The Legal Enforceability of CPTPP Anti-corruption Provisions and The Implications to Dispute Settlements

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Compared to previous free trade agreements(FTAs), the anti-corruption provisions(ACPs) in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership(CPTPP) have been significantly strengthened in terms of legal enforceability and deserve more attention. The legally enforceable ACPs in CPTPP are concentrated in Articles 26.6 and 26.7. However, this legal enforceability may have implications for dispute settlements under CPTPP and could cause internal conflicts and judicial overlap which need to be addressed through treaty interpretation, treaty modification, or general international law approaches, and the role of the Trade Commission could be considered. This article wishes to provide ideas for a more harmonious inclusion of ACPs in future FTAs.

Keywords: CPTPP, Anti-corruption, Enforceability, Dispute Settlement, Internal Conflict, Judicial Overlap

1 INTRODUCTION

As the successor to the Trans-Pacific Partnership Agreement (TPP), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) retains the vast majority of its provisions, including the most detailed anti-corruption provisions (ACPs) in all free trade agreements (FTAs) and other trade agreements,[1] which are thought to have the potential to revolutionize the way in which international law is used against corruption.[2] The inclusion of ACPs in FTAs has been practised internationally after the TPP, particularly in US-led FTAs.[3] CPTPP, as the in-depth

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1 Chang-fa Lo, *Anti-corruption Provisions in the TPP: Innovation, Effectiveness and Prospects*, in *Paradigm Shift in International Economic Law Rule-Making* 206 (J. Chaisse et al. eds 2017).

2 José-Miguel Bello y Villarino, *Will the Anti-Corruption Chapter in the TPP11 Work? Assessing the Role of Trade Law in the Fight Against Corruption Through International Law*, 16 N.Z. Y.B. Int'l L. 41 (2018).

3 Collier Bowling, *Corruption and FTAs: Does an Implicit Cause of Action Exist for Corruption Claims in ISDS*, 51 N.Y.U. J. Int'l L. & Pol. 924 (2019).

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agreement involving countries at different levels of development, provides a model for an understanding of the legal enforceability of ACPs.

Although many previous treaties providing ACPs, most of them lack external enforcement mechanisms and rely on the conscientiousness of parties to implement. It is worth noting that some ACPs in CPTPP have been hardened, with the ability to resort to dispute settlement mechanism (DSM) and enhanced their legal enforceability. But, this may pose challenges to dispute settlements. This article argues that the legal enforceability of ACPs may cause internal conflicts and judicial overlap which need to be addressed through treaty interpretation, treaty modification, or general international law approaches and that the role of the Trade Commission could be considered as well.

The article is organized as follows: section 2 analyses the legal enforceability of ACPs in CPTPP. Section 3 presents the internal conflicts created by the legal enforceability of ACPs in the application of DSMs, discusses the potential for, and limitations of, a treaty interpretation approach to resolving the conflicts, and argues that it would be preferable to include a clause clarifying the relationships. Section 4 presents the judicial overlap between investor-state dispute settlement (ISDS) and the DSM provided for in CPTPP Chapter 28(CPTPP DSM), advising that tribunals could not rigidly apply traditional jurisdiction-regulating rules, exercising inherent powers and comity to avoid double jeopardy or double compensation. Section 5 argues that the resolution of the issues raised in Sections 3 and 4 may also have recourse to the trade commission. Section 6 concludes.

2 THE LEGAL ENFORCEABILITY OF ACPS IN CPTPP

ACPs in CPTPP may differ in terms of binding force and therefore enforceability, due to differences in the subject matters covered, the content and the wording of the provisions. The legal enforceability of a provision is usually measured by determining whether it has the three elements of legalization: *obligation, precision and delegation*.[4]

Overall, ACPs in CPTPP are expressed with precision and do not use too much vague language, thus the focus of this part is on judging the element of obligation. It is more intuitive in international law to judge whether a rule in a treaty creates an express obligation for the parties by looking at the use of mandatory terminology such as 'shall', 'agree', or 'undertake' rather than less mandatory term such as 'will', 'should', 'best endeavours'.[5] When a rule is expressed in 'soft' language, its binding

[4] Kenneth W. Abbott et al., *The Concept of Legalization*, 54 Int'l Org. 401 (2000), doi: 10.1162/002081800551271.

[5] Anthony Aust, *Modern Treaty Law and Practice* 33 (CUP 2007).

force becomes weaker.[6] Examining the substantive ACPs in CPTPP with this criterion uncovers that these provisions exhibit varying levels of obligation, which can be broadly categorized into two types: hard-obligation and soft-obligation provisions. On this basis, the hard obligation ACPs are mainly distributed in Article 26.6, Article 26.7 and Article 26.9.

As for the element of delegation, in FTAs, it is generally required that the dispute arising under a certain rule is capable of being subject to DSM. CPTPP Article 26.12.1 provides that 'Chapter 28(Dispute Settlement), as modified by this Article, shall apply to this Section'. Therefore, in theory, all ACPs except for Article 26.9[7] could potentially be subject to the DSM. However, if a provision falls under a soft obligation, even if it can be subject to the DSM, it cannot obtain legal enforceability[8]; similarly, if a provision falls under a hard obligation but is excluded from the DSM, it is also the case. Therefore, the legally enforceable ACPs are only concentrated in Articles 26.6 and 26.7.

While there are only two articles, they contain the most significant provisions in the realm of anti-corruption. The clearer obligations are set out in Article 26.6. A more important obligation is to ratify or accede to the United Nations Convention against Corruption (UNCAC). All parties to CPTPP have now ratified or acceded to the UNCAC, so this article is of limited practical value.[9]

Article 26.7 is one of the most vital provisions to combat corruption and requires parties to criminalize corrupt practices. Four criminal offences constituting corruption are listed in this article and the parties have to establish them as offences in their domestic law.[10] Furthermore, Article 26.7.2 and Article 26.7.3 require that Parties shall make the commission of offences liable to sanctions and shall ensure that legal persons held liable for offences are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions. However, in conjunction with Article 26.9, there may be controversy as to how to implement Article 26.7. Under Article 26.9.2, each Party retains the right for its law enforcement, prosecutorial and judicial authorities to exercise their discretion with respect to the enforcement of its anti-corruption laws, which is precluded from the application of the DSM,[11] indicating that parties have greater freedom in the application and enforcement of their anti-corruption laws.

At first glance, the binding anti-corruption obligations established by CPTPP for parties appear to be limited to legislation. It is thus argued that parties cannot use the dispute settlement process to challenge another party's alleged inadequate

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6 Yaoyuan Zhang, *The Revival of Spectre: Voluntary Import Expansions and the WTO Compatibility*, 18 Asian J. WTO & Int'l Health L. & Pol'y 240 (2023).

7 CPTPP Art. 26.12.3.

8 Henrik Horn et al., *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, in *The World Economy: Global Trade Policy 2010* 230 (David Greenaway ed. 2011).

9 Bello y Villarino, *supra* n. 2, at 62.

10 CPTPP Art. 26.7.1.

11 CPTPP Art. 26.12.3.

enforcement of its anticorruption laws; as long as a country has adequate laws on the books, it cannot be taken to arbitration for failing to prosecute or convict under those laws.[12] This view may make ACPs in CPTPP much less effective and hardly make substantial progress in eliminating corruption and protecting private interests, albeit it could lead to improvements in the parties' domestic anti-corruption law. Nevertheless, there also seems to be an opposite interpretation as well.

First, Article 26.7.2, which requires that an offence described in paragraph 1 or 5 be liable to sanctions, does not clearly define whether the 'sanctions' to which the offence is subject are in legislation or enforcement. In other words, 'sanctions' may occur in both legislation and enforcement. Second, Article 26.9.2 provides the parties with the discretion to implement their domestic anti-corruption laws, which are essentially based on enforcement. Although Article 26.9.2 is not legally enforceable, it establishes an underlying assumption that the parties will indeed enforce their respective domestic anti-corruption laws. Third, although Article 26.6 provides that 'the applicable legal defences or legal principles controlling the lawfulness of conduct', the Parties also recognize that those offences shall be prosecuted and punished in accordance with each Party's law. This likewise establishes the premise that each party accepts that its anti-corruption law can and shall be enforced. Last, the distinction between legislative measures and law enforcement matters is sometimes unclear. If there is a lack of systemic enforcement in a country, such failure can be argued as being a result of the lack of proper legislative and other systemic measures to provide the basis for enforcement. In other words, the DSM can still be applied to address the systemic failure of law enforcement.[13]

Taken together, the legally enforceable ACPs in CPTPP could be not limited to requiring parties to adopt legislation but could relate to whether parties enforce those domestic laws and sanction offences. For these reasons, this article argues that how to enforce anti-corruption laws is the extent to which Article 26.9.2 allows parties to exercise discretion but that making corruption sanctioned (enforcing anti-corruption laws) remains a compulsory legal obligation under CPTPP.

3 INTERNAL CONFLICTS AND THE SOLUTIONS

3.1 The performance of internal conflicts

The legal enforceability of ACPs results in their potential application in the DSM. The ACPs can be applied to measures to eliminate bribery and corruption with

[12] Kaitlin Beach, *A Trade-Anticorruption Breakthrough?: The Trans-Pacific Partnership's Transparency and Anticorruption Chapter (23 Nov. 2015)*, https://globalanticorruptionblog.com/2015/11/23/the-trans-pacific-partnerships-transparency-and-anticorruption-chapter/ (accessed 11 Mar. 2023).

[13] Lo, *supra* n. 1, at 220.

respect to any matter covered by CPTPP.[14] Corruption may be deeply embedded in all aspects of international trade and investment, and in practice, it is difficult to draw a clear line between corruption matters and trade and investment matters. Failure by a party to sanction corruption may not only constitute a breach of its anti-corruption obligations under Chapter 26, but may also violate obligations under other chapters, creating competing responsibilities, and resulting in the conflicting application of DSMs under different chapters.

In FTAs, there may be differences in the level of development and interests of parties, resulting in different levels of acceptance of some articles or chapters, which are also excluded from the scope of the application of the DSM. Some CPTPP chapters exclude the whole or conditionally partially exclude the application of the DSM in areas that may be high in corruption, such as temporary entry for business persons,[15] and competition policy.[16] As an example, take the chapter on competition policy, where Article 16.2 sets out the obligations of procedural fairness in competition law enforcement. If corruption in competition enforcement in a party results in a failure to provide fair procedures for private individuals,[17] and the party's anti-corruption actions do not reach that, the result is that the corrupt conduct is not sanctioned accordingly. If this is the case, it would not only constitute a breach of Article 16.2 but could also potentially violate Article 26.7. It would therefore appear that a breach of a party's obligations under the Chapter 16 Competition Policy could be subject to DSM through ACPs. This would make the provision that the Chapter 16 Competition Policy does not apply to the DSM possibly de facto ineffective. In general, it also seems to foreshadow that provisions in other chapters excluded from the application of the DSM may also gain access to the DSM by virtue of the legal enforceability of ACPs.

The potential prevalence of corruption in international trade makes it difficult in practice to distinguish between corruption and other violations at the factual level when they are implicated. This is a root cause of the conflicts that can arise when different provisions in CPTPP may regulate the same conduct in different ways. It can be observed that this conflict, for the same party, leads to the fact that it may not be possible to comply with provisions under different chapters at the same time when there is a corruption complaint. This meets the two conditions for the conflicts of norms: the same subject-matter and incompatibility.[18]

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14 CPTPP Art. 26.6.2.
15 CPTPP Art. 12.10.
16 CPTPP Art. 16.9.
17 Bello y Villarino, *supra* n. 2, at 74.
18 Adarsh Ramunujan, *Conflicts Over Conflict: Preventing Fragmentation of International Law*, 1 Trade L. & Dev. 176 (2009).

A conflict of norms is generally understood as a party to the two treaties that cannot simultaneously comply with its obligations under both treaties.[19] This is, of course, based on a narrow understanding, since conflicts do not only arise between obligations, but may also include incompatibilities between permissions and obligations, permissions and prohibitions, and obligations and prohibitions.[20] However, conflicts of norms do not necessarily occur between different treaties, but can also exist between different provisions of the same treaty, more concretely between two different obligations, which already exist in WTO practices and can be called 'internal' conflicts.[21] Plainly, the conflict stemming from the legal enforceability of ACPs also falls into this category. Furthermore, it is a wide conflict. This is because it is a right (permission), not an obligation, for a party to invoke a contrary provision to exclude the application of the DSM under another provision. When a party waives it, the conflict does not actually arise but remains potential.

3.2 Potential solutions

The International Law Commission (ILC) maintains that moving from the prima facie view to a conclusion, legal reasoning will either have to seek to harmonize the apparently conflicting standards through interpretation or, if that seems implausible, to establish definite relationships of priority between them.[22] Similarly, the preferential and desirable way to resolve conflicts within a treaty is to consider whether such conflicts can be eliminated through treaty interpretation and, if not, to consider next the inclusion of compatibility clauses.[23]

3.2[a] *Application and Limits of Treaty Interpretation*

It appears that treaty interpretation can play a difficult or very limited role in the face of such internal conflicts in CPTPP. There may be obstacles to eliminating them by using the methods of interpretation supplied by the Vienna Convention on the Law of Treaties(VCLT).

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19 C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 Brit. Y.B. Int'l L. 426 (1953).

20 Erich Vranes, *The Definition of 'Norm Conflict' in International Law and Legal Theory*, 17 Eur. J. Int'l L. 418 (2006), doi: 10.1093/ejil/chl002.

21 Gabrielle Marceau, *Conflict of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties*, 35 J. World Trade 1085 (2001), doi: 10.54648/384808.

22 ILC, *Fragmentation of International Law: Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi*, A/CN.4/L.682, 2006, para. 36.

23 W. Czapliński & G. Danilenko, *Conflicts of Norms in International Law*, 21 Neth. Y.B. Int'l L. 13 (1990), doi: 10.1017/S0167676800002051.

First, as in the previous analysis of the performance, such internal conflicts are precisely the result of the search for the ordinary meaning of the terms of CPTPP, which is apparent at first sight.

Second, consider the context and refer to the object and purpose of the treaty. When an applier uses the context – this is the assumption – the interpreted treaty provision and the context together form a larger whole, a system.[24] The command to interpret a treaty 'in light of its object and purpose' suggests a holistic mode of interpretation that accounts for more than the goals of specific treaty provisions and encompasses the normative logic that presents itself when the entirety of the treaty's provisions are considered together.[25] For this internal conflict in CPTPP, the key issue is whether ACPs in CPTPP have been endowed with sufficient gravity and are aggressive to affect or even change the provisions in other chapters. In the context of the inclusion of ACPs in FTAs, it seems difficult to confirm that.

On the one hand, while the object of 'eliminate bribery and corruption in trade and investment' is explicitly stated in the preamble of CPTPP and reiterated in section C of Chapter 26, it is not the only object of this agreement. In other chapters, some provisions are excluded from the application of DSM, which also echoes some of the objects of CPTPP, such as 'the differences in levels of development and diversity of economies', and 'inherent right to regulate'.[26] At this point, the lopsided pursuit of anti-corruption may also undermine these differential objects.

On the other hand, ACPs in CPTPP are also the outcome of a compromise. For much of the time, interpretation of treaties alike will be a matter of ascertaining and giving effect to the intention of the parties by reference to the words they have used.[27] The limited number of provisions given legal enforceability in the text of CPTPP is an indication of the divergence of the parties. From a transactional point of view, it would be reasonable to assume that among the negotiating parties some wanted an agreement with powerful anti-corruption clauses and that some did not.[28] In CPTPP, ACPs were concluded at a time when it was not possible to establish a comprehensive anti-corruption legal regime due to a lack of wider consensus among the parties, which led to the anti-corruption objects of CPTPP being effectively conservative and introverted. As such, attributing an overly positive normative role to ACPs may be inconsistent with the parties' actual

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[24] Ulf Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* 105 (Springer 2007).

[25] David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 Vand. J. Transnat'l L. 579 (2010).

[26] The preamble of CPTPP.

[27] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 Int'l & Comp. L.Q. 287 (2005), doi: 10.1093/iclq/lei001.

[28] Bello y Villarino, *supra* n. 2, at 72–73.

objects, and this does not support the conclusion that ACPs have priority over provisions in other chapters. Rather, to some extent, ACPs need to be applied with some restraint at this stage, in order to balance the various objects.

Last but not least, based on the principle of effectiveness, all provisions of the treaty must be supposed to have been intended to have some effect, so that an interpretation which reduces a provision to surplusage must be suspect.[29] Then, this implies the need to limit the scope of effect of these provisions provided for the DSM in different CPTPP chapters so that both work within their respective spheres. However, given the close link between corruption and trade or investment, corrupt behaviour usually constitutes a breach of a party's obligations under other chapters, and making them respectively limited in the scope of application from the normative level is practically difficult to do. This is because they overlap in subject-matter, and when corruption is linked to trade, it is difficult to arbitrarily delineate what is a corruption matter and what is a pure trade matter, thus making a matter subject to only one provision. In other words, it is inherently more challenging to distinguish between the two in terms of subject matter, let alone limit the scope of their effects based on that distinction. Thus, the principle of effectiveness also seems to struggle to resolve internal conflicts in CPTPP.

In short, the treaty interpretation approach does not perform well when it comes to resolving conflicts within CPTPP. While it may be possible to find through context, object and purpose that ACPs should not have an aggressive function and affect the provisions in other chapters, it should also be acknowledged that this conclusion may also not be unique and accurate. This is attributable to inherent flaws of treaty interpretation. The codification in the VCLT occurred at the level of principles, and leaves considerable degrees of freedom to interpreters,[30] which would create difficulties and uncertainties in determining the true intent of the parties via treaty interpretation, and may also make the ultimate findings somewhat subjective. It is conceivable that treaty interpretation, in resolving the internal conflicts in CPTPP, may also, to some extent, produce different results depending on the interpreters, as well as endless arguments between the parties.

3.2[b] *Insertion of a Clause Clarifying the Relationship*

If the treaty provisions are inherently contradictory, lacking terms that are broad and ambiguous enough to allow for interpretative flexibility, the presumption

[29] Hugh Thirlway, *The Law and Procedure of The International Court of Justice 1960–1989: Supplement, 2006: Part Three*, 77 Brit. Y.B. Int'l L. 52 (2006), doi: 10.1093/bybil/77.1.1.

[30] Michael Waibel, *Demystifying the Art of Interpretation*, 22 Eur. J. Int'l L. 574 (2011), doi: 10.1093/ejil/chr046.

against conflict must be seen as rebutted and the adjudicative focus must shift from conflict avoidance to conflict resolution,[31] which applies equally to internal conflicts. That said, thoughtful drafting of treaty provisions is probably the most effective way to avoid or resolve potential treaty conflicts.[32] Therefore, it might be better once and for all to consider, if possible through treaty amendment or successive agreements, introducing provisions into the text that clarifies the relationship between ACPs and other chapters, so that the provisions remain compatible.

To resolve internal conflicts in CPTPP, the compatibility clause could be an option. The above exploration of the objects and purposes of CPTPP indicates that ACPs at this stage do not take precedence over the provisions in the other chapters, and thus should remain somewhat limited to avoid interfering with rights and obligations in other chapters. A possible solution could be to insert a compatibility clause in section C of Chapter 26, i.e., *The Section shall not alter the rights and obligations of parties which arise from other Chapters*, which can express respect for the rights and obligations in the other chapters.

Some may argue that while ACPs do not prevail over provisions in other chapters, both may at least be located at the same level. In this instance, considering the introduction of a more permissive clause that emphasizes achieving mutual supportiveness between divergent norms, rather than a mechanical resort to conflict-resolution techniques,[33] could also be a potential option. The underlying hypothesis of mutual support is that the objects of different norms are not mutually exclusive and subordinate to each other, but mutually reinforcing.[34] In order to maintain that, each framework should remain responsible and competent for the issues falling within its primary area of competence.[35] In this context, ACPs can work together with trade provisions in other chapters to achieve the same treaty objectives, such as sustainable development, which requires the parties to decide in good faith which type of provision concerns and interests are involved in the matter in dispute, which falls within the area of primary competence, and thus which should be applied. Since mutual supportiveness is based on an objective appreciation, this also allows, to a certain extent, to leave the power of which provision to apply to the judge or arbitrator,[36] thereby avoiding deciding from the

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31 Claude Chase, *Norm Conflict Between WTO Covered Agreements – Real, Apparent or Avoided?* 61 Int'l & Comp. L.Q. 809 (2012), doi: 10.1017/S0020589312000358.

32 Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 Geo. Wash. Int'l L. Rev. 584 (2005).

33 Riccardo Pavoni, *Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?*, 21 Eur. J. Int'l L. 657 (2010), doi: 10.1093/ejil/chq046.

34 Laurence Boisson de Chazournes & Makane Moïse Mbengue, *A 'Footnote as a Principle'. Mutual Supportiveness and its Relevance in an Era of Fragmentation*, in *Coexistence, Cooperation and Solidarity* 9 (Holger P. Hestermeyer et al. eds 2011).

35 *Ibid.*, at 10.

36 *Ibid.*, at 9.

outset which prevails. This could also allow room for the evolution of ACPs in FTAs. As a result, such a clause could also be expressed as '*The Section shall be implemented in a mutually supportive manner with other Chapters*'.

4 JUDICIAL OVERLAP AND THE SOLUTIONS

There are two categories of DSMs in CPTPP. One is the DSM in Chapter 28 Dispute Settlement, which is the basis for the legal enforceability of ACPs in CPTPP, and is a state-state dispute settlement (SSDS) mechanism. The other is the ISDS mechanism established in Chapter 9 Investment. The legal enforceability of ACPs may lead to judicial overlap between the two.

4.1 Scenarios for initiating ISDS against corruption in CPTPP: Focusing on the passive side

There are few cases in the ISDS where corruption is invoked as a cause of action for claims, corruption as the basis for a claim in international investment arbitration appears nonetheless to be well-established.[37] Typically, allegations of corruption are presented as a defence against arbitral claims,[38] arguing that has serious ramifications for both the jurisdiction of an investor-state arbitration tribunal and the admissibility of an investment claim.[39] Moreover, it has been shown the decisions of the tribunals are centred on the aspect of the doctrine of unclean hands which restricts the investor from raising claims before the arbitral tribunal against the host state when he is himself at fault.[40] Corruption may be unilateral in character and has two sides: an 'active'(supply) side, and a 'passive'(demand) side.[41] For the active side, investors that have engaged in corrupt conduct do not themselves have clean hands[42] as corruption is the result of investors actively paying bribes. In this regard, corrupt investors and investments procured through corruption could not be protected by investment treaties.[43]

The situation may change on the passive side. The passive side involves public officials who may have solicited or even extorted the bribe, or the bribe may be

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37 Edmund Bao, *Corruption as a 'Sword' in Investor State Arbitrations (28 Jun. 2018)*, http://arbitrationblog.kluwerarbitration.com/2018/06/28/corruption-as-a-sword-in-investor-state-arbitrations/ (accessed 18 Mar. 2023).

38 Lucinda A. Low, *Dealing With Allegations of Corruption in International Arbitration*, 113 AJIL Unbound 341 (2019), doi: 10.1017/aju.2019.61.

39 Cameron A. Miles, *Corruption, Jurisdiction and Admissibility in International Investment Claims*, 3 J. Int'l Disp. Settlement 351 (2012), doi: 10.1093/jnlids/idr017.

40 Chitransh Vijayvergia & Pavan Belmannu, *Exploring the Prospects of Host-State Counterclaims in Corruption Disputes*, 36 Arb. Int'l 586 (2020), doi: 10.1093/arbint/aiaa041.

41 Low, *supra* n. 38, at 342.

42 Bao, *supra* n. 37.

43 Stanimir A. Alexandrov, *Corruption in International Investment Arbitration*, 109 Am. J. Int'l L. 703 (2015).

the result of endemic corruption in the state or sector concerned.[44] In this scenario, the investor is not the instigator of the corrupt act, in which case the investor is not entirely at fault, or at fault at all.[45] Investors and their investments are adversely affected by such corruption resulting in loss of benefits, from which it seems more tenable to establish a claim against the host states for compensation as a result.

Of course, if a more detailed division of fault is made, the investor may also be partially liable for damages, but this may also be operationally challenging. This section, therefore, focuses on the passive side, with the underlying assumption that the investor is not liable for any fault or not primarily liable for the fault when it comes to claims against the host state. Next, the investor's claim against the host state in this situation needs to address at least two questions: what kind of breach of obligations under Chapter 9 Investment is involved in this corruption; and whether and how the solicitation of bribes (the typical kind of this corruption) can be attributed to the host state for which it bears international responsibility.

4.1[a] *Breaches of Obligations in Chapter 9 Investments by Corruption*

On the first question, damages to investors owing to corruption on the passive side in the host state may involve a breach of multiple obligations under international investment agreements (IIAs) and, in particular, the obligation of fair and equitable treatment (FET). In *EDF (Services) Limited (EDF) v. Romania*, although the claimant has not successfully shouldered its burden of proof with respect to its allegation of a bribery solicitation by the respondent, and therefore no FET violation can be held by the tribunal to be present as to this aspect of the case,[46] the tribunal's opinion also suggests that the corrupt conduct could trigger a breach of FET.

On the passive side, corruption is not confined to one form of soliciting bribes, but in some cases may be systemic and occur in the public sector, including the political arena (political corruption), with the additional effect of undermining the governmental structures of the host state and distorting competitive conditions between investors,[47] also to the detriment of their interests. In *Yukos v. Russia*, the tribunal described in detail the harassment, intimidation and arrests to which Yukos and its management but also entities and individuals associated with the company were subjected.[48] Especially, a special unit was set up at the General

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[44] Low, *supra* n. 38, at 342.
[45] Diana A. A. Reisman, *Apportioning Fault for Performance Corruption in Investment Arbitration*, 37 Arb. Int'l 8 (2021), doi: 10.1093/arbint/aiaa044.
[46] EDF *v.* Romania, ICSID Case No. ARB/05/13, Award (8 Oct. 2009), para. 221.
[47] Miles, *supra* n. 39, at 331.
[48] Yukos Universal Limited (Isle of Man) *v.* The Russian Federation, PCA Case No. AA 227, Final Award (18 Jul. 2014), paras 761–812.

Prosecutor's office, working exclusively on fabricating evidence against Mr Khodorkovsky and Yukos.[49] These are believed to be corrupt actions taken by the Russian government against Yukos[50] that constituted grand corruption and severely jeopardized the 'essential' or 'fundamental' human right and the right to property.[51] The tribunal also believed that it need to consider whether the respondent's actions are in breach of Article 10 of the Energy Charter Treaty,[52] which establishes the obligation of FET.

It can be imagined that if a host state adopts a passive attitude towards corruption in foreign investments, a more tolerant attitude towards corruption by its public officials, or even systematic corruption targeting a particular investor within the country, its anti-corruption law in this process will inevitably not be effectively implemented. As a result, investors are vulnerable to coercion and harassment, and their legitimate expectations based on the host country's legal framework and undertakings are not protected.[53] The conception of corruption is malfeasance as the absence of transparency,[54] whereas transparency is widely accepted as the FET's coverage and specific application.[55] Besides, corruption may also constitute a violation of national treatment,[56] full protection and security, and expropriation provisions[57] under IIAs, which are also embodied in Chapter 9.

4.1[b] *Whether the Host Country Needs to Assume International Responsibility for the Corrupt Acts*

On the second question, whether the host state is to assume international responsibility depends on the provisions of the Draft Articles on Responsibility of states for Internationally Wrongful Acts(ARSIWA), which is considered to be an accurate codification of the customary international law.[58] ARSIWA Article 2 provides:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

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49 *Ibid.*, para. 767.
50 Anne Peters, *Corruption as a Violation of International Human Rights*, 29 Eur. J. Int'l L. 1283 (2018), doi: 10.1093/ejil/chy070.
51 *Ibid.*
52 Yukos *v.* Russia, *supra* n. 48, para. 1585.
53 Bowling, *supra* n. 3, at 936.
54 Eric M. Uslaner, *Corruption, Inequality, and the Rule of Law: The Bulging Pocket Makes the Easy Life* 8 (CUP 2008).
55 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 133 (OUP 2008).
56 Bello y Villarino, *supra* n. 2, at 66.
57 Vijayvergia & Belmannu, *supra* n. 40, at 589.
58 James Crawford, *State Responsibility: The General Part* 43 (CUP 2014).

Both conditions need to be satisfied. Once corruption affects investment, as analysed before, there may be a breach of the investment protection obligations under IIAs, which satisfies the second condition. It is therefore crucial to determine whether the first condition is satisfied.

The first condition in Article 2 requires a determination of whether an action can be attributed to the state. An 'act of the State' must involve some action or omission by a human being or group: 'States can act only by and through their agents and representatives'.[59] The issue thus can turn to how to ascertain that a person or an entity committing a corrupt act is acting in the name of the state organ.

In the *Yukos* case, a large number of officials were extensively engaged in a grand corruption for political purposes, with the judicial and executive branches involved, no doubt on behalf of the state organ. This is because, in the light of ARSIWA Article 5 conduct of the organs of state, executive, judicial or legislative, in whichever forms these conducts are carried out, will be the considered to be the conduct of state in so far as these organs are employing powers of governmental authority.[60]

In most cases, however, the officials are motivated by the desire for private gain, which may be perceived as purely private conduct and calls for a distinction to be made from acting *ultra vires*.[61] As for this, ARSIWA Article 7 stipulates that:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

It is well-known that corruption is most often in violation of the laws of a democratic state, or at least beyond the official capacity, because, no state would explicitly allow its officials to engage in corrupt activities. Indeed, the commentary to the ARSIWA also notes that: 'One form of *ultra vires* conduct covered by Article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction'.[62] This illustrates that the corrupt acts of officials, at least in part, as *ultra vires* acts, are attributable to the state. The same should be true for soliciting bribes more specifically, as one of the more egregious occasions for accepting bribes.

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59 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, II Yearbook of the International Law Commission 35 (2001).

60 Amdadul Hoque, *Existence, Breach and Responses to the Breach of State Responsibility: A Critical Analysis*, 53 J.L. Pol'y & Global. 137 (2016).

61 ILC, *supra* n. 59, at 42.

62 *Ibid.*, at 46.

For corruption, there are obstacles to making a clear distinction between purely private conduct and an *ultra vires* act. It can be assumed that corruption, particularly on the passive side, can rarely occur if the official does not rely on the official capacity. Corruption is the abuse of entrusted power for private gain,[63] and *ultra vires* acts also include instances of abuse of authority.[64] Domestic law often gives discretion to officials in the exercise of their powers and in some cases, such as when an officer may or may not act in administration, he or she may act positively if a bribe is solicited, or refrain from acting if it is unsuccessful. When this occurs, although this is said to be private conduct for private gain, it can also be said to be an *ultra vires* act of abuse of power, and the two are conflated. This could also be interpreted as a circumstance of an organ actually using the means put at its disposal by its office and duties and is capable of applying the *ultra vires* rule to attribute to the state.[65]

Further, this attributability is likewise reinforced if the corrupt acts of officials cause investors to suffer and the state does not take effective measures in response. Because rules of attribution stated in the ARSIWA have a cumulative effect, such that a state may be responsible for the effects of the conduct of private parties, if it fails to take measures to prevent those effects.[66] For instance, even if it is accepted that corruption is an entirely private character, committed by its officials, it may still be attributable to the state if it fails to exercise proper care or diligence to prevent such acts or punish the wrong-doers in a timely manner.[67] Corruption on the passive side is oftentimes the result of ineffective enforcement of domestic anti-corruption laws.

In a nutshell, there are scenarios where corrupt acts by officials, although perhaps not all, may be attributed to the host country. This would have been sufficient for the discussion in this article.

4.2 The double jeopardy or double compensation caused by the overlap

It remains plausible that the host state can be made accountable through investment arbitration following the above discussion. Investors, therefore, may have the right to initiate proceedings under the ISDS. It would also involve a breach of the enforcement obligations under ACPs, that is, a failure to make corruption sanctioned under Article 26.7.2 of CPTPP, and the possibility of recourse to the DSM in Chapter 28 by the investor's home state. Then, for the party as the host state, it may face being sued both by the investor and from the investor's home state under separate DSMs.

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63 Isuru C. Devendra, *State Responsibility for Corruption in International Investment Arbitration*, 10 J. Int'l Disp. Settlement 265 (2019), doi: 10.1093/jnlids/idz006.

64 Theodor Meron, *International Responsibility of States for Unauthorized Acts of Their Officials*, 33 Brit. Y.B. Int'l L. 86 (1957).

65 Carlo De Stefano, *Attribution in International Law and Arbitration* 47 (OUP 2020).

66 ILC, *supra* n. 59, at 39.

67 Meron, *supra* n. 64, at 106.

What should be clarified is that the potential parallel proceedings arising from the overlap between the CPTPP DSM and the ISDS may not generate serious judicial competition, since the two proceedings may refer to various parties and causes of action. As the proceedings may be based on the same fact of corruption, the overlap cannot be characterized as truly competing proceedings, but only as a related proceeding,[68] which still has some practical and normative implications.

According to CPTPP Article 28.19, the panel was permitted to decide in the final reports containing 'the measure at issue is causing nullification or impairment within the meaning of Article 28.3.1(c) (Scope)', and determining that 'the responding Party shall, whenever possible, eliminate the non-conformity or the nullification or impairment'. This is clearly of a compensatory nature. Compared to WTO, CPTPP appears to make a major advance in the form of relief by implicitly allowing for the adoption of a form of financial reparation. This raises the possibility under CPTPP of making the non-compliant party liable for multiple indemnities for a particular corrupt fact regarding the investment. The first type of compensation is, as noted above, where a party brings an action under the CPTPP DSM and may eliminate, in monetary terms, the nullification or impairment suffered by the claimant as a result of the other party's failure to comply with ACPs in the area of investment. The second type is that, in the ISDS, an investor may also seek monetary compensation from that other party following the CPTPP investment rules for the loss of investment suffered by that other party.

For the former, although the claimant is the state and the direct object of possible monetary compensation is also the state, it is private parties (including investors) who suffer the nullification or impairment. Generally, the state will use the monetary compensation received to cover the private parties' losses through domestic procedures, in spite of the fact that in most cases it is left to the discretion of governments who receive damages, to decide if and how the money should be redistributed to private parties.[69] Meanwhile, the investor, as a private party, may trigger an ISDS to acquire compensation in the latter. Hence, these compensations could be made under different legal systems, but that will lead to private investors receiving compensations of a similar nature, which in effect leads to double jeopardy or double compensation[70] and is not conducive to judicial economy, legal security and the protection of the defendants.[71]

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68 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* 155 (OUP 2003).

69 Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. Int'l Econ. L. 116 (2005), doi: 10.1093/jielaw/jgi006.

70 Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 Cornell Int'l L.J. 81 (2009).

71 August Reinisch, *The Use and Limits of* Res Judicata *and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 L. & Prac. Int'l Cts. & Tribunals 44 (2004), doi: 10.1163/157180301773732627.

Observe that in Article 9.21.2 of CPTPP, there is a waiver clause stipulating that no claim shall be submitted to arbitration under ISDS unless the claimant provides a written waiver of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 9.19. In this, 'any other dispute settlement procedures' could be all-encompassing and includes national and international instances.[72] However, claims in international instances generally refer to other international DSMs providing for direct remedies to private parties,[73] and it is doubtful whether SSDS can be covered, as well as the current lack of case support. The subject of the right of the waiver clause is the claimant investor.[74] But, it is the state that has the right to decide to initiate SSDS under Chapter 28, as opposed to the investor. The investor has no control over whether a state or group of states pursues a claim with respect to the same measure in CPTPP.[75] There are therefore some impediments to the application of this waiver clause to such double jeopardy or double compensation.

4.3 Potential solutions

4.3[a] *Non-strict Application of Traditional Jurisdiction-Regulating Rules*

In the face of genuine judicial competition, the traditional rules of law are usually involved: *lis pendens*, res judicata, to prevent the risk of incompatible judicial decisions.[76] The relatively similar conditions for the application of these rules, which require strict tests as to the identity of the dispute, the parties, and the cause of action, inhibit the application of these principles to factually related, yet formally independent, proceedings.[77] As mentioned, the two kinds of DSMs that give rise to overlap, at least in terms of differences in parties and causes of action, make it challenging to satisfy the condition that competition proceedings involve the same parties and the same issues,[78] not easy to apply these traditional jurisdiction-regulating rules strictly to dispel the double jeopardy or double compensation referred to herein.

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72 W. Michael Reisman, *Opinion on the International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10* (22 Mar. 2010), http://icsidfiles.worldbank.org/icsid/icsidblobs/OnlineAwards/C661/DC4235_en.pdf (accessed 26 Mar. 2023).

73 Gabrielle Kaufmann-Kohler & Michele Potestà, *The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework* 42 (Springer 2020).

74 Javier Garcia Olmedo, *Recalibrating the International Investment Regime Through Narrowed Jurisdiction*, 69 Int'l & Comp. L.Q. 334 (2020), doi: 10.1017/S0020589320000044.

75 Brooks E. Allen & Tommaso Soave, *Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration*, 30 Arb. Int'l 54 (2014), doi: 10.1093/arbitration/30.1.1.

76 Shany, *supra* n. 68, at 22.

77 Wolfgang Alschner, *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?* 17 J. Int'l Econ. L. 289 (2014), doi: 10.2139/ssrn.2430242.

78 Shany, *supra* n. 68, at 23–24.

Note that in practice there have been instances where the traditional jurisdiction-regulating rules have been applied leniently in specific circumstances, which may offer the possibility of addressing this issue. Three conditions that should be satisfied for the application of these rules can be examined in turn.

(i) Identity of the dispute – As rules of international law res judicata and *lis pendens* relate only to the effect of a decision of, or of proceedings before, one international tribunal on another international tribunal.[79] In other words, the dispute should arise under the international legal system and have an international character. The overlap between the CPTPP DSM and the ISDS is capable of satisfying this condition.

(ii) Identity of the parties – This condition may be interpreted more narrowly when the traditional jurisdiction-regulating rules are strictly applied, yet it could be observed that the dominant test that emerged in practice has been that of 'virtual identity' or 'essentially the same parties'.[80] This said, it is possible for a party in a second set of proceedings to be regarded as 'the same party' if it is acting on behalf of the first set of parties or constitutes its *alter ego*.[81] Despite the differences between state parties under the CPTPP DSM and investors in the ISDS, state parties, as home states of investors, may be believed to represent the interests of investors under the CPTPP DSM in respect of claims for loss of investment benefits. Whilst no identical practice has been found on the basis of the limited material available, the states can pursue international claims on behalf of their nationals. Especially before the ISDS, there was a long-standing practice of SSDS in the era of diplomatic protection in which the rights of the state which acts in diplomatic protection are indissolubly linked to the interests of the physical or juridical persons in whose favour it is acting.[82] Of course, this does not mean that a state party's claim for damages in CPTPP DSM is an exercise of diplomatic protection. But in this sense, it still seems possible that the home state of the investor represents the interests of the investor or acts on behalf of the investor, especially if the home state can reimburse the investor for the compensation it receives, through the domestic procedure. With that, the state party, as the home state of the investor, and the investor may be treated as the 'same party' in the different proceedings.

(iii) Identity of the cause of action – This condition limits that the traditional jurisdiction-regulating rules apply only if both the 'object' and the 'ground' of two claims are the same.[83] Nevertheless, the need for a lenient application of this condition has emerged. If only an exactly identical relief sought (object) based

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79 Reinisch, *supra* n. 71, at 51.
80 Shany, *supra* n. 68, at 24.
81 *Ibid*.
82 Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?,* in *International Courts and the Development of International Law* 758 (N. Boschiero et al. 2013).
83 Reinisch, *supra* n. 71, at 61.

on exactly the same legal arguments (grounds) in a second case would be precluded as a result of res judicata, then litigants could engage in claim splitting[84] and easily evade this by slightly modifying either the relief requested or the grounds relied upon.[85] Hence, a standard of substantial identity not of strict formalistic identity is required for res judicata purposes.[86] It is far more appropriate to look at the specific rules and to examine how far they are substantively identical or different.[87] In essence, the 'nullification or impairment' that the state parties seek to eliminate through the CPTPP DSM is in the nature of a loss of benefits in this proceeding, and such loss is based on the existence of an actual loss, which arises from the investor's loss. As such, the type and nature of remedies alleged by the state parties under this DSM should not vary from those available to investors under the ISDS.

For the ground, it is clear from the context that while a state party may initiate dispute settlement under Chapter 28 on the basis of ACPs, under the same treaty regime, when the respondent is required to eliminate a claim for 'nullification or impairment' about the investment, it is still founded on the rights of the investment chapter. That said, both procedures invoke essentially the same legal doctrine,[88] embodying the same protection for investors, and a claim pursuant to either would lead to the same legal consequences.[89] It can therefore be argued that the two procedures lie on the same ground. Notably, a precedent also suggests that a dispute may be considered a single identical dispute based on identical grounds where claims are based on two fairly different treaties as long as they all relate to the same factual background; this principle applies even more where two separate treaties contain essentially identical provisions.[90] And in this article, if the disputes in the two proceedings are based on the same treaty, involve the same factual background, and are moreover based on the same provisions, then there is not much of an obstacle to treating them as the same dispute.

Overall, if not strictly applied, the CPTPP DSM and ISDS can pass the triple identity test when providing relief to investors as two separate procedures, and the traditional jurisdiction-regulating rules could be the first option to address double jeopardy or double compensation.

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84 William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and* Res Judicata *under Chapter Eleven of NAFTA*, 23 Hastings Int'l & Comp. L. Rev. 366 (2000).
85 Reinisch, *supra* n. 71, at 61.
86 *Ibid.*, at 64.
87 Reinisch, *supra* n. 71, at 64.
88 *The Oxford Handbook of International Investment Law* 1018 (Peter T Muchlinski et al. eds, OUP 2008).
89 *Court Decision – Sweden: CME Czech Republic B.V. v. The Czech Republic, 15 May 2003*, 15 World Trade & Arb. Materials 208 (2003).
90 Reinisch, *supra* n. 71, at 68.

4.3[b] *Inherent Power and Comity*

The second option is for the tribunal to recuse itself from another ongoing proceeding on its initiative, to stay the proceedings, or even to decline jurisdiction. This approach can be based on the inherent power and comity of a tribunal.

(i) Inherent Power – It is generally recognized that tribunals or courts have inherent powers to apply rules that are reasonably necessary for the administration of justice and to ensure the orderly conduct of the judicial system,[91] which has been confirmed by the International Court of Justice and is also evident in the practices of WTO and ICSID.[92] Several inherent powers have been justified on the basis of the need to ensure the proper administration of international justice, such as the power to dismiss proceedings summarily, the power to suspend proceedings, and the power to prevent any 'abuse of process', such as the commencement of vexatious parallel proceedings.[93] As for the potential double jeopardy or double compensation created by the overlap in this article, the tribunal may be prompted to use its inherent power.

On the one hand, inherent power can be associated with the justice and efficiency emphasized by international justice.[94] With justice, international justice needs to be able to ensure the continuity and fairness of the proceedings as well as the interests of the parties.[95] That not only requires that the interests of the victim be properly protected but also that the defendant do the same. The overlap outlined previously would result in de facto duplicative claims, and the defendant would likewise be in a state of uncertainty and instability, which is hardly protection. It is also possible for the claimant to gain additional benefits beyond the actual scope of the loss, favouring in a disproportionate manner the beneficiary of the right.[96] As for efficiency, it can be deemed as the key feature of the judicial economy, as it reflects the relationship between the least expenditure of judicial resources and energies.[97] Duplicating the same corruption claim through multiple processes will inevitably lead to duplication of efforts and waste of time and resources of the international tribunal.

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91 Pamela Apaza Lanyi & Armin Steinbach, *Limiting Jurisdictional Fragmentation in International Trade Disputes*, 5 J. Int'l Disp. Settlement 378 (2014), doi: 10.2139/ssrn.2543446.

92 Chester Brown, *A Common Law of International Adjudication* 63 (OUP 2007).

93 *The Oxford Handbook of International Adjudication* 843 (Cesare P. R. Romano et al. eds, OUP 2013).

94 Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 Brit. Y.B. Int'l L. 231 (2005), doi: 10.1093/bybil/76.1.195.

95 Tobia Cantelmo, *The Inherent Power of Reconsideration in Recent ICSID Case Law*, 18 J. World Inv. & Trade 256 (2017), doi: 10.1163/22119000-12340040.

96 Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, 13 Chinese J. Int'l L. 765 (2014), doi: 10.1093/chinesejil/jmu040.

97 Fulvio Maria Palombino, *Judicial Economy*, in *Max Planck Encyclopedia of International Procedural Law* (Hélène Ruiz Fabri ed., OUP 2020), https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1793.013.1793/law-mpeipro-e1793?rskey=rQQEP4&result=1&prd=OPIL (accessed 27 Mar. 2023).

On the other hand, a claimant's multiple claims under different processes may also border on a parallel proceeding and may constitute an 'abuse of process', which could potentially undermine the integrity of the tribunal's process.[98] Abuse of process is conceptually closer to abuse of rights, and unilateral resort to adjudication certainly constitutes an exercise of a right, so that the right-holders must exercise it, taking into account the rights and interests of those affected by their conduct.[99] Abuse of process is a classical legal concept, usually deduced from good faith,[100] and it is certainly not good faith for a claimant to bring the same claim in another proceeding when having been duly compensated in one proceeding. But, when the CPTPP DSM overlaps with the ISDS, the right to claim is vested in the state party and the investor in separate proceedings, in which case both are competent subjects and the filing of separate proceedings cannot *ipso facto* be considered abuse. At this point, the tribunal may need to give due consideration to whether the investor has been or will be compensated in other proceedings (where the claimant is a state) when exercising its inherent power based on abuse of process and continuing to seek extra relief through other proceedings may tend to be abusive where the investor's losses can be covered.

(ii) Comity – According to principles of comity, in the absence of express provision by treaty, an international tribunal has the discretion not to hear a matter (or continue to do so) – that is, not to exercise its jurisdiction.[101] This principle is believed to be useful in resolving many jurisdiction-related issues and is even regarded as the best way to address issues of overlapping jurisdiction or to preserve the integrity of the administration of justice.[102] Presently, comity still has an undefined meaning, but at its crux lies the limitation of a tribunal's jurisdiction,[103] and cases have emerged in practice to avoid jurisdictional conflicts through its use, such as the *Southern Pacific Properties (Middle East) Limited (SPP) v. Egypt*[104] and the *Mixed Oxide Fuel (MOX) Plant*.[105] In those cases, the tribunals explicitly acknowledged comity as a method of dealing with overlapping jurisdictions and did not set stringent conditions for its application.

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98 Utku Topcan, *Abuse of the Right to Access ICSID Arbitration*, 29 ICSID Rev. 633 (2014), doi: 10.1093/icsidreview/siu018.

99 Shany, *supra* n. 68, at 257–258.

100 Ascensio, *supra* n. 96, at 764.

101 Andrew D. Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 Mich. J. Int'l L. 597 (2010), doi: 10.2139/ssrn.1433616.

102 Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO–FTA Nexus: A Potential Approach for the WTO*, 19 Eur. J. Int'l L. 584 (2008), doi: 10.1093/ejil/chn025.

103 Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l. L.J. 1 (1991).

104 SPP *v.* Egypt, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction (27 Nov. 1985), para. 84.

105 The MOX Plant Case (No.3) (Ireland *v.* United Kingdom), 42 I.L.M. 1187 (Perm. Ct. Arb. 2003), para. 28.

Concerning the potential overlap between the CPTPP DSM and the ISDS due to corruption, the tribunal can likewise limit its jurisdiction through comity within its competence to avert double jeopardy or double compensation. However, comity should generally be invoked in deference to the first-seized or more appropriate jurisdiction (assuming that the most appropriate jurisdiction can be identified).[106] Then, in dealing with investor claims, ISDS should be a preferred option in terms of prevailing practice. Where both may occur, the CPTPP DSM would be well-advised to show initiative and comity by allowing the ISDS to handle corruption-related investment claims.

5 THE ROLE OF THE TRADE COMMISSION

In addressing the implications for dispute settlement arising from the legal enforceability of ACPs, the trade commission could be considered in addition to the aforementioned solutions. Generally speaking, a trade commission is a body comprising trade ministers or senior officials, which is created to oversee the implementation of an FTA, assist with dispute resolution, and provide a forum for further discussion and agreement.[107] Of course, its more specific function relies on provisions in the treaty. Chapter 27 of CPTPP establishes the TPP Commission (the Commission) and confers on its broader functions. Article 27.2 stipulates:

> The Commission may:
>
> (d) develop arrangements for implementing this Agreement;
> (e) seek to resolve differences or disputes that may arise regarding the interpretation or application of this Agreement;
> (f) issue interpretations of the provisions of this Agreement;

Under these functions, the internal conflicts and judicial overlaps posed by ACPs can be settled by the Commission through the development of implementation arrangements or the issuance of interpretations. The Commission is composed of government representatives of each party and makes decisions that shall be taken by agreement of all parties,[108] which will constitute an authoritative interpretation of the treaty and can provide a fundamental solution to the issues.

However, it is worth considering whether the Commission can play a coordinating role in the dispute settlement. Article 27.2.2(e) provides the Commission with relatively broad authority to resolve issues in the implementation of CPTPP, as it does not limit the time, forum, and manner in which the Commission can resolve

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[106] Shany, *supra* n. 68, at 266.
[107] Amokura Kawharu, *Punctuated Equilibrium: The Potential Role of FTA Trade Commissions in the Evolution of International Investment Law*, 20 J. Int'l Econ. L. 99 (2017), doi: 10.1093/jiel/jgw077.
[108] CPTPP Art. 27.3.2.

disputes. Thus, the Commission appears to have more flexibility to engage in dispute settlement among the parties and coordinate among them. In the process, the Commission could persuade parties to abandon some litigation claims or steer them toward more appropriate claims to ensure smooth dispute settlement. The effectiveness of the Commission should lie in its ability to pragmatically resolve issues arising from the implementation of CPTPP. The purpose of the coordination initiated by the Commission should be to facilitate the dispute settlement, which should not amount to a dispute settlement process *per se*. Since there is usually no need for two sets of legal DSMs under one system, the CPTPP text does not assign any judicial function to the Commission. The function performed by the Commission is closer to a political rather than a legal one.

Notice also that the Commission is usually not a standing body, but rather a meeting between the parties. This may make it necessary for the Commission to call a meeting every time it needs to resolve a disagreement between the parties, leading to the inefficient situation. However, Article 27.2.2(a) allows the Commission to 'establish, refer matters to, or consider matters raised by, any ad hoc or standing committee, working group or any other subsidiary body'. So a standing subordinate body of the Commission dedicated to coordinating these types of issues arising in dispute settlement between the parties is also a possible approach. In sum, there appears to be potential for the Commission to address the issues raised in sections 3 and 4.

6 CONCLUSION

The more comprehensive and enforceable ACPs set out in CPTPP respond to the need for corruption governance in trade and investment, although they still have shortcomings. However, the introduction of ACPs in a growing number of FTAs is becoming a trend. CPTPP text shows that it is visible that the international community may not be prepared for the inclusion of enforceable ACPs in FTAs, and that ACPs still pose some problems when applied to dispute settlement. Although this article uses CPTPP as a sample, it hopes to provide a few considerations for the establishment of ACPs in FTAs.

It is a fact that corruption can penetrate deeply into trade and investment matters, making it tough to fully distinguish them from each other. This is reflected at the rule level, which can make corruption potentially touch both ACPs and trade or investment rules, in turn leading to the conflicting or overlapping application of DSMs. These issues can be addressed by considering treaty interpretation, the use of general international law approaches, and the political coordination of the extra-legal trade commission. While the utilization of these methods can help to resolve these problems, they cannot, after all, be eliminated

at the root. Therefore, care needs to be taken to incorporate them more harmoniously in future FTAs' anti-corruption rule-making. On the one hand, attention needs to be paid to the use of compatibility clauses to evade the mutual impact of ACPs with rules in other chapters. On the other hand, it would be desirable to limit the parties to pursue claims regarding investments under the FTA DSM, preferably leaving it to investors to pursue claims under the ISDS, to preclude double jeopardy or compensation.