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INTERPRETATION AND APPLICATION OF INVESTMENT MEASURES IN PRACTICE OF INTERNATIONAL INVESTMENT ARBITRATION

INTRODUCTION. *Developing States are interested in both the inflow of foreign investment and its efficient use in their national economies. In the furtherance of this objective, host States set in their national legislation trade-related investment measures, referred to as “performance requirements” (requirements to achieve certain national economically useful results). The interests of foreign investors and host States in the matter of measures falling within the concept of “performance requirements” mostly diverge, since these measures create for foreign investors competitive restrictions related to the use of their investments. In legal science and practice there are known trade-related investment measures, such as export requirements, foreign exchange restrictions, local content requirements and others. The possibility for foreign investors to invest without performing trade-related investment measures was one of the main problems of transnational investment. The TRIMs agreement and Art. 1106 of NAFTA are devoted to the sole subject of regulation –*

“performance requirements”. The idea of limiting these measures was simultaneously discussed in the NAFTA negotiations and within the Uruguay round: the elaborated provisions are similar in some aspects, but have their specific characteristics.

The article deals with the rules of both agreements in light of dispute settlement practice. The conclusions of the arbitrators are analyzed in chronological order, which helps to trace the evolution of the single concept in two distinct systems of WTO and NAFTA rules. The article demonstrates the common points and differences in the interpretation of the concerned provisions norms, with consideration for the context and objectives of the agreements.

MATERIALS AND METHODS. *The materials used in the article include the works of Russian and foreign scholars in the field of international economic law and WTO law, international legal documents adopted within the WTO and NAFTA, as well as materials of judicial and arbitration practice of investment disputes. The research was done on*

the basis of general and specific scientific methods of cognition (dialectical method, analysis and synthesis, deduction and induction, comparative legal and historical-legal methods).

RESEARCH RESULTS. *The analysis revealed that trade-related investment measures are part of the “performance requirements” listed in Art. 1106 of NAFTA, which developed countries managed to defend in negotiations with developing countries during the drafting of the TRIMs agreement. Despite the integrity of the concept of “investment requirements”, there is an evident difference in the scope of covered measures, as well as the conceptual difference between the notions of “trims” and “performance requirements”, due to the specifics of the WTO and NAFTA. Nevertheless, in both cases, common qualification criteria of prohibited measures have been developed independently from each other*

in the practice of investment disputes settlement in order to address similar issues of interpretation.

DISCUSSION AND CONCLUSIONS. *On the ground of the analysis of arbitration practice in the TRIMs and Art. 1106 of NAFTA, the article gives reasons for the conclusion of the parallel development of the concepts of “trade-related investment measures” and “performance requirements”.*

KEYWORDS: *investment measures, performance requirements, TRIMs Agreement, WTO, NAFTA*

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МЕЖДУНАРОДНОЕ ЭКОНОМИЧЕСКОЕ ПРАВО

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ТОЛКОВАНИЕ И ПРИМЕНЕНИЕ ИНВЕСТИЦИОННЫХ МЕР В ПРАКТИКЕ МЕЖДУНАРОДНОГО ИНВЕСТИЦИОННОГО АРБИТРАЖА

ВВЕДЕНИЕ. *Развивающиеся государства заинтересованы как в притоке иностранных инве-*

стиций, так и в их эффективном использовании в экономике страны. Для достижения этой

цели государства-реципиенты устанавливают в своем национальном законодательстве инвестиционные меры торгового характера, именуемые “performance requirements” (требованиями достижения определенных, полезных для национальной экономики результатов). Интересы иностранных инвесторов и государств-реципиентов в вопросе мер, подпадающих под понятие “performance requirements”, в большинстве случаев не совпадают, поскольку указанные меры создают для иностранных инвесторов конкурентные ограничения, связанные с использованием их капиталовложений. Доктрине и практике известны инвестиционные меры торгового характера, представляющие собой так называемые требования экспортной составляющей, валютного баланса, местной составляющей и т.д. Возможность для иностранных инвесторов осуществлять инвестиционную деятельность без применения инвестиционных мер торгового характера являлась одной из главных проблем транснационального инвестирования. Соглашение ТРИМС и ст. 1106 НАФТА посвящены одному предмету регулирования – performance requirements. Идея ограничения этих мер обсуждалась одновременно на переговорах по НАФТА и в рамках Уругвайского раунда: разработанные положения похожи в отдельных аспектах, но имеют и свои характерные особенности. В статье рассматриваются нормы обоих соглашений в свете практики разрешения споров. Выводы арбитров анализируются в хронологическом порядке, что позволяет проследить эволюцию одной концепции в двух системах норм ВТО и НАФТА. Статья демонстрирует общность и различия толкования исследуемых норм с учетом контекста и целей соглашений.

МАТЕРИАЛЫ И МЕТОДЫ. Материалом для исследования послужили труды российских и зарубежных исследователей в области международного экономического права и права ВТО,

международно-правовые акты, принятые в рамках ВТО и НАФТА, а также материалы судебной и арбитражной практики по инвестиционным спорам. Рассмотрение указанных материалов проходило на основе общенаучных и частнонаучных методов познания (диалектического метода, методов анализа и синтеза, дедукции и индукции, сравнительно-правового и историко-правового методов).

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. Проведенный анализ показал, что инвестиционные меры, связанные с торговлей, являются частью перечисленных в ст. 1106 НАФТА performance requirements. Эти меры развитым государствам удалось отстоять в переговорах с развивающимися странами в ходе подготовки соглашения ТРИМС. Несмотря на целостность концепции инвестиционных требований, очевидна разница объемов охватываемых мер, а также различие понятий «тримс» и «performance requirements», обусловленное спецификой ВТО и особенностями НАФТА. Тем не менее в обоих случаях для решения схожих вопросов толкования, независимо друг от друга, на практике в ходе разрешения инвестиционных споров были разработаны единые критерии квалификации запрещаемых мер.

ОБСУЖДЕНИЕ И ВЫВОДЫ. В статье на основании анализа арбитражной практики по ТРИМС и по ст. 1106 НАФТА обосновывается вывод о параллельном развитии понятий «тримс» и “performance requirements”.

КЛЮЧЕВЫЕ СЛОВА: инвестиционные меры, performance requirements, ТРИМС, ВТО, НАФТА

ДЛЯ ЦИТИРОВАНИЯ: Данельян А.А., Магомедова О.С. 2018. Толкование и применение инвестиционных мер в практике международного инвестиционного арбитража. – *Московский журнал международного права*. № 4. С. 44-53. DOI: 10.24833/0869-0049-2018-4-44-53

Foreign investment activity is regulated both by national legislation and international law. States enter bilateral and multilateral treaties to ensure a higher level of protection of foreign investments as compared to national legislation [Bogatyrev1991:17–27; Danelyan 2015:75–78; Dolzer 1981:553–589].

National laws of host States of investments set guarantees of foreign investors' rights, as well as conditions of their business activities in the territory of such States [Fidler 2015:137–157; Houtte 1995:429; Schwarzenberger 1969:237; Sornarajah 2004:525].

The guarantees provided by a State to foreign investors comprise: guarantee of legal remedies; guar-

antees in case of nationalization and expropriation of property; stabilization guarantee; guarantee of free transfer of capital and earnings; reduction of tax and customs charges for investors, etc. [Kobrin 1982:224; Doronina 2008:5–18; Lisitsa 2011:468; Hefti 1989:114].

Along with the provision of guarantees, the host State can oblige foreign investors to supply part of the products produced in the country to the domestic market, or to purchase raw materials for its production in the domestic market, or provides other protectionist measures in national legislation [Khabibullin, Chernobel 2008:18–27]. For instance, under the second paragraph of item 1 of Art. 8 of the Federal law dated December 30, 1995 No. 225-FZ “Production Sharing Agreements” products produced in the field of subsoil use shall be shared between the state and the investor in accordance with the agreement providing for the terms and procedure of such sharing. This approach has been denominated as the principle of “performance requirements” (hereinafter – “PRs”), which contributes to the revival and development of national economies [Vel'yaminov 2015:859; Danelyan 2016:71–73].

The interests of foreign investors and host States in the matter of measures falling within the concept of “performance requirements” do not always correspond, since these measures create for foreign investors competitive restrictions related to the use of their investments [Silin, Glazunov 1995:46–49; Yudakov 1999:27–30]. It was quite difficult for industrial States to limit the application by developing States of investment regulation measures at the national and bilateral levels and thereby to fix the problem of “performance requirements”. However, this problem was partly resolved by the adoption of a multilateral agreement within the WTO, when the Agreement on trade-related investment measures was concluded at the end of the Uruguay round of GATT negotiations in 1994 [Vitzthum 2015:755–756].

Considering trade-related investment measures (hereinafter – “trims”) as a separate object of regulation within the WTO system, it is necessary to take

into account their ontological origin. The drafters of the TRIMs agreement singled them out from a wide range of “performance requirements”, i.e. requirements to achieve certain national economically useful results. Previously, the concept of “PRs” had appeared only in bilateral investment agreements. Moreover, it has always been enunciated in negative terms such as requirements that the parties should not impose. Therefore, in the context of the regulation of such measures at the international level, it is common to talk about the principle of prohibition of PRs. As envisioned by the parties to the GATT, this rule should have been included in the system of norms of the future WTO¹.

The work of the TRIMs Group was based on the proposals of participating States, including the US project of PRs regulation². It is noteworthy that this project formed the basis of article 1106 of NAFTA³. Therefore, the same concept was simultaneously discussed in the NAFTA negotiations and within the Uruguay round. To one extent or another, the presented ideas were embodied in both agreements: for example, from 10 types of measures proposed for restriction, the provisions of NAFTA regulate 8 types, TRIMs – 5. In 1994, the North American Free Trade Agreement became the first regional agreement to regulate directly “performance requirements”. In 1995 within the WTO the TRIMs Agreement entered into force. However, given the specifics of the WTO, as well as the particularities of the North American organization, we could say that there is a conceptual difference between the concepts of “trims” and “PRs”.

The difference in the “stringency” of regulation, i.e. the number of prohibited investment measures, is easily explained by the composition of the two negotiating processes. In the course of the Uruguay round, alongside the elaboration of the agreement's text, the initiative forces (USA, EU, Japan, Nordic countries) faced another task – to overcome the resistance of developing countries. In particular, Malaysia strongly emphasized the importance of some investment measures for the economies of developing countries⁴; India excluded any prohibition of lo-

¹ Ministerial Declaration on the Uruguay Round of 20 September 1986. Section D. Para 13. URL: <https://docs.wto.org/gattdocs/q/UR/TNCMIN86/MINDEC.PDF> (accessed date: 09.09.2018).

² See Uruguay Round – Group of Negotiations on Goods (GATT). Negotiating Group on Trade-Related Investment Measures. Submission by the United dated June 1, 1987. URL: <https://docs.wto.org/gattdocs/q/UR/GNGNG12/W4.PDF> (accessed date: 09.09.2018).

³ See North American Free Trade Agreement (NAFTA). URL: <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=2> (accessed date: 09.09.2018).

⁴ Uruguay Round – Group of Negotiations on Goods (GATT). Negotiating Group on Trade-Related Investment Measures. Statement by Malaysia dated June 16, 1988. Para 7. URL: <https://docs.wto.org/gattdocs/q/UR/GNGNG12/W13.PDF> (accessed date: 09.09.2018).

cal content requirements, indicating the preponderance of their role in economic development against their negative effects on trade⁵. Therefore, the list of measures agreed upon is for more evidence of the reached compromise than a substantive description of the agreement.

To identify the essential differences between “trims” and “PRs” it is more important to analyze their nature. The dissemblance of these concepts is based on the following reasons. First, the materials of the TRIMs working group were not limited to proposed projects. A basic understanding of investment measures was also provided by the GATT dispute resolution practice. Secondly, the rules on “trims” were integrated into the system of WTO law, and thus were subject to its principles and subordinated to other provisions. Third, the development of a new legal concept implies the definition of its character features, i.e. the criteria of its qualification. The analysis of the provisions, years after their adoption, is interesting not least because of an opportunity to move away from distant textual interpretation and to turn to the experience of their application. To examine them “in action”.

I. The concept of “trade-related investment measures” was formed by the findings of the panels in several cases. The first step was the decision in the dispute on the Italian program of support for the national automotive industry, *Italian tractors* case (1958). Italy argued that the GATT agreement focused specifically on trade aspects, while the government programme addressed the challenge of improving the state of domestic industry and was therefore not directly related to trade measures. Then the arbitrators underlined that the provisions of Art. III:4 of GATT, concern rules “affecting” domestic trade. This formulation means that not only the laws and requirements directly regulating trade are covered, but also those affecting the conditions of the domestic market⁶.

The scope of the concept of “trade-related investment measures” was significantly extended in 1984. In *the FIRA* case, the panel found that the measures

could be imposed not only by legal acts. Following the enactment of the new investment law (Foreign Investment Review Act) in 1973, the Canadian government began to conclude investment contracts with foreign entities. Under their terms, foreign investments were permitted in Canada’s territory only when certain requirements were met. Even though the law didn’t contain such requirements, the practice of treaties conclusion based on the execution this act allowed to establish the fact of violation of Art. III:4 of GATT⁷.

Conclusion in *EEC – Parts and Components* (1990) discovered the concept of “non-mandatory” investment measures. The panel explained that the reference in the Art. III:4 of GATT to “all laws, regulations and requirements affecting their internal sale...” signifies that investment measures could include both legally binding requirements and voluntarily performed conditions⁸. From then on, the criterion of “binding force” ceased to be a defining element. Therefore, at the time of the TRIMs Agreement’s drafting it was found in practice, that the “investment measure” is not confined to the range of formal sources.

The panels’ reasoning is reflected in the definition of “trims”: “mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage...”. This bipartite representation of PRs is likewise assumed in Art. 1106 of NAFTA. However, the distinction is drawn here between certain types of measures, that should be mandatory to be considered PRs (Art. 1106, Para. 1), and other types, for which it is enough to condition the receipt of an advantage (Art. 1106, Para. 3). Herewith, local content requirements, local procurement requirements, trade balancing requirements and exchange restrictions can be either mandatory or permissive (Art. 1106, Paras. 1(b–e), 3(a–d)). At the same time, the export restrictions, technology transfer requirements and required sales to specific region or world market come under the prohibition of PRs only if they are mandatory (Art. 1106, Para. 1(a, f, g)).

⁵ Uruguay Round – Group of Negotiations on Goods (GATT). Negotiating Group on Trade-Related Investment Measures. Submission by India dated September 11, 1989. Para. 36. URL: <https://docs.wto.org/gattdocs/q/UR/GNGNG12/W18.PDF> (accessed date: 09.10.2018).

⁶ Italian Discrimination against imported agricultural machinery. Report adopted on 23 October 1958 (L/833 – 7S/60). Para. 12. URL: https://www.wto.org/english/tratop_e/dispu_e/gatt_e/58agrmch.pdf (accessed date: 09.10.2018).

⁷ Canada – Administration of the Foreign Investment Review Act (“FIRA”). Report of the Panel adopted on 7 February 1984 (L/5504 – 30S/140). Para. 6.3. URL: <http://www.sice.oas.org/dispute/gatt/82fira.asp> (accessed date: 09.10.2018).

⁸ EEC – Regulation on Imports of Parts and Components. Report by the Panel adopted on 16 May 1990. (L/6657 – 37S/132). Para 5.21. URL: https://www.wto.org/english/tratop_e/dispu_e/gatt_e/88sdrv.pdf (accessed date: 09.10.2018).

⁹ Agreement on Trade-related Investment Measures (TRIMs). Illustrative List. Para. 1. URL: https://www.wto.org/english/docs_e/legal_e/18-trims.pdf (accessed date: 12.09.2018).

Such an order may mislead the investor. For example, in *Pope & Talbot Inc. v. Canada* (2000) the question arose, whether it's possible to consider one measure as a whole "PR". The investor believed that an Export Control Regime, imposed by Canada, created for him export restrictions conditional on the receipt of benefits in the form of reduced customs duties. However, the arbitrators rejected the claim without having found a binding force of these export requirements¹⁰. This feature is expressed in the formula "impose or enforce". In this sense, it's not important whether the measure is per se imperative or not, it's the matter of its actual impact on investment. In *ADF Group Inc. v. USA* (2003) the "Buy American" measures were recognized as mandatory, since they "directly impact the daily activities, operations and sales" of the company¹¹.

An available "advantage" is a more flexible feature, because its content easily varies depending on the actual circumstances. Indeed, neither in the NAFTA disputes nor in the WTO ones has the determination of "advantage" been a problem for qualification of measures. As advantages were recognized: export quotas¹², exemption from domestic tax¹³, reduction of customs duties¹⁴, price advantages¹⁵,

the right to conclude a state contract¹⁶. In *Canada – Renewable Energy* (2012) the panel noted a broad understanding of "advantage" for the purposes of TRIMs when compared with the Agreement on subsidies, where the notion "benefits" is strictly related to the financial element¹⁷. Nevertheless, the content of the "advantage" is secondary in regard to the causal link between performance of the requirement and receipt of this advantage. In *Canada – Autos* (2000), the arbitrators clearly emphasized, that competitive equality would be violated if the measure grants an advantage only to domestic goods and not to all similar goods, regardless of whether such advantage could be obtained by other means¹⁸.

However not all essential features of PRs were given in the agreements' definitions. For instance, the conclusion that investment measures can apply to both foreign and domestic investors was formulated only in practice. Notwithstanding the fact that the TRIMs Agreement is aimed at "facilitating foreign investment across international frontiers"¹⁹, in *Indonesia – Autos* (1998), the arbitrators pointed out, that the qualification of "trims" doesn't depend on the nationality of investors²⁰. Within NAFTA, this conclusion was drawn upon the interpretation of in-

¹⁰ *Pope & Talbot Inc. v. Government of Canada*. Interim Award by Arbitral Tribunal dated June 26, 2000. Para. 75. URL: <https://www.italaw.com/sites/default/files/case-documents/ita0674.pdf> (accessed date: 12.09.2018).

¹¹ *ADF Group Inc. v. United States of America*. Paras. 82, 172. URL: <https://www.italaw.com/sites/default/files/case-documents/ita0009.pdf> (accessed date: 12.09.2018).

¹² *Pope & Talbot Inc. v. Government of Canada*. Interim Award by Arbitral Tribunal dated June 26, 2000. Para. 73. URL: <https://www.italaw.com/sites/default/files/case-documents/ita0674.pdf> (accessed date: 12.09.2018).

¹³ See *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*. Para. 222. URL: https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf (accessed date: 12.09.2018); *Cargill, Incorporated v. United Mexican States*. Para. 317. URL: https://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf (accessed date: 12.09.2018).

¹⁴ *Indonesia – Certain Measures Affecting the Automobile Industry*. Report by the Panel adopted on 2 July 1998 (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R). Para. 14.85. URL: https://www.wto.org/english/tratop_e/dispu_e/54r00.doc (accessed date: 12.09.2018); *European Communities – Regime for the Importation, Sale and Distribution of Banana*. Report by the Panel adopted on 22 May 1997 (WT/DS27/R/USA). Paras. 7.179, 7.180. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=WT/DS27/R/USA&Language=English&Context=ScriptedSearches&languageUIChanged=true (accessed date: 12.09.2018).

¹⁵ *Canada – Measures relating to the Feed-in Tariff Program*. Report by the Panel adopted on 19 December 2012 (WT/DS412/R, WT/DS426/R). Paras. 7.165, 7.177. URL: https://www.wto.org/english/tratop_e/dispu_e/412_426r_e.pdf (accessed date: 12.09.2018).

¹⁶ *India – Certain Measures relating to Solar Cells and Solar Modules*. Report by the Panel adopted on 24 February 2016 (WT/DS456/R). Para. 7.68. URL: https://www.wto.org/english/tratop_e/dispu_e/456r_e.pdf (accessed date: 12.09.2018).

¹⁷ *Canada – Certain Measures affecting the Renewable Energy Generation Sector*. Report by the Appellate Body adopted on 6 May 2013 (WT/DS412/AB/R, WT/DS426/AB/R). Para. 5.208. URL: https://www.wto.org/english/tratop_e/dispu_e/412_426abr_e.pdf (accessed date: 12.09.2018).

¹⁸ *Canada – Certain Measures Affecting the Automotive Industry*. Report by the Panel adopted on 11 February 2009 (WT/DS139/R, WT/DS142/R). Para. 10.87. URL: https://www.wto.org/english/tratop_e/dispu_e/6100d.pdf (accessed date: 12.09.2018).

¹⁹ *Agreement on Trade-related Investment Measures (TRIMs)*. Preamble. Para. 2 URL: https://www.wto.org/english/docs_e/legal_e/18-trims.pdf (accessed date: 12.09.2018).

²⁰ *Indonesia – Certain Measures Affecting the Automobile Industry*. Report by the Panel adopted on 2 July 1998 (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R). Para. 14.73. URL: https://www.wto.org/english/tratop_e/dispu_e/54r00.doc (accessed date: 12.09.2018).

troductory Art. 1101 in the Chapter on investments, according to which “all investments in the territory of the Party” fall within the scope of the regulated PRs²¹.

II. For consonant placement of investment issues in a coherent system of trade rules the GATT participants had to advance a clear legal justification for it. Besides the objective to avoid the distorting effect of investment measures on trade, it was necessary to specify explicitly those GATT provisions, which might contradict such measures. For this purpose, the Working Group scrutinized 18 articles [Croome 1996:140]. But, finally, it was decided on the provisions of articles III and XI of GATT.

However, the referential nature of the TRIMs rules didn't help to engrain a new concept into WTO law. Western scholars, who previously put their hopes on the adoption of the TRIMs, eventually treated the agreement contemptuously, considering it “redundant”, i.e. excessive toward the GATT's provisions [Brewer, Young. 1998:457–470]. The decision in *EC-Bananas III* (1997) did its part. It was stated that “the TRIMs Agreement does not add to or subtract from those GATT obligations”²². This raised the question of the order in examining concerned measures for their compliance with the GATT and the TRIMs Agreements. Is there any need to involve the provisions of TRIMs in the decision-making process?

In *Indonesia – Autos* (1998), the panel had to clarify that the TRIMs contains a reference to the provisions of GATT and not to Art. III, as such, and thus, if article III of GATT is not applicable for reasons not related to the disciplines of Art. III itself, its provisions remain applicable for the purposes of the TRIMs agreement²³. Consequently, the TRIMs Agreement should be treated first, since its provisions are more specific as far as claims concern in-

vestment issues²⁴. Nonetheless, the panel rejected the finding of a violation of the TRIMs on the pretext of the principle of “judicial economy”. This position of the WTO Dispute Settlement Body (hereinafter – DSB) is maintained in all subsequent disputes concerning investment measures²⁵. It was presumed that measures falling under the definition of “trims” and incompatible with Art. III:4 or XI:1 of GATT are automatically considered to be in violation of Art. 2.1 of TRIMs.

WTO adjudicators stepped back from the formal-logical approach only in 2012. In the decision in *Canada – Renewable Energy* (2012) they reiterated the independence of the TRIMs provisions and concluded on the need for their separate consideration²⁶. The establishment of the violation of the national treatment principle was based on the assessment of contested measures in respect of Para. 1(a) of the Illustrative list to the TRIMs. The Appellate body confirmed the rationality of this decision and remarked, that “it is not obvious what a stand-alone finding of violation of Article III:4 of GATT would add to a finding of violation of Article III:4 that is consequential to an assessment under the Illustrative List of the TRIMs Agreement”. The panel's achievement was substantially complemented by the Appellate body's note on the content of the Illustrative list. It was indicated, that the list enumerates only exemplary measures that are contrary to the GATT principles, and a broad interpretation of its provisions is therefore needed. Therefore, the WTO DSB managed to cope with the problem of formal assessment of the TRIMs Agreement.

NAFTA investors also encountered the problem of formalism. In contrast to the Illustrative list to the TRIMs, Art. 1106 of NAFTA provides a closed list of PRs. Furthermore, Para. 5 of the Article explicitly pro-

²¹ See *ADM and Tate & Lyle v. Mexico*. Para. 221. URL: https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf (accessed date: 12.09.2018).

²² *European Communities – Regime for the Importation, Sale and Distribution of Banana*. Report by the Panel adopted on 22 May 1997 (WT/DS27/R/USA). Paras. 7.185. URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=WT/DS27/R/USA&Language=English&Context=ScriptedSearches&languageUICanged=true (accessed date: 12.09.2018).

²³ *Indonesia – Certain Measures Affecting the Automobile Industry*. Report by the Panel adopted on 2 July 1998 (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R). Para. 6.32. URL: https://www.wto.org/english/tratop_e/dispu_e/54r00.doc (accessed date: 12.09.2018).

²⁴ *Ibid.* Para. 14.63.

²⁵ See: *Turkey – Measures affecting the Importation of Rice*. Report by the Panel adopted on 21 September 2007 (WT/DS334/R). Para. 7.259. URL: [http://www.worldtradelaw.net/reports/wtopanels/turkey-rice\(panel\).pdf.download](http://www.worldtradelaw.net/reports/wtopanels/turkey-rice(panel).pdf.download) (accessed date: 12.09.2018); *China – Measures affecting Imports of Automobile Parts*. Report by the Panel adopted on 18 July 2008 (WT/DS339/R; WT/DS340/R; WT/DS342/R). Para. 7.759. URL: [http://www.worldtradelaw.net/reports/wtopanels/china-autoparts\(panel\).pdf.download](http://www.worldtradelaw.net/reports/wtopanels/china-autoparts(panel).pdf.download) (accessed date: 12.09.2018).

²⁶ *Canada – Certain Measures affecting the Renewable Energy Generation Sector*. Report by the Appellate Body adopted on 6 May 2013 (WT/DS412/AB/R, WT/DS426/AB/R). Para. 7.154. URL: https://www.wto.org/english/tratop_e/dispu_e/412_426abr_e.pdf (accessed date: 12.09.2018).

hibits an extensive interpretation of these provisions. Due to formal inconformity with the definitions of the article, investors' claims against Canada were rejected; this is the cases of *Pope & Talbot Inc.* in 2000, *Merrill & Ring Forestry L.P.* in 2010. In the first dispute on PRs, adopted for consideration on the merits, the panel conceived a theory of an unintentional impact of measures, the so-called "incidental effects"²⁷. It was assumed that the measures, of a mandatory or conditional nature which could not be established in accordance with Para. 1 or Para. 3 of Art. 1106, influenced investments incidentally²⁸. The negative effects of the measures for investors were considered to be "ancillary restraints"²⁹. In view of this they could not indicate themselves a violation by the state of its obligations under the NAFTA Agreement.

In the separate opinion to the award in *S.D. Myers, Inc. v. Canada* (2000), Dr. Bryan Schwartz pointed out the necessity to examine the substance of measures at issue. The verbal expression shouldn't disguise the meaning of the concept: local content requirements aren't limited to question of "how" the investment operations should be carried out, in the same way as requirements related to purchases from local suppliers aren't limited to the problem of engagement of third parties into production³⁰. This pernicious tendency could be overcome only through appealing to more general qualification criteria of investment measures.

III. The distinguishing of character features serves to set the concept apart from other related phenomena. To be qualified as a "trims", the measure must be "investment" and "trade-related". The criterion of "trade relationship" plays rather an inclusive role, that is to say, it ensures the inclusion of investment rules into the system of trade rules. In *Indonesia – Autos* (1998) the arbitrators formulated the presumption of

influence of local content requirements on the trade: "they would necessarily be 'trade-related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade"³¹. This conclusion was just cited in other decisions, but some clarification was needed in *Brazil – Taxation* (2017).

Brazil argued that its national programme could not be trade-related, because it was aimed at promoting research and development in production. However, the panel even so found the "trade-related" features. It acknowledged, that the inclusion of inputs used in the production of incentivized products into imported ones affects the sale and purchase of the latter, thereby has an impact on trade³². This argument seems unconvincing. On the one hand, a broad interpretation must have a reasonable limit. On the other hand, the panel simply followed the old maxim: "the way in which a measure is defined by a government itself, does not affect the qualification of the 'trims'"³³.

This conclusion was drawn in 1999 in response to Indonesia's arguments that its automobile programmes could not be considered "investment": first, they were adopted by ministries not as "investment", and second, they were effectuated by agencies, office scope of which does not cover investment issues. The purpose of the programmes became though decisive. The panel found that the measures were aimed at increasing the production of finished vehicles, their parts and components in Indonesia, and that the achievement of this objective inevitably would have affected investment in the concerned sector³⁴. As a result, the "objective of introduction" has become the main indication of whether the measure is "investment". Determining the "investment" character of the Indian National programme in the field of solar energy, the panel directly quoted the formulation of

²⁷ *S.D. Myers, Inc. v. Government of Canada*, Partial Award (I) dated November 13, 2000. Para. 270.

²⁸ *Merrill & Ring Forestry L.P. v. The Government of Canada*. Para. 110. URL: <https://www.italaw.com/sites/default/files/case-documents/ita0504.pdf> (accessed date: 12.09.2018).

²⁹ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*. Decision on Liability and on Principles of Quantum dated May 22, 2012. Para. 242. URL: <https://www.italaw.com/sites/default/files/case-documents/italaw1145.pdf> (accessed date: 12.09.2018).

³⁰ Separate Opinion by Dr. Bryan Schwartz, concurring except with respect to performance requirements, in the partial award of the tribunal *S.D. Myers, Inc. v. Government of Canada* dated November 12, 2000. Paras. 188–197. URL: <https://www.italaw.com/sites/default/files/case-documents/ita0748.pdf> (accessed date: 12.09.2018).

³¹ *Indonesia – Certain Measures Affecting the Automobile Industry*. Report by the Panel adopted on 2 July 1998 (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R). Para. 14.82. URL: https://www.wto.org/english/tratop_e/dispu_e/54r00.doc (accessed date: 12.09.2018).

³² *Brazil – Certain Measures concerning Taxation and Charges*. Report by the Panel adopted on 30 August 2017 (WT/DS472/R, WT/DS497/R). Para. 7.360. URL: https://www.wto.org/english/tratop_e/dispu_e/472_497r_e.pdf (accessed date: 12.09.2018).

³³ *Indonesia – Certain Measures Affecting the Automobile Industry*. Report by the Panel adopted on 2 July 1998 (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R). Para. 14.81. URL: https://www.wto.org/english/tratop_e/dispu_e/54r00.doc (accessed date: 12.09.2018).

³⁴ *Ibid.* Para. 14.80.

this approach, which has already become canonical in the practice of the WTO DSB³⁵.

The decision in *Canada-Renewable Energy* (2012) supplemented the “objective” criterion with the “key factor”³⁶. The concept of “key factor” is not identical to the meaning of “causal link”, which is a necessary element in the determination of injury within the meaning of the Agreement on subsidies and countervailing measures and the Agreement on implementation of Art. VI of GATT (on anti-dumping measures). To establish a “trim” it is insufficient to find a potential relationship between the behavior of investors and the impact of the measure, the state initiative should be an overriding reason for the investor's choice of a particular strategy. The factor of “impact” of the measure on investments comes to the forefront.

From this perspective, it would be interesting to compare the criteria of “investment measure” within the meaning of Art. 2.1 of TRIMs and of “in connection with an investment” within the meaning of Para. 1 of Art. 1106 of NAFTA. To determine “whether the measure was introduced in connection with the investment” within the meaning of Art. 1106 of NAFTA it was *a contrario* initially accepted to focus on the nature of the measure's impact on the investment. At this point we return to the very doctrine of “incidental effects”, on the reverse side of which there is a “direct impact” with the performance requirements on the investment realization. In *ADM v. Mexico* (2007) the fact of impact of a new tax on the investment was not only confirmed, but was qualified as a “detrimental effect on the profitability of the investment”³⁷.

It wasn't till *Cargill v. Mexico* (2009), that the arbitrators addressed the idea of “objective”. Furthermore, this criterion was proposed not in addition to the feature of “influence”, but as a determining comprehensive factor. It was stated in the award: “the Tribunal sees no necessity to define in the abstract the degree of association or relationship... Here, the performance requirement in question was integrally related to the investment of the investor. <...> Absent the objective of targeting the supply of HFCS

in Mexico in order to bring pressure on the United States, there would have been no IEPS Tax”³⁸.

The formulation in the award in *Mobil Investments v. Canada* (2012) demonstrates an appropriate combination of a traditional approach and a new one: “It is plain, in the view of the Tribunal, that such spending on R&D (research and development) and E&T (education and traineeship) in the Province is a central feature of the 2004 Guidelines, and not an ancillary objective or consequence”³⁹.

The present analysis suggests the integrity of the concept of investment requirements. Certainly the way of the legal norm's development largely depends on the legal technique of its formulation. But the evidence from practice shows, the task of resolving substantially similar subjects can direct legal reasoning in one direction. Approaches of the TRIMs and NAFTA Agreements' editors inevitably differ. Foremost different goals are pursued: for the TRIMs – protection of trade against distortive effects of investment measure, for NAFTA – increasing investment opportunities (Art. 102.1(C)). Historical background is of great value: the TRIMs provisions reflect the GATT panels' experience, whereas the criterion “in connection with an investment” in Para. 1 of Art. 1006 of NAFTA represents the standard formula in investment treaties of the North American States.

Nevertheless, to address similar issues of interpretation, common qualification criteria of prohibited measures have been developed independently from each other in the practice of the investment disputes settlement. However, for the TRIMs the criterion of “objective” serves as an auxiliary element, in the case of the NAFTA the turn to the concept of “objective” is an opportunity to avoid excessive formalism in the qualification of the contested PRs. In the case of the criterion of “causality” (“impact” for NAFTA, “key factor” for the TRIMs) the situation is reversed. It is revealing that the concepts of “trims” and PRs can virtually develop in parallel to each other. Justification of this statement can be expected in new disputes on investment measures.

³⁵ India – Certain Measures relating to Solar Cells and Solar Modules. Report by the Panel adopted on 24 February 2016 (WT/DS456/R). Para. 7.60. URL: https://www.wto.org/english/tratop_e/dispu_e/456r_e.pdf (accessed date: 12.09.2018).

³⁶ Canada – Certain Measures affecting the Renewable Energy Generation Sector. Report by the Appellate Body adopted on 6 May 2013 (WT/DS412/AB/R, WT/DS426/AB/R). Para. 7.110.

³⁷ Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States. Para. 227. URL: https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf (accessed date: 12.09.2018).

³⁸ Cargill, Inc. v. United Mexican States. Para. 317. URL: https://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf (accessed date: 12.09.2018).

³⁹ Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada. Decision on Liability and on Principles of Quantum dated May 22, 2012. Para. 242. URL: <https://www.italaw.com/sites/default/files/case-documents/italaw1145.pdf> (accessed date: 12.09.2018).

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