Performance Requirement Prohibitions, *Lemire* v. *Ukraine* and *Mobil* v. *Canada*: Stuck Between a Rock and a Hard Place*

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Les interdictions de prescriptions de résultats, *Lemire* c. *Ukraine* et *Mobil* c.*Canada*: pris entre l'arbre et l'écorce

Prohibir la exigencia de resultados, *Lemire* c. *Ukraine* y *Mobil* c. *Canada*: entre la espada y la pared

Proibições de Requisitos de Desempenho, *Lemire* vs. *Ukraine et Mobil* vs. *Canada*: entre a cruz e a espada

左右为难的经营要求禁止
——对"Lemire 诉乌克兰案"和"美孚诉加拿大"案的思考

Résumé

Plusieurs États à travers le monde, ayant identifié l'investissement direct étranger comme un allié indispensable pour leur croissance économique, ont recouru à des prescriptions de résultat afin d'imposer aux investisseurs des obligations visant l'atteinte d'objectifs de politique

Abstract

States around the world, which have labeled foreign direct investment ("FDI") an indispensable ally in their quest for greater economic development, have resorted to performance requirements in order to impose obligations upon investors that aim at increasing their contribution

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publique tout aussi variés que précis. Cependant, un consensus s'est formé parmi un certain nombre d'États selon lequel les prescriptions de résultat causent une distorsion aux flux internationaux de commerce et d'investissement. Cette constatation a mené les États qui la partagent à inclure des interdictions de prescriptions de résultat au sein de leurs accords de libre-échange bilatéraux et régionaux et de protection d'investissement étranger.

Les deux sentences arbitrales analysées dans cet article fournissent d'excellents exemples d'interdictions de prescriptions de résultat s'appliquant à des mesures concernant des questions d'intérêt national particulièrement stratégiques et sensibles. Dans la sentence arbitrale *Lemire* c. *Ukraine*, l'exigence de diffuser 50% de musique ukrainienne sur les ondes radio avait trait à des caractéristiques culturelles et linguistiques névralgiques. Dans la sentence arbitrale *Mobil* c. *Canada*, les exigences de dépenses en matière de recherche et développement, ainsi que d'emploi et de formation constituaient des questions cruciales d'intérêt national.

L'auteur entend mettre de l'avant trois idées dans cet article. Premièrement, les interdictions de prescriptions de résultats s'avèrent un nouveau champ de bataille dans la guerre « public-privé » où s'affrontent droits des investisseurs étrangers et obligations des États hôtes. Deuxièmement, les sentences arbitrales rendues dans *Lemire* c. *Ukraine* (grande déférence octroyée au pouvoir réglementaire de l'État) et dans *Mobil* c. *Canada* (application expansive des droits protégeant les investisseurs étrangers) se trouvent aux opposées respectives du spectre nouvellement formé autour du débat « public-privé » qui émerge aux côtés des

to specific public policy objectives. However, a certain number of States have reached an apparent and sufficiently strong consensus with respect to the distortive impact of performance requirements on trade and FDI, which has driven many among them to include performance requirement prohibitions within numerous bilateral and regional free trade and/or foreign investment protection agreements.

The two investment arbitration awards analyzed in this article provide great examples of performance requirement prohibitions coming into play regarding considerably sensitive matters of national sovereignty. First, in *Lemire* v. *Ukraine*, the 50% Ukrainian music broadcast requirement constituted an exercise in State sovereignty involving "deeply felt cultural or linguistic traits of the community". In the *Mobil* v. *Canada* investment arbitration, the research and development (R&D) and employment and training (E&T) expenditure requirements constituted "matters of considerable national interest".

The author wishes to put forward three ideas thanks to the following analysis of the conclusions reached by *Lemire* v. *Ukraine* and *Mobil* v. *Canada* arbitral Tribunals on performance requirement prohibitions. First, performance requirement prohibitions provide a new battleground for the "public-private debate", whereby a necessary and delicate balance must be struck between rights of private investors and obligations of host States.

Second, the *Lemire* v. *Ukraine* (highly deferential to State sovereignty) and *Mobil* v. *Canada* (highly assertive of investor rights) find themselves at opposite ends of this newly formed spectrum on State sovereignty and investor protection regarding performance requirements.

interdictions de prescriptions de résultat. Troisièmement, la méthodologie employée respectivement par le Tribunal arbitral dans l'arbitrage *Lemire* c. *Ukraine*, en accordant un poids démesuré à l'objet et au but de la mesure contestée, et dans l'arbitrage *Mobil* c. *Canada*, en accordant un poids démesuré à l'effet de la mesure contestée, souffrent de déséquilibres interprétatifs parfaitement antithétiques, ce qui soulève des interrogations quant à la légitimité du processus décisionnel mis en œuvre par les tribunaux arbitraux.

Resumen

Varios Estados en el mundo, habiendo identificado la inversión extranjera como un aliado indispensable para su crecimiento económico, empezaron a exigir resultados con el fin de imponer a los inversionistas obligaciones que permitiesen alcanzar objetivos de política pública tan variados como precisos. Sin embargo, un consenso se formó entre un cierto número de Estados al efecto que las exigencias de resultados causan una distorsión en los flujos internacionales de comercio y de inversión. Esta constatación llevó a varios Estados a prohibir dichas exigencias de resultados en sus acuerdos bilaterales y regionales de libre comercio y de protección de inversión extranjera.

Las dos sentencias arbitrales analizadas en este artículo procuran ejemplos excelentes de aplicación de prohibiciones de exigencias de resultados que conciernen cuestiones de intereses nacionales particularmente estratégicos y sensibles. En la sentencia arbitral *Lemire* c. *Ukraine*, la exigencia de difundir el 50 % de música ucraniana sobre las ondas de radio estaba relacionada con temas culturales y

Third, the decision-making methodologies in *Lemire* v. *Ukraine*, by overly insisting on the purpose of the measure at issue, and in *Mobil* v. *Canada*, by overly insisting on the effects of the measure at issue, suffered from exactly opposite interpretative imbalances, which in turn raise issues of legitimacy as to the decision-making methodologies employed by arbitral tribunals.

Resumo

Muitos paises através do mundo, tendo identificado o investimento estrangeiro direto como um aliado indispensável no crescimento econômico, recorreram a requisitos de desempenho como forma de impor aos investidores obrigações com a finalidade de atingir os objetivos de políticas públicas diversas. Contudo, um certo numero países chegou a um concenso de que os requisitos de desempenho causam uma distorção nos fluxos internacionais de comércio e de investimento. Essa constatação levou os paises que compartilham essa percepção a incluir as "proibições de requisitos de desempenho" em seus acordos de livre comércio bilaterais e regionais e de investimento estrangeiro.

As duas decisões arbitrais analisadas neste artigo fornecem um excelente exemplo de "proibições de requisitos de desempenho" aplicados a medidas referentes a questões de interesse nacional particularmente estratégicas e sensíveis. Na decisão arbitral do caso *Lemire* vs. *Ukraine*, a exigência de se difundir 50% de música ucraniana nas emissoes de rádio está relacionada a características culturais e

lingüísticos neurálgicos. En la sentencia arbitral *Mobil* c. *Canada*, las exigencias de gastos en materia de investigación y desarrollo, así como de empleo y formación constituían cuestiones cruciales de interés nacional.

Me gustaría poner en relieve tres ideas en este artículo, que fueron obtenidas gracias al análisis de las sentencias arbitrales de *Lemire* c. *Ukraine* y de *Mobil* c. *Canada* referentes a las prohibiciones de exigencias de resultados. En primer lugar, las prohibiciones de exigencia de resultados se revelan un nuevo campo de batalla en la guerra "público - privado" donde se enfrentan los derechos de los inversionistas extranjeros y las obligaciones de los Estados huéspedes. En segundo lugar, las sentencias arbitrales de *Lemire* c. *Ukraine* (gran deferencia otorgada al poder reglamentario del Estado) y en *Mobil* c. *Canada* (protección importante otorgada a los derechos de los inversionistas extranjeros) se encuentran en polos opuestos del espectro recientemente formado alrededor del debate "público - privado" que emerge de las nuevas exigencias de resultados. En tercer lugar, la metodología empleada respectivamente por el Tribunal arbitral en *Lemire* c. *Ukraine*, concediendo un peso desmesurado al objeto y a la finalidad de la medida puesta en entredicho, y en el arbitraje *Mobil* c. *Canada*, concediendo un peso desmesurado al efecto de la medida puesta en entredicho, está viciada de desequilibrios interpretativos perfectamente antagónicos, lo que suscita cuestionamientos en cuanto a la legitimidad del proceso de toma de decisiones utilizado por los tribunales arbitrales.

linguísticas nevrálgicas. Na decisão arbitral do caso *Mobil* vs. *Canada*, as exigências de despesas em pesquisa e desenvolvimento, emprego e treinamento eram questões cruciais de interesse nacional.

Eu gostaria de destacar três idéias neste artigo. Primeiramente, as proibições de requisitos de desempenho formam um novo campo de batalha na guerra "público-privada" onde se afrontam os direitos dos investidores estrangeiros e as obrigações dos países hóspedes. Em segundo lugar, a decisão arbitral do caso *Lemire* vs. *Ukraine* (grande deferência outorgada ao poder regulador do Estado) e a decisão no caso entre *Mobil* vs. *Canada* (ampla aplicação dos direitos protegendo os investidores estrangeiros) se encontram em polos opostos no espectro recém formado em torno do debate "público-privado" que emerge ao lado das proibições de requisitos de desempenho. Em terceiro lugar, as metodologias empregadas pelo tribunal arbitral, na decisão *Lemire* vs. *Ukraine*, concedendo um peso desmesurado ao objeto e a finalidade da medida contestada, e na arbitragem *Mobil* vs. *Canada*, concedendo um peso desmesurado ao efeito da medida contestada, sofrem de desiquilíbrio interpretativos perfeitamente antitéticos, o que evidencia questões sobre a legitimidade do processo decisional aplicado pelos tribunais de arbitragem.

摘要

世界上一些把外商直接投资视为促进经济增长必要因素的国家，曾诉诸经营要求给投资者强设义务。这些义务旨在达成各种各样确切的公共政策目标。然而，一些国家一致认为，经营要求造成贸易和投资国际流动的失衡。为此，持这一观点的国家在其双边地区性自由贸易协定和保护外商投资协定中加入了禁止经营要求的规定。

本文分析的两个仲裁判决提供了在涉及到战略敏感性的国家利益问题上适用经营要求禁止的绝佳案例。在Lemire　诉乌克兰仲裁案中，硬性规定在广播中播放50%的乌克兰音乐与“深切感受民族语言文化”有关。在美孚诉加拿大仲裁案中，对研发和雇佣以及培训的硬性规定构成了“重要的国家利益问题”。

本文将提出三个观点。第一，经营要求禁止体现了“公私之战”有了新的战场，交战双方是外商投资者的权利和东道国的义务，两者需要取得平衡。第二，Lemire　诉乌克兰（高度尊重国家主权）和美孚诉加拿大（高度肯定投资者权利）的仲裁判决各自出于国家主权与投资者保护之间有关经营要求这一新战场的两端。第三，无论是Lemire　诉乌克兰一案中过度强调争议措施的目的，还是美孚诉加拿大一案中过度强调争议措施的影响，这两种裁决方法暴露出截然相反的解释失衡的弊端，这样反过来又引发出仲裁法院使用该裁决方法的合法性问题。

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States around the world have identified foreign direct investment ("FDI") as an indispensable ally in their quest for greater economic development. Aside from providing much needed capital to build various types of infrastructure required for providing public services and/or operating enterprises, FDI can bring with it foreign technology and know-how, management expertise, and other key components that play a decisive role in integrating the host State's economy into the global supply chain while increasing its competitiveness[1]. With the economic activity generated by its arrival, FDI can create employment opportunities and demand for locally produced goods and services, increase a host State's exports, and increase its foreign exchange earnings[2].

Admittedly, the previous depiction reads as a best-case scenario. Indeed, FDI inflows are not automatic and must be attracted; moreover, not all types of FDI provide the same level of economic benefits, nor are all host States equally poised to reap all the benefits associated with FDI while minimizing their potential negative effects. When left completely unattended and especially in host States with weak regulatory power, FDI has in certain circumstances the potential to adversely harm the environment and labor rights, distort the domestic market, unhinge the balance-of-payments of a host State, and to wage a stiff competition against local infant industries[3].

As a result, States have strived to attract FDI types commensurate with their absorptive capacities and to regulate FDI in a way tailored to their specific situations so as to maximize positive and minimize negative contributions to State-established development objectives.

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1 United Nations Conference on Trade and Development ["UNCTAD"], *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, UNCTAD/ITE/IIA/2003/7 (2003), p. 1, online: <http://unctad.org/en/Docs/iteiia20037_en.pdf> (accessed October 18, 2013).

2 Freya Baetens, "The Kyoto Protocol Assessed Through the Lens of Investor-State Arbitration: Reconciling Climate Change and Investment Protection Objectives", in Marie-Claire Cordonier-Segger, Markus W. Gehring and Andrew Newcombe (eds.), *Sustainable Development in World Investment Law*, Den Haag, Kluwer Law International, 2011, p. 683, at page 701, online: <www.kluwerarbitration.com> (accessed October 18, 2013).

3 UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives*, UNCTAD/ITE/IIA/2003/4 (2003), p. 1 and 2, online: <http://unctad.org/en/Docs/iteiia20034_en.pdf> (accessed October 18, 2013).

States have resorted to a variety of measures, often referred to as "trade-related investment measures" ("TRIMs"), host-country operational measures ("HCOMs") or "performance requirements", in order to impose obligations upon investors that aim at increasing their contribution to specific policy objectives such as environmental protection, regional and local economic development, technology transfer and local research and development, and affording better employment and training opportunities to local residents and minorities.

Foreign investors may need to comply with TRIMs and/or performance requirements adopted by a State in exchange for the right to establish or operate an investment on its territory or for the right to receive an advantage such as a tax holiday, tax incentives, or a subsidy[4].

However, the effectiveness of performance requirements and TRIMs in achieving such policy objectives has been strongly contested. Moreover, an apparent consensus has been reached with respect to their distortive impact on trade and FDI. Such consensus was sufficiently strong to convince WTO Member States of adopting the WTO Agreement on Trade-Related Investment Measures[5] as part of the Uruguay Round of negotiations in order to reduce TRIMs.

This consensus as to their inefficiency has also driven many States to include performance requirement prohibitions within numerous bilateral and regional free trade and/or investment protection agreements. Article 1106 of the North American Free Trade Agreement[6] constitutes the better known of these prohibitions, while Article II.6 of Treaty Between

4 Meg N. Kinnear, Andrea K. Bjorklund and John F. G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Kluwer Law International, 2006 (Last updated: March 2008 Supplement No. 1), p. 1106-1115, online: <www.kluwerarbitration.com> (accessed October 18, 2013).

5 Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 143 (1999), 1868 U.N.T.S. 186, online: <http://www.wto.org/english/docs_e/legal_e/18-trims.pdf> (accessed October 18, 2013) [hereinafter "TRIMS Agreement"].

6 17 December 1992, 32 I.L.M. 289 (1993), online: <https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=SectionView&mid=1588&sid=539c50ef-51c1-489b-808b-9e20c9872d25&language=en-US#A1106> (accessed October 18, 2013) [hereinafter "NAFTA"].

the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment[7] constitutes another prohibition of a similar nature.

Performance requirement prohibitions can come into play regarding considerably sensitive matters of national sovereignty. The two investment arbitration awards analyzed in this article provide great examples: in *Lemire* v. *Ukraine*[8], the 50 % local music broadcast requirement constituted an exercise in State sovereignty involving "deeply felt cultural or linguistic traits of the community"[9]. In the *Mobil* v. *Canada*[10] investment arbitration, the research and development (R&D) and employment and training (E&T) expenditure requirements were targeted by reservations adopted by Canada as a precautionary step aimed at ensuring that they were exempt from the prohibition under NAFTA Article 1106. The reservations adopted by Canada led partially dissenting arbitrator Philippe Sands to recognize that these expenditure requirements constituted "matters of considerable national interest" and "matters of considerable significance and sensitivity in the relations between Newfoundland [and Labrador] and Canada"[11].

I wish to put forward three ideas thanks to the following analysis of the conclusions reached by the *Lemire* v. *Ukraine* and *Mobil* v. *Canada* arbitral Tribunals on performance requirement prohibitions. First, perfor-

7 March 4, 1994, online: <http://unctad.org/sections/dite/iia/docs/bits/us_ukraine.pdf> (accessed October 18, 2013) (entered into force on November 16, 1996) [hereinafter "U.S. – Ukraine BIT"].

8 *Joseph Charles Lemire* v. *Ukraine*, ICSID Case No. ARB/06/18, January 14, 2010, para. 499-511, online: <http://italaw.com/sites/default/files/case-documents/ita0453.pdf> (accessed October 18, 2013).

9 *Id.*, para. 505.

10 *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, ICSID Case No. ARB(AF)/07/4, May 22, 2012, online: <http://italaw.com/sites/default/files/case-documents/italaw1145.pdf> (accessed October 18, 2013).

11 *Id.* Partial Dissenting Opinion, Professor Philippe Sands Q.C., May 17, 2012, para. 5 and 7, online: <http://italaw.com/sites/default/files/case-documents/italaw1146_0.pdf> (accessed October 18, 2013). Professor Sands dissented on the issue of reservations under NAFTA Article 1108 and found that the measures at issue benefitted from reservations excluding them from the application of NAFTA Article 1106, but sided with the Majority of the Tribunal as to the interpretation and application of NAFTA Article 1106. Reservations and NAFTA Article 1108 will not be discussed any further in this article.

mance requirement prohibitions provide a new battleground for the recently emerged paradigm shift henceforth at the heart of all current and main controversies in the investment arbitration regime: the "public-private debate", whereby the conflicts and tensions and the need for reform in international investment law are not shaped by the North-South divide anymore, but rather by the necessary and delicate balance that must be struck between rights of private investors and obligations of host States[12].

Second, *Lemire* v. *Ukraine* (highly deferential to State sovereignty) and *Mobil* v. *Canada* (highly assertive of investor rights) find themselves at opposite ends of this newly formed spectrum on State sovereignty and investor protection regarding performance requirements.

Third, the decision-making methodologies in *Lemire* v. *Ukraine*, by overly insisting on the purpose of the measure at issue, and in *Mobil* v. *Canada*, by overly insisting on the effects of the measure at issue, suffered from exactly opposite interpretative imbalances, which in turn raise issues of legitimacy as to the decision-making methodologies employed by arbitral tribunals.

I. The Effect and Purpose of a Challenged Measure In Investor-State Disputes

The arbitral tribunal is not bound to strike any balance as to the relative weight assigned to either the effect or the purpose of a measure at issue in rendering its decision upon an alleged violation of an investment treaty provision. Given the existing discretion that arbitral tribunals enjoy in shaping their decision-making processes and their interpretative methodologies, it is suggested that leaning more toward the purpose of a challenged measure often benefits host State sovereignty by granting it greater regulatory flexibility under an investment treaty, while looking more at the effect of a measure often entails a more stringent scrutiny of host State measures and will result in an assertive application of investor rights pursuant to an investment treaty.

[12] Wenhua SHAN, "The Protection of Foreign Investment", in Karen B. BROWN and David V. SNYDER (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé*, Springer, 2012, p. 467, at page 504, online: <https://books2.scholarsportal.info/viewdoc.html?id=502019> (accessed March 28, 2013).

Striking examples of the differences in outcomes depending on whether the effect or the purpose of a measure is granted greater weight can be gleaned from the application of three investment treaty provisions: first, expropriation claims, in respect of which the "sole-effects doctrine"[13] emerged. Second, the relationship between the effect and the purpose of a measure has also drawn attention in the context of the National Treatment obligation, most notably under NAFTA Article 1102[14]. Third, the dichotomy between effect and purpose of a measure surfaced under performance requirement prohibitions. The following provides a brief overview of the interplay between the effect and the purpose of a measure in the context of expropriation and national treatment claims before taking more in-depth look at that same interplay with respect to performance requirement prohibitions.

A. Expropriation and the Sole-Effects Doctrine

According to the "sole-effects doctrine", the effect of a measure on the investment constitutes the decisive and determinative factor in reaching a decision as to whether an indirect expropriation took place. In her article, Ms. Knahr identifies numerous arbitral awards having underlined the crucial importance of the effects of a measure as the decisive factor in reaching a decision as to whether and/or when in time an indirect expropriation took place[15].

[13] See: Christina Knahr, "Indirect Expropriation in Recent Investment Arbitration", (2009) TDM 1, 7, online: <www.transnational-dispute-management.com/article.asp?key=1353> (accessed March 28, 2013).

[14] See on this matter: Fernando Gonzalez Rojas, "The Notion of Discrimination in Article 1102 of NAFTA", (2005) *Jean Monnet Working Paper 05/05*, NYU School of Law, 10-23.

[15] See e.g., *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic*, ICSID Case No. ARB/97/3, August 20, 2007, par. 7.5.20, online: <http://italaw.com/sites/default/files/case-documents/ita0215.pdf> (accessed October 18, 2013); *Compañia del Desarrollo de Santa Elena S.A.* v. *Republic of Costa Rica*, ICSID Case No. ARB/96/1, February 17, 2000, par. 77, online: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC539_En&caseId=C152> (accessed October 18, 2013); *Metalclad Corporation* v. *Mexico*, ICSID Case No. ARB(AF)/97/1, August 30, 2000, par. 103, online: <http://italaw.com/sites/default/files/case-documents/ita0510.pdf> (accessed October 18, 2013); *Biloune and Marine Drive Complex Ltd.* v. *Ghana Investments Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, October 27 1989, 95 ILR 184, 209.

For instance, the arbitral Tribunals in *Santa Elena* v. *Costa Rica*[16] and *Vivendi* v. *Argentina*[17] both asserted that the State's intent in adopting its expropriatory measure under review is irrelevant. The Tribunal in *Santa Elena* stated that the amount owed as compensation for an expropriation remains unaltered by the purpose of an expropriatory measure, "no matter how laudable and beneficial to society as a whole"[18]. The Tribunal in *Santa Elena* further considered that the purpose of the measure "does not alter [its] legal character"[19] as constituting an expropriation.

Two arbitral Tribunals subsequently departed from the "sole-effects doctrine" in the *Methanex* v. *United States*[20] and *Saluka B.V.* v. *Czech Republic*[21] investment arbitrations[22]. In *Methanex* v. *United States*, the Tribunal relied on the public purpose of the measure at issue (along with its non-discriminatory character, its adoption in accordance with due process, and lack of commitments to abstain from such a measure), in order to characterize the measure as "a lawful regulation and not an expropriation"[23]. The Tribunal in *Saluka* v. *Czech Republic* followed the approach of the Tribunal in *Methanex* v. *United States* and decided that "States are not liable to pay compensation when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare"[24] [Emphasis added].

The sole-effects doctrine was reaffirmed as the mainstream approach to indirect expropriation shortly thereafter by the arbitral Tribunals in the

16 *Compañia del Desarrollo de Santa Elena S.A.* v. *Republic of Costa Rica*, *supra*, note 15, para. 72.

17 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic*, *supra*, note 15, para. 7.5.20.

18 *Compañia del Desarrollo de Santa Elena S.A.* v. *Republic of Costa Rica*, *supra*, note 15, para. 72.

19 *Id.*, para. 71.

20 *Methanex Corporation* v. *United States of America*, UNCITRAL ad hoc Tribunal, August 3, 2005, online: <http://italaw.com/sites/default/files/case-documents/ita0529.pdf> (accessed October 18, 2013).

21 *Saluka Investments B.V.* v. *The Czech Republic*, UNCITRAL ad hoc Tribunal, March 17, 2006, online: <http://italaw.com/sites/default/files/case-documents/ita0740.pdf> (accessed October 18, 2013).

22 See: C. Knahr, *supra*, note 13, 11-13.

23 *Methanex Corporation* v. *United States of America*, *supra*, note 20, Part IV D para. 7, 15.

24 *Saluka Investments B.V.* v. *The Czech Republic*, *supra*, note 21, para. 255.

Parkerings v. *Lithuania*[25] and *Vivendi* v. *Argentina*[26] investment arbitrations, according to whom the existence of an expropriation (and the related obligation to compensate) had to be asserted before and independently from looking into the "public purpose" or "general welfare aim" of the measure at issue.

B. National Treatment and the Intent to Discriminate

Article 1102 of the NAFTA states that a NAFTA Party "[…] shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors […]". The text of NAFTA Article 1102 refers to a factual requirement – less favorable treatment – closely linked to the effect of a measure. Nevertheless, some arbitral Tribunals have sought to determine whether the State having adopted the measure at issue grounded its less favorable treatment on a discriminatory intent aimed at protecting domestic investors.

For instance, the arbitral Tribunal in *S.D. Myers* v. *Canada*[27] stated that two requirements had to be met for demonstrating a violation of NAFTA Article 1102: (1) "whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals"; and (2) whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty"[28]. The Tribunal continued its analysis with the statement that "[i]ntent is important, but protectionist intent is not necessarily decisive on its own"[29], and that the word "treatment" as used in NAFTA Article 1102 suggests the requirement of a "practical impact"[30] in order to find a breach of Article 1102.

[25] *Parkerings-Compagniet AS* v. *Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, online: <http://italaw.com/sites/default/files/case-documents/ita0619.pdf> (accessed October 18, 2013).

[26] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic*, *supra*, note 15.

[27] *S.D. Myers Inc.* v. *Canada*, UNCITRAL ad hoc Tribunal, November 13, 2000, online: <http://italaw.com/sites/default/files/case-documents/ita0747.pdf> (accessed October 18, 2013).

[28] *Id.*, para. 252.

[29] *Id.*, para. 254.

[30] *Id.*

The arbitral Tribunal in *Feldman* v. *Mexico*[31] also commented on the distinction between effect and purpose under NAFTA Article 1102 and took the position that the differential treatment should be assumed to have been motivated by the claimant's nationality absent any evidence to the contrary[32]. According to the Tribunal, although its aim is to prevent discrimination on the basis of nationality, NAFTA Article 1102 does not require that a measure explicitly afford less favorable treatment to a foreign investor by reason of nationality: showing less favorable treatment for the foreign investor than for domestic investors in like circumstances is sufficient for purposes of NAFTA Article 1102[33].

Sounding off on the same issue of effect and purpose of a measure under NAFTA Article 1102, the arbitral Tribunal in *CPI* v. *Mexico*[34] stated that although the intent to discriminate by reason of nationality would be sufficient to demonstrate a violation, such intent did not constitute a requirement under NAFTA Article 1102. As a result, the lack of intention to discriminate by reason of nationality would have no bearing on the existence of a less favorable treatment if it can be demonstrated that the effects of a measure benefited domestic investors and harmed exclusively foreign investors[35].

Although perhaps less crucial a distinction than in the context of an expropriation, considering either or both the effect and purpose of a measure has also proven a complex exercise in the context of NAFTA Article 1102.

Overall, these arbitral awards provide examples of the impact of granting greater weight either to the effect or to the purpose of a measure. It is suggested that granting greater weight either to the purpose or to the effect of a measure either informs or reflects an arbitral tribunal's stance as to State sovereignty and investor rights, and that such unfettered interpretative choice can greatly impact the outcome of an arbitral award. As the

31 *Marvin Roy Feldman Karpa* v. *United Mexican States*, ICSID Case No. ARB(AF)/99/1, December 16, 2002, online: <http://italaw.com/sites/default/files/case-documents/ita0319.pdf> (accessed October 18, 2013).

32 *Id.*, para. 181.

33 *Id.*

34 *Corn Products International, Inc.* v. *United Mexican States*, ICSID Case No. ARB (AF)/04/1, January 15, 2008, online: <http://italaw.com/sites/default/files/case-documents/ita0244.pdf> (accessed October 18, 2013).

35 *Id.*, para. 138.

following analysis demonstrates, the *Lemire* v. *Ukraine* Tribunal focused mainly on the purpose of the measure at issue and found no violation of the performance requirement prohibition (pro-State outcome), while the *Mobil* v. *Canada* Tribunal centered its decision on the effects of the measure at issue and found a violation of the performance requirement prohibition (pro-investor outcome).

II. *Lemire* v. *Ukraine* and Performance Requirement Prohibitions

As of 2012, *Lemire* v. *Ukraine* was the only known investment arbitration award that interpreted a performance requirement prohibition outside of the NAFTA. Claimant Joseph Charles Lemire, a national of the United States, was the majority shareholder of a licensed radio station in Ukraine. Among other alleged violations, claimant alleged that Article 9.1 of the 2006 Law on Television and Radio Broadcasting (the "LTR") imposed a local content requirement to the effect that 50 % of the broadcasting time of each radio organization had to consist of music produced in Ukraine. Claimant argued that this provision amounted to a local content requirement prohibited by Article II.6 of the U.S. – Ukraine BIT, which reads as follows:

> "Neither party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods and services must be purchased locally, or which impose any other similar requirements."[36]

The prohibition of performance requirements found in Article II.6 is not qualified or subject to reservations or exceptions, which suggests a sweeping scope of application and a correlatively significant restriction on the Parties' ability to enact measures falling within the broad reach of Article II.6.

[36] See: *Joseph Charles Lemire* v. *Ukraine*, *supra*, note 8, para. 503, for the text of Article II.6 of the U.S. – Ukraine BIT.

A. Local Content Radio Broadcasting Requirement, Regulatory Autonomy of States and Fair and Equitable Treatment

Before proceeding with its analysis under the performance requirement prohibition found in Article II.6 of the U.S. – Ukraine BIT, the Tribunal set the tone with an analysis that the Tribunal itself qualified as "really *obiter dicta*" under the fair and equitable treatment ("FET") standard, given that claimant did not allege that Article 9.1 of the LTR violated the fair and equitable treatment standard[37].

The Tribunal affirmed Ukraine's inherent right, as a sovereign State, "to regulate its affairs and adopt laws in order to protect the common good of its people"[38]. The Tribunal considered that such prerogative extended to regulations implementing a State's cultural policy. Quoting *S.D. Myers* v. *Canada*, the Tribunal stated that the "high measure of deference"[39] recognized by international law regarding a State's ability to regulate matters within its own borders is even more compelling with respect to "deeply felt cultural or linguistic traits of the community"[40].

The tribunal added a second line of justification for Ukraine's measure within its *obiter dicta* relating to the fair and equitable treatment standard : protecting national culture is a concern shared and acted upon by many States around the world. Relying on examples of similar French and Portuguese requirements that radio stations broadcast a minimum of national music and on the fact that many other countries have adopted similar legislation, and citing a similar statement made by the Tribunal in *Plama* v. *Bulgaria*[41], the Tribunal stated that "a rule cannot be said to be unfair, inadequate, inequitable or discriminatory, when it has been adopted by many countries around the world"[42]. Underlining that the 50 % Ukrainian-produced music broadcast requirement applied to all broad-

37 *Id.*, para. 507.
38 *Id.*, para. 505.
39 *S.D. Myers Inc.* v. *Canada*, *supra*, note 27, para. 263.
40 *Joseph Charles Lemire* v. *Ukraine*, *supra*, note 8, para. 505.
41 *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/02, August 27, 2008, par. 269, online : <http://italaw.com/sites/default/files/case-documents/ita0671.pdf> (accessed October 18, 2013).
42 *Joseph Charles Lemire* v. *Ukraine*, *supra*, note 8, para. 506.

casters, the Tribunal ended its *obiter dicta* by declaring Article 9.1 of the 2006 LTR compatible with the FET standard under the U.S. – Ukraine BIT.

B. The Purposes of the Performance Requirement Prohibition and of the Measure at Issue

Following these remarks which clearly suggested where the Tribunal stood in its appreciation of the legitimacy of Article 9.1 of the 2006 LTR, the Tribunal turned its attention to the following question : does Article II.6 of the U.-S. – Ukraine BIT, which prohibits requirements that goods or services must be purchased locally, apply to the requirement that 50 % of the broadcasting time of each radio organization must consist of music produced in Ukraine as required by Article 9.1 of the 2006 LTR ?

The Tribunal kicked off its analysis by referring to Article 31.1 of the Vienna Convention on the Law of Treaties[43] and insisting that the starting point of its analysis lied in the "ordinary meaning" of the terms used in Article II.6 of the U.-S. – Ukraine BIT. The Tribunal considered Article 9.1 of the 2006 LTR from a *de jure* perspective, noting that it only required that 50 % of the music broadcast by radio stations be authored, produced or composed by Ukrainians without specifically imposing that goods or services be purchased locally. As a result, Article 9.1 of the 2006 LTR on its face did not run afoul of Article II.6 of the U.-S. – Ukraine BIT. However, the Tribunal recognized the limited persuasive effect of a literal reading of the 50 % local broadcast requirement, given that although radio stations could have acquired Ukrainian music produced outside of Ukraine and/or by non-Ukrainian nationals, *de facto* the authors, composers and producers of Ukrainian music are located in Ukraine. The Tribunal did not formulate a preliminary conclusion at this stage of its analysis ; however, it appeared as though Article 9.1 of the 2006 LTR could not be excluded from the scope of Article II.6 of the U.-S. – Ukraine BIT based solely on the ordinary meaning of the treaty provision.

The Tribunal then shifted its focus onto the object and purpose of Article II.6 of the U.-S. – Ukraine BIT, which was construed by the Tribunal as "trade-related" and aimed at avoiding the imposition by States of

[43] *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331 ; 8 I.L.M. 679 (1969), online : <http://treaties.un.org/doc/publication/UNTS/Volume%201155/v1155.pdf> (accessed October 18, 2013) [hereinafter "VCLT"].

"local content requirements as a protection of local industries against competing imports"[44]. The Tribunal grounded the determination of the object and purpose of Article II.6 on the preamble of the U.-S. – Ukraine BIT, according to which the BIT aims to "promote greater economic cooperation". Ultimately, the Tribunal conducted a summary analysis that did not rely on evidence or authorities to substantiate the purpose ascribed to Article II.6.

Having identified the purpose of Article II.6, the Tribunal compared such purpose with that of Article 9.1 of the 2006 LTR. According to the Tribunal, Ukraine intended "to promote Ukraine's cultural inheritance" and not "to protect local industries and restrict imports"[45]. Deeming the purpose of Article 9.1 of the 2006 LTR compatible with the purpose of Article II.6 of the U.-S. – Ukraine BIT, the Tribunal decided that Article 9.1 of the 2006 LTR did not violate the prohibition of "performance requirements […] which specify that goods or services must be purchased locally".

The Tribunal limited its analysis to compatibility of purposes between Article 9.1 of the 2006 LTR and Article II.6 of the U.-S. – Ukraine BIT, without looking at whether the effects of Article 9.1 violated the performance requirement prohibition. Moreover, the Tribunal did not invoke any evidence or authorities to determine the purpose of Article 9.1 of the 2006 LTR. This "compatibility of purposes" convinced the Tribunal to overlook its own observation made earlier in its Award, where it concluded that the 50 % Ukrainian music requirement amounted *de facto* to a requirement to purchase musical goods and/or services in Ukraine. From the Tribunal's perspective, a compatible purpose justified not characterizing Article 9.1 of the 2006 LTR as a performance requirement, thus escaping Article II.6 of the U.-S. – Ukraine BIT altogether. Although the reasoning underlying the decision of the Tribunal may seem hasty, it may simply reflect the intent of granting regulatory flexibility to Ukraine in implementing cultural policies, a considerably sensitive matter of national sovereignty. Circumscribing its analysis to the purpose of Article 9.1 of the 2006 LTR allowed the Tribunal to overcome the unpalatable task of second-guessing Ukrainian cultural policy-making and holding it liable for strengthening its cultural identity. The difficulty lies in that nothing in the U.-S. – Ukraine

[44] *Joseph Charles Lemire* v. *Ukraine*, *supra*, note 8, para. 510.
[45] *Id.*

BIT provided an exception to the broad coverage and plain wording of Article II.6, which compelled the Tribunal to disregard its ordinary meaning.

III. *Mobil* v. *Canada* and Performance Requirement Prohibitions (NAFTA Article 1106)

The award in the *Mobil* v. *Canada* investment arbitration constitutes the most in-depth analysis by an arbitral tribunal of a performance requirement prohibition within an investment treaty. The claimants, Mobil Investments Canada Inc. and Murphy Oil Corporation (the "Claimants" or "Mobil and Murphy"), two Delaware corporations, had made investments in the Hibernia and Terra Nova offshore petroleum projects, located off the coast of the Province of Newfoundland and Labrador ("NL") in Canada (the "Projects").

The Hibernia oilfield was discovered in 1979 and the project was built from 1990 to 1997, with oil production beginning in 1997[46]. The Terra Nova oilfield was discovered in 1984, the project was built between 1999 and 2001 and oil production began in 2002[47].

The Projects were governed by parallel provincial and federal legislation[48], which implemented a federal-provincial agreement for the joint regulation of the Projects through the Canada-Newfoundland Offshore Petroleum Board[49] (the "Board"). Claimants, like any other prospective offshore oil operator, had to submit two-fold proposals for approval by the Board : first, a Development Plan laid out the general approach toward oilfield development, and second a Benefits Plan set forth how the oilfield project would benefit NL and Canada.

46 *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 48-49.

47 *Id.*, para. 62-63.

48 The *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, online : <http://laws-lois.justice.gc.ca/eng/acts/C-7.5/> (accessed October 18, 2013) [hereinafter "*Federal Accord Act*"] and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, R.S.N.L. 1990, c. C-2 [hereinafter "*Provincial Accord Act*"], together known as the "*Accord Acts*" and which are very similar.

49 *Provincial Accord Act*, s. 9.

According to section 45 of the Accord Acts, a Benefits Plan must include two provisions among others: first, a provision ensuring that expenditures necessary for research and development ("R&D") to be carried out in NL will be made; and second, a similar provision on expenditures necessary for ensuring that education and training ("E&T") is provided in NL. Section 151.1 of the *Federal Accord Act* granted the Board the power and discretion to issue and publish guidelines and interpretation notes regarding Benefits Plans[50].

Following guidelines applicable to Benefits Plans adopted in 1986[51], 1987[52] and 1988[53], which had couched the requirements for expenditures in NL regarding R&D and E&T in general terms and had simply asked that project proponents submit proposed expenditures, the Board adopted the Guidelines for Research and Development Expenditures (the "2004 Guidelines"), which lied at the heart of the dispute before the Tribunal. The 2004 Guidelines broke ground with previous guidelines in two ways: first, they specifically addressed R&D expenditures during the production phase of oilfield projects (as opposed to the exploration and development phases), and second, they required fixed amounts of R&D expenditures to be made for the first time.

Mobil and Murphy alleged that the 2004 Guidelines violated the performance requirement prohibition in NAFTA Article 1106 and the minimum standard of treatment guarantee in NAFTA Article 1105. The following analysis will focus on the claim regarding NAFTA Article 1106. Claimants alleged that the 2004 Guidelines compelled Claimants to spend

50 See: *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 37-38 for the text of section 45 of the *Accord Acts* and section 151.1 of the *Federal Accord Act*.

51 The Guidelines for Benefits Plan Approval and Reporting Requirements for Exploration Activities in the Newfoundland Offshore Area (1986) required that Benefits Plans include "'proposed expenditures and activities on research and development [and education and training] to be carried out within the Province'" and indicated that further guidelines regarding expenditures would be adopted by the Board in the future; see *id.*, para. 41.

52 The Exploration Benefits Plan Guidelines: Newfoundland Offshore Area (1987) applied only to the exploration phase and not to the development and production phases of the Projects; see *id.*, para. 42.

53 The Development Application Guidelines: Newfoundland Offshore Area (1988) also applied only to the exploration phase and not to the development and production phases of the Projects; see *id.*, para. 44.

fixed amounts for R&D activities in NL as a condition for operating their investments in the Projects in violation of the performance requirement prohibition under NAFTA Article 1106(1)(c). In addition to its defenses under NAFTA Articles 1105 and 1106, Canada argued that, should the Tribunal decide that the 2004 Guidelines violated NAFTA Article 1106, the 2004 Guidelines were exempt from NAFTA Article 1106 by virtue of a reservation adopted in accordance with NAFTA Article 1108. The argument of Canada under NAFTA Article 1108, which was ultimately rejected by the Majority of the Tribunal (Prof. Philippe Sands, dissenting, accepted Canada's argument under Article 1108), will not be analyzed in this article.

The dispute initially turned on the interpretation of NAFTA Article 1106(1)(c), which reads as follows:

> "1106.(1) No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory: […] (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory […]." [Emphasis added.]

The Tribunal identified two main interpretative questions regarding NAFTA Article 1106: (1) did the term "services" cover R&D and E&T expenditure requirements as formulated within the 2004 Guidelines? (2) did the 2004 Guidelines exhibit a sufficiently compulsory nature so as to constitute a "requirement"?

Four main criticisms can be formulated regarding the Tribunal's interpretation of Article 1106(1)(c): (1) it narrowly circumscribed its context; (2) it hastily determined its object and purpose; (3) it disregarded supplementary means of interpretation; and (4) it assigned little or no weight to the purpose of the 2004 Guidelines as opposed to its effects.

A. NAFTA Article 1106(1)(c) and the Meaning of "Services"

1. Ordinary Meaning and Context

The Tribunal decided that although no express reference was made to either R&D or E&T in NAFTA Article 1106(1)(c), the ordinary meaning

of the term "services" "is broad enough to encompass R&D and E&T"[54]. The Tribunal considered that R&D and E&T "may be seen as mainstream forms of service sector activity" and that "there is nothing inherent in term 'services' in Article 1106(1) that necessarily excludes R&D and E&T"[55]. The Tribunal reinforced this interpretation as to the ordinary meaning of the term "services" by relying on the definition of such term provided by Webster's Third New International Dictionary, which defines "services" as "useful labor that does not produce a tangible commodity"[56], and by relying on the Oxford English Dictionary, which defines services as "work directed on a large scale toward the innovation, introduction and improvement of products and processes." According to the Tribunal, R&D and E&T "fit into that broad definitional category of economic activity"[57].

Drawing further support for its interpretation from the context of NAFTA Article 1106(1)(c), the Tribunal limited such context to considering the use of the term "services" within the NAFTA. The Tribunal zeroed in on the use of the term "services" within Appendix 1001.1b-2-B of the NAFTA, i.e. the Common Classification System for services regarding Government procurement, and more particularly on categories A (entitled "Research and Development" and accompanied by a definition and 20 sub-categories) and U (entitled "Educational and Training Services", which includes 11 sub-categories of such services). The Tribunal noted the Common Classification System suggests a broad definition for the term "services" as used therein and that several categories of services, including E&T and R&D services, are explicitly excluded from open procurement under NAFTA Chapter 10[58].

The Tribunal further considered that the sub-categories of E&T and R&D services in the Common Classification System were similar to the types of services Claimants would have been required to undertake under the 2004 Guidelines, and that these sub-categories could lead to activities

54 *Id.*, para. 216.
55 *Id.*
56 *Id.*, para. 177, 218.
57 *Id.*, para. 218.
58 See: NAFTA Annex 1001.1b-2, "Services", Section B – Excluded Coverage – Schedule of Canada, *supra*, note 6; see: *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 220-221.

entailing "the 'purchase', 'use' or 'accord [of] a preference'"[59] as foreseen under NAFTA Article 1106.

The Tribunal also noted NAFTA Article 1106(4), which reads as follows:

> "1106.(4) Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory." [Emphasis added.]

The Tribunal inferred from NAFTA Article 1106(4) that the Parties to the NAFTA intended to exclude R&D and E&T from the prohibitions found in NAFTA Article 1106(3), but that having not included a similar exclusion in respect of NAFTA Article 1106(1) meant that they did not intend to exclude R&D and E&T from the NAFTA Article 1106(1)(c) prohibition on services[60]. It seems however that the Tribunal did not underline that within Article 1106(4) NAFTA Parties distinguished between "provid[ing] a service", "train[ing] or employ[ing] workers", and "carry out research and development", a distinction that suggests that the term service does not automatically include R&D and E&T and that its meaning may not enjoy the clarity that the Tribunal willingly assigned to it using a contextual approach.

2. Object and Purpose

Although Article 31(1) VCLT indeed refers only to the object and purpose of the treaty, the Tribunal did not attempt to determine whether NAFTA Article 1106(1)(c) served a specific object and/or purpose. It simply stated that its interpretation, based on the ordinary meaning and the context of NAFTA Article 1106(1)(c), was consistent with the object and purpose of the NAFTA as set forth in Article 102(1)(a) ("eliminat[ing] barriers to trade in, and facilitat[ing] the cross-border movement of, goods and services between the territories of the Parties") and Article 102(1)(c)

[59] *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 220-221.

[60] *Id.*, para. 224.

("increase substantially investment opportunities in the territories of the Parties")[61].

The objective mentioned in NAFTA Article 102(1)(a) echoes the purpose ascribed to Article II.6 of the U.-S. – Ukraine BIT (performance requirement prohibition) by the arbitral Tribunal in *Lemire* v. *Ukraine*, which was "trade-related" and aimed at avoiding the imposition by States of "local content requirements as a protection of local industries against competing imports"[62]. A distinct difference lies in the explicit reference to trade liberalization in NAFTA's objectives, whereas the Tribunal in *Lemire* v. *Ukraine* derived the trade liberalization purpose of performance requirement prohibitions from the preamble of the U.-S. – Ukraine BIT, which simply stated its intent to "promote greater economic cooperation". Based on the reasoning of the Tribunal in *Lemire* v. *Ukraine*, it would have been a lesser stretch to ascribe a trade liberalization purpose to NAFTA Article 1106(1)(c) than it was for Article II.6 of the U.-S. – Ukraine BIT.

Canada's argument was in line with the reasoning of the arbitral Tribunal in *Lemire* v. *Ukraine*: according to Canada, NAFTA Article 1106(1)(c) applied only to a "closed set of performance requirements that would otherwise reduce the cross-border flow and importation of goods and services"[63], while the R&D and E&T requirements found in the 2004 Guidelines aimed at "increasing the knowledge base of the country"[64]. Canada further invoked NAFTA Article 1106(5) to justify a restrictive interpretation of performance requirement prohibitions[65]. NAFTA Article 1106(5) states that paragraphs 1 and 3 of NAFTA Article 1106 do not apply to any requirement that is not set out in those paragraphs.

The Tribunal rejected Canada's approach, stating that excluding R&D and E&T from "services" "because the form of transmission is not always cross-border" advocated for "a special meaning to be given for R&D and E&T, which we do not see reflected in the NAFTA text"[66]. However, insisting on the "trade liberalization" purpose of NAFTA Article 1106(1)(c)

61 *Id.*, para. 225.

62 *Joseph Charles Lemire* v. *Ukraine*, *supra*, note 8, para. 510.

63 *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 222.

64 *Id.*

65 *Id.*, para. 189-191.

66 *Id.*, para. 222.

could have contributed to construing that prohibition as applying solely to requirements that impacted cross-border flows of goods or services. Moreover, the Tribunal itself insisted on the fact that Article 1106 was "part of a larger treaty that is focused primarily on international trade"[67].

The Tribunal did not address the purpose assigned to NAFTA Article 1106 by the arbitral Tribunal in the *Merrill & Ring Forestry* v. *Canada*[68] arbitration, and neither it seems did the parties to the dispute. According to that Tribunal, Article 1106 intends "to prohibit performance requirements designed to oblige an investor to export more than it otherwise would have exported". According to this same Tribunal, all performance requirements enumerated in NAFTA Article 1106 "are related to the export of goods and services and the conditions under which such exports are made" and are "designed to restrict or enhance exports"[69]. One can only speculate as to why this analysis of NAFTA Article 1106's purpose was not revisited.

3. Relevant Context and Supplementary Means of Interpretation

Having narrowly circumscribed the relevant context for NAFTA Article 1106(1)(c) and having scurried through the determination of its object and purpose, the Tribunal formulated pointed criticisms with respect to supplementary means of interpretation before dismissing them altogether due to their limited or non-existent relevance and assistance[70].

Ultimately, the Tribunal considered that the conditions of Article 32 VCLT for considering supplementary means of interpretation – ambiguous or obscure meaning or manifestly absurd or unreasonable result – were not met. However, the Tribunal did not need to meet either of these criteria to broaden its analysis. It is suggested that a broader interpretative context and approach could have better served the interpretative effort led by the Tribunal, regardless of the outcome.

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67 *Id.*, para. 230.

68 *Merrill & Ring Forestry L.P.* v. *The Government of Canada*, UNCITRAL, ICSID Administered Case, March 31, 2010, online: <http://italaw.com/sites/default/files/case-documents/ita0504.pdf> (accessed October 18, 2013).

69 *Id.*, para. 113, 115.

70 *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 229, 232.

More particularly, a variety of materials raised by Canada could have shed contextual light onto NAFTA Article 1106(1)(c)[71]: (1) the TRIMS Agreement, concluded around the same time as the NAFTA and which includes in its Illustrative List, at paragraph (1)(a), a prohibition similar to that of NAFTA Article 1106(1)(c); (2) the Canada – U.S. Free Trade Agreement[72], which applied between Canada and the United States prior to the NAFTA and included a similar prohibition in Article 1603(1)(c); (3) the 1994 Model U.S. BIT[73], which in its Article VI(A) includes a performance requirement prohibition drafted shortly after the NAFTA; (4) BITs entered into by other nations that included performance requirement prohibitions; (5) UNCTAD reports on performance requirements; and (6) the OECD draft Multilateral Agreement on Investment[74].

The context relevant to NAFTA Article 1106(1)(c) could have been widened to include some or all of these materials on the basis of Article 31(1) VCLT, which refers to "the terms of the treaty in their context"[75]. Although caution is indeed warranted not to infinitely expand such context[76], considering similar performance requirement prohibitions, many of which were drafted and/or negotiated around the same time and involved the same State Parties, could have helped better grasp the meaning and purpose of NAFTA Article 1106(1)(c). The approach of the arbitral Tribunal in the *S.D. Myers* v. *Canada* investment arbitration offers a glimpse of the opposite and all-encompassing interpretative approach when it stated that in order to interpret the term "expropriation" the Tribunal had to consider "the whole body of state practice, treaties and

71 *Id.*, para. 226.

72 22 December 1987, Can. T.S. 1989 N° 3, reprinted in 27 I.L.M. 281 [hereinafter "CUSFTA"].

73 1994 U.S. Model BIT in Kenneth J. Vandevelde, *U.S. International Investment Agreements*, Oxford, Oxford University Press, 2009, p. 388-390.

74 OECD, *Multilateral Agreement on Investment, Documentation from the Negotiations* (five drafts available), May 1997 to April 1998, online: <http://www1.oecd.org/daf/mai/htm/2.htm> (accessed October 18, 2013).

75 See: J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford International Arbitration Series, Oxford, Oxford University Press, 2012, para. 3.55.

76 See *id.*, quoting Arsanjani and Reisman: context as used in Article 31 VCLT "[…] does not have the wide-ranging meaning it has for scholars; for diligent scholars, for whom the world is a vast manifold of interrelated events, everything is context" (see: Mahnoush H. Arsanjani and W. Michael Reisman, "Interpreting Treaties for the Benefit of Third Parties: The 'Salvors' Doctrine' and the Use of Legislative History in Investment Treaties", (2010) 104 *AJIL* 597, 599).

judicial interpretations of that term in international law cases"[77]. The arbitral Tribunal in *S.D. Myers* v. *Canada* also considered that the interpretation of the expression "like circumstances" under NAFTA Article 1102 compelled the Tribunal to consider the "legal context" of the NAFTA, which included legal principles affirmed in related international instruments[78].

Moreover, the TRIMS Agreement (and possibly the CUSFTA) could have been considered along with the context, on the basis of Article 31(3)(c) VCLT, as "relevant rules of international law applicable in the relations between" the NAFTA Parties. Cutting short to their consideration by declaring that these materials lacked any interpretative assistance, the Tribunal avoided deciding whether any of these materials formed part of the context relevant to NAFTA Article 1106(1)(c).

In doing so, the Tribunal expressed numerous concerns regarding supplementary means of interpretation and extraneous materials. The Tribunal stated that the materials invoked by Canada "are not the NAFTA"[79], that they did not involve "entirely the same parties to the negotiation"[80], that they raised inter-temporal discontinuities, that their influence on drafting and negotiating the NAFTA was not substantiated, and that their purposes were "not identical to that of the NAFTA"[81].

However, these legitimate concerns should not lead to discarding supplementary means of interpretation altogether. Rather, these concerns should be used to grant supplementary means of interpretation an impact proportional to their relevance. Moreover, the Tribunal did call upon supplementary means of interpretation when these confirmed the interpretation it had previously reached without their assistance[82], suggesting a piecemeal interpretative approach.

For instance, investment-related treaties often serve similar purposes and use similar language; taking into account general drafting trends

77 *S.D. Myers Inc.* v. *Canada*, *supra*, note 27, para. 280.

78 *Id.*, para. 247, 250.

79 *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, note 10, para. 230.

80 *Id.*

81 *Id.*

82 *Id.*, para. 296.

among treaties that serve similar purposes can shed some light on the meaning of specific terms and is considered an "accepted and established practice"[83]. Moreover, despite challenges related to the timing of supplementary means of interpretation when compared to the treaty under interpretation, there exists a margin of appreciation within which supplementary means of interpretation prior and subsequent to the drafting of the treaty under interpretation can be taken into consideration, granted that the appropriate interpretative safeguards regarding relevance are applied[84].

B. The Purpose and Effect of the Measure at Issue

1. The Purpose and Effect of the 2004 Guidelines and the Meaning of the Term "Services" in NAFTA Article 1106(1)(c)

The Tribunal analyzed the purpose and effect of the 2004 Guidelines with a view to determining whether the term "services" in NAFTA Article 1106(1)(c) encompassed R&D and E&T expenditures and whether the 2004 Guidelines could be characterized as "requirements" under NAFTA Article 1106.

According to the Tribunal, the Board adopted the 2004 Guidelines in order to achieve the objectives set out in section 45 of the of the Accord Acts, which provision they partly implemented through imposing R&D and E&T Benefits Plan requirements. Beyond this objective of effective administration of the Accord Acts, the Board saw the 2004 Guidelines as a means to create "a lasting economic legacy for the people of the Province of NL"[85]. According to the Tribunal, the Board considered improving the intellectual capital and human resources of the Province of NL as the best way to provide for such a lasting legacy.

Tied in with their broad objective of a lasting economic legacy, the 2004 Guidelines were also adopted in reaction to two specific situations: first, they were meant to combat significant decreases in R&D and E&T

83 See: J. R. Weeramantry, *supra*, note 75, para. 5.32-5.34.

84 *Id.*, para. 5.62-5.73.

85 *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 46.

spending by Claimants in the Projects over the 1997-2001 period[86]. Second, the 2004 Guidelines constituted a response to a report published by the Public Review Commissioner with respect to the Development Application submitted by Husky Oil Operations Limited for the separate White Rose oilfield project. In his report, the Public Review Commissioner called upon the Board to "'release publicly a definitive statement'"[87] as to its interpretation of the Accord Acts and their implementation, especially regarding requirements under the Benefits Plans.

The Tribunal had thus brushed a portrait of the 2004 Guidelines as concerned with creating a lasting economic legacy for the Province of NL and intent on combating significant R&D and E&T spending decreases by imposing fixed R&D and E&T expenditure requirements. Nevertheless, embarking on a direction decidedly opposite to that of the Tribunal in *Lemire* v. *Ukraine*, the Tribunal brushed aside the previously identified purposes of the 2004 Guidelines and focused primarily on their effects. The Tribunal stated that the purpose underlying a measure was irrelevant under NAFTA Article 1106(1)(c): so long as a measure required an investor to utilize domestic sources of R&D and E&T, it "rather clearly" constituted a prohibited performance requirement[88]. The Tribunal considered that neither the "furtherance of economic policy objectives"[89] nor a policy purpose that exceeded "strictly economic"[90] objectives, using measures that aimed at "[p]romoting economic development and improving the skills and education of Canadians"[91] would justify excluding such measures from the scope of NAFTA Article 1106(1)(c).

As noted earlier, the Tribunal stated that excluding R&D and E&T from services captured by NAFTA Article 1106(1)(c) would imply "a special meaning to be given to R&D and E&T, which we do not see reflected in the NAFTA text"[92]. Given that neither R&D nor E&T appear in NAFTA Article 1106(1), this comment must likely be understood as directed toward the meaning of the term "services" in relation to R&D and E&T. Rather than calling for a "special meaning", it would appear that Canada

86 *Id.*, para. 60, 74.
87 *Id.*
88 *Id.*, para. 222.
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*

suggested interpreting the term "services", as used by NAFTA Article 1106(1)(c), in accordance with the purpose of the provision as opposed to its strictly ordinary meaning. It also appears as though Canada was asking for a compatibility analysis between the purpose of NAFTA Article 1106(1)(c) and that of the R&D and E&T requirements under the 2004 Guidelines.

2. The Purpose and Effect of the 2004 Guidelines and the Requisite Degree of Compulsion of a Measure Under NAFTA Article 1106(1)

Having determined that a measure had to exhibit "a degree of legal obligation" and a "degree of compulsion"[93] in order to be caught by NAFTA Article 1106, the Tribunal determined that the "purpose" of the 2004 Guidelines "is to introduce an obligatory *expenditure* requirement"[94]. Canada suggested that the requirement for R&D and E&T expenditures "only incidentally result[ed] in the purchase, use or accord of preference to local services"[95].

Canada had successfully argued a similar position before the arbitral Tribunal in the *Merrill & Ring Forestry* v. *Canada* arbitration. Among other claims of violations under NAFTA Article 1106, Merrill & Ring Forestry L.P. ("Merrill") claimed that the Log Export Control regime imposed the obligation to scale timber rafts metrically in violation of NAFTA Article 1106(1)(c) as Merrill needed to retain the services of qualified Canadian personnel to complete such task.

Canada argued that scaling logs in conformity with the metric system simply amounted to the application of Canada's measurement system and did not compel Merrill to purchase services in Canada as Merrill was free to hire workers from outside Canada. According to Canada, resorting to Canadian service providers in order to achieve these tasks constituted "purely a business decision"[96]. Moreover, Canada argued that "incidental consequences of the regulatory regime"[97] could not convert a measure into a performance requirement.

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93 *Id.*, para. 234.
94 *Id.*
95 *Id.*, par. 194.
96 *Merrill & Ring Forestry L.P.* v. *The Government of Canada*, *supra*, note 68, para. 95, 109.
97 *Id.*, para. 110.

The Tribunal in the *Merrill & Ring Forestry* v. *Canada* arbitration agreed with Canada in that even though the aforementioned requirements had "an incidentally adverse effect on the Investor's exports to the extent that it might wish to cut, sort and scale its logs as required by its customers in foreign markets", these requirements were not subject to NAFTA Article 1106 given that they were not "directly and specifically connected to exports" and they "merely ha[d] some indirect effect on exports"[98]. The Tribunal also agreed with Canada that scaling requirements were only remotely and indirectly connected with exports, that Merrill was "free to hire these services from anyone it wishe[d]"[99], and that Merrill hired in Canada only due to business convenience and to the higher cost of hiring elsewhere. Regardless of obvious differences between the 2004 Guidelines and the measures at issue in the *Merrill & Ring Forestry* v. *Canada* arbitration, it is difficult to see how these arguments could not be transposed to the R&D and E&T expenditure requirements under the 2004 Guidelines at issue in the *Mobil* v. *Canada* arbitration.

The Tribunal distinguished the previously discussed award in the *Merrill & Ring Forestry* v. *Canada* arbitration, in addition to the awards rendered in the *S.D. Myers* v. *Canada* and *Pope & Talbot* v. *Canada*[100] investment arbitrations, based on its assessment that the R&D and E&T spending requirements in the Province of NL constituted a "central feature of the 2004 Guidelines, and not an ancillary objective or consequence"[101], and that the 2004 Guidelines did not impose only "incidental effects with respect to the purchase, use or accordance of a preference to local goods or services"[102]. In deciding that the "central purpose of the 2004 Guidelines […] is to require expenditures in the Province"[103], it is suggested that the Tribunal adopted a restrictive view of the 2004 Guidelines and disregarded its own previous characterization of the 2004 Gui-

98 *Id.*, para. 117.

99 *Id.*, para. 118.

100 *Pope & Talbot Inc.* v. *The Government of Canada*, UNCITRAL ad hoc Tribunal, June 26, 2000, online: <http://italaw.com/sites/default/files/case-documents/ita0674.pdf> (accessed October 18, 2013).

101 *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 242.

102 *Id.*, para. 240.

103 *Id.*, para. 239.

delines as intent on creating a lasting economic legacy and combating a decrease in R&D and E&T spending in NL[104].

The Tribunal itself recognized that ways could be envisioned for Claimants to comply with the requirement that R&D and E&T expenditures be undertaken in the Province of NL without directly purchasing domestic goods or services and therefore without the 2004 Guidelines being subject to NAFTA Article 1106[105]. Alongside this recognition, the Tribunal broadened its consideration of the effects of the 2004 Guidelines to reach the conclusion that, "in practice"[106] and in accordance with "the realities of commercial and related activities"[107], the "hypothetical alternative spending examples" that Claimants could undertake to implement the 2004 Guidelines in compliance with NAFTA Article 1106 should not distract the Tribunal from other spending examples, which would be caught by NAFTA Article 1106.

It appears difficult to hold that Canada imposed a requirement to accomplish actions described in NAFTA Article 1106(1)(c), despite that the 2004 Guidelines grant Claimants sufficient discretion to discharge themselves from their obligations in a way that is not caught by NAFTA Article 1106, simply because the 2004 Guidelines would "likely" require local expenditures and would "likely" entail to "accord a degree of preference to local educational facilities or individuals"[108]. It seems as though the Tribunal looked at the ultimate beneficiaries of the 2004 Guidelines to decide that the 2004 Guidelines "accorded a preference" to domestic goods or services. The decision of Tribunal seems to suggest that because the R&D and E&T requirements under the 2004 Guidelines would benefit the population of NL and more particularly its research and educational facilities as opposed to those of anywhere else in the world, the 2004 Guidelines "accorded a preference" to domestic goods or services. However, this "preference" is not accorded with a view to impacting imports or exports or to directly favor the competitiveness of domestic good or service suppliers.

104 *Id.*, para. 46, 60, 74.
105 *Id.*, para. 237, 239.
106 *Id.*, para. 237.
107 *Id.*, para. 238.
108 *Id.*, para. 237.

The Tribunal's analysis of the 2004 Guidelines seems removed from the operationalization of the 2004 Guidelines, which was left at the discretion of Claimants, and from the limited nature of the legal obligation imposed by the 2004 Guidelines, which consisted of R&D and E&T expenditures in the Province of NL in whatever shape or form. Moreover, the Tribunal's analysis appears to constitute a broad reading of the expression "accord a preference" as used in NAFTA Article 1106(1)(c).

Along the same lines, even though it ultimately held that the "central purpose of the 2004 Guidelines [...] is to require expenditures in the Province"[109], the Tribunal could also have held that the 2004 Guidelines only incidentally imposed a requirement "to purchase, use or accord a preference to goods produced or services provided" in NL or "to purchase goods or services from persons" in NL. It is suggested that the Tribunal distinguished the awards in *Merrill & Ring Forestry* v. *Canada*, *S.D. Myers v. Canada* and *Pope & Talbot* v. *Canada* despite that an argument could be made that the 2004 Guidelines only incidentally compelled Claimants to accomplish any of the actions described in NAFTA Article 1106(1)(c).

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The *Mobil* v. *Canada* Tribunal conducted a detailed analysis before reaching its decision on NAFTA Article 1106. By contrast, the *Lemire* v. *Ukraine* Tribunal conducted a very short analysis of Article II.6 of the U.-S. – Ukraine BIT. Yet both arbitral Tribunals appear to have conducted largely imperfect decisions-making processes: both Tribunals summarily assigned a purpose to their respective performance requirement prohibitions[110]while adopting contrasting approaches as to the purpose and effect of the measures at issue. The Tribunal in *Lemire* v. *Ukraine* overlooked the effects of the 50 % Ukrainian music requirement and summarily centered on its non-protectionist and culture-centric purpose. By contrast, the Tribunal in *Mobil* v. *Canada* disregarded the previously acknowledged objectives of the 2004 Guidelines by focusing mainly on its "practical" effects.

[109] *Id.*, para. 239.

[110] *Joseph Charles Lemire* v. *Ukraine*, *supra*, note 8, para. 510; *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Government of Canada*, *supra*, note 10, para. 225.

The comparative analysis of the arbitral awards rendered in the *Mobil* v. *Canada* and *Lemire* v. *Ukraine* investment arbitrations raises a question that warrants further examination : do performance requirement prohibitions imply that measures must exhibit either a discriminatory or protectionist aspect or intent ? The *Lemire* v. *Ukraine* Tribunal constrained the reach of Article II.6 of the U.S.-Ukraine BIT by reading a requirement of protectionist intent into the provision[111]. However, reading a discriminatory intent into NAFTA Article 1106 may be complicated by the fact that NAFTA Article 1106 applies both to domestic and foreign investments (from NAFTA Parties and non-NAFTA Parties alike) according to NAFTA Articles 1106(1) and 1101(1)(c). The matter of the context and relevant supplementary means of interpretation relevant to performance requirement prohibitions, including notably NAFTA Article 1106, constitutes a second issue that would benefit from further exploration.

More generally, the opposite conclusions by these two arbitral Tribunals on performance requirement prohibitions and their contrasting decision-making methodologies raise the lack of a principled approach as to the respective weight that should be assigned to the effect or the purpose of a measure, and as to assigning a purpose to a treaty provision. Given the crucial impact of focusing on the effect of a measure rather than its purpose, and given the similarly important impact of finding a compatibility of purposes between the measure at issue and the treaty provision pursuant to which it is challenged, this uncertainty will likely convert performance requirement prohibitions into a new battleground between investor rights and national sovereignty.

[111] *Joseph Charles Lemire* v. *Ukraine*, *supra*, note 8, para. 510.