Performance requirement prohibitions in international investment law

Genest, A.

negotiations.[225]

IV. Typology and Analysis of PRPs in IIAs

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

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

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

[225] Norway (2007) (n 26) 24-25; Government of Norway (2015) (n 26) 11-12.

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

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

A. Non-Binding PRPs With Narrow Coverage

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

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

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[226] Vandevelde, "The Second Wave" (n 112) 674, 677.
[227] Bale (n 93) 22.
[228] Sachs (n 72) 224.
[229] The BIT with Haiti was signed, but never entered into force: see Vandevelde (n 84) 38.
[230] "U.S. State Dept. Responses to Sen. Pell" (n 78) 45; "Statement of Kenneth J. Vandevelde before the U.S. Senate" (n 130) 70; Gudgeon (n 112) 127; Sachs (n 72) 208; Vandevelde, "The Second Wave" (n 112) 674.
[231] "Question by Sen. Pressler" in *1988 U.S. Senate Hearings on BITs and Tax Treaties* (n 74) 30-31; "Statement of Kenneth J. Vandevelde before the U.S. Senate" (n 130) 70; Vandevelde, "The Second Wave" (n 112) 674.
[232] Kunzer (n 112) 274.
[233] Robin (n 48) 949 fn 125.

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

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

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

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[234] Article II(7) of the U.S. - Zaire/DRC BIT (1984).
[235] U.S. - Zaire/DRC BIT (1984): Letter of Submittal from the Department of State to the President, 26 February 1986, 99th Cong., 2nd Sess.
[236] Turkey - U.S. BIT (1985): Letter of Submittal from the Department of State to the President, 19 February 1986, 99th Cong., 1st Sess., Senate Treaty Doc. 99-19.
[237] Bangladesh - U.S. BIT (1986): Letter of Submittal from the Department of State to the President, 9 May 1986, 99th Senate, 1st Sess.
[238] Tunisia BIT - U.S. (1990): Letter of Submittal from the Department of State to the President, 24 April 1991, 102nd Cong., 1st Sess., Senate Treaty Doc. 102-6.
[239] "U.S. State Dept. Responses to Sen. Pell" (n 78) 26, 40, 45; "Statement of Kenneth J. Vandevelde before the U.S. Senate" (n 130) 70.

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

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

B. PRPs & TRIMs

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

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

[240] Article II(7) of the Haiti - U.S. BIT (1983) also used hortatory "shall seek to avoid" language in its PRP, but the U.S. BIT with Haiti never entered into force.
[241] Nevertheless, as seen below, Article II(8) of the Senegal - U.S. BIT (1983) sets forth a compulsory PRP with open-ended language as to its scope.
[242] Turkey - U.S. BIT Letter of Submittal (n 236); Morocco - U.S. BIT: Letter of Submittal from the Department of State to the President, 20 February 1986, 99th Cong., 2nd Sess; Tunisia BIT - U.S. BIT Letter of Submittal (n 238).
[243] Nordic Countries, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/6 (15 June 1987) 1.
[244] Leland (n 136) 219, 223.
[245] Edward M. Graham and Paul Krugman, "Current US Policy" in Stephen Young (ed), *Multinationals and Public Policy Vol. 2* (Edward Elgar, 2004) 138, 146.

"put the world community on notice about the U.S. position on performance requirements."[246]

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

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

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[246] Bale (n 83) 180, 182, 189; Jacobsen (n 34) 1194-1195; Leland (n 136) 224; LICIT (n 48) 75, 77.
[247] LICIT (n 48) 62-63.
[248] Leland (n 136) 223; Bale (n 83) 180, 188.
[249] GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, GATT Doc L/5504, adopted February 7, 1984, BISD 30S/140, paras 1.1, 1.3, 1.4.
[250] For more on the GATT – FIRA case, see: GATT Secretariat, *Note on TRIMs (1987)* (n 145) 4-8; Emily F. Carasco, "The Foreign Investment Review Agency (FIRA) and the General Agreement on Tariffs and Trade (GATT): incompatible?" 13(2) *Georgia J. Int'l & Comp. L.* 441 (Spring 1983); Brian Derrah, "Canada and the Challenge of Foreign Investment: the First Decade of Foreign Investment Review" 7(3) *Dalhousie Law Journal* 194 (October 1983) 228-231; Graham (n 42) 123; Sanam Salem Haghighi, *A Proposal for an Agreement on Investment in the Framework of the World Trade Organization*, thesis in partial fulfillment of the degree of Master of Laws (LL.M), Institute of Comparative Law, Graduate Faculty of Law, McGill University (1999), 28-31; UNCTC and UNCTAD (n 43) Appendix A – GATT – FIRA; Elizabeth Smythe, "Your Place or Mine? States, International Organization and the Negotiation of Investment Rules" 7(3) *Transnational Corporations* (December 1998) 85, 96; Martha Lara de Sterlini, "The Agreement on Trade-Related Investment Measures" in Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) 444-445; Wang (n 48) 110-117; Singapore (n 148) para 13.
[251] *GATT–FIRA Panel Report* (n 249), paras 2.2-2.4

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

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

2. Performance Requirements Under the TRIMs Agreement

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

[252] ibid paras 2.10-2.11.
[253] ibid para 5.3.
[254] ibid paras 5.4-5.11.
[255] ibid para 5.20.
[256] ibid para 5.18.

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

a) The Endorsement of TRIMs as a Political Compromise

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

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

Intermediary definitions of TRIMs, including those of the European Communities ("EC"), Japan and Switzerland, focused on "inherently trade-distorting"[263] investment measures having a direct

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[257] GATT, G-18 *Note on Performance Requirements* (n 157) 5 (para 6), quoting a September 1980 report by the Task Force on Private Foreign Investment of the Joint Development Committee established by the IMF and the World Bank; Narasimham (n 48) 1-2; OECD, *Framework – Investment Disincentives* (n 27) para 19.
[258] Deluca (n 29), 253.
[259] India Submission 18 (n 35) paras 3, 20.
[260] Switzerland (n 42) 2.
[261] GATT Group of Negotiations on Goods, *Sixteenth meeting: 9 April 1990*, MTN.GNG/22 (8 May 1990) 6-7; Deluca (n 29), 274.
[262] India Submission 18 (n 35) para 23.
[263] European Communities, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/22 (16 November 1989) 3; GATT, *Note on TRIMs* (October 1990) (n 145) para 30 (EC).

and substantial effect on international trading patterns[264] and impacting "the business behaviour of the investor during the production process."[265]

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

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

The definition of TRIMs used in the GATT forum needed to translate into "operational solutions."[269] GATT Members predictably failed in finding an "operational definition" for the

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

[265] Switzerland (n 42) 3.

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

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

[268] U.S. Submission 14 (n 267) 18-20.

[269] Switzerland (n 42) 2.

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

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

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

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[270] GATT, *Note on Trims* (April 1990) (n 147) para 39.
[271] Switzerland (n 42) 2.
[272] Greenaway, "Political Economy of TRIMs" (n 62) 368; UNCTAD, "HCOMs" (n 44) 8.
[273] GATT, *Note on Uruguay Round (1987)* (n 165) paras 49, 52; GATT GNG Report (1988) (n 156) para 79; Japan Submission 7 (n 264) 2; Nordic Countries (n 243) 1; GATT, *Note on TRIMs* (n 60) para 13 (Hong Kong).
[274] de Sterlini (n 250) 449; *India – Certain Measures Relating to Solar Cells and Solar Modules* (24 February 2016), WTO Doc WT/DS456/R (Panel Report), <http://docsonline.wto.org> (India—Solar Cells), para 7.59; *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan)* (19 December 2012), WTO Doc WT/DS412/R (Panel Report) and *Canada – Measures Relating to the Feed-in Tariff Program (Complaint by the European Union)* (19 December 2012), WTO Doc WT/DS426/R (Panel Report), <http://docsonline.wto.org> (Canada—FIT Panel), para 7.108.
[275] Holger P. Hestermeyer and Laura Nielsen, "The Legality of Local Content Measures under WTO Law" 48(3) *Journal of World Trade* 553 (2014) 575; Patrick Low and Arvind Subramanian, "TRIMs in the Uruguay Round: An Unfinished Business?" in Will Martin and L. Alan Winters (eds), *The Uruguay Round and the Developing Economies* (World Bank Discussion Papers 307, 1995) 416.
[276] de Sterlini (n 250) 449-450.
[277] Moran and Pearson, *TRPRs OPIC* (n 31) 5.
[278] GATT Secretariat, *A Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions – Note by the Secretariat*, GATT Committee on Trade and Development, COM.TD/W/510 (2 November 1994) 24-25.

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

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

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

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

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

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

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

3. PRPs That Incorporate the TRIMs Agreement

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

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

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

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

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[284] Broude and Shany (n 10) 8; WTO and UNCTAD (n 5) para 26.

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

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

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

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

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

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

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

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

C. Open-Ended PRPs in IIAs

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

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

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

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

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

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

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

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

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[286] Kunzer (n 112) 273, A-5.
[287] Coughlin (n 36) 131; Deluca (n 29) 272.
[288] The deletion of this limiting clause aimed at providing U.S. treaty negotiators with greater bargaining power by allowing them to reintegrate such limiting clause in exchange for additional concessions: see Coughlin (n 36) 141 fn 6.
[289] Vandevelde (n 84) 387-388.
[290] Supplementary Protocol (1986) to the Egypt - U.S. BIT (1982): Letter of Submittal from the Department of State to the President, 20 May 1986, 99th Cong., 2nd Sess., Senate Treaty Doc. 99-24.
[291] "U.S. State Dept. Responses to Sen. Pell" (n 78) 31.

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

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

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

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

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

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

[293] Argentina - U.S. BIT (1991), Protocol, paras 9, 11, as discussed in Vandevelde, "The Second Wave" (n 112) 689.

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

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

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

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

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[294] Vandevelde, "The Second Wave" (n 112) 689.
[295] ibid.
[296] Coughlin (n 36) 132; Deluca (n 29) 272; Sachs (n 72) 224.
[297] Gudgeon (n 112) 127; Senegal - U.S. BIT (1983): Letter of Transmittal from the White House to the United States Senate, 5 March 1986, 99th Cong., 2nd Sess., Senate Treaty Doc. 99-15.
[298] U.S. Sen. Comm. on For. Rel., *Executive Report on Ratifying BITs (2000)* (n 117) 16.
[299] Tarullo (1992) (n 74) 3, 4, 7; "U.S. State Dept. Responses to Sen. Pell" (n 78) 21; Tarullo (1995) (n 74) 8. See also: Bay (n 94) 51; Papovich (n 94) 73.
[300] "Questions by Sen. Pell and Replies by Daniel Price" in *1995 U.S. Senate Hearings on BITs* (n 74) 32.

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

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

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

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

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[301] U.S. Submission 14 (n 267) 18-20.
[302] Holmer (n 74) 10.
[303] Price (n 92) 30.
[304] "Questions by Sen. Pell and Replies by Daniel Price" in *1995 U.S. Senate Hearings on BITs* (n 74) 32-33.
[305] Supplementary Protocol (1986) to the Egypt - U.S. BIT (1982): Letter of Submittal (n 290).

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

2. Open-Ended PRPs in French BITs

a) France's Model PRP

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

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

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

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

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[306] "Questions by Sen. Pell and Replies by Daniel Price" in *1995 U.S. Senate Hearings on BITs* (n 74) 32-33.

[307] "Accord entre le Gouvernement de la République française et le Gouvernement _____ sur l'encouragement et la protection réciproques des investissements" in UNCTAD, *International Investment Instruments: A Compendium, Vol. V: Regional Integration, Bilateral and Non-governmental Instruments* (UNCTAD/DITE/2, 2000), 283.

[308] "Projet d'accord entre le Gouvernement de la République française et le Gouvernement _____ sur l'encouragement et la protection réciproques des investissements" in UNCTAD, *International Investment Instruments: A Compendium, Vol. III: Regional Integration, Bilateral and Non-governmental Instruments* (UNCTAD/DTCI/30, 1996), 159.

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

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

b) 64 French BITs with Open-Ended PRPs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[315] Article 4 of the France - Iran BIT (2003) and Exchange of Letters No 3 regarding the Bangladesh - France BIT (1985).

[316] OECD, *First Note on TRIMs* (n 30) para 23.

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

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

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

The OECD,[331] UNCTAD,[332] the WTO Secretariat[333] and scholars[334] all identify LCRs, EPRs and

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[317] GATT, *G-18 Note on Performance Requirements* (n 157) para 6; Bergsten, *Performance Requirements* (n 34) 1-2; Narasimham (n 48) 1-2.
[318] India Submission 18 (n 35) para 23; LICIT (n 48) 56.
[319] OECD, *Third Note on TRIMs* (n 70) para 13.
[320] David Greenaway, "Why are we Negotiating on TRIMs?," in David Greenaway and others (eds), *Global Protectionism*, Macmillan (1991) 154, 155-163; Greenaway, "Political Economy of TRIMs" (n 62) 372, 376; see also: Graham and Krugman (n 245) 463-490.
[321] Bergsten (n 53) 13, 15.
[322] Bergsten (n 53) 13, 15.
[323] Bale (n 83) 180, 185.
[324] GATT, *Note on Uruguay Round (1987)* (n 165) para 49.
[325] EC Submission 10 (n 264) para 3.
[326] Japan Submission 20 (n 264) 5-6.
[327] Nordic Countries (n 243) 1-2; Nordic Countries, *Submission to the GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/W/23 (22 November 1989), para 12; GATT, *Note on Trims* (April 1990) (n 147) para 29 (views of the Nordic Countries).
[328] Switzerland Submission 16 (n 42) 3. Singapore opined that the Swiss proposal "simply treats TRIMs as if they are subsidies:" Singapore (n 148) para 17.
[329] U.S., *Trade & FDI* (n 266), quoted in OECD, *First Note on TRIMs* (n 30) 5-6; U.S. Submission 4 (n 267) 3-5; U.S. Submission 14 (n 267) 5, 9, 11, 16-20. See also: Bale (n 83) 180, 185; Brock (n 83) 21, 24. See also: "U.S. State Dept. Responses to Sen. Pell" (n 78); Tarullo (1992) (n 74) 7; Papovich (n 94) 73. The United States developed an additional list of TRIMs in 1989 which reiterated all previously mentioned measures but for domestic sales requirements: see UNCTC and UNCTAD (n 43) 23-24.
[330] India Submission 18 (n 35) para 23.
[331] OECD, *First Note on TRIMs* (n 30) paras 4-12, 23-24; OECD, *Second Note on TRIMs* (n 48) para 10;

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

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

As part of the GATT Uruguay Round of negotiations on TRIMs, the European Communities ("EC"),[335] India[336] and the United States[337] identified between 1987 and 1989 the same 11 performance requirements:

1) LCRs;
2) EPRs;
3) Trade balancing requirements;
4) LERs;
5) Technology transfer, licensing and local R&D requirements;[338]

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

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

[333] WTO and UNCTAD (n 5) para 15.

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

[335] EC Submission 10 (n 264) para 3.

[336] India Submission 18 (n 35) paras 11, 16, 20-21, 23.

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

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

6) Foreign exchange restrictions;

7) Remittance restrictions;

8) Manufacturing requirements;

9) Manufacturing limitations;

10) Product mandating requirements; and

11) Domestic sales requirements.

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

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

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

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

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

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

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

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

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

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

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

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[341] ibid paras 77, 81, 115.
[342] ibid paras 544-545.
[343] ibid para 541.
[344] ibid paras 550, 554.
[345] ibid para 550.
[346] ibid paras 553-554.

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

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

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

[347] *Lemire* (n 14), para 501.
[348] ibid para 507.
[349] ibid para 507.
[350] ibid 505.
[351] *S.D. Myers* – Majority (n 167), para 263.
[352] *Lemire* (n 14), para 505.

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

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

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

[353] ibid para 506.
[354] ibid para 506.
[355] ibid paras 508-509.
[356] ibid para 509.
[357] ibid para 508.
[358] ibid para 510.
[359] ibid para 510.

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

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

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

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[360] ibid para 511.
[361] ibid para 510.
[362] ibid para 511.
[363] ibid para 511.
[364] GATT, *Note on Trims* (April 1990) (n 147) paras 32, 36, 42.
[365] For an example of a country that recommends discarding negative trade effects on the basis of positive objectives, see: GATT Secretariat, *Note on the Meeting of 26 November 1987, GATT Group of Negotiations on Goods – Negotiating Group on Trade-Related Investment Measures*, MTN.GNG/NG12/5 (14 December 1987) para 21.

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

D. Detailed and Exhaustive PRPs in IIAs

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

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

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

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

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

[368] Article 9-07(1)(c) of the Chile - Mexico FTA (1998); Article 10.7(1)(c) of the Chile - Korea FTA (2003);

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

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

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

[369] Article 10.5(1) of the India - Korea CEPA (2009).

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

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

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

[373] Article V(2) of the Canada - Trinidad and Tobago FIPA (1995); Article V(2) of the Canada - Philippines FIPA (1995); Article V(2) of the Canada - South Africa FIPA (1995); Article V(2) of the Canada - Ecuador

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

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

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

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

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

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

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

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

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

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

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[376] Article 9.10(3)(h) of the TPP (2015) provides an exception specific to these two additional prohibitions.
[377] Article V of the Egypt - U.S. BIT (1982); Article VI of the Panama - U.S. BIT (1982); Article V of the Haiti - U.S. BIT (1983); Article V of the Senegal - U.S. BIT (1983); Article V of the U.S. - Zaire/DRC BIT (1984); Article IV of the Morocco - U.S. BIT (1985); Article IV of the Turkey - U.S. BIT (1985); Article V of the Bangladesh - U.S. BIT (1986); Article V of the Cameroon - U.S. BIT (1986); Article IV of the Grenada - U.S. BIT (1986); Article IV of the Congo (Brazzaville) - U.S. BIT (1990); Article V of the Poland - U.S. BIT (1990); Article IV of the Tunisia - U.S. BIT (1990); Article IV of the Argentina - U.S. BIT (1991); Article V of the Czech and Slovak Federal Republic - U.S. BIT (1991); Article IV of the Sri Lanka - U.S. BIT (1991); Article IV of the Armenia - U.S. BIT (1992); Article IV of the Bulgaria - U.S. BIT (1992); Article IV of the Romania - U.S. BIT (1992); Article IV of the Russia - U.S. BIT (1992).
[378] Article V of the 1983 U.S. Model BIT reproduced in Kunzer (n 112) A-7; Article V of the U.S. Model BIT (1994); Article 7 of the 2004 U.S. Model BIT; Article 7 of the 2012 U.S. Model BIT; Article 14 of the 2004 Canada Model FIPA; Article 11 of the 2012 Canada Model FIPA; Article 6 of French Model BIT (undated); Article 7 of the French Model BIT (1998); Article 7 of the India Model BIT (2003); Article 6 of the India Model BIT (2015).
[379] For example, the Egypt - U.S. BIT (1982), the Rwanda - U.S. BIT (2008), the Canada - Ukraine FIPA (1994), the Cameroon - Canada FIPA (2014), the Armenia - France BIT (1995), the France - Senegal BIT (2007) and the India - Korea CEPA (2009) do not explicitly prohibit LERs.

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

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

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

UNCTAD and its predecessor the UNCTC identified 12 measures as performance requirements:[380]

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

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

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

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

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

[381] UNCTAD, *WIR 1996* (n 5) 176, 179.

12) Manufacturing limitations;

13) Domestic sales requirements; and

14) Product mandating requirements.

a) LCRs/LSRs

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

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

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[382] Yukmanic (n 337) 7-8. The expression "import substitution requirements" appears to have been used as an equivalent to LCRs: EC Submission 10 (n 264) para 3; U.S. Submission 9 (n 338) 3.
[383] Coughlin (n 36) 133.
[384] Value-added requirements and LCRs are synonymous to a large extent: see Graham (n 42) 121.
[385] OECD, *First Note on TRIMs* (n 30) para 12; U.S. Submission 9 (n 338) 3.
[386] Gary Clyde Hufbauer and others, *Local Content Requirements: A Global Problem* (Peterson Institute for International Economics 2013) 3; Bale (n 83) 180, 181; see also Bergsten (n 53) 13, 15; LICIT (n 48) 56.
[387] LICIT (n 48) 56; EC Submission 8 (n 30) 2; Nordic Countries (n 243) 1-2; Nordic Countries Submission 23 (n 327) 4; U.S. Submission 9 (n 338) 3; Jan-Christoph Kuntze and Tom Moerenhout, *Local Content Requirements and the Renewable Energy Industry – a Good Match?* (International Centre for Trade and Sustainable Development ("ICTSD"), June 2013) 5.
[388] OECD, *First Note on TRIMs* (n 30) para 12.
[389] Japan Submission 7 (n 264) 3-4; Nordic Countries (n 243) 1-2; WTO and UNCTAD, "Evidence on the Use, the Policy Objectives, and the Impact of Trade-Related Investment Measures and Other Performance Requirements," Part II in *Trade-Related Investment Measures and Other Performance Requirements – Joint Study by the WTO and UNCTAD Secretariats*, Committee on Trade-Related Investment Measures, WTO Doc G/C/W/307/Add.1, 2002, para 63.
[390] UNCTC and UNCTAD (n 43) 36-37.
[391] Kumar, "Effectiveness of Performance Requirements" (n 48) 65.

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

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

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

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[392] GATT, *Note on TRIMs (1988)* (n 52) para 40.
[393] EC Submission 8 (n 30) 2.
[394] UNCTC (n 332) 63.
[395] Japan Submission 12 (n 264) 8-9.
[396] India Submission 18 (n 35) para 30.
[397] U.S. Submission 9 (n 338) 3.

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

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

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[398] UNCTAD, "HCOMs" (n 44) 5; UNCTAD, *WIR 2001* (n 56) 169.
[399] Hufbauer and others, *LCRs* (n 386) 2; Oliver Johnson, *Exploring the Effectiveness of Local Content Requirements in Promoting Solar PV Manufacturing in India*, Discussion Paper 11/2013 (German Development Institute, 2013) 10.
[400] U.S. Submission 9 (n 338) 3; LICIT (n 48) 58-59. See also, *inter alia*: Bernard M. Hoekman and Michel M. Kostecki, "Trade in Goods" *in The Political Economy of the World Trading System* (OUP, 2001) 201-205; Kumar, "Effectiveness of Performance Requirements" (n 48) 62-63; Theodore H. Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Peterson Institute for International Economics, 1998) 51, 53-59, 132-135; Moran, "FDI: a Reassessment" (n 65) 46; Theodore H. Moran, *How to Investigate the Impact of Foreign Direct Investment on Development and use the Results to Guide Policy*, *Brookings Trade Forum* (January 2007) 6; Theodore H. Moran, *Parental Supervision: the New Paradigm for Foreign Direct Investment and Development* (Institute for International Economics, 2001) 33-35, 39; Moran, *Strategy for the Doha Round* (n 65) 10; Moran, "FDI and Host Country Development" (n 65) 285-286, 288; OECD, *Foreign Direct Investment and Economic Development*, Communication to the Working Group on the Relationship between Trade and Investment (WGTI), WTO Doc WT/WGTI/W/26 (1998) 24, 52; Garry Pursell, "The Australian Experience with Local Content Programs in the Auto Industry Some Lessons for India and other Developing Countries" 35(2) *Journal of World Trade* 379 (2001); UNCTAD, *Elimination of TRIMs: The Experience of Selected Developing Countries*, UN Doc UNCTAD/ITE/IIA/2007/6 (2007) 77-78, 133, 141-142.
[401] Hufbauer and others, *LCRs* (n 386) xi, 63-76, 93-108; Kuntze and Moerenhout, *LCRS and Renewables* (n 387) 4, 21-30; Johnson (n 399) 14-24. See also, *inter alia*: European Commission, *Trade and Investment Barriers Report 2013*, COM(2013) 103 final (28 February 2013) 10; Michael Stephen Hanni and others, "Foreign direct investment in renewable energy: trends, drivers and determinants" 20(2) *Transnational Corporations* (August 2011), 58-59; Jacob Funk Kirkegaard, Thilo Hanemann, Lutz Weischer, "It Should be a Breeze: Harnessing the Potential of Open Trade and Investment Flows in the Wind Energy Industry," *Working Paper Series WP 09-14* (World Resource Institute and Peterson Institute for International Economics, 2009) 20-23; Jacob Funk Kirkegaard and others, "Towards a Sunny Future? Global Integration in the Solar Industry," *Working Paper Series WP 10-6* (World Resource Institute and Peterson Institute for International Economics, May 2010) 34; WTI Advisors, *Local Content Requirements & the Green Economy*, Study prepared for the Ad hoc Expert Group Meeting on Domestic Requirements and Support Measures in Green Sectors: Economic and Environmental Effectiveness and Implications for Trade (13−14 June 2013), 58 p.
[402] UNCTAD, *WIR 2001* (n 56) 167, 193 and fn 4.
[403] Hufbauer and others, *LCRs* (n 386) xx-xxi, 5-6.

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

b) EPRs

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

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

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[404] *Indonesia – Certain Measures Affecting the Automobile Industry – Reports of the Panel*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4 <http://docsonline.wto.org> (Indonesia—Autos), paras 14.58, 14.75-14.87.
[405] Canada—FIT Panel (n 274), paras 6.72, 7.121, 7.154–7.155, 7.166-7.167, 8.2, 8.4, 8.5, 8.6, 8.8, 8.9; Canada—FIT ABR (n 283), paras 4.17-4.23, 5.85, 6.1(b)(v) of WT/DS412/AB/R and paras 5.33, 5.89, 6.1(a)(i), 6.1(a)(vi) of WT/DS426/AB/R.
[406] EC Submission 8 (n 30) 2; EC Submission 10 (n 264) para 3; Japan Submission 7 (n 264) 4; Japan Submission 12 (n 264) 10; Nordic Countries (n 243) para 3; Nordic Countries Submission 23 (n 327) para 12; OECD, *First Note on TRIMs* (n 30) para 14; U.S. Submission 9 (n 338) 2; LICIT (n 48) 56; Mark G. Herander and Christopher R. Thomas, "Export Performance and Export-Import Linkage Requirements" 101(3) *Quarterly Journal of Economics* (August 1986) 591, 591-592.
[407] UNCTAD, "HCOMs" (n 44) 5-6.
[408] Kumar, "Effectiveness of Performance Requirements" (n 48) 67-68.
[409] U.S. Submission 9 (n 338) 2.

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

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

c) Trade-Balancing Requirements

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

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

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[410] Wang (n 48) 119.
[411] EC Submission 8 (n 30) 2.
[412] EC Submission 8 (n 30), 2; EC Submission 10 (n 264) para 3; Japan Submission 7 (n 264) 5; Japan Submission 12 (n 264) 11; U.S. Submission 9 (n 338) 4; Herander and Thomas (n 406) 591-592; WTO Secretariat, *The Impact of Investment Incentives and Performance Requirements on International Trade*, Working Group on the Relationship between Trade and Investment, WTO Doc WT/WGTI/W/56, 30 September 1998, paras 28-29; UNCTAD, "HCOMs" (n 44) 5; WTO and UNCTAD (n 389) paras 65-66, 69. See also: India and others, *GATT Communication 25* (n 48) para 8; GATT, *Note on Trims* (April 1990) (n 147) para 3.
[413] India Submission 18 (n 35) para 23; Japan Submission 7 (n 264) 5; Nordic Countries Submission 23 (n 327) para 12; OECD, *First Note on TRIMs* (n 30) para 14.
[414] India and others, *GATT Communication 25* (n 48) para 8; U.S. Submission 9 (n 338) 4.
[415] Nordic Countries Submission 23 (n 327) para 12.
[416] Kumar, "Effectiveness of Performance Requirements" (n 48) 60-61.
[417] India Submission 18 (n 35) para 23; Japan Submission 7 (n 264) 5; LICIT (n 48) 56.

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

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

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

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[418] U.S. Submission 9 (n 338) 4.
[419] Dani Rodrik, "Taking Trade Policy Seriously: Export Subsidization as a Case Study in Policy Effectiveness" *NBER Working Paper No. 4567* (December 1993) 13-14; Dani Rodrik, "Trade and Industrial Policy Reform in Developing Countries: a Review of Recent Theory and Evidence," NBER Working Paper No. 4417 (August 1993) 23 (EPRs in Korea in the 1960s).
[420] Herander and Thomas (n 406) 592; C. Fred Bergsten, "Coming Investment Wars" 53 *Foreign Aff.* 135 (1974-1975) 141-142; Theodore H. Moran, "Enhancing the Contribution of FDI to Development: a new Agenda for the Corporate Social Responsibility Community, International Labour and Civil Society, Aid Donors and Multilateral Financial Institutions" 20(1) *Transnational Corporations* 69 (April 2011), 78; Theodore H. Moran, *Foreign Direct Investment and Development: Launching a Second Generation of Policy Research: Avoiding the Mistakes of the First, Reevaluating Policies for Developed and Developing Countries* (Peterson Institute for International Economics, 2011) 38, 69; Theodore H. Moran, "The United Nations and Transnational Corporations: a Review and a Perspective" 18(2) *Transnational Corporations* 91 (August 2009), 103; Moran, *New Policy Agenda* (n 400) 53-59.
[421] Guoqiang Long, "China's Policies on FDI: Review and Evaluation," in Theodore H. Moran, Edward M. Graham and Magnus Blomström (eds), *Does Foreign Direct Investment Promote Development?* (Institute for International Economics, 2005) 322, 325-327, 335.
[422] Kumar, "Effectiveness of Performance Requirements" (n 48) 68.

d) Export Controls or Restrictions

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

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

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

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

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

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[423] UNCTAD, *WIR 1996* (n 5) 118, 181; UNCTAD, "Investment-Related Trade Measures" in *UNCTAD Series on Issues in International Investment Agreements*, UN Doc UNCTAD/ITE/IIT/10 (vol. IV) (1999) 8, 27-28.
[424] UNCTAD, *WIR 1996* (n 5) 179; see also UNCTAD, "HCOMs" (n 44) 2-3, 8-9, 12-14; UNCTAD, *FDI & Performance Requirements* (n 5) 2-3; Bjorklund (n 279) 486.
[425] EC Submission 22 (n 263) 5.
[426] Japan Submission 12 (n 264) 11.
[427] UNCTAD, *WIR 1996* (n 5) 181; UNCTAD, "IRTMs" (n 423) 3, 5-6, 8.

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

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

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

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

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[428] EC Submission 10 (n 264) para 3.
[429] U.S. Submission 9 (n 338) 11.
[430] Kumar, "Effectiveness of Performance Requirements" (n 48) 69.
[431] Bergsten (n 53) 13, 15.
[432] Bale (n 83) 180, 185.
[433] AEA (n 76) 23.
[434] India and others, *GATT Communication 25* (n 48) 5; UNCTAD, "HCOMs" (n 44) 5.
[435] Kumar, "Effectiveness of Performance Requirements" (n 48) 69.
[436] Cosbey (n 5) 9-11; Moran, "FDI and Host Country Development" (n 65) 46, 49, 66; Moran, *Parental Supervision* (n 393) 33-39; Dani Rodrik, "What's so Special About China's Exports?," *NBER Working paper* No. 11947 (2006), 17-20; Moran, *Strategy for the Doha Round* (n 65) 10 (JVRs in Brazil and Mexico's computer sectors); Long (n 421) 318, 321, 334-336.
[437] Kumar, "Effectiveness of Performance Requirements" (n 48) 70.
[438] U.S. Submission 9 (n 338) 11.

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

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

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

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

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[439] Japan Submission 7 (n 264) 5; U.S. Submission 9 (n 338) 5.
[440] Bale (n 83) 180, 185.
[441] OECD, *First Note on TRIMs* (n 30) para 12.
[442] Japan Submission 7 (n 264) 5; U.S. Submission 9 (n 338) 5; UNCTAD, "Transfer of Technology" in *UNCTAD Series on Issues in International Investment Agreements*, UN Doc UNCTAD/ITE/IIT/28 (2001) 24.
[443] Japan Submission 12 (n 264) 11.
[444] EC Submission 10 (n 264) 3.
[445] India and others, *GATT Communication 25* (n 48) 6; UNCTAD, "HCOMs" (n 44) 5.

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

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

g) Foreign Exchange Restrictions and/or Earning Requirements

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

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[446] U.S. Submission 9 (n 338) 5.
[447] ibid.
[448] ibid.
[449] Moran, *New Policy Agenda* (n 400) 127-131, 160-162; Moran, "FDI: a Reassessment" (n 65) 46-47; Kamal Saggi, *Trade, Foreign Direct Investment, and International Technology Transfer: A Survey*, prepared for the World Bank and the WTO Working Group on the Relationship between Trade and Investment, WTO Doc WT/WGTI/W/88 (19 September 2000) 22; WTO Secretariat, *Report on the Meeting of 8 June 2000 of the Working Group on the Relationship between Trade and Investment - Note by the Secretariat*, WTO Doc WT/WGTI/M/11, 24 July 2000, para 18.
[450] Long (n 421) 321, 334-336; UNCTAD, *WIR 2001* (n 56) 175.
[451] OECD*, Foreign Direct Investment and Economic Development: Lessons from Six Emerging Economies* (OECD, 1998) 60-62, 74-75. For more information on technology transfer requirements, see notably: Ari Kokko, Magnus Blomstrom, "Policies to Encourage Inflows of Technology Through Foreign Multinationals" in Stephen Young (ed), *Multinationals and Public Policy Vol. 2* (Edward Elgar, 2004) 237-246; UNCTAD (n 37) 129-134; UNCTC and UNCTAD (n 43) 24 Table 8.
[452] Vudayagiri N. Balasubramanyam, *Foreign Direct Investment in Developing Countries: Determinants and Impacts*, Paper presented at the Conference entitled "New Horizons and Policy Challenges for Foreign Direct Investment in the 21st Century" in Mexico City (26-27 November 2001), OECD Global Forum on International Investment, 5-6.

reduce an investor's import capacity since an investor needs foreign currency to purchase its imports.[453] Restrictions which condition an investor's access to foreign exchange upon foreign-exchange inflows attributable to that same investor,[454] or which obligate an investor to use only the foreign exchange generated by its exports in order to purchase imports essentially amount to trade-balancing requirements and closely resemble EPRs.[455] Foreign exchange neutrality requirements have been referred to as indirect EPRs.[456] Foreign exchange restrictions aim at easing pressures on a host State's balance of payments.[457] Foreign exchange access restrictions reduce the availability of foreign currency necessary for an enterprise to pay for goods from abroad and therefore restrain an enterprise's ability to import and to a certain extent can be construed as import quotas.

Article 2(b) of the Illustrative List to the TRIMs Agreement describes foreign exchange access restrictions as measures which restrict an enterprise's access to foreign exchange to an amount based on the foreign exchange inflows attributable to that enterprise. NAFTA Articles 1106(1)(d) and (e) and 1106(3)(c) and (d) indirectly prohibit foreign exchange access restrictions and earnings requirements by prohibiting mandatory and advantage-conditioning requirements that correlate imports to the foreign exchange inflows of an investment or that correlate domestic sales of goods or services to the foreign exchange earnings of an investment.

The United States provided a trade-balancing requirement as example of a foreign exchange restriction: a foreign investor intends to establish a subsidiary in a host State in order to produce agricultural machinery which will depend in part on importing a number of components. The host State notifies the foreign investor that due to the balance-of-payment deficit, the host State must impose a requirement that 50% of the foreign investor's necessary foreign exchange must originate from its exports.[458]

h) Remittance Restrictions

Remittance restrictions limit a foreign investor's ability to repatriate profit, dividends, royalties, capital and other investment-related funds.[459] Remittance restrictions share the same objective

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[453] EC Submission 8 (n 30) 5; EC Submission 22 (n 263) 4; U.S. Submission 14 (n 267) 5, 8.
[454] UNCTAD, *FDI & Performance Requirements* (n 5) 2-3; UNCTAD, "HCOMs" (n 44) 3, 5, 12.
[455] EC Submission 8 (n 30) 2, 4, 6; EC Submission 10 (n 264) 2; U.S. Submission 9 (n 338) 8; U.S. Submission 14 (n 267) 11, 14.
[456] Kumar, "Effectiveness of Performance Requirements" (n 48) 60-61.
[457] India and others, *GATT Communication 25* (n 48) para 8.
[458] U.S. Submission 9 (n 338) 8.
[459] EC Submission 10 (n 264) 3; U.S. Submission 4 (n 267) 3, 5; McCulloch and Owen (n 48) 335-336; UNCTAD, *FDI & Performance Requirements* (n 5) 2; UNCTAD, "HCOMs" (n 44) 5; UNCTAD, *WIR 1996* (n 5) 178.

as that of foreign exchange restrictions: improving a host State's balance of payments.[460]

The United States provides two examples of remittance restrictions.[461] First, a foreign investor is planning to invest through a joint venture in the construction of a plant that would produce road construction machinery to supply the host State's domestic market and other countries in the region. The host State conditions approval of the investment on a requirement that the investor limit annual profit repatriation to 20% of the original value of the investment and that the investor's total profit repatriation over the life of the investment does not exceed the original value of the investment.

Second, a foreign investor intends to establish a subsidiary in a host State in order to produce agricultural machinery which will depend in part on importing a number of components. The host State notifies the foreign investor that annual profit remittances are capped at 15% of imported equity capital, while investment capital may be repatriated over a period of at least three years which begins two years after the original investment was made.

i) Local Employment and/or Training Requirements

Local employment and/or training requirements are imposed to correct (regional and/or ethnic) unevenness in hiring practices, to increase the skillfulness of local employees and indirectly to increase the number of skilled workers in the host State.[462]

Local employment requirements can notably consist of imposing minimum thresholds for different ethnic groups that must be met at any or every employment level within targeted corporations; for example, since 1971 Malaysia has imposed employment requirements with a view to increasing the number of workers belonging to the Bumiputera ethnic group.[463] South Africa similarly required that corporations submit employment equity plans consisting notably of initiatives to increase employment for individuals from disadvantaged designated groups.[464]

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[460] India and others, *GATT Communication 25* (n 48) para 8.
[461] U.S. Submission 9 (n 338) 8.
[462] UNCTAD, *FDI & Performance Requirements* (n 5) 30-32.
[463] "Bumiputera" means "sons of the soil" and refers to indigenous Malaysians, as opposed to ethnic Chinese and Indian populations that live in Malaysia. UNCTAD, *FDI & Performance Requirements* (n 5) 137, 143. While the New Economic Policy (NEP) officially ended in the 1990s, a number of its policies, including local employment requirements, continued as part of new programmes, notably the National Development Policy (NDP) for 1991-2000 and the National Vision Policy (NVP) for 2001-2010: Trang Tran, *The Impact of Affirmative Action and Equity Regulations on Malaysia's Manufacturing Firms*, World Bank Paper (June 2013) <http://conference.iza.org/conference_files/worldb2014/tran_t8194.pdf> accessed 12 February 2017, 2-3.
[464] UNCTAD, *FDI & Performance Requirements* (n 5) 201. Under the Employment Equity Act, the expression "designated groups" is defined to mean black people, women and people with disabilities; the

Local employee training requirements can notably take the form of compulsory contributions to skills or human resources development funds and have been imposed notably by Malaysia and South Africa.[465] Local employment and training requirements have further been adopted by Angola, Cameroon, Equatorial Guinea and Nigeria.[466]

j) Investment Localisation Requirements

Performance requirements can also serve as regional development tools: in instances where goods or services produced in or supplied from disadvantaged areas cannot overcome competitive shortcomings, host States may compel investors displaying more advanced production capabilities to locate their activities in such areas instead of directly subsidising production in disadvantaged areas over long periods.[467]

For example, through its Regional Selective Assistance ("RSA") programme in place since the 1970s, the United Kingdom has attributed discretionary grants to corporations located in disadvantaged regions plagued notably by high unemployment.[468] As a further example, Mexico made use of localisation requirements as part of its Programme for Promoting the Manufacturing of Electronic Computer Systems, Their Main Modules and Their Peripheral Equipment, known as the 1981 Computing Programme: one of the numerous eligibility requirements in order to access incentives consisted of establishing operations anywhere but in areas of maximum industrial concentration.[469]

k) Manufacturing Requirements

Manufacturing requirements stipulate that an investor manufacture specified goods (products or components) in the host State, with a view to replacing imports by local production;

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expression "black people" is in turn defined as "a generic term which means Africans, Coloureds and Indians": section 1 of the Employment Equity Act, 1998, as amended.

[465] Konrad von Moltke, Howard Mann, *Towards A Southern Agenda on International Investment: Discussion Paper on the Role of International Investment Agreements* (IISD May 2004) 26-27; UNCTAD, *FDI & Performance Requirements* (n 5) 31, 147, 166, 200.

[466] P. Peek, P. Gantès, *Skills Shortages in the Global Oil and Gas Industry: How to Close the Gap (Part I)*, Centre de recherches enterprises et sociétés (CRES) (December 2008) 72-75.

[467] Brazil and India, *The Mandated Review of the TRIMs Agreement – Paragraph 12(b) of the Doha Ministerial Declaration – Implementation-related issues and concerns (tiret 40) – Communication to the Council for Trade in Goods and to the Committee on Trade-Related Investment Measures*, WTO Doc G/C/W/428 and G/TRIMS/W/25 (9 October 2002), para 7; UNCTAD, *FDI & Performance Requirements* (n 5) 7.

[468] Chiara Criscuolo and others, "The Causal Effects of an Industrial Policy," *SERC Discussion Paper No. 98* (2012), 52 p.

[469] Wilson Peres Nunez, *Foreign Direct Investment and Industrial Development in Mexico* (OECD, 1990), 87-89.

manufacturing requirements generate the same effects as LCRs.[470]

Manufacturing requirements closely resemble LCRs since they can entail a requirement to produce components locally; they differ from classical LCRs by imposing manufacturing as opposed to purchasing obligations and by targeting specific components instead of asking that a percentage of production be undertaken locally.[471]

The United States provided an example of a manufacturing requirement: a foreign investor in pharmaceuticals wishes to open up a subsidiary in a host State. The host State conditions its approval of the subsidiary on a commitment by the foreign investor to produce low-cost, generic consumer drugs for supplying the domestic market.[472]

l) Manufacturing Limitations

Manufacturing limitations may positively compel investors to produce locally only specified goods; they may alternatively restrict or prohibit foreign investors from producing specified goods with a view to entrusting the exclusive production of such goods to local producers.[473] By prohibiting or restricting the production of certain goods, manufacturing limitations also act as export restrictions since they force investors to forego production potentially destined to be exported.[474]

The United States provided an example of a manufacturing limitation: a host State notifies would-be high-technology foreign investors that it has conditioned access to its large domestic market on the following manufacturing limitation: foreign investors are barred from manufacturing or importing high-technology goods produced or soon to be produced by domestic corporations.[475]

m) Domestic Sales Requirements

Domestic sales requirements compel investors to sell a certain proportion or a set value of their output on the host State's domestic market; the compulsoriness of such requirements is generally made necessary because prices on the domestic market are lower and thus less

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[470] EC Submission 10 (n 264) 2-3; EC Submission 22 (n 263) 4; U.S. Submission 9 (n 338) 9; U.S. Submission 14 (n 267) 5.
[471] EC Submission 8 (n 30) 2; U.S. Submission 14 (n 267) 5.
[472] U.S. Submission 9 (n 338) 9.
[473] EC Submission 8 (n 30) 1-2; EC Submission 10 (n 264) 3-4; EC Submission 22 (n 263) 4-5, 7; India Submission 18 (n 35) para 20; U.S. Submission 4 (n 267) 3; U.S. Submission 9 (n 338) 9; U.S. Submission 14 (n 267) 5, 9, 16-17.
[474] U.S. Submission 14 (n 267) 5, 16.
[475] U.S. Submission 9 (n 338) 9.

attractive than those on world markets.[476] A host State resorts to domestic sales requirements with a view to guaranteeing availability of specified products on its domestic market at set prices.

The United States provided the following example of a domestic sales requirement: A foreign investor intends to take over an operating copper mine. The host State conditions its approval of the acquisition on the foreign investor entering into a production-sharing arrangement pursuant to which the foreign investor will dedicate half of its production to supplying a State-owned enterprise at discounted prices.[477]

The NAFTA does not prohibit domestic sales requirements, but rather mandatory and advantage-conditioning restrictions on domestic sales of goods or services in the host State that relate such sales to the exports or foreign exchange earnings of an investment (Articles 1106(1)(e) and 1106(3)(d)).

n) Product Mandating Requirements

Product mandating requirements compel investors to assign to a designated plant or operation the exclusive right to manufacture specified products or to provide specified services, with the output mandatorily destined to supply specified markets, whether national, regional or global; alternatively, product mandating may simply require that investors export a specified quantity or proportion of its output to a designated market, in which case they closely resemble EPRs.[478]

Product mandating requirements amount to restrictions on the choice of goods that investors can produce and/or on the geographic market that investors can supply, by forcing investors to commit to produce specific components or goods and to sell to designated areas, often to the worldwide market.[479]

The United States provided two examples of product mandating requirements.[480] First, a foreign automobile manufacturer intends to build a light-truck factory to supply the domestic market of its host State. The host State informs the foreign manufacturer that its factory project will be

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[476] EC Submission 10 (n 264) 2; EC Submission 22 (n 263) 4; India Submission 18 (n 35) para 21; India and others, *GATT Communication 25* (n 48) 5; Japan Submission 7 (n 264) 5; Japan Submission 12 (n 264) 11; Japan Submission 20 (n 264) 5; U.S. Submission 9 (n 338) 6; U.S. Submission 14 (n 267) 16.
[477] U.S. Submission 9 (n 338) 6.
[478] EC Submission 8 (n 30) 2-3; EC Submission 10 (n 264) 3; India Submission 18 (n 35) para 21; India and others, *GATT Communication 25* (n 48) 5; Japan Submission 12 (n 264) 12; Japan Submission 20 (n 264) 6; U.S. Submission 4 (n 267) 4-5; U.S. Submission 9 (n 338) 10; UNCTAD, *FDI & Performance Requirements* (n 5) 2-3; UNCTAD, "HCOMs" (n 44) 2-3, 12-14; Bjorklund (n 279) 486.
[479] OECD, *First Note on TRIMs* (n 30) paras 4, 12.
[480] U.S. Submission 9 (n 338) 10.

approved only if the foreign manufacturer incorporates into its factory a production line of passenger cars for export to a third country. Second, a foreign-owned, electronics-manufacturing corporation decides to expand into microchip production. The host State subjects its approval of such endeavour to the corporation's commitment that it export 50% of its production to a designated region.

NAFTA Article 1106(1)(g) prohibits mandatory requirements "to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market;" Article 8(1)(g) of the 2004 U.S. Model BIT opted for a slightly reformulated provision that prohibits mandatory requirements "to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market." Article 8(1)(g) of the 2012 U.S. Model BIT reiterated this revised formulation.

This section analysed measures generally recognised as performance requirements. This section also reviewed the terms of art with settled meanings that are widely disseminated within PRPs. The following discusses arbitral awards that have applied NAFTA Article 1106 with a view to shedding greater light on interpretive efforts to date.

3. Interpreting Specifically Prohibited Performance Requirements

This section analyses the interpretation and application of NAFTA Article 1106 by arbitral tribunals to date and focuses on the nature and functioning of the measures alleged to have violated NAFTA Article 1106 on the basis that they constituted one of the following prohibited performance requirements: LCRs, EPRs and export restrictions, domestic sales restrictions and LSRs. This section also explains and where necessary critically assesses the methodology and end-result of relevant arbitral awards and decisions.

a) The Application of Detailed PRPs to LCRs

In *S.D. Myers v Canada*, claimant S.D, Myers, Inc. ("SDMI"), an American corporation, conducted Polychlorinated biphenyl ("PCB") remediation among other activities.[481] SDMI incorporated S.D. Myers (Canada), Inc. ("Myers Canada") under the Canada Business Corporations Act in 1993 with a view to remedying Canadian PCB waste at SDMI's facility in the United States. PCBs have been used for insulation mainly in electrical equipment and have a very slow biodegrading rate; their elimination requires either incineration at very high

[481] *S.D. Myers* – Majority (n 167), paras 1-2.

temperatures or chemical processing.[482] PCB remediation consists of removing PCBs from electrical equipment, decontaminating and recycling the electrical components and destroying the PCBs.[483] In 1990, Canada adopted the PCB Waste Export Regulations, which banned the export of PCB waste from Canada to all countries other than the United States. The PCB Waste Export Regulations allowed exports to the United States only if previously approved by the American Environmental Protection Agency ("EPA").[484] On October 26, 1995 the American EPA issued an "enforcement discretion" allowing SDMI to import PCB waste from Canada during a period of approximately two years.[485] In November 1995, the Minister of the Environment of Canada signed an Interim Order banning the exports of PCBs from Canada and requiring that PCB wastes be managed in Canada.[486] In February 1996 the Interim Order became a Final Order (together the "PCB Export Ban").[487] As a result of measures adopted by Canada, PCB waste could not be exported from Canada to the United States from November 1995 to February 1997 when Canada re-authorised PCB exports to the United States.[488] SDMI argued that the PCB Export Ban effectively forced SDMI to dispose of PCB waste in Canada, which amounted to a mandatory LCR and a mandatory LSR, in violation of NAFTA Articles 1106(1)(b) and (c).[489]

The *S.D. Myers* Majority decided that the PCB Export Ban did not breach NAFTA Article 1106 on the grounds that there existed no performance requirement in the first place (an aspect discussed in greater detail in the later section entitled "existence of a 'requirement'"),[490] while Professor Bryan P. Schwartz dissented solely to the extent that he found a breach of NAFTA Article 1106.[491] Dissenting Arbitrator Schwartz opined that the "practical effect" of the PCB Export Ban imposed an LCR in violation of NAFTA Article 1106(1)(b): the PCB Export Ban effectively meant that SDMI could undertake remediation of PCB waste found in Canada only if the physical destruction of PCB waste occurred in Canada, which amounted to mandating that the service of destroying PCB waste consist of Canadian content.[492] By its very design, the PCB Export Ban did not amount to an LCR, and one would need to focus solely on its effects to characterise it as such, thus converting the PRP into potential catchall provision. The derogatory character of the PCB Export Ban would be more fittingly addressed under other substantive

[482] ibid para 94.
[483] ibid para 91.
[484] ibid para 100.
[485] ibid para 118.
[486] ibid para 123.
[487] ibid para 126.
[488] ibid para 127.
[489] ibid para 140, 270-271.
[490] ibid paras 323.
[491] *S.D. Myers* – Dissent (n 197) para 4.
[492] ibid para 193.

treaty protection standards. Dissenting Arbitrator Schwartz suggested that the PCB Export Ban might also have violated NAFTA Article 1106(1)(c) by necessarily implying the purchase of various goods and services from local suppliers and the hiring of local employees. However, Dissenting Arbitrator Schwartz left undecided the applicability of NAFTA Article 1106(1)(c) due to lack of evidence.[493]

b) The Application of Detailed PRPs to EPRs and Export Restrictions

In *Pope & Talbot v Canada*, Pope & Talbot, an American corporation wholly owned a Canadian subsidiary ("Pope & Talbot International Ltd.") which in turn wholly owned Canadian subsidiary Pope & Talbot Ltd. ("Pope & Talbot Canada"). Pope & Talbot Canada manufactured and sold softwood lumber and exported the greater part of its sales to the United States. Canada and the United States entered into the Softwood Lumber Agreement (the "SLA") in 1996. The SLA established limits on softwood lumber exports from four provinces of Canada (Alberta, British Columbia, Ontario and Quebec) to the United States. Article 2.1 of the SLA required that Canada place softwood lumber on its Export Control List under the Exports and Permits Act. As a result, softwood lumber exports to the United States mandated an export permit.[494]

Article 2.2 of the SLA established a three-tiered system governing softwood lumber exports to the United States: (1) under the Established Base ("EB"), 14.7 billion board feet could be exported free of charge; (2) the Lower Fee Base ("LFB") imposed a fee of USD50 per thousand board feet for exports between 14.7 billion board feet and 15.35 billion board feet; and (3) the Upper Fee Base ("UFB") imposed a fee of USD100 per thousand board feet for exports beyond 15.35 billion board feet. In accordance with Article 2.4 of the SLA, Canada would annually divide up the EB and LFB amounts among softwood lumber exporters by allocating export permits.[495]

On June 21, 1996 Canada implemented the SLA by adopting the Softwood Lumber Export Permit Fees Regulations (the "Export Control Regime") which introduced: (1) the payment of an administrative fee for the issuance of a softwood lumber export permit to the United States regarding exports in the EB bracket, and (2) pursuant to the SLA, the payment of a USD50 fee regarding every thousand board feet of exports in the LFB bracket and a USD100 fee regarding every thousand board feet of exports in the UFB bracket.[496]

Pope & Talbot argued that Canada's Export Control Regime imposed EPRs or export

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[493] ibid para 197.
[494] ibid para 30.
[495] ibid.
[496] ibid para 34.

restrictions contrary to NAFTA Article 1106(1)(a), notably by imposing a lower than business-as-usual export level and thus an export restriction due to export fees imposed on lumber falling within the LFB and UFB brackets.[497] Pope & Talbot argued that NAFTA Article 1106(1)(a), which states "to export at a given level," prohibits requirements which result in an upward or downward change in export amounts compared to what an investment would have otherwise exported were prohibited.[498]

Canada argued that NAFTA Article 1106(1)(a) prohibits only EPRs and not export restrictions, that the Export Control Regime did not require Pope & Talbot Canada to increase its exports and therefore that it could not be prohibited by NAFTA Article 1106(1)(a).[499] Canada further argued that NAFTA Article 1106(1)(a), by using the expression "a given level or percentage of goods or services," entails a "prescribed or identifiable level of export," as supported by the dictionary definition of "given."[500] The Investor's attempt to subject the Export Control Regime to NAFTA Article 1106 "clearly conflict[ed] with the ordinary meaning" of NAFTA Article 1106.[501] With respect to NAFTA Article 1106 as a whole, Canada considered that the general aim of performance requirements is to reduce imports or increase exports, to raise foreign exchange earnings and to create jobs in the export sector without exposing domestic producers to additional competition.[502]

The *Pope & Talbot* Tribunal decided that no violation of NAFTA Article 1106(1)(a) had taken place.[503] The Export Control Regime did not impose or enforce an EPR or an export restriction and simply established a three-tiered system governing the fees applicable to softwood lumber exports to the United States: the EB fee-free and the LFB brackets, each for their specified and distinct amounts of exports, and the UFB higher fee bracket for unlimited amounts beyond the EB and LFB amounts.[504] The Tribunal agreed with Canada and made an unhelpful *obiter dictum* pronouncement to the effect that all performance requirements prohibited under NAFTA Article 1106 generally aim at raising foreign exchange earnings, increasing employment in the export sector and increasing exports.[505] Nevertheless, the Tribunal refused to endorse its own general

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[497] ibid paras 45, 47; *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Memorial of the Investor – Initial Phase (28 January 2000) para 120.
[498] *Pope & Talbot* (n 167) para 59; *Pope & Talbot* – Investor Supplemental Memorial (n 92) para 86; *Pope & Talbot* – Investor Memorial (n 490), para 125.
[499] *Pope & Talbot* (n 167) paras 53-54; *Pope & Talbot* – Counter-Memorial of Canada (n 217), paras 259-260, 306-307, 319-320.
[500] *Pope & Talbot* – Counter-Memorial of Canada (n 217) para 271.
[501] *Pope & Talbot* (n 167) para 56; *Pope & Talbot* – Counter-Memorial of Canada (n 217) para 264.
[502] *Pope & Talbot* – Counter-Memorial of Canada (n 217) para 304.
[503] *Pope & Talbot* (n 167) para 76.
[504] ibid para 75.
[505] ibid para 74.

understanding of performance requirements in its ruling on NAFTA Article 1106(1)(a). The Tribunal underlined that the wording of NAFTA Article 1106(1)(a) is not expressly circumscribed to requirements imposing a higher level or percentage of exports and that NAFTA Article 1106(1)(a) applies to requirements imposing any level or percentage of exports, including export restrictions.[506]

The Tribunal's decision lends support to the view that within a single PRP, purposes underlying the prohibition of certain performance requirements may vary from one another and that not all prohibited performance requirements are equally trade-driven, import-related or export-related. A single PRP may prohibit directly trade-related performance requirements and indirectly and remotely trade-related performance requirements. Accordingly, PRPs are better understood when each prohibited performance requirement is considered separately from other enumerated performance requirements and when overarching statements as to purposes or the nature of performance requirements are avoided.

In *Merrill & Ring v Canada*, claimant Merrill & Ring Forestry L.P. ("Merrill & Ring") alleged violations of NAFTA Chapter 11 resulting from Canada's implementation of its Log Export Regime and its application to Merrill & Ring's operations in British Columbia. Merrill & Ring focused its grievances on log surplus testing procedures and advertising requirements Merrill & Ring had to carry out prior to receiving authorisation for removing or exporting logs.[507]

Merrill & Ring argued that Canada had violated NAFTA Article 1106(1)(a) by requiring as a precondition for export approval the prior advertisement for sale of logs from remote areas; advertised amounts had to fall between a minimum (2,800 m^3) and a maximum (15,000 m^3) amount. According to Merrill & Ring, the advertisement precondition for export approval meant that any advertised logs falling outside those levels could not be exported and that this amounted to a requirement to export at a given level.[508] Canada denied that the prior advertisement requirement had any connection with exports or that it obligated Merrill & Ring to export at a given level.[509] Canada further relied on a general *obiter dictum* statement by the *Pope & Talbot* Tribunal in order to argue that all performance requirements prohibited under NAFTA Article 1106 are "designed to oblige an investor to export more than it otherwise would have exported."[510]

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[506] *Pope & Talbot* (n 167) para 74.
[507] ibid para 28.
[508] ibid paras 98, 114.
[509] ibid para 107.
[510] *Merrill & Ring* – Counter-Memorial of Canada (n 217) para 696, quoting *Pope & Talbot* (n 167) para

The *Merrill & Ring* Tribunal found Merrill & Ring's position "difficult to reconcile with the terms" of NAFTA Article 1106(1)(a).[511] By comparison, the Tribunal found Canada's argument convincing in that a requirement related to the advertisement of goods, which amounts to one of many conditions that must be complied with for obtaining an export permit, cannot amount to an export restriction. Spurred on by Canada's "persuasive argument,"[512] the Tribunal stated that by their very terms, all performance requirements enumerated in NAFTA Article 1106 "are related to the export of goods and services and the conditions under which such exports are made"[513] and are "designed to restrict or enhance exports."[514] The Tribunal went a step further and decided that a requirement "needs to be directly and specifically connected to exports"[515] to qualify as a performance requirement under NAFTA Article 1106. The Tribunal wrongly narrowed the scope of NAFTA Article 1106 to export-related measures in spite of Article 1106's undisputed application to LCRs, LSRs, technology transfer requirements and product-mandating requirements which are not meant to increase or reduce exports.

Both the *Pope & Talbot* and the *Merrill & Ring* Tribunals made unfortunate pronouncements that lumped all performance requirements into a one-dimensional pool of export-driven trade policy instruments, while clearly some performance requirements prohibited under NAFTA Article 1106 relate only remotely and indirectly to exports, imports or even to trade. These statements obscure the distinct and settled meanings of the various performance requirements prohibited under NAFTA Article 1106.

c) The Application of Detailed PRPs to Domestic Sales Restrictions

In *Pope & Talbot v Canada*, Pope & Talbot argued convolutedly that Canada related Pope & Talbot Canada's sales of lumber bound for the United States to American customers in Canada to its United States-bound export volumes by allegedly reducing sales below business-as-usual levels using a "punitive export permit fee" which allegedly reduced exports, an export-based restriction on domestic sales in violation of NAFTA Articles 1106(1)(e) and 1106(3)(d).[516] Canada counter-argued that the Export Control Regime did not limit Pope & Talbot Canada's sales in Canada in any way.[517]

74.
[511] *Merrill & Ring* (n 167) para 114.
[512] ibid para 113.
[513] ibid para 113.
[514] ibid para 115.
[515] ibid para 117.
[516] *Pope & Talbot* (n 167) paras 45, 48.
[517] ibid para 55; *Pope & Talbot* – Counter-Memorial of Canada (n 217) paras 262, 290.

The *Pope & Talbot* Tribunal rejected both of Pope & Talbot's claims based on NAFTA Articles 1106(1)(e) and 1106(3)(d).[518] The Tribunal pointed to the identical text of both provisions and noted that "sales of goods in its territory" meant in this case sales of softwood lumber in Canada for use or consumption within Canada.[519] The Tribunal decided that "sales of goods in its territory" does not cover sales of softwood lumber for export to the United States, even where title to the goods was transferred to the American purchaser while the lumber was still in Canada, or where it was sold to a Canadian party for export to the United States. Rather, such instances amounted to "exports" within the meaning of NAFTA Articles 1106(1)(e) and 1106(3)(d), and not to "sales."[520]

The Tribunal criticised Pope & Talbot for using the terms "exports" and "sales" interchangeably and for ignoring the distinction between domestic sales and sales for export. Pope & Talbot's approach led to "relating or comparing 'exports' to 'exports'," while the requirements envisioned by NAFTA Articles 1106(1)(e) and 1106(3)(d) must restrict domestic sales by relating them to exports or foreign exchange earnings. Pope & Talbot's approach did "violence to the text of Articles 1106(1)(e) and 1106(3)(d), standing those provisions on their head."[521]

In *Merrill & Ring v Canada*, Merrill & Ring argued that Canada had imposed an export-based restriction on its domestic sales in violation of NAFTA Article 1106(1)(e) by relating its sales of logs from remote areas to the volume of its exports. Merrill & Ring convolutedly argued that the minimum (2,800 m^3) and maximum (15,000 m^3) advertisement volumes of logs from remote areas resulted in volume restrictions linked to Merrill & Ring's exports, which would then somehow translate in some form of restriction on its domestic sales.[522] The *Merrill & Ring* Tribunal found Merrill & Ring's position "difficult to understand."[523] The Tribunal summarised Merrill & Ring's argument as identifying the existence of a restriction on its domestic sales of logs related to the volume of its exports through export volume "restrictions" allegedly resulting from the minimum and maximum volume log advertisement requirements.[524] The Tribunal rejected Merrill & Ring's allegation and held that Merrill & Ring could sell as many logs on the Canadian domestic market as it wished and that the level of such sales was in no way related to minimum or maximum volume log advertisement requirements, which needed to be complied

[518] *Pope & Talbot* (n 167) para 80.
[519] ibid paras 77-78.
[520] ibid para 78.
[521] ibid para 79.
[522] *Merrill & Ring* (n 167) paras 101, 119.
[523] ibid para 119.
[524] ibid para 119.

with solely in order to acquire log export permits.[525]

d) The Application of Detailed PRPs to LSRs

In *Merrill & Ring v Canada*, the claimant alleged that Canada had imposed LSRs in violation of NAFTA Article 1106(1)(c) by requiring to cut, sort, boom, deck and/or scale its logs in accordance with the specifications of the "Coast Domestic Market End Use Sort Description," including "normal log market practices" (an undefined expression) and the requirement to scale timber rafts metrically. According to Merrill & Ring, these cutting, sorting and scaling requirements accorded a preference to goods that met domestic market requirements and a preference to local service providers that were hired to carry out these requirements, in breach of NAFTA Article 1106(1)(c).[526]

Canada denied having accorded any preference to Canadian-produced logs in violation of NAFTA Article 1106(1)(c), adding somewhat jeeringly that the logs were produced in Canada simply because they grew there.[527] Moreover, Canada argued that its requirement that logs be scaled in conformity with the metric system had no connection with the manufacture or sale of logs. Canada explained that the measurement of logs in "board feet," prevalent in the United States Pacific Northwest, differs from the measurement system in Canada, which relies on cubic or linear meters, and that the measurement system applicable to logs must conform to local market requirements.[528] Canada also denied that Merrill & Ring was compelled to accord a preference to Canadian service suppliers in having its logs metrically scaled: Merrill & Ring was free to hire service suppliers from outside Canada. Hiring Canadians to accomplish such work stemmed from a purely commercial decision and not from a requirement.[529]

With respect to claimant Merrill & Ring's first alleged violation of NAFTA Article 1106(1)(c), the *Merrill & Ring* Tribunal found the claimant's allegation "difficult to reconcile with the terms of the provision." The Tribunal decided that the requirement to cut, sort and scale logs in accordance with the "Coast Domestic Market End Use Sort Description" did not amount to an LSR.[530] Indeed, the Tribunal noted that scaling according to the metric system constituted a measure simply related to the measurement system used throughout Canada.[531] With respect to Merrill & Ring's second alleged violation of NAFTA Article 1106(1)(c), the Tribunal held that Canada had

[525] ibid para 119.
[526] ibid paras 45, 99-100, 115.
[527] ibid para 107.
[528] ibid para 40.
[529] ibid para 109.
[530] ibid para 115.
[531] ibid para 116.

convincingly demonstrated that the claimant could have hired service providers outside of Canada and that hiring Canadian service providers was primarily motivated by business considerations and the higher cost of hiring outside of Canada.[532]

However, the *Merrill & Ring* Tribunal erroneously considered the absence of intent to restrict or enhance exports as grounds for concluding that the cutting, sorting and scaling requirements did not constitute an LSR.[533] Similarly, the Tribunal erroneously considered the remote and indirect connection between the exports of claimant's investment and the (alleged and non-existent) requirement to resort to Canadian service providers for cutting, sorting and scaling logs as grounds for concluding that there existed no LSR.[534] The Tribunal made an erroneous general pronouncement when declaring that a measure "needs to be directly and specifically connected to exports" in order to qualify as any of the performance requirements prohibited under NAFTA Article 1106.[535] The lack of direct and specific connection between the measures at issue and the exports of a claimant's investment is irrelevant in order to determine whether prohibitions of LSRs such as NAFTA Article 1106(1)(c) are breached. Moreover, many other performance requirements prohibited under NAFTA Article 1106, such as LCRs, product mandating requirements and technology transfer requirements, have nothing to do with exports.

In *Mobil & Murphy v Canada*, the claimants, Mobil Investments Canada Inc. and Murphy Oil Corporation ("Mobil and Murphy"), two Delaware corporations, had invested in the Hibernia and Terra Nova offshore petroleum projects (the "Projects"), located off the coast of the Province of Newfoundland and Labrador ("Province") in Canada. The Projects were governed by parallel provincial and federal legislation (together, the "Accord Acts")[536] that created the Canada-Newfoundland Offshore Petroleum Board (the "Board"). The Claimants, like any other prospective offshore oil operator, had to submit benefits plans containing provisions ensuring that research and development ("R&D") and education and training ("E&T") expenditures would be made in the Province. The Accord Acts granted the Board discretionary power to issue guidelines regarding benefits plans.[537] In 2004, the Board adopted the Guidelines for Research and Development Expenditures (the "2004 Guidelines"), which were at the heart of the dispute before the Tribunal.[538] The 2004 Guidelines departed from previous guidelines, notably by

[532] ibid para 118.
[533] ibid para 115.
[534] ibid para 118.
[535] ibid para 117.
[536] Nearly identical, both Accord Acts were deemed covered by Canada's reservation: *Mobil & Murphy (Majority)* (n 13) paras 35, 248 and fn 272.
[537] ibid paras 37–8.
[538] ibid para 45.

imposing compulsory fixed amounts for R&D expenditures in the Province.[539] Mobil and Murphy alleged that the 2004 Guidelines compelled them to spend fixed amounts for R&D activities in the Province as a condition of operating their investments in the Projects and that this local R&D requirement constituted an LSR in violation of NAFTA Article 1106(1)(c).[540]

The *Mobil & Murphy* Tribunal unanimously decided that the 2004 Guidelines violated NAFTA Article 1106(1)(c).[541] Even though Mobil and Murphy's claim rested only on the local R&D expenditure requirements imposed by the 2004 Guidelines, the Tribunal framed the main interpretative question as whether the term "services," as used in NAFTA Article 1106(1)(c), encompasses R&D and E&T.

In its submissions, Canada referred to a consistent differentiation between LCRs and LSRs on one hand and R&D and E&T requirements on the other hand.[542] Canada argued that NAFTA Article 1106(1)(c) applies only to a "closed set of performance requirements that would otherwise reduce the cross-border flow and importation of goods and services,"[543] which therefore would have excluded R&D requirements aimed at "increasing the knowledge base of the country."[544] Canada argued that while the TRIMs Agreement prohibits LCRs and LSRs, it does not specify R&D requirements.[545] Canada further quoted UNCTAD which had construed NAFTA Article 1106 as permitting R&D requirements and which identified numerous other IIAs which also permitted R&D requirements.[546] Along the same lines, LCRs and LSRs should not include E&T requirements whose largely differing and non-trade purposes[547] warranted tailored treatment under IIAs and which were generally authorised by IIAs according to UNCTAD.[548] Canada also invoked the varying economic policy objectives as grounds for distinguishing LCRs and LSRs from R&D and E&T requirements: neither R&D nor E&T requirements serve as instruments to reduce imports or protecting the domestic market to the benefit of local goods producers or service providers.[549] Canada was effectively arguing that LCRs and LSRs and

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[539] ibid para 46.
[540] ibid paras 100-101.
[541] ibid para 490(2).
[542] *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 161-162, 171.
[543] *Mobil & Murphy (Majority)* (n 13) para 222.
[544] ibid para 222; *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 169-170.
[545] *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 162-164.
[546] *Mobil & Murphy* – Counter-Memorial of Canada (n 182) para 165, quoting UNCTAD, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D*, UN Doc UNCTAD/WIR/2005 (2005) 229.
[547] To correct shortcomings of the labour market, to compel corporations to undertake more training and development activities and to foster increased resources in more specialised and complex activities: see *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 165, 170, quoting notably UNCTAD, *FDI & Performance Requirements* (n 5) 30.
[548] *Mobil & Murphy* – Counter-Memorial of Canada (n 182) paras 167, 176.
[549] *Mobil & Murphy* – Counter-Memorial of Canada (n 182) para 168.

R&D and E&T requirements had to be understood on the basis of their respective settled meanings, that the settled meanings of LCRs and LSRs had never been intended to encompass R&D and E&T requirements and that States have clearly distinguished between these different types of requirements.

The *Mobil & Murphy* Tribunal rejected Canada's approach and stated that excluding R&D and E&T from the term "services" "… because the form of transmission is not always cross-border" demanded assigning "a special meaning" to the term "services" that the NAFTA text did not reflect.[550] The *Mobil & Murphy* Tribunal simply justified its interpretation with a dictionary-driven ordinary meaning, a narrowly-construed context and with the trade-liberalising and investment-increasing objects and purposes of the NAFTA as set forth in Articles 102(1)(a) and 102(1)(c).[551]

The Tribunal incorrectly isolated the term "services" from the rest of NAFTA Article 1106(1) and decontextualised such term before framing its ordinary meaning in an overly broad manner, mainly by relying on dictionary definitions of the term.[552] The Tribunal decided that the ordinary meaning of the term "services" in NAFTA Article 1106(1)(c) "is broad enough to encompass R&D and E&T."[553] The Tribunal considered that R&D and E&T "may be seen as mainstream forms of service sector activity," that "there is nothing inherent in the term 'services' in NAFTA Article 1106(1) that necessarily excludes R&D and E&T,"[554] and that R&D and E&T "fit into that broad definitional category of economic activity."[555]

Drawing further support for its interpretation from the context of NAFTA Article 1106(1)(c), the Tribunal limited such context to considering the use of the term "services" within the NAFTA. The Tribunal zeroed in on the use of the term "services" within the Common Classification System for services regarding Government procurement (NAFTA Appendix 1001.1b-2-B) and noted that the Common Classification System suggests a broad definition for the term "services" that explicitly mentions E&T and R&D services.[556]

The Tribunal further inferred from NAFTA Article 1106(4) that the Parties to the NAFTA excluded R&D and E&T requirements from the prohibition of advantage-conditioning performance requirements under NAFTA Article 1106(3),[557] but not from Article 1106(1).

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[550] *Mobil & Murphy (Majority)* (n 13) para 222.
[551] ibid para 225.
[552] ibid paras 177, 216-218.
[553] ibid para 216.
[554] ibid para 216.
[555] ibid para 218.
[556] ibid paras 220-221.
[557] ibid paras 223-224.

However, the Tribunal did not point out that within Article 1106(4), NAFTA Parties distinguished between "provid[ing] a service," "train[ing] or employ[ing] workers," and "carry[ing] out research and development," distinctions that suggest that the term "service" does not automatically include R&D or E&T and that its meaning does not enjoy the clarity that the Tribunal willingly assigned to it using a minimalistic contextual approach.

By contrast with the wording of the NAFTA, Article VI(f) of the 1994 U.S. Model BIT, as well as the 13 American BITs that reproduce such provision, specifically prohibit local R&D requirements in addition to prohibiting LSRs. The prohibition of local R&D requirements was subsequently omitted from Article 8(1) of the 2004 U.S. Model BIT and from the previously discussed 20 IIAs that reproduce such provision, since the United States was unsure whether its own practice complied with such prohibition.[558] It is obvious that the United States and the other State Parties to these 20 IIAs did not remove the prohibition of mandatory local R&D requirements on the basis that they considered it redundant in the presence of prohibitions of LSRs. Rather, these State Parties did not wish to prohibit mandatory local R&D requirements. Arguing that their prohibitions of LSRs also prohibit mandatory local R&D requirements could not be easily reconciled with their intent.

With its decision, the *Mobil & Murphy* Tribunal incorrectly transformed the prohibition of LSRs into a catchall provision, ignored its clear delimitations and also ignored the respective settled meanings of LSRs, R&D requirements and E&T requirements that differentiate one such set of measures from another. Instead, the 2004 Guidelines should not have fallen within the scope of mandatory performance requirements prohibited under NAFTA Article 1106(1) as they do not amount to LSRs. Canada should have been allowed to adopt the 2004 Guidelines under NAFTA Article 1106(1).

E. Prohibiting Advantages Conditioned Upon Performance Requirements

It has been argued that in instances where subsidiaries abroad deliberately accept performance requirements prior to or simultaneously to their investment decision, prohibiting performance requirements is unnecessary,[559] especially if such subsidiaries receive compensating investment incentives, since MNCs and their subsidiaries abroad can then be assumed to have calculated that complying with performance requirements would net them benefits.[560]

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[558] Vandevelde (n 84) 392.
[559] Singapore (n 148) para 9.
[560] Bergsten (n 53) 14-15; Claude G. B. Fontheim and R. M. Godbaw, "Trade Related Performance Requirements under the GATT-MTN System and US Law" 14 *Law and Policy in International Business*

However, acceptance of performance requirements by targeted investors would cover only the effects incurred by the targeted investors and would do nothing to mitigate the adverse impacts on the trade interests of the home States of such investors or on third States.[561] Welfare losses caused by performance requirements (notably through reduced exports) are then mainly felt by home States and not by the targeted subsidiaries abroad,[562] as well as by other investors in a competitive relationship with recipients of advantages. The EC and a number of other States shared these concerns and unequivocally asserted that agreement by an investor to comply with TRIMs does nothing to mitigate the adverse trade effects incurred by home or third States or by other investors by virtue of such TRIMs.[563] Prohibiting advantage-conditioning performance requirements therefore appear as a rational means for home States to protect their interests at stake in relation with outward FDI.[564]

This section first investigates the disciplining of advantage-conditioning performance requirements under the TRIMs Agreement and the SCM Agreement. Second, this section surveys the various approaches that PRPs in IIAs have espoused in respect of advantage-conditioning performance requirements. Third, this section attempts to define the notion of "advantage" as used in PRPs of IIAs by drawing from the notion of "advantage" under the TRIMs Agreement the notion of "benefit" under the SCM Agreement. Finally, this section appraises the interpretation of the term "advantage" by arbitral tribunals having applied prohibitions of advantage-conditioning performance requirements.

1. Scope and Coverage of Disciplines Applicable to Advantage-Conditioning Performance Requirements Under the TRIMs Agreement and the SCM Agreement

This section analyses the scope and coverage of disciplines applicable to advantage-conditioning performance requirements under the TRIMs Agreement and the WTO SCM Agreement taking into account the fact that disciplines applicable to mandatory performance requirements under the TRIMs Agreement have been previously discussed. This section then scrutinises the contiguous concepts of "advantages" (TRIMs Agreement, PRPs in IIAs) and "benefits" (the SCM Agreement). This section also explores the interconnection between the notions of advantage and benefit and how the notion of benefit in the SCM Agreement can help interpret the term "advantage" used in the TRIMs Agreement and in PRPs of IIAs.

129-180 (1982-1983), 131; Graham (n 42) 122, fn 10; Gudgeon (n 112) 105, 127; Jacobsen (n 34) 1182; McCulloch and Owen (n 48) 335-336; Dani Rodrik, "Industrial Policy for the Twenty-first Century," *paper prepared for UNIDO* (September 2004), 11.

[561] EC Submission 10 (n 264) para 5; see also: GATT, *Note on TRIMs* (1987) (n 365) para 16.

[562] Bergsten, "Investment Wars" (n 420) 144; Wolff (n 48) 41, 43; Barshefsky (n 88) 20.

[563] EC Submission 10 (n 264) para 5; see also: GATT, *Note on TRIMs* (1987) (n 365) para 16.

[564] Bergsten, "Investment Wars" (n 420) 146-147.

The TRIMs Agreement and the SCM Agreement specifically prohibit conditioning the receipt of an advantage on compliance with enumerated performance requirements, albeit both in respect of goods only. A clear complementarity and a convergence of concerns exist between the TRIMs Agreement and the SCM Agreement.[565] Articles 1 and 2 of the TRIMs Agreement's Illustrative List explicitly prohibit identified TRIMs (LCRs, trade-balancing requirements, foreign exchange restrictions, export restrictions and import restrictions) "compliance with which is necessary to obtain an advantage," while the SCM Agreement prohibits two advantage-conditioning performance requirements. Article 3.1(a) of the SCM Agreement prohibits subsidies contingent upon EPRs, while Article 3.1(b) of the SCM Agreement prohibits subsidies contingent upon LCRs. While TRIMs Agreement also prohibits advantage-conditioning LCRs, it fell short of explicitly prohibiting advantage-conditioning EPRs, its disciplines having been confined to export restrictions. The SCM Agreement therefore increases the scope of WTO disciplines applicable to performance requirements beyond the reach of the TRIMs Agreement in respect of advantage-conditioning EPRs, while mandatory EPRs that do not condition the grant of incentives are not prohibited under WTO Agreements.

During the GATT Uruguay Round of negotiations, some GATT Members pointed to the fact that the proposed prohibited subsidies were already prohibited under GATT Articles III (subsidies contingent on LCRs) and XVI:4 (subsidies contingent on EPRs), while States supporting such prohibitions argued that improved clarity and certainty nevertheless warranted their designation as prohibited subsidies.[566]

2. The Regulation of Advantage-Conditioning Performance Requirements by PRPs in IIAs

a) *PRPs Which Remain Silent in Respect of Advantage-conditioning Performance Requirements*

During the GATT Uruguay Round of negotiations, the EC pointed out that not prohibiting performance requirements when they act as conditions for the receipt of investment incentives would provide States with a loophole to PRPs, and that performance requirements should be

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[565] See *Indonesia — Certain Measures Affecting the Automobile Industry*, WTO *Panel Report,* [*Indonesia—Autos*], circulated 2 July 1998, paras. 14.50–14.52: "[w]e consider that the SCM and TRIMs Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The TRIMs Agreement and the SCM Agreement may have overlapping coverage in that they may both apply to a single legislative act, but they have different focus, and they impose different types of obligations." See also Graham (n 42) 123.

[566] GATT, *Note on Subsidies* (1989) (n 164) para 6.

prohibited regardless of whether they are mandatory or condition the conferral of advantages.[567] The United States considered that combining performance requirements with incentives would only exacerbate their trade-distorting effect[568] and originally called for international disciplines applicable to both sets of measures.[569] And yet, a great number of PRPs in IIAs do not explicitly address performance requirements imposed as conditions for the receipt of advantages. What are the implications of such silence? Given the frequent presence of advantages alongside performance requirements, this question can significantly impact the scope of advantage-silent PRPs depending on how this question is answered. This question can notably be answered in two ways. First, performance requirements imposed as conditions for the receipt of an advantage are not prohibited in the absence of explicit reference to the term "advantage." Second and alternatively, such performance requirements are prohibited in spite of the absence of reference to advantages in a PRP. Advantage-conditioning performance requirements could be prohibited by advantage-silent PRPs notably if such PRPs use wording that refers to the establishment, expansion, operation, conduct or maintenance of investments, since advantage-conditioning performance requirements may indeed fall within such scenarios of investment-related activities. Advantage-conditioning performance requirements could also fall within the broad expression "any other similar requirements" or "*toutes autres mesures ayant un effet analogue*" in instances where PRPs use such wordings and where PRPs do not restrict their applicability to specific activities of an investment that would not encompass advantage-conditioning performance requirements.

All of France's 64 BITs which comprise PRPs are silent with respect to advantage-conditioning performance requirements. Perhaps the predominant French approach, which consists of framing the PRP as a subcategory of FET, may provide sufficient breadth to encompass advantage-conditioning performance requirements, at least in respect of the 48 French BITs whose PRPs replicate the PRP from France's Model BIT (see above), and in respect of the three similarly-constructed French BITs whose PRPs provide more comprehensive protection to investors than the PRP from France's Model BIT (see above). While it might be more difficult, in respect of the 13 French BITs with PRPs which prohibit only arbitrary, unfair, abusive and/or discriminatory Performance Requirements (11 as part of FET, one as part of national treatment and one as part of MFN treatment), to argue that advantage-conditioning performance requirements are arbitrary, unfair, abusive and/or discriminatory to the point of breaching such BIT provisions, nothing would explicitly prevent such PRPs from applying to advantage-

[567] GATT, *Note on TRIMs* (n 60) para 5.
[568] GATT, *Note on TRIMs* (n 60) para 55.
[569] Bale (n 83) 180, 181; Waldmann (n 83) 190; Brock (n 83) 21, 24.

conditioning performance requirements in the same way as they would apply to mandatory ones. Accordingly, the 64 French BITs with PRPs would in principle apply to advantage-conditioning performance requirements.

The previously discussed 21 American BITs with practically identically-worded PRPs signed between 1982 and 1995 prohibit the imposition of performance requirements as conditions for the establishment, expansion or maintenance of investments, but make no mention of advantages conditioned on compliance with performance requirements. Among those 21 American BITs, nine address performance requirements as conditions for the receipt of an advantage in IIA sections distinct from the PRP text itself.[570] First, paragraph 2 of the Agreed Minutes to the Panama - U.S. BIT (1982), which was meant to clarify the intent of the PRP and forms an "integral part" of the BIT, acknowledges the existence of Panama's incentive laws which confer benefits to companies having signed contracts with the Government of Panama and pursuant to which these companies agree to comply with performance requirements stated in such contracts. Paragraph 2 does not impose any obligation upon Panama to terminate its incentive laws or to remove performance requirements from contracts entered into or to be signed in the future.[571] Interpreting such "clarifying language" so as to make the PRP inapplicable to advantage-conditioning performance requirements may render the PRP meaningless and would constitute the most significant discrepancy compared to the corresponding U.S. Model BIT.[572] However, such "clarifying language" falls short of explicitly authorising advantage-conditioning performance requirements.

Second, the PRP included in the Sri Lanka - U.S. BIT (1991) departed from the U.S. Model BIT *via* paragraph 4 of its Protocol, which acknowledged Sri Lankan laws that grant incentives to investors on compliance with EPRs or technology transfer requirements.[573] Paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991) ambiguously and implicitly suggests that the otherwise broad and open-ended PRP does not apply to performance requirements imposed as conditions for the receipt of an advantage.[574] The U.S. State Department stated that paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991) was meant to clarify "the U.S. position that such incentive-based commitments are not to be considered performance requirements" for

[570] The Panama - U.S. BIT (1982); the Poland - U.S. BIT (1990); the Czech and Slovak Federal Republic - U.S. BIT (1991); the Sri Lanka - U.S. BIT (1991); the Romania - U.S. BIT (1992); the Bulgaria - U.S. BIT (1992); the Estonia - U.S. BIT (1994); the Latvia - U.S. BIT (1995); the Lithuania - U.S. BIT (1995).
[571] Agreed Minutes to the Panama - U.S. BIT, as discussed in Vandevelde, "The Second Wave" (n 112) 676-677; see also "Statement of Kenneth J. Vandevelde before the U.S. Senate" (n 130) 71.
[572] Sachs (n 72) 208-209. See also: Gudgeon (n 112) 127 and fn 80; Vandevelde (n 84) 38, 40.
[573] "Statement of Kenneth J. Vandevelde before the U.S. Senate" (n 130) 71; Vandevelde, "The Second Wave" (n 112) 676-677.
[574] Paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991), as discussed in Vandevelde, "The Second Wave" (n 112) 674, 676-677. See also "U.S. State Dept. Responses to Sen. Pell" (n 78) 26, 40.

purposes of the PRP since "[s]uch incentives are acceptable parts of any country's economic policy and are also used quite extensively in the United States."[575] Nevertheless, the United States viewed the Sri Lankan incentive programme as a potential barrier to American FDI; the United States and Sri Lanka therefore agreed in the Protocol that either Party to the BIT could request consultations aimed at eliminating adverse effects brought about by such incentive laws.[576]

The United States appears to have construed the faltering language in the Panama - U.S. BIT (1982) and the Sri Lanka - U.S. BIT (1991) as rendering their PRPs inapplicable to advantage-conditioning performance requirements. The U.S. Department of State seems to have partially approved interpreting PRPs in BITs signed before 1992 restrictively and as inapplicable to advantage-conditioning performance requirements. The U.S. State Department considered that most tax matters fell outside of the scope of these same 21 American BITs signed between 1982 and 1995, and that as a result, those U.S. BITs do not prohibit performance requirements imposed as conditions for granting tax incentives.[577] These comments were construed as meaning that these same 21 American BITs did not prohibit advantage-conditioning performance requirements.[578]

As will be seen in greater detail in the following section, the other eight U.S. BITs to explicitly address advantage-conditioning performance requirements within a treaty instrument external to their PRPs were signed respectively with Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia. The PRPs of these eight BITs also do not apply to advantage-conditioning performance requirements.

Article V(2) of the Canada - Ukraine FIPA (1994) applies only to mandatory performance requirements and does not explicitly address performance requirements imposed as conditions for the receipt of advantages. Moreover, Article VI(2)(b) of the Canada - Ukraine FIPA (1994) excludes from its PRPs "subsidies or grants provided by a government or a state enterprise, including government-supported loans, guarantees and insurance." Fourteen Canadian FIPAs replicate this same silence regarding advantage-conditioning performance requirements and this same exclusion of subsidies or grants from their PRPs.[579] Silence and exclusion could

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[575] "U.S. State Dept. Responses to Sen. Pell" (n 78) 44; Vandevelde (n 84) 399.
[576] Paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991); see: Vandevelde, "The Second Wave" (n 112) 676; Vandevelde (n 84) 399.
[577] "U.S. State Dept. Responses to Sen. Pell" (n 78) 34.
[578] Vandevelde (n 84) 393.
[579] Articles V(2) and VI(2)(b) of the Canada - Trinidad and Tobago FIPA (1995); Articles V(2) and VI(2)(b) of the Canada - Philippines FIPA (1995); Articles V(2) and VI(2)(b) of the Canada - South Africa FIPA (1995); Articles V(2) and VI(2)(b) of the Canada - Ecuador FIPA (1996); Articles II(6) and II(8)(b) of the

translate into inapplicability of these 15 PRPs to advantage-conditioning performance requirements. However, as will be explained below, the term "advantage" is broader than subsidies and grants combined. Some advantage-conditioning performance requirements could conceivably still fall within the scope of the PRPs while not being excluded since they would not amount to subsidies or grants. These 15 Canadian FIPAs therefore remain ambiguous and do not explicitly exclude the application of their PRPs to all instances of advantage-conditioning performance requirements. By comparison, and as will be seen in the following section, two Canadian FIPAs (with Latvia and Romania) clearly render their PRPs inapplicable to advantage-conditioning performance requirements in order to address concerns of the European Commission.

b) PRPs Which incorporate the TRIMs Agreement Prohibit Advantage-Conditioning Performance Requirements Unless Specified Otherwise

PRPs which simply incorporate the TRIMs Agreement or its Illustrative List in their entirety incorporate by the same token the TRIMs Agreement's prohibition of advantage-conditioning performance requirements. Article 14.9(1) of the Australia - Japan EPA (2014) also incorporates the TRIMs Agreement's prohibition of advantage-conditioning performance requirements by committing State Parties not to apply any measure inconsistent with the TRIMs Agreement "in connection with investment activities of an investor."

Article VI of the Canada - Costa Rica FIPA (1998), Article 12.6 of the Australia - Malaysia FTA (2012) and Article 5 of AANZFTA (2009) Chapter 11 (Investment) also prohibit advantage-conditioning performance requirements, so long as such requirements are "in connection with the establishment, acquisition or subsequent regulation of an investment" (Canadian IIA) or "in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment" (Australian IIAs).

Article 14.9(2) of the Australia - Japan EPA (2014) further prohibits "[w]ithout prejudice to paragraph 1" (which incorporates the TRIMs Agreement) the same detailed list of prohibited mandatory performance requirements as the ones enumerated in NAFTA Article 1106(1). The only way to reconcile the two subsections of Article 14.9 of the Australia - Japan EPA (2014)

Annex to the Canada - Venezuela FIPA (1996); Articles V(2) and VI(2)(b) of the Canada - Panama FIPA (1996); Articles V(2) and VI(2)(b) of the Canada - Egypt FIPA (1996); Articles V(2) and VI(2)(b) of the Barbados - Canada FIPA (1996); Articles V(2) and VI(2)(b) of the Canada - Thailand FIPA (1997); Article VI of the Canada - Croatia FIPA (1997) and Article III(5)(b) of Annex I thereto; Article VI of the Canada - Lebanon FIPA (1997) and Article III(5)(b) of Annex I thereto; Articles V(2) and VI(2)(b) of the Armenia - Canada FIPA (1997); Article VI of the Canada - Uruguay FIPA (1997) and Article III(5)(b) of Annex I thereto; Article VI of the Canada - Costa Rica FIPA (1998) and Article III(5)(b) of Annex I thereto.

consists of considering advantage-conditioning performance requirements prohibited under the TRIMs Agreement as prohibited under Article 14.9(1) and to consider the mandatory performance requirements explicitly enumerated in Article 14.9(2), including those not prohibited under the TRIMs Agreement, as prohibited.

Article 6.2(5) of the India - Singapore CECA (2005) directly contradicts the prohibition of advantage-conditioning performance requirements enumerated in the TRIMs Agreement by specifying that nothing in Chapter 6 (Investment) applies to subsidies or grants provided by a State Party or to any conditions attached to their receipt. This contradiction could perhaps be resolved in favour of circumscribing the application of the TRIMs Agreement to mandatory performance requirements enumerated therein by resorting to Article 6.16(2)(a) of the India - Singapore CECA (2005), which specifies that the PRP (Article 6.23) does not apply to exceptions specified by the Parties. A negative inference that would make its PRP inapplicable to advantage-conditioning performance requirements could further be drawn from the absence of an exclusion of the PRP from its exception rendering the investment chapter inapplicable to subsidies or grants; by comparison, Article 10.2(6) of the India - Korea CEPA (2009) provides for the same exception that renders its investment chapter inapplicable to subsidies or grants, but excludes its PRP (Article 10.5) from this exception.

Article 9(3) of the Canada - Kuwait FIPA (2011) and Article 9(3) of the Canada - Mali FIPA (2014) provide "[f]or greater certainty" that the enumerated mandatory performance requirements prohibited under their respective Articles 9(2) (EPRs and export restrictions, LCRs, technology transfer requirements and product mandating requirements) are not prohibited when they are imposed as conditions for the receipt of advantages. Articles 9(3) of the Canada - Kuwait FIPA (2011) and of the Canada - Mali FIPA (2014) bring about a partial and unaddressed contradiction at least in respect of LCRs and export restrictions, since Article 9(1) of the Canada - Kuwait FIPA (2011) and Article 9(3) of the Canada - Mali FIPA (2014) incorporate in full the TRIMs Agreement into the FIPA and since advantage-conditioning LCRs and export restrictions are prohibited under the TRIMs Agreement. An additional source of conflict stems from Article 16(6) of the Canada - Kuwait FIPA (2011) and Article 16(7) of the Canada - Mali FIPA (2014), which render a number of provisions within their respective FIPAs inapplicable to "subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance:" Article 16(6) of the Canada - Kuwait FIPA (2011) and Article 16(7) of the Canada - Mali FIPA (2014) do not render their respective PRPs inapplicable to grants or subsidies, hence subsidies or grants, which arguably amount to advantages as understood under the TRIMs Agreement, from the ambit of their respective PRPs which incorporate the TRIMs Agreement.

c) American and Canadian IIAs That Address Concerns of the European Commission in Respect of Advantage-conditioning Performance Requirements

In September 2003, the United States, the European Commission and eight European countries on the verge of joining the European Union (Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and the Slovak Republic) reached an understanding according to which identical Additional Protocols were entered into by the United States separately with these eight countries in order to ensure the compatibility with EU law of these eight BITs.[580] These eights BITs did not address advantage-conditioning performance requirements within their PRPs. The European Commission requested identical exchanges of letters between the United States and each of the eight BIT Parties that would "interpret" each of the eight PRPs with a view to confirming their mutual understanding that the eight PRPs do not apply to performance requirements imposed as conditions for the receipt or continued receipt of an advantage.[581] These exchanges of letters simply aimed at "making explicit," through an "interpretation," what many other American BITs provide for in writing.[582]

Article V(2) of the Canada - Latvia FIPA (2009) and Article V(2) of the Canada - Romania FIPA (2009) prohibit listed mandatory performance requirements and do not refer to advantages. Article V(4) of the Canada - Latvia FIPA (2009) and Article V(4) of the Canada - Romania FIPA (2009) explicitly address advantages and concerns pertaining to the accession of Latvia and Romania to the EU by clearly declaring that their respective PRPs do not "… extend to conditions for the receipt or continued receipt of an advantage, such as any advantage resulting from the establishment of a marketing organisation for agricultural products and its market stabilizing effects." This outcome is reinforced by the fact that Article VI(2)(b) of the Canada - Latvia FIPA (2009) and Article VI(2)(b) of the Canada - Romania FIPA (2009) clearly render their respective PRPs inapplicable to "subsidies or grants provided by a government or a state enterprise, including government-supported loans, guarantees and insurance."

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[580] Vandevelde (n 84) 78-79. Bulgaria and Romania joined the EU on 1 January 2007, while the remaining six countries joined the EU on 1 May 2004.

[581] Article II(B) of the *Understanding Concerning Certain U.S. Bilateral Investment Treaties*, *United States Senate Executive Report 108-13 – Protocols Amending Existing Bilateral Investment Treaties With new European Union Member Nations*, 108th Cong., 2nd Sess. (4 May 2004) 7; see e.g., *Exchange of Letters Between the Embassy of the United States of America to Latvia and the Ministry of Foreign Affairs of the Republic of Latvia*, 11 December 2003 reproduced in *Additional Investment Protocol With the Republic of Latvia*, United States Senate, 108th Cong., 2nd Sess., Treaty Doc. 108–20 (2004).

[582] See e.g., *Letter of Submittal from the Secretary of State to the American President in respect of the Additional Protocol Between the Government of the United States of America and the Government of the Republic of Latvia to the Treaty for the Encouragement and Reciprocal Protection of Investment of January 13, 1995, signed at Brussels on September 22, 2003*, 108th Congress, 2nd Session, Treaty Doc. 108–20, U.S. Government Printing Office (2004), at VI. See also Vandevelde (n 84) 398-399.

d) Explicitly Excluding Advantage-Conditioning Performance Requirements from PRPs

A number of PRPs in American BITs clearly state their inapplicability to at least some advantage-conditioning performance requirements. For example, the final sentence of Article II(5) of the Jamaica - U.S. BIT (1994) states that nothing in the PRP can preclude State Parties from "providing benefits and incentives" on the condition that investments carry out EPRs. The U.S. Department of State described such additional sentences not as a change of policy, but rather as a clarification of what had been the intention under prior U.S. Model BITs and prior U.S. BITs and as "clarifying what is implicit in this paragraph – that this agreement does not preclude such measures as a condition for receipt of an advantage."[583] It is worth noting that the views of the U.S. State Department, which considered all advantage-conditioning performance requirements as excluded from the scope of the PRP in the Jamaica - U.S. BIT (1994), extend far beyond the limitation set out in Article II(5) to the Jamaica - U.S. BIT (1994), which explicitly excludes from the PRP's scope only EPRs that condition the conferral of "benefits and incentives."

Article VI *in fine* of the 1994 U.S. Model BIT stipulates that prohibited requirements "do not include conditions for the receipt or continued receipt of an advantage." Thirteen American BITs authorise advantage-conditioning performance requirements in the same way as does Article VI of the 1994 U.S. Model BIT.[584] The United States and signatory State Parties to these 13 BITs can accordingly lawfully secure an investor's acceptance of a performance requirement by conferring an advantage in return. Similarly, the last sentence of Article VI of the Bolivia - U.S. BIT (1998) and Article 1 of the Protocol to the Bolivia - U.S. BIT (1998) clearly acknowledge the preserved right of Parties to impose performance requirements as conditions for the receipt of an advantage, including in the context of government procurement.

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[583] Jamaica - U.S. BIT (1994): Letter of Submittal from the Department of State to the President, Washington, 7 September 1994, 103rd Cong. 2nd Sess., Senate Treaty Doc. 103-35, 1994; Vandevelde (n 84) 390.

[584] Article VI of the Georgia - U.S. BIT (1994); Article VI of the U.S. - Uzbekistan BIT (signed in 1994, but not in force); Article VI of the Albania - U.S. BIT (1995); Article VI of the Honduras - U.S. BIT (1995); Article VII of the Croatia - U.S. BIT (1996); Article VI of the Jordan - U.S. BIT (1997); Article VI of the Azerbaijan - U.S. BIT (1997); Article VI of the Bolivia - U.S. BIT (1998); Article VI of the Mozambique - U.S. BIT (1998); Article VI of the El Salvador - U.S. BIT (signed in 1999, but not in force); Article VI of the Bahrain - U.S. BIT (1999). Article VI of the Trinidad and Tobago - U.S. BIT (1994) and Article VI of the Nicaragua - U.S. BIT (signed in 1995, but not in force) also follow the 1994 U.S. Model BIT in respect of advantage-conditioning performance requirements, except that the exclusion of advantage-conditioning performance requirements comes in a separate paragraph and such paragraph refers to benefits and incentives in lieu of advantages.

e) Replicating the NAFTA Approach: Prohibiting Limited Lists of Advantage-Conditioning Performance Requirements

The fact that a number of PRPs explicitly prohibit advantage-conditioning performance requirements even in instances where complying with such requirements may turn out to be profitable for complying investors suggests a favourable bias toward the interests of home State exporters of goods and services compared with the interests of home-State foreign investors abroad. This pro-trade and pro-export bias may be explained by the significant trade deficits of some home States, such as the United States, and the fact that more and more PRPs form part of FTAs whose approval by elected officials and their constituents hinges upon the ability of FTAs to increase home State exports.[585]

NAFTA Article 1106(3)[586] prohibits a lesser number of advantage-conditioning performance requirements compared to prohibited mandatory performance requirements: LCRs, LSRs in respect of goods, trade-balancing requirements and domestic sales restrictions. The four performance requirements in NAFTA Article 1106(3) are identically worded as four of the seven performance requirements found in Article 1106(1). Accordingly, EPRs and export restrictions, technology transfer requirements and product mandating requirements can lawfully condition the receipt of an advantage.[587] Thirty-one IIAs among those surveyed follow the exact same approach to advantage-conditioning performance requirements.[588] American BIT negotiators explained during negotiations that the significant trade-distortedness of these four types of performance requirements warranted their prohibition even when imposed as a condition for the

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[585] Vandevelde (n 84) 394.

[586] Article 8(2) of the 2004 U.S. Model BIT, Article 8(2) of the 2012 U.S. Model BIT and Article 9(3) of the 2012 Canada Model FIPA prohibit advantage-conditioning performance requirements in the same manner.

[587] *Pope & Talbot* (n 167) para 72.

[588] American FTAs: Article 15.8(2) of the Singapore - U.S. FTA (2003); Article 10.8(2) of the Morocco - U.S. FTA (2004); Article 10.9(2) of the CAFTA-DR - U.S. FTA (2004); Article 10.8(2) of the Oman - U.S. FTA (2006); Article 10.9(2) of the Peru - U.S. FTA (2006); Article 10.9(2) of the Colombia - U.S. FTA (2006); Article 10.9(2) of the Panama - U.S. FTA (2007); Article 11.8(2) of the Korea - U.S. FTA (2007). American BITs: Article 8(2) of the U.S. - Uruguay BIT (2005); Article 8(2) of the Rwanda - U.S. BIT (2008). Australian Agreements: Article 11.9(2) of the Australia - U.S. FTA (2004); Article 10.7(2) of the Australia - Chile FTA (2008); Article 5(2) of SAFTA Revised Chapter 8 (Investment) (2011); Article 7(2) of the CERTA Investment Protocol (2011); Article 14.9(3) of the Australia - Japan EPA (2014); Article 11.9(2) of the Australia - Korea FTA (2014). Canadian TIPs: Article G-06(3) of the Canada - Chile FTA (1996); Article 807(3) of the Canada - Colombia FTA (2008); Article 807(3) of the Canada - Peru FTA (2008); Article 9.07(3) of the Canada - Panama FTA (2008); Article 10.7(3) of the Canada - Honduras FTA (2013); Article 8.8(3) of the Canada - Korea FTA (2014); Article 8.5(2) of the Canada - EU CETA (2014); Article 9.10(2) of the TPP (2015). Chilean Agreements: Article 9-07(3) of the Chile - Mexico FTA (1998); Article 10.5(2) of the Chile - U.S. FTA (2003); Article 10.7(3) of the Chile - Korea FTA (2003); Article 9.6(2) of the Chile - Colombia FTA (2006); Article 11.6(2) of the Chile - Peru FTA (2006); Article 77(2) of the Chile - Japan EPA (2007); Article 10.8(2) of the Pacific Alliance Protocol (2014).

receipt of an advantage.[589] Ten Canadian FIPAs[590] reproduce Article 7(3) of the 2004 Canada Model FIPA itself the same as NAFTA Article 1106(3).

Other IIAs yield seemingly irreconcilable provisions that confuse the authorised/prohibited status of advantage-conditioning performance requirements. Pursuant to Article 16(9) of the Canada - Tanzania FIPA (2013), Tanzania preserves its right to grant special incentives to its nationals and companies with the avowed objective of "strengthen[ing] the capacity of national entrepreneurs." Tanzania commits to progressively eliminating such special incentives after having strengthened the capacity of local industries. Article 16(9) renders Article 4 (National Treatment) inapplicable to such special incentives on the condition that these incentives "do not significantly affect the investments and activities of investors of the other Party." However, Article 16(9) says nothing about Article 9 (the PRP); the absence of explicit exclusion of such special incentives from the scope of the PRP raises serious doubts as to whether the exception in their favour should prevail over the explicit prohibition of enumerated advantage-conditioning performance requirements under Article 9(3).

A number of IIAs go farther than NAFTA Article 1106(3) and prohibit a greater number of advantage-conditioning performance requirements. For example, Article 10.5(2) of the India - Korea CEPA (2009) prohibits advantage-conditioning EPRs, LCRs, LSRs in respect of both goods and services, trade-balancing requirements and domestic sales restrictions, while Article 89(2) of the India - Japan CEPA (2011) prohibits advantage-conditioning EPRs, LCRs, LSRs in respect of both goods and services, trade-balancing requirements, domestic sales restrictions, export restrictions and requirements to appoint high-ranking employees of a given nationality.

Since both Canada and the United States, as well as their respective signatory partner countries, considered it necessary to explicitly exclude advantage-conditioning performance requirements from their PRPs, the straightforward wording of advantage-silent PRPs in American, Canadian and French IIAs suggests that such PRPs cannot be deemed inapplicable to advantage-conditioning performance requirements on that basis alone and in the absence of explicit language to that effect, either in the PRP itself or in an instrument forming part of the IIA or accompanying it. As a result, proving the existence of an advantage conferred in relation with the imposition of a performance requirement should not automatically exclude such

[589] Vandevelde (n 84) 394.
[590] Article 7(3) of the Canada - Peru FIPA (2006); Article 7(3) of the Canada - Jordan FIPA (2009); Article 10(3) of the Benin - Canada FIPA (2013); Article 9(3) of the Canada - Tanzania FIPA (2013); Article 9(3) of the Canada - Serbia FIPA (2014); Article 9(3) of the Canada - Senegal FIPA (2014); Article 9(3) of the Canada - Côte d'Ivoire FIPA (2014); Article 9(3) of the Burkina Faso - Canada FIPA (2014); Article 9(3) of the Canada - Guinea FIPA (2014); Article 9(3) of the Canada - Hong Kong, China FIPA (2016).

performance requirement from the scope of advantage-silent PRPs. Rather, one should consider whether the wording of a given PRP would encompass advantage-conditioning performance requirements, notably by considering them imposed as conditions for the establishment, operation, maintenance, expansion, sale or disposition of an investment.

The U.S. Department of State, when commenting the Additional Protocols entered into with the European Commission regarding eight U.S. BITs, considered that the silence of American BITs in respect of advantages reflected the standard policy of considering advantage-conditioning performance requirements as a valid and legitimate policy-making exercise. However, it is difficult to identify such a purportedly clear approach in the absence of a clear authorisation of advantage-conditioning performance requirements within PRPs whose wording and scope could be interpreted as applicable to advantage-conditioning performance requirements.

3. Defining Contiguous Concepts: Advantages Under the TRIMs Agreement and in PRPs of IIAs and Benefits under the SCM Agreement

PRPs which address advantage-conditioning performance requirements within surveyed IIAs uniformly use the term "advantage," yet none of these IIAs provides a definition for such term, and nor does the TRIMs Agreement.[591] Article 3.1 of the SCM Agreement only prohibits LCRs and EPRs that are contingent upon subsidies as defined under Article 1 of the SCM Agreement. The jurisprudential definition of the term "benefit" for purposes of the SCM Agreement can improve our understanding of the term "advantage" used in the TRIMs Agreement and within PRPs of IIAs.

Article 1 of the SCM Agreement narrows down the definition of the term "subsidy" by requiring the presence of two elements: first, a financial contribution (a term itself defined in a limited fashion) or income or price support as defined by GATT Article XVI, and second, a benefit. It is submitted that the term "advantage" is clearly reminiscent of the concept of "benefit" as used under Article 1 of the SCM Agreement since its shape or form is not narrowed by any additional criteria, either in the TRIMs Agreement or in PRPs of IIAs that make use of the concept of advantage. Moreover, WTO dispute settlement panels and the Appellate Body have equated "conferring a benefit" with "providing an advantage."[592] The EC considered that advantages for purposes of an agreement on TRIMs are broader than the concept of subsidies, since the undefined notion of advantage is not constrained by the additional criteria of financial

[591] de Sterlini (n 250) 449.
[592] Canada—FIT ABR (n 283), para 5.148; Canada—FIT Panel (n 274), para 7.271.

contributions or income or price support.[593]

In line with the plain and simple wording of Article 1.1(b) of the SCM Agreement, which limits itself to stating: "a benefit is thereby conferred," the benefit test should remain simple and focus on its alleged recipients in light of the recipients' position in the marketplace with and without the advantage.[594] The benefit test could also be formulated as whether a benefit or an advantage "makes the recipient 'better off' than it would otherwise have been," absent that benefit or advantage.[595] According to the WTO Appellate Body, a benefit requires the existence of an advantage that places its recipient in a more advantageous position than that provided by the market absent the advantage;[596] such a test has been coined "the private market test."[597] A lengthy list of measures could amount to advantages based on such a test. In *Pope & Talbot v Canada*, the claimant argued that the undefined term "advantage" used in NAFTA Article 1106(3) has a special meaning when used in trade agreements and defined "advantage" as "a more favourable or improved position or a 'superior position'" by relying upon a WTO Appellate Body report.[598]

4. Interpreting and Applying Prohibitions of Advantage-Conditioning Performance Requirements and the Term "Advantage"

Advantages consist of a wide array of measures. In two recent disputes, WTO dispute settlement panels decided that mere participation in State-run renewable energy programmes which guarantee long-term purchases of electricity at fixed economically beneficial rates constitutes an advantage.[599]

Many arbitral tribunals interpreted the term "advantage" as used in NAFTA Article 1106 and. In *Pope & Talbot v Canada*, the claimant argued that the Export Control Regime imposed conditions upon the receipt of the fee-free (EB) and reduced-fee (LBF) export quotas, both of

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[593] GATT, *Note on TRIMs* (n 60) para 5.
[594] Canada—FIT ABR (n 283), para 5.148; Canada—FIT Panel (n 274), para 7.271.
[595] Canada—FIT ABR (n 283), para 5.130 and fn 624, citing *Canada—Measures Affecting the Export of Civilian Aircraft* (Complaints by Canada and Brazil) (1999), WTO Doc WT/DS70/AB/R (Appellate Body Report) <docsonline.wto.org> (Canada – Aircraft ABR), para 157.
[596] Rajib Pal, "Has the Appellate Body's Decision in Canada—Renewable Energy / Canada—Feed-in Tariff Program Opened the Door for Production Subsidies?" 17(1) *J Int'l Econ L* 125 (2014) 131, citing Canada – Aircraft ABR (n 595), para 149.
[597] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints*, Cambridge University Press (2014), 60.
[598] *Pope & Talbot* – Investor Memorial (n 497) para 105, citing *Brazil – Export Financing Programme for Aircraft – Report of the Appellate Body* (2 August 1999), WT/DS46/AB/R, para 177.
[599] Canada—FIT Panel (n 274), paras 7.164-7.165; India—Solar Cells (n 274), paras 7.70-7.72.

which allegedly constituted "advantages" under NAFTA Article 1106(3).[600] The claimant therefore argued that Canada had conferred an advantage by granting softwood producers export fee-free or reduced export fee amounts of lumber on certain conditions.[601] Canada ultimately acknowledged that the right to export fee-free constituted an advantage.[602] The *Pope & Talbot* Tribunal agreed with the view commonly held by disputing parties.[603]

At the time of initiating their respective arbitrations, Archer Daniels Midland ("ADM") and Tate & Lyle Ingredients Americas, Inc ("TLIA"),[604] CPI and Cargill (the "Sweetener Claimants") were all American corporations that manufactured and distributed HFCS in Mexico. The Sweetener Claimants challenged the same measures within the same timeframe. The Sweetener Claimants sold most of their HFCS to Mexican soft drink bottlers and competed with domestic cane sugar producers as a sweetener for soft drinks.[605] HFCS quickly gained a competitive edge over cane sugar due to its lower production cost, the consistency of its quality and a greater ease for storage and distribution.[606] Once HFCS became available in Mexico during the 1990's, Mexican soft drink producers started replacing cane sugar with HFCS to the point where in 1997 HFCS occupied a 25% market share, up from 0% in 1991.[607] By 2001 the use of HFCS by the soft drink industry had grown substantially, which significantly reduced domestic sugar consumption in Mexico.[608]

On December 30, 2001 the Mexican Congress amended the Ley del Impuesto Especial sobre Producción y Servicios, (the "IEPS Amendment") and imposed a 20% excise tax on soft drinks and on services used to transfer and distribute soft drinks that use any sweetener other than cane sugar (the "Sweetener Excise Tax").[609] When the IEPS Amendment was being introduced before Congress, a Representative of the Mexican Congress stated clearly that the IEPS Amendment was aimed at protecting the domestic cane sugar industry from HFCS.[610] The Sweetener Excise Tax applied to soft drinks that used any sweetener other than cane sugar (most notably HFCS), while soft drinks sweetened exclusively with cane sugar were exempted, the whole in order to protect the domestic cane sugar industry from HFCS.[611] The obligation to

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[600] *Pope & Talbot* (n 167) para 48.
[601] *Pope & Talbot* – Investor Memorial (n 497) para 109.
[602] *Pope & Talbot* – Counter-Memorial of Canada (n 217), paras 325, 348, 351.
[603] *Pope & Talbot* (n 167) para 73.
[604] *ADM* (n 15).
[605] *ADM* (n 15) paras 40, 48-49, 70; *Cargill v Mexico* (n 16) paras 1, 6, 66-67; *CPI* (n 167) para 2.
[606] *ADM* (n 15) para 40; *Cargill v Mexico* (n 16) para 57; *CPI* (n 167) para 26.
[607] *ADM* (n 15) para 49.
[608] ibid para 70.
[609] ibid para 2; *Cargill v Mexico* (n 16) paras 2, 105; *CPI* (n 167) paras 3, 40.
[610] *ADM* (n 15) para 80; *Cargill v Mexico* (n 16) para 106; *CPI* (n 167) paras 42, 101.
[611] *ADM* (n 15) paras 80, 82; *Cargill v Mexico* (n 16) paras 105-106; *CPI* (n 167) paras 3, 40, 42, 101.

pay the Sweetener Excise Tax was incumbent upon Mexican bottlers when selling or importing soft drinks that comprised a sweetener other than cane sugar and/or upon purchasing services used to transfer and distribute same products.[612]

The Sweetener Excise Tax effectively translated into a 400% increase of the HFCS purchase price.[613] The Sweetener Claimants argued that immediately following the entry into force of the Sweetener Excise Tax, Mexican soft drink bottlers replaced HFCS with cane sugar as a sweetener in order to avoid paying the Sweetener Excise Tax, destroying the Sweetener Claimants' market share.[614] By 2001, HFCS had become the predominant sweetener used by the Mexican soft drink industry; within a year of its advent in 2002, the Sweetener Excise Tax had virtually excluded HFCS from the Mexican soft drink market.[615]

The Sweetener Claimants argued that the exemption from the Sweetener Excise Tax constituted an advantage conditioned on the use of domestic cane sugar in soft drink production, which amounted to according a preference to goods produced in Mexico, in violation of NAFTA Article 1106(3).[616] Mexico conceded, in *ADM v Mexico*, that exemption from the Sweetener Excise Tax constituted an advantage in favour of Mexican bottlers that used only cane sugar to sweeten their soft drinks,[617] but denied that NAFTA Article 1106(3) could apply to the Sweetener Excise Tax.[618]

The *ADM* Tribunal found a breach of NAFTA Article 1106 and considered that Mexico conferred an advantage to Mexican cane sugar producers by conditioning the exemption from the Sweetener Excise Tax (the "Sweetener Tax Exemption Advantage") upon the use of cane sugar as a soft drink sweetener, thus placing foreign HFCS producers at a competitive disadvantage compared to Mexican cane sugar producers.[619] The *ADM* Tribunal thus characterised the Sweetener Excise Tax as an LCR and an LSR by exposing the almost exclusively domestic origin of cane sugar consumed in Mexico.[620] The *ADM* Tribunal concluded that based on the essentially domestic nature of the Mexican cane sugar industry,[621] and based on the underlying protectionist intent of the Sweetener Excise Tax and of the Sweetener Tax Exemption

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[612] *CPI* (n 167) para 44; see also *ADM* (n 15) paras 103, 108, 215, 217; see also *Cargill v Mexico* (n 16) paras 306, 317, 319.
[613] *Cargill v Mexico* (n 16) paras 107-108.
[614] *ADM* (n 15) para 100; *CPI* (n 167) paras 4, 44, 46; *Cargill v Mexico* (n 16) paras 107-108.
[615] *Cargill v Mexico* (n 16) para 122; *CPI* (n 167) para 44.
[616] *ADM* (n 15) paras 3, 101, 103, 215-216, 218; *CPI* (n 167) paras 5, 57; *Cargill v Mexico* (n 16) para 306.
[617] *ADM* (n 15) para 218.
[618] ibid paras 108, 217-218.
[619] ibid paras 222, 304.
[620] ibid paras 223, 227.
[621] ibid paras 3, 101, 103, 225-226.

Advantage, the requirement of using only cane sugar as a soft drink sweetener in order to benefit from the Sweetener Tax Exemption Advantage discriminated against the HFCS industry, including the claimants and their investment, in violation of NAFTA Article 1106(3)(a) or (b).[622]

In *Cargill v Mexico*, Cargill argued that the Sweetener Excise Tax violated NAFTA Article 1106(3)(b) because the Sweetener Tax Exemption Advantage was conditioned on the LSR of using domestic cane sugar.[623] Mexico did not deny the existence of an advantage[624] and the *Cargill v Mexico* Tribunal held that the Sweetener Tax Exemption Advantage constituted an advantage under NAFTA Article 1106(3) whose receipt was conditioned upon the performance requirement to use domestically produced cane sugar in violation of NAFTA Article 1106(3), but did not specify which subparagraph of NAFTA Article 1106(3) had thus been violated.[625] In *CPI v Mexico*, the *CPI* Tribunal did not pronounce itself on the existence of an advantage and limited itself to succinctly rejecting the alleged breach of NAFTA Article 1106.[626]

The notion of advantage is broad and its interpretation has yet to face any difficulties in the context of investor-State arbitration. The arbitral tribunals in the previously discussed disputes rightly concluded that an advantage existed in the disputes before them and this conclusion flowed naturally from the lack of factual ambiguity. This thesis suggests that should any difficulties arise in the future, arbitral tribunals may turn to the interpretation of the term "benefit" carried out by WTO dispute settlement panels and the Appellate Body when deciding disputes under the SCM Agreement for guidance. It is true that the WTO dispute settlement body faces its own set of challenges related notably to the complexity of the relevant provisions of the SCM Agreement and to the intricate fact patterns of trade disputes. Nevertheless, as discussed above, WTO jurisprudence can help flesh out basic tests to guide arbitral tribunals when tasked with determining if a given investor received an advantage. The criteria for establishing the existence of an advantage should remain simple and focus on its alleged recipients in light of the recipients' position in the marketplace with and without the alleged advantage. The criteria for ascertaining the conferral of an advantage could consist of determining whether an advantage makes its recipient "better off" than without the advantage.

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[622] ibid paras 227, 304.
[623] *Cargill v Mexico* (n 16) para 306.
[624] ibid para 307.
[625] ibid paras 318-319, 552, 557.
[626] ibid paras 9, 79-80.

F. PRPs in Trade and/or Investment Chapters of TIPs

1. TIPs with two PRPs Reflect Dual Trade and Investment Concerns

The dual and variable trade/investment nature of performance requirements renders them ill fitted for uniform disciplining. The investment-driven purposes of BITs can act as straitjackets onto PRPs which address multiple trade concerns alongside investment concerns. At the same time, aggregating a wide variety of performance requirements into the same PRP, which consequently exhibits an overall trade and investment nature, may lead to the better known performance requirements directly related to trade obfuscating the remote and indirect relation to trade of other performance requirements. PRPs should not be confined to the investment objectives of BITs or to the trade concerns of their most obvious trade-related performance requirements. PRPs should be construed in a way that accounts for the varying degrees of trade or investment relatedness of the distinct measures that they prohibit.

Disciplining performance requirements in TIPs lends itself to adopting two separate PRPs. A number of States have opted for two PRPs in their TIPs: they prohibit a number of performance requirements directly related to trade in their trade-focused chapters while prohibiting the same performance requirements directly related to trade, along with other performance requirements, in their investment-focused chapters. Following the lead of the NAFTA in this respect, 14 TIPs[627] among those surveyed prohibit performance requirements in two distinct chapters: first, in a chapter focused on trade in goods and market access, and second, in a chapter focused on investment. Exhibiting a different approach, six TIPs[628] do not comprise an investment chapter, but nevertheless prohibit performance requirements in their respective trade chapters.

The 15 previously identified TIPs (including the NAFTA) that prohibit performance requirements in both trade and investment chapters prohibit a larger number of mandatory performance requirements in their investment chapters than those contemplated by the PRPs in their respective trade chapters. They also prohibit advantage-conditioning performance requirements only in their investment chapters. Trade-chapter PRPs and investment-chapter PRPs both target EPRs, LCRs, LSRs (although this requirement is strangely limited to goods in the

[627] The Canada - Chile FTA (1996); the Chile - U.S. FTA (2003); the Morocco - U.S. FTA (2004); the Australia - U.S. FTA (2004); the CAFTA-DR - U.S. FTA (2004); the Chile - Colombia FTA (2006); the Colombia - U.S. FTA (2006); the Oman - U.S. FTA (2006); the Peru - U.S. FTA (2006); the Korea - U.S. FTA (2007); the Panama - U.S. FTA (2007); the Australia - Chile FTA (2008); the Pacific Alliance Protocol between Chile, Colombia, Mexico and Peru (2014); the TPP (2015).

[628] Article 13 of the Israel - U.S. FTA (1985); Articles 2.4 and 2.8(2)(b) of the Bahrain - U.S. FTA (2004); Articles 3.4 and 3.8(2)(b) of the Chile - Panama FTA (2006); Article 3.6(2)(a) of the Chile - Vietnam FTA (2011); Article 3.6(4)(b) of the Chile - Hong Kong FTA (2012); Article 3.8(2)(b) of the Chile - Thailand FTA (2013).

investment-chapter PRPs)[629] and trade-balancing requirements. Contrary to their trade-chapter PRPs, the investment-chapter PRPs do not specify import substitution, but in addition to the performance requirements targeted in trade-chapter PRPs, investment-chapter PRPs prohibit domestic sales restrictions, technology transfer requirements and product mandating requirements.

In the same way as does NAFTA Article 318, 16 TIPs[630] among those surveyed define performance requirements as one of five requirements: EPRs, import substitution requirements, LSRs, LCRs and trade-balancing requirements. This list of prohibited performance requirements is clearly predicated on their trade-relatedness. Somewhat incoherently however, all but the trade-balancing requirements (silent as to goods or services) are drafted as encompassing measures applicable to goods and to services, even though this definition of performance requirements forms part of chapters focused solely on trade in goods. Of these 16 TIPs, the 10 American FTAs and the TPP (2015) exclude from their definitions four measures that would otherwise have fallen within EPRs and import substitution requirements: the requirement to subsequently export an imported good; the requirement to use an imported component for producing a good to be subsequently exported; the requirement that an imported component be substituted by an identical or similar component for use in producing a good to be subsequently exported; and the requirement that an imported good be substituted by an identical or similar good to be subsequently exported. By contrast, three Chilean TIPs[631] have left the expression "performance requirement" undefined and therefore do not properly delineate the open-ended scope of their trade-chapter PRPs.

Eighteen TIPs[632] prohibit conditioning import licenses on compliance with a performance

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[629] Except for Article G-06(1)(c) of the Canada - Chile FTA (1996), which applies to both goods and services.

[630] Article C-18 of the Canada - Chile FTA (1996); Article 3.24 of the Chile - U.S. FTA (2003); Article 2.12 of the Bahrain - U.S. FTA (2004); Article 2.11 of the Morocco - U.S. FTA (2004); Article 2.13(11) of the Australia - U.S. FTA (2004); Article 3.31 of the CAFTA-DR - U.S. FTA (2004); Article 3.16 of the Chile - Panama FTA (2006); Article 2.22 of the Colombia - U.S. FTA (2006); Article 2.12 of the Oman - U.S. FTA (2006); Article 2.22 of the Peru - U.S. FTA (2006); Article 3.32 of the Panama - U.S. FTA (2007); Article 2.15 of the Korea - U.S. FTA (2007); Article 3.1(j) of the Australia - Chile FTA (2008); Article 3.1 of the Chile - Vietnam FTA (2011); Article 3.1 of the Pacific Alliance Protocol (2014); Article 2.1 of the TPP (2015).

[631] The Chile - Colombia FTA (2006); the Chile - Hong Kong FTA (2012); the Chile - Thailand FTA (2013).

[632] Article 3.11(2)(b) of the Chile - U.S. FTA (2003); Article 2.8(2)(b) of the Bahrain - U.S. FTA (2004); Article 2.8(2)(b) of the Morocco - U.S. FTA (2004); Article 2.9(2) of the Australia - U.S. FTA (2004); Article 3.8(2)(b) of the CAFTA-DR - U.S. FTA (2004); Article 3.4(2)(b) of the Chile - Colombia FTA (2006); Article 3.8(2)(b) of the Chile - Panama FTA (2006); Article 2.8(2)(b) of the Oman - U.S. FTA (2006); Article 2.8(2)(b) of the Peru - U.S. FTA (2006); Article 2.8(2)(b) of the Colombia - U.S. FTA (2006); Article 3.8(2)(b) of the Panama - U.S. FTA (2007); Article 3.9(2)(b) of the Australia - Chile FTA (2008); Article 2.8(2)(b) of the Korea - U.S. FTA (2007); Article 3.6(2)(a) of the Chile - Vietnam FTA (2011); Article 3.6(4)(b) of the Chile - Hong Kong FTA (2012); Article 3.8(2)(b) of the Chile - Thailand FTA (2013); Article

requirement, a scenario unaddressed in the NAFTA and in the Canada - Chile FTA (1996). In the same way as does NAFTA Article 304, 13 TIPs[633] prohibit conditioning the waiver of customs duties upon the implicit or explicit compliance with performance requirements.

Article 13 of the Israel - U.S. FTA (1985) bears the heading "trade-related performance requirements" and prohibits mandatory EPRs and LCRs as a condition of establishment, expansion or maintenance of investments by State Party investors, as well as advantage-conditioning LCRs. One can easily ascertain its palpable focus on performance requirements most egregiously related to trade.

By drawing up two different PRPs within a single TIP, a number of State Parties clearly differentiated between performance requirements directly related to trade listed in trade-chapter PRPs and performance requirements indirectly or remotely related to trade that are prohibited in their investment-chapter PRPs. The approach of creating trade-chapter PRPs and investment-chapter PRPs has the merit of greater clarity, can facilitate their interpretation and application and better addresses the interests of home States at stake in relation to performance requirements by giving States access to dispute settlement mechanisms.

2. Conflicting Interests of Home States and Their Outward Investors Warrant State-to-State Disciplines on Directly Trade-Related Performance Requirements

The unilateral initiatives of the United States against performance requirements[634] clearly

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3.6(2)(b) of the Pacific Alliance Protocol (2014); Article 2.10(2)(b) of the TPP (2015).

[633] Article C-03 of the Canada - Chile FTA (1996); Article 3.6 of the Chile - U.S. FTA (2003); Article 2.4 of the Bahrain - U.S. FTA (2004); Article 3.4 of the CAFTA-DR - U.S. FTA (2004); Article 2.4 of the Morocco - U.S. FTA (2004); Article 3.4 of the Chile - Panama FTA (2006); Article 2.4 of the Oman - U.S. FTA (2006); Article 2.4 of the Peru - U.S. FTA (2006); Article 2.4 of the Colombia - U.S. FTA (2006); Article 3.4 of the Panama - U.S. FTA (2007); Article 2.4 of the Korea - U.S. FTA (2007); Article 3.11 of the Pacific Alliance Protocol (2014); Article 2.5 of the TPP (2015).

[634] In the early 1980s, the Overseas Private Investment Corporation ("OPIC") could refuse to insure American FDI abroad when bound by performance requirements that substantially reduce trade benefits accruing to the United States as a result of such FDI. Refusing insurance coverage was aimed at deterring American FDI from flowing into host States whose performance requirements reduced American exports: see Coughlin (n 36) 135; Jacobsen (n 34) 1191-1192 and fn 239; see also Roberts (n 136) 175. Section 212(c) of the Caribbean Basin Economic Recovery Act (CBERA) of 1983 enabled the President to confer unilateral preferential trade and tax benefits upon CBERA candidate countries drawing negative inferences from the reliance by candidate countries on distortive export subsidies, EPRs or LCRs: see U.S. House of Representatives, Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes Part I of II*, 111th Congress, 2nd Session, U.S. Doc No WMCP: 111-6, 2010 Edition (December 2010), U.S. Government Printing Office, 25-27; United States International Trade Commission ("ITC"), *Caribbean Basin Economic Recovery Act: Impact on U.S. Industries and Consumers and on Beneficiary Countries, 21st Report 2011–12*, Investigation No. 332-227, USITC Publication 4428 (September 2013), i, ix, 1-1, 1-4, 1-5. Section 203(d) of the Andean Trade Preference Act (ATPA), enacted on December 4, 1991, identically enabled the American President to factor-in the use of distortive export subsidies, LCRs or EPRs upon considering whether a country should receive ATPA

expressed concerns only over the harmful trade impacts of a select number of closely trade-related performance requirements from the vantage point of the United States as a home State and especially as an exporter of goods and services. These examples suggest that addressing performance requirements directly related to trade through State-to-State negotiations, disciplines and dispute settlement could prove more in line with the predominant motivations for disciplining such measures in the first place.

Interests of home States and those of their outward investors may be at odds when assessing host-State performance requirements.[635] For example, in the 1970s, 1980s and even beyond, American subsidiaries in host States and host States cooperated on performance requirements to the detriment of the United States as a home State.[636] As a result of such cooperation, American MNCs that had concluded contracts with host States binding them to comply with performance requirements in exchange for advantages feared the entry into such markets of new, performance requirement-free competitors.[637] For example, the Argentina - U.S. BIT (1991) comprises a PRP whose temporal applicability was adjusted in order to assuage the fears of first-mover American MNCs and notwithstanding that the immediate application of the PRP would have been much more in line with American interests.[638] The Protocol to the Argentina - U.S. BIT (1991) provides that Argentina could "maintain, but not intensify" existing performance requirements in the automotive industry for eight years following the entry into

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benefits: see U.S. House of Representatives, *Compilation of Trade Statutes* (defined in this same footnote above) 41-44; United States International Trade Commission ("ITC"), *Andean Trade Preference Act: Impact on U.S. Industries and Consumers and on Drug Crop Eradication and Crop Substitution, 2013 Sixteenth Report, 2013*, Investigation No. 332-352, USITC Publication 4486 (September 2014), 1-2. The United States Generalized System of Preferences (GSP) Renewal Act of 1984 conditioned eligibility to the U.S. GSP *inter alia* on the extent to which developing countries had "reduce[d] distorting investment practices and policies (including [EPRs]):" see Ronald Arun Nair, "The Role of India's Foreign Investment Laws in Controlling Activities of Multinational Corporations" 14 *Syracuse J. Int'l L. & Comm.* 519 (1988) 542-543, fn 139, 141. Pursuant to the 1984 U.S. Trade and Tariff Act amendment of Section 301 of the 1974 U. S. Trade Act, the President may act against any country which burdens or restricts American trade by adopting trade-related performance requirements, and according to Section 307(b) of the U.S. Trade and Tariff Act of 1984, the USTR may undertake consultations with or retaliation against a country which imposes EPRs that adversely affect the United States: see Moran and Pearson, "Careful With TRIPs" (n 29) 129-130; Moran and Pearson, *TRPRs OPIC* (n 31) 58-59; Nair (679) 545-546, fn 150.

[635] Ariff (n 40) 352; Bergsten (n 60) 41, 43; Greenaway, "Political Economy of TRIMs" (n 62) 374-375; Greenaway (n 31) 148; Jacobsen (n 34) 1182-1183; Moran and Pearson, *TRPRs OPIC* (n 31) 59-60; David Robertson, *Investment Incentives in Home and Host Countries*, Report to the Task Force on Private Foreign Investment of the IMF-World Bank Joint Development Committee, DC/TF/PFI/80-5 (January 25, 1980) 1, 26; UNCTC and UNCTAD (n 43) 54, 61.

[636] Bergsten, "Investment Wars" (n 420) 143; Jacobsen (n 34) 1181-1184; Moran, "FDI and Host Country Development" (n 65) 285; Theodore H. Moran, "FDI and Development: What is the Role of International Rules and Regulations?" 12(2) *Transnational Corporations* (August 2003) 1, 8-9; Moran, Graham and Blomström (n 65) 383.

[637] Coughlin (n 36) 137.

[638] Argentina - U.S. BIT (1991): Letter of Submittal from the Department of State to the President, 13 January 1993, 103rd Cong., 1st Sess., Senate Treaty Doc. 103-2; paras 9, 11 of the Protocol to the Argentina - U.S. BIT (1991), as discussed in Vandevelde, "The Second Wave" (n 112) 674, 689.

force of the BIT. Argentina also had to apply residual performance requirements so as to not competitively disadvantage existing investments compared with new automotive investments.[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 never 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] Vandevelde, "The Second Wave" (n 112) 689.