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Performance requirement prohibitions in international investment law

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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.⁶³⁹ This specification was meant to appease the Ford Motor Company which had made large-scale investments prior to the conclusion of the BIT.⁶⁴⁰ 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.

⁶³⁹ Paragraph 9 of the Protocol to the Argentina - U.S. BIT (1991).

⁶⁴⁰ 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 IIAs⁶⁴¹ specify that their PRPs apply to all investments in

⁶⁴¹ 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).⁶⁴² NAFTA Articles 1106(1) and 1106(3)⁶⁴³ 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 FIPAs⁶⁴⁴ 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.⁶⁴⁵ 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-

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).

⁶⁴² 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).

⁶⁴³ 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.

⁶⁴⁴ 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.

⁶⁴⁵ 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.⁶⁴⁶

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.⁶⁴⁷

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

⁶⁴⁶ Vandeveldel (n 84) 391.

⁶⁴⁷ Vandeveldel (n 84) 392.

another State Party. Twenty-one Canadian FIPAs followed the Canada - Ukraine FIPA (1994) in this respect.⁶⁴⁸ 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 PRPs⁶⁴⁹ apply only to “a covered investment” by a covered investor. Three Indian IIAs⁶⁵⁰ 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)⁶⁵¹ 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

⁶⁴⁸ 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).

⁶⁴⁹ 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).

⁶⁵⁰ 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).

⁶⁵¹ 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.⁶⁵²

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.”⁶⁵³ 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

⁶⁵² *S.D. Myers* – Dissent (n 197) para 196.

⁶⁵³ 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 establishment⁶⁵⁴ 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.⁶⁵⁵

NAFTA Article 1106(3)⁶⁵⁶ 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.⁶⁵⁷

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.⁶⁵⁸ Article 8.5(2) of the Canada - EU CETA (2014) proceeds in the same way, minus sale or disposition.

⁶⁵⁴ Sachs (n 72) 208-209.

⁶⁵⁵ Deluca (n 29) 272; Sachs (n 72) 208.

⁶⁵⁶ Article 7(3) of the 2004 Canada Model FIPA and Article 9(3) of the 2012 Canada Model FIPA reproduce the same approach.

⁶⁵⁷ *Pope & Talbot* – Counter-Memorial of Canada (n 217), paras 342-344.

⁶⁵⁸ 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.⁶⁵⁹ 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.”⁶⁶⁰ 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

⁶⁵⁹ *ADM* (n 15) para 218.

⁶⁶⁰ *ibid* para 221.

Exemption Advantage had a detrimental impact on their investment's profitability.⁶⁶¹

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).⁶⁶² The Tribunal formulated various iterations of the "central question" to be decided.⁶⁶³ 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)⁶⁶⁴ given that the Sweetener Tax Exemption Advantage was "integrally related"⁶⁶⁵ 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.⁶⁶⁶ The Tribunal therefore held that Mexico had violated NAFTA Article 1106(3) without specifying which paragraph thereof had thus been violated.⁶⁶⁷

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

⁶⁶¹ *ADM* (n 15) para 227.

⁶⁶² *Cargill v Mexico* (n 16) para 314.

⁶⁶³ *ibid* paras 308, 313, 316.

⁶⁶⁴ *ibid* para 318.

⁶⁶⁵ *ibid* para 317.

⁶⁶⁶ *ibid* para 317.

⁶⁶⁷ *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.⁶⁶⁸ 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

⁶⁶⁸ *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.⁶⁶⁹ 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,⁶⁷⁰ 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.⁶⁷¹

⁶⁶⁹ *ibid* paras 9, 80.

⁶⁷⁰ Article VI of the 1994 U.S. Model BIT uses the verbs "mandate or enforce" (in lieu of "impose"), an inconsequential change: see Vandeveld (n 84) 389.

⁶⁷¹ 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:4.⁶⁷² 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.⁶⁷³

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.”⁶⁷⁴ 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 1106.⁶⁷⁵ As a result, the Majority concluded that SDMI’s claim was “not a ‘performance requirements’ case.”⁶⁷⁶

In *Pope & Talbot v Canada*, the Tribunal decided that no violation of NAFTA Article 1106(1)(a)

or undertaking “in connection with the receipt of a governmental permission or authorization.”

⁶⁷² *GATT-FIRA Panel Report* (n 249), paras 5.4-5.11.

⁶⁷³ 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).

⁶⁷⁴ *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.

⁶⁷⁵ *S.D. Myers* – Majority (n 167) paras 273-274, 277.

⁶⁷⁶ *S.D. Myers* – Majority (n 167) para 278.

had taken place⁶⁷⁷ on the basis that the Export Control Regime did not impose or enforce a requirement to export below or above a given amount.⁶⁷⁸ 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.⁶⁷⁹ In *Mobil & Murphy v Canada*, the Tribunal determined that a measure had to exhibit “a degree of legal obligation” and a “degree of compulsion”⁶⁸⁰ 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.⁶⁸¹ 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

⁶⁷⁷ *Pope & Talbot* (n 167) para 76.

⁶⁷⁸ *Pope & Talbot* (n 167) para 75.

⁶⁷⁹ *Pope & Talbot* (n 167) para 75.

⁶⁸⁰ *Merrill & Ring* (n 167) para 234.

⁶⁸¹ *CPI* (n 167) paras 9, 80.

requirements.⁶⁸²

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,⁶⁸³ in addition to prohibiting subsidies contingent upon EPRs and LCRs *per se*, regardless of their effects.⁶⁸⁴

By contrast, 42 IIAs⁶⁸⁵ among IIAs surveyed comprise PRPs that reiterate the statement found

⁶⁸² *Merrill & Ring* (n 167) paras 106, 108, 109, 118-119.

⁶⁸³ Footnote 4 to Article 3.1(a) of the SCM Agreement; EC Submission 31 (n 165) 2.

⁶⁸⁴ Switzerland Submission 26 (n 161) 2.

⁶⁸⁵ 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)⁶⁸⁶ 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.⁶⁸⁷ 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.⁶⁸⁸

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.⁶⁸⁹ 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.⁶⁹⁰ While the Tribunal mistakenly considered that a requirement “needs to be directly and specifically connected to exports”⁶⁹¹ 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

⁶⁸⁶ 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.

⁶⁸⁷ *Pope & Talbot* (n 167) paras 57, 70-71; see also *Pope & Talbot* – Counter-Memorial of Canada (n 217) para 295.

⁶⁸⁸ *S.D. Myers* – Majority (n 167) paras 154, 272, 275-276.

⁶⁸⁹ *Merrill & Ring* (n 167) para 111.

⁶⁹⁰ *Merrill & Ring* (n 167) paras 117, 120.

⁶⁹¹ *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.”⁶⁹² 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,⁶⁹³ 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.⁶⁹⁴ 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.⁶⁹⁵

A large number of GATT Members accordingly argued during the GATT Uruguay Round of negotiations that no measure causes “inherently trade restrictive and distorting”⁶⁹⁶ effects, and that such effects cannot be assumed and must be proven on a case-by-case basis.⁶⁹⁷ 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.⁶⁹⁸ 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

⁶⁹² *Mobil & Murphy (Majority)* (n 13) paras 189-191, 225 and fn 247.

⁶⁹³ Moran and Pearson, *TRPRs OPIC* (n 31) 7.

⁶⁹⁴ Switzerland Submission (n 42) 2.

⁶⁹⁵ India Submission 18 (n 35) para 11; see also Switzerland Submission (n 42) 2.

⁶⁹⁶ India and others, *GATT Communication 25* (n 48) 2; GATT, *Note on TRIMs* (1987) (n 365) para 17.

⁶⁹⁷ 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).

⁶⁹⁸ 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.”⁶⁹⁹ 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,”⁷⁰⁰ 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.”⁷⁰¹ The Tribunal decided that the “central purpose of the 2004 Guidelines [...] is to require expenditures in the Province”⁷⁰² and that the 2004 Guidelines were aimed at “introduc[ing] an obligatory *expenditure* requirement.”⁷⁰³

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”⁷⁰⁴ 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.⁷⁰⁵ 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.⁷⁰⁶ The Tribunal considered that neither the “furtherance of economic policy objectives”⁷⁰⁷ nor a policy purpose that exceeded “strictly economic”⁷⁰⁸ objectives, using measures that aimed at “[p]romoting economic development and improving the skills and education of Canadians”⁷⁰⁹ would justify excluding such measures from the scope of NAFTA Article 1106(1).

⁶⁹⁹ *Mobil & Murphy (Majority)* (n 13) para 194.

⁷⁰⁰ *ibid* para 242.

⁷⁰¹ *ibid* para 240.

⁷⁰² *ibid* para 239.

⁷⁰³ *ibid* para 234. Emphasis in the original.

⁷⁰⁴ *ibid* para 46.

⁷⁰⁵ *ibid* para 60, 74.

⁷⁰⁶ *ibid* para 222.

⁷⁰⁷ *ibid* para 222.

⁷⁰⁸ *ibid* para 222.

⁷⁰⁹ *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.⁷¹⁰ 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"⁷¹¹ and in accordance with "the realities of commercial and related activities,"⁷¹² the "hypothetical alternative spending examples"⁷¹³ 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."⁷¹⁴ 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

⁷¹⁰ *ibid* paras 237, 239.

⁷¹¹ *ibid* paras 237.

⁷¹² *ibid* paras 238.

⁷¹³ *ibid* paras 238.

⁷¹⁴ *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)⁷¹⁵ 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.⁷¹⁶ Two of these IIAs⁷¹⁷ explicitly ensure the lawfulness of these same requirements when mandatorily-imposed; four FTAs⁷¹⁸ ensure the lawfulness of mandatory employee training requirements and one TIP⁷¹⁹ validates mandatory local employment or employee training requirements, subject to their compliance with the

⁷¹⁵ 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.

⁷¹⁶ 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.

⁷¹⁷ 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).

⁷¹⁸ 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).

⁷¹⁹ 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.⁷²⁰

Twenty-three IIAs⁷²¹ have reiterated NAFTA Article 1106(2)⁷²² 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.⁷²³

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.⁷²⁴

⁷²⁰ *Mobil & Murphy* (n 13) – Rejoinder of Canada (9 June 2010) para 64.

⁷²¹ 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).

⁷²² 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).

⁷²³ 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.

⁷²⁴ 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.⁷²⁵ Article VI(e) of the 1994 U.S. Model BIT and the 13 American BITs that reproduce such provision,⁷²⁶ 10 Canadian FIPAs⁷²⁷ and two Canadian TIPs⁷²⁸ 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 BIT⁷²⁹ sets forth a partially altered formulation of permitted

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).

⁷²⁵ 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).

⁷²⁶ 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).

⁷²⁷ 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.

⁷²⁸ Article 9.07(5) of the Canada - Panama FTA (2008); Article 8.5(3) of the Canada - EU CETA (2014).

⁷²⁹ 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,⁷³⁰ 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.⁷³¹ Ten Canadian FIPAs⁷³² and four Canadian FTAs⁷³³ 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

⁷³⁰ 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).

⁷³¹ 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).

⁷³² 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.

⁷³³ 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;⁷³⁴ this exception is identically reproduced in 42 IIAs among those currently surveyed,⁷³⁵ 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.⁷³⁶

⁷³⁴ 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.

⁷³⁵ 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).

⁷³⁶ 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))⁷³⁷ 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.⁷³⁸ 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;

(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).

⁷³⁷ 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.

⁷³⁸ 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.⁷³⁹ Nineteen IIAs⁷⁴⁰ 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.⁷⁴¹

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.⁷⁴² Ten Canadian FIPAs reproduce this

⁷³⁹ 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).

⁷⁴⁰ 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).

⁷⁴¹ 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).

⁷⁴² 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.”⁷⁴³ 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;⁷⁴⁴ these FTAs provide that the exception in favour of protecting human, animal or plant life or health includes environmental measures necessary for such purposes.⁷⁴⁵ 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 1106,⁷⁴⁶ while Professor Bryan P. Schwartz dissented solely to the extent that he found a breach of Article 1106.⁷⁴⁷ 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.⁷⁴⁸ 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

to the entirety of the Agreement including its PRP.

⁷⁴³ 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).

⁷⁴⁴ 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).

⁷⁴⁵ 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).

⁷⁴⁶ *S.D. Myers* – Majority (n 167) paras 323.

⁷⁴⁷ *S.D. Myers* – Dissent (n 197) para 4.

⁷⁴⁸ *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).⁷⁴⁹ 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.⁷⁵⁰

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

⁷⁴⁹ *ibid* paras 148-150.

⁷⁵⁰ 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.⁷⁵¹ 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: Canada⁷⁵² 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. Peru⁷⁵³ 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).⁷⁵⁴ Canada adopted these same reservations in the Canada - Colombia FTA (2008),⁷⁵⁵ while Colombia reserved the right to adopt or maintain any measure according rights

⁷⁵¹ Annex II - Schedule of Canada to the Canada - Chile FTA (1996); Annex II - Schedule of Chile to the Canada - Chile FTA (1996).

⁷⁵² Annex II - Reservations for Future Measures - Schedule of Canada to the Canada - Peru FIPA (2006) - Sector: Aboriginal Affairs and Sector: Minority Affairs.

⁷⁵³ Annex II - Reservations for Future Measures - Schedule of Peru to the Canada - Peru FIPA (2006) - Sector: Indigenous Communities, Peasant, Native, and Minority Affairs.

⁷⁵⁴ Annex II - Schedule of Canada to the Canada - Peru FTA (2008); Annex II - Schedule of Peru to the Canada - Peru FTA (2008).

⁷⁵⁵ Annex II - Schedule of Canada to the Canada - Colombia FTA (2008).

or preferences to socially or economically disadvantaged minorities and ethnic groups.⁷⁵⁶

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.⁷⁵⁷ 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.⁷⁵⁸

Canada included similar reservations to the PRPs of an additional 11 post-2004 Canadian FIPAs.⁷⁵⁹ The Cameroon - Canada FIPA (2014) displays the same formulation, but both State Parties (and not only Canada) made such reservations to the PRP.⁷⁶⁰ 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.⁷⁶¹ 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

⁷⁵⁶ Annex II - Schedule of Colombia to the Canada - Colombia FTA (2008).

⁷⁵⁷ Annex II - Schedule of Canada to the Canada - Panama FTA (2008); Annex II - Schedule of Panama to the Canada - Panama FTA (2008).

⁷⁵⁸ Annex II - Schedule of Canada to the Canada - Honduras FTA (2013); Annex II - Schedule of Honduras to the Canada - Honduras FTA (2013).

⁷⁵⁹ 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).

⁷⁶⁰ Annex II - Reservations for Future Measures - Schedules of Canada and of Cameroon to the Cameroon - Canada FIPA (2014).

⁷⁶¹ 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.⁷⁶² 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.⁷⁶³

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)⁷⁶⁴ excludes investments in cultural industries in Canada from the scope of the FIPA. Thirty-one Canadian FIPAs⁷⁶⁵ and five Canadian FTAs⁷⁶⁶ reproduce this exception in practically

⁷⁶² 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).

⁷⁶³ Annex II - Schedule of Chile to the Australia - Chile FTA (2008).

⁷⁶⁴ Article 10(6) of the 2004 Canada Model FIPA and Article 18(7) of the 2012 Canada Model FIPA reproduce this approach.

⁷⁶⁵ 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

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).

⁷⁶⁶ 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.⁷⁶⁷ 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 TIPs⁷⁶⁸ and three IIAs⁷⁶⁹ 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)⁷⁷⁰ 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.⁷⁷¹

⁷⁶⁷ 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).

⁷⁶⁸ 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).

⁷⁶⁹ 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).

⁷⁷⁰ 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.

⁷⁷¹ 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.⁷⁷² 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.⁷⁷³

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).

⁷⁷² 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.

⁷⁷³ *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).⁷⁷⁴

BITs with Acceding Countries Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovak Republic and Candidate Countries Bulgaria and Romania) 3, 7.

⁷⁷⁴ 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)⁷⁷⁵ 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).⁷⁷⁶

In the Canada - Korea FTA (2014),⁷⁷⁷ 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.

⁷⁷⁵ See Exchange of Letters No 1 dated 2 May 1983 to the France - Nepal BIT.

⁷⁷⁶ See Exchange of Letters No 3 to the Bangladesh - France BIT (1985).

⁷⁷⁷ 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.⁷⁷⁸ As detailed below, more than 60 IIAs among those surveyed exclude procurement from their PRPs. Article 1108(8)(b) of the NAFTA (1992)⁷⁷⁹ 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.⁷⁸⁰ 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 BIT⁷⁸¹ and use the expression “procurement” or “government procurement” instead of the expression “procurement by a Party or a state enterprise” used in the NAFTA.⁷⁸² 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.

⁷⁷⁸ *ADF* (n 167) para 94.

⁷⁷⁹ Article 7(6)(b) of the 2004 Canada Model FIPA and Article 9(6)(b) of the 2012 Canada Model FIPA reproduce this provision.

⁷⁸⁰ 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).

⁷⁸¹ 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.

⁷⁸² 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.⁷⁸³ 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

⁷⁸³ 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.⁷⁸⁴

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”).⁷⁸⁵ 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.⁷⁸⁶ 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.⁷⁸⁷

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”).⁷⁸⁸ As a result, ADF International fabricated its steel products at five different locations in the United States, which “massively increased” ADF International’s costs.⁷⁸⁹

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.⁷⁹⁰ The United States acquiesced to characterising the Buy America Interchange Project Provisions as LCRs and as LSRs.⁷⁹¹ 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.⁷⁹²

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.”

⁷⁸⁴ *ADF* (n 167) para 44.

⁷⁸⁵ *ibid* para 46.

⁷⁸⁶ *ibid* para 49.

⁷⁸⁷ *ibid* paras, 50, 52.

⁷⁸⁸ *ibid* paras 52, 56-58.

⁷⁸⁹ *ibid* paras 54-55.

⁷⁹⁰ *ibid* paras 81-82, 87.

⁷⁹¹ *ibid* para 159.

⁷⁹² *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.”⁷⁹³ “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.⁷⁹⁴ 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.⁷⁹⁵

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)).⁷⁹⁶ 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.⁷⁹⁷

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).⁷⁹⁸

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

⁷⁹³ *ibid* para 160.

⁷⁹⁴ *ibid* para 161.

⁷⁹⁵ *ibid* para 162.

⁷⁹⁶ *ibid* para 164.

⁷⁹⁷ *ibid* para 165.

⁷⁹⁸ *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 TIPs⁷⁹⁹ 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 TIPs⁸⁰⁰ 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)⁸⁰¹

⁷⁹⁹ 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.

⁸⁰⁰ 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).

⁸⁰¹ 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)⁸⁰² and Article IV(6) of the Revised WTO GPA (2012),⁸⁰³ 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

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)].

⁸⁰² Agreement on Government Procurement, adopted 15 April 1994, entered into force 1 January 1996, 1869 *UNTS* 508 (also available at 1915 *UNTS* 103).

⁸⁰³ 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;⁸⁰⁴ moreover, no sub-federal governmental entity of any of the NAFTA Parties had voluntarily decided to subject its procurement practices to NAFTA Chapter 10.⁸⁰⁵ 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-3.⁸⁰⁶

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.⁸⁰⁷ 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)⁸⁰⁸ 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

⁸⁰⁴ *ADF* (n 167) para 168.

⁸⁰⁵ *ibid* para 168.

⁸⁰⁶ *ibid* para 170.

⁸⁰⁷ 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.

⁸⁰⁸ 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.⁸⁰⁹

Article IV(2)(a)(i) of the Canada - Ukraine FIPA (1994)⁸¹⁰ 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).⁸¹¹

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

⁸⁰⁹ 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).

⁸¹⁰ Article 17(1) of the 2012 Canada Model FIPA provides for reservations in the same way.

⁸¹¹ 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.⁸¹² 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.⁸¹³ This exception is oddly positioned in the midst of these FIPAs' reservations,⁸¹⁴ 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.

⁸¹² 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).

⁸¹³ 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).

⁸¹⁴ 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.⁸¹⁵

2. The Unpredictable Scope of Open-Ended Reservations to PRPs in IIAs

Six Canadian FIPAs⁸¹⁶ 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 FIPAs⁸¹⁷ 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

⁸¹⁵ 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).

⁸¹⁶ 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).

⁸¹⁷ 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)⁸¹⁸ 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.⁸¹⁹

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

⁸¹⁸ 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.

⁸¹⁹ 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.⁸²⁰

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.⁸²¹ 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.⁸²²

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.”⁸²³ It is apparent that the *Mobil & Murphy* Majority assigned a meaning to the expression “the measure” well beyond its ordinary meaning.⁸²⁴

⁸²⁰ *ibid* paras 105-106.

⁸²¹ *Mobil & Murphy (Majority)* (n 13) paras 307-308.

⁸²² UNCTAD, “Reservations” (n 807) 19, fn 5, 35.

⁸²³ *Mobil & Murphy (Majority)* (n 13) paras 394, 410.

⁸²⁴ 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.⁸²⁵ The Board had used that discretion to issue guidelines applicable to benefits plans in 1986,⁸²⁶ 1987⁸²⁷ and 1988.⁸²⁸ 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.⁸²⁹ By using the existing “legal framework”⁸³⁰ 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),⁸³¹ 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.⁸³² 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.”⁸³³

The *Mobil & Murphy* Majority formulated the consistency test under Article (2)(f)(ii) of NAFTA

⁸²⁵ *Mobil & Murphy (Majority)* (n 13) paras 37–8.

⁸²⁶ *ibid* para 41.

⁸²⁷ *ibid* para 42.

⁸²⁸ *ibid* para 44.

⁸²⁹ *ibid* paras 309-310, 315, 317, 324-327, 333, 336, 338, 380, 410.

⁸³⁰ *ibid* para 394.

⁸³¹ *ibid* paras 305-307.

⁸³² 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.

⁸³³ *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”⁸³⁴ 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.”⁸³⁵ 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.⁸³⁶

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 oversight⁸³⁷ whose additional burdens exceeded the requisite consistency threshold.⁸³⁸ The 2004 Guidelines imposed “quantitatively and qualitatively different, and more burdensome” requirements,⁸³⁹ resulting in a “substantial expansion”⁸⁴⁰ that went beyond a mere change in “character.”⁸⁴¹ Accordingly, the *Mobil & Murphy* Majority rejected Canada’s arguments regarding the application of its reservation under NAFTA Article 1108.⁸⁴²

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 requirements⁸⁴³ and that taken in isolation, neither a mere change in methodology,⁸⁴⁴ nor a requirement for additional spending would breach the consistency test.⁸⁴⁵ 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.”⁸⁴⁶ 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.”⁸⁴⁷

⁸³⁴ *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.

⁸³⁵ *Mobil & Murphy (Majority)* (n 13) para 394.

⁸³⁶ *ibid* para 410.

⁸³⁷ *ibid* para 398, 404.

⁸³⁸ *ibid* para 410.

⁸³⁹ *ibid* para 409.

⁸⁴⁰ *ibid* para 401.

⁸⁴¹ *ibid* para 339.

⁸⁴² *ibid* para 490(3).

⁸⁴³ *ibid* para 401.

⁸⁴⁴ *ibid* para 398.

⁸⁴⁵ *ibid* para 400.

⁸⁴⁶ *ibid* para 323.

⁸⁴⁷ *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”⁸⁴⁸ 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.”⁸⁴⁹ While the standard for the consistency test of the 2004 Guidelines could be equated to “the previously existing legal framework,”⁸⁵⁰ 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.”⁸⁵¹

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.”⁸⁵² The *Mobil & Murphy* Majority added a layer of complexity by deciding that authority constituted “a matter of domestic law,”⁸⁵³ while consistency constituted a NAFTA treaty-based test to be applied under international law after having considered relevant national laws.⁸⁵⁴

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.⁸⁵⁵ Dissenting Arbitrator Sands viewed Canada’s reservation in respect of the Accord Acts as broad, open-ended and not limited in time,⁸⁵⁶ which suggested the need to preserve the possibility for regulatory change as an “evolutionary process.”⁸⁵⁷ 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

unanimous statements on this matter: see *Mobil & Murphy (Dissent)* (n 824) para 24.

⁸⁴⁸ *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.

⁸⁴⁹ *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.

⁸⁵⁰ *Mobil & Murphy (Majority)* (n 13) paras 398, 404.

⁸⁵¹ *ibid* paras 330, 332.

⁸⁵² *ibid* para 330.

⁸⁵³ *ibid* para 350.

⁸⁵⁴ *ibid* paras 355-356, 407-408.

⁸⁵⁵ *Mobil & Murphy (Dissent)* (n 824) para 37.

⁸⁵⁶ *ibid* paras 14-15.

⁸⁵⁷ *ibid* para 43.

source non-conforming measure, and not that new subordinate measures would fall within the scope of prior subordinate measures.⁸⁵⁸ 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.⁸⁵⁹

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.⁸⁶⁰ 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.⁸⁶¹

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

⁸⁵⁸ *ibid* paras 28, 32-33.

⁸⁵⁹ *ibid* para 3.

⁸⁶⁰ *Mobil & Murphy (Majority)* (n 13) paras 249, 255; *Mobil & Murphy (Dissent)* (n 824) para 4.

⁸⁶¹ *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.⁸⁶² 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.⁸⁶³ MFN treatment clauses have been variously described as an insurance policy against poor draftsmanship,⁸⁶⁴ as providing a rampart against discrimination,⁸⁶⁵ thus ensuring equal competitive conditions between foreign investors from different countries,⁸⁶⁶ and as a harmonisation device regarding the legal regime applicable to foreign investment among

⁸⁶² UNCTAD, *Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II*, UN Doc UNCTAD/DIAE/IA/2010/1 (2010) 13.

⁸⁶³ 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.

⁸⁶⁴ Georg Schwarzenberger, "The Most-Favoured Nation Standard in British State Practice" 22 *Brit. Y.B. Int'l L.* 96 (1945) 99.

⁸⁶⁵ 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.

⁸⁶⁶ UNCTAD MFN (2010) (n 862) 13-14.