Empirical Study: Performance Requirement Prohibitions in International Investment Agreements

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Introduction

BIICL and Steptoe International (UK) LLP are pleased to present their first comprehensive empirical study of PRPs in IIAs. This study examines over 500 IIAs signed by six States (the United States, Canada, India, France, Australia, and Chile) from the early 1960s to date. This subject matter is both relevant and topical, as many States have turned back the clock and renewed their use of performance requirements as economic policy instruments in recent years.

It is increasingly common to find elaborate PRPs in complex trade and investment treaties. These include the recently concluded CPTPP, USMCA and RCEP. While PRPs are widespread, appearing in hundreds of IIAs, they have thus far eluded close and systematic scrutiny. Their complex inner-workings and their positioning at the crossroads between law and economics make it a perfect topic to shine a spotlight on.

This study provides a comprehensive framework to better understand the typically complex PRP provisions in IIAs and their implications, situating them within their broader geopolitical and economic context. In particular, it analyses the evolving trends and rationales underlying States' treaty-drafting approaches to prohibiting performance requirements – and to narrowing the scope and applicability of PRPs where deemed necessary. It also considers the kinds of disputes that have arisen under PRP provisions of IIAs, and the prospects for such disputes in the future.

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Table of common or recurring abbreviations

AANZFTA	Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area
ASEAN	Association of Southeast Asian Nations
BIICL	British Institute of International and Comparative Law
BIT(s)	Bilateral investment treaty / treaties
CECA(s)	Comprehensive economic cooperation agreement(s)
CEPA(s)	Comprehensive economic partnership agreement(s)
CERTA Investment Protocol	Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUSFTA	Canada - United States Free Trade Agreement
E&T	Education and training
ECT	Energy Charter Treaty
EPA(s)	Economic partnership agreement(s)
EPR(s)	Export performance requirement(s)
EU	European Union
FET	Fair and equitable treatment
FDI	Foreign direct investment
FIPA(s)	Foreign investment promotion and protection agreement(s)
FTA(s)	Free trade agreement(s)
GATT	General Agreement on Tariffs and Trade
IIA(s)	International investment agreement(s) (broadly including investment chapters of FTA(s) and BIT(s))
ISDS	Investor-state dispute resolution
LCR(s)	Local content requirement(s)
LSR(s)	Local sourcing requirement(s)
MNC(s)	Multinational corporation(s)
NAFTA	North American Free Trade Agreement
PACER Plus	Pacific Agreement on Closer Economic Relations Plus
PRP(s)	Performance requirement prohibition(s)
R&D	Research and development
RCEP	Regional Comprehensive and Economic Partnership
SAFTA	Singapore - Australia FTA
SCM	WTO Agreement on Subsidies and Countervailing Measures
TIP(s)	Treaty / treaties with investment provisions
TRA(s)	Trade relations agreement(s)
TRIMs	Trade-related investment measures
UNCTAD	United Nations Conference on Trade and Development
U.S.	United States of America
USMCA	United States - Mexico - Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
TRIMs Agreement	WTO Agreement on Trade-Related Investment Measures

I. Executive summary

The main focus of this empirical study is on performance requirement prohibitions (PRPs). PRPs are a distinct type of treaty provisions that appear in many international investment agreements and that seek to curtail States' ability to impose performance requirements.

Performance requirements are investment-related measures imposed by a host State which are either (i) conditions precedent to that State's authorisation for an investor to make, expand or operate an investment in its territory; or (ii) conditions for an investor receiving a State advantage. Some of the most common examples of performance requirements include: local content requirements ("LCRs")/local sourcing requirements ("LSRs"); export performance requirements ("EPRs"); export controls/restrictions; and technology transfer, licensing and/or local R&D requirements.

When it stipulates performance requirements, a host State does so with a view to maximise the beneficial impacts of FDI on its economy; to bolster its industrial base; and/or to increase FDI-derived added value. Performance requirements tend to be common in States whose economies promote or otherwise depend on resource intensive or politically sensitive industries, such as energy, oil/gas, commodities and strategic technologies.

In the early 1970s, countries seeking to attract foreign capital simultaneously sought to impose performance requirements in an attempt to leverage foreign investment to benefit their economic and social development.

In response, capital-exporting countries began to integrate PRPs into their IIAs from the late 1970s onward, as their outward FDI increased considerably over the 1970s, 1980s and 1990s. PRPs are treaty provisions which prohibit the imposition of performance requirements. A home State may wish to prohibit performance requirements in its IIAs so as to eliminate: (i) the trade-distorting effects of performance requirements (for example, to eliminate market access barriers that prevent its own investors and exports from reaching a host State's market); and, relatedly, (ii) government-mandated practices that hinder entrepreneurial autonomy and side-line investors' best judgment and business decision-making when conducting investment activities in a host State's territory.

In more recent years, economic policy-making has swung the other way. In the wake of the 2008 global financial crisis, a sustained trend pushed countries of all macroeconomic persuasions towards a more interventionist approach to industrial policy, not only for development but also in response to myriad contemporary challenges including recession, deindustrialisation, globalisation, trade competition, and sustainable development. Performance requirements (especially in combination with investment incentives) have formed part of the policy toolkit of many countries in their attempts to steer their economies towards specific economic development objectives. The COVID-19 pandemic accelerated this existing trend towards more restrictive foreign investment policy measures.

The current worldwide reversal of the pro-investment liberalisation consensus, in favour of greater economic regulation and more nationalistic industrial policies, raises the prospect of an increasing number of PRP-based disputes. The increased use of performance requirements runs directly counter to existing (and typically, unaltered) State obligations to restrict performance requirements under previously negotiated IIAs. In the course of this study, PRPs were found in close to 40% of the IIAs that were surveyed for this study (approximately 200 out of 500). Many hundreds more PRPs are likely to be present in the IIAs beyond those surveyed (with the total number of IIAs exceeding 3,000). PRPs are hardly an isolated occurrence.

In many instances, countries have adopted performance requirements notwithstanding having signed up to PRPs, many of which offer limited or no exceptions to their prohibitions. This discrepancy suggests that PRP-based ISDS proceedings stand a good chance of increasing over the coming years. PRPs have featured in approximately a dozen publicly known investor-state disputes thus far. A small number of these disputes have resulted in multi-million-dollar awards or settlements for investors to compensate their losses arising out of PRP breaches.

To give but a few examples, past PRP-based disputes have involved: (i) local R&D expenditure requirements in the oil and gas industry; (ii) local content broadcasting requirements in the radio industry; (iii) taxes applicable to soft drinks that contain foreign-produced high-fructose corn syrup; (iv) government procurement of structural steel components; and (v) restrictions on gold exports.

Given the impacts performance requirements can have on the efficient management of their enterprises, investors should pay close attention to the protections that PRPs in IIAs may afford as a source of relief. When a State adopts performance requirements that negatively affect an investor's business activities, and this performance requirement runs afoul of a PRP, investors will need to weigh the benefits of ISDS as a means of bringing a host State to the negotiating table, and potentially as a means of obtaining financial compensation should the measure remain in place.

PRPs in IIAs provide attractive legal protections that are particularly relevant to businesses in the following sectors: (i) extractive industries, including oil and gas and mining; (ii) renewable energies (solar, wind, etc.); (iii) car manufacturing (including electric cars); (iv) commodities (including sugar and lumber); (v) semiconductors/microchips and other IT hardware components; and (vi) the broadcasting sector (including radio and television).

States in turn should closely scrutinise their PRP commitments under their existing networks of IIAs as part of their wider management of FDI and existing/prospective foreign investors that can resort to ISDS. They should also take stock of the carve-outs and exceptions in such IIAs, to determine whether or not these afford sufficient regulatory space and flexibility to derogate from their commitments under PRPs.

II. Methodology: exhaustive overview of PRPs in the IIAs of six countries

This empirical study seeks to develop a detailed typology and analysis of PRPs in IIAs. It does not aim at completing an exhaustive analysis of the occurrences and variations of PRPs in all IIAs: thousands of treaties would need to be reviewed to achieve that goal.

This study instead exhaustively surveys the treaty practice of six representative States (the U.S.; Canada, India, France, Australia, and Chile), providing insights into international trends in drafting PRPs, and the problems that may arise with their interpretation and application. The selection of the treaties signed by these six countries aims at reflecting a global and diverse cross-section of State practice across major regions and economies. Our selection also accounts for the following considerations:

a. The U.S. has included PRPs in every Model BIT from 1981 onward, and in all of its IIAs. It also made multiple submissions on performance requirements at the GATT forum, including during the GATT Uruguay Round of negotiations which led to the WTO TRIMs Agreement. This study therefore closely scrutinises U.S. treaty practice on PRPs.

b. Canada's treaty practice has been at the heart of the elaboration of PRPs since the mid-1980s. Canada (together with the U.S.) signed the CUSFTA and its PRP (Article 1603) in 1987, the successor agreement NAFTA and its PRP (Article 1106) in 1992 and the successor agreement USMCA and its PRP (Article 14.10) in 2020. The NAFTA in particular influenced the drafting of a large number of subsequent PRPs in other IIAs and generated the great majority of the publicly available arbitral awards dealing with PRPs. Further, Canada has included PRPs in its FIPA Models and in a large number of its IIAs.

c. India has signed a large number of IIAs and has developed a Model BIT. Tension between the opposing views of the U.S. and of India on performance requirements shaped the GATT Uruguay Round negotiations on performance requirements and the resulting TRIMs Agreement. India's views on performance requirements during these negotiations embodied those of a large number of "developing countries", as they were referred to at that time.

d. France's IIAs were included in light of its longstanding, consistent and unique approach to PRPs.

e. Australia's IIAs were included in light of Australia's elaborate approach to PRPs, many of which feature some of the most recent model language.

f. Chile's IIAs were included in light of Chile's well-developed PRP practice with detailed and variable iterations of such provisions.

In total, this empirical study surveys 528 publicly available IIAs entered into as of 24 February 2023, as follows:[1] 117 U.S. IIAs; 49 Australian IIAs; 67 Canadian IIAs; 92 Chilean IIAs; 116 French IIAs;[2] 102 Indian IIAs.[3] These 528 treaties consist of publicly available (i) BITs; and (ii) TIPs. This sample provides a view into the prevalence of PRPs, and provides the core sample for the PRP analysis undertaken in this study.[4]

1 As of the cut-off date of this study (i.e. 24 February 2023), this includes IIAs (i) which have been signed, but have not yet been reported to be in force; and (ii) reported to have been terminated or otherwise to be no longer in force. Both these categories of IIAs continue to be counted and considered as part of this study, as they remain relevant for the purpose of analysing historical and evolving treaty practices. Further, in relation to (ii), the validity and effect of certain (purported) terminations may yet prove controversial, and it is beyond the scope of this study to take a position on any or all of them.

2 In relation to those IIAs entered into by France, this study has only taken into account (i) BITs having France as one of the two contracting parties; and (ii) TIPs having France as a contracting party, but excluding any having France as a party (or otherwise binding France) by virtue of its membership of the EU (or of a predecessor entity). The only French TIP in this regard is the Energy Charter Treaty (1994).

3 Where more than one of the six States featured in this study are party to the same IIA (e.g. Australia and India in the Australia - India ECTA (2022), they have been counted separately as an IIA pertaining to each State. However, care has been taken not to double-count these IIAs when computing the total number of IIAs forming the sample size of this study.

4 Among the 206 IIAs are (i) BITs with PRPs; and (ii) TIPs with PRPs among their investment provisions (e.g., in an investment chapter of a trade agreement). Among those TIPs in (ii) are a small number of recent treaties (e.g., the Australia - UK FTA (2021) (signed but not in force); RCEP (2020); PACER Plus (2017)) with PRPs in separate investment chapters, but without provisions for ISDS. These IIAs nevertheless form part of the study as they remain relevant for the purpose of analysing historical and evolving treaty practices with respect to PRPs. Likewise, the CETA (2014) and its PRPs (Article 8.5) form part of this study, even though the scope of its ISDS provision does not include claims with respect to PRP breaches (Article 8.18). For the sake of brevity, this study does not reproduce integral lists of PRPs in IIAs that underpin each given figure mentioned in the main body of the study. Instead, reference is made only to illustrative examples of treaty provisions.

III. Introduction to performance requirements and their prohibition in investment treaties

This Part introduces what are performance requirements and how their use and prohibition have evolved over time.

Part IV of this study provides a deeper discussion of performance requirements and their prohibition. In particular, Part IV explains: (i) the main characteristics of performance requirements; (ii) the main types of performance requirements that PRPs in IIAs prohibit; (iii) why States enact performance requirements; (iv) why performance requirements are usually packaged with State incentives; and (v) why States in turn prohibit performance requirements through IIAs.

Parts V and VI provides an overview of the prevailing approaches to drafting PRPs in IIAs. It discusses in particular: (i) open-ended PRPs in IIAs; (ii) PRPs in IIAs that incorporate the TRIMs Agreement; (iii) prohibiting detailed lists of mandatory performance requirements in PRPs of IIAs; (iv) and prohibiting advantages conditioned upon performance requirements.

Part VII provides an overview of options available to States in order to better calibrate the scope and coverage of PRPs in IIAs. This part examines the main recurring techniques that States have developed to fine-tune the scope and coverage of PRPs over time.

Part VIII discusses the settlement of investment disputes involving PRPs and examines the findings of arbitral tribunals, focussing on key disputes.

A. What are performance requirements?

Performance requirements are investment-related measures which are either conditions precedent to a host State's authorisation for an investor to establish, acquire, expand or operate an investment in its territory, or are preconditions to the granting of a State advantage to an investor. States may impose performance requirements, for example, by prescribing the use of specific inputs or the production of specific outputs as a condition for investment; by stipulating that purchases are to be made from specific sources; or by directing that sales be made to specific markets. Performance requirements often seek to increase the exports generated by an investment or the proportion of local inputs used by an investment.

More generally, States deploy performance requirements as policy instruments that seek to promote national economic, industrial and/or technology development objectives by imposing specific undertakings on investors. For an investor, performance requirements amount to a variable that may alter the risk profile and ultimate profitability of its investment: compliance will often mean operating an investment in a manner at odds with the investor's best commercial interests. It is the arguably operationally distorting and trade-restrictive nature of performance requirements that investment treaty disciplines seek to address and discipline.

B. How have the use of performance requirements and their prohibition evolved over time?

Performance requirements and corresponding PRPs arise out of recent trends in globalisation and economic liberalisation (mainly during the eighties, nineties and noughties) and related State push-back (mainly from 2010 onward). Such liberalising trends increased the operational freedoms of MNCs, allowing them to spread production activities across multiple countries to benefit from local comparative advantages. Host States view such FDI as an important means of economic development and integration into international markets.

However, merely opening borders to allow inward FDI does not guarantee improvements to national economies. Host States may therefore resort to imposing performance requirements upon foreign investors, seeking to enhance the benefits and effects of inward FDI towards its own national development goals. Many developing countries had done so in the 1970s by regulating MNCs as part of their push for a "New International Economic Order (NIEO)", notably with the aim of increasing technology transfer and assistance for industrialisation projects in developing countries. In response, PRPs have been negotiated into IIAs to discipline the ability of host States to impose nationalist economic policy restrictions on the conduct of covered foreign investment within their territories.

An understanding of performance requirements and PRPs deserves greater attention in light of the many recent factors which have contributed to a resurgence in economic nationalism and protectionist policies: the global financial crisis of 2008-2009; supply chain resilience concerns in the face of the COVID-19 pandemic; and politically-motivated trade restrictions on strategic commodities and technologies. These deep-seated trends have led many States to review their industrial policies and to consider measures aimed at ensuring adequate domestic manufacturing capacity for necessary goods[5] and general supply chain security. In addition, States are also attempting to increase economic benefits that can be reaped nationally through manufacturing, job creation and increased R&D at the local and regional levels.

Such trends run directly against existing PRP disciplines, negotiated during more economically liberal phases of national economic policy. Many States in the 1980 through 2000 period signed up to treaty commitments that curtail their ability to impose nationalist agenda on the conduct of foreign investments in their respective territories. States adopting measures that impose performance requirements upon foreign investors expose themselves to challenge through the dispute resolution mechanisms available in IIAs. In the current environment, PRPs therefore raise issues of policy space and sensitive matters of national sovereignty.[6]

5 Andrew Newcombe, “Book Review – Performance Requirement Prohibitions in International Investment Law” (2020), ICSID Review, pp. 1–5. For more details, see Alexandre Genest, Performance Requirement Prohibitions in International Investment Law (Nijhoff International Investment Law Series, Brill, 2019). *See also* Simon Evenett et al., The Return of Industrial Policy in Data, IMF Working Paper WPIEA2024001, 4 January 2024, p. 5.

6 For example, in the *Lemire v. Ukraine* investment treaty arbitration, the arbitral tribunal characterised the 50 percent local music radio broadcast requirement as an exercise in State sovereignty involving “deeply felt cultural or linguistic traits of the community”. *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (“*Lemire v. Ukraine*”), para. 505. In *Mobil v Canada*, partially Dissenting Arbitrator Philippe Sands QC recognised that the local research and development expenditure requirements at issue constituted “matters of considerable national interest” and “matters of considerable significance and sensitivity in the relations between Newfoundland [and Labrador] and Canada”. *See Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4, Partial Dissenting Opinion, Professor Philippe Sands QC (17 May 2012) paras 5 and 7 [“*Mobil v Canada* (Dissent)”].

IV. What are the main types of performance requirements that investment treaties prohibit, and why do investment treaties prohibit them?

A. What are the main types of performance requirements that investment treaties prohibit?

This part sets out the 9 main types of measures that States seek to prohibit with PRPs in their IIAs:

1. Local Content Requirements (LCRs) and Local Sourcing Requirements (LSRs);
2. Export Performance Requirements (EPRs);
3. Trade-balancing requirements;
4. Export controls or restrictions;
5. Technology transfer, Licensing and/or local R&D requirements;
6. Foreign exchange restrictions and/or earning requirements;
7. Investment localisation requirements;
8. Domestic sales requirements;
9. Product mandating requirements.

1. Local Content Requirements (LCRs) and Local Sourcing Requirements (LSRs);

LCRs/LSRs are sometimes referred to as “import-substitution,” “minimum value-added” or “domestic value-added” requirements. Their effects can be likened to those of import quotas, as they essentially ask investors (i) to purchase a specified amount or percentage of their inputs, or (ii) to carry out a specified amount or percentage of their production, in a host State’s territory. Compulsory use of local resources or components thus curtails the import of potentially more attractive foreign equivalents, as well as the repatriation of generated returns.

> *Example:* An investor wishes to exploit iron ore mines in a host State’s territory. The host State conditions its approval of the investment on the investor building a steel plant in its territory to process locally the iron ore extracted from the mines.

2. Export performance requirements (EPRs)

EPRs impose the export of a specified proportion, percentage or minimum amount of goods produced locally by reference to (i) the value or quantity of local production, or (ii) a proportion of an investor’s imports – ultimately with a view to increasing the amount of foreign exchange acquired by a host State. They can serve to improve the integration of local producers into an MNC’s global production networks, as well as encourage the use of superior technology and production processes in order to meet the sometimes more exacting demands of export markets. However, they pose an obvious restriction on potential target markets for an investor’s production in a host State.

> *Example:* An investor producing machinery intends to build a plant in a host State in order to gain direct access to the host State’s market and circumvent import tariffs. The investor plans on exporting between 5 and 10% of its local production. The host State notifies the investor that it must export 25% of its production in order to qualify for fiscal incentives, and 50% to qualify for tax exemptions.

3. Trade-balancing requirements

Trade-balancing requirements (also known as export-import linkage requirements) limit an investor’s imports to a proportion or quantity of its exports. Host States do so notably by requiring that investors generate sufficient foreign exchange earnings with exports in order to cover (in whole or in part) or to exceed their foreign exchange expenses incurred by importing inputs. The aim is either to eliminate any adverse effects on the host State’s balance of payments or overcoming foreign exchange shortages.

> *Example:* An investor intends to build a tractor-producing plant in a host State with the aim of supplying the host State’s domestic market. The investor needs to import various components from its home State and a number of third States. Approval of the plant is conditioned upon the investor paying for these imports with foreign exchange generated by its exports.

4. Export controls or restrictions

Originally developed to stop adversaries from acquiring particular goods or services (such as advanced military equipment), modern export controls and restrictions are frequently contemplated and imposed with a view to preventing technology transfers that might strengthen strategic and commercial rivals. Export restrictions can notably link the quantity of an investor’s authorised exports to that investor’s sales on the host State’s market. The circumvention of export restrictions can constitute a primary motivation for investing abroad.

> *Example:* An investor that manufactures cutting-edge semiconductors in a host State wishes to export its production to a third State. The host State is concerned that if exported to the third State the underlying technology could be reverse-engineered, and production in its own territory undercut. In light of this, the host State bans the investor from selling any of its production (or any components thereof) to the third State.

5. Technology transfer, licensing and/or local R&D requirements

Technology transfer requirements oblige foreign investors to use production or processing techniques that entail superior technology, with a view to the host State acquiring it and diffusing related know-how within its territory. The host State will often compel the investor to enter into a licensing agreement which will stipulate conditions (including royalty caps) for the supply of technological products, proprietary knowledge and/or processes. It may also order the investor to produce technologically advanced components in the host State and/or to conduct R&D in the host State.

> *Example*: An investor wishes to build a computer production facility in order to sell on the domestic (host State) market and to export. The host State requires that the investor transfer the technology underlying its computers components through a licensing agreement as a condition for authorising the investment.

6. Foreign exchange restrictions and/or earning requirements

Foreign exchange restrictions reduce an investor's import capacity by limiting its access to the foreign currency needed to purchase imports, with a view to easing pressures on a host State's balance of payments. Such restrictions may condition an investor's access to foreign exchange upon foreign-exchange inflows attributable to that same investor. They may also oblige an investor to use only the foreign exchange generated by its exports in order to purchase imports.

> *Example*: An investor intends to establish a subsidiary in a host State in order to produce machinery, but will require components to be imported. The host State notifies the investor that in light of its balance-of-payment deficit, the State requires that 50% of the investor's foreign exchange originate from its own exports.

7. Investment localisation requirements

Host States may use performance requirements in an attempt to compel investors engaged in advanced production processes to locate particular activities in specific geographical areas. States do so to benefit areas that are otherwise unable to attract such producers of goods or suppliers of services due to their competitive shortcomings or other economic or social disadvantages. Compelling the localisation of specific investment activities can thus serve as a regional development tool.

> *Example:* An investor is choosing where to establish a production site in a host State. The host State has a program of discretionary grants for this type of operation, but conditions the eligibility for such grants on the investor locating its site in a relatively underdeveloped part of its territory.

8. 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, in instances where prices are lower on its domestic market than on world markets. A host State resorts to domestic sales requirements with a view to guaranteeing availability of specified products on its domestic market.

> *Example:* An investor intends to take over an operating mine. The host State conditions its approval on the investor entering into a production-sharing arrangement whereby half of the mine's production must supply a State-owned enterprise at discounted prices.

9. 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.

> *Example:* An investor decides to expand its microchip manufacturing operations in a host State, which subjects its approval to the investor's commitment that 50% of its production must be exported to a designated region.

B. Why do some States impose performance requirements?

The myriad measures that qualify as performance requirements have been invoked and adopted by States as policy instruments to achieve numerous trade-related objectives. Three broad objectives in particular stand out:

a. First, to maximise the beneficial impacts of FDI on the economy;

b. Second, to bolster, diversify and expand a State's industrial base, notably by introducing new products or processes into the local economy; and

c. Third, to increase the generation of FDI-derived added value.

Many performance requirements aim at improving a State's balance of payments and foreign exchange reserves through the reduction of imports and/or the increase of exports. LCRs/LSRs, EPRs, trade-balancing requirements, and foreign exchange restrictions are examples of performance requirements that directly target imports-exports and the balance of payments.

However, performance requirements may also aim at objectives beyond trade. States may impose performance requirements on foreign investors to achieve social and economic objectives – for example, by using LCRs and LSRs to foster commercial relations between foreign subsidiaries and local suppliers, and by using technology transfer requirements for its domestic economy to absorb foreign know-how.

C. Why are performance requirements usually packaged with incentives?

While States impose performance requirements as standalone mandatory requirements, they also frequently condition the conferral of investment incentives (also referred to as "advantages" or "benefits") upon compliance with performance requirements.

Historically, foreign subsidiaries that operated in host States were owned by or related to parent corporations located in home States where key and advanced production processes took place. In order to persuade foreign investors to relocate operations (and thereby attract inward FDI) in a host State's territory, the latter may resort to investment incentives to increase its attractiveness.

As part of the overall arrangement, host States may impose performance requirements as a *quid pro quo* for its investment incentives, in order to overcome investors' reluctance to relocate their activities due to the associated costs while host States recoup part of their outlays through contributions to their domestic economies. Investment incentives and performance requirements are essential components of the bargaining process between a host State wishing to adopt such measures and a foreign investor weighing whether or not compliance with them is worthwhile.

D. Why do some States seek to prohibit performance requirements in investment treaties?

PRPs in IIAs are broadly designed to achieve two distinct objectives: one trade-related, the other investment-related.

First, on the trade side, PRPs seek to eliminate trade-distorting performance requirements with the aim of: (i) increasing foreign market access for foreign investors and home-State exports; (ii) preventing the compulsory export of production by investors in a host State; and (iii) eliminating host-State import restrictions on investors.

Second, on the investment side, PRPs seek to eliminate performance requirements that hinder entrepreneurial autonomy and side-line investors' best judgment and business-as-usual decision-making in exchange for politically-motivated objectives.

It is the convergence of MNCs' trade and investment activities that prompted a similar convergence within State trade and investment policies, including in the form of performance requirements and their prohibition in IIAs.

Indeed, the operations of MNCs blurred the line between trade and investment, notably as a result of MNCs scattering their operations in different countries in order to optimise costs and benefits. In some instances, MNCs engage in transactions that fall within trade policies of States (e.g., the cross-border sales of goods or services). In other instances, MNCs opt for cross-border investment (e.g., the establishing of production or sales facilities within different States), resulting in transactions that fall within investment policies of States.

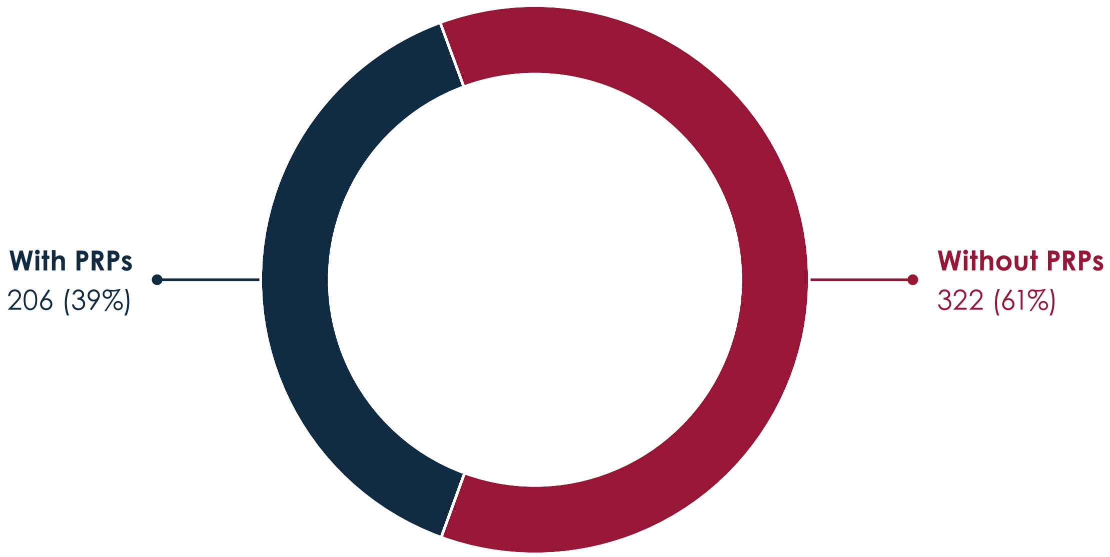
Performance requirements were initially addressed as a trade-related issue from the vantage point of *home* States, which were weighing the potential export gains from increased outward FDI that import production output from their home States. Specifically, home States sought to maximise the cross-border operational freedom of their MNCs so that subsidiaries abroad would more likely do business with parent entities or other corporations also located in the same home States (e.g., as suppliers of product components or accessories or as service providers). In other words, PRPs would have the effect of increasing exports originating in home States and stimulating outward-oriented domestic production in home States.

E. What proportion of investment treaties prohibit performance requirements?

This study's empirical analysis reveals that, while there is considerable variation on the general prevalence of PRPs among IIAs, those that do contain them tend to employ a limited number of PRP core disciplines originally developed in a few influential treaties (including, notably, the NAFTA). Such trends are evident in the body of IIAs sampled in this study, and likely reflect the evolving policy imperatives as well as treaty-making practices of the relevant States over time.

Among the 528 IIAs entered into by this study's six representative States, 206 include treaty provisions which regulate performance requirements one way or another. These include BITs with PRPs, and TIPs with PRPs among their investment provisions (e.g., in an investment chapter of a trade agreement). Among the latter category are a subset of recent treaties (e.g., the CETA; the RCEP) with PRPs in separate investment chapters, but which carve out those provisions from their ISDS chapter or which have no ISDS chapter at all.

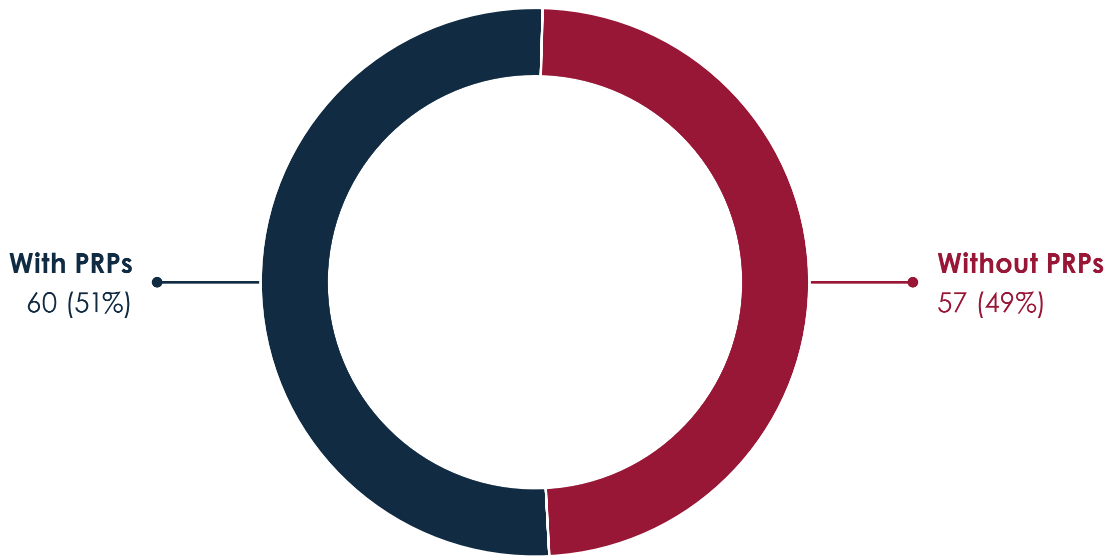
Sampled IIAs with/out PRPs



These figures can be broken down by reference to the IIAs of each of the six surveyed States:

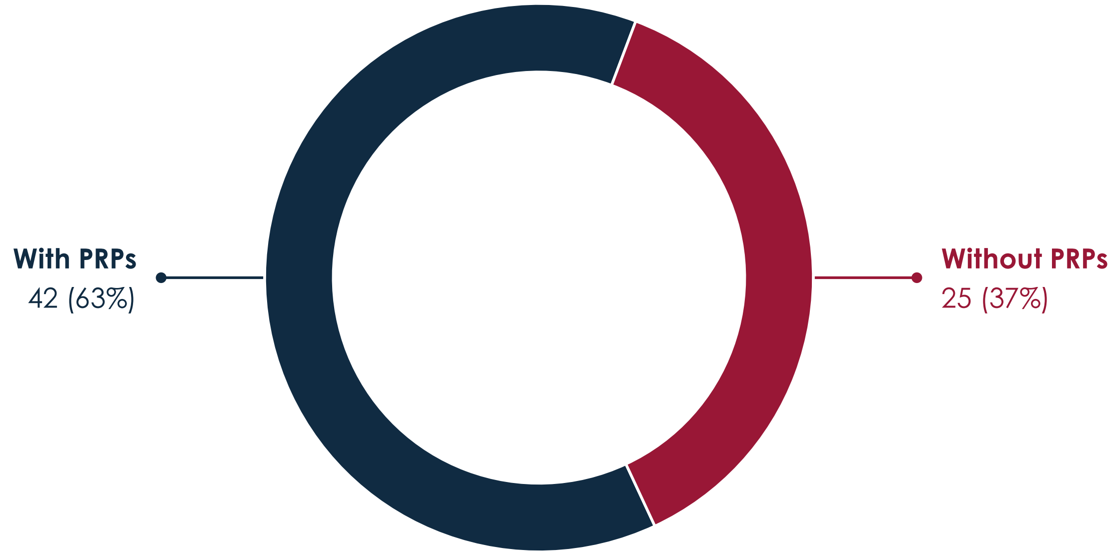
a. The U.S.: 60 of its 117 IIAs contain PRPs, i.e., an almost 50/50 split;

U.S. IIAs with/out PRPs



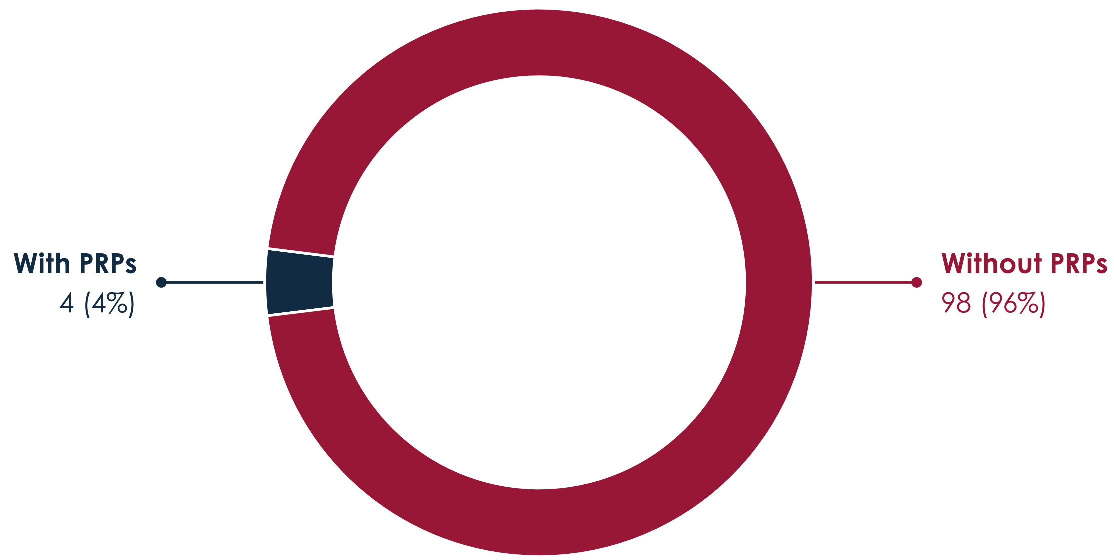
b. Canada: 42 of its 67 IIAs contain PRPs, i.e., almost twice as many IIAs with PRPs than those without PRPs;

Canada IIAs with/out PRPs



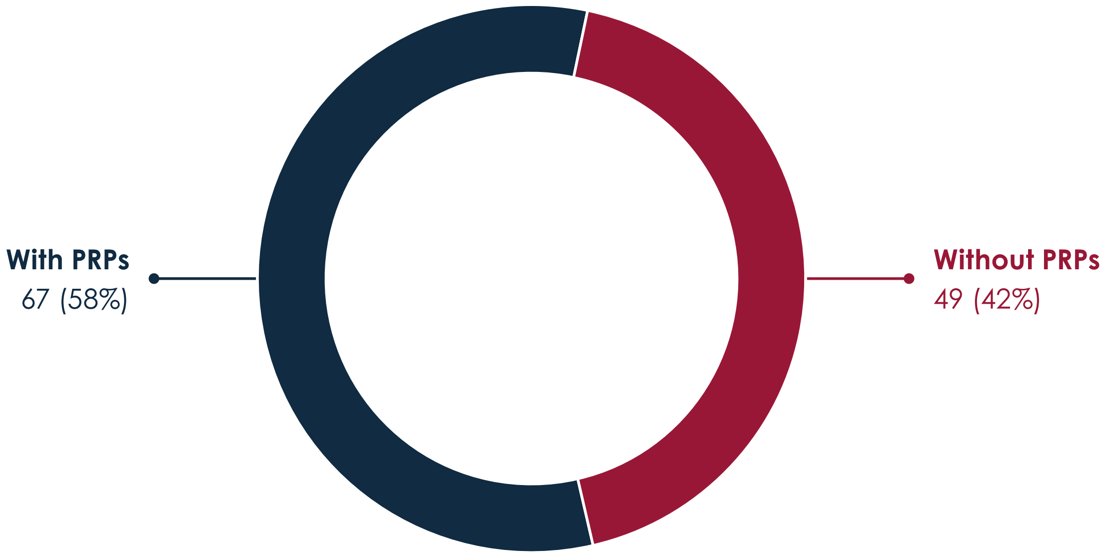
c. India: somewhat of a statistical outlier, with only 4 of its 102 IIAs having PRPs;

Indian IIAs with/out PRPs



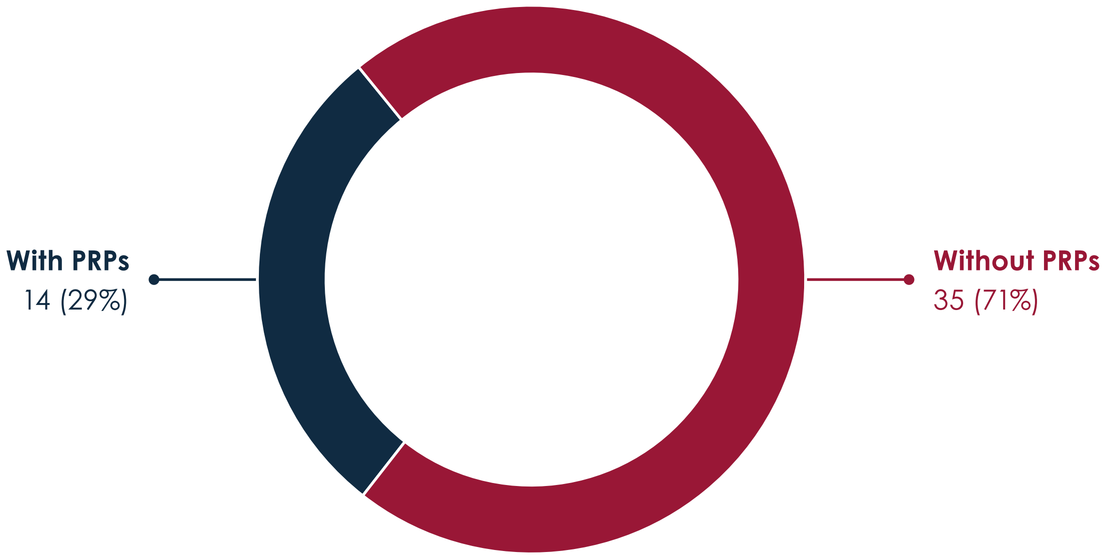
d. France: a slim majority – 67 – of its 116 IIAs contain PRPs;

French IIAs with/out PRPs



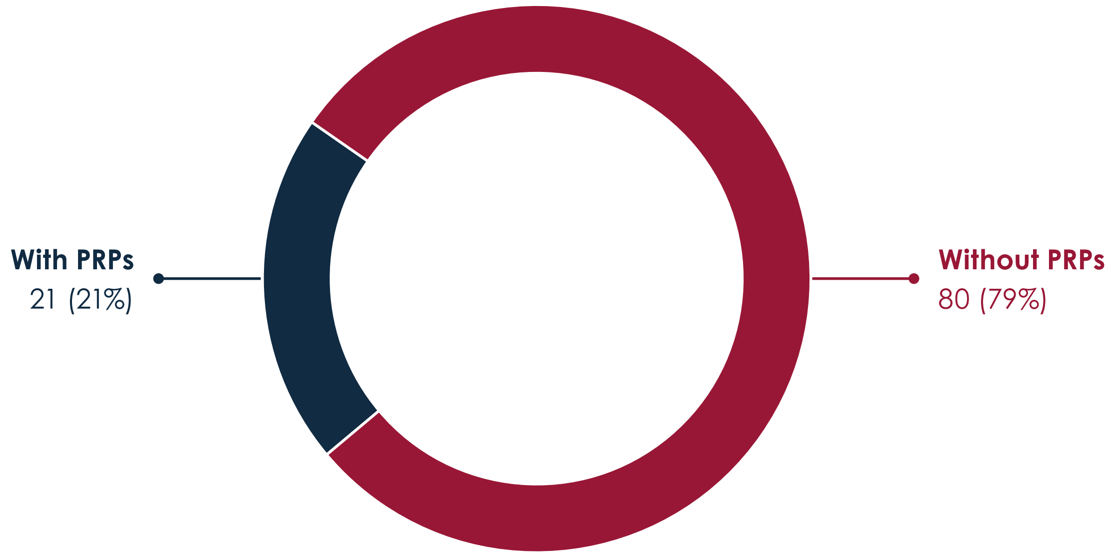
e. Australia: close to a third – 14 – of its 49 IIAs have PRPs;

Australian IIAs with/out PRPs



f. Chile: 21 of its 101 IIAs have PRPs, i.e., almost four times as many IIAs without PRPs than those with PRPs;

Chilean IIAs with/out PRPs



These figures illustrate that while PRPs do not feature in all IIAs, they do appear in a non-negligible number of IIAs. There is no single explanation for such variation, which instead likely reflects the interplay between a number of different factors over time, such as:

a. States' evolving approaches to foreign trade and investment;

b. States' evolving domestic economic and development goals;

c. States' evolving diplomatic relations and relative bargaining power vis-à-vis its IIA counterparties; and

d. The 'state of the art' and global trends on performance requirements and their prohibitions at a given point in time, and States' access to the relevant policy and treaty drafting know-how.

V. How do investment treaties prohibit mandatory performance requirements?

Virtually all of those sampled IIAs which contain PRPs employ, as a starting point, one of the following three main drafting approaches, each of which is discussed in more detail in subsections A, B, and C below:

a. Open-ended PRPs with broad indications of what is prohibited (characteristic of first-generation U.S. BITs and French BITs);

b. PRPs consisting of detailed lists of prohibited mandatory performance requirements (mainstreamed by NAFTA Article 1106); and

c. PRPs incorporating or otherwise "reaffirming" the TRIMs Agreement's non-exhaustive "Illustrative List" approach.

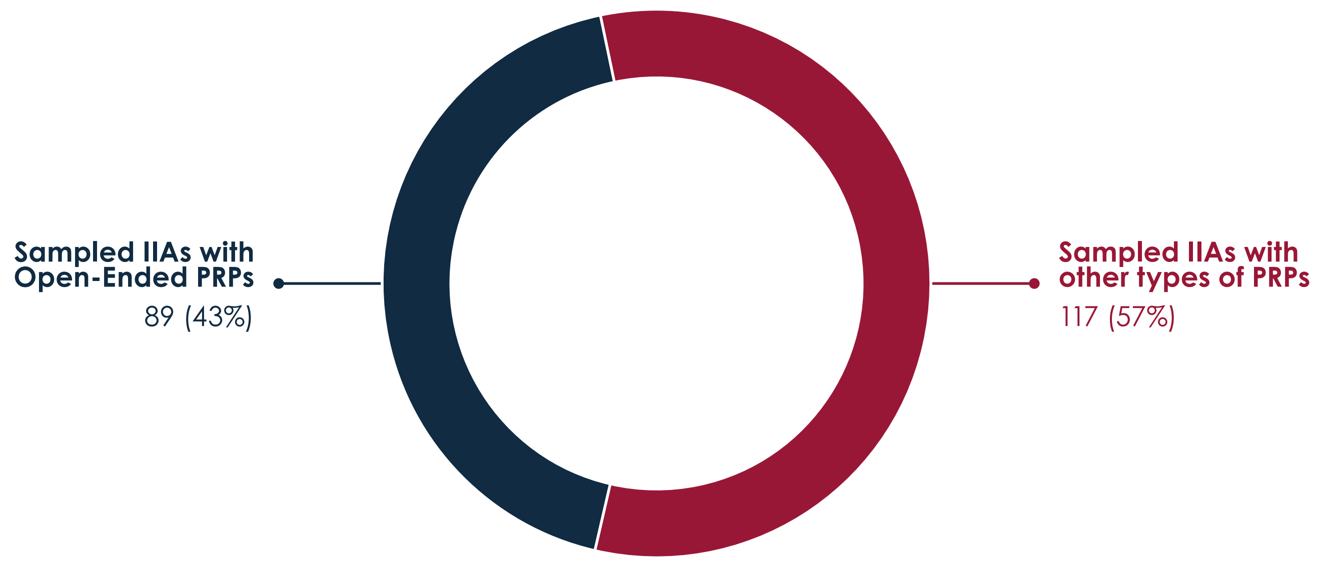
Subsection D will discuss separately the treatment of advantage-conditioning performance requirements under each of these approaches.

A. Open-ended PRPs in investment treaties

BITs signed notably by the U.S. and France prohibit performance requirements in an open-ended fashion by not limiting the outer limits of prohibited measures. India signed only one BIT that comprises a PRP. This PRP is of the open-ended-type. Article 4(4) of the India - Kuwait BIT (2001) provides that investments must not be subject to "additional performance requirements" without specifying what types of measures these additional performance requirements are intended to capture.

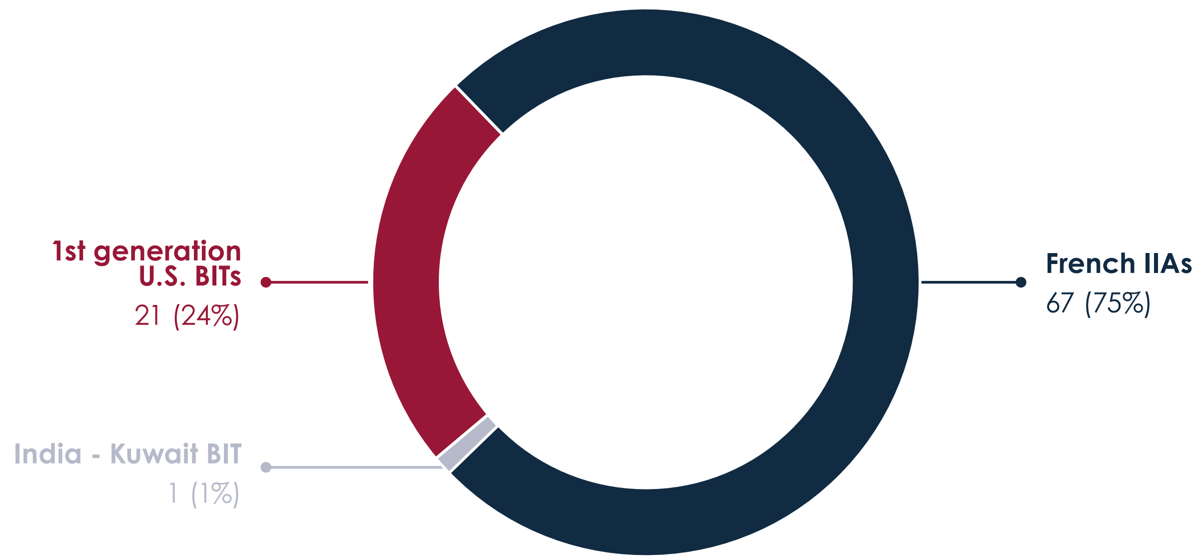
Among the 206 surveyed IIAs with PRPs, just over 40% of the sample size are open-ended PRPs:

Sampled IIAs with/out Open-Ended PRPs



In turn, of those 89 surveyed IIAs with open-ended PRPs, the vast majority (approx. 75%) are found in French BITs, and the remainder in first-generation U.S. BITs:

Sampled IIAs with Open-Ended PRPs



PRPs in first-generation U.S. BITs use the broad and undefined expression "performance requirements". They are discussed in greater detail in Annex A.

Similar to the approach in U.S. BITs, PRPs in French BITs use open-ended language intended to cover other measures having similar effects to the explicitly described performance requirements. They are discussed in greater detail in Annex A.

B. The prohibition of detailed lists of mandatory performance requirements in investment treaties

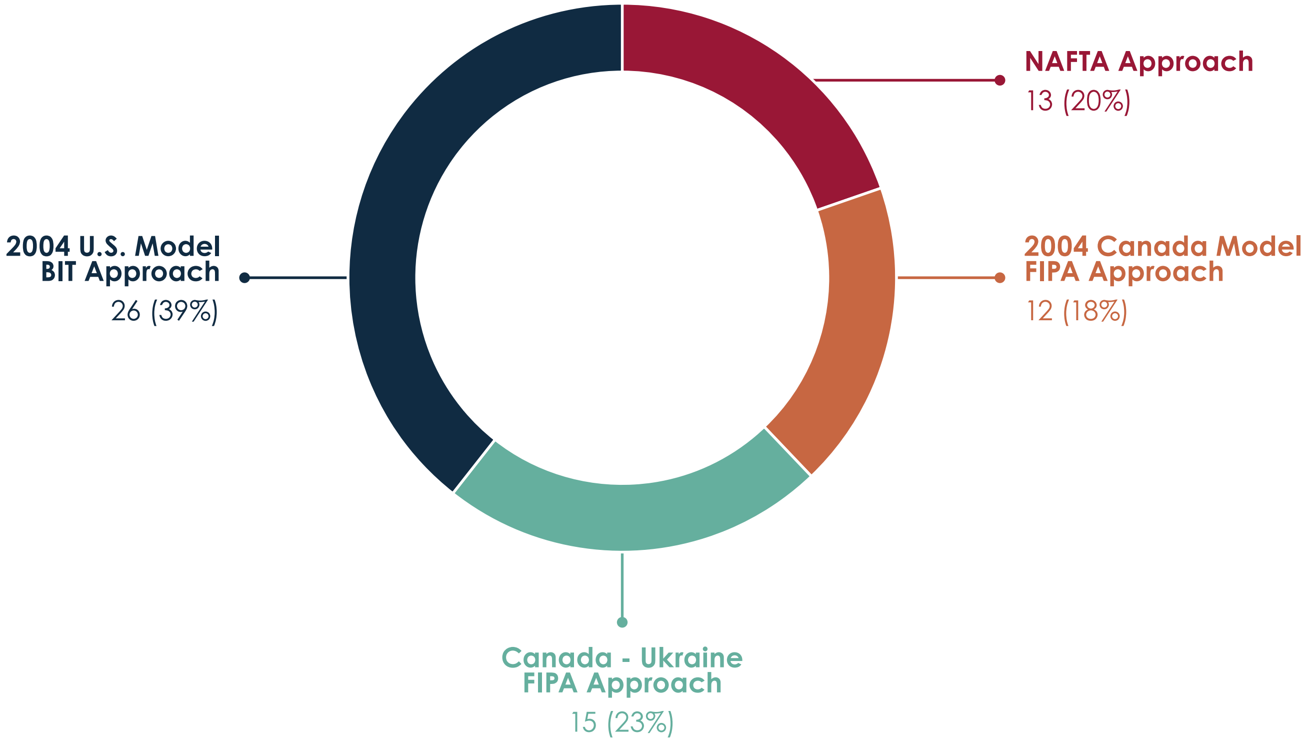
Beginning in the 1980s and following an upward trend throughout the 1990s and 2000s, a growing number of States began setting out their PRP obligations, and the limits to these obligations, in greater detail than in open-ended PRPs. Canada and the United States signed the CUSFTA and its PRP (Article 1603) in 1987, signalling a shift toward this more detailed approach to drafting PRPs. Canada and the United States repeated this approach in the NAFTA (the successor agreement to the CUSFTA) and its PRP (Article 1106) in 1992. Other States followed suit and progressively moved away from imprecise and overly broad PRPs, resorting instead to more detailed and precise PRPs. This approach prevailed from the 1990s onward. This section analyses the great majority of PRPs within surveyed IIAs which are very close to the standard and wording set by NAFTA Article 1106.

Article 1106 of the NAFTA 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. The lacklustre progress achieved during the negotiations on TRIMs influenced NAFTA Article 1106. NAFTA Article 1106 in turn greatly influenced the 1994 U.S. Model BIT, the Canada - Ukraine FIPA (1994),[7] the 2004 U.S. Model BIT and the 2004 Canada Model FIPA, as well as the 2012 U.S. Model BIT, the 2012 Canada Model FIPA and the 2020 USMCA (the successor agreement to the NAFTA) and its PRP (Article 14.10). All eight instruments provide for detailed and exhaustive lists of prohibited performance requirements. The NAFTA in particular influenced the drafting of a large number of subsequent PRPs in other IIAs and generated the great majority of the publicly available arbitral awards dealing with PRPs.

The Canada - Ukraine FIPA (1994) approach, the 2004 U.S. Model BIT approach, the 2004 Canada Model FIPA approach, the 2012 Canada Model FIPA all closely follow the NAFTA approach. This near-uniformity reinforces the need for a systemic understanding of PRPs within IIAs, as well as the need to remain vigilant in respect of variations specific to any given PRP.

7 The Canada - Ukraine FIPA is the first IIA that Canada signed following the NAFTA and set the tone for numerous subsequent Canadian FIPAs.

IIAs with Detailed List PRPs



NAFTA Article 1106 signalled a more elaborate and complex approach to PRPs.[8] It occupies central stage among PRPs for the added reason that it has been the most-litigated PRP (see Annex D for more details).

Further, NAFTA Article 1106 greatly influenced (i) the PRPs in Article 14.10 of the USMCA, which superseded the NAFTA upon the entry into force of the USMCA Protocol on 1 July 2020; and (ii) those in Article 9.10 of the CPTPP. Article 14.10 of the USMCA and Article 9.10 of the CPTPP are themselves very similar to one another.

NAFTA Article 1106(1) prohibits the following list of mandatory performance requirements: EPRs and export restrictions; LCRs; LRSs; trade-balancing requirements; domestic sales restrictions linked to exports or foreign exchange earnings; technology transfer requirements; and product mandating requirements. PRPs in surveyed IIAs that closely follow the NAFTA approach are set out in Annex A.

Both the USMCA and the CPTPP prohibit two other categories of mandatory performance requirements additional to those enumerated by NAFTA Article 1106, namely, non-judicial requirements to adopt a given rate or amount of royalty, or a given duration, in license contracts. In that respect, they both closely follow Article 8(1) of the 2012 U.S. Model BIT (which is itself almost exactly the same as Article 8(1) of the 2004 U.S. Model BIT).[9]

As detailed in Annex A, there is a widespread recurrence of a limited number of treaty drafting patterns among a great number of the surveyed IIAs which replicate this approach, as they reproduce either 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. These model and treaty PRPs also widely influenced PRPs of IIAs between States other than Canada or the U.S.[10]

8 The NAFTA was negotiated and signed at the same time as GATT Uruguay Round negotiations on TRIMs were taking place. GATT negotiations on TRIMs influenced NAFTA Article 1106. NAFTA Article 1106 in turn greatly influenced the 1994 U.S. Model BIT, the Canada - Ukraine FIPA, 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 PRPs.

9 One difference with the 2004 U.S. Model BIT is that the 2012 U.S. Model BIT further prohibits, in Article 8(1)(h), requirements to purchase, use, or accord a preference to a "technology of the [host State] Party or of persons of the [host State] Party," as well as requirements which prevent from purchasing, using or granting a preference to a particular technology. Article 14.10(1)(h) of the USMCA and Article 9.10(1)(h) of the CPTPP (2015) reproduce Article 8(1)(h) of the 2012 U.S. Model BIT. However, they also go a step farther than the 2012 U.S. Model BIT and prohibit non-judicial requirements to adopt a given rate or amount of royalty, or a given duration, in license contracts (Article 14.10(1)(i) of the USMCA; Article 9.10(1)(i) of the CPTPP).

10 The 2012 U.S. Model BIT, the CPTPP and the USMCA did not influence the sampled IIAs that have been reviewed for this part.

C. Investment treaties that prohibit mandatory performance requirements by incorporating the TRIMs Agreement

1. Backgrounder on the ties between the TRIMs Agreement and investment

The GATT 1947 does not include rules that are explicitly applicable to performance requirements. Back in the 1970s and 1980s, some States began viewing performance requirements as trade distortions contrary to the spirit, if not the letter of the GATT 1947. The outcomes of a few GATT dispute settlement cases indicated that the GATT 1947 applied only to a limited subset of performance requirements.[11] These unsatisfactory outcomes fuelled the view that existing multilateral trade disciplines were insufficient to curb the use of performance requirements.

In March 1981, the United States announced its intention of negotiating new multilateral disciplines on performance requirements in the GATT forum. A large number of developing countries (including India) opposed addressing performance requirements within the GATT. They saw the disciplining of performance requirements as an assault on their sovereignty over investment matters. They further insisted on situating performance requirements within the broader context of social and economic policy objectives and development. GATT disciplines should apply only to measures that are explicitly restrictive of trade in goods, and since performance requirements focus on production and investment while affecting trade only residually and marginally, they should not fall within the scope of the GATT 1947.

Investment nevertheless made its way into the GATT Uruguay Round negotiating mandate in July 1986, but only insofar as GATT Members considered, upon examining the operation of GATT Articles with regard to the trade restrictive and distorting effects of investment measures, that coming up with further disciplines would be necessary to avoid such adverse effects on trade.[12]

GATT Member countries thus made sure that the GATT Uruguay Round of negotiations prioritised further analysis of the applicability of existing GATT rules to performance requirements, and that negotiating additional disciplines was optional and limited only to the potentially adverse trade effects of what subsequently became known as TRIMs. The lack of evidence regarding the adverse trade effects of performance requirements constituted a stumbling block to achieving comprehensive multilateral disciplines on performance requirements.

Recasting performance requirements as trade-driven measures using the TRIMs concept was made necessary by the trade-defined multilateral negotiating platform offered by the GATT. 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.

The separation between performance requirements directly related to trade and those indirectly related to trade rested on inconclusive empirical assessments of their impacts on trade. Such a distinction therefore provided shaky grounds for defining the outer reaches of, or the differences between, TRIMs and performance requirements.

It is apparent that the notion of TRIMs as enshrined in what became the TRIMs Agreement reflects a political compromise rather than a settled understanding of performance requirements related to trade. As GATT Members predictably failed in finding an operational definition for inherently trade distorting measures, they instead opted for illustrative lists of measures which had a direct and significant restrictive or distorting effect on trade, and which had a direct link to existing GATT disciplines.

2. How does the TRIMs Agreement prohibit mandatory performance requirements?

The TRIMs Agreement makes no attempt at defining TRIMs. The notion of trade-related investment measures as enshrined in the TRIMs Agreement is structured around illustrative lists of performance requirements that cause trade distorting effects. The Agreement explicitly restricts its application to investment measures related to trade in goods, thereby excluding any application to trade in services. It essentially reaffirms and extends GATT Articles III (National Treatment) and XI (General Elimination of Quantitative Restrictions) to TRIMs, such that a State may impose performance requirements so long as it does not differentiate between domestic and imported goods.[13]

Articles 1 and 2 of the TRIMs Agreement's Illustrative List explicitly prohibit identified TRIMs, namely: LCRs, trade-balancing requirements, foreign exchange restrictions, export restrictions and import restrictions:

a. Article 1(a) prohibits three variations of LCRs/LSRs, namely, those that (i) impose the purchase or use of specific domestic products; (ii) require the purchase or use of a specified volume or value of domestic products; and (iii) mandate that a specified proportion of an enterprise's local production be of a domestic origin or source.

b. Article 1(b) prohibits trade-balancing requirements that limit an enterprise's purchase or use of imported products by reference to the volume or value of its export of local products.

c. Article 2(a) prohibits trade-balancing requirements that restrict imports to an amount based on the volume or value of local production exported by an enterprise.

d. Article 2(b) prohibits foreign exchange access restrictions that consist of measures which restrict an enterprise's access to foreign exchange by reference to its foreign exchange inflows.

11 See, e.g., GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, paras. 1.1, 1.3, 1.4, 2.2-2.4, 2.10-2.11, 5.3-5.11, 5.18, 5.20.

12 GATT, Ministerial Declaration on the Uruguay Round, Multilateral Trade Negotiations (20 September 1986), MIN DEC, p. 8.

13 Article 3 of the TRIMs Agreement further provides that GATT exceptions can apply to validate TRIMs that would otherwise violate it. Most notably, (i) GATT Article III:8 authorises TRIMs in the context of government procurement; and (ii) GATT Article XX provides a number of exceptions permitting TRIMs.

Article 2(c) prohibits three types of restrictions on an enterprise's exports or sale for exports, namely, (i) restrictions on the export of specified products; (ii) export restrictions based on the volume or value of products; and (iii) export restrictions based on a proportion of volume or value of that enterprise's local production.

These performance requirements, as well as general import restrictions, are explicitly prohibited in both mandatory and advantage-conditioning forms. However, performance requirements enumerated in the TRIMs Agreement may be adopted if they do not discriminate between imported and domestic goods and if they do not amount to quantitative restrictions.

The disciplines of the TRIMs Agreement thus cover only a limited subset of performance requirements. However, the Illustrative List to the TRIMs Agreement is not exhaustive, and other measures may engage the agreement insofar as they violate the broader underlying obligations of GATT Articles III or XI.

3. How do some PRPs in investment treaties incorporate the TRIMs Agreement's prohibition of mandatory performance requirements?

In order to enforce their rights under the TRIMs Agreement, Article 8 of the TRIMs Agreement states that Members can have recourse to the dispute settlement system of the WTO, as embodied in the Dispute Settlement Understanding. This dispute settlement mechanism operates between States and is therefore not available to investors. One roundabout way of making the disciplines of the TRIMs Agreement directly accessible to investors is to incorporate the TRIMs Agreement in an IIA and subjecting its disciplines to ISDS.

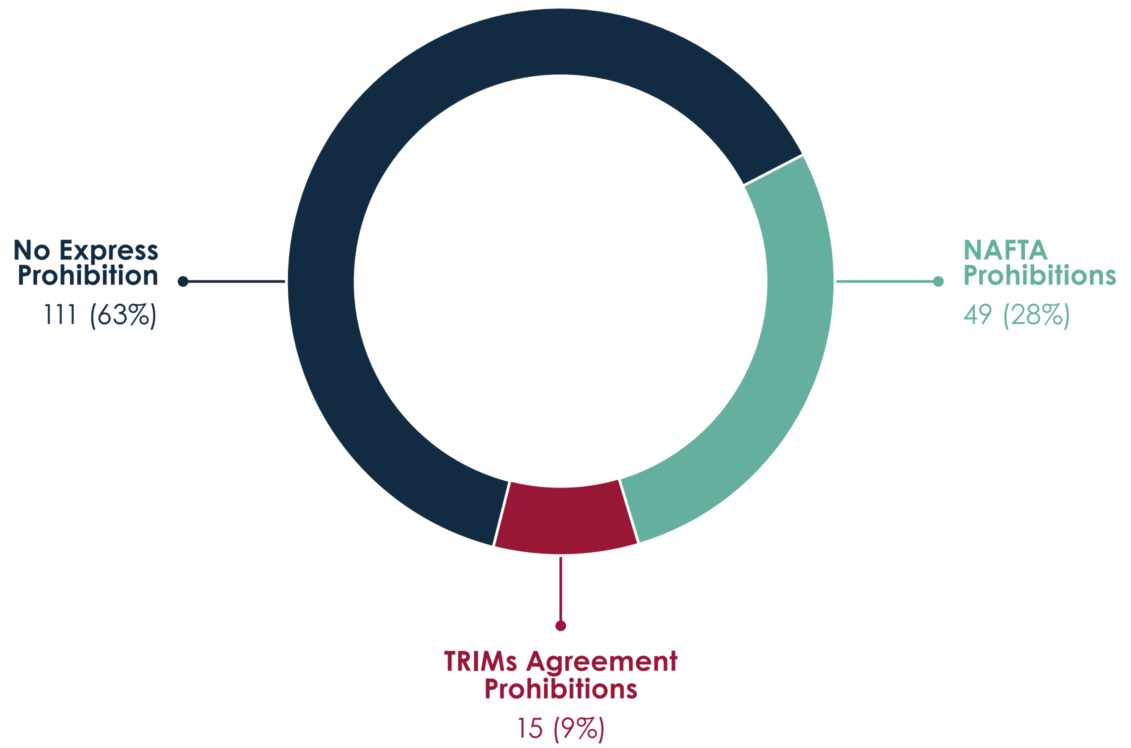
To incorporate State Parties' obligations under the TRIMs Agreement into an IIA offers a low-hanging fruit for States that are negotiating an IIA. For the most part, States that negotiate IIAs are already WTO Members and already have to comply with obligations under the TRIMs Agreement. They are already familiar with the scope and reach of these obligations. Moreover, these obligations are less comprehensive and restrictive of regulatory space than are the obligations that detailed and standalone PRPs in IIAs impose upon States. However, incorporating the TRIMs Agreement into an IIA may raise more complications and intricacies than meets the eye. The practice of incorporating the TRIMs Agreement into IIAs is surveyed and discussed in greater detail in Annex A, as are some of the main the complications and intricacies.

VI. How do investment treaties prohibit advantages that are conditioned upon complying with performance requirements?

As alluded to earlier, host States may seek to impose performance requirements as a *quid pro quo*, whereby a foreign investor's compliance with them will lead to investment incentives, benefits or advantages from the host State.

Compared with performance requirements as standalone mandatory requirements, such advantage-conditioning performance requirements are designed to encourage foreign investors to relocate to or otherwise operate in the host State by offsetting the economic loss to an investor that may arise out of complying with performance requirements.

Approach to Advantage-Conditioning IIAs



A. PRPs which remain silent in respect of advantage-conditioning performance requirements

A great number of PRPs in IIAs do not explicitly address advantage-conditioning performance requirements. In light of the frequent presence of advantages alongside performance requirements, such silence has one of two possible implications:

a. 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".

b. Second, and alternatively, such performance requirements *are prohibited* in spite of the absence of reference to advantages, especially where a PRP refers to the establishment, expansion, operation, conduct or maintenance of investments.[14]

PRPs that do not explicitly address advantage-conditioning performance requirements are surveyed and discussed in greater detail in Annex B.

B. PRPs which incorporate the TRIMs Agreement prohibit advantage-conditioning performance requirements unless specified otherwise

1. How do the TRIMs Agreement and SCM Agreement prohibit advantage-conditioning performance requirements?

The TRIMs Agreement specifically prohibits conditioning the receipt of an advantage on compliance with enumerated performance requirements, albeit in respect of goods only. 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." The TRIMs Agreement falls short of explicitly prohibiting advantage-conditioning EPRs,[15] its disciplines having been confined to export restrictions.

2. How do PRPs in certain investment treaties incorporate the TRIMs Agreement's prohibition of advantage-conditioning performance requirements?

PRPs incorporating the TRIMs Agreement and/or its Illustrative List in their entirety necessarily incorporate the latter's prohibition against advantage-conditioning performance requirements. Such PRPs are surveyed and discussed in greater detail in Annex B.

C. PRPs which explicitly exclude advantage-conditioning performance requirements from their scope

A number of PRPs in U.S. BITs clearly exempt their application to at least certain advantage-conditioning performance requirements. Such PRPs are surveyed and discussed in Annex B.

3. Replicating the NAFTA approach: the targeted disciplining of advantage-conditioning performance requirements by PRPs in IIAs

NAFTA Article 1106(3) prohibits a lesser number of advantage-conditioning performance requirements compared to prohibited mandatory performance requirements: (i) LCRs; (ii) LSRs in respect of goods; (iii) trade-balancing requirements; and (iv) domestic sales restrictions. These are identically worded as four of the seven *mandatory* performance requirements in NAFTA Article 1106(1). Accordingly, EPRs and export restrictions, technology transfer requirements, and product mandating requirements can lawfully condition the receipt of an advantage. The widespread replication of the NAFTA approach to advantage-conditioning performance requirements is surveyed in Annex B.

14 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 a PRP uses such wordings, and where it does not restrict its applicability to specific activities of an investment that would not encompass advantage-conditioning performance requirements.

15 The WTO Agreement on Subsidies and Countervailing Measures, 15 April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14 ("SCM Agreement") prohibits EPRs.

VII. What are the main options to better calibrate the scope and coverage of PRPs in investment treaties?

The analysis of IIAs sampled for this study shows that States have resorted to a variety of intricate adjustments, exceptions and carve-outs in order to fine-tune the scope of their PRPs.

The repeated use of a limited number of archetypal PRPs (including those developed by Canada and the U.S. in their BITs and FTAs such as the NAFTA and its successor agreement the USMCA) suggests that adopting a holistic approach to understanding PRPs would be most beneficial when drafting a PRP as part of IIA negotiations or when interpreting and applying a PRP as part of ISDS proceedings.

The IIAs surveyed in this part further reinforce the findings that: (i) PRPs in IIAs have reached a level of sophistication and complexity that extends far beyond WTO rules applicable to performance requirements; and (ii) the bulk of rules applicable to performance requirements have emerged from IIAs, outside the WTO forum.

The IIAs surveyed in this part further demonstrate that ongoing developments regarding performance requirements will continue to arise outside of the WTO, at the bilateral and regional levels. Indeed, many States continue to sign IIAs with elaborate PRPs. This area of treaty law-making will continue to generate new developments regarding performance requirements, through the signing of additional IIAs with PRPs in the future and through the settlement of disputes that may arise regarding these PRPs in the future.

A. Tailoring the investment coverage of PRPs in IIAs

1. PRPs applicable to all investments

A large number of surveyed IIAs reproduce the approach of NAFTA Articles 1106(1) and (3)[16] which provide that their prohibitions of mandatory and advantage-conditioning performance requirements apply to investments by both investors of a Party and investors of a non-Party. The large number of surveyed IIAs that similarly extend their PRPs to non-Party investors are surveyed in Annex C.

Rendering a PRP applicable to *all* investments and investors can further objectives beyond investor protection:

a. First, the State more likely to act as a home State in a cross-border investment relationship, wishing to promote its exports, may benefit from a PRP that minimises import-export restrictions that a host State can impose on *any* investor (either domestic, from the home-State or from a third State).[17]

b. Second, it avoids covered investors and investments being placed at a disadvantage, as it would be impossible for host States to offer to any investor advantages in exchange for compliance. To the contrary, if a PRP were applicable only to covered investors and investments, nothing would prevent a host State from making compliance with advantage-conditioning performance requirements profitable for a non-covered investor or investment.

16 Article 8(1) and 8(2) of the 2004 U.S. Model BIT, Articles 7(1) and 7(3) of the 2004 Canada Model FIPA, Article 8(1) and 8(2) of the 2012 U.S. Model BIT and Article 9(1) and 9(3) of the 2012 Canada Model FIPA opt for the same approach as that of the NAFTA.

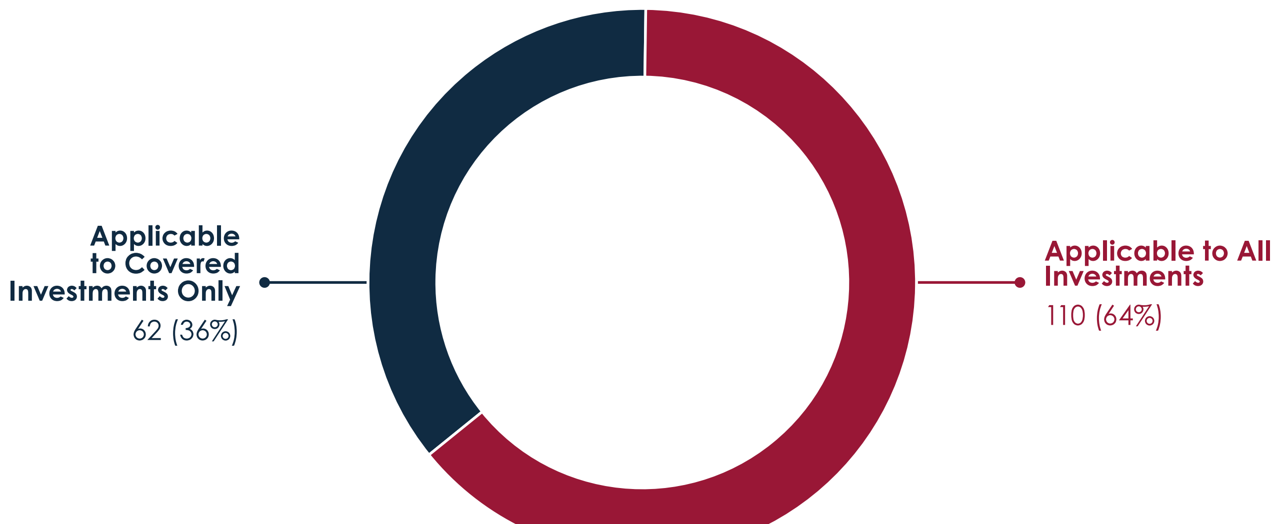
17 To illustrate: unhindered investors in the host State Party (for example, State B), whether bearing the nationality of the host State (State B), of the home State Party (for example, State A) or of a third non-Party State (for example, State C), may elect to import goods or services from home State Party A if guaranteed freedom of choice thanks to the PRP's broad application within the IIA entered into by State A and State B. The outcome of such a scenario would be an increase in the exports of home State Party A.

2. PRPs applicable only to covered investments and investors

By contrast, a host State may prefer to retain greater discretion to impose performance requirements. One way of achieving this is to restrict the applicability of a PRP to covered investors and investments, and then to narrow the scope of covered investors and investments. For example, Article V(2) of the Canada - Ukraine FIPA (1994) applies to "an investment," which is specifically defined under its Article 1(f) as those made by an investor of one State Party in the territory of another State Party, thereby excluding domestic investors or investors from a third State. The large number of surveyed IIAs that similarly restrict their PRPs to covered investors and investments are set out in Annex C.

IIAs surveyed in this section show a roughly two-thirds/one-third split in favour of rendering their PRPs applicable to all investments (110 IIAs) versus covered investments and investors only (62 IIAs).

Investment Coverage of PRPs in Sampled IIAs



B. Treaty provisions aimed at ensuring the continued lawfulness of specific types of performance requirements under IIAs

1. "Clarifying" provisions

In an attempt to further reign in the "catch-all" risk that PRPs pose to the extent of a State's regulatory activity in the economic sector, IIAs frequently stipulate that specific types of performance requirements (whether mandatory or advantage-conditioning) do *not* violate their respective PRPs. A large number of the surveyed IIAs replicate NAFTA Article 1106(4) and ensure that their State Parties can impose the following advantage-conditioning performance requirements: local R&D requirements; local employment and training requirements; investment localisation requirements; service supply requirements and construction or expansion requirements.

Multiple surveyed IIAs contain a clarification akin to NAFTA Article 1106(2) which states that a requirement to use a technology to meet generally applicable health, safety or environmental requirements does not violate the prohibition against technology transfer requirements.

Surveyed IIAs which include such clarifying provisions are discussed in Annex C.

2. Preserving the right to impose some technology transfer requirements

Multiple surveyed IIAs have adopted the approach of NAFTA Article 1106(1)(f) or a modified version of it. NAFTA Article 1106(1)(f), while prohibiting technology transfer requirements, also provides instances where they are permissible, namely when they seek (i) to remedy an alleged violation of competition laws; or (ii) to induce behaviour not inconsistent with the NAFTA. The provisions of surveyed IIAs that mirror NAFTA Article 1106(1)(f) are set out in Annex C.

3. Excluding eligibility requirements for export promotion and foreign aid programs

A great many IIAs provide that many prongs of their prohibitions of mandatory and advantage-conditioning performance requirements do not apply to the eligibility for export promotion and foreign aid programmes. In doing so, they replicate the approach set out in NAFTA Article 1108(8)(a) which provides that the prohibition of mandatory EPRs, LCRs and LSRs,[18] as well as the prohibition of advantage-conditioning LCRs and LSRs,[19] "do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes".[20] The surveyed IIAs which reproduce this exception are discussed in Annex C.

18 See NAFTA Articles 1106(1)(a), (b) and (c).

19 See NAFTA Articles 1106(3)(a) and (b).

20 This exception is identically reproduced in Article 8(3)(d) of the 2004 U.S. Model BIT, Article 8(3)(d) of the 2012 U.S. Model BIT and Article 9(6)(a) of the 2012 Canada Model FIPA.

4. Excluding eligibility requirements for preferential tariffs or quotas

Similarly, a great many IIAs provide that many prongs of their prohibitions of advantage-conditioning performance requirements do not apply to conditions for securing preferential tariffs or preferential quotas. This exception was similarly mainstreamed by the NAFTA which at Article 1108(8)(c) renders inapplicable the prohibition of advantage-conditioning LCRs and LSRs[21] to the content of goods necessary to qualify for preferential tariffs or preferential quotas. The surveyed IIAs which reproduce this exception are set out in Annex C.

5. GATT Article XX-like exceptions

Multiple surveyed IIAs have followed in the footsteps of NAFTA Article 1106(6) which itself largely draws from the provisions of GATT Article XX. GATT Article XX shields certain measures from otherwise breaching WTO disciplines on the basis that they are necessary to achieve one of the specified domestic policy purposes. Similarly, NAFTA Article 1106(6) provides that State Parties may enact mandatory and advantage-conditioning LCRs and LSRs if: (i) such measures are not applied in an arbitrary or unjustifiable manner; (ii) they do not constitute a disguised restriction on international trade or investment; and (iii) they are "necessary" for one of the following purposes:

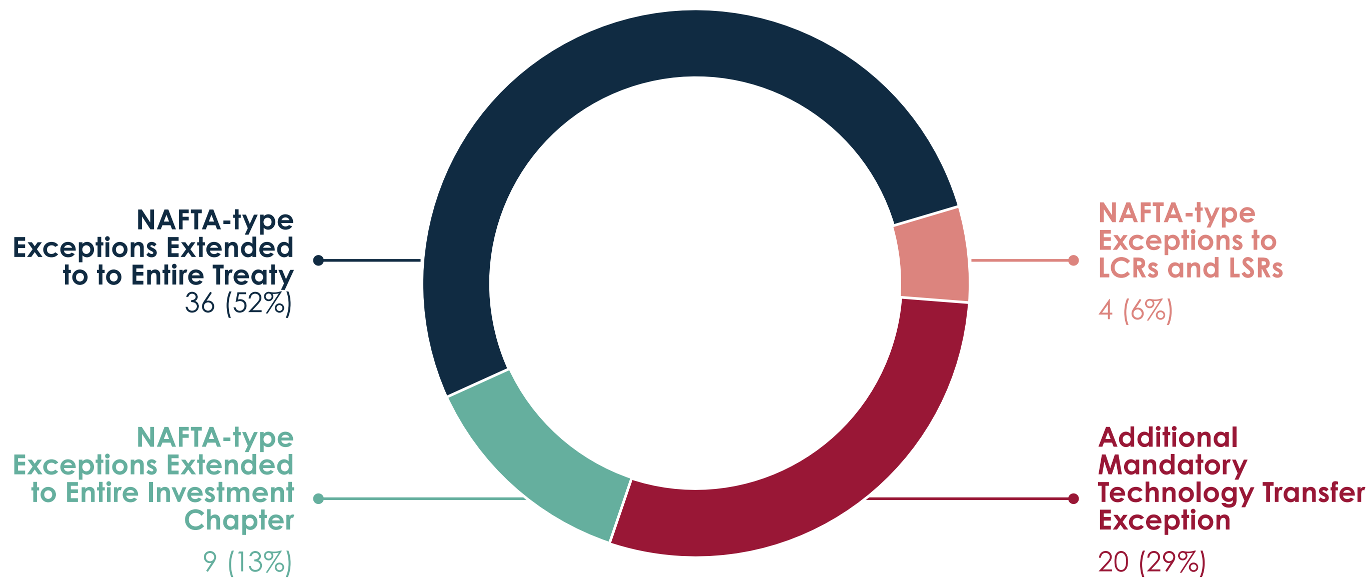
"(a) ... to secure compliance with laws and regulations that are not inconsistent with the provisions of [the NAFTA];

(b) ... to protect human, animal or plant life or health; or

(c) ... for the conservation of living or non-living exhaustible natural resources."

Surveyed IIAs that have adapted this GATT Article XX-type exception for their PRPs are discussed in Annex C. Two thirds of these IIAs have extended this exception to either their respective investment chapters or the entire treaty altogether. A sizeable minority have opted for a much more modest expansion to also include mandatory technology transfers, and a much smaller number still have essentially reproduced NAFTA Article 1106(6).

GATT Art. XX Exception among Sampled IIAs



6. Tailored exceptions to PRPs that address various issues of national or regional concern

Many of the surveyed IIAs include a wide array of exceptions to their PRPs that aim to ensure that compliance with their PRPs does not impede the adoption of measures aimed at achieving any number of the following objectives among others:

(a) Preserving performance requirements necessary to comply with EU rules;

(b) Maintaining public order,

(c) Protecting morals;

(d) Protecting life or health;

(e) conserving exhaustible natural resources;

(f) Protecting national treasures of artistic, historic or archaeological value;

(g) Ensuring access to products in general or local short supply.

The provisions of surveyed IIAs that include such exceptions are set out in Annex C.

21 See NAFTA Articles 1106(3)(a) and (b). The Article 1108 (8)(c) exception is also reproduced in Article 8(3)(f) of the 2004 U.S. Model BIT, in Article 7(6)(c) of the 2004 Canada Model FIPA, in Article 8(3)(f) of the 2012 U.S. Model BIT and in Article 9(6)(c) of the 2012 Canada Model FIPA.

7. Exceptions in favour of aboriginal peoples and/or socially or economically disadvantaged minorities

Some IIAs reserve the right for their Signatory States to adopt or maintain any measure denying investors of another Party and their investments any rights or preferences provided to aboriginal peoples socially or economically disadvantaged minorities, notably by carving out such measures from the disciplines of their PRPs.

NAFTA Article 1108(3) pioneered this approach, permitting by way of reservation the non-application of, inter alia, its Article 1106 PRP to "any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II". Pursuant to this, in the Schedule to NAFTA Annex II, Canada reserved the right to adopt or maintain any measure denying investors of another Party and their investments any rights or preferences provided to "aboriginal peoples". Similarly, both Canada and the U.S. made a PRP reservation with respect to any measure according rights or preferences to "socially or economically disadvantaged minorities".[22] Surveyed IIAs that have resorted to a similar approach are set out in Annex C.

8. Exempting cultural industries from PRPs

Many IIAs aim at ensuring that their PRPs do not interfere with their regulation of investments in the cultural sector, a politically sensitive area of national sovereignty. IIAs that include carve-outs regarding the cultural sector are set out in Annex C.

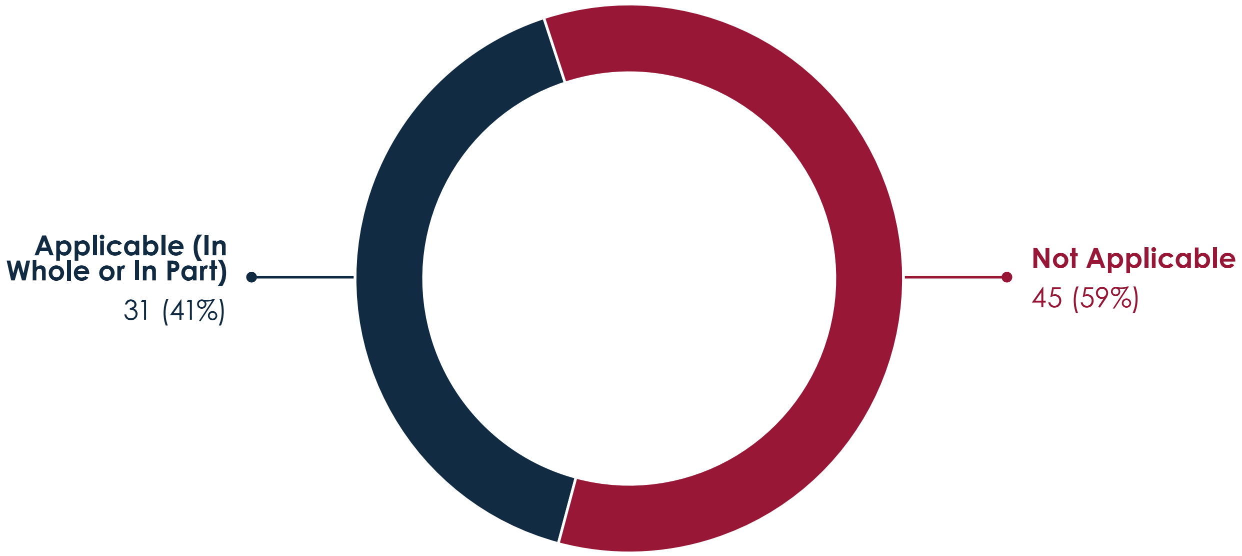
C. Shielding government procurement from PRPs in IIAs

Government procurement amounts to a large proportion of public expenditure in most States and often involves projects in core sectors of government services to their populations, including health, education, infrastructure, energy, utilities and waste management. Carrying out these responsibilities is paramount to the proper functioning of States. Many States also choose to use government procurement in order to attain socioeconomic and industrialisation objectives. Accordingly, a large number of the surveyed IIAs reflect the critical importance of government procurement and aim at shielding it from their PRPs. The surveyed IIAs which address government procurement as it relates to their PRPs are set out in Annex C.

D. Opting taxation measures in or out of PRPs of IIAs

Provisions on taxation typically do not feature prominently in IIAs. Nonetheless, there exists a wide variety of provisions in IIAs on taxation. These range from excluding taxation altogether from the scope of an IIA to covering specifically identified taxation-related issues. Should an IIA cover a given set of taxation-related issues, such specifically identified issues may include notably the use of taxation measures as incentives for foreign investors and their conditioning on compliance with performance requirements. Among surveyed IIAs, there is a 60/40 split in favour of exempting taxation measures from the scope of their PRPs:

Application of PRPs to Taxation Measures among Sampled IIAs



Surveyed IIAs that address taxation measures in relation to their PRPs are set out and discussed in Annex C.

22 The reservation by the U.S. further specified that this includes "corporations organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act".

E. Reserving non-conforming measures from PRPs in IIAs

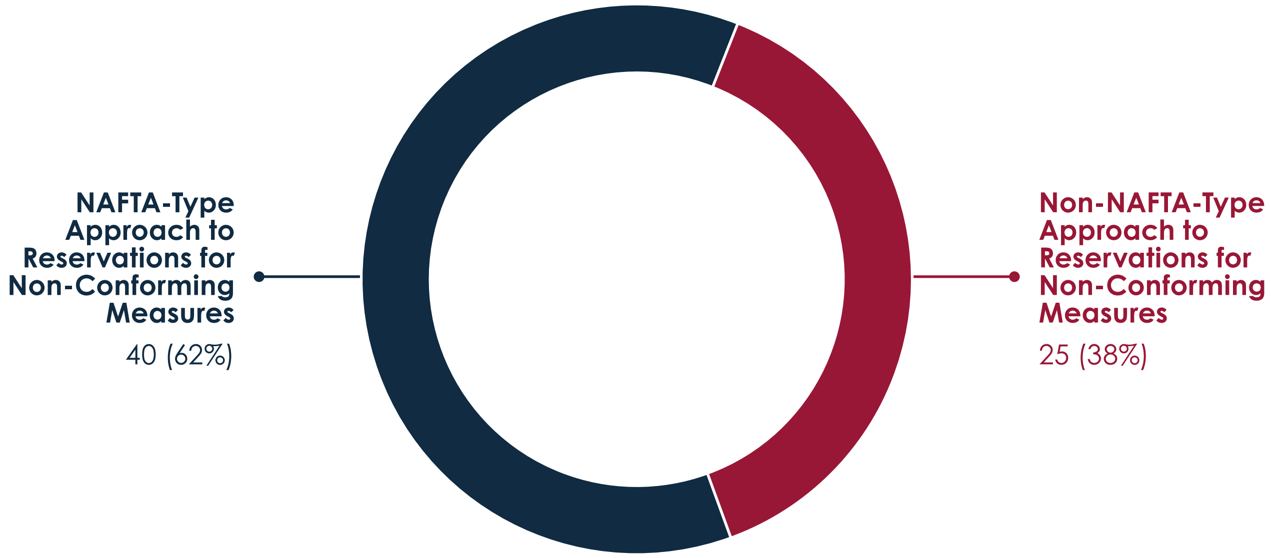
States may moderate the constraining effects of PRPs and thereby preserve policy-making flexibility by making reservations (in more concrete terms, "carve-outs") for non-conforming measures. States make reservations for non-conforming measures in sectors deemed important from a longer-term developmental perspective or for sectors deemed to be critical and sensitive areas of national sovereignty. Most IIAs that include such carve-outs through reservations implement this using a "negative list" system, such that only non-conforming measures that benefit from a reservation (in addition to measures falling within the scope of treaty-defined exceptions) may lawfully derogate from the disciplines of an IIA, including its PRPs.[23]

The bulk of reservations target services, with the following sectors attracting the greatest proportion of reservations: finance; telecommunications; transportation; broadcasting; media and audio-visual content production; education; health; and environmental services (including water distribution). Compared with the services sector, reservations in respect of the primary sector are comparatively scarce – and scarcer still in respect of manufacturing. The exploitation of natural resources (agriculture, fisheries, forestry and mining) attracts many more reservations than does manufacturing.[24]

The first main category of non-conforming measures that tend to benefit from reservations are existing and specifically identified non-conforming measures that States wish to maintain after the entry into force of a given IIA. The second main category of reservations shields from PRPs existing and future non-conforming measures that are adopted in specified sectors.

A number of reservations carve non-conforming measures out of the scope of PRPs. Surveyed IIAs that include reservations for non-conforming measures specifically in respect of PRPs are set out in Annex C. A majority (close to two-thirds) of these have replicated the NAFTA. A sizeable minority (close to one-third) have applied variations on the precise scope of their reservations on non-conforming measures vis-à-vis their respective PRPs.

Reservations for Non-Conforming Measures among Sampled IIAs



23 UNCTAD, "Preserving Flexibility in International Investment Agreements: the Use of Reservations" in *UNCTAD Series on International Investment Policies for Development* (2006), UN Doc UNCTAD/ITE/IIT/2005/8, 5-12.

24 UNCTAD, "Preserving Flexibility in International Investment Agreements: the Use of Reservations" in *UNCTAD Series on International Investment Policies for Development* (2006), UN Doc UNCTAD /ITE/IIT/2005/8, 39-46.

VIII. What are the key issues when interpreting PRPs in investor-State dispute settlement?

Our analysis of PRPs in IIAs has demonstrated that many similarities exist between PRPs in various BITs, the NAFTA and other bilateral as well as multilateral IIAs. Construing PRPs by drawing from their integrated and interconnected nature can help arbitral tribunals reach a more accurate interpretation of a given PRP and achieve a more satisfactory outcome to ISDS proceedings.

However, for the most part, past decisions of arbitral tribunals have left a mixed legacy in terms of contributing to an understanding of PRPs that promotes their consistent and predictable application. The summary nature of submissions on alleged PRP breaches by disputing parties in the majority of such disputes to date, and the correspondingly summary analyses of PRPs by some arbitral tribunals, may have contributed in the past to an unfounded perception that PRPs were inconsequential as a basis for holding a respondent State liable.[25]

This section provides summary observations mainly based on an analysis of key arbitral awards and decisions that have interpreted and applied PRPs in IIAs. This section draws in particular on two arbitral decisions under open-ended PRPs in the Ukraine - U.S. BIT (*Lemire v Ukraine*)[26] and the Poland - U.S. BIT (*Cargill v Poland*)[27], as well as on four decisions under NAFTA Article 1106 (*Mobil & Murphy v Canada; ADM v Mexico; Cargill v Mexico; CPI v Mexico*).[28] These awards and decisions are further commented on in Annex D.

To date, PRPs have played a critical role in a limited number of investor-State disputes. Only four PRPs have been interpreted by arbitral tribunals thus far: Article II(6) of the Ukraine - U.S. BIT (1994);[29] Article 1106 of the NAFTA (1992);[30] Article II(4) of the Poland - U.S. BIT;[31] and Paragraph 6 of Part II of the Annex to the Canada - Venezuela FIPA (1996).[32] Article II(6) of the Ukraine - U.S. BIT and Article II(4) of the Poland - U.S. BIT form part of the first-generation, open-ended PRPs. NAFTA Article 1106 is the PRP that has most often been the subject of findings by arbitral tribunals. The Canada - Venezuela FIPA (1996) is alone among Canadian IIAs to comprise a PRP that does not replicate a previously existing PRP model.

25 For example, in *CPI v Mexico*, the Tribunal devoted only two paragraphs to the PRP at issue (NAFTA Article 1106), underlining that claimant Corn Products International, Inc. ("CPI") "freely admitted" that its alleged violation of Article 1106 was "without precedent" and deciding that CPI clearly had "not made out its case" under Article 1106. It is likely that the summary nature of the disputing parties' submissions on NAFTA Article 1106 led to the expeditious dismissal of this alleged breach by the tribunal: see *CPI v Mexico* paras 5, 57, 70, 79-80. *Cargill v Mexico* provides an additional example: in its Award, the Tribunal noted the lack of interpretative guidance on NAFTA Article 1106. The Tribunal might have been prevented from conducting an in-depth analysis of NAFTA Article 1106 due to the summary submissions of the disputing parties on this issue: see *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) paras 309, 313.

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

27 *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008).

28 In the first instance: *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4 ("*Mobil & Murphy v. Canada*"), Decision on Liability and Principles of Quantum (22 May 2012); followed by *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007) ("*ADM v. Mexico*"); *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008) ("*CPI v. Mexico*"); *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) ("*Cargill v. Mexico*").

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

30 See *S.D. Myers Inc. v. Canada*, UNCITRAL, First Partial Award (13 November 2000); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007) ("*ADM v. Mexico*"); *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008) ("*CPI v. Mexico*"); *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) ("*Cargill v. Mexico*"); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003); *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award (31 March 2010); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4 ("*Mobil & Murphy v. Canada*"), Decision on Liability and Principles of Quantum (22 May 2012).

31 *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008).

32 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016).

The lack of in-depth engagement with PRPs is likely to dissipate in the wake of: (i) the award of more than CAN$ 17 million plus interest in damages on the basis of NAFTA Article 1106 alone in *Mobil & Murphy v Canada*;[33] (ii) the award of US$ 1.277 million in damages in *Rusoro Mining v Venezuela* specifically to compensate for a PRP breach;[34] and (iii) an agreement between Mobil and Canada to settle subsequent arbitral proceedings pursuant to which Mobil secured a tax credit of CAN$ 35 million to protect the investment against future damages arising from Canada's continuing breach of NAFTA Article 1106.[35]

For the most part, arbitral tribunals which have analysed PRPs have acknowledged the central role played by Articles 31 and 32 of the VCLT[36] in interpreting and applying PRPs.[37] Despite this acknowledgment, in practice tribunals have tended to side-line the VCLT in their analysis of PRPs. This generates the impression that each PRP exists in isolation without any connection to PRPs in other IIAs.

Thus far, arbitral tribunals have failed to make full use of the interpretative methods and tools at their disposal to work out the meaning of terms used in PRPs. Their varying approaches to PRPs, sometimes at odd with one another, have resulted in an arguably incoherent jurisprudence. The arbitral jurisprudence on PRPs often overlooks a given PRP's actual wording and the intended meaning of such wording; it also does not properly account for a given PRP's context, object and purpose, nor does it consider sources that can shed light on the meaning and operation of PRPs.

As a first example further discussed in Annex D, the tribunal in *Lemire v Ukraine* appears to have reached its decision by assigning purposes to the applicable PRP and the measure at issue and prioritising a purpose-driven interpretation in order to validate a local content radio broadcasting quota (a cultural measure of national importance and sensitivity) that was otherwise inconsistent with the clear wording of the applicable PRP. As a second example further discussed in Annex D, the tribunal in *Cargill v Poland* did not engage in a textual analysis of the applicable PRP in order to determine whether the measure at issue (domestic sale restrictions on sugar (isoglucose)) was a covered performance requirement or to determine whether these domestic sale restrictions breached the applicable PRP.

As a third example further discussed in Annex D, the tribunal in *Mobil & Murphy v Canada* expanded the reach of the applicable prohibition of LSRs so as to make it encompass local R&D expenditure requirements, an arguably distinct type of performance requirement that was addressed separately in the applicable PRP.

As a fourth example further discussed in Annex D, the tribunals in a series of three disputes under NAFTA Chapter Eleven against Mexico (the "Mexican sugar saga" cases) strayed from the text of the applicable PRP by deeming it necessary to establish a connection between a complaining investor's investment and an advantage being conferred upon compliance with performance requirements, even though the text of the applicable PRP did not stipulate such a connection.

These examples illustrate the discomfort of both disputing parties and tribunals with the opaque formulation of most PRPs. Increasing awareness to the background and technical intricacies of PRPs can only serve to improve their consistent application by tribunals in future investment treaty arbitration disputes arising out of performance requirements.

33 *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Award (20 February 2015), para 178. NAFTA's PRP (Article 1106) constituted the sole basis for State liability and for the award of damages only in *Mobil & Murphy v Canada*. The disputing parties in *Mobil & Murphy v Canada* submitted the most in-depth arbitral submissions on a PRP that any arbitral proceedings have yielded to date. The *Mobil & Murphy v Canada* Tribunal accordingly produced the most detailed reasons regarding a PRP to date. By contrast, the PRP proved a secondary issue in most of the other arbitrations that involved PRPs given that a finding of liability could be argued under other better-known treaty provisions. For example, the *ADM* Tribunal and the *Cargill v Mexico* Tribunal did not consider whether their findings of violations of NAFTA Article 1106 entailed compensable damages as separately from breaches under other NAFTA provisions: see *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007) paras 261, 269, 295; *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) paras 431, 520, 540.

34 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016), paras 584-597, 814-822.

35 *Mobil Investments Canada Inc. v Canada*, ICSID Case No. ARB/15/6, Consent Award, 4 February 2020, para. 6.

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

37 *S.D. Myers Inc. v Canada*, UNCITRAL, First Partial Award (13 November 2000) paras 200-202; *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Interim Award (26 June 2000) paras 66-69; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007) para 195; *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008) para 76; *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) paras 133-134, 315; *ADF Group Inc. v United States of America*, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003) paras 147-149; *Merrill & Ring Forestry L.P. v The Government of Canada*, UNCITRAL, ICSID Administered Case, Award (31 March 2010) paras 84, 183 (albeit in respect of NAFTA Articles 1102 and 1105); *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) paras 508-509; *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) paras. 174, 210, 227, 232. The Tribunal does not refer to the VCLT in *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008) or in *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016).

IX. Annexes

A. The prohibition of mandatory performance requirements in investment treaties

1. First-generation PRPs in U.S. BITs (1982-1995)

PRPs in first-generation U.S. BITs use the broad and undefined expression "performance requirements". This approach made it difficult to predict which measures might fall within the scope of such an open-ended PRP. This soon proved unsatisfactory for other State Parties with whom the U.S. was negotiating BITs. While the U.S. may have been content with conferring a broad scope to its PRPs, many States pushed back in an attempt to narrow the PRPs' coverage.

The first U.S. Model BIT to be published in 1983 contained, at Article II(7), the first standalone PRP. 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.]

This text singles out two performance requirements (LCRs and EPRs), but does not otherwise define the expression "performance requirements". It also leaves open for reading-in by analogy additional species of "other similar" performance requirements. Article II(5) of the 1984 U.S. Model BITs, as well as its subsequent revisions from 1987, 1991 and 1992, reproduce this approach in substantively identical fashion.

PRPs in 21 U.S. BITs signed between 1982 and 1995 replicate the prohibition of mandatory performance requirements found in the 1983 and 1984 U.S. Model BITs.[38] The PRPs in these BITs employ illustrative lists which explicitly mention LCRs and EPRs, and otherwise leave open the precise contours of such prohibitions.

As a clear sign of some other States' reluctance toward prohibiting performance requirements, PRPs in seven of the first 10 U.S. BITs (which were signed between 1982 and 1990) deviate from the prevailing U.S. Model BIT: they use an open-ended reference to performance requirements, but provide only for non-binding, "best effort" commitments to avoid performance requirements.[39]

The broadness of the expression "performance requirements", left undefined, arguably raises serious problems of unpredictability with regard to the measures that ultimately fall within the open-ended PRP's scope. A few U.S. BITs indeed seek to narrow the open-endedness of PRPs, as though in response to negotiating pressures. For example, paragraph 7 of the Supplementary Protocol (1986) to the Egypt - U.S. BIT (1982) modifies Article II(5) of the BIT to limit "performance requirements" to LCRs and EPRs (i.e., the two examples mentioned in Article II(5)). By the same token, paragraph 7 essentially empties the terms "any other similar requirements" in Article II(5) of any meaning.[40]

The Protocol to the Argentina - U.S. BIT (1991) provides two further examples of tailoring the scope of an otherwise vague and open-ended PRP. First, paragraph 9 of the Protocol provides that Argentina could "maintain, but not intensify" existing performance requirements in the automotive industry for eight years following the entry into force of the BIT, notwithstanding the PRP in Article II(5). Argentina also had to apply residual performance requirements so as to not competitively disadvantage existing investments compared with new automotive investments.

Second, with paragraphs 9 and 11 of the Protocol to the Argentina - U.S. BIT (1991) Argentina sought to preserve its capacity to regulate new owners of public utilities and other previously State-owned assets in a way that ensured that the PRP in Article II(5) would not "adversely affect" its privatisation process in progress at the time of signing the BIT. Argentina and the United States therefore agreed to "undertake their best efforts, including through consultations, to avoid any misinterpretation regarding the scope of Article II(5) that would adversely affect this privatization process".

38 See, e.g., Article II(8) of the Senegal - U.S. BIT (1983).

39 See, e.g., Article II(5) of the Morocco - U.S. BIT (1985).

40 See paragraph 7 of the Supplementary Protocol (1986) to the Egypt - U.S. BIT (1982) ("… performance requirements are conditions imposed which would require an investor to export a minimum percentage of final product or to source some inputs locally.").

2. Open-ended PRPs in French BITs

Similar to the approach in U.S. BITs, PRPs in French BITs use open-ended language intended to cover other measures having similar effects to those explicitly described. However, France has opted for an otherwise distinctive approach to prohibiting performance requirements in its Model BITs[41] and in the great majority of its BITs. First, PRPs in French BITs are distinguishable from the U.S. BIT approach in that they deem performance requirements to be breaches of a State Party's obligation to accord FET. PRPs in French BITs form part of the FET provisions within BITs and translate in English 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.[42]

Second, PRPs in French BITs do not use the expression "performance requirements". Instead, 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 or abroad.

Third, PRPs in French BITs have a broad scope of application, in spite of the reliance on more practical illustrations of measures deemed to breach the FET standard and thus to be prohibited. PRPs in French BITs also prohibit measures that would produce similar effects to the two previously-mentioned broad categories of measures. This is reinforced by qualifying the enumeration of FET-breaching performance requirements with the terms "though not exclusively".

Restrictions on or hindrances of purchases, sales or transportation (or measures producing similar effects) encompass performance requirements applicable to purchases or sales of investors. Therefore, such prohibited measures include LCRs, EPRs, trade-balancing requirements, export restrictions, foreign exchange restrictions (including earning or neutrality requirements), domestic sales requirements and product mandating requirements.

51 of France's 67 BITs that include PRPs replicate the text from France's Model BIT:

- 31 BITs signed between 1989 and 2014 are known to have incorporated PRPs identical to France's PRP Model.[43]
- 3 French BITs comprise PRPs with only a few immaterial textual differences.[44]
- 17 French BITs comprise PRPs which are worded in the same way as France's Model PRP, but appear in a Protocol, Annex or Exchange of Letters.[45]

The remaining 16 French BITs retain open-ended language and scope of France's PRP Model, but differ in other material aspects:

- 3 PRPs provide much more comprehensive protection to investors against performance requirements and a wide array of other measures, in addition to the otherwise usually broad coverage of French PRPs, which prohibit "any other measures that have a similar effect":
  - Article 3 of the France - Madagascar BIT (2003) deems the unusually broad category of measures which can affect, directly or indirectly, investments of covered investors to breach the FET standard;
  - 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 identical to Article 3 of the France - Zambia BIT (2002).

The comprehensiveness of these three treaty provisions means that at the very least they prohibit all performance requirements that hinder the free movement, purchase or sale of goods and services.

- 11 PRPs limit their prohibition of purchase or transportation restrictions and/or sale or transportation hindrances by adding an additional criterion, i.e., that these restrictions or hindrances also be arbitrary, unfair and/or discriminatory.[46]
- 2 PRPs adopt an altogether different approach by viewing performance requirements and any other measures of equivalent or analogous effect as "less favourable treatment" within national treatment and/or MFN provisions.[47]

41 See UNCTAD, *International Investment Instruments: A Compendium, Vol. V: Regional Integration, Bilateral and Non-governmental Instruments* (UNCTAD / DITE/2, 2000), 283; see also UNCTAD, *International Investment Instruments: A Compendium, Vol. III: Regional Integration, Bilateral and Non-governmental Instruments* (UNCTAD /DTCI/30, 1996), 159 (Article 4 of France's 1998 Model BIT; Article 3 of France's undated Model BIT).

42 See, e.g., Protocol regarding Article 3 of the Ethiopia - France BIT (2003).

43 See, e.g., Article 4 of the France - Senegal BIT (2007).

44 See, e.g., France - Saudi Arabia BIT (2002), Protocol regarding Article 2.

45 See, e.g., Ethiopia - France BIT (2003), Protocol regarding Article 3.

46 See, e.g., Article 3 of the France - Venezuela BIT (2001) ("arbitrary and discriminatory").

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

3. The prohibition of detailed lists of mandatory performance requirements in investment treaties

51 of the IIAs currently surveyed comprise PRPs that apply the same NAFTA list of mandatory performance requirements: EPRs and export restrictions; LCRs; LRSs; trade-balancing requirements; domestic sales restrictions linked to exports or foreign exchange earnings; technology transfer requirements; and product mandating requirements.

a. 7 Canadian FTAs, 4 Chilean IIAs and one Indian IIA employ language nearly identical to that of NAFTA Article 1106(1).[48]

b. PRPs in 12 Canadian FIPAs that reproduce the 2004 Canada Model FIPA prohibit the same mandatory performance requirements,[49] but (unlike the NAFTA) prohibit EPRs and export restrictions only in respect of goods and not of services (the PRP in Article 9(1)(a) of the Canada - Moldova FIPA (2018) being a notable exception).

c. PRPs in 26 of the currently inventoried IIAs based on Article 8 of the 2004 U.S. Model BIT likewise prohibit the same mandatory performance requirements,[50] save that: first, their prohibition of LSRs applies only in respect of goods (and not of services); and second, their prohibition of mandatory product mandating requirements may use different language.

Many IIAs prohibit a more limited range of mandatory performance requirements than the NAFTA. For example, Article V(2) of the Canada - Ukraine FIPA (1994) prohibits EPRs and export restrictions (in respect of goods only), LCRs, LSRs, trade-balancing requirements and technology transfer requirements, but not domestic sales restrictions or product mandating requirements (which are prohibited by the NAFTA). 14 Canadian FIPAs replicate this narrower list of prohibited mandatory performance requirements.[51]

Conversely, a number of IIAs prohibit a greater number of mandatory performance requirements than the NAFTA. For example:

a. Article VI of the 1994 U.S. Model BIT additionally prohibits R&D requirements;[52]

b. Article 89(1) of the India - Japan CEPA (2011) likewise prohibits the same mandatory performance requirements as those enumerated in NAFTA Article 1106(1), as well as export restrictions and requirements to appoint high-ranking employees of a given nationality;

c. Article 9.10(1)(h) of the CPTPP and Article 13.11(1)(h) of the Australia - UK FTA (2021) reproduce Article 8(1)(h) of the 2012 U.S. Model BIT. These provisions prohibit requirements to purchase, use, or accord a preference to a particular technology, as well as requirements which prevent the purchase, use, or according of a preference to a particular technology.

d. Article 9.10(1)(i) of the CPTPP and Article 10.6(1)(h) of the RCEP (2020) additionally prohibit requirements concerning a given rate or amount of royalty or a given duration in license contracts.

4. PRPs in investment treaties incorporate the TRIMs Agreement's prohibition of mandatory performance requirements

15 of the surveyed IIAs[53] reiterate, incorporate or refer specifically to the TRIMs Agreement in their respective PRPs, albeit with slight variations. For example:

a. Article 6.23 of the India - Singapore CECA (2005) "reaffirm[s] ... and incorporate[s] the provisions of TRIMs ... as part of this Agreement";

b. Article 9 of the Canada - China FIPA (2012) reaffirms both Parties' obligations under the TRIMs Agreement, and specifically incorporates "Article 2 and the Annex" thereof;

c. Article 14.9(1) of the Australia - Japan EPA (2014) prohibits either Party from applying "any measure which is inconsistent with the [TRIMs] Agreement";[54]

d. Article 11(1) of Chapter IV (Development of Investment Relations) to the U.S. - Vietnam TRA (2000) provides that neither Party shall apply measures inconsistent with the TRIMs Agreement, *and* reproduces the latter's "illustrative list" of such measures in its Annex I;

e. Article 11 of Chapter 9 of PACER Plus (2017) affirms that parties who are WTO Members "shall ... ensure that any measure taken is consistent with the TRIMs Agreement", but also provides that non-WTO Member parties shall strive for the same "to the extent of [their] capacity".

One aspect that many IIAs do not address head-on when resorting to this incorporation approach usually is the non-exhaustive nature of the TRIMs Agreement's Illustrative List (more on the Illustrative List in the next section). Accordingly, and absent wording to the contrary, the better view is that PRPs incorporating the TRIMs Agreement could potentially apply to performance requirements *beyond* those enumerated in the TRIMs Agreement's List.[55] Indeed, the drafting used in certain IIAs necessarily contemplates the prohibition of additional performance requirements.[56] Others expressly enumerate additional performance requirements not otherwise contained in the TRIMs Agreement – for example:

a. Article V(2) of the Canada - Thailand FIPA (1997) further prohibits technology transfer requirements in connection with the establishment or acquisition of an investment, as well as the enforcement of such requirements in connection with the subsequent regulation of an investment;

b. Articles 9(2) of the Canada - Kuwait FIPA (2011), the Canada - Mali FIPA (2014) and the Canada - Mongolia FIPA (2016) further prohibit mandatory EPRs, LCRs, technology transfer requirements and product mandating requirements; and

c. Chapter IV of the U.S. - Vietnam TRA (2000) includes a separate Article 7 which prohibits technology transfer requirements.

By contrast, some PRPs appear to have been drafted with a view to incorporating a "closed set" of prohibitions limited to the performance requirements enumerated in the TRIMs Agreement. For example, Article VI of the Canada - Costa Rica FIPA (1998), which prohibits performance requirements "set forth" in the TRIMs Agreement, could be interpreted as suggesting that only those performance requirements explicitly enumerated in the TRIMs Agreement's Illustrative List are prohibited under Article VI of the Canada - Costa Rica FIPA.

B. The prohibition of advantage-conditioning performance requirements in investment treaties

1. PRPs which remain silent in respect of advantage-conditioning performance requirements

All of France's 67 BITs which comprise PRPs are silent with respect to advantage-conditioning performance requirements. The predominant French approach, which frames the PRP as a subcategory of FET, may provide sufficient breadth to capture advantage-conditioning performance requirements, especially in respect of the 50 which replicate the French Model BIT, as well as the other 3 with PRPs providing even more comprehensive investor protections. Accordingly, the French BITs with PRPs should in principle apply to advantage-conditioning performance requirements.[57]

21 U.S. BITs with PRPs signed between 1982 and 1995 prohibit the imposition of performance requirements as conditions for the establishment, expansion or maintenance of investments,[58] but make no mention of advantages conditioned on compliance with performance requirements. However, 9 of these 21 BITs address performance requirements as conditions for the receipt of an advantage, albeit in sections separate from the PRP text itself. For example:

a. Paragraph 2 of the Agreed Minutes to the Panama - U.S. BIT (1982) acknowledges Panama's incentive laws conferring benefits to companies having contracted with the Government of Panama and agreeing to comply with performance requirements stated in such contracts.

b. Paragraph 4 of the Protocol to the Sri Lanka - U.S. BIT (1991) acknowledges Sri Lankan laws granting incentives to investors on compliance with EPRs or technology transfer requirements. This suggests that its open-ended PRP does not apply to performance requirements imposed as conditions for the receipt of an advantage.

14 Canadian FIPAs are silent on advantage-conditioning performance requirements. For example, 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.[59]

48 See, e.g., Article G-06(1) of the Canada - Chile FTA (1996); Article 8.5(1) of the CETA (2014); Article 10.7(1)(c) of the Chile - Korea FTA (2003); Article 10.5(1) of the India - Korea CEPA (2009).

49 See, e.g., Article 7(1) of the Canada - Peru FIPA (2006).

50 See, e.g., Article 10.9(1)(c) and (g) of the CAFTA-DR - U.S. FTA (2004); Article 9.10(1)(c) and (g) of the CPTPP (2015); Article 11.9(1)(c) and (g) of the Australia - Korea FTA (2014); Article 8.9(1)(c) and (g) of the Pacific Alliance - Singapore FTA (2022).

51 See, e.g., Article V(2) of the Canada - Philippines FIPA (1995); Article 9(2) of the Canada - Mongolia FIPA (2016).

52 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. In contrast, (i) 6 U.S. BITs reproduce a PRP identical to that found in the 1994 U.S. Model BIT (see, e.g., Article VI of the Georgia - U.S. BIT (1994)); and (ii) 7 additional U.S. BITs reproduce the PRP from the 1994 U.S. Model BIT with minor stylistic changes (see, e.g., Article 6 of the Bahrain - U.S. BIT (1999)).

53 See also, e.g., Article 5 of the Energy Charter Treaty ("ECT") (1994); Article 3(2)(b) of the Brazil - Chile BIT (2015); Article 10.5(3) of the India - Korea Comprehensive Economic Partnership Agreement ("CEPA") (2009).

54 See also Article 12.6 of the Australia - Malaysia FTA (2012); and Chapter 11, Article 5 of the AANZFTA (2009).

55 This is of course subject to the proviso that a performance requirement needs to apply to goods and to violate either GATT Article III:4 (on national treatment of goods in respect of internal measures) or Article XI:1 (on quantitative restrictions at the border), for a violation of the TRIMs Agreement to occur.

56 For example, the fact that Article 14.9 of the Australia - Japan EPA (2014) prohibits a larger number of performance requirements than those set forth in the TRIMs Agreement does not clash with the Parties' respective obligations under the TRIMs Agreement, as these latter obligations are essentially subsumed under the EPA.

57 It might be more difficult, in respect of the 13 French BIT 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 conclude that advantage-conditioning performance requirements *per se* are arbitrary, unfair, abusive and/or discriminatory. Nevertheless, there seems to be no reason not to apply these PRPs to advantage-conditioning performance requirements.

58 See, e.g., Article II(8) of the Senegal - U.S. BIT (1983); Article II(5) of the Argentina - U.S. BIT (1991).

59 Note that 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." However, given that the term "advantage" conceivably encompasses more than just subsidies and grants, it remains ambiguous as whether the silence of the PRPs in these Canadian FIPAs necessarily implies their inapplicability to all species of advantage-conditioning performance requirements.

2. Advantage-conditioning performance requirements and PRPs which incorporate the TRIMs agreement

PRPs incorporating the TRIMs Agreement and/or its Illustrative List in their entirety necessarily incorporate the latter's prohibition against advantage-conditioning performance requirements. For example:

a. Canadian FIPAs prohibit the imposition of "requirements" set forth in the TRIMs Agreement "in connection with the establishment, acquisition or subsequent regulation of an investment";[60] and

b. Australian FTAs prohibit the imposition of "measures" inconsistent with the TRIMs Agreement "in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of the other Party in its territory"[61].

Similarly, Article 14.9(1) of the Australia - Japan EPA (2014) also incorporates the TRIMs Agreement's prohibition of advantage-conditioning performance requirements "in connection with investment activities of an investor." At Article 14.9(2), it goes further by also prohibiting "[w]ithout prejudice to [Article 14.9(1)]" the same detailed list of prohibited mandatory performance requirements as per NAFTA Article 1106(1). Such a formulation implies that both advantage-conditioning as well as mandatory performance requirements must be considered as prohibited.

The precise scope of such PRPs incorporating the TRIMs Agreement can however be complicated by bespoke exceptions and carve-outs. For example:

a. Article 6.23 of the India - Singapore CECA (2005) reaffirms and incorporates the TRIMs Agreement (including, by implication, the latter's prohibition of advantage-conditioning performance requirements) but also specifies at Article 6.2(5) that nothing in Chapter 6 (Investment) shall apply "to subsidies or grants provided by a Party or to any conditions attached to the receipt or continued receipt of such subsidies and grants".[62] This apparent tension may be resolved by reading down the application of the TRIMs Agreement in this instance to prohibiting only *mandatory* performance requirements.

b. Articles 9(3) of the Canada - Kuwait FIPA (2011) and of the Canada - Mali FIPA (2014) provide, "[f]or greater certainty", that the enumerated mandatory performance requirements prohibited under their respective Articles 9(2) (i.e. EPRs and export restrictions; LCRs; technology transfer requirements; product mandating requirements) are *not* prohibited when imposed as conditions for the receipt of advantages. At the same time, both FIPAs' Article 9(1) reaffirm and incorporate the full terms of the TRIMs Agreement, including – necessarily – the latter's prohibition against advantage-conditioning LCRs and export restrictions. This contradiction is difficult to reconcile in the absence of any language in the FIPAs explicitly permitting exceptions to the disciplines of the TRIMs Agreement that they otherwise incorporate in full.

3. PRPs which explicitly exclude advantage-conditioning performance requirements from their scope

A number of PRPs in U.S. BITs clearly exempt their application to at least certain 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 as clarification (and affirmation) of the U.S. BIT policy not to preclude advantage-conditioning requirements.[63]

Indeed, 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", an approach which has been followed in 13 U.S. BITs. In other words, the U.S. and signatory State Parties to these 13 BITs can lawfully impose a performance requirement by conferring an advantage in return.[65]

4. Replicating the NAFTA approach: the targeted disciplining of advantage-conditioning performance requirements by PRPs in IIAs

The original NAFTA Article 1106(3) text on advantage-conditioning performance requirements survives verbatim in Article 7(3) of the 2004 Canadian Model FIPA, and was subsequently reproduced in 11 Canadian FIPAs.[66] 36 additional IIAs among those surveyed likewise adopted the NAFTA approach of prohibiting limited lists of advantage-conditioning performance requirements. For example, Article 10.8(2) of the Morocco - U.S. FTA; Article 14.9(3) of the Australia - Japan EPA (2014); Article 10.7(3) of the Canada - Honduras FTA; Article 10.7(3) of the Chile - Korea FTA; and Article 9.10(2) of the CPTPP closely mirror NAFTA Article 1106(3) with regard to advantage-conditioning performance requirements.

60 See, e.g., Article VI of the Canada - Costa Rica FIPA (1998).

61 See, for example, Article 12.6 of the Australia - Malaysia FTA (2012); and Chapter 11, Article 5 of the AANZFTA (2009).

62 See Article 6.16(2)(a) of the India - Singapore CECA (2005), which expressly provides, inter alia, that Article 6.23 may be subject to "any exception that is specified by the Parties". Compare with Article 10.2(6) of the India - Korea CEPA (2009), which likewise carves out subsidies and grants from its investment chapter (Chapter 6), unless a performance requirement is otherwise engaged (Article 10.5).

63 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.

64 See, e.g., Article VI of the Georgia - U.S. BIT (1994).

65 See also the last sentence of Article VI of the Bolivia - U.S. BIT (1998) and Article 1 of its Protocol, which acknowledge the preserved State right to impose performance requirements as conditions for the receipt of an advantage, *including* in the context of government procurement.

66 See, e.g., Article 7(3) of the Canada - Peru FIPA (2006); Article 9(3) of the Canada - Moldova FIPA (2018).

A number of IIAs go farther than NAFTA Article 1106(3) and prohibit a greater number of advantage-conditioning performance requirements. For example:

a. Article 10.5(2) of the India - Korea CEPA (2009) prohibits advantage-conditioning EPRs and LSRs in respect of services;

b. Article 89(2) of the India - Japan CEPA (2011) prohibits advantage-conditioning EPRs, LSRs in respect of services, export restrictions and requirements to appoint high-ranking employees of a given nationality.

c. Article 14.10(2)(e) of the USMCA introduces a fifth category of prohibited advantage-conditioning performance requirement that conditions the receipt or continued receipt of an advantage on compliance with a requirement "to purchase, use, or accord a preference to … technology of the [host State] Party or a person of the [host State] Party" or otherwise "prevent[ing] the purchase or use of, or the according of a preference to … a technology".

C. Main options to better calibrate the scope and coverage of PRPs in investment treaties

1. Tailoring the investment coverage of PRPs in IIAs

38 of the currently surveyed IIAs,[67] including Article 9.10(1) of the CPTPP and Article 14.10(1) of the USMCA, specify that their PRPs apply to *all* investments in the territories of the relevant State Parties (and not only to investments by investors of other State Parties). These TIP provisions thus reproduce NAFTA Article 1101(1)(c) by stating that their PRPs apply to "an investment … of an investor of a Party or of a non-Party", i.e. a State Party cannot impose performance requirements on covered investors, on its own domestic investors or on third-State investors.

50 of the surveyed IIAs (i.e. the 38 previously identified IIAs, plus 12 Canadian FIPAs[68]) similarly extend their PRPs to non-Party investors.[69] Relevant provisions in France's 67 BITs that include PRPs prohibit the measures in and of themselves, irrespective of the investor or investment concerned, and would accordingly apply to any investment by any investor in the host State's territory.

By contrast, 21 Canadian FIPAs follow the Canada - Ukraine FIPA (1994) in this respect.[70] Based on their identical definitions of "investment," the open-ended PRPs of the 21 U.S. BITs signed between 1982 and 1995 likewise only apply to investments in one Party made by investors of the other Party. Similarly, Article VI of the 1994 U.S. Model BIT and the 13 U.S. BITs with identical PRPs[71] apply only to "a covered investment" by a covered investor. 3 Indian IIAs,[72] 1 Chilean IIA[73] and 1 Australian IIA[74] also provide that their respective PRPs apply only to investments by a home State Party.

2. Treaty provisions aimed at ensuring the continued lawfulness of specific types of performance requirements under IIAs

(a) "Clarifying" provisions

Like NAFTA Article 1106(4),[75] 50 of the surveyed IIAs,[76] as well as Article 14.10(3)(a) of the USMCA, ensure that their State Parties can impose the following advantage-conditioning performance requirements: local R&D requirements; local employment and training requirements; investment localisation requirements; service supply requirements and construction or expansion requirements. 12 of these IIAs further clarify that some or all of the same four requirements may also be mandatorily-imposed.[77]

Following NAFTA Article 1106(2), 27 of the surveyed IIAs[78] contain a clarification that a requirement to use a technology to meet generally applicable health, safety or environmental requirements does not violate the prohibition against technology transfer requirements.[79] Similarly, the Rwanda - U.S. BIT (2008) provides that "the enforcement of a commitment or undertaking to use a particular technology, a production process, or other proprietary knowledge" does not *per se* violate its prohibition against mandatory technology transfer requirements.[80]

67 See, e.g., Articles 10.1(c), 10.9(1) and 10.9(2) of the CAFTA-DR - U.S. FTA (2004); Articles 11.1(1)(c), 11.9(1) and 11.9(2) of the Australia - Korea FTA (2014); Articles 11(1) and 11(2), Chapter 9 of PACER Plus (2017); Articles 801(1)(c), 807(1) and 807(3) of the Canada - Peru FTA (2008); Article 8.2(1)(c), 8.5(1) and 8.5(2) of the CETA (2014) (refers to "any investments" instead of non-Party investors); Articles 9.2(1)(c), 9.10(1) and 9.10(2) of the CPTPP (2015); Articles 10.2(1)(c), 10.8(1) and 10.8(2) of the Pacific Alliance Protocol (2014).

68 See, e.g., Article 9(2) of the Canada - Mali FIPA (2014) (renders its PRP applicable to a covered investment "or any other investment").

69 By way of comparison, the relevant provisions in France's 67 BITs that include PRPs prohibit the measures in and of themselves, irrespective of the investor or investment concerned, and would accordingly apply to any investment by any investor in the host State's territory.

70 See, e.g., the Canada - Philippines FIPA (1995).

71 See, e.g., Article VI of the Georgia - U.S. BIT (1994).

72 Article 6.2(1) of the India - Singapore CECA (2005); Articles 10.2(1), 10.5(1), 10.5(2) of the India - Korea CEPA (2009); Articles 83(1), 89(1) of the India - Japan CEPA (2011).

73 Articles 9(1) and 9(2) of the Chile - Hong Kong BIT (2016).

74 Articles 10.6(1) and 10.6(2) of the RCEP (2020).

75 NAFTA Article 1106(4) is identically reproduced in Article 8(3)(a) of the 2004 U.S. Model BIT, in Article 8(3)(a) of the 2012 U.S. Model BIT, in Article 7(4) of the 2004 Canada Model FIPA and in Article 9(4)(a) of the 2012 Canada Model FIPA.

76 See, e.g., Article 11.8(3)(a) of the Korea - U.S. FTA (2007); Article 13.11(3) of the Australia - UK FTA (2021); Article 10.6(3)(a) of the RCEP (2020); Article 9(4)(a) of the Canada - Senegal FIPA (2014); Article 8.5(3) of the CETA (2014); Article 9.10(3)(a) of the CPTPP (2015); Article 10.8(3) of the Pacific Alliance Protocol (2014). Article 10.7(4) of the Chile - Korea FTA (2003) adds as safeguard that the TRIMs Agreement would prevail in respect of any inconsistency between such requirements and the TRIMs Agreement.

77 3 of these IIAs explicitly ensure the lawfulness of all of the same four requirements when mandatorily-imposed (see, e.g., Footnote 5 to Article 11.8(3)(a) of the Korea - U.S. FTA (2007)). 4 IIAs ensure the lawfulness of mandatory employee training requirements, and 5 IIAs validate mandatory local employment or employee training requirements, subject to their compliance with the prohibition of mandatory technology transfer requirements (see, e.g., Article 9.10(4) of the CPTPP (2015)).

78 See, e.g., Article 8.9(2) of the Pacific Alliance - Singapore FTA (2022); Article 8.8(2) of the Canada - Korea FTA (2014); Article 7(2) of the Canada - Jordan FIPA (2009); Article 9(4) of the Canada - Mongolia FIPA (2016).

79 Compare with paragraph 1 of the Protocol to the Mozambique - U.S. BIT (1998), which memorializes the Parties' understanding that the relevant PRP at Article VI (otherwise identical to that found in the 1994 U.S. Model BIT) does not prohibit requirements for "environmental impact statements, environmental management plans, or other measures of public health and safety … otherwise consistent with the remainder of the treaty".

80 See Article 8 and Footnote 12 of the Rwanda - U.S. BIT (2008).

(b) Preserving the right to impose some technology transfer requirements

22 of the surveyed IIAs reproduce the exceptions of NAFTA Article 1106(1)(f) integrally.[81]

25 of the surveyed IIAs (13 U.S. BITs;[82] 10 Canadian FIPAs;[83] and two Canadian TIPs[84]) stipulate only a competition law exception to the general prohibition against technology transfer requirements.[85]

Another 31 of the surveyed IIAs,[86] including the USMCA,[87] likewise reproduce the competition law exception to technology transfers, but also permit the imposition of such performance requirements if done pursuant to the authorised use or disclosure of IP under Articles 31 and/or 39 of the TRIPS Agreement.[88] A further 17 IIAs (10 Canadian FIPAs,[89] 6 Canadian FTAs[90] and 1 Chilean IIA[91]) similarly allows derogation from, *inter alia*, the general prohibition against technology transfer requirements provided that the derogating measure is consistent with the TRIPs Agreement or with a waiver thereof.

Annex 15C of the Singapore - U.S. FTA (2003) provides a *sui generis* exception, whereby the general prohibition against technology transfer requirements (at Article 15.1(f)) "does not apply … to the sale or other disposition of an investment of an investor of a non-Party in its territory".

(c) Excluding eligibility requirements for export promotion and foreign aid programs

NAFTA Article 1108(8)(a) provides that the prohibition of mandatory EPRs, LCRs and LSRs,[92] as well as the prohibition of advantage-conditioning LCRs and LSRs,[93] "do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes".[94] This exception is reproduced in substantially if not entirely identical terms in 49 of the surveyed IIAs, as well as in the USMCA.[95]

A few subsequent IIAs have exhibited variations to the NAFTA approach:

Article 5(3) of the ECT (1994) opts for the same exception to its TRIMs Agreement-like disciplines, but with a much-simplified wording.

Article 8.8(6)(a) of the Canada - Korea FTA (2014) uses the same wording as NAFTA Article 1108(8)(a), but expands the scope of its export promotion/foreign aid exception to also encompass mandatory technology transfer and product mandating requirements.

In contrast, Article VI(2)(d) of the Canada - Ukraine FIPA (1994) has developed its own formulation, which provides that its PRP does not apply to "any current of future foreign aid program to promote economic development, whether under a bilateral agreement, or pursuant to a multilateral arrangement or agreement." 16 subsequent Canadian IIAs provide for an identically worded exception.[96]

(d) Excluding eligibility requirements for preferential tariffs or quotas

51 of the surveyed IIAs,[97] including the USMCA,[98] reproduce in substantially if not entirely identical terms NAFTA Article 1108(8)(c) which renders inapplicable the prohibition of advantage-conditioning LCRs and LSRs[99] to the content of goods necessary to qualify for preferential tariffs or preferential quotas. By way of comparison, Article 5(3) of the ECT (1994) opts for the same exception to its TRIMs Agreement-like disciplines, but with a much-simplified wording.

81 See, e.g., Article V(2)(e) of the Canada - Ukraine FIPA (1994); Article VI(e) of the Canada - Uruguay FIPA (1997); Article 10.7(1)(f) of the Chile - Korea FTA (2003).

82 See, e.g., Article VI(e) of the Georgia - U.S. BIT (1994); Article VI(e) of the Bahrain - U.S. BIT (1999).

83 See, e.g., Article 10(4)(b) of the Benin - Canada FIPA (2013).

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

85 See also Article VI(e) of the 1994 U.S. Model BIT.

86 See, e.g., Article 10.9(3)(b) of the CAFTA-DR - U.S. FTA (2004); Article 13.11(4) of the Australia - UK FTA (2021); Article 10.6(3)(b) of the RCEP (2020); Article 9.10(3)(b)(i) and (ii) of the CPTPP (2015); Article 10.5(1)(f) of the India - Korea CEPA (2009) (refers simply to the TRIPs Agreement).

87 Article 14.10(3)(b) of the USMCA.

88 Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, the Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299 (1994).

89 See, e.g., Article 19(1) of the Benin - Canada FIPA (2013); Article 17(4) of the Canada - Guinea FIPA (2014); Article 16(4) of the Canada - Hong Kong, China FIPA (2016).

90 See, e.g., Article 809(4) of the Canada - Colombia FTA (2008).

91 Articles 9(3)(b) and 17(4) of the Chile - Hong Kong BIT (2016).

92 See NAFTA Articles 1106(1)(a), (b) and (c).

93 See NAFTA Articles 1106(3)(a) and (b).

94 This exception is identically reproduced in Article 8(3)(d) of the 2004 U.S. Model BIT, Article 8(3)(d) of the 2012 U.S. Model BIT and Article 9(6)(a) of the 2012 Canada Model FIPA.

95 See, e.g., Article 10.9(3)(d) of the CAFTA-DR - U.S. FTA (2004); Article 10.6(3)(d) of the RCEP (2020); Article 13.11(6) of the Australia - UK FTA (2021); Article 807(7)(a) of the Canada - Colombia FTA (2008); Article 8.9(7) of the Pacific Alliance - Singapore FTA (2022); Article 14.10(3)(d) of the USMCA.

96 See, e.g., Article VI(2)(d) of the Canada - Romania FIPA (2009).

97 See, e.g., Article 10.9(3)(f) of the CAFTA-DR - U.S. FTA (2004); Article 13.11(8) of the Australia - UK FTA (2021); Article 10.6(3)(e) of the RCEP (2020); Article 807(7)(c) of the Canada - Colombia FTA (2008); Article 8.5(6) of the CETA (2014); Article 9.10(3)(g) of the CPTPP (2015); Article 10.8(8) of the Pacific Alliance Protocol (2014); Article 10.7(7)(c) of the Chile - Korea FTA (2003).

98 See Article 14.10(3)(f) of the USMCA.

99 See NAFTA Articles 1106(3)(a) and (b). The Article 1108 (8)(c) exception is also reproduced in Article 8(3)(f) of the 2004 U.S. Model BIT, in Article 7(6)(c) of the 2004 Canada Model FIPA, in Article 8(3)(f) of the 2012 U.S. Model BIT and in Article 9(6)(c) of the 2012 Canada Model FIPA.

(e) GATT Article XX-like exceptions

A number of the surveyed IIAs have adapted the GATT Article XX exception in different ways:

a. 3 FTAs have reproduced the NAFTA formulation in identical terms.[100]

b. 20 IIAs,[101] including the USMCA,[102] have followed Article 8(3)(c) of the 2004 U.S. Model BIT, which extends the availability of this same exception to mandatory technology transfer requirements.[103]

Other IIAs, replicating the majority of NAFTA Article 1106(6), have further tailored it to achieve different outcomes:

a. A number of IIAs provide that the GATT Article XX exception applies to the entirety of their PRP, and not only to LCRs and LSRs. For example, both Article 14.15 of the Australia - Japan EPA (2014) and Article 19 of the CERTA Investment Protocol (2011) opted for "general exceptions" applicable to multiple treaty provisions, including but not limited to the entirety of their respective PRPs.

b. Article XVII(3) of the Canada - Ukraine FIPA (1994), which contains an exception mirroring NAFTA Article 1106(6), goes further by extending its applicability to the entire treaty. 23 Canadian FIPAs and 1 Chilean IIA follow this latter approach.[104] 10 Canadian FIPAs, as well as 2 Indian IIAs, largely reproduce this, but add to the exception regarding exhaustible natural resources the requirement that such measures be made effective in conjunction with restrictions on domestic production or consumption.[105]

c. Similarly, 3 Canadian FTAs, 1 Indian IIA and 5 Australian IIAs reproduce in substance exceptions nearly identical to NAFTA Article 1106(6), but extend their application to the entirety of their respective investment chapters.[106]

(f) Tailored exceptions to PRPs that address various issues of national or regional concern

i. Preserving performance requirements necessary to comply with EU rules

Article I of the EU - U.S. Additional Protocols (September 2003) relates to 8 U.S. BITs each entered into with a different EU Member State,[107] and carves out from the respective PRPs the ability of each of those Member States to impose, as necessary under EU law, performance requirements in respect of agricultural and audio-visual goods or services.[108] Similarly, in light of the requirements of EU law on Member States, Articles V(3) of the Canada - Latvia FIPA (2009) and of the Canada - Romania FIPA (2009) clarify that their respective mandatory PRPs "shall not be interpreted to prohibit" performance requirements regarding the production, processing and trade of agricultural and processed agricultural products.

ii. General exceptions pertaining to public order, national treasures and other miscellaneous issues

A number of IIAs contain an additional exception including to PRPs for measures adopted or maintained on public policy grounds. These are often found in those provisions which reproduce or adapt the GATT Article XX-type exceptions discussed above. For example, Article 19 of the CERTA Investment Protocol (2011), Article 14.15 of the Australia - Japan EPA (2014) and Article 18(1) of the Chile - Hong Kong BIT (2016) – apart from reiterating the exceptions to protect life or health, to ensure regulatory compliance not inconsistent with the treaty, and to conserve exhaustible natural resources – contain a separate category of excepted measures "necessary to protect morals or to maintain public order".[109] Two older French BITs also recognise a similar exception within their PRPs in relation to measures taken for *ordre public* reasons.[110]

100 Article 10.7(6) of the Chile - Korea FTA (2003); Article 9-07(6) of the Chile - Mexico FTA (1998); Article G-06(6) of the Canada - Chile FTA (1996).

101 See, e.g., U.S. TIPs: Article 15.8(3)(c) of the Singapore - U.S. FTA (2003); Article 10.9(3)(c) of the CAFTA-DR - U.S. FTA (2004); Article 9.10(3)(d) of the CPTPP (2015). U.S. BITs: see, e.g., Article 8(3)(c) of the U.S. - Uruguay BIT (2005). Australian Agreements: see, e.g., Article 11.9(5) of the Australia - Korea FTA (2014); Article 7(3)(c) of SAFTA Revised Chapter 8 (Investment) (2016); Article 10.7(3)(c) of the Australia - Chile FTA (2008); Article 11.9(3)(c) of the Australia - U.S. FTA (2004). Chilean Agreements: Article 10.8(5) of the Pacific Alliance Protocol (2014); Article 9.6(3)(c) of the Chile - Colombia FTA (2006); Article 11.6(3)(c) of the Chile - Peru FTA (2006); Article 10.5(3)(c) of the Chile - U.S. FTA (2003).

102 See Article 14.10(3)(c) of the USMCA.

103 Those following the formulation in Article 8(3)(c) of the 2004 U.S. Model BIT also eases the threshold in respect of exhaustible natural resources: "*related to* the conservation of living or non-living exhaustible natural resources" (emphasis added).

104 See, e.g., Article 18(1) of the Canada - Nigeria FIPA (2014); Article 18(1) of the Chile - Hong Kong BIT (2016).

105 See, e.g., Article 33(2) of the Canada - China FIPA (2012). Article 6.11 of the India - Singapore CECA (2005) and Article 10.18(1) of the India - Korea CEPA (2009) adopt very similar exceptions with the same proviso to the exception regarding exhaustible natural resources

106 Canadian FTAs: Article 2201(3)(a) of the Canada - Peru FTA (2008); Article 2201(3)(a) of the Canada - Colombia FTA (2008); Article 23.02(3)(a)(i) of the Canada - Panama FTA (2010). Australian IIAs: Article 31.1(1) and 31.1(2) of the Australia - UK FTA (2021); Article 17.12(1) of the RCEP (2020); Article 8.18(1) of the Australia - Peru FTA (2018); Article 1(5) of Chapter 11 of PACER Plus (2017); Article 17.2(3) of the Australia - Indonesia CEPA (2017). Indian IIA: Articles 11(1) and 11(2) of the India - Japan CEPA (2011).

107 Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and the Slovak Republic.

108 See e.g., Article I of the *Additional Protocol Between the United States of America and the Czech Republic to the Treaty Between the United States of America and the Czech And Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment of October 22, 1991*, signed at Brussels on 10 December 2003, 108th Cong., 2nd Sess., Treaty Doc. 108–18.

109 See also Article 6.11 of the India - Singapore CECA (2005); Chapter 11, Article 1(5) of PACER Plus (2017); and Article 17.2(3) of the Australia - Indonesia CEPA (2019).

110 The France - Nepal BIT (1983) clarifies that measures taken for public security, public health, public order or public morality do not breach the FET provision which includes a PRP, so long as these measures are neither abusive nor discriminatory: see Exchange of Letters No 1 dated 2 May 1983 to the BIT. Likewise, the Bangladesh - France BIT (1985) clarifies that measures taken for public security, public health, public order or public morality do not breach the MFN treatment clause which includes a PRP: see Exchange of Letters No 3 to the BIT.

A few IIAs have created another category of GATT Article XX-type exception for measures (including PRPs) directed at the protection of "national treasures". Among the surveyed IIAs, the Canada - Thailand FIPA (1997) seems to have been the first to recognise (at Article XVII(3)(d)) excepted measures "imposed for the protection of national treasures of artistic, historic or archaeological value", a formulation which has subsequently been emulated by the India - Korea CEPA (2009) (at Article 10.18(1)(d)), the Australia - Peru (2018) (at Article 8.18(1)(c)) and the Australia - Indonesia CEPA (2019) (at Article 17.2(3)(d)). Chapter 11, Article 1(7)(a) of PACER Plus (2017) contains essentially the same exception for measures "necessary to protect national works or specific sites of historical or archaeological value."

Occasionally the State Parties may also negotiate bespoke treaty exceptions applicable to PRPs. For example, Article XVII(3)(e) of the Canada - Thailand FIPA (1997) provides a general exception in respect of temporary and non-discriminatory measures "essential to the acquisition or distribution of products in general or local short supply". In the Canada - Korea FTA (2014),[111] Canada and Korea have arrived at a shared understanding that neither (i) recycling obligations and low-emission motor vehicle distribution obligations, nor (ii) Korean rules regarding raw materials for liquor production, are inconsistent with the PRP.

(g) Exceptions in favour of aboriginal peoples and/or socially or economically disadvantaged minorities

The NAFTA approach of including PRP reservations with respect to aboriginal peoples and/or other minorities[112] as a treaty annex was subsequently adapted into the 2004 Canada Model FIPA, and has been followed in 21 of the surveyed Canadian IIAs,[113] 2 of the surveyed Chilean IIAs[114] and in 11 of the surveyed Australian IIAs.[115]

The Canada - Ukraine FIPA (1994) takes a slightly different approach, which stipulates in the body of the treaty itself (Article VI(2)(c)) its relevant PRP exception in respect of measures that deny Ukrainian investors and investments any rights or preferences provided to the aboriginal peoples of Canada. This approach has been followed by 16 other Canadian FIPAs[116] and 4 Australian IIAs.[117]

(h) Exempting cultural industries from PRPs

Cultural industries are largely carved out from the NAFTA's application pursuant to its Article 2106 and Annex 2106, which essentially incorporates by reference Article 2005 of the CUSFTA (1988) and makes it applicable to NAFTA State Parties.[118] Article O-06 of and Annex O-06 to the Canada - Chile FTA (1996) mirrors the NAFTA/CUSFTA approach to exempting cultural industries, except for specifically identified tariff elimination commitments. Article VI(3) of the Canada - Ukraine FIPA (1994)[119] goes further by excluding investments in cultural industries in Canada from the treaty's scope altogether. 33 Canadian FIPAs[120] and 5 Canadian FTAs[121] reproduce this exception in substantially identical terms, but extend this exemption to the cultural industries of both their State Parties.

Not unlike the Canada - Ukraine FIPA (1994), many but not all French BITs comprise both a PRP and an exclusion of measures pertaining to the cultural sector, as part of policies designed to preserve and promote cultural and linguistic diversity.[122]

111 See Chapter 9 – Exchange of Confirming Letters Between Korea and Canada.

112 A number of IIAs have employed different categories such as "ethnic groups" (e.g. Annex II - Reservations for Future Measures - Schedule of Peru to the Canada - Peru FIPA (2006) - Sector: Indigenous Communities, Peasant, Native, and Minority Affairs; Annex II - Schedule of Colombia to the Canada - Colombia FTA (2008) and "indigenous persons" (e.g. Annex II to the Australia - Chile FTA (2008)).

113 See, e.g., Annex II to the Canada - Peru FTA (2008); Annex I to the Canada - Moldova FIPA (2018).

114 Annex II to the Pacific Alliance - Singapore FTA (2022); Annex II to the Chile - Hong Kong BIT (2016).

115 See, e.g., Annex II to the Australia - UK FTA (2021); Annex III of the RCEP (2020).

116 See, e.g., Article XVII(4) and Annex, section 2(b) of the Canada - Philippines FIPA (1995); Article VI(2)(c) of the Canada - Romania FIPA (2009).

117 Article 17.16(1) of the RCEP (2020) (with respect to any measures adopted by New Zealand to accord more favorable treatment to Maori pursuant to the Treaty of Waitangi); Article 6(1) of Chapter 11 of PACER Plus (2017) (with respect to any measures adopted by New Zealand to accord more favorable treatment to Maori pursuant to the Treaty of Waitangi); Article 23 of the CERTA Investment Protocol (2011); Chapter 22, Article 5 of AANZFTA (2009) (in respect of trade in goods and services).

118 Article 2005 of the CUSFTA (1988) exempts cultural industries except in respect of a limited number of treaty provisions relating to (i) tariff elimination, (ii) the sale of an indirectly acquired foreign-owned cultural enterprise, (iii) copyright protection, and (iv) printing requirements, applicable to cultural industries.

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

120 See, e.g., Article 17(7) of the Canada - Moldova FIPA (2019); Article 20(7) of the Benin - Canada FIPA (2013); Article 17(7) of the Canada - Tanzania FIPA (2013); Article 17(7) of the Cameroon - Canada FIPA (2014); Article 18(7) of the Canada - Nigeria FIPA (2014); Article 18(7) of the Canada - Serbia FIPA (2014); Article 18(7) of the Canada - Senegal FIPA (2014); Article 17(7) of the Canada - Mali FIPA (2014); Article 17(7) of the Canada - Côte d'Ivoire FIPA (2014); Article 18(7) of the Burkina Faso - Canada FIPA (2014); Article 18(7) of the Canada - Guinea FIPA (2014); Article 17(7) of the Canada - Hong Kong, China FIPA (2016).

121 Article 2205 of the Canada - Peru FTA (2008); Article 2206 of the Canada - Colombia FTA (2008); Article 23.06 of the Canada - Panama FTA (2008); Article 22.7 of the Canada - Honduras FTA (2013); Article 22.6 of the Canada - Korea FTA (2014).

122 See, e.g., Article 1(6) ("Definitions") of the Ethiopia - France BIT (2003); Article 1(5) ("Definitions") of the France - Senegal BIT (2007). Article 1(5) of the France - Senegal BIT (2007) is noteworthy as the only such provision that specifically refers to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted during the 33rd session of the United Nations Educational, Scientific and Cultural Organization in October 2005 (Signed on 20 October 2005 and entered into force on 18 March 2007, 2440 UNTS 43977, 311).

3. Shielding government procurement from PRPs in IIAs

69 IIAs among those surveyed exclude government procurement from their PRPs one way or another. NAFTA Article 1108(8)(b)[123] specifies that the prohibition of mandatory LCRs, LSRs, technology transfer requirements and product mandating requirements[124], as well as the prohibition of advantage-conditioning LCRs and LSRs,[125] do not apply to procurement by a Party or a state enterprise. This formulation is adopted either verbatim or in almost identical terms in 43 of the surveyed IIAs.[126] Article 5(3) of the ECT (1994) opts for the same exception to its TRIMs Agreement-like disciplines, but with a much-simplified wording.

In addition to those requirements listed in NAFTA 1108(8)(b), a few recent IIAs exempt even more performance requirements from their PRPs in the context of government procurement:

a. The Australia - UK FTA (2021) also allows the imposition of mandatory requirements to prefer a specific technology; prohibitions from using a specific technology; localisation of a headquarters in its territory; and achievement of R&D in its territory.[127] (Interestingly, its Article 13.2(4) contains a separate but generic PRP exemption for "activities carried out in the exercise of government authority".)

b. The USMCA, like the 2012 U.S. Model BIT also allows the imposition of: (i) mandatory requirements to prefer a specific technology or to use a specific technology, and non-judicial mandatory requirements to adopt a given rate or amount of royalty, or a given duration, in license contracts; as well as (ii) advantage-conditioning requirements that either impose a preference to use a specific technology or that prohibit the use of a specific technology.[128]

In contrast, a number of IIAs follow Article VI(2)(a) of the Canada - Ukraine FIPA (1994), which renders the entirety of its PRP inapplicable to procurement by a government or state enterprise. 18 Canadian FIPAs follow this approach.[129] Article 90(7) of the India - Japan CEPA (2011) and Article 8.5(5)(b) of the CETA (2014) specify instead that their respective PRPs do not apply to government procurement or "procurement ... of a good or service purchased or governmental purposes".[130] 4 of the surveyed IIAs go farther and carve out government procurement altogether from the scope of their respective "Investment" chapters.[131]

Even more striking is Article 2(3)(c) of the Chile - Hong Kong BIT (2016), which excludes government procurement altogether from the scope of the entire treaty.

4. Opting taxation measures in or out of PRPs of IIAs

NAFTA Article 2103(1) states that the treaty does not apply to taxation measures unless provided otherwise. Article 2103(5) in turn specifies that Articles 1106(3), (4) and (5) apply to taxation measures, such that (i) conditioning tax advantages upon LCRs, LSRs, trade-balancing requirements or domestic sales restrictions through taxation measures is prohibited; but tax advantage-conditioning requirements to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out R&D in their territories through taxation measures are permitted. Articles O-03(1) and O-03(5) of the Canada - Chile FTA (1996), as well as Articles 24.3(2) and 24.3(7) of the Pacific Alliance - Singapore FTA, follow essentially the same approach.

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

124 See NAFTA Article 1106(1)(b), (c), (f) and (g).

125 See NAFTA Article 1106(3)(a) and (b).

126 See, e.g., Article 10.7(7)(b) of the Chile - Korea FTA (2003); Article 807(6)(b) of the Canada - Peru FTA (2008); Article 10(6)(b) of the Benin - Canada FIPA (2013). Article 9(6)(b) of the Canada - Tanzania FIPA (2013) likewise reproduces NAFTA Article 1108(8)(b) and excludes procurement "by a Party or a State enterprise" from the same set of prohibited performance requirements, but its Article 16(7) simultaneously excludes "procurement by a Party" from the entirety of its PRP. The following IIAs follow employ the formulation in Article 8(3)(e) of the 2004 U.S. Model BIT, which is identical to NAFTA Article 1108(8)(b) save that the terms "procurement" or "government procurement" replace the expression "procurement by a Party or a state enterprise": see, e.g., Article 10.9(3)(e) of the CAFTA-DR - U.S. FTA (2004); Articles 11.9(7) of the Australia - Korea FTA (2014); Article 10.8(7) of the Pacific Alliance Protocol (2014).

127 See Article 13.11(7) of the Australia - UK FTA (2021) which notably carves out measures from the prohibitions of Articles Article 13.11(1)(h) through 13.11(1)(j) in the context of government procurement.

128 See Article 14.10(3)(e) of the USMCA which notably carves out measures from the prohibitions of Articles 14.10(1)(h), 14.10(1)(i) and 14.10(2)(e) of the USMCA in the context of government procurement.

129 See, e.g., Article 16(5) of the Canada - Mongolia FIPA (2016).

130 The CETA (2014) employs this alternative expression, whether or not it amounts to "government procurement", as the latter expression is construed for purposes of its distinct chapter on government procurement.

131 Article 10.2(2)(a) of the RCEP (2020); Article 3(2)(a) of Chapter 9 of PACER Plus (2017); Article 14.2(3)(a) of the Australia - Indonesia CEPA (2017); Article 11.1(4)(c) of the Chile - Peru FTA (2006).

A number of other IIAs follow the NAFTA Article 2103 approach, but lay out more specific rules as to the extent to which their PRPs apply to taxation measures:

a. 13 of the surveyed IIAs reproduce Articles 21(1) and (3) of the 2004 and 2012 U.S. Model BITs, which prohibits a more limited set of advantage-conditioning performance requirements in relation to taxation measures.[132]

b. 3 IIAs – Article 18.4(2) of the Pacific Alliance Protocol (2014); Article 22.3(1) and (4)(c) of the Australia - Chile FTA (2008); Article 22.3(2)(e) of the Australia - Korea FTA (2014) – follow a similar approach, albeit with additional restrictions as to the applicability of their respective PRPs to taxation measures.

c. 5 Canadian TIPs[133] and 4 IIAs[134] state that nothing applies to taxation measures unless indicated otherwise, but then subject taxation measures to all of their respective PRP provisions. 3 Australian IIAs provide for essentially the same, but with a different formulation that "rights or … obligations with respect to taxation measures" may be granted pursuant to their respective PRPs.[135]

In total, 31 of the surveyed IIAs have subjected taxation measures to part of or to the entirety of their respective PRPs. By contrast, 45 of the surveyed IIAs follow the example set by Article XII(1) of the Canada - Ukraine FIPA (1994)[136] and exempt taxation measures from their respective PRPs entirely.[137]

5. Reserving non-conforming measures from PRPs in IIAs

With regard to the first category of reservations (applicable to specified existing non-conforming measures), NAFTA Article 1108(1)[138] specifies that Article 1106 does not apply to: (i) any non-conforming measure that existed at the time of signing the NAFTA and that is maintained by a level of government;[139] (ii) the continuation or prompt renewal of any such non-conforming measure[140] (Article 1108(1)(b)); or (iii) an amendment to any such non-conforming measures, provided that such amendments do "not decrease the conformity of the measure, as it existed immediately before the amendment".[141] The NAFTA formulation is replicated nearly without change in 39 of the surveyed IIAs.[142] 24 other IIAs have implemented slight variations while replicating this approach:

a. Article IV(2)(a)(i) of the Canada - Ukraine FIPA (1994) follows closely NAFTA Article 1108(1), but only refers to existing non-conforming measures maintained by a "Contracting Party" (without disaggregating different levels of government). 18 Canadian FIPAs and 1 Chilean IIA reproduce this approach.[143]

b. 2 IIAs adopt essentially the same structure and content as NAFTA Article 1108(1), but specify the application of reservations to maintained non-conforming measures which existed on the date of the treaty's entry into force.[144] 1 recent multilateral IIA provides, in relation to amendments to a non-conforming measure, that the extent to which such amendments affects the conformity of the original measure shall be assessed by reference to "the date of entry in force" for certain parties, but "immediately before the amendment" for others.[145]

c. Two recent Canadian FIPAs – the Canada - Mongolia FIPA (2016); and the Canada - Moldova FIPA (2018) – substantially reproduce NAFTA Article 1108(1), but also allows non-conforming measures "maintained or adopted after the date of entry into force" concerning the sale or other disposition of certain state and governmental assets.

d. Other IIAs may comprise reservations available only to specified State Parties. For example, Chapter 11, Article 12 of the AANZFTA (2009) provides for the same reservations to its PRP as the NAFTA, but only in respect of measures adopted by Lao PDR.

e. 6 Canadian FIPAs[146] reproduce in essence NAFTA Article 1108, but do not specify that existing, non-conforming and maintained measures must be listed in an Annex. Rather, they only provide that a State Party set them out in their respective Annex I "to the extent possible", and which would in any event be "without prejudice" to the provisions on non-conforming measures.

f. 6 other Canadian FIPAs[147] go even farther by not stipulating any obligation or recommendation for State Parties to set out their existing, non-conforming and maintained measures in an Annex.

132 See, e.g., Articles 22.3(1), 22.3(5) and 11.8(3) of the Korea - U.S. FTA (2007); Article 29.4(2), 29.4(7) and 9.10(2) of the CPTPP (2015); Articles 21.4(1), 21.4(5) and 9.6(3) of the Chile - Colombia FTA (2006).

133 See, e.g., Article 2203(1), 2203(7) of the Canada - Peru FTA (2008).

134 See, e.g., Articles 31.4(2) and 31.3(d) of the Australia - UK FTA (2021).

135 Articles 28.4(2) and 28.4(3)(b)(ii) of the Australia - Peru FTA (2018); Articles 17.4(2) and 17.4(3)(b) of the Australia - Indonesia CEPA (2017); Article 5(2)(b) of Chapter 11 of PACER Plus (2017).

136 Article 14(1) of the 2012 Canada Model FIPA and Article 16(1) of the 2004 Canada Model FIPA achieve the same result of rendering their PRP inapplicable to taxation measures.

137 See, e.g., Article 17.14(2) of the RCEP (2020); Article 14(1) of the Canada - Moldova FIPA (2018); Article XII(1) of the Canada - Philippines FIPA (1995); Article 20.3(2) of the Chile - Korea FTA (2003); Article 10.2(8) of the India - Korea CEPA (2009).

138 Article 14(1) of the 2004 U.S. Model BIT, Article 9(1) of the 2004 Canada Model FIPA and Article 14(1) of the 2012 U.S. Model BIT reproduce this same approach.

139 Such existing non-conforming measures may be maintained by a NAFTA State Party's federal government (as per Article 1108(1)(a)(i), and Annexes I and II), by a state or provincial government (as per Article 1108(1)(a)(ii), and Annex I) or by a local government of a State Party (as per Article 1108(1)(a)(iii).

140 NAFTA Article 1108(1)(b).

141 NAFTA Article 1108(1)(c).

142 See, e.g., Article 11.12(1) of the Korea - U.S. FTA (2007); Article 13.13(1) of the Australia - UK FTA (2021); Article 8.15(1) of the CETA (2014); Article 9.12(1) of the CPTPP (2015); Article 9.8(1) of the Chile - Colombia FTA (2006); Article 10.8(1) of the India - Korea CEPA (2009).

143 See, e.g., Article 16(1) of the Canada - Moldova FIPA (2018); Article IV(2) of the Canada - Philippines FIPA (1995). Article IV(2) of the Canada - Philippines FIPA (1995) unfortunately includes a mistake, referring to Article IV twice and omitting to refer to Article V (which includes the PRP), a mistake which is not repeated in the French version thereof and which clearly makes reservations applicable to the PRP.

144 Article 14.10(1)(a) and (b) of the Australia - Japan EPA (2014); note at the end of Article 90 of the India - Japan CEPA (2011).

145 See Article 10.8(1)(c)(i) and (ii) of the RCEP (2020).

146 See, e.g., Articles 17(1)(a)(i), (b) and (c) and 17(2) of the Canada - Senegal FIPA (2014).

147 See, e.g., Article 17(1)(a)(i), (b) and (c) of the Canada - Nigeria FIPA (2014).

With regard to the second category of reservations (applicable to existing and future non-conforming measures in specified sectors), NAFTA Article 1108(3)[148] excludes the application of Article 1106 against any measure that State Parties adopt or maintain in sectors, subsectors or activities set out in Annex II, thus providing reservations for both existing and future measures. 72 of the surveyed IIAs reproduce this approach with respect to PRPs.[149]

There has been relatively little variation to the NAFTA approach. In relation to the AANZFTA (2009), its PRP confines the availability of sectoral reservations to specified State Parties.[150] One other IIA limits such reservations to measures that already existed at the time of signature – Article 6.16(2)(b) of the India - Singapore CECA (2005) provides that its PRP does not apply to reservations made in respect of the measures "maintained in the sectors, sub-sectors or activities" as specified in its annexes, which suggests that such reservations apply only to non-conforming measures which existed at the time of signature.

Accordingly, 74 of the surveyed IIAs specify that their PRPs do not apply to non-conforming measures subject to sectoral reservations. Among these, only one (i.e. the India - Singapore CECA (2005)) does not resort to a formulation similar to NAFTA Article 1108(1).

D. Analysis of key arbitral awards and decisions that have interpreted and applied PRPs in IIAs

(a) The *Lemire* Tribunal's "purpose driven" Interpretation of Open-Ended PRPs

Lemire v Ukraine demonstrates the perils of assigning "purposes" to an open-ended PRP in order to determine its scope and applicability. The claimant Joseph Charles Lemire was the majority shareholder of a licensed radio station in Ukraine.[151] Among other alleged violations, Lemire alleged that Article 9.1 of the 2006 Law on Television and Radio Broadcasting (the "LTR") imposed an LCR that 50 percent of the broadcasting time of each radio organisation had to consist of music produced in Ukraine. The LTR provided that "music produced in Ukraine" included any music where the author, the composer or the performer was Ukrainian.

Lemire argued that this provision amounted to an LCR prohibited by Article II(6) of the Ukraine - U.S. BIT, which provides that "[n]either party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments … which specify that goods and services must be purchased locally, or which impose any other similar requirements".[152] The text of Article II(6) is a verbatim adoption of the PRP language from first-generation U.S. Model BITs. In this context (and as the *Lemire* Tribunal recognised), the LTR's radio broadcasting quota operated like an LCR, given that "*de facto* the market for Ukrainian-authored, -composed or -produced music is located in Ukraine".

Nevertheless, the *Lemire* Tribunal avoided this conclusion and dismissed Lemire's claim for a PRP violation. Despite opening its analysis with the "ordinary meaning" of the Ukraine - U.S. BIT, it ultimately reasoned that the "correct interpretation" of Article II(6) must be informed by the treaty's object and purpose, i.e., "to promote greater economic cooperation".

On this analysis, those prohibitions flowing from Article II(6) had to be trade-related, as the PRP was intended to prevent States from imposing LCRs as a protection of local industries against competing imports – which, in the Tribunal's view, did not apply to the LTR's radio broadcasting quota, the rationale of which was instead "to promote Ukraine's cultural inheritance". This exclusion of cultural measures from the scope of Article II(6) is however difficult to reconcile with the plain meaning of its text, which is a broadly-worded, open-ended PRP admitting no exceptions or reservations.

148 Article 14(2) of the 2004 U.S. Model BIT, Article 9(2) of the 2004 Canada Model FIPA, Article 14(2) of the 2012 U.S. Model BIT and Article 17(2) of the 2012 Canada Model FIPA also reproduce this approach.

149 See, e.g., Article 11.12(2) of the Korea - U.S. FTA (2007); Article 13.13(2) of the Australia - UK FTA (2021); Article 10.8(2) of the RCEP (2020); Article 8.15(2) of the CETA (2014); Article 9.12(2) of the CPTPP (2015); Article IV(2)(d) of the Canada - Philippines FIPA (1995); Article 10.10(2) of the Pacific Alliance Protocol (2014); Article 10.8(2) of the India - Korea CEPA (2009).

150 Chapter 11, Article 12(2) of the AANZFTA (2009) provides that its PRP does not apply to any of Lao PDR's measures adopted or maintained with respect to sectors, sub-sectors, or activities set out in Lao PDR's Schedule to List II.

151 *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), paras. 501, 505-511.

152 See *Lemire v. Ukraine*, para. 503 for the text of Article II.6 of the Ukraine - U.S. BIT.

The *Lemire* Tribunal's reasoning in this regard is also thinly substantiated, as it invoked no authorities to support its assignment of a "cultural" object and purpose to the measure at issue (i.e., the LTR's radio broadcasting quota). Its interpretation of Article II(6) of the Ukraine - U.S. BIT as trade-related and aimed at prohibiting LCRs as a protection of local industries against competing imports, rested solely on the treaty's preamble – which makes no mention of trade and which refers instead to cross-border bilateral investment.

Moreover, the *Lemire* Tribunal's conclusion that the radio broadcasting quota did not violate Article II(6) of the Ukraine - U.S. BIT arguably cannot be justified on the basis of what the Tribunal described as Ukraine's "inherent right to regulate its affairs and adopt laws in order to protect the common good of its people". A prohibited performance requirement cannot be validated and excluded from the scope of prohibition on the sole ground that it aims at achieving some important, legitimate and/or sensitive public policy purposes. Rather, preserving the right for States to impose performance requirements deemed critical should be achieved through specific exceptions, exclusions or reservations in the relevant treaty.

The delicate position of the *Lemire* Tribunal provides a compelling explanation for the progressive abandonment of broadly-worded PRPs in treaty drafting. Over time, they were replaced by detailed PRPs applicable to a limited number of explicitly identified performance requirements, which were further confined by a number of exceptions, exclusions and reservations. The regulatory flexibility and predictability afforded by such safeguards in turn ensured that this more comprehensive approach to performance requirements was reproduced with much greater frequency.

(b) The *Cargill v Poland* Tribunal's "hindrance driven" interpretation of open-ended PRPs

The *Cargill v Poland* award exemplifies a tribunal reading in unwritten criteria in a given PRP as part of its reasoning.[153] The claimant, Cargill, a global food producer and trader from the U.S., began manufacturing isoglucose as a sweetener in Poland during the 1990s, at a time when such production was not subject to domestic regulation. As Poland sought accession to the EU, it passed a 2001 Sugar Law which imposed "quotas on isoglucose limiting the amount which could be sold domestically". Excess production must be exported outside the EU, and Poland acknowledged that such failure to export might lead to financial sanctions.

Cargill argued that this 2001 Sugar Law and related EU regulations amounted to an EPR prohibited by Article II(4) of the Poland - U.S. BIT, which stipulates that "[n]either Party shall impose, as a condition of establishment, expansion or maintenance of investments, any performance requirements which require or enforce commitments to export goods produced ... or which impose any other similar requirements or measures." This is the same broadly-worded and open-ended PRP language employed in the first-generation U.S. Model BITs.

The *Cargill* Tribunal concluded that the relevant quotas and export provisions under the 2001 Sugar Law constituted an EPR. However, it reached this conclusion not by a VCLT-based or text-based analysis of Article II(4) of the Poland - U.S. BIT, but seemingly by reference to a generic definition from an UNCTAD publication ("[p]erformance stipulations are stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country"). Notwithstanding this finding, the Tribunal ultimately concluded that the 2001 Sugar Law did not violate the PRP in Article II(4) of the Poland - U.S. BIT, for two main reasons.

First, the Tribunal found that the 2001 Sugar Law was not imposed as an investment condition "when [Cargill] *established* its investment and while [it] still *maintains* its investment in Poland" (emphases added). While there were indeed no restrictions on isoglucose production or sale when Cargill first began investing and operating in Poland during the 1990s, the Tribunal provided no explanation as to why the relevant EPR could not be said to affect the maintenance of Cargill's investments in Poland. It also appears to overlook that Article 1 of the Additional Protocol to the Poland - U.S. BIT expressly excluded performance requirements in the agricultural sector from the scope of Article II(4).[154]

Second, it similarly decided that the 2001 Sugar Law did not amount to a condition on 'expansion' so as to violate Article II(4) of the Poland - U.S. BIT, because the relevant EPR did not "hinder[] the expansion of [Cargill's] investment", which was instead due to Cargill's own "commercial decision not to export more of its production". This unwritten "hindering" criterion is difficult to reconcile with Article II(4), which – in contrast to, for example, Article II(4) of the India - Kuwait BIT (2001) – does not stipulate that a performance requirement must have such effect on an investment in order to constitute a prohibited "condition of ... expansion".

Indeed, an EPR's very effect would normally be to divert the output of production to foreign markets and to compel an increase in exports, such that to require an investor to demonstrate that an EPR "hindered" the expansion of exports is a contradiction in terms.

Furthermore, the Tribunal did not consider that Cargill might have increased its isoglucose production for sale onto the Polish market had it not been compelled to export excess amounts by reason of the 2001 Sugar Law. It also dismissed as irrelevant that exporting isoglucose from Poland was not a financially sound alternative, due to high storage and transportation costs as well as high import tariffs of selling into non-EU countries. Therefore, these "commercial considerations" demonstrate that, on the Tribunal's own reasoning, the EPR at issue could in fact be said to have hindered the expansion of Cargill's investment on the Polish market.

153 *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008) paras 82-88, 160, 255, 532-533, 544-545, 547-554.

154 In September 2003, the U.S., the EU and the then eight EU candidate countries (Bulgaria; the Czech Republic; Estonia; Latvia; Lithuania; Poland; Romania; the Slovak Republic) reached an understanding pursuant to which the U.S. would enter into substantively identical Additional Protocols with each of these eight countries in order to ensure the compatibility of these 8 BITs with EU law.

Article I of these Additional Protocols amend the PRPs within the BITs to which they are respectively related. Article I ensures that these eight European countries preserve their ability to impose performance requirements in the agricultural and audio-visual sectors to the extent that they are necessary to comply with EU law.

(c) NAFTA Article 1106, *Mobil & Murphy v Canada* and turning the prohibition of mandatory LSRs into a catch-all provision

Mobil & Murphy v Canada illustrates that a text-driven approach to interpreting a PRP may lead to an unexpected expansion of its scope to also exclude other types of performance requirements. The claimants, Mobil Investments Canada Inc. and Murphy Oil Corporation had invested in the Hibernia and Terra Nova offshore petroleum projects (the "Projects") off the coast of Newfoundland and Labrador in Canada. The Projects were governed by a pair of parallel provincial and federal "Accord Acts"[155] that created the Canada-Newfoundland Offshore Petroleum Board. Mobil and Murphy, like any other prospective offshore oil operator, had to submit benefits plans containing provisions ensuring that R&D and E&T expenditures would be made in Newfoundland and Labrador.[156]

In 2004, the Board adopted a set of 2004 Guidelines for Research and Development Expenditures, which departed from previous guidelines by imposing compulsory fixed amounts for local R&D expenditures. Mobil and Murphy alleged that the 2004 Guidelines compelled them to such R&D expenditures in the Province as a condition of operating their investments in the Projects, which in turn allegedly constituted an LSR in violation of NAFTA Article 1106(1)(c).

In response to this line of allegation, Canada's essential argument was that LCRs and LSRs, on one hand, and R&D and E&T requirements, on the other, had to be understood on the basis of their respective meanings, and that the former category of measures did not effectively subsume the latter. In this context, NAFTA Article 1106(1)(c) prohibited only a "closed set of performance requirements that would otherwise reduce the cross-border flow and importation of goods and services," but not R&D requirements aimed at "increasing the knowledge base of the country".

Framing the main question as whether the term "services" as used in NAFTA Article 1106(1)(c) encompasses R&D and E&T, the *Mobil & Murphy* Tribunal decided that the 2004 Guidelines' imposition of local R&D expenditure violated the Article's prohibitions against LSRs. Focussing on the ordinary, dictionary meaning of "services", as well as the NAFTA's trade-liberalising rationale, it rejected Canada's argument, and held that excluding R&D and E&T requirements from "services" amounted to assigning "a special meaning" in a manner inconsistent with the treaty text: "there is nothing inherent in the term 'services' in NAFTA Article 1106(1) that necessarily excludes R&D and E&T".[157]

In construing the provision, the Tribunal found that the TRIMs Agreement, the SCM Agreement and the CUSFTA offered no assistance, and refused any supplementary means of interpretation (including UNCTAD reports on PRPs).[158]

In its reasoning, the *Mobil & Murphy* Tribunal further relied on NAFTA Article 1106(4) to emphasise that the Parties to the NAFTA had excluded R&D and E&T requirements from NAFTA Article 1106(3)'s prohibition of *advantage-conditioning* performance requirements, but not from Article 1106(1)'s prohibition of *mandatory* equivalents. However, what the Tribunal did not point out is that the text of Article 1106(4) distinguishes between "provid[ing]a service," "train[ing] or employ[ing] workers," and "carry[ing] out research and development". This explicit differentiation suggests that "services" do not automatically include R&D or E&T, thereby bringing into question the Tribunal's approach as a matter of textual analysis.

A curious ramification of this finding is that it effectively elevated NAFTA Article 1106(1)(c)'s prohibition of LSRs into a potentially catch-all PRP covering measures that can be construed as applying to activities that amount to "services", without regard to how LSRs or R&D/E&T requirements (as well as potentially other performance requirements) are understood to encompass distinct categories of measures. This stands in contrast to the treaty practice of U.S. Model BITs. The 2004 U.S. Model BIT omits the explicit prohibition of mandatory local R&D requirements originally present in its 1994 predecessor.

It is obvious that the U.S. (and its counterparts to the various IIAs based on the 2004 U.S. Model BIT) did not remove from its 2004 U.S. Model BIT the prohibition of mandatory local R&D requirements on the basis that they considered such wording redundant in the presence of a mandatory prohibition of LSRs. Rather, the simple reason is that the U.S. no longer wished to prohibit mandatory local R&D requirements, since the U.S. was unsure whether its own practice complied with such a prohibition.[159] Such nuance may however be lost through the expansive interpretation of the term "services" and the broadening of the scope of a prohibition of LSRs such as the one in NAFTA Article 1106(1)(c).

155 Nearly identical, both Accord Acts were deemed covered by Canada's reservation: *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) paras 35, 248 and fn 272.

156 *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) paras 37–8, 45-46, 100-101, 490(2).

157 *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) paras 177, 216-218, 220-221, 222-225.

158 *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012) paras 226-231.

159 Kenneth J. Vandevelde, *U.S. International Investment Agreements* (OUP, 2009) 392.

(d) NAFTA Article 1106, the Mexican sugar saga cases and undue restrictions to the scope of PRPs with regard to advantage-conditioning performance requirements

One of the challenges facing tribunals when interpreting and applying PRPs to advantage-conditioning performance requirements is determining to whose investment an advantage must be connected: that of the complaining investor or to any other investor? This complication arises in instances where the complaining party is neither the recipient of the challenged advantage nor subject to compliance to the performance requirement being challenged.

NAFTA Article 1101(1)(c) states that NAFTA Article 1106 applies to measures adopted or maintained by a Party relating to all NAFTA and non-NAFTA investments in the territory of the Party, which includes a State Party's own investors.

NAFTA Article 1106(3) indicates that "an advantage" can be connected to "an investment" of "an investor" of a NAFTA Party or of a non-NAFTA Party. NAFTA Article 1101(1)(c) plainly indicates that NAFTA Article 1106 applies to all investments and not only to investments made by investors of NAFTA Parties. NAFTA Article 1106 thus clearly prohibits performance requirements connected to investments made either by covered Party investors or by non-Party investors. While only a covered investor can submit a claim of to arbitration, NAFTA Article 1106(3) confers onto a NAFTA investor the ability to challenge an advantage-conditioning performance requirement that is connected to an investment that is not its own, including the investment of a non-NAFTA investor or that of a domestic investor of a NAFTA Party.

This understanding is necessary to ensure that prohibitions of advantage-conditioning performance requirements allow a claimant investor to complain about a performance requirement which acts as a condition for an advantage conferred to another investor. Without such an understanding, a claimant investor could not challenge an advantage-conditioning performance requirement even though such advantage causes loss or damage to the claimant investor, notably by detrimentally altering the competitive relationship between the recipient investor and the claimant investor. The findings of the tribunals in the three disputes that together make up the "Mexican sugar saga" undermined such understanding of the disciplines on advantage-condition performance requirements worded in the same way as NAFTA Article 1106(3).

The "Sweetener Claimants" Archer Daniels Midland (ADM), Tate & Lyle, CPI and Cargill were all American corporations that manufactured and distributed high-fructose corn syrup ("HFCS") in Mexico when the latter implemented the measures at issue in those disputes.[160] The Sweetener Claimants challenged the same measures within the same timeframe.

On December 30, 2001 the Mexican Congress amended its law which imposed a 20% "Sweetener Tax" on soft drinks and on services used to transfer and distribute soft drinks that use any sweetener other than cane sugar. The Sweetener Claimants had been selling most of their HFCS to Mexican soft drink bottlers up to that point. They competed with domestic cane sugar producers as suppliers of sweetener for soft drinks. Mexican soft drink producers replaced cane sugar with HFCS due to it being cheaper than cane sugar. By 1997, HFCS occupied a 25% market share, up from 0% in 1991.

The Sweetener Tax was designed to apply to soft drinks that used any sweetener other than cane sugar. Soft drinks sweetened exclusively with cane sugar were exempted.

Immediately following the entry into force of the Sweetener Tax, Mexican soft drink bottlers replaced HFCS with cane sugar as a sweetener in order to avoid paying the Sweetener Tax. This substitution destroyed the Sweetener Claimants' market share. By 2001, HFCS had become the predominant sweetener used by the Mexican soft drink industry. Within a year of its entry into force in 2002, the Sweetener Tax had virtually excluded HFCS from the Mexican soft drink market.

The Sweetener Claimants argued that the exemption from the Sweetener Tax constituted an advantage conditioned on the use of domestic cane sugar in soft drink production. This amounted to according a preference to goods produced in Mexico, in violation of NAFTA Article 1106(3).

One of the challenges facing tribunals in these disputes is that Mexican bottlers were the ones who had the obligation to pay the Sweetener Tax when they sold or imported soft drinks that comprised a sweetener other than cane sugar. The Sweetener Tax did not apply to the Sweetener Claimants.

The *CPI v Mexico* Tribunal did not make any finding on the existence of an advantage and limited itself to succinctly rejecting the alleged breach of NAFTA Article 1106.[161] The Tribunal found that the Sweetener Tax applied to soft drink bottlers and not to HFCS producers such as CPI. It predicated its decision notably on concluding that Mexico had imposed no mandatory requirement directly on CPI upon enacting the Sweetener Tax.[162] The Tribunal did recognise that the intent and effect of the Sweetener Tax was to reduce CPI's customer base.

160 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007) paras 2-3, 40, 48-49, 70, 80, 82, 100-101, 103, 108, 215-218; *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008) paras 2-5, 26, 40, 42, 44, 46, 57, 101; *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) paras 1, 2, 6, 57, 66-67, 105-108, 122, 306, 317, 319.

161 *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008) paras 9, 79-80.

However, the Sweetener Tax applied only to soft drink bottlers, such that CPI could not challenge the Sweetener Tax. With its decision, the Tribunal inaccurately construed NAFTA Article 1106 as mandating the direct applicability of a challenged performance requirement to the claimant's investment. Mexico might not have imposed a mandatory performance requirement, but it did condition the receipt of the exemption from the Sweetener Tax upon the use by Mexican soft drink bottlers of cane sugar instead of HFCS. The non-mandatory nature of the Sweetener Tax might have sufficed to prevent the application of NAFTA Article 1106(1). Nevertheless, the requirement of using of cane sugar instead of HFCS clearly acted as an advantage-conditioning performance requirement prohibited under NAFTA Article 1106(3).

The *ADM v Mexico* Tribunal considered that Mexico had conferred an advantage to Mexican cane sugar producers by conditioning the exemption from the Sweetener Tax on the use of cane sugar as a soft drink sweetener. Mexico had thus placed foreign HFCS producers at a competitive disadvantage compared with Mexican cane sugar producers.[163]

The Tribunal characterised the Sweetener Tax as an LCR and an LSR by exposing the almost exclusively domestic origin of cane sugar consumed in Mexico. It decided that the exemption from the Sweetener Tax was in connection with the investments of claimants ADM and Tate & Lyle in Mexico since such exemption had a detrimental impact on their investment's profitability. Accordingly, the Tribunal concluded that the requirement of using cane sugar in order to secure an exemption from the Sweetener Tax had violated NAFTA Article 1106(3).

The *Cargill v Mexico*[164] Tribunal held that exemption from the Sweetener Tax constituted an advantage under NAFTA Article 1106(3) whose receipt, conditioned upon the requirement to use domestically produced cane sugar in violation of NAFTA Article 1106(3), was "in connection with" the operation of claimant's investment (i.e., Cargill de Mexico) given that exemption from the Sweetener Tax was "integrally related" to Cargill de Mexico. The Tribunal based this connection on the Sweetener Tax's design aimed at restricting or even eliminating the sale of HFCS to Mexican soft drink bottlers. The Tribunal therefore held that Mexico had violated NAFTA Article 1106(3).

Both the *ADM v Mexico* and the *Cargill v Mexico* Tribunals misconstrued NAFTA Article 1106(3) by mandating a connection between a claimant's investment and the performance requirement at issue. The wording of NAFTA Article 1106(3) (and of the many PRPs that replicate its wording) does not ask for a connection between the investment of the claimant investor and the advantage whose receipt is conditioned on a performance requirement.

Although the *ADM v Mexico* Tribunal linked the interpretation of NAFTA Article 1106(3) to NAFTA Article 1101(1)(c), it did not account for the latter's broad scope when it circumscribed NAFTA Article 1106 to investments by "any investor from the NAFTA region".[165] The *Cargill v Mexico* Tribunal construed the "in connection with" element in NAFTA Article 1106(3) in the same way as the standing test for bringing a claim under NAFTA Articles 1116 or 1117.

In both *ADM v Mexico* and *Cargill v Mexico*, it should have sufficed to decide that exemption from the Sweetener Tax was connected with investments of Mexican soft drink bottling companies for the exemption from the Sweetener Tax to be challengeable by the Sweetener Claimants. ADM and Cargill would have had to link their damages or losses to the exemption from the Sweetener Tax and to the performance requirement that conditioned its receipt. By insisting on connecting the exemption from the Sweetener Tax to the respective investments of ADM and Cargill as claimants, the *ADM v Mexico* and *Cargill v Mexico* Tribunals needlessly restricted the scope and coverage of NAFTA Article 1106(3).

162 *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008) paras 9, 80.

163 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007) paras 3, 101, 103, 222, 223, 225-227, 304.

164 *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) paras 306-308,313-319, 552, 557.

165 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award (21 November 2007) paras 218, 221, 227.

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Christophe Bondy has more than 20 years of experience as an investment treaty counsel, and his work includes taking a leading role in some of the highest profile cases yet decided in investment treaty arbitration. Through his work as lead counsel to Canada in multiple NAFTA Chapter Eleven arbitrations and as private sector counsel to multiple sovereigns and private claimants, he has addressed and considered in depth virtually all procedural and substantive issues arising in international investment law both from the state and the investor perspective. His cases have made a substantial contribution to the development of international law in this field. In addition to his busy counsel practice, Christophe sits as an arbitrator in investment treaty cases.

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Since then, Steptoe's arbitration practice is renowned for advising on high-profile, complex disputes and enforcing arbitral awards. With a strong litigation background, the firm handles disputes involving both judicial and arbitration proceedings, including Mareva injunctions, 1782 requests, and other tools in aid of arbitration.

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