1 Introduction

The major controversies around investment treaty arbitration have, since its beginnings, focused on large-scale questions of the field’s substantive content and its procedural structure. In terms of substance, tribunals and writers have debated the appropriate balance between state regulatory freedom and meaningful protection for foreign investors, mostly through the definitions of expropriation and fair and equitable treatment. Meanwhile, the choice of arbitration as the dispute settlement procedure has given rise to concerns of apparent bias, leading to more recent calls for new structures, such as a permanent investment court to replace ad hoc arbitral tribunals.\(^1\) Alongside these issues, however, a number of smaller-scale matters have begun to occupy observers of the system. There is now recognition that, while seemingly less political and more technical, these matters are no less important for the workings of the investment treaty regime. One such question which has garnered attention in recent years is the question of applicable law in investment treaty arbitration.\(^2\)

The Trans-Pacific Partnership (TPP) appears to resolve this question swiftly, providing in Article 9.24.1 that tribunals convened to resolve investor-state disputes under Chapter 9 are to ‘decide the issues in dispute in accordance with this Agreement and applicable rules of international law’. This applicable law clause mirrors the long-standing equivalent clause in NAFTA Article 1131(1), and (like much else in the TPP) has appeared in US Model BITs since 2004.\(^3\) However, the clause’s straightforward language masks a number of uncertainties that lie behind it. This article seeks to address two such uncertainties: first, the role that previous investment agreements concluded between TPP parties might play in affecting the law applied by a TPP tribunal; and second, the role of domestic law in TPP investment disputes.

The first uncertainty arises because, in most cases, the TPP does not terminate earlier, overlapping agreements between TPP parties. Section 2 of this article addresses the possibility that these earlier agreements conflict with provisions of the TPP, potentially preventing a tribunal from applying the TPP despite the direction to do so. The second uncertainty arises because the applicable law clause appears to constrain tribunals from applying domestic law, even though this will often be unavoidable. Section 3 considers whether this apparent constraint poses a real problem for tribunals. Through an examination of the law applicable in TPP investment disputes, the article therefore seeks to mark out the

\(^1\) CETA.

\(^2\) Spiermann; Kjos; Salacuse; Sasson.

\(^3\) US 2004 Model BIT Article 30(1); US 2012 Model BIT Article 30(1).
TPP’s place in the universe of international and domestic laws relevant to contemporary investment disputes.

The TPP provides for the possibility of arbitral claims of breach of three different categories of obligation: first, the investment protection obligations in Section A of the TPP itself, including expropriation, FET, national treatment and the other usual investment treaty obligations; second, the obligations in an investment authorisation; and third, the obligations in an investment agreement. This article will focus only on claims of breach of the first category, the typical investment treaty obligations. Thus, it will not consider issues of applicable law in disputes in the second two categories.

2 Overlapping BITs, treaty conflict and applicable law in TPP disputes

As noted above, the TPP’s applicable law clause in Article 9.24.1 directs tribunals to apply both the TPP itself and ‘applicable rules of international law’. This phrase permits a TPP tribunal to apply the international law rules on, for instance, treaty interpretation and state responsibility. Pope and Talbot v Canada provides one example, where the tribunal noted that the reference to ‘applicable rules of international law’ in NAFTA permitted it to look to general international law on the award of interest as part of compensation. Such a provision in the TPP is understandable, since the TPP itself largely does not contain any rules on these matters, and it would be difficult for a tribunal to resolve a claim without engaging with questions of treaty interpretation or with matters addressed in the law of state responsibility, such as attribution of conduct or reparation.

Mostly finding their origin in custom, these secondary rules of international law are generally applicable in any international dispute. However, there will often be a range of more specific rules – most likely primary rules – that also form part of the ‘applicable rules of international law’ in an investment claim under the TPP, by virtue of a particular agreement between the host and home states. Thus, in a TPP dispute between a Japanese investor and Vietnam, for instance, the entire universe of primary obligations in force as between Japan and Vietnam will constitute ‘applicable rules of international law’. These obligations may relate to all sorts of matters, including environmental, diplomatic, human rights, judicial assistance or extradition matters.

---

4 Articles 9.18.1(a)(i)(A) and 9.18.1(b)(i)(A).
5 Articles 9.18.1(a)(i)(B) and 9.18.1(b)(i)(B). An ‘investment authorisation’ is defined in Article 9.1.
6 Articles 9.18.1(a)(i)(C) and 9.18.1(b)(i)(C). An ‘investment agreement’ is defined in Article 9.1.
7 Article 9.24.2 sets out the applicable law in such disputes.
8 Pope & Talbot v Canada (UNCITRAL), Award in Respect of Damages, 31 May 2002 [89].
9 The TPP does contain provisions on state enterprises in Chapter 17, which may displace the residual rules on attribution of conduct in the law of state responsibility, similar to the provisions in NAFTA Chapter 15. See Mesa Power v Canada on the lex specialis nature of these state enterprise rules.
10 However, the WTO Agreements do not contain an applicable law clause, and yet WTO panels have made reference to these areas of general international law without particular difficulty. See Bartels, Applicable Law in the WTO.
11 Setting aside the possibility of a persistent objector in a case.
Most of these obligations are unlikely to assist a TPP tribunal to ‘decide the issues in dispute’ in an investment claim. However, one category of primary rules that seems highly relevant to a TPP investment dispute is the category of pre-existing, overlapping investment treaties. As Alschner has observed, the new wave of regionalism in investment treaty-making has seen numerous multilateral investment treaties, including the TPP, come into existence in parallel with older, usually bilateral treaties in force between pairs of the multilateral treaties’ members. Indeed, according to Alschner, the TPP overlaps with 35 prior investment treaties between different TPP states.12 More than half of the 66 bilateral relationships between the twelve TPP parties are therefore already covered by at least one investment treaty. Given that the United States, Canada and Mexico are all TPP parties, one prominent example of this overlap is NAFTA. Other examples include the 2003 Japan-Vietnam BIT, the 2008 Australia-Chile FTA and the 2009 ASEAN Comprehensive Investment Agreement, the latter applying amongst TPP parties Singapore, Brunei, Malaysia and Vietnam.

One TPP party, Australia, has explicitly agreed to terminate some of its overlapping treaties, in side letters attached to the TPP. Thus, the Australia-Mexico, Australia-Vietnam and Australia-Peru will be terminated (subject to a sunset clause) once the TPP comes into force. However, this approach is exceptional. The only other party to make specific provisions relating to prior agreements, New Zealand, has provided in side letters (with Brunei, Chile, Malaysia, Singapore and Vietnam) that the prior agreements remain in force and should be interpreted consistently with the TPP, but that investors can ultimately claim the most favourable treatment under any agreement. New Zealand has also agreed with Australia that the long-standing Closer Economic Relations framework between the two states will remain in place,13 and that the TPP’s investor-state dispute settlement mechanisms will not apply as between them. Otherwise, the TPP states have been content to include a general provision, in Article 1.2(1), providing as follows:

Recognizing the Parties’ intention for this Agreement to coexist with their existing international agreements, each Party affirms, ... in relation to existing international agreements to which that Party and at least one other Party are party, its existing rights and obligations with respect to such other Party or Parties, as the case may be.

The inclusion of Article 1.2(1) is important in that it rules out an argument that, by concluding the TPP, the parties have implicitly terminated all prior overlapping investment

---

12 W Alschner and D Skougarevskiy, ‘The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe’ (Graduate Institute of International and Development Studies, Working Paper N IHEIDCTEI2015-08) 13. The authors note that the exact number of overlapping agreements may vary depending on, for instance, whether treaties that contain only a simple mandate to pursue further negotiations on investment protection are included, or whether the count extends solely to those containing fully-fledged investor protections.

treaties by virtue of VCLT Article 59. Although the TPP undoubtedly relates to the same subject-matter as the earlier investment treaties, in light of Article 1.2(1), it could not be contended that ‘it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty’, as VCLT Article 59(1)(a) requires. Similarly, it would be difficult to maintain that the provisions of the TPP are ‘so far incompatible’ with the other treaties that they are ‘not capable of being applied at the same time’, to meet VCLT Article 59(1)(b). The TPP parties themselves clearly do not view the treaties as incompatible to this degree, but even on an objective test, any conflicts that might exist between certain provisions are not likely to constitute the kind of ‘exceptional’ circumstances of ‘fundamental opposition’ that allow Article 59(1)(b) to operate. Thus, apart from the explicit terminations and opt-outs taken by Australia and New Zealand, the TPP will not affect the existence of any prior, overlapping investment treaties.

2.1 Potentially conflicting provisions in the applicable law

These overlapping investment treaties will therefore form part of the applicable law in TPP investment disputes. What consequences will this have for tribunals applying this law?

An initial point to clarify is that investors claiming under the TPP will not be able to claim breaches of overlapping investment treaties in the TPP arbitral proceedings. This conclusion stems from the difference between jurisdictional clauses and applicable law clauses. The jurisdiction of TPP investment tribunals is defined by Article 9. This Article makes clear that investor-claimants may only submit claims for breach of ‘an obligation under Section A’ – ie, a breach of the substantive investment protections in the TPP itself. A TPP tribunal has no jurisdiction to hear a claim that a respondent state has breached any provision of an overlapping investment treaty such as NAFTA. The fact that the applicable law clause is framed more widely, covering not just the TPP but also parallel investment treaties (and other international obligations), does not expand the jurisdiction of the tribunal.

Nevertheless, the presence of overlapping investment treaty obligations within the applicable law may well have other consequences for tribunals ‘decid[ing] the issues in dispute’ in an investment claim. The question becomes most relevant where the provisions of the overlapping treaty arguably conflict with the provisions of the TPP.

---

14 Villiger 727.
15 Villiger 729.
16 Alschner 295.
17 See, eg, L Bartels, ‘Jurisdiction and Applicable Law Clauses: Where does a Tribunal find the Principal Norms Applicable to the Case before it?’ in T Broude and Y Shany (eds), Multi-Sourced Equivalent Norms in International Law (Hart 2011) 115.
18 Alschner and Skougarevskiy 24; Bartels MSEN chapter.
19 See, eg, European Media Ventures SA v Czech Republic (UNCITRAL), Award on Jurisdiction, 15 May 2007 [86].
To adapt an example from Alschner, suppose that Chile wishes to ban the production and sale of a hazardous chemical, with good faith public health and environmental reasons justifying its decision. A Malaysian investor in the chemicals industry may seek to challenge this decision under the TPP’s investor-state arbitration mechanism. However, Chile would be likely to point to Annex 9-B of the TPP, which contains the more extensive provisions on indirect expropriation that have been common in recent US and Canadian investment treaties. Annex 9-B(3)(b) confirms that non-discriminatory measures designed and applied to protect public health, safety and the environment do not constitute indirect expropriations (‘except in rare circumstances’). Relying on this provision, a TPP tribunal may be tempted to find that Chile’s measure does not amount to an expropriation, with no compensation due to the Malaysian investor.

However, alongside the TPP and its Annex 9-B, the 1992 Malaysia-Chile BIT remains in force, and represents one of the prior investment treaties that overlap with the TPP. Article 4 of the BIT contains a short provision prohibiting ‘expropriation’ with no further definition of the term. Arguably, such a clause could be more favourable to an investor, particularly if a tribunal adopted the so-called ‘sole effect’ approach that proposes the effect on the investor as the touchstone of whether expropriation has occurred. Cases supporting this approach have typically been heard under older-style investment treaties with wording similar to the Malaysia-Chile BIT. Under this interpretation of each clause, the situation would then be that Chile’s measure is permitted under the TPP, but prohibited under the Malaysia-Chile BIT.

Whether this situation creates a conflict depends on the definition of conflict that is adopted. Some writers, such as Jenks in one of the early, classic pieces on conflict, take the view that two obligations can only conflict when it is impossible to comply with both simultaneously. On this narrow view, there would be no conflict in the situation above, because Chile can comply with both treaties simply by choosing not to implement the chemical ban. Others, meanwhile, take a broader view of conflict, contending that the notion extends to situations where one treaty prohibits conduct that another treaty allows. On this view, the TPP and the Malaysia-Chile BIT ‘suggest different ways of dealing with a problem’; one permits Chile to implement the ban while the other prohibits it.

The remainder of this section considers the outcome that will result under each definition of conflict. Before this, however, it must be recalled that the possible conflict in the example

---

20 Alschner 292
22 Jenks; Finke [416]; B Conforti, ‘Consistency among Treaty Obligations’ in E Cannizzaro (ed), The Law of Treaties Beyond the Vienna Convention (OUP 2011) 188.
23 J Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law (CUP 2003) XXX; Finke [417]. Akhavi appears to consider that conflict arises only when two rules cannot simultaneously be complied with (82), but also considers that the norm that permits the conduct can be ‘ complied’ with by deciding to engage in the conduct (6), meaning that the two rules do conflict. 24 ILC Fragmentation Report [25].
above arose only by adopting a particular interpretation of the Malaysia-Chile BIT’s expropriation clause. If the conflict is created by interpretation, perhaps it can (or must) also be resolved by interpretation. Section 2.2, therefore, addresses the possibility of ‘harmonious interpretation’, before turning to analyse the other outcomes in sections 2.3 and 2.4.

2.2 Harmonious interpretation to avoid conflict

International law generally maintains a presumption against conflict. Pauwelyn suggests that ‘explicit language’ is needed before it can be assumed that a new rule deviates from a previous one. Prima facie conflicts between treaty provisions thus can and should be avoided by finding a harmonising interpretation of the two instruments. Indeed, this may well be the intentions of the TPP parties. Under TPP Article 1.2(1), as noted above, the TPP is expressed to ‘coexist’ with previous treaties, the rights and obligations in which are ‘affirmed’. Even without the general presumption against conflict, Article 1.2(1) may itself constitute a direction to arbitrators to interpret the TPP and other treaties harmoniously.

25 Pauwelyn 240.
26 MPEPIL Conflicts between Treaties [20]; Finke 421; Klabbers 203; Aust 216; Villiger 402.
27 Pauwelyn 334; a ‘conflict clause stating that a norm ought not to be interpreted or considered in conflict with another norm’ (similar to Article 1.2(1)’s indication that the TPP affirms and coexists with earlier treaties) has the effect that ‘the adjudicator is precluded from adopting an interpretation that conflicts with another norm’.
28 NAFTA’s expropriation provision, which does not contain much more definition than that of the Malaysia-Chile BIT, was considered by one tribunal to be ‘of such generality as to be difficult to apply in specific cases’: Marvin Feldman v Mexico (ICSID Case No ARB(AF)/99/1), Award, 16 December 2002 [98].
Since a TPP tribunal would not be asked (and would have no jurisdiction) to make a final determination of breach of an earlier treaty, it may be reluctant to offer any formal view on the meaning of the earlier treaty. Its conclusion might therefore be that there is no necessary conflict between the TPP and the earlier treaty, given that it is at least possible to interpret the two harmoniously (by reading the earlier treaty to include the various ‘state-friendly’ clarifications of the TPP). This lack of any necessary conflict sets the matter to rest, and the tribunal would proceed to decide in the ordinary way whether the TPP had in fact been breached.

2.3 Narrow definition of conflict

In some circumstances, it may not be possible to find a harmonious interpretation of the two treaties. Indeed, the TPP parties may well see the treaty’s provisions as a conscious and deliberate ‘roll-back’ of investor protections in order to preserve regulatory flexibility, in light of recent concerns about an imbalance of rights and obligations between investors and host states under investment treaties. The parties may be fully expecting that certain conduct which would breach an earlier treaty would not be found to breach the TPP.

If a narrow view of conflict is adopted, however, still no conflict will arise, as discussed earlier. Even if the TPP represents a lower level of obligation towards foreign investors compared to an earlier treaty, both treaties can theoretically be complied with – simply by the state adhering to the higher level of obligation in the earlier treaty. Rather than conflicting, the treaties will merely ‘accumulate’, in the ordinary way that most new treaties sit alongside all earlier ones. In this scenario, if a TPP state chooses to make use of the new regulatory flexibility that it has carefully restored for itself in the TPP, it accepts the possibility that it may violate an earlier treaty, even if the TPP is not violated. For instance, if the Malaysian investor feels that its chances of a successful claim are higher under the Malaysia-Chile BIT than under the TPP, it is free to bring its claim under the former instrument and receive compensation if it wins. For whatever reason, Malaysia and Chile have chosen not (yet) to terminate the BIT, and investors can benefit from that additional protection in the meantime. This may well be the TPP parties’ intention in ‘affirming’ previous treaties and declaring that those treaties will ‘coexist’ with the TPP.

---

30 Alschner and Pauwelyn use the term ‘backsliding’, which seems to carry a negative connotation that may not be appropriate when the changes are seen as a response to justified criticism of over-protection of investors.
31 This view assumes that the source of the imbalance was the terms of investment treaties themselves, rather than expansive ‘investor-friendly’ interpretations given to those terms by arbitral tribunals. If the problem (as states see it) lay only with arbitrators, one might expect changes to the institutional structure of investment arbitration – for instance, more state control over the appointment process via the creation of an investment court – instead of changes to the wording of substantive protections in the treaties.
32 Pauwelyn, general principle of accumulation of treaty obligations.
33 Subject to the rules on waiver (TPP Article 9.20) in submitting disputes to several fora.
34 Even Jenks (who preferred the narrow view of conflict) recognised, however, that simply complying with the stricter obligation does have the undesirable effect of defeating the object of the other treaty: see Pauwelyn 171.
Thus, if a narrow definition of conflict is adopted, the case proceeds as normal and the tribunal determines whether the TPP has been breached, as in Section 2.2.

2.4 Broad definition of conflict

Under a broad definition of conflict, as noted above, the TPP unavoidably conflicts with earlier treaties containing stronger obligations towards investors. Interestingly, Article 1.2(2) does envisage that the TPP provisions may conflict with the provisions of earlier treaties, imposing an obligation of consultations between the overlapping parties to find a ‘mutually satisfactory solution’. At the same time, this third scenario is the most difficult to square with the text of Article 1.2(1): if the TPP conflicts with earlier treaties, the parties cannot simply ‘affirm’ those treaties and declare that they ‘coexist’. To deal with this situation, conflict resolution rules must be applied.

The effect of a TPP tribunal’s limited jurisdiction

At the outset, a tribunal dealing with this conflict may be tempted to declare that the conflict is irrelevant to its ruling. The tribunal might observe that it is only empowered to rule on claimed breaches of the TPP itself, under Article 9.18. Even if the Malaysia-Chile BIT were to prevail once the conflict resolution rules had been applied, the tribunal would still have no power to find any breach of that BIT. The tribunal might then find that its only option would be to examine the case under the instrument grounding its jurisdiction (i.e., the TPP).

Support for this position might from the Oscar Chinn case of the Permanent Court of International Justice. In that case, certain parties to an 1885 multilateral treaty had concluded a later agreement arguably in breach of the 1885 treaty. A dispute arose under the later treaty, and the two parties (Belgium and the United Kingdom) took the dispute to the PCIJ. Neither party raised the question of the later treaty’s legality or interaction with the earlier treaty. The majority of the Court was content to note that it had only been asked to rule on (and therefore only had jurisdiction to rule on) breaches of the later treaty. As a result, for the Court, any potential conflict with the 1885 treaty was irrelevant.

However, two of the dissenting judges in Oscar Chinn criticised the majority’s position on this question. Judge van Eysinga considered that the conflict between the earlier and later treaties was ‘of such importance that a tribunal should reckon with it ex officio’, despite the disputing parties’ decision to ignore it. Given that, in van Eysinga’s view, the earlier treaty did not permit the parties to adopt the later treaty, only the earlier treaty could apply. Meanwhile, Judge Schücking preferred to consider the later treaty null and void due to its

---

35 Maj opinion p80
36 p135.
violation of the 1885 treaty.\textsuperscript{37} Again, even though neither party had questioned the later treaty’s validity, ‘international public policy’ suggested that the Court could not apply a treaty which it knew to be invalid.\textsuperscript{38}

In any event, the \textit{Oscar Chinn} case falls within a different category of conflicts than the one currently under consideration. Pauwelyn labels the \textit{Oscar Chinn} category as ‘inherent normative conflicts’, which includes situations where ‘an \textit{inter se} agreement is concluded by some parties to a multilateral treaty, in breach of an explicit prohibition to conclude such agreement.’\textsuperscript{39} The kind of conflict at issue here, meanwhile, is labelled ‘conflict in the applicable law’, where ‘[c]ompliance with, or the exercise of rights under, one of the two norms constitutes breach under the other norm’.\textsuperscript{40} Importantly, as discussed further below, when a treaty outside the tribunal’s jurisdiction is to prevail following a conflict in the applicable law, the tribunal is barred from applying the treaty within its jurisdiction. As the ILC’s Fragmentation Report notes, even though the jurisdiction of a tribunal might be limited, ‘the exercise of that jurisdiction is controlled by the normative environment’.\textsuperscript{41}

Thus, the TPP tribunal could not avoid addressing the conflict, since it is not irrelevant but would directly affect whether the TPP could be applied in the case.

\textbf{Resolving the conflict: VCLT Article 30(2)}

The existence of conflict between overlapping treaties activates Article 30 of the Vienna Convention on the Law of Treaties (VCLT), which deals with ‘successive treaties relating to the same subject-matter’.\textsuperscript{42} The provision sets out a number of rules that enable a determination of the relations between treaty parties, essentially giving priority to one or the other of the multiple treaties on the same subject-matter.

In many contexts where Article 30 is commonly discussed, the requirement of ‘same subject-matter’ is controversial. It is not obvious, for instance, that treaties on investment have the same subject-matter as treaties on human rights or the environment. Even though states’ investment obligations may sometimes be thought to conflict with their human rights obligations, the VCLT’s rules on treaty conflict are not necessarily useful in resolving this, due to the ‘same subject-matter’ requirement. However, as noted earlier,\textsuperscript{43} it is significantly easier to maintain that earlier investment treaties (including earlier regional trade agreements

\textsuperscript{37} This position would likely not hold today. In the event of conflicts, the outranked treaty is not rendered void or invalid; it is simply a matter of priority as between the two (apart from when a treaty violates \textit{ius cogens} – see VCLT Art 53). See ILC Fragmentation Report [320].

\textsuperscript{38} p150.

\textsuperscript{39} Pauwelyn 275, 308.

\textsuperscript{40} 275.

\textsuperscript{41} [45]; see also [423].

\textsuperscript{42} Article 30 is not explicitly restricted to situations of treaty conflict: MPEPIL Conflicts between Treaties [13]. However, most commentators treat the clause as relevant only where treaties do conflict.

\textsuperscript{43} In the context of Article 59’s implicit termination rule.
with investment chapters, such as NAFTA) have the same subject-matter as the TPP. Furthermore, the TPP is clearly later in time compared to all the various treaties that overlap with it, satisfying the requirement for ‘successive treaties’. Thus, the predicates of Article 30 can be relatively easily treated as satisfied in this situation.

Article 30(2) sets out a kind of *lex specialis* rule, resolving treaty conflicts by giving effect to any specific intentions of the parties as manifested in a conflict clause in the treaty texts themselves. Under Article 30(2), ‘where a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail’. As suggested above, the precise intentions of the TPP parties are not entirely clear as to resolving conflicts with earlier treaties. TPP Article 1.2(1) ‘affirms’ the existing rights and obligations of TPP parties under other treaties (perhaps suggesting that existing treaties prevail in the event of conflict), but also recognises the parties’ intention that the TPP ‘coexist’ with earlier agreements (making any intended hierarchy more difficult to discern). Meanwhile, Article 1.2(2) appears decidedly unsure how to resolve conflicts, leaving it to the parties to engage in consultations on a ‘mutually satisfactory solution’. Furthermore, none of these TPP provisions expressly make the TPP ‘subject to’ earlier treaties or state that it is ‘not to be considered as incompatible with’ earlier treaties, as Article 30(2) appears to require.

However, it is recognised that no exact form of words is needed for Article 30(2). While TPP Article 1.2 may be unclear on the parties’ own intentions as to conflict, it does surely specify that the TPP is not to be considered as incompatible with earlier treaties. Whatever the parties’ intentions might have been, then, VCLT Article 30(2) resolves the matter, by providing that ‘the provisions of that other treaty [ie, the earlier treaty] prevail’.

As a result, in this scenario, all earlier investment treaties are to prevail over the TPP, by virtue of VCLT Article 30(2). But the VCLT does not clarify the meaning of the word ‘prevail’. It is clear that Article 30 does not invalidate the disfavoured treaty entirely but only decreases its priority; the treaty’s rights and obligations remain valid. The complication in the case of TPP investment disputes is that the tribunal’s jurisdiction extends only to the TPP itself, even though the applicable law is wider. What happens to the TPP, then, in a scenario where an earlier treaty prevails over it, but the tribunal has no jurisdiction to rule on breaches of that earlier treaty? This question is not addressed by the VCLT itself or, in general, by writers. The most prominent answer comes from Pauwelyn, who suggests that ‘[t]he

---

45 Cf Alscher and Skougarevskiy 25, who consider that the intention of Article 1.2(1) is that existing treaties prevail in the event of a conflict.
46 MPEPIL Conflict Clauses [8]; Pauwelyn 332.
47 ILC Fragmentation Report [320]. Note Lauterpacht’s early views – conflicting treaty would be invalid – while later views just went for priority, not invalidity.
48 Alscher (at 295) considers the scenario in which the treaty that prevails is *within* the jurisdiction of the tribunal.
discarded rule does not apply and can hence a fortiori not be breached.\textsuperscript{49} The result is that the TPP cannot be applied by the tribunal, and the respondent state necessarily wins the claim, since the merits of any alleged breach of the TPP cannot be addressed.

**VCLT Articles 30(3) and (4)**

Apart from the *lex specialis* rule in Article 30(2), the VCLT also contains other rules for resolving conflict, including the *lex posterior* rule in Article 30(3) and the *pacta tertiis* rule in Article 30(4).\textsuperscript{50} However, it is unclear, on the face of the VCLT, whether the provisions of Article 30 are to be applied in order (from paragraph 1 to paragraph 5), with the tribunal stopping the analysis at the first paragraph that applies in the case, or whether all its paragraphs must be assessed and could all be simultaneously operative if the facts allow.\textsuperscript{51} As discussed above, Article 30(2) may be applicable in a TPP investment dispute, and would suggest (by virtue of the TPP’s conflict clause) that the earlier treaty prevails. But the conditions of Article 30(3) are also fulfilled: by definition here, the parties to the earlier treaty are also parties to the TPP, but the TPP is not implicitly terminated or suspended. According to Article 30(3), then, ‘the earlier treaty applies only to the extent that its provisions are compatible with [the TPP]’. The earlier treaty applies only where its provisions do not conflict with the later treaty; if there is a conflict, the *later* treaty (ie, the TPP) is to prevail. Thus, the VCLT’s conflict rules themselves might appear to create a conflict, in that paragraphs 2 and 3 lead to different results when applied to the relations between the TPP and earlier investment treaties.

However, commentators agree that Article 30 contains its own implicit hierarchy, in that the treaty parties’ intentions, and therefore Article 30(2), must be paramount.\textsuperscript{52} A tribunal would apply the VCLT’s ‘residual’ conflict rules in paragraphs 3–5 only if the treaty does not make provision for conflicts itself. Since the TPP does make provision for its relations with other agreements in Article 1.2, there would be no cause for a tribunal to consider Articles 30(3) or (4).

**Conflict rules for non-VCLT parties**

Although the VCLT is currently in force for 114 states, this figure does not include three TPP parties – Brunei, Singapore and the United States.\textsuperscript{53} The VCLT’s conflict rules therefore cannot be applied in TPP investment disputes involving these states. However, the *lex*

\textsuperscript{49} 327; see also 469 and 473. This may be the scenario envisaged by Alschner (n XXX at 293), suggesting that the overlapping treaty would ‘excuse’ violations of the other treaty, and by Mitchell and Voon (n XXX at 131), suggesting that the overlapping treaty would provide a ‘defence’.

\textsuperscript{50} Orakhelashvili 774.


\textsuperscript{52} MPEPIL Conflict Clauses [3]; ILC Fragmentation Report [251]; Akhavi 61; Finke 422; Aust 227; Villiger 403–405; Pauwelyn 363; Sinclair 66.

\textsuperscript{53} Brunei and Singapore have not signed the VCLT, while the US has signed but not ratified the treaty.
specialis rule in Article 30(2), giving priority to any conflict clause specified by the parties themselves in a treaty, can likely be considered a rule of customary international law. Consequently, the same result as outlined above would also follow for TPP disputes involving Brunei, Singapore or the United States.

2.5 Conclusions on conflict

Thus, where the TPP can be harmonised with the earlier apparently conflicting treaty, or where a narrow definition of conflict is adopted, the presence of these overlapping treaties within the applicable law in TPP investment disputes will have very limited effect. The tribunal will proceed as normal to determine the claimed breach of the TPP on the merits.

Meanwhile, in a TPP investment dispute where the provisions of an earlier overlapping treaty are found to conflict irreconcilably with the provisions of the TPP (usually because the earlier treaty prohibits conduct that the TPP permits), the tribunal will be barred from applying the TPP to resolve the dispute. As a result, it will always find no breach of the relevant TPP rule.

This finding of no breach may be absolutist, but it is ultimately not surprising, since it is already premised on the position that the TPP permits the state conduct in issue (which creates the conflict with the earlier treaty that prohibits the conduct). Of course, in this scenario, the investor remains free to claim instead under the earlier treaty. Indeed, if a tribunal were to find an irreconcilable conflict between the TPP and an earlier treaty, it is unlikely that future investors from the relevant states would ever attempt to bring another claim under the TPP until the earlier conflicting treaty was terminated. This sits uneasily with the states parties’ intention that the TPP coexist with earlier agreements, but it is also a consequence of the lack of clarity in the TPP on dealing with conflicts, and the continued existence of the earlier agreements. It may be at this point that the consultations on inconsistency, mandatorily activated under TPP Article 1.2(2) upon request of one state party, become most useful.

3 Domestic law and the applicable law in TPP investment disputes

Overlapping treaties and questions of conflict are not the only issues raised by the TPP’s seemingly simple applicable law clause. This section turns to consider the role of domestic law, a source of law that does not appear in the applicable law clause, in TPP investment disputes.

54 Villiger 410; Orakhelashvili 774.
55 Thus, even in this scenario where unavoidable conflict is found, it may be less of a problem than is suggested by, eg, Alschner and Skougarevskiy 24-25. The ultimate result is less a matter of ‘how the tribunal characterizes the interaction between the TPP and [eg] NAFTA’ (25), and more a function of which agreement the investor chooses to bring its claim under.
56 Subject to the waiver arrangements – ie, potentially could not claim under earlier treaty if investor has already claimed under the TPP and lost.
To recall, under Article 9.24.1, TPP tribunals are directed to ‘decide the issues in dispute in accordance with this Agreement and applicable rules of international law’. This applicable law clause mirrors the long-standing equivalent clause in NAFTA Article 1131(1), which similarly identifies ‘this Agreement and applicable rules of international law’ as the two permissible bodies of law to be applied in a NAFTA investment dispute. However, the TPP clause contains a notable difference to its NAFTA predecessor. In a footnote to Article 9.24.1, the TPP provides: ‘For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent when it is relevant to the claim as a matter of fact.’

The footnote constitutes an acknowledgement that the law of the host state will be relevant to TPP investment disputes. Indeed, in general, there are many issues on which such domestic law is relevant in an investment treaty arbitration. On some of these issues, consideration of domestic law is inescapable, such as where the treaty expressly indicates that investments must be made ‘in accordance with host state law’ (or similar wording). When states raise objections to a claimant’s ability to enjoy the protections of the investment treaty due to alleged violation of host state law in making its investment, tribunals will unavoidably need to determine whether the claimant did violate the respondent’s domestic law.57 The TPP does not contain such an explicit provision on investor legality, but this is not likely to be a bar to considering the matter. Several investment tribunals have held that an investor legality requirement can be implied into a treaty, and have proceeded to assess the investor’s domestic legal compliance in order to meet the implied requirement.58 On other issues, consideration of domestic law falls within the discretion of the tribunal, such as for claims of FET breach. A respondent state’s compliance with its own law is likely to play some role, even if only serving as a contributory factor, in a tribunal’s assessment of whether the state has complied with the FET obligation.

The TPP footnote does not acknowledge, however, that the domestic law of other states could well be relevant too. On its face, this omission might suggest either that questions of domestic law of other states are simply not expected to arise in TPP investment disputes, or that such questions are expected to arise but that tribunals are forced to apply ‘this Agreement and applicable rules of international law’ when resolving them. The former position is not tenable; a very wide range of laws are potentially relevant to any foreign investment operation, including the law of the host state but also, for instance, the law of the investor’s home state or the law governing any contracts entered into by the investor relating to the investment. In EuroGas v Slovakia, a still-pending ICSID arbitration, the parties have submitted extensive pleadings on issues of Canadian law (the home state of one claimant) and US law including federal law and Utah state law (the home jurisdiction of the other claimant).

58
In *Occidental v Ecuador*, a major portion of the award (and dissenting opinion) was devoted to analysis of New York law, even though the claimant corporations were registered in California and Delaware.59

The latter position – namely, applying international law to resolve questions of domestic law – is also not tenable. International law does not contain rules on, for instance, the issues of bankruptcy, corporate dissolution and merger and contractual conditions precedent that are addressed in the parties’ pleadings in *EuroGas v Slovakia*. If an ICSID tribunal attempted to apply international law to these questions, it would face a stalemate, impermissible under the ICSID Convention’s prohibition on *non liquet* in Article 42(2). The tribunal is therefore forced to find a solution by application of some law: most obviously, this will be the relevant domestic law.60 Numerous tribunals have recognised this point already. As noted above, NAFTA’s applicable law clause does not refer to domestic law. Despite this, NAFTA tribunals have acknowledged that domestic law must nevertheless be applied on issues such as property rights definition.61 Indeed, the application of international law to an issue that is properly governed by domestic law might be considered equivalent to the application of no law at all, thus grounding an annulment claim.62 In one annulment claim outside of NAFTA, *MTD v Chile*, the annulment committee noted that it is ‘often necessary for BIT tribunals to apply the law of the host State’. The committee held that ‘the Tribunal should have applied Chilean law to those questions which were necessary for its determination and of which Chilean law was the governing law.’63 This flexible approach – of first identifying the specific issue needing resolution and then applying the law which properly applies to that issue – is in fact the prevailing approach, and perhaps the only logical one.64 In any case, it would be odd to assume that the TPP footnote acknowledges that questions of domestic law

59 New York law governed an agreement concluded by the claimants with a Chinese company. The agreement had arguably transferred a portion of the claimants’ rights in the investment to the Chinese company, potentially meaning that the claimant was not entitled to compensation for that portion of the investment. The tribunal majority and dissenting arbitrator split on this issue, amongst others.
61 See, eg, *Bayview Irrigation District v Mexico* (ICSID Case No ARB(AF)/05/1), Award, 19 June 2007 [109]–[118]; also *Robert Azimian v Mexico* (ICSID Case No ARB(AF)/97/2), *Marvin Feldman v Mexico* (ICSID Case No ARB(AF)/99/1) and *International Thunderbird Gaming Corporation v Mexico* (UNCITRAL), cited to this effect by C Lévesque, ‘Investment and Water Resources: Limits to NAFTA’ in MC Cordonier Segger, M Gehring and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer 2011) 424. More recently, see *Mobil Investments Canada Inc v Canada* (ICSID Case No ARB(AF)/07/4), Decision on Liability and on Principles of Quantum, 22 May 2012 [354], acknowledging that Canadian law must govern the question of whether a subordinate measure is ‘under the authority of’ a principal measure for the purposes of NAFTA Article 1108. Douglas has also made this general point at (XXX) 196. Outside the NAFTA context, see similarly Sasson (n 2) xxvii. Schreuer suggests that NAFTA’s applicable law rule is ‘not advisable’ and ‘impractical’, because of the unavoidable connections between investments and host state law: (n 60) 562.
63 *MTD Equity Sdn Bhd v Chile* (ICSID Case No ARB/01/7), Decision on Annulment, 21 March 2007 [72].
will arise while simultaneously (implicitly) directing tribunals to apply an entirely different body of law, international law, to those questions.

The TPP footnote’s lack of reference to the law of other jurisdictions (apart from the host state) can thus not be explained by an assumption that such law will never be relevant or that international law is sufficient to resolve all matters in an arbitration. It might then be assumed that the domestic law of other jurisdictions will be treated as the footnote directs for host state law – namely, not as law but ‘as a matter of fact’.

This direction to treat domestic law as fact might appear to have a strong pedigree in public international law, of which investment treaty arbitration forms a part. In any discussion of the position of domestic law as seen from the perspective of international law, the 1926 statement of the PCIJ in *Certain German Interests in Polish Upper Silesia* is usually cited: ‘[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts’. 65 This position is commonly repeated by international courts and tribunals, including investment tribunals. Certainly, one scenario in which the domestic law of the host state may appear most ‘fact-like’ is where a law itself is the object of the investor’s challenge. In this scenario, the host state’s introduction of the new law (or amendment of an existing law) constitutes the events giving rise to the claim. One example might be *Paushok v Mongolia*, in which the claimant challenged the state’s introduction of a new legislative ‘windfall’ tax on mining profits. 66 The tribunal’s task in such claims will be to apply the international law obligations in the investment treaty to the fact of the new law’s existence, and to determine whether this legislative conduct of the host state amounts to an expropriation or breach of fair and equitable treatment or another guarantee. The new domestic law itself is not applied by the tribunal, but it is treated as the facts to which international law is applied.

In the other situations outlined above, though, the domestic law is being applied directly by the tribunal to resolve a particular question, rather than constituting the factual basis of the claim. In these situations, as Jenks recognised even in 1938, it would be ‘a mistake to attach undue importance’ to the position of the PCIJ. 67 It is not necessarily clear what difference it would make to treat domestic law as fact rather than law. After all, a party seeking to rely on a point of customary international law must prove that point by reference to sufficient evidence (of state practice and *opinio juris*), but custom is clearly law, not fact. As Ketcheson has observed, 68 investment tribunals have been known to hear expert witness evidence on questions of international law (for example, on the availability of restitution in *von Pezold v*

---

65 *Certain German Interests in Polish Upper Silesia (Germany v Poland)* Series A No 7 (1926) 19.
66 Sergei *Paushok v Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011.
Zimbabwe, and on denial of justice in *Chevron v Ecuador*), and yet the presence of expert witnesses did not remove the legal character of the tribunal’s determination on those points. In deciding a question of domestic law, tribunals must typically apply that law to underlying facts; it is not entirely natural to treat this process instead as an instance of applying *facts* to facts. Where a tribunal has recognised that a particular issue is governed by domestic law, it makes little sense to persist with the traditional view that domestic law is to be treated only as fact in the international proceedings.\(^\text{69}\) To paraphrase the *SPP v Egypt* tribunal:\(^\text{70}\)

‘[The TPP’s] contention that […] municipal law should be treated as a “fact” is not helpful. [When disputing] parties are in fundamental disagreement as to what [a provision of domestic law] means […] the Tribunal therefore must interpret [that provision] and determine its legal effect’.

It is therefore not clear that the direction to treat domestic law as fact will serve any meaningful purpose in a TPP investment dispute. Indeed, the footnote was most likely included as a political tool of appeasement for states concerned that international tribunals might be empowered to apply the states’ own domestic laws, with the perceived lack of legitimacy that this would entail. This concern has recently been prominent in the European Union. The European Commission has sought to intervene in several investment treaty arbitrations, to argue that any issues of EU law in the case must be ruled on by the European Court of Justice, rather than by the investment tribunal.\(^\text{71}\) It has always been doubtful that the ECJ possessed any monopoly on interpretation of EU law, as recognised by the *EURAM v Slovakia*\(^\text{72}\) and *Eureka v Slovakia*\(^\text{73}\) tribunals. Nevertheless, the perception of intrusion appears to trouble the Commission and the Court, and is likely to have encouraged the inclusion of a comparable (and more extensive) clause in the EU’s recent Comprehensive Economic and Trade Agreement (CETA) with Canada.\(^\text{74}\) Of course, neither the EU nor any of its member states are parties to the TPP.\(^\text{75}\) But a similar concern has long lain at the heart of many NAFTA tribunals, which have frequently been at pains to emphasise that they are not ‘fourth instances’ sitting in appeal over matters of host state law.\(^\text{76}\) The tensions between the majority arbitrators and the dissenter in the recent *Clayton/Bilcon v Canada* NAFTA case centred at least partly on the propriety of investment tribunals assessing state conduct by

---


\(^{70}\) Decision on Jurisdiction [58].

\(^{71}\) See, eg, Czech and Spanish solar cases.

\(^{72}\) *European American Investment Bank AG v Slovakia* (PCA Case No 2010-17), Award on Jurisdiction, 22 October 2012 [248].

\(^{73}\) *Eureko BV v Slovakia* (PCA Case No 2008-13), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 [282].


\(^{75}\) Accession to the TPP is open only to APEC member states, none of which are also EU member states.

\(^{76}\) See, eg, *ADF Group v USA* [190].
reference to domestic (host state) law. Canada has also been alive to treaty drafting on the position of domestic law at least since its 2008 FTA with Colombia, which included a provision similar to the CETA provision. Since the NAFTA states including Canada are all parties to the TPP, the appearance of the footnote may not be so surprising.

4 Conclusions

The technical issues of applicable law considered in this article serve as a reminder of the fact that a multilateral investment treaty such as the TPP does not exist in ‘clinical isolation’ from other international law instruments, nor from domestic law. If the TPP is to serve as the ‘gold standard’ agreement that Hillary Clinton once described it as, it would have done well to provide greater clarity on its priority over other international agreements in the event of conflict, and on the role of domestic law. However, arbitration is a pragmatic exercise. In practice, TPP arbitral tribunals are likely to find harmonising interpretations or to adopt definitions of conflict that avoid the complications potentially raised by earlier agreements. Similarly, they are also likely to continue determining unavoidable questions of domestic law in the same manner in which they have done to date, regardless of directions in footnotes. This approach to applicable law represents the best approximation of the TPP parties’ intentions regarding their bold new regional agreement, when properly understood in the framework of public international law.

77


79 In Mamidoil v Albania, the claimant brought its claim under a BIT, but also relied partly on the Energy Charter Treaty as a parallel, overlapping instrument in force between the home and host states. Although the issue of conflict between the two instruments might have been raised, neither party appears to have done so. The tribunal also did not address the issue directly, beyond noting that the BIT contained a clause entitling the investor to the most favourable treatment available to it in any investment treaty: Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania (ICSID Case No ARB/11/24), Award, 30 March 2015 [261]–[278].