Performance requirement prohibitions in international investment law

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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 19th century or even earlier.[1]

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"),[2] the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement")[3] and PRPs in IIAs share common

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[1] 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.

[2] 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").

[3] 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")[4] 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.[5] 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.[6] Professor

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

[4] 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").

[5] 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.

[6] 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,

Investment Treaties & Why they Matter to Sustainable Development: Questions & Answers (IISD, 2011) 27-30; Andrea K. Bjorklund, "Improving the International Investment Law and Policy System - Report of the Rapporteur Second Columbia International Investment Conference: What's Next in International Investment Law and Policy?" in Jose E. Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford Scholarship Online, 2011) 228; Thomas L. 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Sauvant (ed), *Yearbook on International Investment Law & Policy 2011-2012* (OUP, 2013) 293-296; Erik Denters, "Preferential Trade and Investment Treaties" in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: the Sources of Rights and Obligations* (Brill, 2012) 54-56; Rudolf, Dolzer and Christoph Schreuer, *Principles of international investment law* (OUP, 2008) 82-84; Rudolf Dolzer and Margrete Stevens, *Bilateral investment treaties* (Martinus Nijhoff, 1995) 79–81; Monica Fernandez, *Integration of Foreign Investment Policies and Regulations in the Western Hemisphere*, thesis in partial fulfillment of the degree of Master of Laws (LL.M) (McGill University, 1997) 25-28, 39, 60-61, 67-69, 101-103, 121, 127; Daniel M. Firger and Michael Gerrard, "Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities" in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-11* (OUP, 2011) 17-18, 49-50; Matthew Happold and Thomas Roe, "The Energy Charter Treaty" in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: the Sources of Rights and Obligations* (Brill, 2012) 88-90; Marie-France Houde, "Novel Features in Recent OECD Bilateral Investment Treaties" in *International Investment Perspectives 2006 Edition* (OECD, 2006) 147, 151, 154-155, 167, 169, 171, 176; Won Kidane, "The Sources and Content of Current International Investment Law" part III ch. 8 in Won Kidane (ed), *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration, International Arbitration Law Library Vol. 23* (Kluwer Law International, 2011) 135, 141-142, 148, 152-153, 156-157; Howard Mann, *International Economic Law: Water For Money's Sake?* (IISD, 2004) 15-16; Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (IISD, 2008) 36-38; Howard Mann and others, *IISD Model International Agreement on Investment for Sustainable Development* (IISD, 2005) 14; Howard Mann and Konrad von Moltke, *A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* (IISD, 2005) 3, 9-11; Lindsay Marchessault, "Recent Trends in International Investment Agreements in Asia" 8 *TDM* 1 (2011) 42-47; Graham Mayeda, "Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries" in *Sustainable Development in World Investment Law* (2011) 549; Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2007) 30; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP, 2013) 365; Konrad von Moltke and Howard Mann, *Towards A Southern Agenda on International Investment: Discussion Paper on the Role of International Investment Agreements* (IISD, 2004) 15, 26-28, 33; Peter Muchlinski, *Multinational Enterprises & the Law* (OUP, 2007) 258-261; Peter Muchlinski, "Regulating Multinationals: Foreign Investment, Development, and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World" in Jose E. 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 (AII) 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.[7] 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")),[8] 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, 2nd 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.

[7] David Collins, *Performance Requirements and Investment Incentives Under International Economic Law* (Edward Elgar, 2015) 116-131.

[8] 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[9] 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[10] while remaining fully attuned to their respective textual, contextual and purposive specificities in order to avoid "gloss[ing] over differences" between PRPs.[11]

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.[12]

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

[10] 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.

[11] 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.

[12] 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)[13] and the *Lemire* Tribunal under the Ukraine - U.S. BIT (1994)[14] 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[15] and the *Cargill v Mexico* Tribunal[16] 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*.[17] 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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[13] *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").

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

[15] *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.

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

[17] *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,[18] while Murphy submitted a Notice of Intent to submit a NAFTA Chapter 11 claim similarly seeking CDN$ 5 million in damages.[19]

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.[20] 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.[21] 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.[22] 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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[18] *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).

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

[20] 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.

[21] Dumberry (n 20) 4, citing Stephan Schill, *The Multilateralization of International Investment Law* (CUP, 2009) 142.

[22] 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")[23] 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

[23] *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[24] 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

[24] 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."[25] 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

[25] 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.