

# APPLICABLE LAW IN TPP INVESTMENT DISPUTES

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*The Trans-Pacific Partnership ('TPP') directs investment tribunals to apply both the TPP itself and 'applicable rules of international law' in resolving disputes. This article addresses two uncertainties that lie behind this seemingly straightforward provision. First, the article considers the effects that might flow from the presence, within the 'applicable rules of international law', of prior overlapping investment treaties concluded between TPP parties. A TPP investment tribunal might view these prior treaties as conflicting with the TPP, raising questions over which treaty will prevail. The resolution of this conflict will depend on the possibility of interpreting the two treaties harmoniously, the definition of conflict adopted and the meaning given to the conflict resolution clause in the TPP. The article suggests that tribunals are likely to find a pragmatic solution to avoid the potential complications posed by the earlier treaties. Secondly, the article examines the effects of the absence of domestic law from the TPP's applicable law clause and the presence of a footnote nevertheless permitting tribunals to consider domestic law as a fact. The article suggests that neither point is likely to alter, nor should alter, a tribunal's approach to the questions of domestic law that will inevitably arise in TPP investment disputes.*

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## I 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 ('FET'). 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

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permanent investment court to replace ad hoc arbitral tribunals.<sup>1</sup> 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.<sup>2</sup>

The *Trans-Pacific Partnership* ('TPP') appears to resolve this question swiftly, providing in art 9.25.1 that tribunals convened to resolve investor–state disputes under ch 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 longstanding equivalent clause in the *North America Free Trade Agreement* art 1131(1) ('NAFTA'),<sup>3</sup> and (like much else in the TPP) has appeared in US model bilateral investment treaties ('BITs') since 2004.<sup>4</sup> 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. Part II 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. Part III 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 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 ch 9 of the TPP itself, including expropriation, FET, national treatment and the other usual investment treaty obligations;<sup>5</sup> second, the

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<sup>1</sup> See, eg, the new approach in the Canada–EU *Comprehensive Economic and Trade Agreement* ('CETA'): European Commission, 'EU and Canada Agree on New Approach on Investment in Trade Agreement' (Press Release, IP/16/399, 29 February 2016) <europa.eu/rapid/press-release\_IP-16-399\_en.htm>.

<sup>2</sup> Ole Spiermann, 'Applicable Law' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 89; Hege Elisabeth Kjos, *Applicable Law in Investor–State Arbitration: The Interplay between National and International Law* (Oxford University Press, 2013); Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (Oxford University Press, 2013); Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International and Municipal Law* (Kluwer Law International, 2010).

<sup>3</sup> *North American Free Trade Agreement*, Canada–Mexico–United States, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) ('NAFTA').

<sup>4</sup> US 2004 Model Bilateral Investment Treaty ('BIT') art 30(1); US 2012 Model BIT art 30(1).

<sup>5</sup> *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) arts 9.19.1(a)(i)(A), 9.19.1(b)(i)(A) ('TPP').

obligations in an investment authorisation;<sup>6</sup> and third, the obligations in an investment agreement.<sup>7</sup> 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.<sup>8</sup>

## II OVERLAPPING BITS, TREATY CONFLICT AND APPLICABLE LAW IN TPP DISPUTES

As noted above, the TPP's applicable law clause in art 9.25.1 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 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.<sup>9</sup> Such a provision in the TPP is understandable, since the TPP itself largely does not contain any rules on these matters,<sup>10</sup> 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.<sup>11</sup>

Mostly finding their origin in custom, these secondary rules of international law are generally applicable in any international dispute.<sup>12</sup> 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.

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 Wolfgang 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 and Dmitriy

<sup>6</sup> TPP arts 9.19.1(a)(i)(B), 9.19.1(b)(i)(B). An 'investment authorisation' is defined in art 9.1.

<sup>7</sup> TPP arts 9.19.1(a)(i)(C), 9.19.1(b)(i)(C). An 'investment agreement' is defined in art 9.1.

<sup>8</sup> TPP art 9.25.2 sets out the applicable law in such disputes.

<sup>9</sup> *Pope v Canada (Award in Respect of Damages)* (2002) 41 ILM 1347, 1362 [89].

<sup>10</sup> The TPP does contain provisions on state enterprises in ch 17, which may displace the residual rules on attribution of conduct in the law of state responsibility, similar to the provisions in *NAFTA* ch 15. On the *lex specialis* nature of these state enterprise rules, see *Mesa Power Group, LLC v Canada (Award)* (Permanent Court of Arbitration, Case No 2012-17, 24 March 2016) [358]–[365].

<sup>11</sup> 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 Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *Journal of World Trade* 499.

<sup>12</sup> Setting aside the possibility of a persistent objector in a case.

Skougarevskiy, the TPP overlaps with 35 prior investment treaties between different TPP states.<sup>13</sup> More than half of the 66 bilateral relationships between the 12 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 Free Trade Agreement* and the 2009 *ASEAN Comprehensive Investment Agreement*, the latter applying amongst TPP parties Singapore, Brunei, Malaysia and Vietnam.<sup>14</sup>

One TPP party, Australia, has explicitly agreed to terminate some of its overlapping treaties, in side letters attached to the TPP.<sup>15</sup> Thus, the Australia–Mexico, Australia–Vietnam and Australia–Peru agreements 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.<sup>16</sup> New Zealand has also agreed with Australia that the longstanding ‘Closer Economic Relations’ framework between the two states will remain in place,<sup>17</sup> 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 art 1.2.1, providing as follows:

Recognising 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 that other Party or Parties, as the case may be.

The inclusion of art 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 treaties by virtue of the *Vienna Convention on the Law of Treaties* art 59 (*VCLT*).<sup>18</sup> In light of art 1.2.1, it could not be contended that ‘it appears

<sup>13</sup> Wolfgang Alschner and Dmitriy Skougarevskiy, ‘The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe’ (2016) 17 *Journal of World Investment & Trade* 339, 353–4. 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.

<sup>14</sup> *Australia–Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009); *ASEAN Comprehensive Investment Agreement*, opened for signature 26 February 2009 (entered into force 29 March 2012) <<https://perma.cc/NQ3X-W3Q2>>.

<sup>15</sup> Australian Government, Department of Foreign Affairs and Trade, *TPP Text and Associated Documents* (6 October 2015) <[dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx](http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx)>.

<sup>16</sup> New Zealand Ministry of Foreign Affairs and Trade, *Trans-Pacific Partnership* <[www.tpp.mfat.govt.nz/text](http://www.tpp.mfat.govt.nz/text)>.

<sup>17</sup> On the *Closer Economic Relations* framework generally, see Jarrod Hepburn, ‘The *Australia New Zealand Closer Economic Relations Trade Agreement*: First among Equals’ (2009) 10 *Journal of World Investment and Trade* 153.

<sup>18</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*VCLT*).

from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty’, as *VCLT* art 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* art 59(1)(b). The TPP parties themselves clearly do not view the treaties as incompatible to this degree, but even on an objective test,<sup>19</sup> any conflicts that might exist between certain provisions are not likely to constitute the kind of ‘exceptional’<sup>20</sup> circumstances of ‘fundamental opposition’<sup>21</sup> that allow art 59(1)(b) to operate. In any case, art 59 also requires the two treaties to relate to the same subject-matter, and this is not necessarily satisfied where only part of the later treaty (that is, the TPP’s investment chapter) relates to the same subject-matter as an earlier investment treaty.<sup>22</sup> 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.

#### A *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.<sup>23</sup> The jurisdiction of TPP investment tribunals is defined by art 9.19. This article makes clear that investor-claimants may only submit claims for breach of ‘an obligation under Section A’ — that is, 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*.<sup>24</sup> The fact that the applicable law clause is framed more widely, covering not just the TPP

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<sup>19</sup> Art 59(1)(b) imposes an objective test of incompatibility, not based on the parties’ own intentions: Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009) 727.

<sup>20</sup> *Ibid* 729.

<sup>21</sup> Wolfgang Alschner, ‘Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?’ (2014) 17 *Journal of International Economic Law* 271, 295.

<sup>22</sup> Villiger, above n 19, 725: ‘the term “treaty” [in art 59(1) *VCLT*] refers to the entire treaty’. However, Giegerich contends that the requirement would be fulfilled where a later treaty addresses both the subject-matter of the earlier treaty and other, additional subject-matters: Thomas Giegerich, ‘Article 59: Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 1011, 1014.

<sup>23</sup> See, eg, Lorand Bartels, ‘Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?’ in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, 2011) 115 (‘Jurisdiction and Applicable Law Clauses’).

<sup>24</sup> Alschner and Skougarevskiy, above n 13, 364; Bartels, *Jurisdiction and Applicable Law Clauses*, above n 23.

but also parallel investment treaties (and other international obligations), does not expand the jurisdiction of the tribunal.<sup>25</sup>

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.<sup>26</sup> The question becomes most relevant where the provisions of the overlapping treaty arguably conflict with the provisions of the TPP. As will be seen, in certain circumstances of conflict between provisions of the treaty within jurisdiction (that is, the TPP) and provisions of another treaty elsewhere within the applicable law, the tribunal may be barred from applying the TPP.<sup>27</sup>

To adapt an example from Alschner,<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.

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<sup>25</sup> See, eg, *European Media Ventures SA v Czech Republic (Award on Jurisdiction)* (UNCITRAL Arbitral Tribunal, 15 May 2007) [86].

<sup>26</sup> TPP art 9.25.1.

<sup>27</sup> Thus, even if the view is taken that the ‘rules of international law’ that are ‘applicable’ are only those that are directly necessary for resolving the dispute (such as rules on state responsibility or treaty interpretation), it is difficult to avoid seeing overlapping investment treaties as similarly necessary, if their existence might render the TPP itself inapplicable in a case. Notably, Schreuer sets out two possible interpretations of ‘applicable rules of international law’, both of which would appear to include other investment treaties: Christoph Schreuer, ‘Jurisdiction and Applicable Law in Investment Treaty Arbitration’ (2014) 1(1) *McGill Journal of Dispute Resolution* 1, 16–17.

<sup>28</sup> Alschner, above n 21, 292.

<sup>29</sup> *Agreement between the Government of Malaysia and the Government of the Republic of Chile for the Promotion and Protection of Investments*, signed 11 November 1992 (entered into force 4 August 1995).

<sup>30</sup> See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 114.

Whether this situation creates a conflict depends on the definition of conflict that is adopted.<sup>31</sup> Some writers, such as Wilfred 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.<sup>32</sup> 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.<sup>33</sup> On this view, the TPP and the Malaysia–Chile BIT ‘suggest different ways of dealing with a problem’;<sup>34</sup> 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 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. Part II(B), therefore, addresses the possibility of ‘harmonious interpretation’, before turning to analyse the other outcomes in Parts II(C) and (D).

### B *Harmonious Interpretation to Avoid Conflict*

International law generally maintains a presumption against conflict.<sup>35</sup> Joost 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

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<sup>31</sup> In turn, ‘the very definition of conflict may ... influence the outcome of a dispute’: Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003) 193.

<sup>32</sup> C Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 *British Yearbook of International Law* 401, 451; Jasper Finke, ‘Regime-Collisions: Tensions between Treaties (And How to Solve Them)’ in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar, 2014) 415, 416; Benedetto Conforti, ‘Consistency among Treaty Obligations’ in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011) 187, 188.

<sup>33</sup> Pauwelyn, above n 31, 175–6; Finke, above n 32, 417; Erich Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17 *European Journal of International Law* 395. Sadat-Akhavi appears to consider that conflict (or at least ‘incompatibility’) arises only when two rules cannot simultaneously be complied with (at 82), but also considers that the norm that permits the conduct can be ‘complied’ with by deciding to engage in the conduct (at 6), meaning that the two rules do conflict: see Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff, 2003). See also at 8.

<sup>34</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UNGAOR, 58<sup>th</sup> sess, UN Doc A/CN.4/L.682 (13 April 2006) para 25 (‘*ILC Fragmentation Report*’).

<sup>35</sup> Pauwelyn, above n 31, 240.

harmonising interpretation of the two instruments.<sup>36</sup> Indeed, this may well be the intention of the TPP parties. Under TPP art 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, art 1.2.1 may itself constitute a direction to arbitrators to interpret the TPP and other treaties harmoniously.<sup>37</sup>

The most obvious harmonising interpretation in this context will usually be to make the earlier treaty conform to the TPP. This is because, compared to many earlier treaties, the TPP contains more detailed provisions on most of the key investment protections, including expropriation, fair and equitable treatment and national treatment, with numerous footnotes and annexes offering clarifications of these protections. Meanwhile, earlier treaties often have shorter, simpler language that is also vaguer and more amenable to contested interpretation by tribunals. The Malaysia–Chile BIT itself, for instance, simply prohibits expropriation without offering any definition of the term.<sup>38</sup> Many of the TPP’s clarifications are expressed to be included only ‘for greater certainty’, thus encouraging tribunals to consider that the equivalent protections in earlier treaties already had the same meaning as the TPP, even if the earlier treaties did not explicitly say so. For instance, even though the rule against expropriation in the Malaysia–Chile BIT appears absolute on its face, it is likely quite reasonable to interpret the rule to include the TPP’s proviso in art 9.8.6 that the mere withdrawal of a subsidy does not in itself amount to expropriation. Furthermore, a harmonising interpretation would be even easier to find in relation to certain overlapping treaties, such as the US–Singapore free trade agreement, which contain interpretive annexes on expropriation and other clarifications similar to the TPP. If the interpretations can be harmonised, the two treaties would then have the same meaning, and no conflict arises.

Moreover, 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.

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<sup>36</sup> Nele Matz-Lück, ‘Conflicts between Treaties’ in Rüdiger Wolfrum et al (eds), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2015) para 20; Finke, above n 32, 421; Jan Klabbers, ‘Beyond the *Vienna Convention*: Conflicting Treaty Provisions’ in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011) 192, 203; Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2<sup>nd</sup> ed, 2007) 216; Villiger, above n 19, 402.

<sup>37</sup> Pauwelyn, above n 31, 334: a ‘conflict clause stating that a norm ought not to be interpreted or considered in conflict with another norm’ (similar to art 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’.

<sup>38</sup> *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’: *Feldman v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/1, 16 December 2002) [98].



### C Narrow Definition of Conflict

Some tribunals might take a different view of the various treaty provisions, and might determine simply that no harmonious interpretation is possible. Indeed, the tribunal may well see many of the TPP's provisions as a conscious and deliberate 'roll-back'<sup>39</sup> 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.<sup>40</sup> Provisions such as the tobacco exception in art 29.5 or the prudential exception for financial regulation in art 11.11 are undoubtedly explicit innovations to maintain such state flexibility. The parties may thus 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.<sup>41</sup> In this scenario, if a TPP state chooses to make use of the regulatory flexibility that it has carefully drafted 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.<sup>42</sup> For whatever reason, Malaysia and Chile have chosen not to terminate the BIT (yet), and investors can benefit from that additional protection in the meantime.<sup>43</sup> This accumulation of obligations may well be the TPP parties' intention in 'affirming' previous treaties and declaring that those treaties will 'coexist' with the TPP.

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 Part II(B).

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<sup>39</sup> Pauwelyn and Alschner 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: Joost Pauwelyn and Wolfgang Alschner, 'Forget about the WTO: The Network of Relations between PTAs and Double PTAs' in Andreas Dür and Manfred Elsig (eds), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (Cambridge University Press, 2015) 497, 522.

<sup>40</sup> 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.

<sup>41</sup> Pauwelyn, above n 31, 162.

<sup>42</sup> The investor could not necessarily bring *both* claims, depending on the operation of the TPP's waiver clause in art 9.21.

<sup>43</sup> 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: Jenks, above n 32, 426–7.

### D Broad Definition of Conflict

Under a broad definition of conflict, as noted above, and if no harmonious interpretation is possible, the TPP then unavoidably conflicts with earlier treaties containing stronger obligations towards investors. While this view of conflict has not particularly found favour to date with adjudicators,<sup>44</sup> it enjoys a degree of support in the literature,<sup>45</sup> and could well be adopted by a future investment tribunal. Notably, the possibility that the TPP is inconsistent with the provisions of earlier treaties is arguably envisaged in art 1.2.2, which imposes an obligation of consultations between the overlapping parties in this situation to find a ‘mutually satisfactory solution’. At the same time, this third scenario is the most difficult to square with the text of art 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.

#### 1 *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. Firstly, the tribunal might take art 1.2.2 to mean that questions of conflict resolution are non-justiciable, and that the parties themselves have the sole power to resolve such questions.<sup>46</sup> However, this is not a necessary reading of art 1.2.2. The clause imposes an obligation of state–state consultations if one state chooses to activate that process, but it does not purport to exclude a tribunal’s concurrent power to address questions of conflict if they arise in an investor–state dispute.

Secondly, the tribunal might observe that it is only empowered to rule on claimed breaches of the TPP itself, under art 9.19. Even if the Malaysia–Chile BIT (returning to the hypothetical above) 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 (that is, the TPP).

Support for this position might come from the *Oscar Chinn* case of the Permanent Court of International Justice (‘PCIJ’). 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.<sup>47</sup> 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

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<sup>44</sup> But see Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WTO Doc WT/DS27/R/MEX (22 May 1997) [7.159].

<sup>45</sup> See above nn 33–4.

<sup>46</sup> Andrew Mitchell and James Munro, ‘State–State Dispute Settlement under the Trans-Pacific Partnership’ in Tania Voon (ed), *Trade Liberalisation and International Co-Operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2013) 156, 163–4.

<sup>47</sup> *Oscar Chinn (UK v Belgium) (Judgment)* [1934] PCIJ (ser A/B) No 63, 80 (‘*Oscar Chinn*’).

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.<sup>48</sup> Given that, in Judge 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 violation of the 1885 treaty.<sup>49</sup> 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.<sup>50</sup> Following the minority's opinion, a conflict could be viewed as an objective matter which binds the tribunal not to apply a treaty if it is outranked by another treaty, regardless of the jurisdiction that the parties have chosen to confer on the tribunal.

In any event, though, the *Oscar Chinn* case falls within a different category of conflicts than the one currently under consideration. Pauwelyn labels the *Oscar Chinn* category as 'inherent normative conflicts', which includes situations where 'an inter se agreement is concluded by some parties to a multilateral treaty, in breach of an explicit prohibition to conclude such agreement'.<sup>51</sup> 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'.<sup>52</sup> 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 International Law Commission's *Fragmentation Report* notes, even though the jurisdiction of a tribunal might be limited, 'its exercise of that jurisdiction is controlled by the normative environment'.<sup>53</sup>

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.

## 2 Resolving the Conflict: VCLT art 30(2)

The existence of conflict between overlapping treaties activates art 30 of the *VCLT*, which deals with 'successive treaties ... relating to the same

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<sup>48</sup> Ibid 135.

<sup>49</sup> 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 *ius cogens*; see *VCLT* art 53). See *ILC Fragmentation Report*, above n 34, para 320.

<sup>50</sup> *Oscar Chinn* [1934] PCIJ (ser A/B) No 63, 150.

<sup>51</sup> Pauwelyn, above n 31, 275, 308.

<sup>52</sup> Ibid 275.

<sup>53</sup> *ILC Fragmentation Report*, above n 34, paras 45, 423. See also Alexander Orakhelashvili, 'Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter' (2016) 31 *ICSID Review* 344, 361–4 ('Article 30 of the 1969 Vienna Convention').

subject-matter'.<sup>54</sup> 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 art 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.<sup>55</sup> However, it is easier to maintain that earlier investment treaties (and earlier regional trade agreements with investment chapters, such as *NAFTA*) have the same subject-matter as the TPP. Even if the entirety of both treaties must share the same subject-matter for the purposes of art 59 (as discussed above),<sup>56</sup> it is recognised that art 30 plays a more flexible, residual role, capturing situations not addressed by art 59 and allowing for partial overlaps.<sup>57</sup> 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 art 30 can be treated as satisfied in this situation.

*VCLT* art 30(2) sets out a kind of *lex specialis* rule,<sup>58</sup> 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 art 30(2), '[w]hen 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.<sup>59</sup> TPP art 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, art 1.2.2 appears decidedly unsure how to resolve conflicts in advance, 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 art 30(2) appears to require.

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<sup>54</sup> Article 30 is not explicitly restricted to situations of treaty conflict: Matz-Lück, above n 36, para 13. However, most commentators treat the clause as relevant only where treaties do conflict.

<sup>55</sup> See, eg, Klabbers, above n 36, 193.

<sup>56</sup> But see Giegerich's contrary view: Giegerich, above n 22, 1014 [11].

<sup>57</sup> This is implied in art 30(3). See also Villiger, above n 19, 402, 726; Kerstin Odendahl, 'Article 30: Application of Successive Treaties Relating to the Same Subject Matter' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 505, 510–11.

<sup>58</sup> Alexander Orakhelashvili, 'Article 30' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011) vol I, 764, 774.

<sup>59</sup> Cf Alschner and Skougarevskiy, above n 13, 365.

However, it is recognised that no exact form of words is needed for art 30(2).<sup>60</sup> While TPP art 1.2 may be unclear on the parties' own intentions as to conflict, it is certainly possible to read the provision as specifying that the TPP is not to be considered as incompatible with earlier treaties. Whatever the parties' intentions might have been, then, on this view *VCLT* art 30(2) resolves the matter, by providing that 'the provisions of that other treaty [that is, the earlier treaty] prevail'.

As a result, in this scenario, all earlier investment treaties are to prevail over the TPP, by virtue of *VCLT* art 30(2). But the *VCLT* does not clarify the meaning of the word 'prevail'. It is clear that art 30 does not invalidate the disfavoured treaty entirely but only decreases its priority; the treaty's rights and obligations remain valid.<sup>61</sup> 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.<sup>62</sup> The most prominent answer comes from Pauwelyn, who suggests that '[t]he discarded rule does not apply and can hence a fortiori not be breached'.<sup>63</sup> Alexander Orakhelashvili similarly considers that application of the conflict rules 'may, in some situations, require disapplying the treaty on the basis of which [the tribunal] is composed and operates'.<sup>64</sup> 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.

### 3 *VCLT arts 30(3) and (4)*

Alternatively, the presence of art 1.2.2 may complicate an argument that the TPP is not to be considered as incompatible with earlier treaties. The fact that the parties have included a process to follow when inconsistencies between obligations are identified suggests that the parties did envisage the possibility of such inconsistencies.<sup>65</sup> Far from specifying that the TPP is not to be considered as incompatible with earlier treaties, art 1.2.2 can then be read as specifying that the TPP might well be so incompatible.

If this approach is taken, *VCLT* art 30(2) will not apply. A tribunal would then turn to the other rules for resolving conflict in art 30, including the *lex posterior*

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<sup>60</sup> Nele Matz-Lück, 'Treaties, Conflict Clauses' in Rüdiger Wolfrum et al (eds), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2015) para 8; Pauwelyn, above n 31, 332–3.

<sup>61</sup> *ILC Fragmentation Report*, above n 34, para 320.

<sup>62</sup> Alschner considers the scenario in which the treaty that prevails is *within* the jurisdiction of the tribunal: Alschner, above n 21, 295.

<sup>63</sup> Pauwelyn, above n 31, 327. See also at 469, 473. This may be the scenario envisaged by Alschner, who suggests that the overlapping treaty would 'excuse' violations of the other treaty: Alschner, above n 21, 293. See also Andrew D Mitchell and Tania Voon, 'PTAs and Public International Law' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2009) 114, 131, suggesting that the overlapping treaty would provide a 'defence'.

<sup>64</sup> Orakhelashvili, 'Article 30 of the *Vienna Convention*', above n 53, 361.

<sup>65</sup> '[O]ne can presume that if states insert [a conflicts clause], they must at least have considered that there was potential for conflict to arise': Pauwelyn, above n 31, 199.

rule in art 30(3) and the *pacta tertiis* rule in art 30(4).<sup>66</sup> (These other rules would not be applied where art 30(2) applies, since art 30 contains its own implicit hierarchy, in that the treaty parties' intentions, and therefore art 30(2), must be paramount.<sup>67</sup> A tribunal would apply the *VCLT*'s 'residual' conflict rules in the other paragraphs only if the treaty does not make provision for conflicts itself.)

Most relevantly, the conditions of art 30(3) are fulfilled here: by definition, the parties to the earlier treaty are also parties to the TPP, but the TPP is not implicitly terminated or suspended. According to art 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 (that is, the TPP) is to prevail. The same result will be produced under art 30(4)(a), where the earlier treaty is one that also has parties that are not TPP parties (such as the *ASEAN Comprehensive Investment Agreement*).

In a TPP investment dispute, this means that the conflicting earlier treaty does not affect the tribunal's determination; the TPP prevails and the dispute is decided as normal.<sup>68</sup>

#### 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.<sup>69</sup> The *VCLT*'s conflict rules therefore cannot be applied in TPP investment disputes involving these states. However, the *lex specialis* rule in art 30(2), giving priority to any conflict clause specified by the parties themselves in a treaty, and the *lex posterior* rule in art 30(3) can likely be considered rules of customary international law.<sup>70</sup> Consequently, the same result as outlined above would also follow for TPP disputes involving Brunei, Singapore or the United States.

#### E Conclusions on Conflict

Thus, where the TPP can be harmonised with the earlier apparently conflicting treaty, where a narrow definition of conflict is adopted, or where a broad definition is adopted but the TPP prevails as *lex posterior*, 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

<sup>66</sup> Orakhelashvili, 'Article 30', above n 58, 774.

<sup>67</sup> Matz-Lück, above n 60, para 3; *ILC Fragmentation Report*, above n 34, [251]; Sadat-Akhavi, above n 33, 61; Finke, above n 32, 422; Aust, above n 36, 227–8; Villiger, above n 19, 403–5; Pauwelyn, above n 31, 363; I M Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1973) 66–7.

<sup>68</sup> The effects of this situation would be more relevant to a dispute brought under the earlier treaty: if the TPP were to prevail as *lex posterior*, the tribunal would be unable to find a breach of the earlier treaty.

<sup>69</sup> Brunei and Singapore have not signed the *VCLT*, while the US has signed but not ratified the treaty.

<sup>70</sup> Villiger, above n 19, 410; Orakhelashvili, 'Article 30', above n 58, 774.

TPP (usually because the earlier treaty prohibits conduct that the TPP permits), and where art 1.2 is read as a conflicts clause that activates *VCLT* art 30(2), the tribunal will then 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,<sup>71</sup> 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.<sup>72</sup> 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 art 1.2.2 upon request of one state party, become most useful.

### III 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.

To recall, under art 9.25.1, 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 longstanding equivalent clause in *NAFTA* art 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 art 9.25.1, 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

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<sup>71</sup> Thus, even in this scenario where unavoidable conflict is found, it may be less of a problem than is suggested by, for example, Alschner and Skougarevskiy: above n 13, 365–6.

<sup>72</sup> Subject to the waiver clause in art 9.21: an investor potentially could not claim under the earlier treaty if it has *already* unsuccessfully claimed under the TPP.

domestic law.<sup>73</sup> 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.<sup>74</sup> 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 International Centre for Settlement of Investment Disputes ('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).<sup>75</sup> In *Occidental Petroleum Corporation 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.<sup>76</sup>

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 art 42(2). The tribunal is therefore forced to find a solution by application of *some* law: most obviously, this will be

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<sup>73</sup> Jarrod Hepburn, 'In Accordance with *Which* Host State Laws? Restoring the "Defence" of Investor Illegality in Investment Arbitration' (2014) 5 *Journal of International Dispute Settlement* 531.

<sup>74</sup> *Ibid* 532.

<sup>75</sup> *Eurogas Inc v Slovak Republic (Respondent's Counter-Memorial)* (ICSID Arbitral Tribunal, Case No ARB/14/14, 30 June 2015); *Eurogas Inc v Slovak Republic (Reply)* (ICSID Arbitral Tribunal, Case No ARB/14/14, 29 September 2015).

<sup>76</sup> *Occidental Petroleum Corporation v Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/11, 5 October 2012); *Occidental Petroleum Corporation v Ecuador (Dissenting Opinion)* (ICSID Arbitral Tribunal, Case No ARB/06/11, 5 October 2012). 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 proportion of the investment. The tribunal majority and dissenting arbitrator split on this issue, amongst others.



the relevant domestic law.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> In one annulment claim outside of *NAFTA*, *MTD Equity 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'.<sup>80</sup> 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.<sup>81</sup> In any case, it would be odd to assume that the TPP footnote acknowledges that questions of domestic law will arise while simultaneously (and 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) thus cannot 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'.

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<sup>77</sup> Christoph H Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2<sup>nd</sup> ed, 2009) 594.

<sup>78</sup> See, eg, *Bayview Irrigation District v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/1, 19 June 2007) [109]–[118]; *Azinian v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/97/2, 1 November 1999) [86]–[87]; *Feldman v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/1, 13 June 2003); *International Thunderbird Gaming Corporation v Mexico (Award)* (UNCITRAL, 26 January 2006), cited in Céline Lévesque, 'Investment and Water Resources: Limits to *NAFTA*' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer, 2011) 409, 424. More recently, see *Mobil Investments Canada Inc v Canada (Decision on Liability and on Principles of Quantum)* (ICSID Arbitral Tribunal, Case No ARB(AF)/07/4, 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* art 1108. Outside the *NAFTA* context, see Sasson, above n 2, xxvii; Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press, 2011) 51. Schreuer et al suggest that *NAFTA*'s applicable law rule is 'not advisable' and 'impractical', because of the unavoidable connections between investments and host state law: Schreuer et al, above n 77, 562.

<sup>79</sup> Giuditta Cordero Moss, 'Tribunal's Powers versus Party Autonomy' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1207, 1216, citing Zachary Douglas, 'Nothing If Not Critical for Investment Treaty Arbitration: *Occidental*, *Eureka* and *Methanex*' (2006) 22 *Arbitration International* 27. See also Kjos, above n 2, 56–7.

<sup>80</sup> *MTD Equity Sdn Bhd v Chile (Decision on Annulment)* (ICSID Arbitral Tribunal, Case No ARB/01/7, 21 March 2007) [72].

<sup>81</sup> Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 191, 203–4.

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: ‘From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts’.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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 Jonathan Ketcheson has observed, 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 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.<sup>85</sup> 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

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<sup>82</sup> *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Award)* [1926] PCIJ (ser A) No 7, 19.

<sup>83</sup> *Paushok v Mongolia (Jurisdiction and Liability)* (UNCITRAL Arbitral Tribunal, 28 April 2011).

<sup>84</sup> C Wilfred Jenks, ‘The Interpretation and Application of Municipal Law by the Permanent Court of International Justice’ (1938) 19 *British Yearbook of International Law* 67, 68. Jenks later called the position ‘at most ... debatable’: C Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons, 1964) 552.

<sup>85</sup> Jonathan Ketcheson, *The Application of Domestic Law by International Tribunals* (PhD Thesis, University of Cambridge, 2014) 57.

view that domestic law is to be treated only as fact in the international proceedings.<sup>86</sup> To paraphrase the *SPP v Egypt* tribunal:

[The TPP's] contention that [...] municipal law should be treated as a 'fact' is not helpful. [When disputing p]arties 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.<sup>87</sup>

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, where the European Commission has maintained that investment tribunals have no jurisdiction to apply or interpret EU law, questions of which must be left to the Court of Justice of the European Union ('CJEU').<sup>88</sup> It has always been doubtful that the CJEU possessed any monopoly on interpretation of EU law, as recognised by the *EURAM v Slovakia*<sup>89</sup> and *Eureko v Slovakia*<sup>90</sup> 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.<sup>91</sup> Of course, neither the EU nor any of its member states are parties to the TPP.<sup>92</sup> 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.<sup>93</sup> The tensions between the majority arbitrators and the dissenter in the recent *NAFTA* case of *Clayton/Bilcon v Canada* centred at least partly on the propriety of investment tribunals assessing state conduct by reference to domestic (host state) law.<sup>94</sup> Canada has also been alive to treaty drafting on the position of domestic

<sup>86</sup> Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) 77, 115; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 95; Kjos, above n 2, 256.

<sup>87</sup> *Southern Pacific Properties (Middle East) Ltd v Egypt (Decision on Jurisdiction of 14 April 1988)* (1988) 106 ILR 501, 541–2 [58].

<sup>88</sup> See, eg, European Commission, 'Amicus Curiae Brief', Submission in *US Steel Global Holdings I BV v Slovakia*, Permanent Court of Arbitration, Case No 2013-6 (15 May 2014) [40].

<sup>89</sup> *European American Investment Bank AG (Austria) v Slovakia (Jurisdiction)* (Permanent Court of Arbitration, Case No 2010-17, 22 October 2012) [248].

<sup>90</sup> *Eureko BV v Slovakia (Jurisdiction, Arbitrability and Suspension)* (Permanent Court of Arbitration, Case No 2008-13, 26 October 2010) [282].

<sup>91</sup> *Comprehensive Economic and Trade Agreement*, European Union–Canada, signed 30 October 2016 (not yet in force) art 8.31(2). See Jarrod Hepburn, 'CETA's New Domestic Law Clause' on EJIL: *Talk!* (17 March 2016) <<https://perma.cc/AU58-4CN7>>.

<sup>92</sup> Unless the TPP parties otherwise agree, accession to the TPP is open only to Asia-Pacific Economic Cooperation forum member states, none of which are also EU member states. See TPP art 30.4.1.

<sup>93</sup> See, eg, *ADF Group Inc v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/1, 9 January 2003) [190].

<sup>94</sup> *Clayton v Canada (Award on Jurisdiction and Liability)* (Permanent Court of Arbitration, Case No 2009-04, 17 March 2015); *Clayton v Canada (Dissenting Opinion of Professor Donald McRae)* (Permanent Court of Arbitration, Case No 2009-04, 10 March 2015).

law at least since its 2008 free trade agreement with Colombia, which included a provision similar to the *CETA* provision. Since *NAFTA* states including Canada are all parties to the TPP, the appearance of the footnote may not be so surprising.

#### IV 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,<sup>95</sup> 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.<sup>96</sup> 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.

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<sup>95</sup> Hillary Rodham Clinton (US Secretary of State), *Remarks at Techport Australia* (15 November 2012) United States Department of State <<https://perma.cc/ZB4J-WN7E>>.

<sup>96</sup> 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 Société SA v Albania (Award)* (ICSID Arbitral Tribunal, Case No ARB/11/24, 30 March 2015) [261]–[278].