirements.<sup>720</sup>

Twenty-three IIAs<sup>721</sup> have reiterated NAFTA Article 1106(2)<sup>722</sup> so as to clarify that a requirement to use a technology to meet generally applicable health, safety or environmental requirements does not violate the prohibition of technology transfer requirements. Similarly, at the request of Mozambique, paragraph 1 of the Protocol to the Mozambique - U.S. BIT (1998) clarifies that the PRP otherwise identical to that found in the 1994 U.S. Model BIT does not prohibit requirements to carry out environmental impact statements, environmental management plans, or other measures of public health and safety otherwise consistent with the remainder of the BIT.<sup>723</sup>

Footnote 12 to Article 8(1)(f) of the Rwanda - U.S. BIT (2008) precludes a specific measure from amounting to a performance requirement. It states “[f]or greater certainty” that the enforcement of a commitment or undertaking to use a particular technology, a production process, or other proprietary knowledge is not in and of itself inconsistent with the prohibition of mandatory technology transfer requirements.

In an abundance of caution, footnote 10 to Article 8(1) of the 2004 U.S. Model BIT and footnote 11 to Article 8(1) of the 2012 U.S. Model BIT clarify, “for greater certainty,” that a condition for the receipt or continued receipt of an advantage does not constitute a “commitment or undertaking” for the purposes of their prohibitions of mandatory performance requirements.<sup>724</sup>

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<sup>720</sup> *Mobil & Murphy* (n 13) – Rejoinder of Canada (9 June 2010) para 64.

<sup>721</sup> Footnote 9 to Article 10.8(1)(f) the Pacific Alliance Protocol (2014); Article 10.7(2) of the Chile - Korea FTA (2003); Article 9-07(2) of the Chile - Mexico FTA (1998); Article G-06(2) of the Canada - Chile FTA (1996); Article 807(2) of the Canada - Peru FTA (2008); Article 807(2) of the Canada - Colombia FTA (2008); Article 9.07(2) of the Canada - Panama FTA (2008); Article 10.7(2) of the Canada - Honduras FTA (2013); Article 8.8(2) of the Canada - Korea FTA (2014). Canadian FIPAs: Article 7(2) of the Canada - Peru FIPA (2006); Article 7(2) of the Canada - Jordan FIPA (2009); Article 9(4) of the Canada - Kuwait FIPA (2011); Article 10(2) of the Benin - Canada FIPA (2013); Article 9(2) of the Canada - Tanzania FIPA (2013); Article 9(2) of the Cameroon - Canada FIPA (2014); Article 9(2) of the Canada - Nigeria FIPA (2014); Article 9(2) of the Canada - Serbia FIPA (2014); Article 9(2) of the Canada - Senegal FIPA (2014); Article 9(4) of the Canada - Mali FIPA (2014); Article 9(2) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(2) of the Burkina Faso - Canada FIPA (2014); Article 9(2) of the Canada - Guinea FIPA (2014); Article 9(2) of the Canada - Hong Kong, China FIPA (2016).

<sup>722</sup> Article 7(2) of the 2004 Canada Model FIPA and Article 9(2) of the 2012 Canada Model FIPA also reiterate NAFTA Article 1106(2).

<sup>723</sup> Mozambique - U.S. BIT (1998): Letter of Submittal from the Department of State to the President, 1 May 2000, 106th Cong., 2nd Sess., Senate Treaty Doc. 106-31, XVI.

<sup>724</sup> Fourteen IIAs reproduce such clarification in respect of their prohibition of mandatory performance

## 2. Preserving the Right to Impose Some Technology Transfer Requirements

NAFTA Article 1106(1)(f), while prohibiting technology transfer requirements, also provides instances where they are permissible, namely when they aim at remedying an alleged violation of competition laws or at inducing behaviour not inconsistent with the NAFTA; 22 IIAs among those surveyed reproduce these exceptions integrally.<sup>725</sup> Article VI(e) of the 1994 U.S. Model BIT and the 13 American BITs that reproduce such provision,<sup>726</sup> 10 Canadian FIPAs<sup>727</sup> and two Canadian TIPs<sup>728</sup> also prohibit technology transfer requirements, but permit them only to remedy violations of competition laws and simply abandon permitting technology transfer requirements “to act in a manner not inconsistent with other provisions of this Agreement.”

Article 8(3)(b) of the 2004 U.S. Model BIT<sup>729</sup> sets forth a partially altered formulation of permitted

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requirements: footnote 8 to Article 10.8(1) of the Pacific Alliance Protocol (2014); footnote 39 to Article 11.9(1) of the Australia - Korea FTA (2014); footnote 5 to Article 9.6(1) of the Chile - Colombia FTA (2006); Footnote 4 to Article 11.6(1) of the Chile - Peru FTA (2006); footnote 11-11 to Article 11.9(1) of the Australia - U.S. FTA (2004); footnote 3 to Article 807(1) of the Canada - Colombia FTA (2008); footnote 5 to Article 10.8(1) of the Morocco - U.S. FTA (2004); footnote 3 to Article 10.8(1) of the Oman - U.S. FTA (2006); footnote 6 to Article 10.9(1) of the Peru - U.S. FTA (2006); footnote 6 to Article 10.9(1) of the Colombia - U.S. FTA (2006); footnote 4 to Article 11.8(1) of the Korea - U.S. FTA (2007); footnote 4 to Article 8.8(1) of the Canada - Korea FTA (2014). American BITs: footnote 11 to Article 8(1) of the U.S. - Uruguay BIT (2005); footnote 11 to Article 8(1) of the Rwanda - U.S. BIT (2008).

<sup>725</sup> Canadian FIPAs: Article V(2)(e) of the Canada - Ukraine FIPA (1994); Article V(2)(e) of the Canada - Trinidad and Tobago FIPA (1995); Article V(2)(e) of the Canada - Philippines FIPA (1995); Article V(2)(e) of the Canada - Ecuador FIPA (1996); Article II(6)(e) of the Annex to the Canada - Venezuela FIPA (1996); Article V(2)(e) of the Canada - Panama FIPA (1996); Article V(2)(e) of the Canada - Egypt FIPA (1996); Article V(2)(e) of the Barbados - Canada FIPA (1996); Article V(2)(b) of the Canada - Thailand FIPA (1997); Article VI(e) of the Canada - Croatia FIPA (1997); Article VI(e) of the Canada - Lebanon FIPA (1997); Article V(2)(e) of the Armenia - Canada FIPA (1997); Article VI(e) of the Canada - Uruguay FIPA (1997); Article 7(1)(f) of the Canada - Peru FIPA (2006); Article V(2)(e) of the Canada - Latvia FIPA (2009); Article V(2)(e) of the Canada - Romania FIPA (2009); Article 7(1)(f) of the Canada - Jordan FIPA (2009). Canadian FTAs: Article G-06(1)(f) of the Canada - Chile FTA (1996); Article 807(1)(f) of the Canada - Peru FTA (2008); Article 807(4)(b) of the Canada - Colombia FTA (2008). Chilean Agreements: Article 9-07(1)(f) of the Chile - Mexico FTA (1998); Article 10.7(1)(f) of the Chile - Korea FTA (2003).

<sup>726</sup> Article VI(e) of the Georgia - U.S. BIT (1994); Article VI(e) of the U.S. - Uzbekistan BIT (signed in 1994, but not in force); Article VI(e) of the Trinidad and Tobago - U.S. BIT (1994); Article VI(e) of the Albania - U.S. BIT (1995); Article VI(e) of the Honduras - U.S. BIT (1995); Article VI(e) of the Nicaragua - U.S. BIT (signed in 1995, but not in force); Article VII(e) of the Croatia - U.S. BIT (1996); Article VI(e) of the Jordan - U.S. BIT (1997); Article VI(e) of the Azerbaijan - U.S. BIT (1997); Article VI(e) of the Bolivia - U.S. BIT (1998); Article VI(e) of the Mozambique - U.S. BIT (1998); Article VI(e) of the El Salvador - U.S. BIT (signed in 1999, but not in force); Article VI(e) of the Bahrain - U.S. BIT (1999).

<sup>727</sup> Article 10(4)(b) of the Benin - Canada FIPA (2013); Article 9(4)(b) of the Canada - Tanzania FIPA (2013); Article 9(4)(b) of the Cameroon - Canada FIPA (2014); Article 9(4)(b) of the Canada - Nigeria FIPA (2014); Article 9(4)(b) of the Canada - Serbia FIPA (2014); Article 9(4)(b) of the Canada - Senegal FIPA (2014); Article 9(4)(b) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(4)(b) of the Burkina Faso - Canada FIPA (2014); Article 9(4)(b) of the Canada - Guinea FIPA (2014); Article 9(4)(b) of the Canada - Hong Kong, China FIPA (2016). Article 9(4)(b) of the 2012 Canada Model FIPA also reproduces this provision.

<sup>728</sup> Article 9.07(5) of the Canada - Panama FTA (2008); Article 8.5(3) of the Canada - EU CETA (2014).

<sup>729</sup> Article 8(3)(b) of the 2012 U.S. Model BIT is the same as Article 8(3)(b) of the 2004 U.S. Model BIT, except that it further applies to newly added Article 8(1)(h) of the 2012 U.S. Model BIT (domestic technology preference granting requirements and technology prohibitions).

technology transfer requirements: it retains the permitted instance pertaining to competition laws and anticompetitive behaviour, but replaces the permissible instance of “acting not inconsistently with” the enclosing agreement by instances where a State Party authorises use of intellectual property pursuant to Article 31 of the TRIPS Agreement,<sup>730</sup> or requires disclosure of proprietary information pursuant to Article 39 of the TRIPS Agreement. Twenty-five of the currently surveyed IIAs reproduce such text in their own PRPs.<sup>731</sup> Ten Canadian FIPAs<sup>732</sup> and four Canadian FTAs<sup>733</sup> provide that the prohibition of technology transfer requirements may be derogated from as long as the derogating measure is in conformity with the TRIPs Agreement or with a waiver thereof.

Annex 15C of the Singapore - U.S. FTA (2003) clarifies that regarding Singapore, Article 15.8.1(f), which prohibits technology transfer requirements, does not apply with respect to the sale or other disposition of an investment of an investor of a non-Party in its territory. Singapore has therefore preserved the right to impose technology transfer requirements upon the sale or disposition of an investment.

### **3. Excluding Qualification Requirements for Export Promotion and Foreign Aid Programmes**

NAFTA Article 1108(8)(a) provides that the prohibition of mandatory EPRs, LCRs and LSRs

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<sup>730</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, the Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299 (1994).

<sup>731</sup> American FTAs: Article 15.8(3)(b) of the Singapore - U.S. FTA (2003); Article 10.8(3)(b) of the Morocco - U.S. FTA (2004); Article 10.9(3)(b) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(3)(b) of the Oman - U.S. FTA (2006); Article 10.9(3)(b) of the Peru - U.S. FTA (2006); Article 10.9(3)(b) of the Colombia - U.S. FTA (2006); Article 10.9(3)(b) of the Panama - U.S. FTA (2007); Article 11.8(3)(b) of the Korea - U.S. FTA (2007). American BITs: Article 8(3)(b) of the U.S. - Uruguay BIT (2005); Article 8(3)(b) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 14.9(1)(f) of the Australia - Japan EPA (2014); Article 11.9(4) of the Australia - Korea FTA (2014); Article 5(3)(b) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(4) of the CERTA Investment Protocol (2011); Article 10.7(3)(b) of the Australia - Chile FTA (2008); Article 11.9(3)(b) of the Australia - U.S. FTA (2004). Canadian FTAs: Article 8.8(5) of the Canada - Korea FTA (2014); Article 9.10(3)(b)(i) and (ii) of the TPP (2015). Chilean Agreements: Article 10.8(4) of the Pacific Alliance Protocol (2014); Article 77(1)(f) of the Chile - Japan EPA (2007); Article 9.6(3)(b) of the Chile - Colombia FTA (2006); Article 11.6(3)(b) of the Chile - Peru FTA (2006); Article 10.5(3)(b) of the Chile - U.S. FTA (2003). Indian Agreements: Article 10.5(1)(f) of the India - Korea CEPA (2009) (refers simply to the TRIPs Agreement); Article 89(1)(h) of the India - Japan CEPA (2011) (refers simply to the TRIPs Agreement).

<sup>732</sup> Article 19(1) of the Benin - Canada FIPA (2013); Article 16(5) of the Cameroon - Canada FIPA (2014); Article 17(4) of the Canada - Nigeria FIPA (2014); Article 17(5) of the Canada - Serbia FIPA (2014); Article 17(5) of the Canada - Senegal FIPA (2014); Article 16(5) of the Canada - Mali FIPA (2014); Article 16(5) of the Canada - Côte d'Ivoire FIPA (2014); Article 17(4) of the Burkina Faso - Canada FIPA (2014); Article 17(4) of the Canada - Guinea FIPA (2014); Article 16(4) of the Canada - Hong Kong, China FIPA (2016). Article 17(4) of the 2012 Canada Model FIPA also reproduces this provision.

<sup>733</sup> Article 808(3) of the Canada - Peru FTA (2008); Article 809(4) of the Canada - Colombia FTA (2008); Article 9.09(4) of the Canada - Panama FTA (2008); Article 10.9(4) of the Canada - Honduras FTA (2013).

(NAFTA Articles 1106(1)(a), (b) and (c)), as well as the prohibition of advantage-conditioning LCRs and LSRs (NAFTA Articles 1106(3)(a) and (b)) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes;<sup>734</sup> this exception is identically reproduced in 42 IIAs among those currently surveyed,<sup>735</sup> while Article 5(3) of the ECT (1994) opts for the same exception to its TRIMs Agreement-like disciplines, but with a much simpler wording. Article 8.8(6)(a) of the Canada - Korea FTA (2014) uses the same wording as NAFTA Article 1108(8)(a), but expands the scope of the exception regarding export promotion and foreign aid programmes by rendering inapplicable the prohibition of mandatory LCRs, LSRs, technology transfer requirements and product mandating requirements, as well as the prohibition of advantage-conditioning LCRs and LSRs to qualification requirements for goods or services with respect to such initiatives.

Article VI(2)(d) of the Canada - Ukraine FIPA (1994) does not follow the wording of such exception and instead provides for the inapplicability of its PRP to existing or future bilateral or multilateral foreign aid economic development programmes. Sixteen Canadian IIAs provide for an identically worded exception.<sup>736</sup>

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<sup>734</sup> This exception is identically reproduced in Article 8(3)(d) of the 2004 U.S. Model BIT, Article 8(3)(d) of the 2012 U.S. Model BIT and Article 9(6)(a) of the 2012 Canada Model FIPA.

<sup>735</sup> American FTAs: Article 15.8(3)(d) of the Singapore - U.S. FTA (2003); Article 10.8(3)(d) of the Morocco - U.S. FTA (2004); Article 10.9(3)(d) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(3)(d) of the Oman - U.S. FTA (2006); Article 10.9(3)(d) of the Peru - U.S. FTA (2006); Article 10.9(3)(d) of the Colombia - U.S. FTA (2006); Article 10.9(3)(d) of the Panama - U.S. FTA (2007); Article 11.8(3)(d) of the Korea - U.S. FTA (2007). American BITs: Article 8(3)(d) of the U.S. - Uruguay BIT (2005); Article 8(3)(d) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 14.9(5) of the Australia - Japan EPA (2014); Articles 11.9(6) of the Australia - Korea FTA (2014); Article 5(3)(d) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(5) of the CERTA Investment Protocol (2011); Article 10.7(3)(d) of the Australia - Chile FTA (2008); Article 11.9(3)(d) of the Australia - U.S. FTA (2004). Canadian TIPs: Article G-08(7)(a) of the Canada - Chile FTA (1996); Article 807(6)(a) of the Canada - Peru FTA (2008); Article 807(7)(a) of the Canada - Colombia FTA (2008); Article 9.07(8)(a) of the Canada - Panama FTA (2008); Article 10.9(7)(a) of the Canada - Honduras FTA (2013); Article 8.5(5)(a) of the Canada - EU CETA (2014); Article 9.10(3)(e) of the TPP (2015). Canadian FIPAs: Article 7(6)(a) of the Canada - Peru FIPA (2006); Article 7(6)(a) of the Canada - Jordan FIPA (2009); Article 10(6)(a) of the Benin - Canada FIPA (2013); Article 9(6)(a) of the Canada - Tanzania FIPA (2013); Article 9(6)(a) of the Cameroon - Canada FIPA (2014); Article 9(6)(a) of the Canada - Nigeria FIPA (2014); Article 9(6)(a) of the Canada - Serbia FIPA (2014); Article 9(6)(a) of the Canada - Senegal FIPA (2014); Article 9(6)(a) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(6)(a) of the Burkina Faso - Canada FIPA (2014); Article 9(6)(a) of the Canada - Guinea FIPA (2014); Article 9(6)(a) of the Canada - Hong Kong, China FIPA (2016). Chilean Agreements: Article 10.8(6) of the Pacific Alliance Protocol (2014); Article 77(3)(b) of the Chile - Japan EPA (2007); Article 9.6(3)(d) of the Chile - Colombia FTA (2006); Article 11.6(3)(d) of the Chile - Peru FTA (2006); Article 10.7(7)(a) of the Chile - Korea FTA (2003); Article 10.5(3)(d) of the Chile - U.S. FTA (2003); Article 9-09(7)(a) of the Chile - Mexico FTA (1998).

<sup>736</sup> Article VI(2)(d) of the Canada - Trinidad and Tobago FIPA (1995); Article VI(2)(c) of the Canada - Philippines FIPA (1995); Article VI(2)(d) of the Canada - South Africa FIPA (1995); Article VI(2)(d) of the Canada - Ecuador FIPA (1996); Article II(8)(d) of the Annex to the Canada - Venezuela FIPA (1996); Article VI(2)(d) of the Canada - Panama FIPA (1996); Article VI(2)(d) of the Canada - Egypt FIPA (1996); Article VI(2)(d) of the Barbados - Canada FIPA (1996); Article VI(2)(d) of the Canada - Thailand FIPA



#### 4. Excluding Qualification Requirements for Preferential Tariffs or Quotas

NAFTA Article 1108(8)(c) renders inapplicable the prohibition of advantage-conditioning LCRs and LSRs (NAFTA Articles 1106(3)(a) and (b))<sup>737</sup> to the content of goods necessary to qualify for preferential tariffs or preferential quotas; this exception is also reproduced in 43 IIAs among the ones surveyed.<sup>738</sup> In addition, Article 5(3) of the ECT (1994) opts for the same exception to its TRIMs Agreement-like disciplines, but with a much simpler wording.

#### 5. GATT Article XX-like Exceptions

In a way clearly reminiscent of GATT Article XX, NAFTA Article 1106(6) provides that State Parties preserve their right to enact mandatory and advantage-conditioning LCRs and LSRs if such measures are not applied in an arbitrary or unjustifiable manner, if they do not constitute a disguised restriction on international trade or investment, and if they are necessary for one of the following purposes:

- (a) to secure compliance with laws and regulations that are not inconsistent with the provisions of the NAFTA;

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(1997); Article III(5)(d) of Annex I to the Canada - Croatia FIPA (1997); Article III(5)(d) of Annex I to the Canada - Lebanon FIPA (1997); Article VI(2)(d) of the Armenia - Canada FIPA (1997); Article III(5)(d) of Annex I to the Canada - Uruguay FIPA (1997); Article III(5)(d) of Annex I to the Canada - Costa Rica FIPA (1998); Article VI(2)(d) of the Canada - Latvia FIPA (2009); Article VI(2)(d) of the Canada - Romania FIPA (2009).

<sup>737</sup> This exception is also reproduced in Article 8(3)(f) of the 2004 U.S. Model BIT, in Article 7(6)(c) of the 2004 Canada Model FIPA, in Article 8(3)(f) of the 2012 U.S. Model BIT and in Article 9(6)(c) of the 2012 Canada Model FIPA.

<sup>738</sup> American FTAs: Article 15.8(3)(f) of the Singapore - U.S. FTA (2003); Article 10.8(3)(f) of the Morocco - U.S. FTA (2004); Article 10.9(3)(f) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(3)(f) of the Oman - U.S. FTA (2006); Article 10.9(3)(f) of the Peru - U.S. FTA (2006); Article 10.9(3)(f) of the Colombia - U.S. FTA (2006); Article 10.9(3)(f) of the Panama - U.S. FTA (2007); Article 11.8(3)(f) of the Korea - U.S. FTA (2007). American BITs: Article 8(3)(f) of the U.S. - Uruguay BIT (2005); Article 8(3)(f) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 14.9(7) of the Australia - Japan EPA (2014); Article 11.9(8) of the Australia - Korea FTA (2014); Article 5(3)(f) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(7) of the CERTA Investment Protocol (2011); Article 10.7(3)(f) of the Australia - Chile FTA (2008); Article 11.9(3)(f) of the Australia - U.S. FTA (2004). Canadian TIPs: Article 807(7)(c) of the Canada - Colombia FTA (2008); Article 807(6)(c) of the Canada - Peru FTA (2008); Article 9.07(8)(c) of the Canada - Panama FTA (2008); Article 10.9(7)(c) of the Canada - Honduras FTA (2013); Article 8.8(6)(c) of the Canada - Korea FTA (2014); Article 8.5(6) of the Canada - EU CETA (2014); Article 9.10(3)(g) of the TPP (2015). Canadian FIPAs: Article 7(6)(c) of the Canada - Peru FIPA (2006); Article 7(6)(c) of the Canada - Jordan FIPA (2009); Article 10(6)(c) of the Benin - Canada FIPA (2013); Article 9(6)(c) of the Canada - Tanzania FIPA (2013); Article 9(6)(c) of the Cameroon - Canada FIPA (2014); Article 9(6)(c) of the Canada - Nigeria FIPA (2014); Article 9(6)(c) of the Canada - Serbia FIPA (2014); Article 9(6)(c) of the Canada - Senegal FIPA (2014); Article 9(6)(c) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(6)(c) of the Burkina Faso - Canada FIPA (2014); Article 9(6)(c) of the Canada - Guinea FIPA (2014); Article 9(6)(c) of the Canada - Hong Kong, China FIPA (2016). Chilean Agreements: Article 10.8(8) of the Pacific Alliance Protocol (2014); Article 77(3)(d) of the Chile - Japan EPA (2007); Article 9.6(3)(f) of the Chile - Colombia FTA (2006); Article 11.6(3)(e) of the Chile - Peru FTA (2006); Article 10.7(7)(c) of the Chile - Korea FTA (2003); Article 10.5(3)(f) of the Chile - U.S. FTA (2003); Article 9-09(7)(c) of the Chile - Mexico FTA (1998); Article G-08(7)(c) of the Canada - Chile FTA (1996).

(b) to protect human, animal or plant life or health; or

(c) to conserve living or non-living exhaustible natural resources.

Three FTAs have reproduced this exception to their PRPs in identical terms.<sup>739</sup> Nineteen IIAs<sup>740</sup> followed instead the slightly diverging approach of Article 8(3)(c) of the 2004 U.S. Model BIT, which extends the availability of this same exception to mandatory technology transfer requirements and which eases the threshold in respect of exhaustible natural resources from necessary conservation measures to measures merely “related to” exhaustible natural resources.<sup>741</sup>

Other IIAs have replicated the majority of NAFTA Article 1106(6), but tailored it to achieve slightly different outcomes. For instance, a number of IIAs provide that the exception applies to the entirety of their PRP. Both Article 14.15 of the Australia - Japan EPA (2014) and Article 19 of the CERTA Investment Protocol (2011) opted for “general exceptions” applicable to multiple treaty provisions, including but not limited to the entirety of their respective PRPs. Article XVII(3) of the Canada - Ukraine FIPA (1994) establishes an exception identical to that of NAFTA Article 1106(6), but for its applicability to the whole of the FIPA including its PRP; 21 Canadian FIPAs follow the Canada - Ukraine FIPA (1994) in this respect.<sup>742</sup> Ten Canadian FIPAs reproduce this

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<sup>739</sup> Article 10.7(6) of the Chile - Korea FTA (2003); Article 9-07(6) of the Chile - Mexico FTA (1998); Article G-06(6) of the Canada - Chile FTA (1996).

<sup>740</sup> American TIPs: Article 15.8(3)(c) of the Singapore - U.S. FTA (2003); Article 10.8(3)(c) of the Morocco - U.S. FTA (2004); Article 10.9(3)(c) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(3)(c) of the Oman - U.S. FTA (2006); Article 10.9(3)(c) of the Peru - U.S. FTA (2004); Article 10.9(3)(c) of the Colombia - U.S. FTA (2006); Article 10.9(3)(c) of the Panama - U.S. FTA (2007); Article 11.8(3)(c) of the Korea - U.S. FTA (2007); Article 9.10(3)(d) of the TPP (2015). American BITs: Article 8(3)(c) of the U.S. - Uruguay BIT (2005); Article 8(3)(c) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 11.9(5) of the Australia - Korea FTA (2014); Article 5(3)(c) of SAFTA Revised Chapter 8 (Investment) (2011); Article 10.7(3)(c) of the Australia - Chile FTA (2008); Article 11.9(3)(c) of the Australia - U.S. FTA (2004). Chilean Agreements: Article 10.8(5) of the Pacific Alliance Protocol (2014); Article 9.6(3)(c) of the Chile - Colombia FTA (2006); Article 11.6(3)(c) of the Chile - Peru FTA (2006); Article 10.5(3)(c) of the Chile - U.S. FTA (2003).

<sup>741</sup> Article 8(3)(c) of the 2012 U.S. Model BIT as well as the equivalent provision in the TPP are the same as Article 8(3)(c) of the 2004 U.S. Model BIT, except that they are also made applicable to newly added Article 8(1)(h) of the 2012 U.S. Model BIT (domestic technology preference granting requirements and technology prohibitions).

<sup>742</sup> Article XVII(3) of the Canada - Trinidad and Tobago FIPA (1995); Article XVII(3) of the Canada - Philippines FIPA (1995); Article XVII(3) of the Canada - South Africa FIPA (1995); Article XVII(3) of the Canada - Ecuador FIPA (1996); Article II(10)(b) of the Annex to the Canada - Venezuela FIPA (1996); Article XVII(3) of the Barbados - Canada FIPA (1996); Article 10(1) of the Canada - Peru FIPA (2006); Article XVII(3) of the Canada - Latvia FIPA (2009); Article XVII(3) of the Canada - Romania FIPA (2009); Article 10(1) of the Canada - Jordan FIPA (2009); Article 17(1) of the Canada - Kuwait FIPA (2011); Article 20(1) of the Benin - Canada FIPA (2013); Article 17(1) of the Canada - Tanzania FIPA (2013); Article 17(1) of the Cameroon - Canada FIPA (2014); Article 18(1) of the Canada - Nigeria FIPA (2014); Article 18(1) of the Canada - Serbia FIPA (2014); Article 18(1) of the Canada - Senegal FIPA (2014); Article 17(1) of the Canada - Mali FIPA (2014); Article 17(1) of the Canada - Côte d'Ivoire FIPA (2014); Article 18(1) of the Burkina Faso - Canada FIPA (2014); Article 18(1) of the Canada - Guinea FIPA (2014). Article 18(1) of the 2012 Canada Model FIPA reproduces NAFTA Article 1106(6), save for its applicability

same approach, but add to the exception regarding exhaustible natural resources the requirement that such measure be “made effective in conjunction with restrictions on domestic production or consumption.”<sup>743</sup> Article 6.11 of the India - Singapore CECA (2005) and Article 10.18(1) of the India - Korea CEPA (2009) adopt very similar exceptions with the same proviso to the exception regarding exhaustible natural resources.

Three Canadian FTAs opt for exceptions nearly identical to NAFTA Article 1106(6), but make such exceptions applicable to the entirety of their respective chapters on investment;<sup>744</sup> these FTAs provide that the exception in favour of protecting human, animal or plant life or health includes environmental measures necessary for such purposes.<sup>745</sup> Article 807(4)(c) of the Canada - Colombia FTA (2008) adds, “for greater certainty,” that the general exception enshrined in Article 2201(3) of the Canada - Colombia FTA (2008) (very similar to NAFTA Article 1106(6)) applies to Article the PRP found in Article 807.

Article 4(4) of the India - Kuwait BIT (2001) opts for a broad exception to its PRP by allowing performance requirements “deemed vital for reasons of public order, public health or environmental concerns” when such performance requirements “are enforced by law of general application.” Article 11(1) and (2) of the India - Japan CEPA (2011) merely render the general exceptions of the GATT and the GATS applicable to multiple provisions including its PRP.

In *S.D. Myers v Canada*, the *S.D. Myers* Majority decided that the PCB Export Ban did not breach NAFTA Article 1106,<sup>746</sup> while Professor Bryan P. Schwartz dissented solely to the extent that he found a breach of Article 1106.<sup>747</sup> Dissenting Arbitrator Schwartz is alone in having considered NAFTA Article 1106(6) and opined that while such exception could be invoked in principle, it was of no assistance to Canada in its attempt to justify the PCB Export Ban.<sup>748</sup> First, the PCB Export Ban constituted a disguised barrier on international trade: the PCB Export Ban was adopted in order to protect the local PCB waste disposal industry, a finding corroborated

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to the entirety of the Agreement including its PRP.

<sup>743</sup> Article XVII(3) of the Canada - Panama FIPA (1996); Article XVII(3) of the Canada - Egypt FIPA (1996); Article XVII(3) of the Canada - Thailand FIPA (1997); Article III(2) of Annex I to the Canada - Croatia FIPA (1997); Article III(2) of Annex I to the Canada - Lebanon FIPA (1997); Article XVII(3) of the Armenia - Canada FIPA (1997); Article III(2) of Annex I to the Canada - Uruguay FIPA (1997); Article III(2) of Annex I to the Canada - Costa Rica FIPA (1998); Article 33(2) of the Canada - China FIPA (2012); Article 17(1) of the Canada - Hong Kong, China FIPA (2016).

<sup>744</sup> Article 2201(3) of the Canada - Peru FTA (2008); Article 2201(3) of the Canada - Colombia FTA (2008); Article 23.02(3) of the Canada - Panama FTA (2010).

<sup>745</sup> Article 2201(3)(a) of the Canada - Peru FTA (2008); Article 2201(3)(a) of the Canada - Colombia FTA (2008); Article 23.02(3)(a)(i) of the Canada - Panama FTA (2010).

<sup>746</sup> *S.D. Myers* – Majority (n 167) paras 323.

<sup>747</sup> *S.D. Myers* – Dissent (n 197) para 4.

<sup>748</sup> *ibid* paras 21, 148-150, 174, 195, 198-200.

notably by a statement before Parliament of the Minister of the Environment of Canada to the effect that PCB wastes should be disposed of in Canada and by Canadians. That statement, along with additional evidence, had already led the Tribunal to unanimously find a violation of NAFTA Article 1102 (national treatment).<sup>749</sup> Second, the PCB Export Ban was not necessary to protect life or health given that Canada could have addressed its safety and environmental concerns without preventing claimant SDMI from remediating Canadian PCB waste outside Canada. Third, the PCB Export Ban was applied in a way both arbitrary and unjustifiable on the basis that it constituted a disguised barrier to trade and was unnecessary. Dissenting Arbitrator Schwartz referred to GATT Article XX at length while conducting his analysis under NAFTA Article 1106(6).

GATT Article XX and related decisions rendered pursuant to WTO dispute settlement proceedings can provide helpful interpretative guidance in the context of ISDS proceedings when the exception to a given PRP is similarly worded and when the claimant's home State and the respondent State are WTO Members.

## **6. Exceptions in Favour of Aboriginal Peoples and/or Socially or Economically Disadvantaged Minorities**

Article VI(2)(c) of the Canada - Ukraine FIPA (1994) provides for an exception to its PRP in respect of measures that deny Ukrainian investors and investments any rights or preferences provided to the aboriginal peoples of Canada. Sixteen Canadian FIPAs provide for an identically worded exception.<sup>750</sup>

Providing for an exception regarding aboriginal peoples within the texts of the FIPAs themselves departed markedly from the approach to aboriginal affairs elaborated in the NAFTA (1992). As will be analysed in greater detail below, NAFTA Article 1108(3) excludes from the scope of NAFTA Article 1106 any measure that State Parties adopt or maintain in sectors, subsectors or activities set out in Annex II. NAFTA Annex II allows State Parties to take reservations with respect to specific sectors, sub-sectors or activities for which State Parties may maintain

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<sup>749</sup> *ibid* paras 148-150.

<sup>750</sup> Article VI(2)(c) of the Canada - Trinidad and Tobago FIPA (1995); Article XVII(4) and Annex, section 2(b) of the Canada - Philippines FIPA (1995); Article VI(2)(c) of the Canada - South Africa FIPA (1995); Article VI(2)(c) of the Canada - Ecuador FIPA (1996); Article II(8)(c) of the Annex to the Canada - Venezuela FIPA (1996); Article VI(2)(c) of the Canada - Panama FIPA (1996); Article VI(2)(c) of the Canada - Egypt FIPA (1996); Article VI(2)(c) of the Barbados - Canada FIPA (1996); Article VI(2)(c) of the Canada - Thailand FIPA (1997); Article III(5)(c) of Annex I to the Canada - Croatia FIPA (1997); Article III(5)(c) of Annex I to the Canada - Lebanon FIPA (1997); Article VI(2)(c) of the Armenia - Canada FIPA (1997); Article III(5)(c) of Annex I to the Canada - Uruguay FIPA (1997); Article III(5)(c) of Annex I to the Canada - Costa Rica FIPA (1998); Article VI(2)(c) of the Canada - Latvia FIPA (2009); Article VI(2)(c) of the Canada - Romania FIPA (2009).

existing, or adopt new or more restrictive measures that do not conform to the PRP. In its Schedule to Annex II, Canada reserved the right to adopt or maintain any measure denying investors of another Party and their investments any rights or preferences provided to aboriginal peoples in violation of the PRP. In their respective Schedules to Annex II, Canada and the United States reserved the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities in violation of the PRP. The United States added a specific mention of Alaskan corporations organised in accordance with the Alaska Native Claims Settlement Act. Mexico adopted a similarly-worded reservation, except that it replaced “minorities” by “groups.”

In a way both simpler than and reminiscent of the NAFTA, both Canada and Chile reserved, under the Canada - Chile FTA (1996), the right to adopt or maintain any measure that denied investors of the other State Party and their investments any rights or preferences provided to aboriginal peoples.<sup>751</sup> Starting with the 2004 Canada Model FIPA, Canadian FIPAs ceased to provide a PRP exception regarding aboriginal peoples within the texts of the FIPAs themselves and adopted an approach more closely based on that of the NAFTA. In the first Canadian FIPA to follow the release of the 2004 Canada Model FIPA, Canada and Peru closely followed the approach developed in the NAFTA and adopted reservations to the PRP: Canada<sup>752</sup> reserved the right to adopt or maintain any measure denying investors of the other Party and their investments any rights or preferences provided to aboriginal peoples or additionally to socially or economically disadvantaged minorities. Peru<sup>753</sup> reserved the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities and ethnic groups. That provision defines “ethnic groups” as indigenous and native communities, while “minorities” include peasant (*campesinos*) communities.

The application of the Canada - Peru FIPA (2006) was suspended as a result of the entry into force of the Canada - Peru FTA (2008) (Article 845), but remains in force in respect of pre-FTA breaches; moreover, Canada and Peru reiterated the same reservations in the Canada - Peru FTA (2008).<sup>754</sup> Canada adopted these same reservations in the Canada - Colombia FTA (2008),<sup>755</sup> while Colombia reserved the right to adopt or maintain any measure according rights

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<sup>751</sup> Annex II - Schedule of Canada to the Canada - Chile FTA (1996); Annex II - Schedule of Chile to the Canada - Chile FTA (1996).

<sup>752</sup> Annex II - Reservations for Future Measures - Schedule of Canada to the Canada - Peru FIPA (2006) - Sector: Aboriginal Affairs and Sector: Minority Affairs.

<sup>753</sup> Annex II - Reservations for Future Measures - Schedule of Peru to the Canada - Peru FIPA (2006) - Sector: Indigenous Communities, Peasant, Native, and Minority Affairs.

<sup>754</sup> Annex II - Schedule of Canada to the Canada - Peru FTA (2008); Annex II - Schedule of Peru to the Canada - Peru FTA (2008).

<sup>755</sup> Annex II - Schedule of Canada to the Canada - Colombia FTA (2008).

or preferences to socially or economically disadvantaged minorities and ethnic groups.<sup>756</sup>

The application of the Canada - Panama FIPA (1996) was also suspended as a result of the entry into force of the Canada - Panama FTA (2010) (Article 9.38(1)), but remains in force in respect of pre-FTA breaches. Going forward, Canada and Panama replaced Article VI(2)(c) of the Canada - Panama FIPA (1996) with respective reservations of their right to adopt or maintain any measure denying investors of the other Party and their investments any rights or preferences provided to aboriginal peoples or to socially or economically disadvantaged minorities.<sup>757</sup> Canada adopted the same reservations in the Canada - Honduras FTA (2013), while Honduras limited its similarly worded reservation to the benefit of socially and economically disadvantaged minorities.<sup>758</sup>

Canada included similar reservations to the PRPs of an additional 11 post-2004 Canadian FIPAs.<sup>759</sup> The Cameroon - Canada FIPA (2014) displays the same formulation, but both State Parties (and not only Canada) made such reservations to the PRP.<sup>760</sup> Canada adopted the same formulation for its reservations to the PRP in the Canada - Burkina Faso FIPA (2014), while Burkina Faso did the same, but only in respect of socially or economically disadvantaged minorities.<sup>761</sup> Only the Canada - China FIPA (2012) does not provide for an exception or a reservation to its PRP in favour of aboriginal peoples or socially or economically disadvantaged minorities.

With identical reservations in five of its FTAs, Australia preserved its right to adopt or maintain any measure which grants preferences or more favourable treatment to any indigenous person

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<sup>756</sup> Annex II - Schedule of Colombia to the Canada - Colombia FTA (2008).

<sup>757</sup> Annex II - Schedule of Canada to the Canada - Panama FTA (2008); Annex II - Schedule of Panama to the Canada - Panama FTA (2008).

<sup>758</sup> Annex II - Schedule of Canada to the Canada - Honduras FTA (2013); Annex II - Schedule of Honduras to the Canada - Honduras FTA (2013).

<sup>759</sup> Annex II - Reservations for Future Measures - Schedule of Canada to the Canada - Jordan FIPA (2009); Annex I - Reservations for Future Measures - Schedule of Canada to the Canada - Kuwait FIPA (2011); Annex II - Reservations for Future Measures - Schedule of Canada, paragraphs (b) and (c) of the Benin - Canada FIPA (2013); Annex II - Reservations for Future Measures - Schedule of Canada to the Canada - Tanzania FIPA (2013); Annex I - Reservations for Future Measures - Schedule of Canada to the Canada - Nigeria FIPA (2014); Annex II - Reservations for Future Measures - Schedule of Canada to the Canada - Serbia FIPA (2014); Annex I - Reservations for Future Measures - Schedule of Canada to the Canada - Senegal FIPA (2014); Annex II - Reservations for Future Measures - Schedule of Canada to the Canada - Mali FIPA (2014); Annex II - Reservations for Future Measures - Schedule of Canada to the Canada - Côte d'Ivoire FIPA (2014); Annex I - Reservations for Future Measures - Schedule of Canada to the Canada to the Guinea FIPA (2014); Annex II - Reservations for Future Measures - Schedule of Canada, paragraphs (b) and (c) of the Canada - Hong Kong, China FIPA (2016).

<sup>760</sup> Annex II - Reservations for Future Measures - Schedules of Canada and of Cameroon to the Cameroon - Canada FIPA (2014).

<sup>761</sup> Annex II - Reservations for Future Measures - Schedules of Canada and of Burkina Faso to the Burkina Faso - Canada FIPA (2014).

or organisation with respect to investments or in relation to the acquisition, establishment or operation of any commercial or industrial undertaking in the service sector.<sup>762</sup> Chile also reserved, in its FTA with Australia (2008), its right to adopt or maintain any measure denying Australian investors, investments and service suppliers any rights or preferences provided to indigenous peoples.<sup>763</sup>

Article 23 of the CERTA Investment Protocol (2011) (in respect of investments) and Article 5 of AANZFTA Chapter 22 (2009) (in respect of trade in goods and services) both ensure that New Zealand preserves its unhindered right to enact measures deemed necessary to “accord more favourable treatment to Maori” for purposes of fulfilling its obligations under the Treaty of Waitangi of 1840 which essentially authorises the British Crown to develop British settlements in exchange for the guarantee of full protection of Maori interests and status.

## **7. Exempting Cultural Industries from PRPs**

Cultural industries are basically exempted from the NAFTA’s application: Article 2106 and Annex 2106 of the NAFTA render Article 2005 of the CUSFTA (1988) applicable to NAFTA State Parties. Article 2005 of the CUSFTA (1988) exempts cultural industries from the CUSFTA except in respect of a limited number of treaty provisions which apply to cultural industries regarding tariff elimination, the sale of an indirectly acquired foreign-owned cultural enterprise, copyright protection and printing requirements. Article O-06 of and Annex O-06 to the Canada - Chile FTA (1996) follow the approach of the NAFTA, but use simpler language and render the FTA inapplicable to cultural industries except for specifically identified tariff elimination commitments. In much simpler and straightforward terms, Article VI(3) of the Canada - Ukraine FIPA (1994)<sup>764</sup> excludes investments in cultural industries in Canada from the scope of the FIPA. Thirty-one Canadian FIPAs<sup>765</sup> and five Canadian FTAs<sup>766</sup> reproduce this exception in practically

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<sup>762</sup> Annex 7 - Non-conforming Measures Relating to Paragraph 2 of Articles 9.7 and 14.10 - Part 1 - Schedule of Australia to the Australia - Japan EPA (2014); Annex II - Schedule of Australia to the Australia - Korea FTA (2014); Annex II - Schedule of Australia to the CERTA Investment Protocol (2011); Annex II - Schedule of Australia to the Australia - Chile FTA (2008); Annex II - Schedule of Australia to the Australia - U.S. FTA (2004); Annex 4-II(a) - Australia’s Reservations to Chapter 7 (Trade in Services) and Chapter 8 (Investment) of SAFTA (2011).

<sup>763</sup> Annex II - Schedule of Chile to the Australia - Chile FTA (2008).

<sup>764</sup> Article 10(6) of the 2004 Canada Model FIPA and Article 18(7) of the 2012 Canada Model FIPA reproduce this approach.

<sup>765</sup> Article VI(3) of the Canada - Trinidad and Tobago FIPA (1995); Article XVII(4) and Annex, section 2(c) of the Canada - Philippines FIPA (1995); Article VI(3) of the Canada - South Africa FIPA (1995); Article VI(3) of the Canada - Ecuador FIPA (1996); Article II(9) of the Annex to the Canada - Venezuela FIPA (1996); Article VI(3) of the Canada - Panama FIPA (1996); Article VI(3) of the Canada - Egypt FIPA (1996); Article VI(3) of the Barbados - Canada FIPA (1996); Article VI(3) of the Canada - Thailand FIPA (1997); Article III(4) of Annex I to the Canada - Croatia FIPA (1997); Article III(4) of Annex I to the Canada - Lebanon FIPA (1997); Article VI(3) of the Armenia - Canada FIPA (1997); Article III(4) of Annex I to the

identical terms, but extend this exemption to the cultural industries of both their State Parties.

## 8. Opting Taxation Measures in or out of PRPs

Forming part of NAFTA Chapter 21 (on exceptions), Article 2103(1) (on taxation) states as a rule that the NAFTA does not apply to taxation measures unless the contrary is provided for in Article 2103. NAFTA Article 2103(5) specifies that Article 1106(3) applies to taxation measures: conditioning advantages upon LCRs, LSRs, trade-balancing requirements or domestic sales restrictions through taxation measures is therefore prohibited. NAFTA Article 2103(5) also renders applicable to taxation measures the following provisions of NAFTA's PRP: Article 1106(4), according to which State Parties preserve their rights to impose advantage-conditioning requirements to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out R&D in their territories, and Article 1106(5) which ensures that the PRP applies only to the performance requirements explicitly set out. Articles O-03(1) and O-03(5) of the Canada - Chile FTA (1996) follow the same approach regarding the relation between its PRP and taxation measures as the one laid out in NAFTA Article 2103.

A number of other IIAs lay out specific rules that render their PRPs applicable to taxation measures and go about it in many different ways. Article 21(1) and 21(3) of the 2004 U.S. Model BIT and Article 21(1) and 21(3) of the 2012 U.S. Model BIT 2012 operate in the same way as NAFTA Article 2103. The main difference consists of the contents of Article 8(3) of the 2004 U.S. Model BIT and the nearly identical Article 8(3) of the 2012 U.S. Model BIT, which are much broader than any corresponding provision within NAFTA Article 1106 since it comprises numerous exceptions and limitations to its PRP, most of which are instead found in NAFTA Article 1108(8). Thirteen IIAs among the ones surveyed reproduce Article 21(1) and 21(3) of the 2004 U.S. Model BIT and therefore provide for the same framework regarding the application of their PRPs to taxation measures: only the enumerated advantage-conditioning performance

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Canada - Uruguay FIPA (1997); Article III(4) of Annex I to the Canada - Costa Rica FIPA (1998); Article 10(6) of the Canada - Peru FIPA (2006); Article VI(3) of the Canada - Latvia FIPA (2009); Article VI(3) of the Canada - Romania FIPA (2009); Article 10(6) of the Canada - Jordan FIPA (2009); Article 17(8) of the Canada - Kuwait FIPA (2011); Article 33(1) of the Canada - China FIPA (2012); Article 20(7) of the Benin - Canada FIPA (2013); Article 17(7) of the Canada - Tanzania FIPA (2013); Article 17(7) of the Cameroon - Canada FIPA (2014); Article 18(7) of the Canada - Nigeria FIPA (2014); Article 18(7) of the Canada - Serbia FIPA (2014); Article 18(7) of the Canada - Senegal FIPA (2014); Article 17(7) of the Canada - Mali FIPA (2014); Article 17(7) of the Canada - Côte d'Ivoire FIPA (2014); Article 18(7) of the Burkina Faso - Canada FIPA (2014); Article 18(7) of the Canada - Guinea FIPA (2014); Article 17(7) of the Canada - Hong Kong, China FIPA (2016).

<sup>766</sup> Article 2205 of the Canada - Peru FTA (2008); Article 2206 of the Canada - Colombia FTA (2008); Article 23.06 of the Canada - Panama FTA (2008); Article 22.7 of the Canada - Honduras FTA (2013); Article 22.6 of the Canada - Korea FTA (2014).



requirements are prohibited in relation with taxation measures.<sup>767</sup> Article 18.4(2) of the Pacific Alliance Protocol (2014) follows a similar approach and renders only the prohibition of enumerated advantage-conditioning performance requirements (as opposed to mandatory performance requirements) applicable to taxation measures. Article 22.3(1) of the Australia - Chile FTA (2008) and Article 22.3(1) of the Australia - Korea FTA (2014) also set inapplicability of their provisions to taxation measures as the by default setting; Article 22.3(4)(c) of the Australia - Chile FTA (2008) renders portions of its PRP (prohibition of advantage-conditioning performance requirements, exceptions and exclusions, limitation to measures explicitly set out) applicable to taxation measures, while Article 22.3(2)(e) of the Australia - Korea FTA (2014) goes on to render its PRP (all of it except for the prohibition of mandatory of performance requirements) applicable to taxation measures. Both FTAs therefore impose additional restrictions as to the applicability of their respective PRP provisions to taxation measures. Opting for a simpler approach, five Canadian TIPs<sup>768</sup> and three IIAs<sup>769</sup> state that nothing applies to taxation measures unless indicated otherwise and that taxation measures are subject to all of the provisions of the PRP within those IIAs. In total, 25 IIAs among those surveyed (including the NAFTA) have decided to subject taxation measures to part of or to the entirety of their PRPs.

By contrast, 41 IIAs among the ones surveyed follow the example set by the accounted for Article XII(1) of the Canada - Ukraine FIPA (1994)<sup>770</sup> and shield taxation measures from their respective PRPs: treaty provisions in these IIAs state that nothing in these IIAs applies to taxation measures unless indicated otherwise; in the absence of such contrary indication, their respective PRPs do not apply to taxation measures.<sup>771</sup>

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<sup>767</sup> American TIPs: Articles 23.3(1), 23.3(5) and 10.5(3) of the Chile - U.S. FTA (2003); Articles 21.3(1), 21.3(5) and 15.8(3)(a) of the Singapore - U.S. FTA (2003); Articles 22.3(1), 22.3(5) and 11.9(3) of the Australia - U.S. FTA (2004); Article 21.3(1), 21.3(5) and 10.8(3) of the Morocco - U.S. FTA (2004); Articles 21.3(1), 21.3(5) and 10.9(3) of the CAFTA-DR - U.S. FTA (2004); Articles 21.3(1), 21.3(5) and 10.8(3) of the Oman - U.S. FTA (2006); Articles 21.3(1), 21.3(5) and 10.9(3) of the Panama - U.S. FTA (2007); Articles 22.3(1), 22.3(5) and 11.8(3) of the Korea - U.S. FTA (2007); Article 29.4(2), 29.4(7) and 9.10(2) of the TPP (2015). American BITs: Articles 21(1), 21(4) and 8(3) of the U.S. - Uruguay BIT (2005); Articles 21(1), 21(4) and 8(3) of the Rwanda - U.S. BIT (2008). Australian and Chilean FTAs: Articles 21.4(1), 21.4(5) and 9.6(3) of the Chile - Colombia FTA (2006); Articles 17.3(1), 17.3(5) and 11.6(3) of the Chile - Peru FTA (2006).

<sup>768</sup> Article 2203(1), 2203(7) of the Canada - Peru FTA (2008); Article 2204(1), 2204(6) of the Canada - Colombia FTA (2008); Article 23.04(1), 23.04(7) of the Canada - Panama FTA (2008); Article 22.4(1), 22.4(7) of the Canada - Honduras FTA (2013); Article 22.3(1), 22.3(6) of the Canada - Korea FTA (2014).

<sup>769</sup> Articles 21(1) and 21(2)(b) of the CERTA Investment Protocol (2011); Articles 22.3(1) and 22.3(5) of the Peru - U.S. FTA (2006); Articles 22.3(1) and 22.3(5) of the Colombia - U.S. FTA (2006).

<sup>770</sup> Article 14(1) of the 2012 Canada Model FIPA and Article 16(1) of the 2004 Canada Model FIPA achieve the same result of rendering their PRP inapplicable to taxation measures.

<sup>771</sup> American Agreements: Article 4(1) of Chapter VII – General Articles to the U.S. - Vietnam TRA (2000); Australian Agreements: Article 1.8 (Taxation) of the Australia - Japan EPA (2014); Article 18.3(1) of the

Expressing a willingness to preserve unfettered tax policy-making powers, States have set as the default rule the inapplicability of a large number of surveyed IIAs to taxation measures, while a lesser number have carefully rendered parts of their PRPs applicable to taxation measures. This survey shows that States have expressed acute awareness as to the sensitivity of the relationship between PRPs and taxation measures.

## **9. Tailored Exceptions to PRPs that Address Various Issues of National or Regional Concern**

### *a) Preserving Performance Requirements Necessary to Comply with EU Rules*

Article I of the EU - U.S. Additional Protocols (September 2003) in respect of eight American BITs each entered into with a different EU Member State (Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and the Slovak Republic) preserves from the PRPs the ability of each of the eight European Parties to impose, as necessary under EU law, performance requirements in respect of agricultural and audio-visual goods or services.<sup>772</sup> Article I of the EU - U.S. Additional Protocols (September 2003), initially described as an “interpretation,” is duly acknowledged as an amendment to the PRPs within the eight BITs concerned.<sup>773</sup>

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Australia - Malaysia FTA (2012); Article 2(3) (Scope of Application) of SAFTA Revised Chapter 8 (Investment) (2011); Article 3(1) of AANZFTA (2009) Chapter 15 (General Provisions and Exceptions). Canadian FIPAs: Article XII(1) of the Canada - Trinidad and Tobago FIPA (1995); Article XII(1) of the Canada - Philippines FIPA (1995); Article XII(1) of the Canada - South Africa FIPA (1995); Article XII(1) of the Canada - Ecuador FIPA (1996); Article XI(1) of the Canada - Venezuela FIPA (1996); Article XII(1) of the Canada - Panama FIPA (1996); Article XII(1) of the Canada - Egypt FIPA (1996); Article XII(1) of the Barbados - Canada FIPA (1996); Article XII(1) of the Canada - Thailand FIPA (1997); Article XI(1) of the Canada - Croatia FIPA (1997); Article XI(1) of the Canada - Lebanon FIPA (1997); Article XII(1) of the Armenia - Canada FIPA (1997); Article XI(1) of the Canada - Uruguay FIPA (1997); Article XI(1) of the Canada - Costa Rica FIPA (1998); Article 16(1) of the Canada - Peru FIPA (2006); Article XII(1) of the Canada - Latvia FIPA (2009); Article XII(1) of the Canada - Romania FIPA (2009); Article 16(1) of the Canada - Jordan FIPA (2009); Article 14(1) of the Canada - Kuwait FIPA (2011); Article 14(1) of the Canada - China FIPA (2012); Article 17(1) of the Benin - Canada FIPA (2013); Article 14(1) of the Canada - Tanzania FIPA (2013); Article 14(1) of the Cameroon - Canada FIPA (2014); Article 14(1) of the Canada - Nigeria FIPA (2014); Article 14(1) of the Canada - Serbia FIPA (2014); Article 14(1) of the Canada - Senegal FIPA (2014); Article 14(1) of the Canada - Mali FIPA (2014); Article 14(1) of the Canada - Côte d'Ivoire FIPA (2014); Article 14(1) of the Burkina Faso - Canada FIPA (2014); Article 14(1) of the Canada - Guinea FIPA (2014); Article 14(1) of the Canada - Hong Kong, China FIPA (2016). Chilean Agreements: Article 194(1) of the Chile - Japan EPA (2007); Article 20.3(2) of the Chile - Korea FTA (2003); Article 19-05 of the Chile - Mexico FTA (1998). Indian Agreements: Article 10.2(8) of the India - Korea CEPA (2009); Article 10(1) of the India - Japan CEPA (2011).

<sup>772</sup> See e.g., Article I of the *Additional Protocol Between the United States of America and the Czech Republic to the Treaty Between the United States of America and the Czech And Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment of October 22, 1991*, signed at Brussels on 10 December 2003, 108th Cong., 2nd Sess., Treaty Doc. 108–18.

<sup>773</sup> *United States Senate Executive Report 108-13 – Protocols Amending Existing Bilateral Investment Treaties With new European Union Member Nations*, 108th Cong., 2nd Sess., 4 May 2004 (in respect of

Article V(3) of the Canada - Latvia FIPA (2009) and Article V(3) of the Canada - Romania FIPA (2009) clarify that their respective mandatory PRPs “shall not be interpreted to prohibit” performance requirements necessary under EU law regarding the production, processing and trade of agricultural and processed agricultural products; rather, this “clarification” operates as an exception or an exclusion to the PRP regarding agricultural products.

*b) Protecting National Treasures, Accessing Products in Short Supply, and Maintaining Public Order*

Article XVII(3)(d) of the Canada - Thailand FIPA (1997) adds an exception to its PRP in respect of measures aimed at protecting national treasures of artistic, historic or archaeological value. Article XVII(3)(e) of the Canada - Thailand FIPA (1997) provides an additional exception to its PRP in respect of temporary and non-discriminatory measures essential to acquiring or distributing products in general or local short supply.

Article 14.15 of the Australia - Japan EPA (2014), Article 19 of the CERTA Investment Protocol (2011) and Article 6.11 of the India - Singapore CECA (2005) reiterate the exceptions to protect life or health and to conserve exhaustible natural resources available under NAFTA Article 1106(6) and add two more exceptions to their PRPs: first, an exception in respect of measures necessary to protect public morals or to maintain public order, and second, an exception in respect of measures imposed for the protection of national treasures of artistic, historic or archaeological value. Article 10.18(1)(d) of the India - Korea CEPA (2009) also provides for a similar exception in respect of national treasures of artistic, historic or archaeological value.

Article 10.9(6) of the Chile - Korea FTA (2003) deems its PRP inapplicable to “any voluntary and special investment regime” and more particularly to that established in its Annex 10.9.6, which refers to Chile’s Decree Law 600 (1974), referred to as the Foreign Investment Statute. This exception means that Chile can impose performance requirements upon Korean investors in investor-State contracts so long as these contracts comply notably with the non-discrimination and free remittance requirements of Chile’s Decree Law 600 (1974).<sup>774</sup>

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BITs with Acceding Countries Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovak Republic and Candidate Countries Bulgaria and Romania) 3, 7.

<sup>774</sup> The Decree Law provided that the Chilean State and a foreign investor enter into a contract as the way to authorise foreign investment in Chile. The Decree Law further set out rights and obligations of foreign investors. Chile adopted Law 20,780, on foreign investment on June 16, 2015 as replacement for the Decree Law set to be repealed on 1 January 2016. Rights and obligations of foreign investors under existing contracts with Chile continue to apply. See: Library of Congress, Global Legal Monitor, *Chile: New Foreign Investment Law Enacted*, <<http://www.loc.gov/law/foreign-news/article/chile-new-foreign-investment-law-enacted/>> accessed 9 February 2017.

Two French BITs provide for a public order exception within their PRPs: measures taken for public security, public health, public order or public morality do not breach FET that includes a PRP under the France - Nepal BIT (1983)<sup>775</sup> so long as they are neither abusive nor discriminatory, nor do measures with such justifications breach the MFN treatment that includes a PRP under the Bangladesh - France BIT (1985).<sup>776</sup>

In the Canada - Korea FTA (2014),<sup>777</sup> Canada and Korea confirmed a shared “understanding” that recycling obligations and low-emission motor vehicle distribution obligations are not inconsistent with the PRP, and that Korean rules regarding raw materials for liquor production are not inconsistent with the PRP so long as they are applied in conformity with the TRIMs Agreement. These “shared understandings” act more like exceptions or reservations to the otherwise applicable PRP.

Contrary to what the free-wheeling approach of the *Lemire* Tribunal suggests, the detailed and complex nature, the intricacy of the fine-tuning and variations involved, the large number of different exceptions and exclusions, as well as the frequent reproduction of practically identical wording suggest that little improvisation or short-sightedness comes into drafting PRPs in IIAs. The willingness of State Parties to provide for all kinds of curbs to their PRPs reinforces the need to adhere to the wording of PRPs in IIAs very closely and to avoid creating unwritten exceptions or exclusions while interpreting and applying PRPs in IIAs. By contrast with previously discussed IIAs, France’s 64 BITs that include PRPs which replicate the French Model, the 13 American BITs with PRPs identical to Article VI of the 1994 U.S. Model BIT, as well as the 21 American BITs based on the 1983 or 1984 U.S. Model BITs do not provide for any of the previously discussed exceptions. Interpretations that depart from the clear wording of PRPs should be discouraged and should not result in creating exceptions or exclusions where none are provided for.

For example, Article VI(3) of the Canada - Ukraine FIPA (1994) was signed in the same year as the Ukraine - U.S. BIT (1994). The Canada - Ukraine FIPA excludes investments in cultural industries in Canada from its scope. However unfortunate, the PRP in the Ukraine - U.S. BIT (Article II(6)) clearly applied to the culturally-sensitive measure at issue and the Ukraine - U.S. BIT did not provide for an exception in favour of Ukraine’s cultural industries. The *Lemire* Tribunal should not have embarked on an unwieldy interpretation of the PRP at issue in order to exempt cultural industries from its scope in the absence of any such written exclusion.

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<sup>775</sup> See Exchange of Letters No 1 dated 2 May 1983 to the France - Nepal BIT.

<sup>776</sup> See Exchange of Letters No 3 to the Bangladesh - France BIT (1985).

<sup>777</sup> See Chapter 9 – Exchange of Confirming Letters Between Korea and Canada.

## F. Shielding Government Procurement from PRPs in IIAs

The prevalence of excluding government procurement from PRPs clearly reflects the widespread practice among most, if not all countries of subjecting government procurement to performance requirements and especially LCRs.<sup>778</sup> As detailed below, more than 60 IIAs among those surveyed exclude procurement from their PRPs. Article 1108(8)(b) of the NAFTA (1992)<sup>779</sup> specifies that the prohibition of mandatory LCRs, LSRs, technology transfer requirements and product mandating requirements (NAFTA Article 1106(1)(b), (c), (f) and (g)), as well as the prohibition of advantage-conditioning LCRs and LSRs (NAFTA Article 1106(3)(a) and (b)) do not apply to procurement by a Party or a state enterprise, an exception reiterated without change in 19 IIAs among the ones surveyed.<sup>780</sup> Twenty IIAs reproduce this exception to their PRPs, except that these IIAs reproduce the slight tweak found in the otherwise identical Article 8(3)(e) of the 2004 U.S. Model BIT<sup>781</sup> and use the expression “procurement” or “government procurement” instead of the expression “procurement by a Party or a state enterprise” used in the NAFTA.<sup>782</sup> Thirty-nine IIAs therefore closely follow the NAFTA’s exclusion of procurement from its PRP. In addition, Article 5(3) of the ECT (1994) opts for the same exception to its TRIMs Agreement-like disciplines, but with a much simpler wording.

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<sup>778</sup> ADF (n 167) para 94.

<sup>779</sup> Article 7(6)(b) of the 2004 Canada Model FIPA and Article 9(6)(b) of the 2012 Canada Model FIPA reproduce this provision.

<sup>780</sup> Chilean FTAs: Article 10.7(7)(b) of the Chile - Korea FTA (2003); Article 9-09(7)(b) of the Chile - Mexico FTA (1998). Canadian FTAs: Article G-08(7)(b) of the Canada - Chile FTA (1996); Article 807(6)(b) of the Canada - Peru FTA (2008); Article 807(7)(b) of the Canada - Colombia FTA (2008); Article 9.07(8)(b) of the Canada - Panama FTA (2008); Article 10.9(7)(b) of the Canada - Honduras FTA (2013); Article 8.8(6)(b) of the Canada - Korea FTA (2014). Canadian FIPAs: Article 7(6)(b) of the Canada - Peru FIPA (2006); Article 7(6)(b) of the Canada - Jordan FIPA (2009); Article 10(6)(b) of the Benin - Canada FIPA (2013); Article 9(6)(b) of the Cameroon - Canada FIPA (2014); Article 9(6)(b) of the Canada - Nigeria FIPA (2014); Article 9(6)(b) of the Canada - Serbia FIPA (2014); Article 9(6)(b) of the Canada - Senegal FIPA (2014); Article 9(6)(b) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(6)(b) of the Burkina Faso - Canada FIPA (2014); Article 9(6)(b) of the Canada - Guinea FIPA (2014); Article 9(6)(b) of the Canada - Hong Kong, China FIPA (2016).

<sup>781</sup> Article 8(3)(e) of the 2012 U.S. Model BIT is the same, except that it is also made applicable to newly added Article 8(1)(h) of the 2012 U.S. Model BIT (domestic technology preference granting requirements and technology prohibitions). Article 9.10(3)(f) of the TPP (2015) follows the 2012 U.S. Model BIT in this respect.

<sup>782</sup> American FTAs: Article 10.5(3)(e) of the Chile - U.S. FTA (2003); Article 15.8(3)(e) of the Singapore - U.S. FTA (2003); Article 10.8(3)(e) of the Morocco - U.S. FTA (2004); Article 10.9(3)(e) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(3)(e) of the Oman - U.S. FTA (2006); Article 10.9(3)(e) of the Peru - U.S. FTA (2006); Article 10.9(3)(e) of the Colombia - U.S. FTA (2006); Article 10.9(3)(e) of the Panama - U.S. FTA (2007); Article 11.8(3)(e) of the Korea - U.S. FTA (2007). American BITs: Article 8(3)(e) of the U.S. - Uruguay BIT (2005); Article 8(3)(e) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 14.9(6) of the Australia - Japan EPA (2014); Articles 11.9(7) of the Australia - Korea FTA (2014); Article 5(3)(e) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(6) of the CERTA Investment Protocol (2011); Article 10.7(3)(e) of the Australia - Chile FTA (2008); Article 11.9(3)(e) of the Australia - U.S. FTA (2004). Chilean Agreements: Article 10.8(7) of the Pacific Alliance Protocol (2014); Article 77(3)(c) of the Chile - Japan EPA (2007); Article 9.6(3)(e) of the Chile - Colombia FTA (2006).

Opting for an approach that differs slightly from Article 1108(8)(b) of the NAFTA (1992), Article VI(2)(a) of the Canada - Ukraine FIPA (1994) renders all of its PRP inapplicable to procurement by a government or state enterprise; 17 Canadian FIPAs follow this approach.<sup>783</sup> Article 90(7) of the India - Japan CEPA (2011) similarly specifies that its PRP (Article 89) does not apply to government procurement. Article 11.1(4)(c) of the Chile - Peru FTA (2006) goes farther and excludes government procurement altogether from the scope of its investment chapter including its PRP.

While Article 9(6)(b) of the Canada - Tanzania FIPA (2013) reproduces NAFTA Article 1108(8)(b) and similarly excludes procurement “by a Party or a State enterprise” from a limited and targeted number of prohibited performance requirements, the Canada - Tanzania FIPA (2013) includes in Article 16(7) an additional exclusion from the scope of its PRP, this time excluding “procurement by a Party” from the entirety of its PRP. These two divergent exclusions appear difficult to reconcile; tentatively, one could argue that procurement by a State enterprise would be excluded only from the prohibition of mandatory LCRs, LSRs, technology transfer requirements and product mandating requirements, as well as the prohibition of advantage-conditioning LCRs and LSRs, while procurement by a Party would be excluded altogether from the PRP. Article 8.5(5)(b) of the Canada - EU CETA (2014) opts for an altogether different approach by deeming its PRP inapplicable to purchases for governmental purposes, whether or not it amounts to “government procurement” as that expression is construed for purposes of the scope and coverage of its distinct chapter on government procurement.

In *ADF v United States*, Canadian claimant ADF Group Inc. (“ADF Group”) and its American investment ADF International Inc. (“ADF International”) participated in the construction of the Springfield Interchange Project (the “Interchange Project”) in Northern Virginia. In 1998, the Commonwealth of Virginia (“Virginia”) applied for and received funding assistance from the Federal Highway Administration of the U.S. Department of Transportation (“FHWA”) for

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<sup>783</sup> Article VI(2)(a) of the Canada - Trinidad and Tobago FIPA (1995); Article VI(2)(a) of the Canada - Philippines FIPA (1995); Article VI(2)(a) of the Canada - South Africa FIPA (1995); Article VI(2)(a) of the Canada - Ecuador FIPA (1996); Article II(8)(a) of the Annex to the Canada - Venezuela FIPA (1996); Article VI(2)(a) of the Canada - Panama FIPA (1996); Article VI(2)(a) of the Canada - Egypt FIPA (1996); Article VI(2)(a) of the Barbados - Canada FIPA (1996); Article VI(2)(a) of the Canada - Thailand FIPA (1997); Article III(5)(a) of Annex I to the Canada - Croatia FIPA (1997); Article III(5)(a) of Annex I to the Canada - Lebanon FIPA (1997); Article VI(2)(a) of the Armenia - Canada FIPA (1997); Article III(5)(a) of Annex I to the Canada - Uruguay FIPA (1997); Article III(5)(a) of Annex I to the Canada - Costa Rica FIPA (1998); Article VI(2)(a) of the Canada - Latvia FIPA (2009); Article VI(2)(a) of the Canada - Romania FIPA (2009); Article 16(5) of the Canada - Kuwait FIPA (2011) (except that the provision refers to “procurement by a Party”).

construction designed to improve the safety and efficiency of the Springfield Interchange.<sup>784</sup>

Shirley Contracting Corporation (“Shirley”) was awarded the contract for the Interchange Project (the “Main Contract”) in September 1998 following a public tender by Virginia’s Department of Transportation (the “VDOT”).<sup>785</sup> Shirley and ADF International then signed a Sub-Contract for structural steel components (the “Sub-Contract”). ADF International proposed to perform part of its obligations in facilities owned by its parent ADF Group and located in Canada.<sup>786</sup> The VDOT intimated that ADF International’s proposal did not comply with the Buy America clause of the Main Contract, which stipulated that all steel materials had to originate in the United States and all manufacturing processes necessary for producing steel and turning it into a suitable product for the Interchange Project had to be undertaken in the United States.<sup>787</sup>

The Buy America Clause was mandated by the Buy America requirements under Section 635.410 of the Federal Highway Administration Regulations (the “FHWA Regulations”) and Section 165 of the Surface Transportation Assistance Act of 1982 (the “STAA”) as a condition for federal aid through cost reimbursement (all challenged measures are collectively referred to as the “Buy America Interchange Project Provisions”).<sup>788</sup> As a result, ADF International fabricated its steel products at five different locations in the United States, which “massively increased” ADF International’s costs.<sup>789</sup>

ADF Group argued that the Buy America Interchange Project Provisions were connected with the “management, conduct or operation” of ADF International and violated Article 1106(1)(b), by imposing a 100% LCR, and NAFTA Article 1106(1)(c), by requiring that preference be given to American steel products.<sup>790</sup> The United States acquiesced to characterising the Buy America Interchange Project Provisions as LCRs and as LSRs.<sup>791</sup> The applicability of NAFTA Articles 1106(1)(b) and (c) to the Buy America Interchange Project Provisions proved undisputed; hence the *ADF* Tribunal did not dwell on this issue.<sup>792</sup>

The Tribunal identified the deciding question as whether the Interchange Project constituted “procurement by a Party” within the meaning of NAFTA Article 1108(8)(b), which provides an exception *inter alia* to NAFTA Articles 1106(1)(b) and (c) in respect of “procurement by a Party.”

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<sup>784</sup> *ADF* (n 167) para 44.

<sup>785</sup> *ibid* para 46.

<sup>786</sup> *ibid* para 49.

<sup>787</sup> *ibid* paras, 50, 52.

<sup>788</sup> *ibid* paras 52, 56-58.

<sup>789</sup> *ibid* paras 54-55.

<sup>790</sup> *ibid* paras 81-82, 87.

<sup>791</sup> *ibid* para 159.

<sup>792</sup> *ibid* para 159.

This “crucial question” in turn raised two separate questions: first, whether the Interchange Project constituted “procurement,” and second, whether the “procurement” had been conducted by a “Party.”<sup>793</sup> “Procurement” is not defined under NAFTA Chapter 11. The Tribunal drew from NAFTA Article 1001(5), within its Chapter 10 on Government Procurement, to define “procurement” as including purchases of goods by governmental entities and as excluding governmental assistance notably in the form of funding through grants to the state, provincial or regional governmental entity conducting the procurement.<sup>794</sup> Based on this definition, the Tribunal decided that the Interchange Project had involved government procurement conducted by the VDOT on behalf of Virginia, and that federal aid to the Interchange Project through cost reimbursement did not constitute government procurement.<sup>795</sup>

In defining “Procurement ‘by a Party,’” the Tribunal relied on the “clear textual basis” of NAFTA Article 1001(1)(a), which identifies federal and state or provincial procurement as part of “government procurement.” The Tribunal further decided that there existed no distinction as to the meaning of “government procurement” (NAFTA Article 1001(1)(a)) and “procurement by a Party” (NAFTA Article 1108(8)(b)).<sup>796</sup> The Tribunal drew further support for its interpretation of the term “Party” from NAFTA Article 1108(1), which specifies that the existing and maintained non-conforming measures that can benefit from a reservation include federal, state or provincial and local measures.<sup>797</sup>

Accordingly, the Tribunal decided that NAFTA Article 1108(8)(b) precluded ADF Group from invoking NAFTA Article 1106 against the Buy America Interchange Project Provisions since the Interchange Project had involved government procurement conducted by the VDOT on behalf of Virginia and since “procurement by a Party” includes procurement by any organ or territorial unit of a Party, be it federal or state/provincial, and since granting funds to the VDOT for the Interchange Project did not constitute government procurement by the FHWA pursuant to NAFTA Article 1001(5)(a).<sup>798</sup>

### **G. Disciplining Performance Requirements as “Offsets” in TIP Chapters on Government Procurement**

Although many IIAs exclude government procurement from the reach of their PRPs, some TIPs

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<sup>793</sup> *ibid* para 160.

<sup>794</sup> *ibid* para 161.

<sup>795</sup> *ibid* para 162.

<sup>796</sup> *ibid* para 164.

<sup>797</sup> *ibid* para 165.

<sup>798</sup> *ibid* para. 170.



provide for disciplines in respect of performance requirements within their chapters on government procurement. NAFTA State Parties pioneered this approach by committing, in NAFTA Article 1006, not to “consider, seek or impose offsets” during the qualification and selection of suppliers, goods or services, the evaluation of bids or the award of contracts as part of procurement by a State Party. NAFTA Article 1006 defines offsets in an open-ended manner as any condition that encourages local development or improves a State Party’s balance-of-payments accounts, including notably LCRs, technology licensing requirements, two elements vaguely described as “investment” and “counter-trade,” as well as “similar requirements.”

Twenty-six IIAs use identical or nearly identical wording to prohibit “offsets” at any stage of government procurement and define “offsets” in a manner nearly identical to the definition put forward in NAFTA Article 1006: the term “offset” is defined by 21 TIPs<sup>799</sup> in a manner nearly identical to the definition put forward in NAFTA Article 1006; many of these provisions merely add “undertakings” alongside “conditions” and “similar actions” alongside “similar requirements.” Article 9.5(3) of the Chile - Hong Kong FTA (2012), within the chapter on government procurement, prohibits some performance requirements in a manner nearly identical to the previously discussed “offset prohibition,” but without using the term “offset;” four American TIPs<sup>800</sup> provide for very similar definitions of the term “offset,” but add requirements to use domestic suppliers in addition to LCRs applicable to goods and technology transfer requirements in addition to technology licensing requirements.

NAFTA Article 1006 drew from the language of Article V(14)(h) of the GATT GPA (1979) and Article V(15)(h) of the Revised “Tokyo Round Code on Government Procurement” (1987)<sup>801</sup>

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<sup>799</sup> American TIPs: Articles 9.2(4) and 9.20 of the Chile - U.S. FTA (2003); Articles 15.2(5) and 15.15(7) of the Australia - U.S. FTA (2004); Articles 9.2(4) and 9.16 of the Morocco - U.S. FTA (2004); Articles 9.2(4) and 9.17 of the CAFTA-DR - U.S. FTA (2004); Articles 9.2(4) and 9.17 of the Panama - U.S. FTA (2007); Australian Agreements: Article 17.6 of the Australia - Japan EPA (2014); Articles 12.3(4) and 12.17 of the Australia - Korea FTA (2014); Articles 15.1(g) and 15.6 of the Australia-Chile FTA (2008). Canadian TIPs: Articles 1403(6) and 1417 of the Canada - Peru FTA (2008); Articles 1403(6) and 1417 of the Canada - Colombia FTA (2008); Articles 16.01 and 16.04(6) of the Canada - Panama FTA (2010); Articles 17.1 and 17.4(4) of the Canada - Honduras FTA (2013); Articles 19.1 and 19.4(6) of the Canada - EU CETA (2014); Article 15.1 and 15.4(6) of the TPP (2015); Articles 10.1 and 10.5(6) of the Canada - Ukraine FTA (2016). Chilean Agreements: Articles 16.01 and 16.04(3) of the Chile - Central American Common Market (“CACM”) (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) FTA (1999); Articles 138(j) and 140 of the Chile - EC Association Agreement (2002); Articles 49(d) and 51 of the Chile - European Free Trade Association (“EFTA”) FTA (2003); Articles 15.1 and 15.4 of the Chile - Korea FTA (2003); Articles 11.1 and 11.6 of the Trans-pacific Strategic Economic Partnership Agreement between Brunei Darussalam, Chile, New Zealand and Singapore (“P4 Agreement”) (2005); Article 139 of the Chile - Japan EPA (2007). Article 15.5(1)(b) of the TPP (2015) provides for transitional measures in respect of offsets imposed by developing countries.

<sup>800</sup> Articles 9.2(4) and 9.15 of the Bahrain - U.S. FTA (2004); Articles 9.2(4) and 9.15 of the Oman - U.S. FTA (2006); Articles 9.2(5) and 9.16 of the Peru - U.S. FTA (2006); Articles 9.2(5) and 9.16 of the Colombia - U.S. FTA (2006).

<sup>801</sup> Agreement on Government Procurement, adopted 12 April 1979, in force 1 January 1981 *BISD*

which stated that “entities should normally refrain from awarding contracts on the condition that the supplier provide offset procurement opportunities or similar conditions” and that “[I]icensing of technology should not normally be used as a condition of award.”

NAFTA Article 1006 likely influenced the formulation of the prohibition of offsets under Article XVI:1 of the WTO Agreement on Government Procurement (“WTO GPA”) (1994)<sup>802</sup> and Article IV(6) of the Revised WTO GPA (2012),<sup>803</sup> as well as the definition of “offset” provided in footnote 7 to Article XVI:1 of the WTO GPA (1994) and in Article I(I) of the Revised WTO GPA (2012), which are nearly identical to those of the NAFTA. The proximity between the WTO GPA (1994) and IIAs is laid bare by Article 13.3(1) of the Singapore - U.S. FTA (2007) and Article 17.3(1) of the Korea - U.S. FTA (2007) which incorporate notably the prohibition of offsets found in Article XVI:1 of the WTO GPA (1994).

One needs to pay close attention to the sometimes strict and narrow conditions of applicability of disciplines within government procurement chapters of TIPs. In *ADF v United States*, having decided that NAFTA Article 1106 did not apply as a result of the exclusion of procurement by a Party pursuant to NAFTA Article 1108(8)(b), the Tribunal turned to NAFTA Chapter 10. NAFTA Article 1001(1)(a) provides that NAFTA Chapter 10 applies to measures “relating to procurement” conducted either by federal government entities set out in NAFTA Annex 1001.1a-1 or by a state or provincial government entity set out in NAFTA Annex 1001.1a-3 in accordance with Article 1024. The United States then had listed 56 Federal Government entities in its Schedule. NAFTA Article 1024(1) commits State Parties to initiate further negotiations aimed at increasing the liberalisation of their respective government procurement markets prior to the end of 1998, while NAFTA Article 1024(3) invites State Parties to consider subjecting procurement by state and provincial government entities to the disciplines of Chapter 10. When the arbitral award was rendered in *ADF v United States* in January 2003, no state or provincial government entity was subject to NAFTA Chapter 10 since negotiations on such matters either had not

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26S/33, 1235 *UNTS* 258, subsequently re-negotiated: the Protocol amending the Agreement on Government Procurement, adopted by the Committee on Government Procurement on 21 November 1986, done at Geneva on 2 February 1987 and entered into force on 14 February 1988 [GATT GPA (1979) and Revised GATT GPA (1987)].

<sup>802</sup> Agreement on Government Procurement, adopted 15 April 1994, entered into force 1 January 1996, 1869 *UNTS* 508 (also available at 1915 *UNTS* 103).

<sup>803</sup> Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012, entered into force 6 April 2014: WTO Committee on Government Procurement, Adoption of the Results of the Negotiations Under Article XXIV:7 of the Agreement on Government Procurement, Following Their Verification and Review, as Required by the Ministerial Decision of 15 December 2011 (GPA/112), paragraph 5; Action Taken by the Parties to the WTO Agreement on Government Procurement at a Formal Meeting of the Committee, at the Level of Geneva Heads of Delegations, on 30 March 2012, GPA/113 (2 April 2012).

begun or had not been completed;<sup>804</sup> moreover, no sub-federal governmental entity of any of the NAFTA Parties had voluntarily decided to subject its procurement practices to NAFTA Chapter 10.<sup>805</sup> The Tribunal decided that NAFTA Article 1006 did not apply since granting funds to the VDOT for the Interchange Project did not constitute government procurement by the FHWA pursuant to NAFTA Article 1001(5)(a), and since procurement by the VDOT was not subject to the disciplines of NAFTA Chapter 10 on the basis that neither the VDOT nor Virginia were listed in the United States' Schedule to NAFTA Annex 1001.1a-3.<sup>806</sup>

## **H. Reserving Existing or Future Non-Conforming Measures from PRPs**

While IIAs predominantly aim at attracting FDI notably by promoting a stable, predictable and transparent regulatory framework, host States attempt to soften the constraining character of intrusive commitments such as PRPs by preserving policy-making flexibility in areas deemed critical. Reservations for non-conforming measures within IIAs can provide much-needed regulatory space relief by softening the tight grip exerted on States by PRPs, notably in respect of sensitive economic and social matters of national sovereignty. Most IIAs operate on the basis of a “negative list” system: reservations play a critical role under such a system, since only non-conforming measures that benefit from a reservation (in addition to exceptions) may lawfully derogate from the disciplines of an IIA. The importance of such relief is amplified in relation with the far-reaching nature of PRPs.<sup>807</sup> This section investigates reservations as they relate to PRPs in order to assess their frequency and the variations within their formulations.

### **1. Reserving Existing Non-Conforming Measures from PRPs**

A great number of IIAs specify that their PRPs do not apply to measures in respect of which State Parties have adopted reservations. Article 1108(1) of the NAFTA (1992)<sup>808</sup> specifies that NAFTA Article 1106 does not apply to: any non-conforming measure that existed at the time of signing the NAFTA and that is maintained by the federal government (and is set out in Annex I or III), by a state or provincial government (and is set out in Annex I) or by a local government of a State Party (Article 1108(1)(a)); the continuation or prompt renewal of any such non-conforming measure (Article 1108(1)(b)), as well as amendments to such measures, provided

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<sup>804</sup> *ADF* (n 167) para 168.

<sup>805</sup> *ibid* para 168.

<sup>806</sup> *ibid* para 170.

<sup>807</sup> UNCTAD, “Preserving Flexibility in International Investment Agreements: the Use of Reservations” in *UNCTAD Series on International Investment Policies for Development* (2006), UN Doc UNCTAD/ITE/IIT/2005/8, 5-12.

<sup>808</sup> Article 14(1) of the 2004 U.S. Model BIT, Article 9(1) of the 2004 Canada Model FIPA and Article 14(1) of the 2012 U.S. Model BIT reproduce this same approach.

that such amendments do “not decrease the conformity of the measure, as it existed immediately before the amendment” with NAFTA Article 1106 (Article 1108(1)(c)). NAFTA Article 1108(1) is replicated nearly without change in 34 IIAs among the ones surveyed as regards their respective PRPs.<sup>809</sup>

Article IV(2)(a)(i) of the Canada - Ukraine FIPA (1994)<sup>810</sup> follows closely NAFTA Article 1108(1), except that it mentions only a “Contracting Party” (as opposed to mentioning federal, state or provincial or local levels of government) regarding maintained existing non-conforming measures. Articles IV(2)(b) and (c) of the Canada - Ukraine FIPA (1994) respectively reproduce NAFTA Article 1108(1)(b) with respect to the reserved continuation or prompt renewal of any such non-conforming measure, as well as NAFTA Article 1108(1)(c) with respect to amendments thereto. Sixteen Canadian FIPAs reproduce the approach of the Canada - Ukraine FIPA (1994).<sup>811</sup>

While otherwise adopting the same structure and practically the same content as NAFTA Article 1108(1), some IIAs will specify the application of reservations to maintained non-conforming

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<sup>809</sup> American FTAs: Article 10.7(1) of the Chile - U.S. FTA (2003); Article 15.12(1) of the Singapore - U.S. FTA (2003); Article 11.13(1) of the Australia - U.S. FTA (2004); Article 10.12(1) of the Morocco - U.S. FTA (2004); Article 10.13(1) of the CAFTA-DR - U.S. FTA (2004); Article 10.12(1) of the Oman - U.S. FTA (2006); Article 10.13(1) of the Peru - U.S. FTA (2006); Article 10.13(1) of the Colombia - U.S. FTA (2006); Article 10.13(1) of the Panama - U.S. FTA (2007); Article 11.12(1) of the Korea - U.S. FTA (2007). American BITs: Article 14(1) of the U.S. - Uruguay BIT (2005); Article 14(1) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 10.9(1) of the Australia - Chile FTA (2008); Article 9(1) of the CERTA Investment Protocol (2011); Article 14.10(1) of the Australia - Japan EPA (2014); Article 11.12(1) of the Australia - Korea FTA (2014). Canadian TIPs: Article G-08(1) of the Canada - Chile FTA (1996); Article 808(1) of the Canada - Peru FTA (2008); Article 809(1) of the Canada - Colombia FTA (2008); Article 9.09(1) of the Canada - Panama FTA (2010); Article 10.9(1) of the Canada - Honduras FTA (2013); Article 8.9(1) of the Canada - Korea FTA (2014); Article 8.15(1) of the Canada - EU CETA (2014); Article 9.12(1) of the TPP (2015). Canadian FIPAs: Article 9(1) of the Canada - Peru FIPA (2006); Article 9(1) of the Canada - Jordan FIPA (2009). Chilean Agreements: Article 9-09(1) of the Chile - Mexico FTA (1998); Article 10.9(1) of the Chile - Korea FTA (2003); Article 9.8(1) of the Chile - Colombia FTA (2006); Article 11.8(1) of the Chile - Peru FTA (2006); Article 79(1) of the Chile - Japan EPA (2007); Article 10.10(1) of the Pacific Alliance Protocol (2014). Indian Agreements: Article 10.8(1) of the India - Korea CEPA (2009); Article 90(1) of the India - Japan CEPA (2011).

<sup>810</sup> Article 17(1) of the 2012 Canada Model FIPA provides for reservations in the same way.

<sup>811</sup> Article IV(2) of the Canada - Trinidad and Tobago FIPA (1995); Article IV(2) of the Canada - Philippines FIPA (1995); Article IV(2) of the Canada - South Africa FIPA (1995, not in force); Article IV(2) of the Canada - Ecuador FIPA (1996); Article II(11)(a) to (c) of the Annex to the Canada - Venezuela FIPA (1996); Article IV(2)(a) to (c) of the Canada - Panama FIPA (1996); Article IV(2)(a) to (c) of the Canada - Egypt FIPA (1996); Article IV(2)(a) to (c) of the Barbados - Canada FIPA (1996); Article IV(2)(a) to (d) of the Canada - Thailand FIPA (1997); Article II(1)(a) and (b) of Annex I to the Canada - Croatia FIPA (1997); Article II(1)(a) to (c) of Annex I to the Canada - Lebanon FIPA (1997); Article IV(2)(a) to (c) of the Armenia - Canada FIPA (1997); Article II(1)(a) and (b) of Annex I to the Canada - Uruguay FIPA (1997); Article II(1)(a) and (b) of Annex I to the Canada - Costa Rica FIPA (1998); Article IV(1)(a) to (c) of the Canada - Latvia FIPA (2009); Article IV(1)(a) to (c) of the Canada - Romania FIPA (2009). Article IV(2) of the Canada - Philippines FIPA (1995) unfortunately includes a mistake, referring to Article IV twice and omitting to refer to Article V (which includes the PRP), a mistake which is not repeated in the French version thereof and which clearly makes reservations applicable to the PRP.

measures which existed on the date of entry into force of the IIA instead of on the date of its signature.<sup>812</sup> Other IIAs may comprise reservations available only to specified State Parties: for example, Article 12 of AANZFTA Chapter 11 (Investment) (2009) provides for the same reservations to its PRP (which merely incorporates the WTO TRIMs Agreement) as the NAFTA, but only in respect of measures adopted by Lao PDR. State Parties may also opt for static, more predictable and more easily applicable reservations: for example, Article 7(1)(a) and 7(1)(b) of SAFTA Revised Chapter 8 (Investment) (2011) uses wording identical to the NAFTA, but provides no reservation regarding amendments to existing non-conforming measures (NAFTA Article 1108(1)(c)).

Article IV(2)(a)(ii) of the Canada - Ukraine FIPA (1994) further renders the PRP inapplicable to any pre-existing and maintained and to any new, post-FIPA entry into force equity ownership limitations or prohibitions or senior management or director nationality requirements which apply to the disposition of a State Party's equity interests in an existing State enterprise or governmental entity, or to the disposition of the assets of such State enterprise or entity. Twenty-eight Canadian FIPAs reproduce this exception using the same wording.<sup>813</sup> This exception is oddly positioned in the midst of these FIPAs' reservations,<sup>814</sup> acts as an exception/exclusion and needlessly breaks up otherwise coherent provisions that lay out the framework applicable to measures excluded from the scope of PRPs through reservations. No compelling reason appears to justify its insertion in the midst amongst reservations on non-conforming measures. This exception could have been inserted after the reservations on non-conforming measures and in isolation from those provisions.

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<sup>812</sup> Article 14.10(1)(a) and (b) of the Australia - Japan EPA (2014); note at the end of Article 90 of the India - Japan CEPA (2011).

<sup>813</sup> Article IV(2)(a)(ii) of the Canada - Trinidad and Tobago FIPA (1995); Article IV(2)(a)(ii) of the Canada - Philippines FIPA (1995); Article IV(2)(a)(ii) of the Canada - South Africa FIPA (1995); Article IV(2)(a)(ii) of the Canada - Ecuador FIPA (1996); Article II(11)(a)(ii) of the Annex to the Canada - Venezuela FIPA (1996); Article IV(2)(a)(ii) of the Canada - Panama FIPA (1996); Article IV(2)(a)(ii) of the Canada - Egypt FIPA (1996); Article IV(2)(a)(ii) of the Barbados - Canada FIPA (1996); Article IV(2)(b) of the Canada - Thailand FIPA (1997); Article II(1)(a) of Annex I to the Canada - Croatia FIPA (1997); Article II(1)(a)(ii) of Annex I to the Canada - Lebanon FIPA (1997); Article IV(2)(a)(ii) of the Armenia - Canada FIPA (1997); Article II(1)(a) of Annex I to the Canada - Uruguay FIPA (1997); Article II(1)(a) of Annex I to the Canada - Costa Rica FIPA (1998); Article IV(1)(a)(ii) of the Canada - Latvia FIPA (2009); Article IV(1)(a)(ii) of the Canada - Romania FIPA (2009); Article 16(1)(a)(2) of the Canada - Kuwait FIPA (2011); Article 18(1)(a)(ii) of the Benin - Canada FIPA (2013); Article 16(1)(a)(ii) of the Canada - Tanzania FIPA (2013); Article 16(1)(a)(ii) of the Cameroon - Canada FIPA (2014); Article 17(1)(a)(ii) of the Canada - Nigeria FIPA (2014); Article 17(1)(a)(ii) of the Canada - Serbia FIPA (2014); Article 17(1)(a)(ii) of the Canada - Senegal FIPA (2014); Article 16(1)(a)(ii) of the Canada - Mali FIPA (2014); Article 16(1)(a)(ii) of the Canada - Côte d'Ivoire FIPA (2014); Article 17(1)(a)(ii) of the Burkina Faso - Canada FIPA (2014); Article 17(1)(a)(ii) of the Canada - Guinea FIPA (2014); Article 16(1)(a)(ii) of the Canada - Hong Kong, China FIPA (2016).

<sup>814</sup> Except for Article II(1)(a) of Annex I to the Canada - Croatia FIPA (1997), which puts this exception ahead of the treaty provisions on reservations.

NAFTA Article 1108(2) allowed State Parties, for two years following NAFTA's entry into force, to include within Annex I any existing and maintained state or provincial nonconforming measure; this provision has been reproduced only in five Canadian FIPAs.<sup>815</sup>

## 2. The Unpredictable Scope of Open-Ended Reservations to PRPs in IIAs

Six Canadian FIPAs<sup>816</sup> reproduce in essence Article 1108(1)(a), (b) and (c) of the NAFTA (1992). However, these provisions on reservations depart from those of the NAFTA in an important fashion by not specifying that existing, non-conforming and maintained measures must be listed in an Annex to the FIPA; rather, the provisions within these six Canadian FIPAs stipulate that "to the extent possible" a State Party must set out in Annex I existing non-conforming measures maintained at the national level, but doing so would be "without prejudice" to the provisions on non-conforming measures and for illustrative, guideline or information purposes only. Six Canadian FIPAs<sup>817</sup> similarly differ from NAFTA Article 1108(1) and increase even further the uncertainty caused by their reservations by stipulating no obligation or recommendation for State Parties to set out in an Annex non-conforming measures that existed at the time of signing the FIPA. The approach to reservations within these 12 FIPAs causes significant unpredictability as to their outer reach by rendering lists of reserved measures by State Parties merely illustrative and non-limitative.

In addition to non-exhaustive lists of non-conforming measures, the Canada - Tanzania FIPA (2013) integrates a distinct provision that further departs from the NAFTA. Article 16(1)(b) thereof ensures that the PRP does not apply to Tanzania's incipient oil and gas legislation intended to ensure domestic supply, to impose foreign ownership restrictions and to stipulate requirements as to the composition of senior management and board of directors in these sectors by deeming such legislation an existing measure once in force and thus potentially benefitting from the inapplicability of the PRP reserved to existing, non-conforming and

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<sup>815</sup> Article II(12) of the Annex to the Canada - Venezuela FIPA (1996); Article II(2) of Annex I to the Canada - Croatia FIPA (1997); Article II(2) of Annex I to the Canada - Lebanon FIPA (1997); Article II(2) of Annex I to the Canada - Uruguay FIPA (1997); Article II(2) of Annex I to the Canada - Costa Rica FIPA (1998).

<sup>816</sup> Articles 16(1)(a)(i), (c) and (d) and 16(2) of the Canada - Tanzania FIPA (2013); Articles 16(2) and 16(1)(a)(i), (b) and (c) of the Cameroon - Canada FIPA (2014); Articles 17(1)(a)(i), (b) and (c) and 17(2) of the Canada - Serbia FIPA (2014); Articles 17(1)(a)(i), (b) and (c) and 17(2) of the Canada - Senegal FIPA (2014); Articles 16(1)(a)(i), (b) and (c) and 16(2) of the Canada - Mali FIPA (2014); Articles 16(1)(a)(i), (b) and (c) and 16(2) of the Canada - Côte d'Ivoire FIPA (2014).

<sup>817</sup> Article 16(1)(a)(1), (b) and (c) of the Canada - Kuwait FIPA (2011); Article 18(1)(a)(i), (b) and (c) of the Benin - Canada FIPA (2013); Article 17(1)(a)(i), (b) and (c) of the Canada - Nigeria FIPA (2014); Article 17(1)(a)(i), (b) and (c) of the Burkina Faso - Canada FIPA (2014); Article 17(1)(a)(i), (b) and (c) of the Canada - Guinea FIPA (2014); Article 16(1)(a)(i), (b) and (c) of the Canada - Hong Kong, China FIPA (2016).

maintained measures.

### 3. Sectoral Reservations to PRPs for Existing and Future Non-Conforming Measures

Article 1108(3) of the NAFTA (1992)<sup>818</sup> excludes from the scope of NAFTA Article 1106 any measure that State Parties adopt or maintain in sectors, subsectors or activities set out in Annex II, thus providing reservations for both existing and future measures; 64 IIAs among those surveyed reproduce that same type of reservation to their PRPs.<sup>819</sup>

Some IIAs confine such reservation to specified State Parties: for example, Article 12(2) of AANZFTA Chapter 11 (Investment) (2009) provides that the PRP (Article 5) does not apply to any of Lao PDR's measures adopted or maintained with respect to sectors, sub-sectors, or

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<sup>818</sup> Article 14(2) of the 2004 U.S. Model BIT, Article 9(2) of the 2004 Canada Model FIPA, Article 14(2) of the 2012 U.S. Model BIT and Article 17(2) of the 2012 Canada Model FIPA also reproduce this approach.

<sup>819</sup> American FTAs: Article 10.7(2) of the Chile - U.S. FTA (2003); Article 15.12(2) of the Singapore - U.S. FTA (2003); Article 11.13(2) of the Australia - U.S. FTA (2004); Article 10.12(2) of the Morocco - U.S. FTA (2004); Article 10.13(2) of the CAFTA-DR - U.S. FTA (2004); Article 10.12(2) of the Oman - U.S. FTA (2006); Article 10.13(2) of the Peru - U.S. FTA (2006); Article 10.13(2) of the Colombia - U.S. FTA (2006); Article 10.13(2) of the Panama - U.S. FTA (2007); Article 11.12(2) of the Korea - U.S. FTA (2007). American BITs: Article 14(2) of the U.S. - Uruguay BIT (2005); Article 14(2) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 14.10(2) of the Australia - Japan EPA (2014); Article 11.12(2) of the Australia - Korea FTA (2014); Article 7(2) of SAFTA Revised Chapter 8 (Investment) (2011); Article 10.9(2) of the Australia-Chile FTA (2008); Article 9(2) of the CERTA Investment Protocol (2011). Canadian TIPs: Article G-08(2) of the Canada - Chile FTA (1996); Article 808(2) of the Canada - Peru FTA (2008); Article 809(2) of the Canada - Colombia FTA (2008); Article 9.09(2) of the Canada - Panama FTA (2010); Article 10.9(2) of the Canada - Honduras FTA (2013); Article 8.9(2) of the Canada - Korea FTA (2014); Article 8.15(2) of the Canada - EU CETA (2014); Article 9.12(2) of the TPP (2015). Canadian FIPAs: Article IV(2)(d) of the Canada - Ukraine FIPA (1994); Article IV(2)(d) of the Canada - Trinidad and Tobago FIPA (1995); Article IV(2)(d) of the Canada - Philippines FIPA (1995); Article IV(2) of the Canada - South Africa FIPA (1995, not in force); Article IV(2)(d) of the Canada - Ecuador FIPA (1996); Article II(11)(d) of the Annex to the Canada - Venezuela FIPA (1996) (lists excluded sectors instead of referring to an Annex); Article IV(2)(d) of the Canada - Panama FIPA (1996); Article IV(2)(d) of the Canada - Egypt FIPA (1996); Article IV(2)(d) of the Barbados - Canada FIPA (1996); Article IV(3) of the Canada - Thailand FIPA (1997); Article II(1)(c) of Annex I to the Canada - Croatia FIPA (1997) (lists excluded sectors instead of referring to an Annex); Article II(1)(d) of Annex I to the Canada - Lebanon FIPA (1997) (lists excluded sectors instead of referring to an Annex); Article IV(2)(d) of the Armenia - Canada FIPA (1997); Article II(1)(c) of Annex I to the Canada - Uruguay FIPA (1997) (which lists excluded sectors instead of referring to an Annex); Article II(1)(c) of Annex I to the Canada - Costa Rica FIPA (1998) (lists excluded sectors instead of referring to an Annex); Article 9(2) of the Canada - Peru FIPA (2006); Article IV(1)(d) of the Canada - Latvia FIPA (2009); Article IV(1)(d) of the Canada - Romania FIPA (2009); Article 9(2) of the Canada - Jordan FIPA (2009); Article 16(2) of the Canada - Kuwait FIPA (2011); Article 18(2) of the Benin - Canada FIPA (2013); Article 16(3) of the Canada - Tanzania FIPA (2013); Article 16(3) of the Cameroon - Canada FIPA (2014); Article 17(2) of the Canada - Nigeria FIPA (2013); Article 17(3) of the Canada - Serbia FIPA (2014); Article 17(3) of the Canada - Senegal FIPA (2014); Article 16(3) of the Canada - Mali FIPA (2014); Article 16(3) of the Canada - Côte d'Ivoire FIPA (2014); Article 17(2) of the Burkina Faso - Canada FIPA (2013); Article 17(2) of the Canada - Guinea FIPA (2013); Article 16(2) of the Canada - Hong Kong, China FIPA (2016). Chilean Agreements: Article 10.10(2) of the Pacific Alliance Protocol (2014); Article 79(2) of the Chile - Japan EPA (2007); Article 9.8(2) of the Chile - Colombia FTA (2006); Article 11.8(2) of the Chile - Peru FTA (2006); Article 10.9(2) of the Chile - Korea FTA (2003); Article 9-09(2) of the Chile - Mexico FTA (1998). Indian Agreements: Article 10.8(2) of the India - Korea CEPA (2009); Article 90(2) of the India - Japan CEPA (2011).

activities set out in Lao PDR's Schedule to List II. Other IIAs have confined such reservation to measures that existed at the time of signing the IIA: for example, Article 6.16(2)(b) of the India - Singapore CECA (2005) provides that the PRP (Article 6.23) does not apply to reservations made in respect of the measures maintained in the sectors, sub-sectors or activities as specified in Annexes 6A and 6B; the language used suggests that the reservations can apply only in respect of maintained non-conforming measures which existed at the time of signing the India - Singapore CECA (2005).

Accordingly, 66 IIAs among those surveyed specify that their PRPs do not apply to measures in respect of which State Parties have adopted reservations. The India - Singapore CECA (2005) is the only IIA to have opted only for sectoral reservations without resorting to any language similar to NAFTA Article 1108(1). Within these IIAs, noteworthy departures from the NAFTA model for reservations include: extending reservations to maintained non-conforming measures which existed on the date of entry into force of an IIA instead of on the date of its signature; restricting the availability of reservations to specified (as opposed to all) State Parties; the absence of provisions pertaining to the consequences of amending existing non-conforming measures on the reservations in their favour; and relieving State Parties from any duty to exhaustively identify and list existing, non-conforming and maintained measures within Annexes to IIAs.

#### **4. The Unpredictable Application of Reservations to PRPs in IIAs**

Given the complexity of the terms used therein, interpreting and applying reservations to PRPs raise the delicate issue of predictability of international investment law. The Majority Award in *Mobil & Murphy v Canada* demonstrates the risk that arbitral tribunals may interpret reservations in unexpected ways and defeat carve-outs meant to protect and validate certain measures from the rigors of investment disciplines, including PRPs. Even though the ripple effect of the Majority Award and Dissent is hard to assess, as few investor-State disputes have surfaced regarding reservations under IIAs, the *Mobil & Murphy v Canada* arbitration is guaranteed to generate further shock waves when other disputes based on PRPs arise.

Canada had argued that should the *Mobil & Murphy* Tribunal decide that the 2004 Guidelines violated NAFTA Article 1106, they were nonetheless exempt from Article 1106 by virtue of a reservation: Canada had taken a reservation for the Accord Acts, under whose authority the 2004 Guidelines were adopted, in its Schedule to NAFTA Annex I as provided by NAFTA Article



1108(1)(a)(i) for existing and maintained non-conforming measures.<sup>820</sup>

The Tribunal agreed with Mobil & Murphy and with Canada that the 2004 Guidelines did not amend the Accord Acts and confirmed the inapplicability of NAFTA Article 1108(1)(c) pertaining to amendments to non-conforming measures.<sup>821</sup> NAFTA Article 1108(1)(c) causes a “ratchet effect” by automatically and irreversibly incorporating an amendment to a non-conforming measure into a reservation; an amendment to a non-conforming measure may thus erode the initial scope of the reservation should it reduce the non-complying character of the non-conforming measure.<sup>822</sup>

NAFTA Article (2)(f)(ii) of Annex I stipulates that the measure set out in an Annex I reservation “includes any subordinate measure adopted or maintained under the authority of and consistent with the measure.” [Emphasis added.] In spite of different wording, the *Mobil & Murphy* Majority attributed a “ratchet effect” to Article (2)(f)(ii) of NAFTA Annex I similar to that of NAFTA Article 1108(1)(c).

In deciding that the 2004 Guidelines could not benefit from a reservation that shielded the Accord Acts from NAFTA Article 1106, the *Mobil & Murphy* Majority rendered a controversial award in two main respects. First, the *Mobil & Murphy* Majority reduced regulatory flexibility by narrowing the scope of Canada’s reservation. Second, the *Mobil & Murphy* Majority reduced the predictability of international investment law by developing a complex analytical approach to assessing the validity of new measures under reservations.

The *Mobil & Murphy* Majority decided that the ordinary meaning of “the measure,” as used at the end of Article (2)(f)(ii) of NAFTA Annex I, included prior subordinate measures: the *Mobil & Murphy* Majority interpreted “the measure” as meaning “the legal framework.”<sup>823</sup> It is apparent that the *Mobil & Murphy* Majority assigned a meaning to the expression “the measure” well beyond its ordinary meaning.<sup>824</sup>

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<sup>820</sup> *ibid* paras 105-106.

<sup>821</sup> *Mobil & Murphy (Majority)* (n 13) paras 307-308.

<sup>822</sup> UNCTAD, “Reservations” (n 807) 19, fn 5, 35.

<sup>823</sup> *Mobil & Murphy (Majority)* (n 13) paras 394, 410.

<sup>824</sup> According to Dissenting Arbitrator Sands, the concept of “legal framework” was “plucked out of the air” and its use meant discarding the ordinary meaning of the terms “the measure” as used in Article 2(f)(ii) of NAFTA Annex I, which refers only to the non-conforming measure, here the Accord Acts, and not to its subordinate measures: see *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4, Partial Dissenting Opinion, Professor Philippe Sands QC (17 May 2012) paras 28, 30-33. (Dissenting Arbitrator Sands was likely referring to the nearly identical federal and provincial Accord Acts as both were deemed covered by Canada’s reservation: *Mobil & Murphy (Majority)* (n 13) paras 35, 46, 248 and fn 272.)

The Accord Acts granted the Board discretionary power to issue guidelines regarding benefits plans.<sup>825</sup> The Board had used that discretion to issue guidelines applicable to benefits plans in 1986,<sup>826</sup> 1987<sup>827</sup> and 1988.<sup>828</sup> These guidelines had couched the requirements for R&D expenditures in the Province in general terms and only required project proponents to submit proposed expenditures. Accordingly, the consistency of the new subordinate measure at issue (the 2004 Guidelines) was to be tested against the “legal framework” that existed prior to the 2004 Guidelines which consisted of the existing non-conforming measure (the Accord Acts) plus subordinate measures (the pre-2004 benefits plans and related Board decisions) that had preceded the new subordinate measure.<sup>829</sup> By using the existing “legal framework”<sup>830</sup> as the base reference for the consistency test, the *Mobil & Murphy* Majority attributed a more stringent ratchet effect to Article (2)(f)(ii) of NAFTA Annex I in respect of new subordinate measures than that of NAFTA Article 1108(1)(c) in respect of amendments.

Moreover, the *Mobil & Murphy* Majority assigned an expansive ordinary meaning to the terms “consistent with” used in Article (2)(f)(ii) of NAFTA Annex I, which stipulates that a new subordinate measure must be adopted “under the authority of and consistent with” the non-conforming measure in order to remain within the scope of a reservation. Despite acknowledging the distinctiveness of the legal test under NAFTA Article 1108(1)(c),<sup>831</sup> which mandates that an amendment to a non-conforming measure “not decrease the conformity” of the non-conforming measure, the *Mobil & Murphy* Majority construed the consistency test applicable to new subordinate measures in a way nearly identical to the “non-decreasing conformity” test applicable to amendments.<sup>832</sup> The *Mobil & Murphy* Majority erroneously equated both treaty provisions notwithstanding their divergent wordings because of its concern that State Parties might circumvent the seemingly more demanding test for amendments by adopting a “disguised amendment, executed via a subordinate measure that was to unduly expand the non-conforming features of a reservation.”<sup>833</sup>

The *Mobil & Murphy* Majority formulated the consistency test under Article (2)(f)(ii) of NAFTA

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<sup>825</sup> *Mobil & Murphy (Majority)* (n 13) paras 37–8.

<sup>826</sup> *ibid* para 41.

<sup>827</sup> *ibid* para 42.

<sup>828</sup> *ibid* para 44.

<sup>829</sup> *ibid* paras 309-310, 315, 317, 324-327, 333, 336, 338, 380, 410.

<sup>830</sup> *ibid* para 394.

<sup>831</sup> *ibid* paras 305-307.

<sup>832</sup> Dissenting Arbitrator Sands insisted on distinguishing the authority and consistency tests for new subordinate measures (Article 2(f)(ii) of NAFTA Annex I) from the “non-decreasing conformity” test applicable to amendments (NAFTA Article 1108(1)(c)): see *Mobil & Murphy (Dissent)* (n 824) paras 21, 24.

<sup>833</sup> *Mobil & Murphy (Majority)* (n 13) para 341.

Annex I as “whether the new measures enlarge [or unduly expand] the non-conforming features of the reservation”<sup>834</sup> and “whether the changes are imposing such additional burdens that are of an inhospitable, inharmonious, incompatible, contradictory nature, and are otherwise inconsistent with the existing legal framework.”<sup>835</sup> In other words, the new subordinate measure must not “alter the legal framework in a fundamental manner” in order to remain “consistent with” the measure.<sup>836</sup>

The *Mobil & Murphy* Majority decided that the combination of additional spending requirements, new reporting and preauthorisation requirements, and a new funding mechanism amounted to “a substantial adjustment to the regulatory framework” that translated into a fundamentally different kind of regulatory oversight<sup>837</sup> whose additional burdens exceeded the requisite consistency threshold.<sup>838</sup> The 2004 Guidelines imposed “quantitatively and qualitatively different, and more burdensome” requirements,<sup>839</sup> resulting in a “substantial expansion”<sup>840</sup> that went beyond a mere change in “character.”<sup>841</sup> Accordingly, the *Mobil & Murphy* Majority rejected Canada’s arguments regarding the application of its reservation under NAFTA Article 1108.<sup>842</sup>

In order to reach this decision, the *Mobil & Murphy* Majority disregarded three of its own crucial acknowledgments which should have altered its approach to Article (2)(f)(ii) of NAFTA Annex I. First, that there exists no “statutory bright line test” for the consistency of additional spending requirements<sup>843</sup> and that taken in isolation, neither a mere change in methodology,<sup>844</sup> nor a requirement for additional spending would breach the consistency test.<sup>845</sup> Second, reservations serve a specific purpose as alleged by Canada: Article (2)(f)(ii) of NAFTA Annex I meant to preserve “flexibility for the NAFTA Parties in sensitive areas through effective reservations.”<sup>846</sup> Third, NAFTA State Parties explicitly agreed that a new subordinate measure “could impose some additional and/or more onerous commitments than those that were imposed by the earlier measure.”<sup>847</sup>

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<sup>834</sup> *ibid* paras 336, 341, 411. Dissenting Arbitrator Sands criticised the Majority’s aversion toward “undue” regulatory changes: see *Mobil & Murphy (Dissent)* (n 824) paras 27-29, 43.

<sup>835</sup> *Mobil & Murphy (Majority)* (n 13) para 394.

<sup>836</sup> *ibid* para 410.

<sup>837</sup> *ibid* para 398, 404.

<sup>838</sup> *ibid* para 410.

<sup>839</sup> *ibid* para 409.

<sup>840</sup> *ibid* para 401.

<sup>841</sup> *ibid* para 339.

<sup>842</sup> *ibid* para 490(3).

<sup>843</sup> *ibid* para 401.

<sup>844</sup> *ibid* para 398.

<sup>845</sup> *ibid* para 400.

<sup>846</sup> *ibid* para 323.

<sup>847</sup> *ibid* para 374, 400. Dissenting Arbitrator Sands disapproved the Majority’s disregard of NAFTA Parties’

The *Mobil & Murphy* Majority acknowledged that its consistency test entailed holding State Parties accountable to an “evolving legal and regulatory framework”<sup>848</sup> and admitted to not being troubled by “the implication that consistency, as well as authority, could be evaluated by reference to a different mix of measures.”<sup>849</sup> While the standard for the consistency test of the 2004 Guidelines could be equated to “the previously existing legal framework,”<sup>850</sup> in this case the 2004 Guidelines were to be tested only against the non-conforming measure (the Accord Acts) to be deemed “under the authority” of “the measure.”<sup>851</sup>

The *Mobil & Murphy* Majority explained the difference in standards between the consistency and authority tests on the basis that here the prior subordinate measures (the pre-2004 benefits plans and related Board decisions) and the new subordinate measure (the 2004 Guidelines) were authorised separately by the non-conforming measure (the Accord Acts) “in a vertical relationship” to the non-conforming measure and that the prior subordinate measures and the new subordinate measure were not “in a vertical relationship with each other.”<sup>852</sup> The *Mobil & Murphy* Majority added a layer of complexity by deciding that authority constituted “a matter of domestic law,”<sup>853</sup> while consistency constituted a NAFTA treaty-based test to be applied under international law after having considered relevant national laws.<sup>854</sup>

By contrast, Dissenting Arbitrator Sands described reserved measures as providing a perennial ceiling that remained in place indefinitely absent any State Party commitment to phase out or liberalise non-conforming measures.<sup>855</sup> Dissenting Arbitrator Sands viewed Canada’s reservation in respect of the Accord Acts as broad, open-ended and not limited in time,<sup>856</sup> which suggested the need to preserve the possibility for regulatory change as an “evolutionary process.”<sup>857</sup> Dissenting Arbitrator Sands took the view that Article 2(f)(ii) of NAFTA Annex I aims at ensuring that new subordinate measures also benefit from a reservation taken for their

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unanimous statements on this matter: see *Mobil & Murphy (Dissent)* (n 824) para 24.

<sup>848</sup> *Mobil & Murphy (Majority)* (n 13) para 338. Dissenting Arbitrator Sands criticised the silence of the Majority regarding practical difficulties stemming from a “continually evolving standard” for the consistency test in respect of new subordinate measures: see *Mobil & Murphy (Dissent)* (n 824) paras 35-36.

<sup>849</sup> *Mobil & Murphy (Majority)* (n 13) para 335. Dissenting Arbitrator Sands argued that authority and consistency within Article 2(f)(ii) of NAFTA Annex I are connected and must both be determined by reference to the same standard and the same measure (here, the Accord Acts): see *Mobil & Murphy (Dissent)* (n 817) paras 22, 34, 41.

<sup>850</sup> *Mobil & Murphy (Majority)* (n 13) paras 398, 404.

<sup>851</sup> *ibid* paras 330, 332.

<sup>852</sup> *ibid* para 330.

<sup>853</sup> *ibid* para 350.

<sup>854</sup> *ibid* paras 355-356, 407-408.

<sup>855</sup> *Mobil & Murphy (Dissent)* (n 824) para 37.

<sup>856</sup> *ibid* paras 14-15.

<sup>857</sup> *ibid* para 43.

source non-conforming measure, and not that new subordinate measures would fall within the scope of prior subordinate measures.<sup>858</sup> Accordingly, Dissenting Arbitrator Sands accepted Canada's arguments regarding NAFTA Article 1108 and considered that Mobil and Murphy were precluded from raising a violation of NAFTA Article 1106 in respect of the 2004 Guidelines which could benefit from the reservation enacted in respect of the Accord Acts.<sup>859</sup>

The fact that the United States and Mexico each made two Party submissions to the Tribunal under NAFTA Article 1128 underscores the importance of reservations and of the *Mobil & Murphy v Canada* decision for the NAFTA system as a whole.<sup>860</sup> Despite the Tribunal's invitation, both Mexico and the United States declined to make submissions to the Tribunal as to whether the terms "the measure," as used at the end of Article (2)(f)(ii) of NAFTA Annex I, included only the non-conforming measure or whether it also included prior subordinate measures.<sup>861</sup>

NAFTA Article 1132 offers a disputing party that asserts a reservation as a defence the right to request that a tribunal request an interpretation from the Free Trade Commission on the relevant reservation. The Tribunal and Canada's silence over Article 1132 suggests that Canada made the strategic decision not to request such interpretation and leaves unanswered the question of whether NAFTA State Parties agreed on how to interpret reservations.

Although States can take solace from the *Mobil & Murphy* Dissent, which weakened the persuasiveness of the *Mobil & Murphy* Majority Award and provides useful ammunition for States in formulating future defences based on reservations, the *Mobil & Murphy* Majority Award should raise awareness among States when drafting reservations within IIAs. States should avoid treaty provisions on reservations that cause ratchet effects beyond their intended effects. States should also beware when drafting treaty provisions that govern the following categories of measures: amendments to non-conforming measures, non-conforming measures subsequent to the related reserved measures or non-conforming measures subordinate to the related reserved measures. The provisions governing such changes to non-conforming measures should not involuntarily turn out to cause ratchet effects that shrink the scope of the relevant reservation.

The *Mobil & Murphy* Majority Award complicated the ability of States to concretely avail themselves of reservations regarding non-conforming measures. The *Mobil & Murphy* Majority

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<sup>858</sup> *ibid* paras 28, 32-33.

<sup>859</sup> *ibid* para 3.

<sup>860</sup> *Mobil & Murphy (Majority)* (n 13) paras 249, 255; *Mobil & Murphy (Dissent)* (n 824) para 4.

<sup>861</sup> *Mobil & Murphy (Majority)* (n 13) paras 318-319.

set out to evaluate the validity of new subordinate measures by reference to a different mix of measures, and to hold State Parties accountable to an evolving legal and regulatory framework upon their adoption of new subordinate measures. This approach stirs up a thick layer of uncertainty that States can pierce through only with great care upon adopting new subordinate measures. Based on the *Mobil & Murphy* Majority's approach, States cannot ascertain the validity of new subordinate measures simply by reference to the non-conforming measure provisions in their TIPs or to the related Annexes that accompany such TIPs. Rather, States would need to establish up-to-date registers of non-conforming measures and subordinate measures for each reservation taken under their TIPs in order to ensure compliance of every new subordinate measure with the totality of such prior (non-conforming plus subordinate) measures. The complexity of such an undertaking evokes a chillingly burdensome and costly scenario for States. Should States adopt new subordinate measures without having diligently verified whether these measures are consistent and under the authority of the evolving legal and regulatory framework relevant to a given reservation, they risk facing challenges from investors alleging that these measures fall outside the scope of a given reservation.

## **VI. The Disruptive Broadening of PRPs by Virtue of MFN Treatment Clauses**

Generally speaking, MFN treatment clauses in the context of IIAs can be construed as guaranteeing foreign investors and investments covered by a basic treaty treatment no less favourable than that afforded to foreign investors and investments of any third country.<sup>862</sup> By their very nature, MFN treatment clauses ensure that treatment accorded by a granting State to entities or persons that are nationals of a beneficiary State is not less favourable than treatment extended by the granting State to entities or persons that are nationals of a third State.<sup>863</sup> MFN treatment clauses have been variously described as an insurance policy against poor draftsmanship,<sup>864</sup> as providing a rampart against discrimination,<sup>865</sup> thus ensuring equal competitive conditions between foreign investors from different countries,<sup>866</sup> and as a harmonisation device regarding the legal regime applicable to foreign investment among

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<sup>862</sup> UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, UN Doc UNCTAD/DIAE/IA/2010/1 (2010) 13.

<sup>863</sup> Draft Article 5 of the *International Law Commission Final Draft Articles with Commentaries on Most-Favoured-Nation Clauses* (1978), Yearbook of the International Law Commission 1978, Vol. II, Part Two, 21.

<sup>864</sup> Georg Schwarzenberger, "The Most-Favoured Nation Standard in British State Practice" 22 *Brit. Y.B. Int'l L.* 96 (1945) 99.

<sup>865</sup> Acconci (n 20) 365. See also Tony Cole, "The Boundaries of Most Favored Nation Treatment in International Investment Law" 33 *Mich. J. Int'l L.* 537 (Spring 2012) 540 and references in fn 13.

<sup>866</sup> UNCTAD MFN (2010) (n 862) 13-14.

different States.<sup>867</sup>

The following hypothetical example raises questions that could arise upon attempting to apply an MFN treatment clause to a PRP. Article 8 of the U.S. - Uruguay BIT (2005) constitutes a comprehensive PRP applicable to a detailed list of performance requirements. Article 4 of the U.S. - Uruguay BIT entitles an investor and its investments to treatment no less favourable than that afforded to investors of a third State in a straightforward manner. Let's suppose that a Uruguayan investor must comply with an LER imposed by the United States, a measure not prohibited under Article 8 of the U.S. - Uruguay BIT. Let's further suppose that none of the reservations or restrictions within the U.S. - Uruguay BIT constrain the application of Article 4 to this hypothetical example. Could the Uruguayan investor invoke Article II(6) of the Ukraine - U.S. BIT (1994), assuming that he would successfully argue that its open-ended PRP prohibits LERs, and avail himself of its treatment more favourable than that afforded by Article 8 of the U.S. - Uruguay BIT? This question raises two sets of issues: first, to what extent can an MFN treatment clause serve to import substantive protections from a third treaty? And second, can a PRP from a third treaty that pre-dates a basic treaty nevertheless be imported into the subsequent basic treaty?

In this hypothetical example, one would expect an arbitral tribunal to apply Article 4 (the MFN treatment clause) so as to afford the Uruguayan investor a more favourable PRP given the absence of any explicit wording to the contrary in the U.S. - Uruguay BIT. Nevertheless, a nascent trend among arbitral tribunals of restricting the applicability of MFN treatment clauses in respect of substantive protection standards warrants closer analysis. The following sections analyse the implications for PRPs of applying MFN treatment clauses to substantive protection standards, as well as the possibility of importing such standards from a prior third treaty.

### **A. A Consensus Toward Applying MFN Treatment Clauses to Substantive Protections**

The controversy surrounding MFN treatment clauses, which erupted in 2000 with the decision of the *Maffezini* Tribunal,<sup>868</sup> has been characterised as an evenly split and “fiercely contested no-man’s land”<sup>869</sup> subject to a “lively debate.”<sup>870</sup> This controversy appears to have focused almost

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<sup>867</sup> Cole (n 858) 539.

<sup>868</sup> *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000).

<sup>869</sup> *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013) paras 40-41.

<sup>870</sup> *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) para 219.

exclusively on ISDS provisions construed as pertaining to the jurisdiction of arbitral tribunals and to the consent of States to arbitration.<sup>871</sup>

Indeed, scholars are in broad agreement that MFN treatment clauses confer upon investors “the right to benefit from substantive guarantees contained in third treaties.”<sup>872</sup> The “no less favourable treatment” that MFN treatment clauses generally guarantee consists notably of the substantive rights conferred to investors by IIAs.<sup>873</sup> In stark contrast to their application of MFN treatment clauses to ISDS provisions, arbitral tribunals had until recently developed a consensus to the effect that MFN treatment clauses apply so as to import into the basic treaty any and all substantive protection provisions found within third treaties.<sup>874</sup> As sole generally recognised caveat, MFN treatment clauses had to comply with the *ejusdem generis* principle and could accordingly only operate in respect of matters within third treaties that belong to the same subject matter or category as those dealt with by the basic treaty.<sup>875</sup>

MFN treatment clauses apply to substantive protections in two main ways. First, MFN treatment

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<sup>871</sup> See e.g., ILC MFN Study Group Report (n 22) para 80; *Garanti Koza* (n 869) paras 40-41; see fn 53 thereof for a list of Tribunals applying an MFN treatment clause to ISDS provisions, and see fn 54 thereof for a list of Tribunals refusing to apply an MFN treatment clause to ISDS provisions; see *Daimler* (n 870) para 268. See also: *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) para 565; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012) para 935.

<sup>872</sup> Dumberry (n 20) 4 and fn 15, quoting the following scholars and sources: Dolzer and Schreuer (n 6) 190-1; Acconci (n 20) 383, 401-4; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009) 228-9; August Reinisch, “Most-Favoured-Nation Treatment” in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (CH Beck, Hart, Nomos 2015) 820; Schill (n 21) 139-40; Nick Gallus, “*Plama v Bulgaria* and the Scope of Investment Treaty MFN Clauses” (2005) 3 *Transnat'l Disp. Mgmt.*; Institut de droit international, “Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-State Treaties” 74 *Annuaire Institut de droit international* (2011) 504; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP, 2013) 134.

<sup>873</sup> Dumberry (n 20) 4-5 and ILC MFN Study Group Report (n 22) para 98, both quoting *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award (13 September 2006) para 92; *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) para 168.

<sup>874</sup> See e.g., *Daimler* (n 870) para 219 fn 376; *Paushok* (n 871) para 565; Dumberry (n 20) 5, quoting *Asian Agricultural Products Ltd (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990) para 54, and quoting *Vladimir Berschader and Moïse Berschader v Russian Federation*, SCC Case No 080/2004, Award (9 June 2006) para 179; *HICEE B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award (23 May 2011) para 149; *Garanti Koza* (n 869) para 54; *RosInvestCo UK Ltd. v The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (1 October 2007), paras 131-132.

<sup>875</sup> See e.g., ILC MFN Study Group Report (n 22) paras 15-16, 35, 214; UNCTAD MFN (2010) (n 862) 24-25; see also *Maffezini* (n 868) para 56; *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) para 377; *Hochtief AG v The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) para 77; *Paushok* (n 871) para 565; *Garanti Koza* (n 869) para 54; *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) para 551.



clauses can serve to incorporate into a basic treaty substantive protections that it lacks.<sup>876</sup> The absence of a specific type of substantive protection from the basic treaty cannot be interpreted in and of itself as a refusal of its import through MFN treatment clauses.<sup>877</sup> Second, at their very core, MFN treatment clauses seek to provide better treatment than what the basic treaty otherwise already guarantees.<sup>878</sup> MFN treatment clauses can thus lead to more favourable provisions of a third treaty superseding existing provisions of a basic treaty.<sup>879</sup>

Based on their prevailing understanding, MFN treatment clauses can operate so as to incorporate into a basic treaty a PRP from a third treaty while the basic treaty lacks a PRP, or to incorporate into a basic treaty (in our example, the U.S. - Uruguay BIT) a more favourable PRP from a third treaty (in our example, the Ukraine - U.S. BIT). However, the following section appraises recent arbitral awards that exemplify a trend of narrowly construing MFN treatment clauses.

## **B. Cracks in the Consensus: Restricting the Application of MFN Treatment Clauses to Substantive Protections and Implications for PRPs**

Multiple MFN treatment clauses exhibit no explicit restrictions that would preclude importing PRPs from third treaties into a basic treaty that comprises no PRP or a less protective PRP. The *Al-Warraq* Tribunal summed up the two alternatives available to arbitral tribunals having to apply MFN treatment clauses. First, tribunals can follow the literal wording of MFN treatment clauses more closely, thereby expanding their application to all areas covered by third treaties subject to explicit exclusions and to the *ejusdem generis* rule.<sup>880</sup> Second, tribunals can limit the operation

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<sup>876</sup> *Mr. Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) paras 395-396; *EDF* (n 871) paras 929, 931-938; *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010) para 125 fn 16; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No. RB/03/29, Decision on Jurisdiction (14 November 2005) paras 227-235; *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) paras 100, 104, 179, 183, 187, 197, 204; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) paras 558, 581, 573-575, 591; *L.E.S.I. S.p.A. and ASTALDI S.p.A. v People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award (12 November 2008), paras 150-151; *Al-Warraq* (n 875) paras 383, 540, 545, 551, 554.

<sup>877</sup> *Dumberry* (n 20) 5, quoting *Bayindir* (n 876) paras 153, 157; see also *L.E.S.I.* (n 876), paras 150-151.

<sup>878</sup> ILC MFN Study Group Report (n 22) para 115.

<sup>879</sup> *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5) (16 January 2013) paras 64, 73-74 and fn 56; *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Final Award (14 March 2003), para 500; *Paushok* (n 871), paras 242, 254, 570-573, 596, 602, 609. See e.g., UNCTAD MFN (2010) (n 862) 58-60, where UNCTAD discusses two arbitral awards (*AAPL v Sri Lanka* (n 874) and *ADF* (n 167)) in which attempts to invoke MFN treatment clauses in order to override substantive protections within basic treaties were unsuccessful on the basis that claimants failed to prove more favourable treatment within third treaties.

<sup>880</sup> *Al-Warraq* (n 875) para 544.

of MFN treatment clauses by superimposing unwritten restrictions “to the extent that a provision in another treaty is compatible in principle with the scheme negotiated by the parties in the basic treaty and departs from it only in a detail consistent with the broader scheme.”<sup>881</sup> The *Al-Warraq* Tribunal clearly opted for the first alternative by importing an FET clause from a prior third treaty, which the basic treaty lacked.<sup>882</sup> The first alternative appears to predominate in decisions of other tribunals.

However, future arbitral tribunals might buckle under the pressure exercised by the systemic implications of applying MFN treatment clauses literally. They might then be tempted to follow the second alternative and turn to previous awards by arbitral tribunals that created unwritten restrictions when applying or refusing to apply MFN treatment clauses to ISDS provisions. For example, UNCTAD relied on the decision of the *Maffezini* Tribunal, on the application of MFN treatment clauses to ISDS provisions, to conclude that in the absence of a clear and demonstrable intention to that effect, a PRP-deprived basic treaty’s MFN treatment clause could not incorporate within such basic treaty a PRP from a third treaty.<sup>883</sup>

Right from the start of the MFN treatment controversy in *Maffezini v Spain*, the Tribunal, which decided that MFN treatment clauses could apply to ISDS,<sup>884</sup> considered that MFN treatment clauses cannot override public policy considerations deemed essential by State Parties to their agreeing to the basic treaty.<sup>885</sup> The Tribunal considered that public policy considerations should be assigned even greater weight in narrowing the scope of MFN treatment clauses, which “might thus be narrower than it appears at first sight,” when the beneficiary of the MFN treatment clause is a private investor.<sup>886</sup> The Tribunal thus opened the door to a number of unpredictable exclusions that an arbitral tribunal may erect so as to negate the applicability of MFN treatment clauses. The Tribunal put forward four types of ISDS-related provisions that MFN treatment clauses could not override.<sup>887</sup> The Tribunal asserted the non-limitative nature of its unwritten exclusions to MFN treatment clauses, stating that “[o]ther elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals.”<sup>888</sup>

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<sup>881</sup> *ibid.*

<sup>882</sup> *ibid.* paras 545-546, 551, 555.

<sup>883</sup> UNCTAD (n 37) 123, 152-153.

<sup>884</sup> *Maffezini* (n 868) para 64.

<sup>885</sup> *ibid.* paras 56, 62; see also *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004), para 109.

<sup>886</sup> *Maffezini* (n 868) para 62.

<sup>887</sup> *ibid.*

<sup>888</sup> *ibid.*

In *Hochtief v Argentina*,<sup>889</sup> the Tribunal decided that MFN treatment clauses can serve to import more favourable third-treaty ISDS provisions and to override less-favourable provisions of a basic treaty, but stated that MFN treatment clauses are subject to unspecified “implicit limitations” and cannot serve to import “wholly new rights” absent from the basic treaty.<sup>890</sup> Instead, an MFN treatment clause can only impact how covered investors are treated in respect of rights already conferred in the basic treaty. Moreover, the Tribunal applied the *ejusdem generis* rule in a very strict manner by considering that similarity in subject matters had to be established between the specific rights at issue under a basic treaty and rights under a third treaty. The *Hochtief* Tribunal’s narrow approach to the *ejusdem generis* principle would prevent MFN treatment clauses from importing into a basic treaty more favourable treatment that the basic treaty lacks, but which can be found in a third treaty. This approach contradicts numerous arbitral awards that incorporated new rights into the basic treaty. Nevertheless, the broader approach to the *ejusdem generis* principle seems to have been more frequently and consistently applied so as to consider the subject matter of a basic treaty and of a third treaty the same when both aim at protecting foreign investment.<sup>891</sup> For example, the *Maffezini* Tribunal itself had previously considered that foreign investment protection, as well as trade promotion, would constitute sufficiently similar subject matters in order to link two treaties through an MFN treatment clause.<sup>892</sup>

In *İçkale v Turkmenistan*,<sup>893</sup> the Tribunal considered that the terms “treatment accorded in similar situations” in an MFN treatment clause, which do not appear in all MFN treatment clauses, preclude the import of additional substantive protection standards from third treaties that are lacking from the basic treaty. Home State Party investors cannot be in a situation similar to that of third State investors who benefit from substantive protection standards under third treaties that are lacking in the basic treaty. Therefore, the MFN treatment clause cannot apply in such an instance. The dissonance of the *İçkale* award comes in full focus when contrasted with the arbitral awards in *ATA v Jordan* and in *Bayindir v Pakistan*, in which the basic treaties’ MFN treatment clauses also comprised the terms “in similar situations,” but were nevertheless applied so as to import substantive protection standards from third treaties without the slightest discussion by their respective arbitral tribunals of the terms “in similar situations.”<sup>894</sup>

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<sup>889</sup> *Hochtief* (n 875) paras 77-79, 81, 83, 90.

<sup>890</sup> *ibid* paras 79, 81.

<sup>891</sup> See for example *Al-Warraq* (n 875) paras 544, 551.

<sup>892</sup> *Maffezini* (n 868) para 56.

<sup>893</sup> *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016) paras 314, 323, 328-329, 332, citing *Hochtief* (n 875) para 81.

<sup>894</sup> It must be noted that among others, arbitral tribunals in *EDF* (n 871) and in *MTD* (n 876) applied MFN treatment clauses so as to import substantive protection standards from third treaties applied MFN

The *İçkale* Tribunal foreshadows a restrictive application under which the MFN treatment clause of a basic treaty lacking a PRP could not serve to import a PRP from a third treaty.

In *Tecmed v Mexico*,<sup>895</sup> the Tribunal considered that the non-retroactive application of a basic treaty's substantive provisions constitutes a core matter deemed specifically negotiated by State Parties and a determining factor for State Parties when consenting to a treaty. The Tribunal refused to contemplate applying the basic treaty's MFN treatment clause to alter its non-retroactive application. In reaching this decision, the Tribunal left undefined the expression "core of matters" deemed specifically negotiated by State Parties." The uncertain contours of this expression could complicate the application of MFN treatment clauses to substantive protections including PRPs.

In *Accession Mezzanine v Hungary*,<sup>896</sup> the Tribunal applied the basic treaty's MFN treatment clause to override the basic treaty's provision on expropriation by more favourable ones, but formulated a general restriction applicable to the scope of MFN treatment clauses. The Tribunal stated that MFN treatment clauses should apply to rights and benefits that are "included within the arbitral scope" of the basic treaty, and that MFN treatment clauses should not create new causes of action, grant rights beyond those already in the basic treaty or fundamentally subvert "the carefully negotiated balance of the BIT in question." The expression used by the *Accession Mezzanine* Tribunal could serve to underpin additional unwritten exclusions to MFN treatment clauses in the future that could impact their applicability to PRPs.

The *Maffezini* Tribunal distinguished between two uses of MFN treatment clauses which instead appear as inseparable opposite faces of the MFN treatment coin: "the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand."<sup>897</sup> However, it would appear that by their very nature, MFN treatment clauses both legitimately improve an investor's rights under a basic treaty and disrupt the policy objectives of a basic treaty's impacted provisions. Such improvement does not amount to treaty-shopping nor does it shroud MFN treatment clauses in a cloud of illegitimacy. Moreover, the *Maffezini* Tribunal's statements increase unpredictability and inconsistency when applying MFN treatment clauses by entitling a tribunal to amplified discretion regarding MFN

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treatment clauses that did not comprise the words "in similar situations."

<sup>895</sup> *Tecnicas Mediambientales Tecmed S.A. v the United Mexican States*, ICSID Case no. ARB (AF)/00/02, Award (29 May 2003), para. 69.

<sup>896</sup> *Accession Mezzanine* (n 879) paras 64, 73-74 and fn 56, quoting McLachlan, Shore and Weiniger (n 6) 254.

<sup>897</sup> *Maffezini* (n 868) para 63.

treatment clauses. In *White Industries v India*,<sup>898</sup> the Tribunal applied an MFN treatment clause to import more favourable substantive protections from a third treaty (the obligation to provide effective means of asserting claims and enforcing rights). In doing so, the Tribunal denied having subverted “the carefully negotiated balance” of the basic treaty and instead considered having achieved precisely the intended result of the MFN treatment clause.<sup>899</sup>

Many substantive treaty provisions, including PRPs, address sensitive public policy concerns and “constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations.”<sup>900</sup> Excluding IIA provisions on an *ad hoc* basis from the scope of MFN treatment clauses increases unpredictability. All treaty provisions amount to exercises of State consent; concerns over the impacts on State sovereignty cannot serve to draw distinctions between substantive protections, ISDS provisions or other treaty provisions.<sup>901</sup> Indeed, the *White Industries* Tribunal noted that there should be “no room for creating a specific class of ‘specifically negotiated’ provisions of the basic treaty that is *per se* immune from circumvention by more favourable treatment in third-party BITs.”<sup>902</sup>

Undoubtedly, MFN treatment clauses and the *ejusdem generis* principle must be interpreted and applied on a case-by-case basis based on the specific wording and surrounding context of a given MFN treatment clause.<sup>903</sup> It remains to be seen whether superimposing restrictive tests upon MFN treatment clauses will impact their applicability to PRPs. As of August of 2015, no arbitral tribunal had invoked such public policy considerations to preclude the applicability of an MFN treatment clause to substantive protections standards.<sup>904</sup>

State Parties that would prefer avoiding the application of MFN treatment clauses to PRPs should amend existing MFN treatment clauses and draft future MFN treatment clauses more narrowly. A straightforward application of MFN treatment clauses rooted in their explicit wording increases the importance of providing for explicit exclusions should State Parties intend to restrict their applicability. For example, based on the *ejusdem generis* principle, MFN treatment clauses could in principle apply to import within a BIT a PRP or a more favourable PRP from within the investment chapter of a TIP that comprises no PRP or a less favourable one and vice

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<sup>898</sup> *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award (30 November 2011) paras 11.2.3-11.2.4, 11.2.9.

<sup>899</sup> *ibid* paras 11.2.1-11.2.4 and fn 73.

<sup>900</sup> *Daimler* (n 870) para 164.

<sup>901</sup> *Daimler* (n 870) para 168.

<sup>902</sup> *ibid* para 11.2.8, quoting Stephan Schill, “Multilateralizing Investment Treaties through Most-Favored-Nation Clauses” 27(2) *Berkeley J. Int’l L.* 496 (2009) 524-525.

<sup>903</sup> ILC MFN Study Group Report (n 22) paras 147-149, 213-214.

<sup>904</sup> *ibid* para 140.

versa: BITs and investment chapters within TIPs both deal with the same subject matter – investment protection. However, many BITs explicitly exclude from the scope of their MFN treatment clauses the import of treatment afforded under agreements regarding free trade areas, customs union or other similar regional economic integration organisations.<sup>905</sup> Exclusions of treatment afforded under TIPs from MFN treatment clauses in BITs play a critical role in preserving the treaty practice of States that have included PRPs in BITs much less frequently than in their TIPs. For example, none of Australia’s 22 BITs in force include a PRP, but eight out of Australia’s 13 TIPs in force comprise PRPs. Of all 54 BITs signed by Chile, only two include PRPs, while 17 of Chile’s 20 TIPs prohibit performance requirements one way or another. Among India’s 73 publicly available BITs, only one includes a PRP, while all three of its TIPs comprise PRPs.

Explicitly worded exclusions within MFN treatment clauses provide the best rampart for States wishing to constrain their applicability. Alternatively, States can do away with MFN treatment clauses altogether. For example, the 2015 India Model BIPA comprises no MFN treatment clause. The hypothetical example discussed at the opening of this part raises an additional question stemming from the fact that the Ukraine - U.S. BIT pre-dates the U.S. - Uruguay BIT. The following section analyses the implications of an antecedent third treaty.

### **C. The Uncertain Application of MFN Treatment Clauses to Incorporate More Favourable PRPs From Third Treaties that Pre-Date the Basic Treaty**

Applying MFN treatment clauses to PRPs could entail answering the question of whether PRPs from third treaties that pre-date a basic treaty could nevertheless be imported into the subsequent basic treaty absent any temporal limitation within the basic treaty’s MFN treatment clause. Numerous arbitral tribunals have decided that MFN treatment clauses can serve to import more favourable clauses from prior third treaties into a more recent basic treaty.<sup>906</sup> Moreover, the *Bayindir* Tribunal considered that the fact that a third treaty preceded a basic treaty did not in and of itself preclude the basic treaty’s MFN treatment clause from

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<sup>905</sup> See for example: Article III(3)(a) of the Canada - Ukraine FIPA (1994); Article 9(3) and Annex III(2)(a) of the 2004 Canada Model FIPA; Article 17(3) and Annex II of the 2012 Canada Model FIPA; Article 16(5)(a) of the Canada - Tanzania FIPA (2013); Article 6 of French Model BIT (undated); Article 5 of the French Model BIT (1998); Article 3(4) of the France - Turkey BIT (2006); Article 4(3)(a) of the India Model BIT (2003); Article 4(4)(a) of the Australia - India BIT (1999); Article 4(2)(a) of the Australia - Sri Lanka BIT (2002); Article 4(4) of the Australia - Mexico BIT (2005); Article 4(a) of the Chile - Denmark BIT (1993); Article 8 of the Chile - New Zealand BIT (1999, not in force); Article 4(2) of the Chile - Peru BIT (2000).

<sup>906</sup> *ATA* (n 876) para 125, fn 16; *EDF* (n 871) paras 929, 931-938; *Arif* (n 876) paras 395-396; *L.E.S.I.* (n 876) para 150; *Al-Warraq* (n 875) paras 545, 551, 554; *Dumberry* (n 20) 10 and fn 64, 72.

incorporating more favourable treatment from such prior third treaty.<sup>907</sup>

However, two arbitral tribunals<sup>908</sup> recently excluded the import of increased substantive protection from third treaties that pre-date a basic treaty even in the absence of any temporal limitation within the basic treaty's MFN treatment clause. These two arbitral tribunals insisted, when dealing with ISDS provisions (an 18-month domestic litigation prerequisite) on conformity with the *effet utile* principle in order to avoid converting basic treaty provisions into "stillborn provisions ... void *ab initio*" and "immediately superseded" by the MFN treatment clause. The two tribunals also called for conformity with the "principle of contemporaneity" which advocates for the interpretation of MFN treatment clauses in accordance with the State's demonstrated treaty practice at the time when the basic treaty at issue is signed. On such grounds, MFN treatment clauses could be interpreted as excluding certain matters (for example, more favourable treatment conferred prior to signing the treaty at issue) which would not form part of the State Parties' understanding of the terms "treatment" or "rights" as used in their MFN treatment clauses. Nevertheless, contemporaneity is no panacea: while it may provide important interpretative guidance, its application "cannot be regarded as necessarily definitive"<sup>909</sup> and could collide with the clear wording of multiple MFN treatment clauses.

In our hypothetical example, incorporating the PRP from the Ukraine - U.S. BIT into the subsequent U.S. - Uruguay BIT would improve upon the treatment afforded by its PRP, but would at the same time nullify its carefully crafted scope of application. This consequence is bound to fuel on-going debates regarding existing MFN treatment clauses that do not comprise temporal limitations. With respect to MFN treatment clauses to be drafted and negotiated in future IIAs, States that intend to restrict MFN treatment clauses to incorporate future more favourable treatment should specify its forward-looking scope.

#### **D. MFN Treatment Clauses, PRPs and Reservations**

An additional topic whose ramifications extend far beyond the scope of this thesis consists of determining the interaction between PRPs, reservations and MFN treatment clauses. This topic at the crossroads of these three types of treaty provisions has serious implications for all three

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<sup>907</sup> Dumberry (n 20) 7-8; *Bayindir* (n 876) paras 151, 160, 165-167, 420. The *Bayindir* Tribunal ultimately rejected claimant's recourse to the MFN treatment clause since one of the necessary requirements, the similarity of the situations, was not met.

<sup>908</sup> *ICS Inspection and Control Services Limited (United Kingdom) v The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012) paras 315-318; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013) paras 7.4.1-7.4.3.

<sup>909</sup> ILC MFN Study Group Report (n 22) para 178.

of them, but would require additional, in-depth research focused on the inner-workings of reservations and MFN treatment clauses.

In *Mesa v. Canada*,<sup>910</sup> The *Mesa* Tribunal clarified that the MFN treatment clause of a basic treaty cannot serve to override exceptions to that MFN treatment clause which preclude its application. The *Mesa* Tribunal reasoned that “one must first be *under* the treaty to claim *through* the treaty.” However, one could suggest that once an MFN treatment clause applies, it could serve to broaden the scope of application of a PRP in a basic treaty otherwise constrained by reservations and exceptions by importing a PRP from a third treaty unfettered by such exceptions or reservations. This preliminary hypothesis requires additional scrutiny that could form the basis of a distinct research endeavour.

## **VII. General Conclusion and Proposals**

This thesis has made a number of findings while answering two research questions outlined in the introduction: how do States prohibit performance requirements in IIAs? And second, how should PRPs in IIAs be interpreted and applied? This Part sets forth a number of conclusions and proposals that can also help drafting future PRPs in a more deliberate and informed way.

**1. The meaning of terms used in PRPs is not readily apparent. General characteristics of performance requirements and their objectives, as well as their role in a bargaining process between States and investors help inform purposes of PRPs.** At first, and even at second glance, the expression “performance requirement” and the numerous terms used recurrently within the nearly 200 PRPs that this thesis has investigated come into view as cryptic concepts wrapped into arcane configurations. PRPs developed as treaty-based disciplines in the 1970s and 1980s, in response to increasing FDI flows and to the increasing frequency of performance requirements. They were destined to remain in the shadows of better-known substantive protection standards in IIAs.

Scholarly attempts at defining performance requirements identify general shared characteristics helpful for understanding the broader context, the mechanics and the purposes of performance requirements. Performance requirements act as investment measures and investment disincentives because they aim at steering operational decisions of investors (both domestic and foreign) in a direction beneficial to the State imposing them regardless of investors’ interests. While TRIMs consist of a subset of performance requirements to some States, others

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<sup>910</sup> *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Final Award (24 March 2016), paras 400- 403.



equate TRIMs and performance requirements. Performance requirements are universally understood to impact trade; the debate centres on the direct and significant as opposed to indirect and remote impacts of individual categories of measures that constitute performance requirements. Ultimately, the lack of commonly accepted definition of either TRIMs or performance requirements compels States to spell out what measures they mean to prohibit within their PRPs. The terms used and indications provided within PRPs acquire increased importance in respect of concepts that lack universally accepted meanings.

Cast in the simplest of terms, many performance requirements driven by trade considerations aim at improving a State's balance of payments and foreign exchange reserves through the reduction of imports and the increase of exports. Beyond trade, some performance requirements aim at improving a State's capacity to absorb spillovers from foreign investors and at fostering additional linkages between foreign investors and the local economy.

While States impose performance requirements as standalone mandatory requirements, they also directly condition the conferral of investment incentives upon compliance with performance requirements. Host States often engage in bargaining processes with foreign investors. Referred to as "advantages" in the TRIMs Agreement and within PRPs in IIAs, investment incentives influence the location of FDI by increasing the attractiveness of host States offering them. Host States must often incentivise the localisation of high value-added operations of foreign investors within their territories. Host States often attempt to recoup part of what investment incentives cost them by imposing performance requirements meant to increase their benefits.

PRPs thus emerged as a converging trade and investment policy response to the reliance of MNCs on integrated trade and investment production and sales chains. PRPs thus aim at ensuring the operational freedom of investors and at securing lasting trade benefits for home States that export goods, services and capital.

**2. Interpreting and applying PRPs in IIAs should entail cross-fertilisation and systemic integration.** Cross-fertilisation refers to the process of understanding legal expressions through an analysis of the relationships and interactions between the various manifestations of such legal expressions. The "principle of systematic integration" stands for interpreting international obligations by reference to their wider normative environment. Cross-fertilisation and systemic integration between PRPs scattered in autonomous and seemingly unrelated treaties can be justified in substantive terms (through the origins, content and wording of PRPs) and methodological terms (through treaty interpretation rules). Investigating the origins

and historical treaty-making context of PRPs in IIAs reveals the close interrelatedness and interconnectedness between PRPs found within a great number of IIAs. Our understanding of PRPs in IIAs can only improve by drawing up commonalities and differences within these treaty provisions. Three main justifications support cross-fertilisation and systemic integration in relation to PRPs.

First, PRPs systematically reproduce successive and evolving approaches from PRPs in pre-existing IIAs or Model BITs. While PRPs appear only in a handful of Model BITs, American, Canadian and French Model BITs comprise PRPs that have made their way, integrally or with limited alterations, into a great number of IIAs. Article 1106 of the NAFTA (1992) and Article V(2) of the Canada - Ukraine FIPA (1994) have also been extremely influential in the development and spread of PRPs in IIAs. Multiple instances of transplanted PRPs can be identified and traced back to these influential sources. Very few of the surveyed PRPs depart significantly from established treaty practice.

Second, the U.S. BIT Programme exerted a significant influence on PRPs in IIAs. The United States deliberately attempted to sign uniform BITs in order to create a uniform body of State practice and new rules of international law. The PRP quickly emerged as a core provision within American BITs. The United States sought to include PRPs in all of its BITs, achieving little success during the 1980s, but constantly securing PRPs that closely reflected its Model BIT from 1990 onward. In order to ensure the greatest conformity possible between its BITs and its Model BITs and to leave the main text of the BIT unchanged, the United States would place clarifications, altering language and other departures from the Model BIT in protocols to BITs. The multiplication of similarly worded PRPs in BITs with countries from all over the world likely spread and increased the influence of the American approach to PRPs.

Third, the TRIMs Agreement, the SCM Agreement and PRPs in IIAs are joined at the hip. GATT/WTO disciplines on performance requirements developed at the same time as the highly influential PRPs in American BITs during the 1980s and early 1990s, and both negotiating paths addressed disciplines on performance requirements. The United States doubled down on its bilateral negotiations on performance requirements in light of the slow and unfulfilling progress made in the GATT forum in respect of the future TRIMs Agreement and SCM Agreement.

These three ideas demonstrate that PRPs use terms of art, share common normative content and origins and are even often identically worded. Moreover, these three ideas justify cross-fertilisation and systemic integration when interpreting and applying PRPs in IIAs. The interpretation of PRPs in IIAs should reflect and enhance such synergies. The interconnection

between PRPs in IIAs and multilateral trade disciplines on performance requirements, as well as treaty interpretation rules call for their coherent interpretation and application while remaining fully attuned to their respective textual, contextual and purposive specificities.

An accurate and holistic interpretative approach must look beyond the IIA of a given PRP to the normatively connected PRPs within other IIAs, as well as to the TRIMs Agreement and SCM Agreement and related documentation produced during the GATT Uruguay Round of negotiations and WTO dispute settlement proceedings. Such documentation notably provides enlightening information for properly construing the settled meanings of terms of art used in PRPs of IIAs. Future arbitral tribunals must overcome the methodological shortcomings of prior arbitral tribunals and their reluctance toward the extensive background of PRPs. Future arbitral tribunals must make full use of the elements made available to them by disputing parties pursuant to Articles 31 and 32 of the VCLT in order to elucidate the proper meaning of terms used in PRPs, their context and their object and purpose. Systemic integration and cross-fertilisation, while acknowledging that PRPs constitute MSENs and transplanted treaty rules, can assist arbitral tribunals to situate PRPs in their continuum and to foster consistency with their awards. Proceeding with comprehensive interpretations of PRPs could help build up a supportive body of jurisprudence that would increase consistent and predictable arbitral decisions and offer better guidance as to what kind of State conduct would comply with or run afoul of PRPs.

**3. PRPs in IIAs reproduce a limited number of prevailing archetypes.** PRPs followed a curve of increasing complexity and exhibited more precise language and increasing detail. First, as a testament to the refusal of numerous States to prohibit performance requirements, non-binding PRPs with narrow coverage emerged as part of American BITs signed for the most part during the 1980s. Second, a number of PRPs incorporate the TRIMs Agreement. Third, numerous American, French and Indian BITs comprise open-ended PRPs in IIAs. Fourth, a large number of PRPs prohibit detailed and exhaustive lists of measures with numerous repeated patterns and slight variations.

**4. PRPs that incorporate the TRIMs Agreement raise thorny issues.** Approximately a dozen IIAs among those surveyed reiterate, incorporate or refer specifically to the TRIMs Agreement in a variety of ways. While incorporating the TRIMs Agreement into an IIA may appear straightforward at first glance, numerous issues of compatibility and coherence with other provisions of the IIA arise. First, the TRIMs Agreement applies only to goods and not to services and only in instances of discrimination between goods of domestic investors and goods of foreign investors. Such PRPs would thus presumably apply only to a subset of investments

and activities covered by the presumably broader scope of a given IIA. Second, the TRIMs Agreement makes no attempt at defining TRIMs and provides a non-exhaustive Illustrative List as an Annex to its disciplines. Such PRPs would thus arguably apply to measures beyond those set out in the TRIMs Agreement's Illustrative List. Third, such PRPs would arguably apply to both mandatory and advantage-conditioning performance requirements.

**5. Open-ended PRPs refer to an identifiable set of measures.** State submissions on performance requirements made during the GATT Uruguay Round of negotiations can improve our understanding of PRPs in IIAs notably when attempting to accomplish the following: first, unfurling the undefined expression “performance requirements,” and second, fleshing out open-ended expressions such as “any other similar requirements.” The attempts at defining TRIMs during the GATT Uruguay Round of negotiations simultaneously defined performance requirements. The United States, the EC, India and the OECD each identified the same 11 measures as performance requirements in their GATT submissions on TRIMs.<sup>911</sup> Given that a significant number of American and French BITs with open-ended PRPs, as well as the India - Kuwait BIT (2001), were negotiated at the same time as or within a few years following the conclusion of the GATT Uruguay Round, one would expect that France, India and the United States were referring to performance requirements explicitly identified in their respective submissions made during the GATT Uruguay Round of negotiations on TRIMs when using in their respective PRPs undefined expressions such as “performance requirements” and open-ended expressions such as “any other similar requirements,” or “any other measures that have a similar effect.”

**6. Open-ended PRPs unaccompanied by reservations or exceptions constrain States cumbersomely. However, preserving the lawfulness of performance requirements deemed critical should be achieved through specific treaty-based exceptions, exclusions or reservations and not by departing from the clear meaning of PRPs.** The Decision of the *Lemire* Tribunal illustrates the challenges and dilemmas that arbitral tribunals can face when interpreting and applying open-ended PRPs. The *Lemire* Tribunal disregarded the clear, broad and open-ended wording of a PRP unmitigated by reservations or exceptions in order to preserve regulatory flexibility in implementing cultural policies. Arbitral tribunals should resist using the noble objectives and/or the importance to national interests of certain performance requirements as exculpatory justifications when these performance requirements are specifically prohibited. The understandably delicate position of the *Lemire* Tribunal provides a compelling

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<sup>911</sup> LCRs; EPRs; trade balancing requirements; LERs; technology transfer, licensing and local R&D requirements; foreign exchange restrictions; remittance restrictions; manufacturing requirements; manufacturing limitations; product mandating requirements; and domestic sales requirements.

justification for why broadly-worded PRPs with unfettered applicability should be abandoned and replaced by detailed PRPs applicable to a limited number of explicitly identified performance requirements and confined by a number of exceptions, exclusions and reservations.

**7. PRPs with detailed lists of mandatory performance requirements widely reproduce a limited number of prototypes.** Article 1106 of the NAFTA (1992) signalled a more elaborate and complex approach to PRPs. The NAFTA was negotiated and signed at the same time as GATT Uruguay Round negotiations on TRIMs were taking place. Negotiations on TRIMs influenced NAFTA Article 1106, which in turn greatly influenced the 1994 U.S. Model BIT, the Canada - Ukraine FIPA (1994), the 2004 U.S. Model BIT and the 2004 Canada Model FIPA, as well as the 2012 U.S. Model BIT and the 2012 Canada Model FIPA. All seven instruments, as well as the IIAs that follow their lead, provide for detailed and exhaustive lists of prohibited performance requirements. Accounting for variations as to the precise number and formulation of prohibited performance requirements, the great majority of PRPs within surveyed IIAs remain very close to the standard set by NAFTA Article 1106 and rely upon very similar wording. This show of near-uniformity reinforces the need for a systemic understanding of PRPs within IIAs and for interpreting PRPs in accordance with their shared settled meanings, but also heightens the need to remain vigilant in respect of slight variations specific to a given PRP. The slightest feature specific to a given PRP may render it inapplicable to a given measure or may expand its scope of application beyond other PRPs more closely in line with predominant patterns.

**8. At least 14 categories of performance requirements that appear in PRPs with detailed and exhaustive lists make use of terms of art which have acquired settled meanings.** By combining the American/EC/Indian/OECD list of 11 measures and the measures identified as performance requirements by UNCTAD, one reached 14 categories of measures consistently construed as performance requirements by States, IGOs and/or scholars which have acquired settled meanings that crystallised over time.<sup>912</sup> These settled meanings should be carefully considered when interpreting and applying PRPs in IIAs in order to assign the proper scope, breadth and specificity to each prohibited performance requirement within PRPs. With its Decision, the *Mobil & Murphy* Tribunal accomplished the opposite. By deciding that the prohibition of LSRs under NAFTA Article 1106(1)(c) also prohibited R&D requirements and E&T

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<sup>912</sup> LCRs/LSRs; EPRs; trade-balancing requirements; export controls or restrictions; local employment and employee training requirements; LERs and JVRs; technology transfer, licensing and local R&D requirements; foreign exchange restrictions and/or earning requirements; remittance restrictions; investment localisation requirements; manufacturing requirements; manufacturing limitations; domestic sales requirements; and product mandating requirements.

requirements, the *Mobil & Murphy* Tribunal incorrectly accorded too much weight to effects and incidental aspects of the measure at issue instead of identifying its true nature by reference to its essential characteristics and features. The Tribunal also transformed the prohibition of LSRs into a catchall provision, ignored its clear delimitations and also ignored the respective settled meanings of LSRs, R&D requirements and E&T requirements that differentiate one such set of measures from another. Finally, the Tribunal incorrectly isolated the term “services” from the rest of NAFTA Article 1106(1) and decontextualised such term before framing its ordinary meaning in an overly broad manner, mainly by relying on dictionary definitions of the term.

**9. PRPs are better understood when each prohibited performance requirement is considered separately from other performance requirements enumerated in that same PRP. Overarching statements as to purposes or the nature of performance requirements are best avoided. Not all prohibited performance requirements are equally trade-driven, import-related or export-related.** Unfortunate pronouncements made by both the *Pope & Talbot* and the *Merrill & Ring* Tribunals, lumping all performance requirements into a one-dimensional pool of export-driven trade policy instruments, are contradicted by the fact that clearly some performance requirements prohibited under PRPs relate only remotely and indirectly to exports, imports or even to trade. Such statements obscure the distinct and settled meanings of the various performance requirements prohibited under PRPs. The connection between a given measure and exports is not decisive for determining the existence of any type of performance requirement, but rather only for the existence of EPRs, trade-balancing requirements and other performance requirements closely related to exports.

**10. PRPs should explicitly address advantages in order to avoid the uncertainty that lingers over the applicability of advantage-silent PRPs to advantage-conditioning performance requirements.** The United States expressed the views that “incentive-based commitments” do not amount to performance requirements, that the United States and many other countries resort to conditioned advantages, that States should be entitled to continue imposing such conditions, and that explicit statements within IIAs or accompanying instruments that legitimise advantage-conditioning performance requirements make explicit what advantage-silent PRPs implicitly authorise. However, Canada and the United States, as well as their respective signatory partner countries, eventually considered it necessary to explicitly exclude advantage-conditioning performance requirements from their PRPs. The straightforward wording of advantage-silent PRPs in American, Canadian and French IIAs suggests that such PRPs cannot be categorically deemed inapplicable to advantage-conditioning performance requirements on that basis alone and in the absence of explicit language to that effect, either in the PRP itself or in an instrument forming part of the IIA or accompanying it. As a result, proving

the existence of an advantage conferred in relation with the imposition of a performance requirement should not automatically exclude such performance requirement from the scope of advantage-silent PRPs. Rather, one should consider whether the wording of a given PRP would encompass advantage-conditioning performance requirements, notably by considering them imposed as conditions for the establishment, operation, maintenance, expansion, sale or disposition of an investment. For example, advantage-conditioning performance requirements could be prohibited by advantage-silent PRPs notably if such PRPs use wording that refers to the establishment, expansion, operation, conduct or maintenance of investments, since advantage-conditioning performance requirements may indeed fall within such scenarios of investment-related activities. Advantage-conditioning performance requirements could also fall within broad expressions within open-ended PRPs such as “any other similar requirements” or “*toutes autres mesures ayant un effet analogue.*” Advantage-silent PRPs in American BITs may trigger a conflict between their wording and the intention of the United States expressed subsequently to their conclusion. States should avoid such conflicts and draft their PRPs in a way that clearly conveys their positions on advantage-conditioning performance requirements.

**11. The jurisprudential definition of the term “benefit” for purposes of the SCM Agreement can improve our understanding of the term “advantage” used in the TRIMs Agreement and within PRPs of IIAs.** PRPs which address advantage-conditioning performance requirements within surveyed IIAs uniformly use the term “advantage,” yet none of these IIAs provides a definition for such term, and nor does the TRIMs Agreement. The notion of advantage is broad and its interpretation has yet to face any difficulties in the context of investor-State arbitration. Should any difficulties arise in the future, arbitral tribunals may turn to the interpretation of the term “benefit” carried out by WTO dispute settlement panels and the Appellate Body when deciding disputes under the SCM Agreement for guidance. WTO dispute settlement panels and the Appellate Body have equated “conferring a benefit” under Article 1.1(b) of the SCM Agreement with “providing an advantage” under the TRIMs Agreement. As is the case for determining the conferral of a benefit, the existence of an advantage under the TRIMs Agreement and under PRPs within IIAs should remain simple. Identifying an advantage should depend on whether its alleged recipients are “better off” with the advantage than without it.

**12. PRPs should not be confined to the investment objectives of BITs or to the trade concerns of their most obvious trade-related performance requirements. PRPs should be construed in a way that accounts for the varying degrees of trade or investment relatedness of the distinct measures that they prohibit.** Disciplining performance requirements in TIPs lends itself to adopting two separate PRPs: one that prohibits a number of

performance requirements directly related to trade in their trade-focused chapters, and one that prohibits the same performance requirements directly related to trade, along with other performance requirements, in their investment-focused chapters. The approach of creating trade-chapter PRPs and investment-chapter PRPs has the merit of greater clarity, can facilitate their interpretation and application and better addresses the interests of home States at stake in relation to performance requirements. Trade interests of home States figure prominently in PRPs, at least in respect of LCRs/LSRs, EPRs, export restrictions and trade-balancing requirements. Trade considerations therefore constitute an essential and definitional component of such performance requirements. Non-trade driven measures should therefore not fall within the meaning of LCRs/LSRs, EPRs or trade-balancing requirements. PRPs should therefore not be framed or construed solely by reference to the investors that must comply with performance requirements. The harm caused by directly trade-related performance requirements is often felt by home States of targeted investors and not by targeted investors themselves. PRPs should therefore be drafted and interpreted so as to address the negative impacts of performance requirements on the party effectively injured, including home States of targeted investors. The fact that only States can institute disputes over disciplines on performance requirements in trade chapters of TIPs adds clarity as to their purpose, their scope and their interpretation.

**13. The PRPs in IIAs surveyed in this thesis exhibit a wide variety of features that future drafters can resort to in order to modulate the scope and coverage of PRPs in IIAs. These features must be given full force and effect when interpreting and applying existing PRPs in IIAs.** This thesis has identified numerous recurring attributes that allow tailoring and fine-tuning PRPs to the specific intentions of State Parties. States should consider these attributes carefully and make full use of the flexibility that they provide when negotiating PRPs in the future. Arbitral tribunals should consider these features conscientiously when deciding disputes arising under existing PRPs.

First, PRPs can apply either to investments and investors originating from any State (State Parties and non-Party States) as well as to domestic investments and investors, or they can apply only to investments and investors originating from State Parties, but excluding investments of domestic investors of the home State. The State more likely to act as a home State in a cross-border investment relationship may wish to draft the PRP in a way that ensures that the PRP fully serves to promote its exports. To do so, the PRP must remove any home-State export restrictive measure that a host State can impose on any investor (domestic, from the home-State or from a third State) in the host State. The PRP can secure greater host-State market access for home-State exporters by applying to all investors, thus granting them all the ability to import from the home State. Rendering a PRP applicable to all investors and



investments also avoids placing covered investors and investments at a disadvantage as a result of prohibiting advantage-conditioning performance requirements. PRPs applicable to all investors and investments make it impossible for host States to offer to any investor advantages in exchange for compliance with performance requirements. If a PRP applied only to covered investors or investments, nothing would prevent a host State from making compliance with performance requirements profitable for a non-covered investor or investment. This would harm the competitiveness of covered investors or investments. By contrast, a host State may prefer to retain greater discretion to impose performance requirements. States can achieve this by narrowing the applicability of a PRP to covered investors and investments.

Second, PRPs can apply only to phases of investment activities specifically spelled out and can also apply to the pre-establishment phases of an investment, to its post-establishment phases or to both. PRPs can apply to the establishment, acquisition, expansion, management, conduct, operation, sale or disposition of an investment or only to a subset of such investment phases. The more phases a PRP applies to, the more stringent and the broader its scope of application turns out to be.

Third, advantage-conditioning performance requirements raise complex issues that warrant careful consideration prior to drafting, interpreting or applying PRPs. Regarding the drafting of future PRPs, making the prohibition of advantage-conditioning performance requirements conditional on the absence of a complying investor's consent risks depriving such prohibition of any effectiveness. Advantage-conditioning performance requirements inherently apply only to investors who voluntarily complied with conditions preceding the conferral of an advantage. It is therefore difficult to envision a scenario where an advantage-conditioning performance requirement could be imposed upon an investor without that investor's consent. Moreover, prohibitions of advantage-conditioning performance requirements are not intended to protect complying investors who receive advantages or to grant the right for investors to receive unencumbered advantages. They mean to achieve a level playing field among all investors in a host State by ensuring their equal treatment and by removing the conferral of State advantages and the imposition of State conditions that alter the competitive conditions between them.

Regarding the interpretation of existing PRPs, the stipulation that an advantage-conditioning performance requirement be "in connection with an investment" must not be turned into a pre-condition of standing for alleging a breach of such a prohibition. Prohibitions of advantage-conditioning performance requirements such as NAFTA Article 1106(3) do not apply only in respect of performance requirements connected to a claimant's investment. Their wording should not be converted into a standing test for claimants under ISDS provisions. Otherwise, a

claimant investor could never complain under NAFTA Article 1106(3) of a performance requirement acting as a condition for an advantage conferred to another investor even though such advantage causes loss or damage to the claimant investor, notably by detrimentally altering the competitive relationship between the recipient investor and the claimant investor.

Fourth, PRPs can specify their applicability not only to requirements as such, but also to performance requirements that take the form of commitments or undertakings, so as to avoid an overly formalistic understanding of what constitutes a “requirement.” At the same time, PRPs can stipulate that they apply only to the mandatory and advantage-conditioning performance requirements explicitly set out. Detailed and exhaustive PRPs that comprise such a statement convey the intention of applying only to measures whose true nature corresponds to the settled meaning of one of the specifically prohibited performance requirements, and not to measures whose effects may incidentally resemble those of prohibited performance requirements.

A measure must clearly compel the achievement of precisely what a prohibited performance requirement consists of. The equivalence between a given measure’s effects and those normally attributable to prohibited performance requirements provides insufficient grounds for characterising a given measure as a prohibited performance requirement. Stretching the meaning of categories of measures in PRPs too broadly can nullify their intended predictability and disregard their settled meanings. Moreover, effects of measures are erratic and difficult to prove. Relying on them for applying PRPs unduly and unnecessarily increases unpredictability. In *Mobil & Murphy v Canada*, the Tribunal misconstrued the prohibition of LSRs in NAFTA Article 1106(1)(c) and disregarded its own previous characterisation of the measure at issue. The Tribunal’s willingness to focus on the effects of the measure at issue eclipsed its true nature as a local R&D requirement and its clear differentiation from LCRs and LSRs. The Tribunal accorded too much weight to effects and incidental aspects of measure at issue instead of identifying its true nature by reference to their essential characteristics and features.

Fifth, IIAs comprise provisions aimed at ensuring that specific performance requirements deemed sufficiently important to warrant explicit assurances remain lawful in the presence of PRPs. States have resorted to a great number of means to retain certain prerogatives. These include “clarifying” provisions that provide for the lawful application of mandatory or advantage-conditioning local R&D requirements, local employment and training requirements, investment localisation requirements, service supply requirements, construction or expansion requirements or requirements to use a technology to meet generally applicable health, safety or environmental requirements. Numerous IIAs also comprise provisions that authorise technology transfer requirements when they aim at remedying an alleged violation of competition laws or

when they are imposed in conformity with the TRIPS Agreement. Several States have ensured that they retain the right to condition the qualification to export promotion and foreign aid programmes, as well as to preferential tariffs or quotas upon compliance with performance requirements.

Numerous IIAs ensure that some or all of otherwise prohibited performance requirements can be justified under exception provisions akin to GATT Article XX. A great number of IIAs also provide exceptions to PRPs in order to enable State Parties to continue favouring aboriginal peoples and/or socially or economically disadvantaged minorities, to retain greater flexibility in cultural industries and with tax policy, as well as miscellaneous exclusions to PRPs in line with varying national or regional interests such as complying with EU rules, protecting national treasures, accessing products in short supply, and maintaining public order.

Numerous States have reflected in their IIAs the intent of shielding government procurement from part or all of disciplines on performance requirements. While excluding government procurement from the PRPs in investment chapters, several TIPs provide for disciplines on performance requirements within TIP chapters focused on government procurement. These disciplines focus on the various stages of government procurement and have evolved in close connection with the GATT GPA and the WTO GPA. They have therefore adopted terms that differ from PRPs that serve as investment disciplines and are often applicable to an undefined, open-ended number of performance requirements.

Finally, numerous IIAs comprise reservations that shield existing or future non-conforming measures from PRPs. Reservations play a crucial role in striking the appropriate balance between ensuring a stable regulatory framework for investors and preserving sufficient policy-making flexibility for States, especially in policy-making areas deemed of critical importance. A number of complex practical implications of reservations leave the door open to considerable uncertainty.

In terms of drafting reservations, States should avoid resorting to reservations that apply to an undefined and non-limitative set of measures, since such reservations undermine all disciplines in respect of which they apply. Reservations should provide clear, limited and predictable exclusions to preserve measures that would otherwise run afoul of IIA disciplines, including PRPs. Reservations should also compel States to disclose lists of reserved measures or sectors. Open-ended reservations cause significant unpredictability as to their outer reach when rendering lists of reserved measures by State Parties merely illustrative and non-limitative or when exempting State Parties from any obligation to provide indicative lists of reserved

measures or sectors.

In terms of interpreting reservations, arbitral tribunals should avoid unexpected outcomes that defeat the carve-outs meant to protect and validate certain measures from the rigors of PRPs. The *Mobil & Murphy* Majority rendered a controversial award in two main respects. First, the *Mobil & Murphy* Majority reduced regulatory flexibility by narrowing the scope of the reservation at issue. Second, the *Mobil & Murphy* Majority reduced the predictability of international investment law by developing a complex analytical approach to assessing the validity of new measures under reservations. In achieving this outcome, the *Mobil & Murphy* Majority developed and applied a test that entailed assessing the validity of non-conforming measures against a progressively more stringent threshold. By contrast, Dissenting Arbitrator Sands in *Mobil & Murphy v Canada* described reserved measures as providing a perennial ceiling that remained in place indefinitely absent any State Party commitment to phase out or liberalise non-conforming measures. Dissenting Arbitrator Sands viewed the reservation at issue as broad, open-ended and not limited in time. Arbitrator Sands preserved the possibility for regulatory change to fall within the scope of a given reservation.

States should avoid treaty provisions on reservations that reduce the scope of reservations beyond their intended effects. States should also beware when drafting treaty provisions that govern the following categories of measures: amendments to non-conforming measures, non-conforming measures subsequent to the related reserved measures or non-conforming measures subordinate to the related reserved measures. The provisions governing changes to non-conforming measures should not involuntarily shrink the scope of the relevant reservation.

The *Mobil & Murphy* Majority Award complicated the ability of States to concretely avail themselves of reservations regarding non-conforming measures. Based on the *Mobil & Murphy* Majority's approach, States would need to establish up-to-date registers of non-conforming measures and subordinate measures for each reservation taken under their TIPs in order to ensure compliance of every new subordinate measure with the totality of such prior (non-conforming plus subordinate) measures. The complexity of such an undertaking evokes a chillingly burdensome and costly scenario for States. Should States adopt new subordinate measures without having diligently verified whether these measures are consistent and under the authority of the evolving legal and regulatory framework relevant to a given reservation, they risk facing challenges from investors alleging that these measures fall outside the scope of a given reservation.

Contrary to what the free-wheeling approach of the *Lemire* Tribunal suggests, the detailed and

complex nature, the intricacy of the fine-tuning and variations involved, the large number of different exceptions and exclusions, as well as the frequent reproduction of practically identical wording suggest that little improvisation or short-sightedness comes into drafting PRPs in IIAs. The willingness of State Parties to provide for all kinds of curbs to their PRPs reinforces the need to adhere to the wording of PRPs in IIAs very closely and to avoid creating unwritten exceptions or exclusions while interpreting and applying PRPs in IIAs. IIAs that provide for no such exceptions or exclusions to their PRPs accordingly expose their State Parties to correspondingly more stringent PRPs.

**14. Applying MFN treatment clauses to PRPs would clearly add to the uncertainty and the destabilisation that MFN treatment clauses inherently bring about to treaties. Arbitral tribunals might then be tempted to turn to previous awards by arbitral tribunals that created unwritten restrictions when considering MFN treatment clauses in relation to ISDS provisions.** With respect to existing MFN treatment clauses, the controversy surrounding MFN treatment clauses appears to have focused almost exclusively on ISDS provisions construed as pertaining to the jurisdiction of arbitral tribunals and to the consent of States to arbitration. Nevertheless, future arbitral tribunals might buckle under the pressure exercised by the systemic implications of applying MFN treatment clauses literally to substantive protection standards, including PRPs. By their very nature, MFN treatment clauses both legitimately improve an investor's rights under a basic treaty and disrupt the policy objectives of a basic treaty's impacted provisions. Such improvement does not amount to treaty-shopping nor does it shroud MFN treatment clauses in a cloud of illegitimacy. The answer to such uncertainty does not reside in entitling arbitral tribunals to amplified discretion regarding MFN treatment clauses, which would only increase unpredictability and inconsistency when applying MFN treatment clauses.

With respect to future MFN treatment clauses, State Parties that would prefer avoiding the application of MFN treatment clauses to PRPs should amend existing MFN treatment clauses and draft future MFN treatment clauses more narrowly. A straightforward application of MFN treatment clauses rooted in their explicit wording increases the importance of providing for explicit exclusions should State Parties intend to restrict their applicability. Explicitly worded exclusions within MFN treatment clauses provide the best rampart for States wishing to constrain their applicability. States that intend to restrict MFN treatment clauses to incorporate future more favourable treatment should specify its forward-looking scope. Alternatively, States can do away with MFN treatment clauses altogether. For example, the 2015 India Model BIPA comprises no MFN treatment clause.

## **Appendix – Examples of the Main Types of Performance Requirement Prohibitions and Related Treaty Provisions**

### **Non-Binding PRPs With Narrow Coverage**

Article II(6) of the Egypt - U.S. BIT (1982):

6. In the context of its national economic policies and objectives, each Party shall seek to avoid the imposition of performance requirements of the investment of nationals and companies of the other Party.

### **Scope and Coverage of the TRIMs Agreement**

Article 2 and the Annex of the TRIMs Agreement:

Article 2 National Treatment and Quantitative Restrictions

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

ANNEX

Illustrative List

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production;

or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows

attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

### **PRPs Which Incorporate the TRIMs Agreement**

Article 9 of the Canada - China FIPA (2012):

Article 9 Performance Requirements

The Contracting Parties reaffirm their obligations under the WTO Agreement on Trade-Related Investment Measures (TRIMs), as amended from time to time. Article 2 and the Annex of the TRIMs are incorporated into and made part of this Agreement.

### **Open-Ended PRPs in First-Generation American BITs (1982-1995)**

Article II(6) of the Ukraine - U.S. BIT (1994):

ARTICLE II

6. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

### **Open-Ended PRPs in French BITs**

Protocol regarding Article 3 of the Ethiopia - France BIT (2003):

As regards Article 3

In particular though not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction on the purchase or transport of raw materials and auxiliary materials, energy and fuels, as well as the means of production and operation of all types, any hindrance of the sale or transport of products within the country and abroad, as well as any other measures that have a similar effect.

### **Detailed and Exhaustive PRPs in IIAs**

Article 1106 of the NAFTA (1992):

Article 1106: Performance Requirements

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:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) necessary for the conservation of living or non-living exhaustible natural resources.



Article V(2) of the Canada - Ukraine FIPA (1994):

2. Neither Contracting Party may impose any of the following requirements in connection with permitting the establishment or acquisition of an investment or enforce any of the following requirements in connection with the subsequent regulation of that investment:

(a) to export a given level or percentage of goods;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(e) to transfer technology, a production process or other proprietary knowledge to a person in its territory unaffiliated with the transferor, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of competition laws or acting in a manner not inconsistent with other provisions of this Agreement.

**Disciplines Applicable to Advantage-Conditioning Performance Requirements**

Article 3.1 of the SCM Agreement:

Article 3 Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact<sup>4</sup>, whether solely or as one of several other

conditions, upon export performance, including those illustrated in Annex I5;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

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<sup>4</sup> This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

**PRPs in Trade Chapters of TIPs**

Articles 304 and 318 of the NAFTA (1992):

Chapter Three: National Treatment and Market Access for Goods

Article 304: Waiver of Customs Duties

1. Except as set out in Annex 304.1, no Party may adopt any new waiver of customs duties, or expand with respect to existing recipients or extend to any new recipient the application of an existing waiver of customs duties, where the waiver is conditioned, explicitly or implicitly, on the fulfillment of a performance requirement.

2. Except as set out in Annex 304.2, no Party may, explicitly or implicitly, condition on the fulfillment of a performance requirement the continuation of any existing waiver of customs duties.

#### Article 318: Definitions

For purposes of this Chapter:

performance requirement means a requirement that:

- (a) a given level or percentage of goods or services be exported;
- (b) domestic goods or services of the Party granting a waiver of customs duties be substituted for imported goods or services;
- (c) a person benefitting from a waiver of customs duties purchase other goods or services in the territory of the Party granting the waiver or accord a preference to domestically produced goods or services;
- (d) a person benefitting from a waiver of customs duties produce goods or provide services, in the territory of the Party granting the waiver, with a given level or percentage of domestic content; or
- (e) relates in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows;

#### **Exceptions and Reservations to PRPs in IIAs**

Articles 1108(1), 1108(2), 1108(3) and 1108(8) of the NAFTA (1992):

#### Article 1108: Reservations and Exceptions

1. Articles 1102, 1103, 1106 and 1107 do not apply to:

- (a) any existing non-conforming measure that is maintained by
  - (i) a Party at the federal level, as set out in its Schedule to Annex I or III,
  - (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or
  - (iii) a local government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.

2. Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing nonconforming measure maintained by a state or province, not including a local government.

3. Articles 1102, 1103, 1106 and 1107 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

8. The provisions of:

(a) Article 1106(1)(a), (b) and (c), and (3)(a) and (b) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;

(b) Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a Party or a state enterprise; and

(c) Article 1106(3)(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

Article VI(3) of the Canada - Trinidad and Tobago FIPA (1995):

ARTICLE VI:

Miscellaneous Exceptions

3. Investments in cultural industries are exempt from the provisions of this Agreement. "Cultural industries" means natural persons or enterprises engaged in any of the following activities:

a. the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

b. the production, distribution, sale or exhibition of film or video recordings;

c. the production, distribution, sale or exhibition of audio or video music recordings;

d. the publication, distribution, sale or exhibition of music in print or machine readable form; or

e. radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.

Article VI(2)(c) of the Canada - Ukraine FIPA (1994):

(2) The provisions of Articles II, III, IV and V of this Agreement do not apply to:

(c) any measure denying investors of the other Contracting Party and their investments any rights or preferences provided to the aboriginal peoples of Canada;

## **Summary**

Performance requirements act as policy instruments for achieving broadly-defined economic and developmental objectives of States, especially industrial and technological development objectives. Many States consider that performance requirements distort trade and investment flows, negatively impact global and national welfare and disrupt investment decisions compared to business-as-usual scenarios. As a result, a number of States have committed to prohibiting performance requirements in international investment agreements (“IIAs.”). Performance requirement prohibitions (“PRPs”) are meant to eliminate trade-distorting performance requirements and performance requirements which replace investor decision-making by State decision-making.

This thesis focuses on providing answers to two research questions: first, how do States prohibit performance requirements in IIAs? And second, how should PRPs in IIAs be interpreted and applied?

For the first time, this thesis: proposes a unitary understanding of PRPs in IIAs by drawing notably on the General Agreement on Tariffs and Trade (“GATT”) Uruguay Round of negotiations and on the United States Bilateral Investment Treaty (“BIT”) Programme; develops a detailed typology and analysis of PRPs in IIAs through the identification of systematically reproduced drafting patterns; conducts the first critical and in-depth analysis of all arbitral awards which have decided claims based on PRPs in IIAs; analyses interpretation and application issues related to provisions that exempt government procurement from PRPs and to reservations that shield sensitive non-conforming measures or strategically important sectors from PRPs; and anticipates the application of most-favoured nation (“MFN”) treatment clauses to PRPs in the future.

Finally, this thesis formulates proposals that can help interpret and apply existing PRPs and draft future PRPs in a more deliberate and informed way.

## **Samenvatting (Summary in Dutch)**

### Verboden op prestatie-eisen in internationale investeringsrecht

Prestatie-eisen fungeren als beleidsinstrumenten voor het bereiken van breed gedefinieerde economische en ontwikkelingsdoelstellingen van staten, met name doelstellingen inzake industriële en technologische ontwikkeling. Veel staten zijn echter van mening dat prestatie-eisen de handels- en investeringsstromen vervormen, het wereldwijde en nationale welzijn negatief beïnvloeden en investeringsbeslissingen verstoren in vergelijking met business-as-usual scenario's. Als gevolg hebben een aantal staten zich gecommitteerd prestatie-eisen te verbieden in internationale investeringsakkoorden (IIAs). Verboden op prestatie-eisen (*performance requirement prohibitions (PRPs)*) zijn bedoeld om handel verstorende prestatie-eisen en prestatie-eisen die er toe leiden dat de besluitvorming van de investeerders wordt vervangen door de besluitvorming van de staten, te elimineren.

Dit proefschrift richt zich op het beantwoorden van twee onderzoeksvragen: ten eerste, hoe verbieden staten prestatie-eisen in IIAs? En ten tweede, hoe moeten deze PRPs in IIAs worden geïnterpreteerd en toegepast?

Dit proefschrift stelt een unitair begrip van PRPs in IIAs voor door met name te putten uit de Uruguay-ronde van onderhandelingen onder de General Agreement on Tariffs and Trade (GATT) en uit het bilateraal investeringsverdrag programma van de Verenigde Staten; ontwikkelt een gedetailleerde typologie en analyse van PRPs in IIAs door de identificatie van systematisch gereproduceerde patronen; voert de eerste kritische en diepgaande analyse van alle openbaar toegankelijke arbitrale vonnissen inzake claims gebaseerd op PRPs in IIAs; analyseert interpretatie- en toepassingskwesaties in verband met bepalingen die overheidsopdrachten uitzonderen van PRPs en voorbehouden die gevoelige non-conforme maatregelen of strategisch belangrijke sectoren beschermen via PRPs; en loopt vooruit op de toepassing van *most-favoured nation (MFN)* behandelingsclausules in PRPs in de toekomst.

Tenslotte formuleert dit proefschrift voorstellen die kunnen helpen bij het interpreteren en toepassen van bestaande PRPs en het opstellen van toekomstige PRPs op een meer doordachte en welingelichte manier.

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## **CURRICULUM VITAE**

Alexandre Genest (born in Laval, Canada on 9 September 1982) completed his high school degree at the Collège Mont-Saint-Louis in 1999 (with great distinction) and then studied at Ahuntsic College for two years where he studied social sciences and international relations. Alexandre then studied law at the University of Montréal from 2002 to 2005 (Dean's Excellence List) and became a Member of the Québec Bar in 2007 while working at Davies, Ward, Phillips & Vineberg LLP from 2004 to 2009. Alexandre completed a Diploma in public administration as part of the *Cycle International Long* at the École nationale d'administration (ENA) of France (*summa cum laude*) and a Master in Public Affairs (MPA) (M2) at the Université Paris-Dauphine (*mention très bien*) from 2009 to 2011. Alexandre then worked at the Trade Law Bureau of the Department of Foreign Affairs of Canada in 2011 and 2012 and began his double PhD programme at the Universities of Ottawa and Leiden in 2011. Alexandre was Part-Time Professor of Public International Law at the University of Ottawa from 2012 to 2014, Legal Researcher at the International Investment Agreements (IIA) Section of UNCTAD in 2013, Visiting Lecturer at Leiden University College The Hague in 2014 and Law Clerk to His Excellency Peter Tomka, Judge at the International Court of Justice in 2015-2016. Alexandre currently works as an Associate with boutique law firm Volterra Fietta in London.