
International Economic Law Clinic

**TERMINATION OF BILATERAL INVESTMENT TREATIES:
ALTERNATIVES FOR LEAST DEVELOPED COUNTRIES**

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List of Abbreviations

BIT	Bilateral Investment Treaty
BLEU	Belgium–Luxembourg Economic Union
EU	European Union
FDI	Foreign Direct Investments
IIA	International Investment Agreement
ILC	International Law Commission
ICSID	International Center for Settlement of Investment Disputes
Iran	Islamic Republic of Iran
ISDS	Investor-State Dispute Settlement
Laos	Lao People’s Democratic Republic
LDC	Least Developed Country
MFN	Most-favoured-nation
Tanzania	United Republic of Tanzania
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

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Executive Summary

Introduction

Bilateral Investment Treaties (BITs) have proliferated dramatically as one of the main instruments to shield foreign investments. However, their operation has generated discontent in a number of States (including least developed countries, or LDCs) and caused discussions about their termination. LDCs¹ might have specific reasons for terminating their BITs, including not only the rapid recent growth in investment disputes (which also includes disputes against LDCs), but also limited legal capacity and lack of bargaining power at the time of the conclusion of their BITs.

The Project team takes no position on the desirability of terminating BITs. The goal of the present study is to outline the choices LDCs have at their disposal for terminating their BITs and the legal questions arising from termination. The Project team has analyzed the theoretical background outlining possible ways for terminating BITs; mapped 213 BITs concluded by LDCs (that are currently in force) and identified common features and potential problems of their termination; formulated policy options for LDCs regarding termination of their BITs; and addressed legal questions arising from such termination.

Ways of Termination of BITs

Bilateral investment treaties, being treaties under public international law, are subject to the rules of the Vienna Convention on the Law of Treaties² (VCLT), which also apply to termination of BITs. According to Article 54 of the VCLT, the termination of a BIT can take place: 1) in conformity with the termination provisions of the treaty or 2) at any time by consent of the parties. If these

¹ The United Nations Committee for Development Policy (CDP) defines LDCs as low-income countries confronting severe structural impediments to sustainable development. They are highly vulnerable to economic and environmental shocks and have low levels of human assets, <<https://www.un.org/development/desa/dpad/least-developed-country-category.html>> accessed 29 September 2018.

² 'Vienna Convention on the Law of Treaties (1969) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>> accessed 29 September 2018.

options are not available, States may resort to other modes of termination generally available in public international law and specified in the VCLT.

Unilateral termination according to a BIT termination clause. The majority of BITs incorporate provisions that contain information on the *duration* of the initial validity period of the BIT, which enables determining the earliest possibility to terminate the treaty, requirements for the *notice* of termination to the other Party, and the provision on the *extension* of the BIT.

As a general rule, a BIT can be terminated by the end of its initial validity period provided that a proper timely notice is given to the other Party.

After the expiration of the initial period, one approach provides that the BIT can be terminated at any time, upon issuance of a prior written notice. Another approach, however, incorporates provisions for tacit renewal for successive defined periods after the lapse of the initial validity period and upon expiry of a fixed term window for notifying termination. The next moment of possible termination of such a BIT is the date of expiry of the next period of validity, provided that notification was sent before the deadline indicated in the BIT.

Bilateral termination is possible at any time, even while the initial validity period is still running. By so doing, parties can mutually agree to vary the requirements for termination specified in the BIT. Moreover, pursuant to Article 59(1) of the VCLT, a BIT termination can be implied, if a new BIT between the same Parties covering the same subject matter is concluded, subject to certain conditions.

If neither a unilateral termination under a BIT provision, nor bilateral termination is possible within the desired time period³, there are still possibilities, under certain circumstances, to terminate a treaty unilaterally. Article 62 of the VCLT codifies the customary international law principle of *rebus sic stantibus*, which provides that where there has been a fundamental change in the circumstances which formed the basis of the parties' acceptance (consent) to the treaty, and where such change in circumstances has radically transformed the extent of

³There might be different reasons for that. For example, one Contracting Party does not agree to terminate a BIT, Contracting Parties failed to agree on the conditions of the mutual termination etc.

obligations, any affected party may, under certain conditions, invoke the change as a ground for termination of the treaty.

Pursuant to Article 61 of the VCLT, the performance of the obligations of a treaty may be rendered impossible by the permanent destruction or disappearance of an object that was indispensable to the execution of the treaty. Another possibility for unilateral termination of treaties, including BITs, under special circumstances is termination as a result of *material breach* (Art. 60 of the VCLT).

Survival Clauses in BITs

Termination of a BIT does not mean, however, that former Contracting Parties are free from any obligations in respect of the investors of the other Contracting Party. Most investment treaties include a '*survival clause*' which prevents termination of the treaty with immediate effect. Survival clauses prolong the exposure of the host state to international responsibility by extending the treaty's application for a further period in relation to existing investments covered by the BIT.

As opposed to unilateral termination, it is not always clear-cut whether the survival clause is equally abrogated together with the termination of the respective BIT in cases of mutual termination. Considering the lack of certainty in this regard, when jointly terminating a BIT States are well advised to clarify their intention with regard to the survival clause, either by explicitly neutralizing the survival clause prior to its termination, or explicitly confirming that they wish for the survival clause to apply after the termination.

Analysis of BITs of LDCs

The analysis has revealed that 116 out of 213 BITs of LDCs⁴ (in force) with both developed and developing countries have already outlived their initial periods and remain in force indefinitely unless terminated at any time by issuance of a written termination notice.

⁴ The Project team used the UN LDC's list as at September, 2018. The list of LDCs is reviewed each three years by the UN Committee for Development Policy based on the following criteria: income, human assets, economic vulnerability.

Further, 84 BITs have their initial validity periods expiring before 2025, and 13 BIT will have expiry of their initial validity periods after 2025. They can therefore be terminated by proper notice given within a certain period of time specified in the respective BIT termination clause. It is important to keep an eye on termination notification deadlines in order to issue timely notice since many BITs can get renewed for definite periods of time, and the next opportunity to terminate them will be in 2, 5, 10, 20 or even 30 years after the expiration of the initial validity period.

The BITs covered by the present research have 5, 10, 15 or 20-year term survival clauses with half of them having 10 years as the survival clause term. The analysis has revealed that BITs of certain countries have longer than an average duration of survival period (20 years), which can diminish the results of BIT termination.

Suggestions for LDCs' planning to terminate their BITs:

a) LDCs are invited to take specialist advice⁵ along with the attached table that contains essential information about termination clauses and survival clauses of BITs of LDCs. Irrespective of the intent to terminate BITs in the near future, States are advised to have a clear picture of possible time periods to terminate them and also to monitor this timeline.

b) If a state intends to terminate a BIT unilaterally, it needs first to look at the initial validity term and the deadline for sending a notice of termination to the other Contracting Party. In any case, LDCs which intend to terminate BITs should not hesitate to give notice of termination prior to or on the deadline for issuing the termination notice, regardless of the date of expiry of initial validity period and clause on renewal of a BIT (indefinitely or for definite periods of time), in order to terminate the BIT on the earliest possible date.

c) Regarding survival clauses, if States want to terminate BITs and absolve themselves from obligations, it is necessary to start the process of termination as soon as possible. LDCs are advised to try to persuade their BIT partners to

⁵ LDCs might well benefit, e.g., from the support of different international intergovernmental and non-governmental organizations, such as the UNCTAD, IISD, South Centre etc.

neutralize survival clauses by mutual consent before terminating BITs or at least advocate for reduced periods in cases when the survival clause is essential for the other party to the BIT. The reduction of the period of a survival clause provides an option for LDCs in BITs that have very long survival clauses and not enough bargaining power to persuade the other party to neutralize the survival clause.

d) In any case, if parties to a BIT decide to terminate a BIT by mutual consent, they are advised to make a clear and transparent statement as to the exact date of termination and the conditions of termination (for example, by exchange of notes or letters).

1. Introduction

Bilateral Investment Treaties (BITs) are agreements concluded by two Contracting Parties containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories in each other's territory.⁶ BITs cover, *inter alia*, admission and establishment of investments, investment promotion, standards of treatment, expropriation and dispute resolution. The primary role of BITs is to lay down the terms and conditions under which nationals of one party to the BIT invest in the other one, including their rights and protection thereof.

Over the years, BITs have proliferated dramatically as one of the main formulas to shield foreign investments. However, their operation has generated discontent in a number of countries (including LDCs), some of which have even decided to terminate them.

We take no position on the desirability of terminating BITs. As LDCs often lack capacity to assess their options for terminating BITs, the aim of this project is to outline the choices LDCs have at their disposal for terminating their BITs and the legal questions arising from termination.

The need to terminate existing BITs could be explained, *inter alia*, by the rapid recent growth in investment disputes, both in general and against LDCs in particular.⁷ One may also argue that many LDCs did not completely realize the nature and extent of obligations they undertook when concluding BITs⁸ in the past due to, among other reasons, the lack of case law and interpretative guidance on the standards of protection as well as their limited legal resources. In addition, LDCs may have enjoyed very limited bargaining power and were

⁶ Practical Law, *Bilateral Investment Treaty*, <[https://uk.practicallaw.thomsonreuters.com/4-502-2491?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-502-2491?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)> accessed 29 September 2018.

⁷ In 2017 alone, foreign investors initiated investment arbitration proceedings against the following LDCs: Benin, Ethiopia, Gambia, Laos, Madagascar, Mozambique and Tanzania. UNCTAD Database: <<http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>> accessed 29 September 2018.

⁸ Jonathan Bonnitcha, Lauge Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 189.

not able to effectively negotiate the terms of their BITs.⁹ Such a desire to conclude numerous BITs and undertake numerous obligations was based on the assumption that BITs would generate benefits to home economies.¹⁰

Having later assessed the benefits and costs of BITs for their economies, countries began questioning the beneficial nature of BITs.¹¹ Consequently, many countries (including LDCs) may opt for modernization of their BITs by clarifying and interpreting the standards of protection and inserting some exceptions. However, in some cases termination of BITs can be the only choice for countries (especially LDCs) in order to improve the situation. This choice has already been made by a number of countries: as UNCTAD statistics shows, in 2017, for the first time, effective treaty terminations exceeded the number of new treaty conclusions.¹²

The termination of a treaty, however, requires a careful analysis of the text of a BIT, because termination clauses vary from BIT to BIT. What is more, occasionally BITs do not contain any clauses at all, thus leaving the legal consequences to general international law. Another issue is that if countries terminate their BITs, their effects might continue to exist because of survival clauses (applicable to existing investments), which are included in the vast majority of BITs. In this context, this memorandum, coupled with legal support to LDCs, can help States to understand, which options for termination of BITs they have and which legal questions arise from a particular termination.

The present study consists of the following parts:

- 1) Theoretical background outlining possible ways for terminating BITs (both unilateral and by consent of the parties) and regarding the operation of survival clauses in BITs.

⁹ Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997) 38 Va. J.Int'l L. 639.

¹⁰ J. Pohl, 'Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence' (2018) OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris, 7.

¹¹ *Ibid.*

¹² World Investment Report 2018. Investment and New Industrial Policies. United Nations Publication 88, <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 29 September 2018.

- 2) The analysis of the results of mapping 213 BITs concluded by LDCs (that are in force) including common features and potential problems, an exercise required by the beneficiary to this project. One of the tasks received from the beneficiary was to find out the BITs of LDCs that can be terminated prior to 2025.
- 3) Formulation of policy options for LDCs regarding termination of their BITs and explanation of legal questions arising from such termination.

2. Theoretical basis for terminating BITs

2.1. Methods for terminating BITs

The termination of BITs is first dictated by the terms of each specific treaty, before resorting to other modes of termination generally available in public international law (following the general rules on treaty termination laid down in the VCLT).¹³

Where a BIT incorporates a termination clause, either Contracting Party might terminate it by invoking such clause at any time by consulting with the other Party and securing its consent.¹⁴ If there is no termination clause, Article 44 of the VCLT might be helpful since it outlines the general rule on treaty termination. A Contracting Party is required to terminate, withdraw from or suspend the operation of a treaty as a whole unless the treaty provisions allow for partial termination or the Contracting Parties agree to such partial termination.¹⁵

¹³ UNCTAD, 'Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims' IIA Issues Note, No. 2 December 2010, 7. The VCLT has codified customary international law rules through which a state can terminate, withdraw from or suspend the application of a treaty or parts thereof See, e.g., Max Planck Encyclopedia of Public International Law, 'Vienna Convention on the Law of Treaties (1969)' <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>> accessed 27 August 2018.

¹⁴ Articles 54 and 57 of the Vienna Convention on the Law of Treaties.

¹⁵ Malcolm N. Shaw, *International Law*, (CUP 2008, 6 eds) 939. A Contracting Party might desire to only terminate certain clauses in a BIT (for instance, unfavourable dispute settlement clause) as opposed to termination of the whole BIT. In such instances where partial termination is contemplated and where the treaty allows for such separability, the VCLT lays down three conditions to be satisfied: first, the clauses must be separable; second, they should not have been the essential basis of the other party's consent; and third, it would not be unjust to continue

This study shall focus on examining the existing BITs entered into by LDCs and the available options for wholly terminating such BITs.

2.2. Termination by invoking a BIT provision

The majority of BITs incorporate provisions that contain information on the *duration* of the initial validity period of the BIT, which enables determining the earliest possibility to terminate the treaty, requirements for the *notice* of termination to the other Party, and the provision on the *extension* of the BIT.

As a general rule, BITs can first be terminated by the end of the initial validity period provided that a proper timely notice is given to the other Party. BITs of LDCs can be terminated by invoking their termination clauses under the following rules:

- a) Issuance of written notice within a specified period prior to the expiry of the initial validity period. Illustrative examples include the Ethiopia – Algeria BIT¹⁶, the Afghanistan – Germany BIT.¹⁷
- b) Issuance of written notice at any time after the expiration of the initial period for which the treaty was concluded. Instructive examples

with the performance of the remaining clauses of the treaty. (*Norwegian Loans case*, ICJ Reports, 1957, 9, 55–9).

¹⁶ [cite] Article 11: This agreement shall remain in force for a period of ten years and shall extend for another same period, unless written notice for termination is given by either Contracting Party twelve (12) months prior to the expiration of the Agreement.

¹⁷ [cite] Article 14: This Treaty shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period unless denounced in writing through diplomatic channels by either Contracting State twelve months before its expiration. After the expiry of the period of ten years this Treaty may be denounced at any time by either Contracting State giving twelve months' notice.

comprise the Sierra Leone – Germany BIT,¹⁸ the Tanzania – Switzerland BIT¹⁹ and the Senegal – United States BIT.²⁰

- c) Some BITs incorporate provisions for tacit renewal for successive defined periods after the lapse of the initial term. Such BITs can be terminated by a Contracting Party only by sending a notice to the other Party before a certain period of time prior to the expiration of the current validity period, after which the treaty would normally get renewed for the new period of time. The Malawi – Netherlands BIT²¹ serves as an example.²²

South Africa and Indonesia (though not LDCs) are important examples of countries which have invoked termination clauses in BITs. In 2009, the South African Department of Trade and Industry published the draft policy review which examined key issues such as the content of its BITs and the claims that

¹⁸ [cite] Article 14 (2): The present Treaty shall enter into force one month after the day of exchange of the instruments of ratification. It shall remain in force for a period of three years and shall continue in force thereafter for an unlimited period except if denounced in writing by either Contracting Party one year before its expiration. After the expiry of the period of three years the present Treaty may be denounced at any time by either Contracting Party giving one year's notice. *[Note: This BIT entered into force on 10/12/1966, its initial term expired on 10/12/1969, after which the treaty continued in force for an unlimited period of time and, according to the treaty provisions, can be terminated at any time by issuing one year's written notice.]*

¹⁹ [cite] Article 12 (1) This Agreement shall enter into force on the day when both Governments have notified each other that they have complied with the legal requirements for the entry into force of international agreements, and shall remain in force for a period of ten years. Thereafter, it shall remain in force until either Contracting Party notifies the other in writing of its intention to terminate the Agreement in six months.*[emphasis added]*

²⁰ Article XIII: 2 - This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with Paragraph 4 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

Article XIII: 4 - Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten-year period or at any time thereafter. (emphasis added)

²¹ Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, *the present Agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.* [emphasis added]

²² This type of termination clause requires a constant monitoring of deadlines for termination of BITs in order to ensure that a state does not miss its 'window of opportunity' to terminate a BIT that it might wish to discontinue for various reasons. More detailed analysis of BIT termination clauses is contained below, as it is considered that certain types of clauses in BITs are especially susceptible for termination of BITs.

risk assessments were not undertaken prior to their conclusion.²³ The review was also partly informed by two arbitrations where investors sought compensation for violation of BIT provisions.²⁴ The policy review resulted in the imposition of a moratorium on conclusion of new BITs²⁵ and termination in 2013 of BITs with Spain, Denmark, United Kingdom, France, Luxembourg, Switzerland and Germany.²⁶ Further, South Africa notified countries it had BITs with of its intention to terminate the BITs as each treaty's term neared expiry.²⁷ South Africa resorted to replacing these BITs with additional domestic protections for investors.²⁸ Such action may or may not be perceived as helpful for foreign investors given the ability of the host government to make changes in national legislation at any time.

Indonesia recently followed the example of South Africa and issued a notice of its intention to terminate more than 60 BITs.²⁹ Indonesia's actions were partly

²³ Luke Eric Peterson, 'South African Government releases draft paper reviewing its BIT program, and calling for major revisions to approach' (17 July 2009) *Investment Arbitration Reporter*, <<https://www.iareporter.com/articles/tag/south-africa-investment-arbitration/>>; See also Damon Vis-Dunbar, 'South African trade department critical of approach taken to BIT-making' (15 July 2009) *Investment Treaty News*, <<https://www.iisd.org/itn/2009/07/15/south-african-trade-department-critical-of-approach-taken-to-bit-making/>> accessed 29 September 2018.

²⁴ The Confidential arbitration proceedings on the Switzerland/South Africa BIT 1995 (terminated 31 August 2014) and *Foresti and others v The Republic of South Africa*, Award, ICSID Case no. ARB(AF)/07/01, 4 August 2010.

²⁵ Luke Eric Peterson, 'Discontinuance of bilateral investment treaty claim leave some questions unresolved for South Africa; future shape of BIT program still up in the air' (28 August 2010) *Investment Arbitration Reporter*, <<https://www.iareporter.com/articles/discontinuance-of-bilateral-investment-treaty-claim-leave-some-questions-unresolved-for-south-africa-future-shape-of-bit-program-still-up-in-the-air/>> accessed 29 September 2018.

²⁶ UNCTAD South Africa Investment Profile <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu>> accessed 29 September 2018.

²⁷ EC Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) *ICSID Review* 23.

²⁸ Department of Trade and Industry, South Africa, 'Notice 733 of 2015: Notice of Introduction of a Bill into Parliament – Promotion and Protection of Investment Bill' (22 July 2015) 601 *Government Gazette* 39009 <https://www.thedti.gov.za/gazettes/Promotion_Protection_Investment_Notice.pdf> accessed 29 September 2018.

²⁹ Ben Bland and Shawn Donnan, 'Indonesia to terminate more than 60 bilateral investment treaties' (26 March 2014) *Financial Times* (online). See also Netherlands Embassy in Jakarta, Indonesia, *Termination Bilateral Investment Treaty* <<http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html>> accessed 29 September 2018.

motivated by ISDS claims,³⁰ and they culminated in the unilateral termination of 20 BITs between 2014-2018.³¹ It is worth noting that Indonesia managed to terminate the BITs by keeping track of the expiry of the initial terms of the BITs and issuing notice accordingly, which shows that vigilance is crucial for the efficient management of the termination process.³²

2.3. Termination by consent

The reviewed BITs do not explicitly provide for mutual termination. However, Article 54(b) of the VCLT (which reflects a customary international law rule) provides that a treaty may be terminated by the Contracting Parties at any time by consent of all the parties after consultation with each other.³³ Therefore, BITs can be terminated at any time by mutual consent, even if it is done while the initial validity period is still running or if the parties do not observe requirements for termination (e.g., regarding prior notice) specified in the BIT.³⁴

Additionally, Contracting Parties may terminate a BIT and replace it with another BIT, enter into an FTA incorporating an investment chapter, modify the provisions of a BIT or provide no replacement at all.³⁵ For instance, the initial Madagascar – Germany BIT was signed on 21 September 1962 and entered

³⁰ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction (24 February 2014), <<https://www.italaw.com/cases/1479>> accessed 29 September 2018.

³¹ Luke Eric Peterson, 'Indonesia Ramps up Termination of BITs – and Kills Survival Clause in One Such Treaty – But Faces New \$600 Mil. Claim from Indian Mining Investor' (20 November 2015) <<https://www.iareporter.com/articles/indonesia-ramps-up-termination-of-bits-and-kills-survival-clause-in-one-such-treaty-but-faces-new-600-mil-claim-from-indian-mining-investor/>>

³² Profile of Indonesia's BITs <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iialInnerMenu> accessed 29 September 2018.

³³ Anthony Aust, *Modern Treaty Law and Practice* (CUP 2007, 2nd) 292.

³⁴ See, e.g., Karsten Nowrot, Termination and Renegotiation of International Investment Agreements, in: Steffen Hindelang and Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 249.

³⁵ Yoram Haftel, Alexander Thompson, 'When Do States Renegotiate International Agreements? A Case of Bilateral Investment Treaties' (unpublished working paper, November 2013). Cited in Gordon, K. and J. Pohl (2015), 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World', *OECD Working Papers on International Investment*, 2015/02, OECD Publishing.

into force on 21 March 1966. It was terminated by the parties on 17 October 2015, on the day when the new BIT between the Parties entered into force.³⁶

Moreover, pursuant to Article 59(1) of the VCLT, a BIT termination can be implied, if a new BIT between the same Parties covering the same subject matter is concluded, subject to certain conditions.³⁷

It is worth noting that here are numerous recent examples of termination without replacement, although not in respect of LDCs, but in the context of the European Union (EU). The European Commission has called for mutual termination of BITs concluded between Member States of the European Union (intra-EU BITs),³⁸ stating that intra-EU BITs are not compatible with the European Union law³⁹ (The *Achmea v. Slovakia*⁴⁰ decision has bolstered the

³⁶ There is no provision on mutual termination in the initial BIT. However, the initial BIT was terminated by mutual consent, which was reflected in Article 14(4) of the new Madagascar – Germany BIT (signed on 1 August 2006, entered into force on 17 October 2015): „Mit dem Inkrafttreten dieses Vertrags treten der Vertrag vom 21. September 1962 zwischen der Bundesrepublik Deutschland und der Republik Madagaskar über die Förderung von Kapitalanlagen, das dazugehörige Protokoll und der Briefwechsel vom gleichen Tag außer Kraft“ (*Upon the entry into force of this Treaty, the Treaty of 21 September 1962 between the Federal Republic of Germany and the Republic of Madagascar on the promotion of capital investments, the Protocol thereto and the correspondence of the same day shall expire.*) Madagascar BIT profile is available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/125#iialInnerMenu> accessed 29 September 2018.

³⁷ Art. 59(1) of the VCLT: A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:(a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

³⁸ Tania Voon, Andrew D. Mitchell, James, 'Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties' (2014) 29(2) ICSID Review - Foreign Investment Law Journal 451-73.

³⁹ See, e.g.: "Such 'extra' reassurances should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). All EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law." European Commission, *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, Press Release (18 June 2015).

⁴⁰ *Slovakische Republik v Achmea BV*, CJEU, Case C-284/16, para. 58 < <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=801433>> accessed 29 September 2018.

European Commission's view that intra-EU BITs are incompatible with EU Law⁴¹). To date, Ireland, Italy and Romania no longer have intra-EU BITs.⁴²

2.4. Fundamental change in circumstances

If neither a unilateral termination under a BIT provision, nor bilateral termination is possible within the desired time period, there are still possibilities to terminate a treaty unilaterally. Article 62 of the VCLT codifies the customary international law principle of *rebus sic stantibus*, which provides that where there has been a fundamental change in the circumstances which formed the basis of the parties' acceptance (consent) to the treaty, and where such change in circumstances has radically transformed the extent of obligations, any affected party may, under certain conditions, invoke the change as a ground for termination of the treaty.⁴³

The *rebus sic stantibus* principle is relevant for BITs, which remain in force for long periods of time during which factual circumstances might have changed, thus increasing the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that initially undertaken by a host state.⁴⁴

The Ecuador – Finland BIT termination is arguably an illustration of fundamental change in circumstances. Ecuador unilaterally terminated its BIT with Finland before the expiration of its initial ten year period.⁴⁵ This action was justified by Article 422 of the new Ecuador Constitution which proscribed the conclusion of

⁴¹ European Commission - Fact Sheet, Commission provides guidance on protection of cross-border EU investments – Questions and Answers, Brussels, 19 July 2018 <[http://europa.eu/rapid/press-release MEMO-18-4529_en.htm](http://europa.eu/rapid/press-release_MEMO-18-4529_en.htm)> accessed 29 September 2018.

⁴² European Commission – Fact Sheet. 'Commission provides guidance on protection of cross-border EU investments – Questions and Answers', Brussels, 19 July 2018. http://europa.eu/rapid/press-release MEMO-18-4529_en.htm accessed 29 September 2018. See also <<http://www.mondaq.com/x/633490/international+trade+investment/Law+On+The+Termination+Of+IntraEu+Bilateral+Investment+Treaties>> accessed 29 September 2018.

⁴³ *Fisheries Jurisdiction Case*, ICJ Reports, 1973, pp. 3, 20–1; 55 ILR, p. 183.

⁴⁴ *Ibid.*

⁴⁵ Article 84(1) of the Ecuador – Finland BIT.

treaties providing for international arbitration in commercial matters between States and natural persons/legal entities of other States.⁴⁶

The Ecuador example has remained controversial and scholars⁴⁷ have pointed out that the intention of the drafters and the National Assembly behind Article 422 of the Ecuadorian Constitution was not exhaustively thought out and the legal effect is that it does not shield Ecuador from treaty claims from investment treaties that remain in existence post-2008.⁴⁸ Pursuant to Article 27 of the VCLT, such internal legislative actions do not suffice to justify the non-performance of a treaty obligation.⁴⁹

The Ecuador Constitutional Court has also been criticized for likening international investment to international commercial/contract arbitration, as the former concerns itself with breaches of international standards of protection in international law while the latter addresses contractual breaches not necessarily drawn from international law.⁵⁰

2.5. Supervening impossibility of performance

Pursuant to Article 61 of the VCLT, the performance of the obligations of a treaty may be rendered impossible by the permanent destruction or disappearance of an object that was indispensable to the execution of the treaty. The *International Law Commission (ILC) Articles On State Responsibility* delineate that supervening impossibility of performance may be raised if the act is due to *force majeure* (i.e., due to an irresistible force or of an unforeseen event beyond

⁴⁶ Jose Gustavo Prieto Muñoz, 'ECUADOR's 2017 Termination of Treaties: How not to Exit the International Investment Regime' (2017) 14:2 *Direito Internacional dos Investimentos* 184.

⁴⁷ See Avtgis, Alexander B. (2016) "Rethinking Article 422: A Retrospective on Ecuador's 2008 Constitutional ISDS Recalibration," *Indiana Journal of Constitutional Design*: Vol. 2, Article 2, Katia F. Gomez, *Latin America and ICSID: David versus Goliath*, 17 *Law & Bus. Rev. Am.* 195 (2011) pg.17

⁴⁸ Avtgis, Alexander B. (2016) "Rethinking Article 422: A Retrospective on Ecuador's 2008 Constitutional ISDS Recalibration," *Indiana Journal of Constitutional Design*: Vol. 2, Article 2 pg. 17.

⁴⁹ See generally William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 *HASTINGS L.J.* 251 (2006)

⁵⁰ See, e.g., Javier Jaramillo and Camilo Muriel-Bedoya, 'Ecuadorian BITs' Termination Revisited: Behind the Scenes', <<http://arbitrationblog.kluwerarbitration.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes/>> accessed 29 September 2018.

control of the Contracting Party making it impossible to perform its obligations under the BIT).⁵¹ In such scenarios, a party may validly issue notice of withdrawal from the treaty.

Argentina raised the impossibility of performance defence in ICSID expropriation cases brought against it claiming the severe economic emergency it faced leaving it with no choice.⁵² However, such defence was unsuccessful, as international law requires that impossibility of performance should be invoked to terminate a treaty when there is a '*fundamental change in the circumstances which determined the parties to accept a treaty which has resulted in a radical transformation of the extent of the obligations imposed by it*'.⁵³

Article IV(3) of the Argentina – US BIT lists war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events as examples of *force majeure*. It was, however, doubtful whether economic emergencies could be comprised by *force majeure* clause. Considering the frequency of economic crises, such inclusion could create uncertainty for investors.⁵⁴

2.6. Termination as a result of material breach

Another possibility for unilateral termination of treaties, including BITs, under special circumstances is termination as a result of *material breach*. This is a form of reprisal mechanism in which, if a party breaches a fundamental provision of a treaty, the innocent party is entitled to regard the treaty as terminated.⁵⁵ Where a Contracting Party to a BIT makes it impossible for the core purpose of the BIT to be achieved (for instance, willful failure to admit

⁵¹ G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, at art. 23, U.N. Doc. A/56/589 (2001).

⁵² 'Balance del juicio en Paris - Rosatti: 'El submarino diesel enfrentó a los nucleares' -El Ministro de Justicia habló con La Nación antes de regresar,' LA NACION (Buenos Aires), Aug. 21, 2004, <<http://WWW.JUS.GOV.AR/PRENSA/ARTICULOS/CIADI/21-8-4%20LN.PDF>> accessed 29 September 2018.

⁵³ Paolo Di Rosa, The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues, 36 U. Miami Inter-Am. L. Rev. 41 (2004) <<http://repository.law.miami.edu/umialr/vol36/iss1/4>> accessed 29 September 2018.

⁵⁴ Ibid note 39.

⁵⁵ Article 60 (1) of the VCLT.

investments as per the law)⁵⁶, the other Party might claim material breach, as Article 60(3) of the VCLT recognizes such violation of a provision essential to the accomplishment of the object or purpose of the treaty as a material breach.

2.7. Consequences of treaty termination

The termination of a treaty releases the parties from any obligation further to perform the treaty unless the treaty provides otherwise or the parties otherwise agree. However, rights, obligations or legal situations of the parties that were established through the execution of the treaty prior to its termination subsist irrespective of termination.⁵⁷ The majority of BITs have express survival clauses to protect investments already made and preserve the investors' right to initiate dispute settlement proceedings after termination of a BIT. Survival clauses will be discussed in detail in the next part of the present study.

The termination of a treaty may also in some cases result in the continued application of the obligations, if such obligations are embodied in international law independently from the treaty (such as general principles of law, or customary international law, or human rights law). Article 43 of the VCLT stipulates that termination of a treaty does not impair the duty to fulfill any treaty obligation existing under international law independently from the treaty.

⁵⁶ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 1 204 (Mar. 17, 2006), para 204, <<https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>> accessed 29 September 2018.

⁵⁷ Article 70 (1) of the VCLT.

2.8. Survival clauses in BITs

2.8.1. Nature and effect of survival clauses

Termination of a BIT does not mean, however, that former Contracting Parties are free from any obligations in respect of the investors of the other Contracting Party. Most investment treaties include a ‘survival clause’⁵⁸ which prevents termination of the treaty with immediate effect. Survival clauses prolong the exposure of the host state to international responsibility by extending the treaty’s application for a further period.⁵⁹ For instance, Article 14(3) of Afghanistan – Germany BIT provides a relatively standard formulation:

In respect of investments made prior to the date of termination of this Treaty, the provisions of the preceding Articles shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.⁶⁰

Survival clauses are designed to advance the treaty goal of providing a stable legal framework for the protection of investments after the termination of a BIT.⁶¹ Additionally, their role is to protect investments already made in the host state by preventing an overnight change of the legal regime covering them and allowing them to enjoy the treaty’s protection for an additional period of time. At the same time, survival clauses with long duration periods may interfere with a state’s endeavours to renew or abolish its BITs since, when the state terminates a BIT, the latter continues to subsist through the survival clause.⁶²

Generally, the survival clause applies to those investments that already exist at the time of termination of a BIT. However, it is questionable whether an MFN provision could be applied in order to import another BIT’s survival clause with

⁵⁸ Anthea Roberts, ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56:2 Harvard International Law Journal 286.

⁵⁹ ‘International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal’ (2013)4 IIA Issue Note UNCTAD 4.

⁶⁰ Afghanistan – Germany BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1>> accessed 29 September 2018.

⁶¹ K. Gordon, J. Pohl, ‘Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World’ (2015) 2015/02 OECD Working Papers on International Investment, OECD Publishing 18.

⁶² Catharine Titi, ‘Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law’ (2016) 33:5 Journal of International Arbitration 434.

long periods of duration and, subsequently, extend the period of protection under a BIT. This concern arises from the fact that many investment tribunals have interpreted MFN provisions broadly and allowed importation of such provisions.⁶³ In case of application of an MFN clause for importing of longer survival clauses from another BIT two scenarios are possible. The first one envisages that the dispute needs to be initiated before the survival clause expires. In the second one, if the dispute was initiated after expiry of the survival clause, the BIT would no longer be applicable.⁶⁴

It is worth noting that survival clauses apply both to the substantive provisions of a BIT as well as to the dispute settlement clauses, so that an established investor continues to be entitled to bring a claim under the investment treaty, even after its termination.⁶⁵

2.8.2. Survival clause and termination by consent

As opposed to unilateral termination where the survival clause might protect existing investments and preserve investors' rights, it is not always clear-cut whether the survival clause is equally abrogated together with the termination of the respective BIT in cases of mutual termination of a BIT.

It might be presumed that the VCLT sheds some light on the present matter. For example, Article 70 (1)(b) of the VCLT provides that a state is responsible *for internationally wrongful acts*, even after the relevant treaty ends or is modified.⁶⁶ It is, however, argued in the literature that Article 70(1)(b) does not apply to mutual terminations of BITs, which is explained by the following arguments. First, the reference to party autonomy in the introductory part of Article 70(1) of the VCLT, which stipulates that 'unless parties otherwise agree', demonstrates that the VCLT not only recognizes the rights of the parties to

⁶³ PHASE 2 of IIA Reform: Modernizing the Existing Stock of Old-generation Treaties (June 2017) 2 IIA Issues Note, UNCTAD <http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf> accessed 29 September 2018.

⁶⁴ Catharine Titi, 'Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law' (2016) 33:5 Journal of International Arbitration 439.

⁶⁵ James Harrison, 'The Life and Death of BITs: Legal Issues concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 J. World Investment & Trade 935.

⁶⁶ Tania Voon, Andrew D. Mitchell, James Munro, 'Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties' (2014) 29(2) ICSID Review - Foreign Investment Law Journal 463.

agree on the requirements of a legally valid termination (Article 54 of the VCLT), but also gives discretion to the Contracting Parties to determine the consequences of termination by mutual consent. In such a way Article 70(1)(b) does not prevent parties to a BIT from mutually agreeing on termination with immediate effect and thus in disregard of a survival clause. Second, the legislative history of this provision confirms its limited scope, which covers only rights, obligations or legal situations in the relationship between the parties, but by no means 'vested rights' or other private foreign investors covered and protected under BITs.⁶⁷

By way of comparison, the International Court of Justice (ICJ) in *Ambatielos (Jurisdiction)* case (though not involving a BIT) observed that the provision in the 1926 treaty could, in the absence of a saving clause, be regarded as completely rendering nugatory the earlier 1886 treaty and all its provisions and any claims based upon them.⁶⁸

General international law permits LDCs to mutually terminate BITs, including absolving responsibility for past BIT breaches for which an investor has not yet lodged a claim.⁶⁹ However, BIT termination does not defeat the arbitral tribunal's jurisdiction if the investor has already filed the claim. The *Nottebohm*⁷⁰ case set up the guiding principle, with the ICJ ruling against Guatemala's challenge to the ICJ's compulsory jurisdiction. The Court noted that Liechtenstein had filed its claim prior to the expiry of the five-year period for which the Government of Guatemala subscribed to a Declaration accepting the compulsory jurisdiction of the ICJ. Hence, the ICJ confirmed that it has jurisdiction in the present case.⁷¹

67 Steffen Hindelang and Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 251-2.

68 *Ambatielos (Jurisdiction) (Greece v United Kingdom)* [1952] ICJ Rep 28, 43-44. The ICJ however noted that the 1926 treaty had a declaration attached to the effect that it did not prejudice claims on behalf of private persons based on the provisions of the [1886 treaty]', which could continue to be invoked in arbitral proceedings. Ibid 36.

69 Tania Voon, Andrew D. Mitchell, James Munro, 'Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties' (2014) 29(2) ICSID Review - Foreign Investment Law Journal 463.

70 *Nottebohm Case (Lichtenstein v Guatemala) (Preliminary Objection)* [1953] ICJ Rep 111, 121.

71 Ibid 123.

Similarly, mutual termination may amount to an attempt to unilaterally withdraw consent in respect to an ongoing ICSID arbitral proceeding, which is prohibited by Article 25(1) of the ICSID Convention. The host state might be estopped (in good faith) from using mutual termination to retroactively extinguish the investor's rights in respect of existing claims.⁷²

Considering the lack of certainty in this regard, when jointly terminating a BIT States are well advised to clarify their intention with regard to the survival clause. States may explicitly amend their survival clause, for example, in order to shorten survival period, neutralize survival clause (indicate that it will not be applicable at all) or explicitly confirm that they wish for the survival clause to apply.⁷³

For example, Indonesia reached a mutual agreement with Argentina to terminate the Argentina – Indonesia BIT, with such termination to be effective starting from 19 October 2016.⁷⁴ Understanding that Article 13(2) of their BIT envisages a survival period for another 10 years⁷⁵, the countries neutralized the survival clause by mutual agreement before withdrawing from the BIT. It implies that survival clauses will not operate so as to confer some residual protection (for existing investments) following termination.⁷⁶ The Czech Republic earlier used the same approach and neutered its survival clauses prior to the agreed termination of several BITs with fellow EU Member States.⁷⁷ However, such an approach has not been tested by arbitral tribunals yet.

⁷² *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) paras. 94–5; *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and Others*, ICSID Case No ARB/07/3, Award (28 December 2009) paras. 211–7.

⁷³ PHASE 2 of IIA Reform: Modernizing The Existing Stock of Old-generation Treaties (June 2017) 2 IIA Issues Note, UNCTAD <http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf> accessed 29 September 2018.

⁷⁴ Alvin Yeo SC, Smitha Menon, 'Indonesia – Arbitrating with Foreign Parties: A Closer Look at Indonesia's Approach to Investor-State Dispute Settlement' (2016) *Asian Dispute Review* 124.

⁷⁵ Argentina – Indonesia BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/97>> accessed 29 September 2018.

⁷⁶ Luke Eric Peterson, 'Indonesia ramps up termination of BITs – and kills survival clause in one such treaty – but faces new \$600 mil. claim from Indian mining investor' (20 November 2015) *IA Reporter* <<http://isds.bilaterals.org/?indonesia-ramps-up-termination-of&lang=es>> accessed 29 September 2018.

⁷⁷ PHASE 2 of IIA Reform: Modernizing The Existing Stock of Old-generation Treaties (June 2017) 2 IIA Issues Note, UNCTAD <http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf> accessed 29 September 2018.

2.8.3 Differences in survival clauses

One might distinguish several differences in the language of survival clauses, which can affect their application. First, survival clauses differ in duration of the treaty effects beyond the termination they set out.⁷⁸ Most treaties determine the duration of the treaty effect beyond the termination by setting a fixed period. Below is an illustration of the common duration periods of survival clauses in the sampled BITs:

- a) Egypt – Ethiopia BIT, Bangladesh – Italy BIT = 5 years.
- b) Ethiopia – Malaysia BIT, Chad – Germany BIT = 10 years.
- c) Cambodia – Croatia BIT, Bangladesh – Singapore BIT = 15 years.
- d) Afghanistan – Germany BIT, Burundi – Germany BIT = 20 years.

Some BITs determine a fixed minimum period, while referring to specific investment agreements that may provide for longer periods.⁷⁹ For instance, Article 12(3) of Mozambique – South Africa BIT sets out as follows:

In respect of investments approved and/or made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of the preceding articles 1 to 11 shall remain in force with respect to such investments for a further period of ten (10) years from that date or any longer period as provided for or agreed upon in the relevant contract or approval granted to the investor.⁸⁰

Second, the scope of investments to which survival clauses apply may differ. Usually survival clauses cover all investments as, for example, Bangladesh – Netherlands BIT (Article 14(3)):

⁷⁸ J. Pohl, 'Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions' (2013) *OECD Working Papers on International Investment*, 2013/04, OECD Publishing, Paris 16.

⁷⁹ J. Pohl, 'Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions' (2013) *OECD Working Papers on International Investment*, 2013/04, OECD Publishing, Paris 17.

⁸⁰ Mozambique – South Africa BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/5192>> accessed 29 September 2018.

In respect of investments *made before the date of the termination of the present Agreement* the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.⁸¹

Other BITs cover only some investments. One example is Article 14 of the Angola – United Kingdom BIT, which covers only those investments made after the entry into force and not before:

Provided that in respect of investments *made whilst the Agreement is in force*, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.⁸²

On balance, each treaty contains its own survival clause with its own wording and there is no general standard that applies in respect of such clauses (although they look alike). It implies that it is necessary to check the very text of a BIT and its particular wording, given that the treaty text is the determinant in any termination strategy.

2.8.3. Relevant jurisprudence

It is worth mentioning that although jurisprudence on survival clauses is limited, some ISDS tribunals have analyzed survival clauses invoked by investors. For instance, in *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25), the investors initiated arbitration under the Italy – Romania BIT in 2012 after the treaty had already been mutually terminated in 2010⁸³, since Article 11(3) of the BIT envisaged survival period for five years, which was still running.⁸⁴ Although the survival clause was neither discussed nor interpreted in this case, it still contains two important considerations. First, the effectiveness

⁸¹Bangladesh – Netherlands BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/271>> accessed 29 September 2018.

⁸²Angola – United Kingdom BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/67>> accessed 20 July 2018.

⁸³ Agnieszka Zarowna, 'Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect?' (2017) Kluwer Arbitration Blog.

⁸⁴ Italy – Romania BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1708>> accessed 29 September 2018.

of the survival clause was not disputed, which means those States accepted their obligations under the survival clause. Second, survival clauses might be considered as applicable even in instances of termination by consent.

2.9. Implications of survival clauses

Survival clauses may have an impact on the development of international investment law. In short, even if new BITs enter into force the old BITs' provisions are still valid for investments made prior to the termination of the old BITs (e.g., Zambia – Germany BIT⁸⁵, Togo – Germany BIT⁸⁶, Sudan – Germany BIT⁸⁷ etc.). However, their effect does not go so far as to completely limit the States' ability to pursue a new policy (be it with a new, more modern BIT or without any BIT). Three issues are worth considering.

Firstly, where parties agree to neuter the survival clause before terminating their BITs, the clause does not come into play,⁸⁸ as it was in case of the Indonesia – Argentina BIT.

Secondly, survival clauses do not hinder reform, if their validity is limited in time, such as where the treaty survives only for five years (e.g., Bangladesh – Italy BIT,⁸⁹ Ethiopia – Egypt⁹⁰).

Finally, the issue of the survival clause needs to be treated with serious attention, in order to make efficient termination of a BIT. This is possible to achieve by shortening the time period of such a clause⁹¹ (in case of BITs which are being negotiated) or by explicitly amending and/or neutralizing survival

⁸⁵ Zambia – Germany BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1451>> accessed 29 September 2018.

⁸⁶ Togo – Germany BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1433>> accessed 29 September 2018.

⁸⁷ Sudan – Germany BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1420>> accessed 29 September 2018.

⁸⁸ Catharine Titi, 'Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law' (2016) 33:5 Journal of International Arbitration 438.

⁸⁹ Bangladesh – Italy BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/268>> accessed 29 September 2018.

⁹⁰ Egypt – Ethiopia BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/5345>> accessed 29 September 2018.

⁹¹ The issue is significant given the number of BITs that have recently been terminated or that are currently in the termination process. BIT denunciations by Ecuador and other Latin American countries were among the first to attract worldwide attention and were followed by South Africa and Indonesia.

clauses (in case of existing BITs). Also, there needs to be particular consideration to different survival clause durations for different sectors of investment.⁹² Otherwise, survival clauses might cause delay to reform of investment law⁹³ and the investment regime in the countries in question, although not indefinitely.

3. LDCs' Termination and BITs Analysis

3.1. Characteristics of BITs of LDCs.

The Project team analysed termination provisions of 213 BITs of LDCs that are in force. The study did not cover the analysis of BITs that have been terminated according to the information contained on the UNCTAD website 'Investment Policy Hub'.⁹⁴ To date, only one BIT concluded by an LDC, between Laos and Indonesia, was terminated without replacement.⁹⁵

This chapter describes the results of this analysis, focusing on the possibilities to terminate BITs.

a) 116 BITs of LDCs with both developed and developing countries have already outlived their initial periods and remain in force indefinitely, unless terminated at any time by issuance of a written termination notice.

E.g., it has been possible to unilaterally terminate the Haiti – Germany BIT since 1 December 1985. Hence, if Haiti has such an intention, it just needs to send a written notice to Germany and after one year from the date of sending such a notice, the BIT would be terminated.

Chart 1 shows the proportion of BITs that have already outlived their initial period of validity and have either been extended for indefinite periods of time

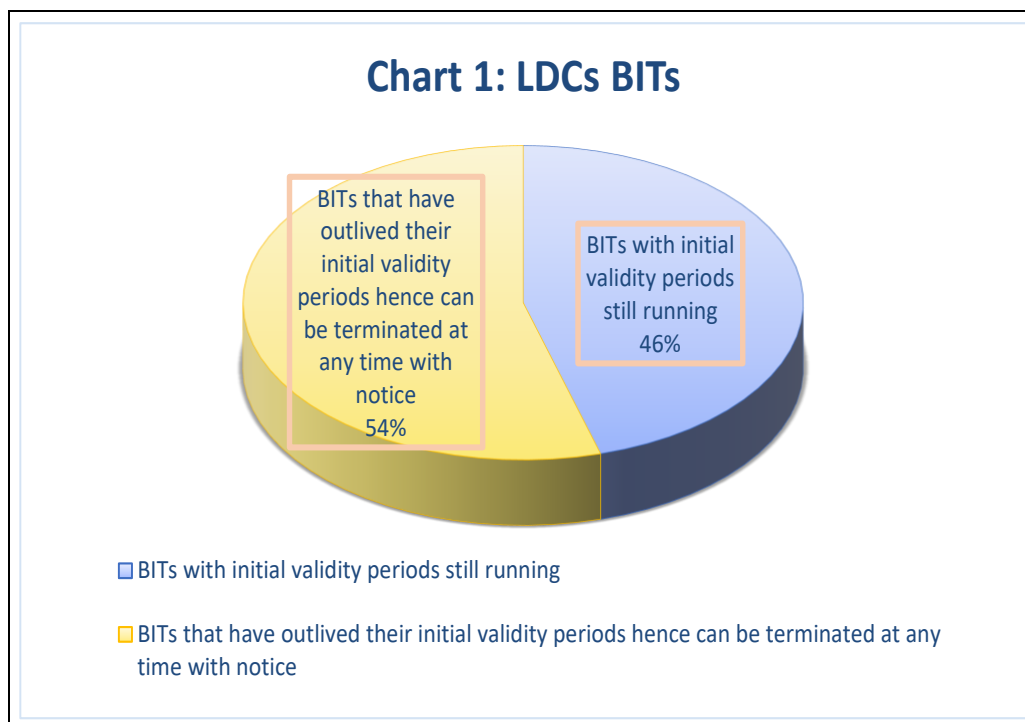
⁹² Abdulkadir Jailani, 'Indonesia's Perspective on Review of International Investment Agreements' (2015) 1 Investment Policy Brief 4.

⁹³ *Ibid* 7, 439.

⁹⁴ <<http://investmentpolicyhub.unctad.org/IIA/liasByCountry#iiaInnerMenu>> accessed 29 September 2018.

⁹⁵ <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/114#iiaInnerMenu>> accessed 29 September 2018.

or in few cases limited periods of time but can be terminated at any time with prior notice.



Annex A, Table 1.1 contains the list of BITs that have already outlived their initial period of validity and have been extended for either indefinite (or in few cases definite) periods of time but can be terminated at any time with prior notice.⁹⁶

4 BITs under consideration (Liberia – Switzerland, Mali – Canada, and Senegal – Canada and Benin – Canada BITs) do not have initial periods of validity. The

⁹⁶ Some BITs listed in Annex A Table 1.1 in fact do not continue to be in force indefinitely, but have certain extension periods. They were listed in Annex A Table 1.1 for the following reason:

The provisions of the Laos – Pakistan and Laos – Viet Nam BITs stipulate that these treaties can be terminated at any time with prior notice (after the expiration of the initial period of validity). As the conditions of termination are the same as in case of BITs that are renewed for an indefinite period of time, they have been included in Annex 1.

Annex A Table 1.1 also incorporates BITs that are extended for short periods of time (one year), and although they can be terminated only at the end of each period of validity, *de facto* the conditions of terminations are like those in case of 'termination at any time with a prior notice'. Examples are the Guinea – Switzerland, Madagascar – Sweden, Mauritania – Switzerland BITs.

respective treaty provisions stipulate that they can be terminated at any time with prior notice and therefore they are also listed in the present Table 1.1.

b) 84 BITs in force have their initial validity terms still running, with initial expiry dates before 2025. (See Annex A, Table 1.2). They can be terminated after the expiry of the initial period of validity: (i) by proper notice given within a certain period of time specified in the respective BIT's termination clause (in cases where tacit renewal for definite periods of time is envisaged) or (ii) at any time after the lapse of the initial validity period (mostly if it does not envisage tacit renewal for a definite period of time).

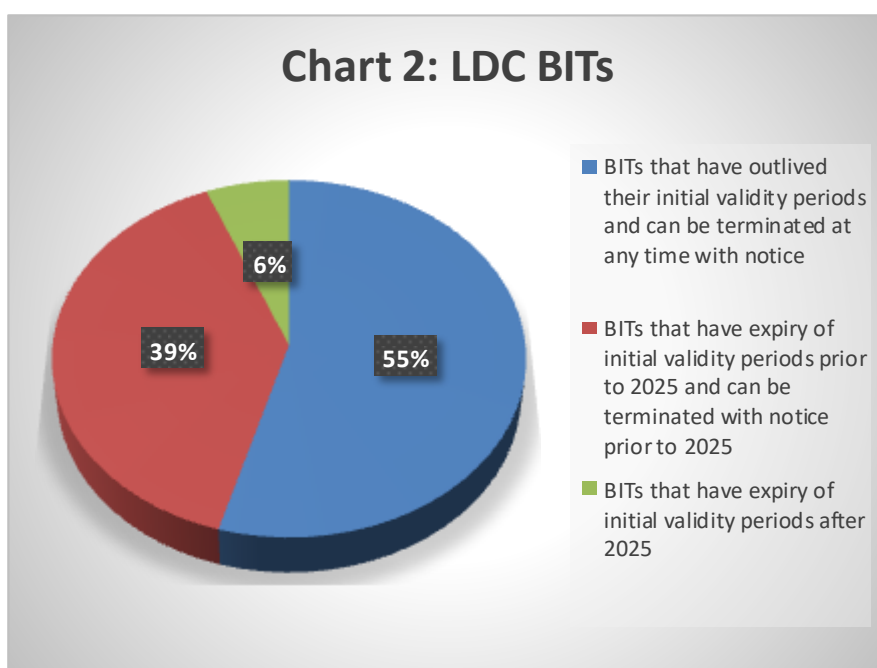
It is important to keep an eye on termination notification deadlines in order to issue timely notice, since if BITs get renewed for definite periods of time (group (i)), the next opportunity to terminate them will be in 2, 5, 10, 20 or even 30 years after the expiration of the initial validity period.

It is worth noting that there are also some BITs that get extended for definite periods of time but can be terminated at any time. For instance, the Sudan – Jordan BIT expires on 2 February 2021 and envisages that after this date the BIT shall be extended tacitly for another ten-years period, unless a Contracting Party notifies the other Contracting Party of its intention to terminate the BIT at the end of its duration or at any time after the expiry of the initial ten years period. If Sudan wants to terminate the present BIT as soon as possible (*i.e.*, 2 February 2021, which is the nearest possible date), it should notify Jordan of its intention to terminate the BIT before 2 February 2020. Otherwise, Sudan may send such a notice anytime after, the issue being that it would need to wait one year for the notice to be effective.

In respect of the second group (group ii), it is also important to control terms for notification deadlines, although it might be not as crucial as in respect of BITs from group i. For instance, the Madagascar – Germany BIT expires on 17 October 2025, after which it will continue in force indefinitely, unless any Contracting Party notifies the other Contracting Party of its intention to terminate the BIT at the end of the initial period of time. Therefore, if Madagascar wants to terminate this BIT as soon as possible, it should notify

Germany of its intention to terminate the BIT before 17 October 2024. Otherwise, Madagascar may send such a notice anytime thereafter and would need to wait one year for the notice to be effective.

Chart 2 shows the proportions of BITs of LDCs that have outlived their initial validity terms, those that have their initial expiration periods (that are still running) prior to 2025 and can be terminated at the end of the initial validity period, and those that have initial validity periods expiring after 2025 (39 BITs).



c) 13 BITs in force have their initial validity terms still running, with initial expiry dates after 2025. (See Annex A Table 1.3). They may be terminated by giving written notice after the expiry of the initial validity terms at any point in time or, in cases of envisaged tacit renewal, by giving written notice prior to the lapse of the deadline set out in a BIT.

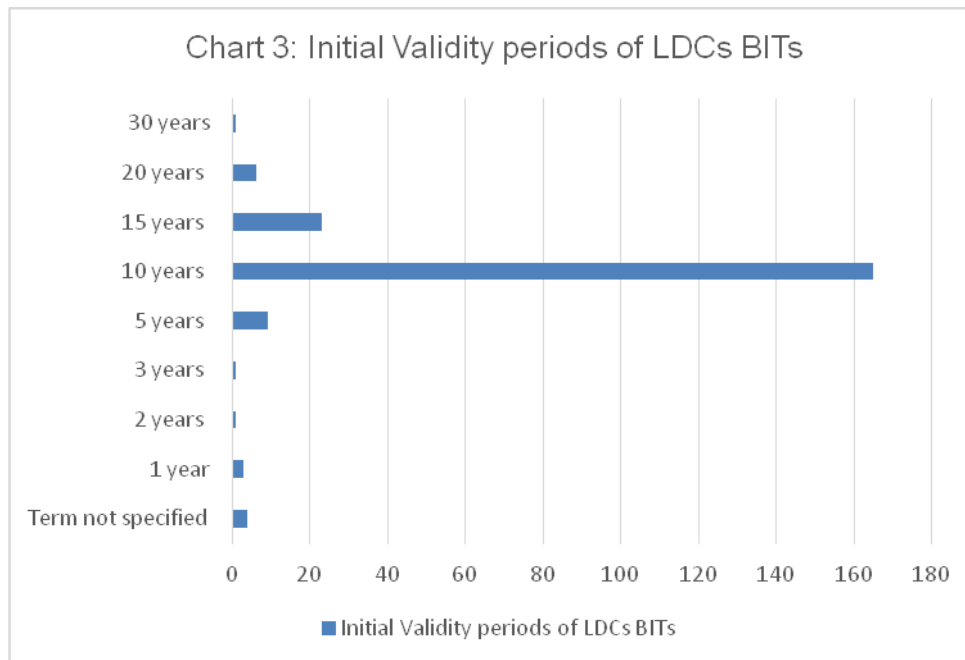
d) The vast majority of BITs under consideration have initial terms of 5, 10, 15 and 20 years. However, the Senegal – Canada BIT does not specify any initial term and only stipulates that it could be terminated with one year’s notice.⁹⁷ Similarly, the Benin – Canada BIT fails to set an initial validity period. Other examples of BITs without initial validity period are the Liberia – Switzerland and the Mali – Canada BITs.

Moreover, the Yemen – Austria BIT stipulates that after the expiry of the initial validity period, the treaty shall be automatically renewed for further periods of ten years, unless one of the Contracting Parties notifies its intention to terminate it before the deadline for notification expires. At the same time, it clearly envisages the right of each Contracting Party to terminate the present BIT at any time after the expiry of initial validity period ⁹⁸ (See Annex A, Table 1.3).

Chart 3 shows the initial validity periods in BITs of LDCs.

⁹⁷ Article 42 (3) - This Agreement shall remain in force unless a Party notifies the other Party in writing of its intention to terminate it. The termination of this Agreement will be effective one year after notice of termination has been received by the other Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, Articles 1 to 41 inclusive, as well as paragraphs 1 and 2 of this Article, shall remain in force for a period of 15 years.

⁹⁸ Yemen – Austria BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/228>> accessed 29 September 2018.



e) Most BITs have 6 months or one-year termination notice periods. For example, the Ethiopia – Malaysia BIT provides for a one year termination notice.

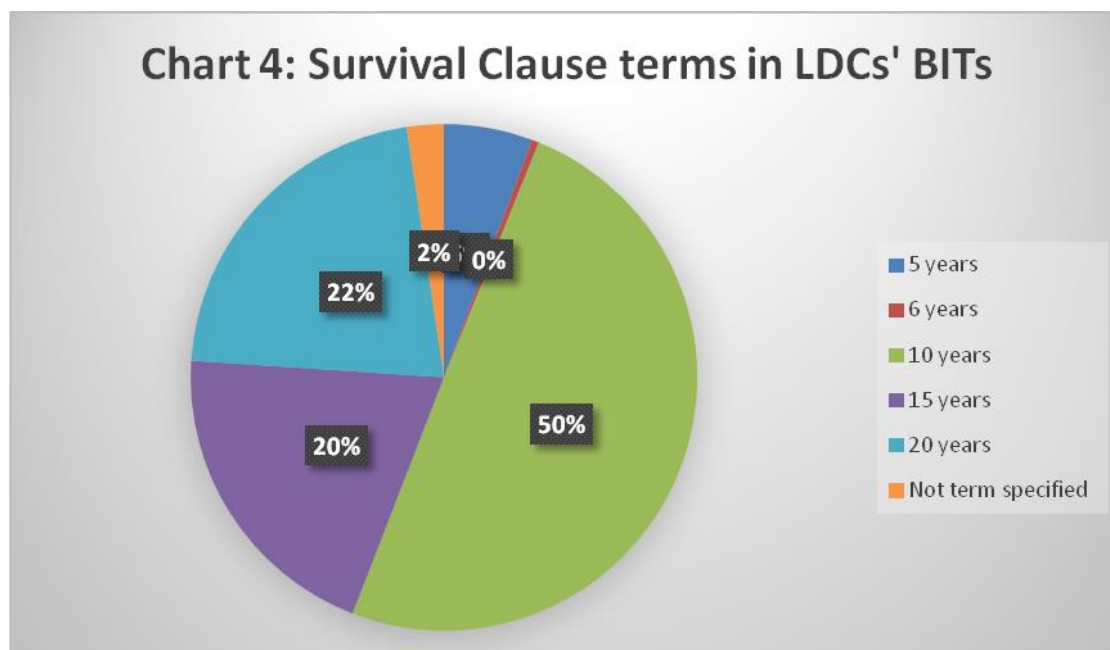
Article 12(3) - Either Contracting Party may by giving one (1) year's written notice to the other Contracting Party, terminate this Agreement at the end of the initial ten (10) year period or anytime thereafter.

The Bangladesh – Switzerland BIT provides for automatic renewals, subject to a six months period to notify termination:

Article 11(1) - Unless written notice of termination is given six months before the expiration of this period, the Agreement shall be considered as renewed on the same terms for a period of two years, and so forth.

e) The BITs covered by the present research have 5, 10, 15 or 20-year term survival clauses with half of them having 10 years as the survival clause term. The Sudan – France and the Sudan – Netherlands BITs are exceptional cases as they do not specify the period for the survival clause (See Annex A, Table 1.4).

Chart 4 shows the duration periods of survival clauses in LDCs' BITs.



The analysis has revealed that BITs of certain countries have longer than an average duration of survival period. For instance, most LDC BITs with Germany contains survival periods of 15 or 20 years (only the Chad – Germany BIT envisages 10-year survival period). All Nepal BITs that are currently in force (with Finland, France, Germany, UK) as well as a number of BITs of Laos and Mozambique have 20-year survival clauses.

g) It might be possible that an international investment agreement does not contain a survival clause at all (for example, the Ethiopia – Libya BIT⁹⁹).

Article 12 (3) - After the expiration of the initial ten-years period either Contracting Party may at any time thereafter terminate this Agreement by giving at least one year's written notice to the other Contracting Party.

⁹⁹ Ethiopia – Libya BIT <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1170>> accessed 29 September 2018. There are also other types of agreements, which do not have them – e.g. Australia's FTAs and the Japan's EPA do not include 'survival clauses' in their investment chapters – see, e.g., <<https://globalarbitrationreview.com/jurisdiction/1004619/australia>> accessed 29 September 2018.

3.2. Legal issues arising from BITs of LDCs

The analysis has revealed the following legal issues that should be relevant for LDCs planning to terminate BITs:

- a) The initial validity terms of some BITs are long and if the treaty entered into force recently can prevent termination of the BIT for many years. (For example, Zambia – France BIT, Zambia – Netherlands BIT.)
- b) The BITs can contain provisions that extend their validity for definite periods of time and allow for termination only at the end of each new period of validity, upon notification given before certain indicated deadlines. This seriously impedes the possibility to terminate the BIT, because if the deadline was missed the next available opportunity to terminate the BIT can be, e.g., in 10 or 15 years.
- c) Even if a BIT is terminated, the survival clause extends the effect of BIT provisions on investment protection for the period of time indicated in the respective treaty. This can nullify the desired effect of termination of BITs – such as insulating from ISDS proceedings – for many years. In this sense, we see three possible scenarios that are:
 - i. In the case of a unilateral termination of the BIT according to its provisions, if there is a survival clause, investors continue to enjoy protection under the BIT during the indicated period of time. As discussed above in the section on survival clauses, this includes both standards of protection and procedural rights of an investor.
 - ii. If States decide to mutually terminate their BIT, it seems to be undisputed that if an investor has already started arbitration procedure by the moment of termination of the international investment agreement, the investment tribunal will hear the case and render its decision.
 - iii. However, there is no single answer to the question of whether an investor can still make a claim regarding a host state's conduct

that took place before the termination of the BIT but in respect of which no notice has been made by the date of termination.¹⁰⁰ This demands careful analysis of every concrete situation and parties' position in respect of the BIT survival clause (*i.e.*, whether there is a clear decision to terminate it).

4. Recommendations to the governments. Policy options.

Currently a number of LDCs are re-assessing the system of BITs, because they want to be free from obligations under the BITs and uncertainties arising therefrom or because they want to reform their treaties, or for other reasons that they consider important for their development. It is therefore essential to provide LDCs with policy options as to how to terminate their BITs and how to address possible challenges in this process.

The determination of whether a policy option is 'right' for a particular LDC in specific circumstances requires a careful and fact-based analysis of the cost and benefits involved. The present Memorandum aims only at addressing a number of broad challenges which were identified while analyzing provisions on termination and survival clauses of 213 BITs from LDCs. Taking into account the similarity of termination and survival clauses covered by the present analysis, we believe that the policy options discussed below might be used by LDCs. Nevertheless, LDCs are invited to take specialist advice along with the attached table that contains essential information about termination clauses and survival clauses of BITs of LDCs. Irrespective of the intent to terminate BITs in the near future, States are advised to have a clear picture of possible time periods to terminate them and also to monitor this timeline.

¹⁰⁰ See Tania Voon, Andrew Mitchell, James Munro, 'The Impact of Mutual Termination of Investment Treaties on Investor Rights' <<http://investmentpolicyhub.unctad.org/Blog/Index/28>> accessed 19 August 2018; Domitille Baizeau, 'Opciones ante las denuncias de los TBI/ Options available upon the termination of BITs' <http://www.lalive.ch/data/document/05.10.2017_Speaking_Notes_D_Baizeau_Quito_Conf_5_Oct_2017.pdf> accessed 20 August 2018, See also Agnieszka Zarowna, 'Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect?'¹³, <<http://arbitrationblog.kluwerarbitration.com/2017/02/28/booked-22-february-polish-bits/>> accessed 29 September 2018.

4.1. Options for unilateral terminations.

4.1.1. Requirements for termination.

If a state intends to terminate a BIT unilaterally, it should first look at the termination provision of the respective BIT, in order to understand whether and under which conditions it is possible to terminate it. Important criteria are the expiration of the initial validity term and the deadline for sending a notice of termination to the other Contracting Party.

- a) If the initial validity term has not expired and the deadline for sending a notice of termination to the other Party has not passed, the state is free to notify the other Party of its intention to terminate the BIT. Even if the deadline for notice is not approaching, States might already submit the notice of termination provided that the provision for notification is not restricted to the notification period. This will guarantee that the deadline will not be overseen and the BIT will be terminated at the earliest possible date.
- b) If the initial validity term has expired States can have the following options for termination of the treaty:
 - If the BIT is to be extended for an indefinite period of time, subject to prior notice of termination, a state can send notice of termination at any time. The research results demonstrate that LDCs have numerous BITs of this type, and they can be terminated immediately.
 - If the BIT is extended for definite periods of time, LDCs are advised to verify the next opportunity to terminate the treaty in question. Although the termination will take place at the end of the current indicated period of validity and it may still be several years ahead, LDCs are advised to send the notice of termination to the other party now in order to make sure that the deadline is not overlooked.
 - If the BIT is extended for definite periods of time, but at the same time provides that after the expiry of the initial validity period it can be terminated at any time by giving timely notice, LDCs should not

hesitate to terminate such BITs at any time regardless of a clause on tacit renewal of a BIT.

4.1.2. Survival clauses and possible challenges

Survival clauses apply in case of unilateral termination and in case of treaty expiry and provide continued protection for existing investors. The survival clause provides investors with continued protection for the remaining life of the clause.

States are advised to carefully check survival clauses in their BITs. If these clauses provide for long periods of protection after the BIT has been terminated, it significantly undermines the effect of treaty termination and limits the regulatory freedom of the parties, as they have to observe the treaty provisions for up to 20 years. If States want to terminate BITs and absolve themselves from its obligations, it is necessary to start the process of termination as soon as possible.

4.2. Termination by consent

Notwithstanding termination clauses in BITs, parties can terminate BITs by mutual consent, as discussed above.

- a) If parties to a BIT decide to terminate a BIT by mutual consent, they are advised to make a clear and transparent statement as to the exact date of termination and the conditions of termination.
- b) When jointly terminating a BIT 'States are well advised to clarify their intention with regard to the survival clause, either by explicitly amending and/or suppressing it (neutralization), or explicitly confirming that they wish for the survival clause to apply'.¹⁰¹
- c) LDCs are advised to try to persuade their BIT partners to neutralize survival clauses before terminating BITs or at least advocate for reduced

¹⁰¹ PHASE 2 of IIA Reform: Modernizing the Existing Stock of Old-generation Treaties (June 2017) 2 IIA Issues Note, UNCTAD
<http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf> accessed 29 September 2018.

periods in cases when the survival clause is essential for the other party to the BIT. The reduction of the period of a survival clause can be used by LDCs that have very long survival clauses and not enough bargaining power to persuade the other party to neutralize the survival clause.

In order to do so, it is possible to use a two-fold approach tested by the Czech Republic, Indonesia and Argentina.

The first step for the Contracting Parties is to agree to amend the treaty by terminating the survival clause. However, amendment, in the context of treaty law, means the formal alteration of the provisions of a treaty by its parties. Such alterations must be effected with the same formalities that attended the original formation of the treaty.¹⁰² It implies that the process of termination of a BIT might be sufficiently extended. So, as an alternative, LDCs can take advantage of the bilateral nature of these treaties which makes possible to modify the treaty through protocols, amendments or subsequent practice.¹⁰³ Moreover, LDCs can use the simplified form of an exchange of letters or notes.¹⁰⁴ In such a way, Contracting Parties may modify their obligations for meeting their evolving needs or for keeping the rules governing FDI in line with the evolution of international law.¹⁰⁵

The second step is a way easier one and provides that the Contracting Parties would need to terminate their BIT which would not contain the survival clause anymore.

¹⁰² International Treaty Making (August 2017), 40
<<https://www.mfat.govt.nz/assets/Treaties/International-Treaty-Making-Guide-2017.pdf>>
accessed 29 September 2018.

¹⁰³ Tarcisio Gazzini , 'Bilateral investment treaties' in In T. Gazzini, E. De Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations* (The Hague: Martinus Nijhoff, 2012) 19.

¹⁰⁴ Claude Schenker, 'Practice Guide to International Treaties' (2015) Federal Department of Foreign Affairs FDFA Directorate of International Law DIL, 43
<https://www.eda.admin.ch/dam/eda/en/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege_en.pdf 43> accessed 13 September 2018.

¹⁰⁵ Tarcisio Gazzini, 'Bilateral investment treaties' in In T. Gazzini, E. De Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations* (The Hague: Martinus Nijhoff, 2012) 7.

The Contracting Parties to a BIT can at any time amend its content, either formally (i.e. through a protocol) or informally (through subsequent practice).¹⁰⁶

If States do not want to neuter the survival clause (or cannot agree on that), they might shorten the period of its application. To do so, they can use the same methodology. As the first step, states should amend the BIT and shorten the period of survival clause application from, for example 20 or 15 years, to 5 years (or even less) and, as the second step, terminate their BIT with modified survival clause.¹⁰⁷ Similarly, LDCs should realize that amendments may trigger domestic procedures¹⁰⁸ which might cause sufficient delay in termination process. For these reasons, LDCs are well advised to refer to exchange of letters or notes.

As the second step, the parties would need to terminate their BIT with a considerably shorter survival period.

- d) However, if a BIT provides that the survival clause applies only in case of a unilateral termination of a treaty¹⁰⁹, it will not come into play in case of mutual termination. Therefore, it would not be necessary to neuter the survival clause in case of mutual termination.

It is therefore important that the governments bear in mind that:

- Investor-to-state disputes already launched cannot be stopped by termination of the respective BIT.

¹⁰⁶Tarcisio Gazzini, 'Bilateral investment treaties' in T. Gazzini, E. De Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations* (The Hague: Martinus Nijhoff, 2012) 19.

¹⁰⁷ E.g., Australia and Chile, while terminating their BIT, agreed to replace it with a FTA. By doing so, they amended the former treaty's survival clause to make it applicable for only three, instead of fifteen years.

¹⁰⁸ E.g., New Zealand Government must follow the same constitutional and procedural requirements outlined in this Guide for the conclusion of a treaty.

¹⁰⁹ For example, Article 22 of the US Model BIT of 2012 provides for the following:
A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination.

- In case of a unilateral termination pursuant to a BIT provision, investors can still initiate ISDS during the period of survival clause in respect of the investments made prior to the termination of the BIT.
- In case of mutual termination of the BIT and the survival clause, however, it seems to be possible to prevent claims that were not yet brought.

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Annex A : Schedule of BITs

Table 1.1 BITs that have already outlived their initial period of validity and have been extended for either indefinite or definite periods of time but can be terminated at any time with prior notice

No.	BIT	The date from which it is/was possible to terminate the BIT at any time with notice	Notice period required
1	Afghanistan – Turkey	19/07/2015	12 months
2	Afghanistan – Germany	12/10/2017	12 months
3	Angola – Germany	01/03/2017	12 months
4	Bangladesh – Austria	01/12/2011	12 months
5	Bangladesh – BLEU	15/09/1997	12 months
6	Bangladesh – Germany	14/09/1996	12 months
7	Bangladesh – Islamic Republic of Iran	05/12/2012	6 months
8	Bangladesh – Japan	25/08/2009	12 months
9	Bangladesh – Republic of Korea	06/10/1998	12 months
10	Bangladesh – Malaysia	20/08/2006	12 months
11	Bangladesh – Philippines	01/08/2008	12 months
12	Bangladesh – Romania	31/10/1997	12 months
13	Bangladesh – Thailand	12/01/2013	12 months
14	Bangladesh – Turkey	21/06/2000	12 months
15	Bangladesh – United Kingdom	19/06/1990	12 months
16	Bangladesh – USA	25/07/1999	12 months

17	Benin – Canada	No initial validity period	12 months
18	Benin – Germany	18/07/1995	12 months
19	Benin - United Kingdom	27/11/1997	12 months
20	Burkina Faso – Malaysia	18/08/2013	12 months
21	Burundi – Germany	09/12/1997	12 months
22	Burundi – United Kingdom	13/09/2000	12 months
23	Cambodia – China	01/02/2005	12 months
24	Cambodia – Germany	14/04/2012	12 months
25	Cambodia – Japan	31/07/2018	12 months
26	Cambodia – Republic of Korea	12/03/2012	12 months
27	Cambodia – Malaysia	09/05/2007	12 months
28	Cambodia – Thailand	16/04/2007	12 months
29	Central African Republic – Germany	21/01/1978	12 months
30	Chad – Germany	23/11/1978	12 months
31	Democratic Republic of the Congo – United States of America	28/07/1999	12 months
32	Ethiopia – Austria	01/11/2015	12 months
33	Ethiopia – China	01/05/2010	12 months
34	Ethiopia – Denmark	21/08/2015	12 months
35	Ethiopia – Germany	04/06/2016	12 months
36	Ethiopia – Islamic Republic of Iran	15/12/2014	12 months
37	Ethiopia – Israel	15/02/2016	12 months
38	Ethiopia – Libya	25/06/2014	12 months
39	Ethiopia – Malaysia	04/06/2009	12 months

40	Ethiopia – Tunisia	02/10/2014	12 months
41	Ethiopia – Turkey	10/03/2015	12 months
42	Ethiopia – Yemen	15/04/2010	12 months
43	Guinea - Burkina Faso	26/08/2014	12 months
44	Guinea – Italy	20/02/1969	12 months
45	Guinea-Bissau – Portugal	08/04/2006	12 months
46	Haiti – France	25/03/1995	12 months
47	Haiti – Germany	01/12/1985	12 months
48	Haiti – United Kingdom	27/03/2005	12 months
49	Laos – Australia	08/04/2010	12 months
50	Laos – China	01/06/2003	12 months
51	Laos – Denmark	09/05/2009	12 months
52	Laos – France	08/03/2001	12 months
53	Laos – Germany	24/03/2009	12 months
54	Laos – India	05/01/2018	12 months
55	Laos – Japan	03/08/2018	12 months
56	Laos – Republic of Korea	14/06/2011	12 months
57	Laos – Mongolia	29/12/2004	6 months
58	Laos – Pakistan	19/03/2017	12 months
59	Laos – Singapore	26/03/2008	12 months
60	Laos – Sweden	01/01/2017	12 months
61	Laos – Thailand	07/12/2000	12 months
62	Laos – United Kingdom	01/06/2005	12 months
63	Laos – Vietnam	23/06/2006	12 months
64	Lesotho – Germany	17/08/1995	12 months
65	Lesotho – United Kingdom	18/02/1991	12 months
66	Liberia – France	22/01/1992	12 months

67	Liberia – Germany	22/10/1977	12 months
68	Liberia – Switzerland	No initial validity period	12 months
69	Madagascar – China	01/07/2017	12 months
70	Madagascar – France	17/04/2015	12 months
71	Madagascar – Mauritius	29/12/2015	12 months
72	Malawi – Egypt	07/09/2009	12 months
73	Mali – Canada	No initial validity period	12 months
74	Mali – Germany	16/05/1990	12 months
75	Mauritania – Germany	26/04/1996	12 months
76	Mauritania – Republic of Korea	21/07/2016	12 months
77	Mauritania - Switzerland	30/05/2018	3 months
78	Mozambique – Algeria	25/07/2010	12 months
79	Mozambique – Finland	21/09/2015	12 months
80	Mozambique – Mauritius	26/05/2013	12 months
81	Mozambique – United Kingdom	12/05/2014	12 months
82	Mozambique – USA	03/03/2015	12 months
83	Myanmar – China	21/05/2012	12 months
84	Myanmar-Laos	28/08/2017	12 months
85	Nepal – France	13/06/1995	12 months
86	Nepal – Germany	07/07/1998	12 months
87	Nepal – United Kingdom	02/03/2003	12 months
88	Niger – Germany	10/01/1976	12 months
89	Niger – Switzerland	31/12/2017	3 months
90	Rwanda – Germany	28/02/1979	12 months
91	Senegal – Canada	No initial validity period	12 months

92	Senegal – Germany	16/01/1976	12 months
93	Senegal – United Kingdom	09/02/1994	12 months
94	Senegal – USA	25/10/2000	12 months
95	Sierra Leone – Germany	10/12/1969	12 months
96	Sierra Leone – United Kingdom	20/11/2011	12 months
97	Somalia – Germany	15/02/1995	12 months
98	Sudan – France	05/07/1990	12 months
99	Sudan – Germany	24/01/1972	12 months
100	Tanzania – Denmark	24/10/2015	12 months
101	Tanzania – Finland	30/10/2012	12 months
102	Tanzania – Germany	12/07/1978	12 months
103	Tanzania – Italy	25/04/2013	12 months
104	Tanzania – Sweden	01/03/2012	12 months
105	Tanzania – Switzerland	06/04/2016	6 months
106	Tanzania – United Kingdom	02/08/2006	12 months
107	Togo – Germany	21/12/1974	12 months
108	Uganda – Denmark	19/10/2015	12 months
109	Uganda – Germany	19/08/1978	12 months
110	Uganda – Netherlands	01/01/2018	6 months
111	Uganda – Switzerland	08/05/1977	6 months
112	Uganda – United Kingdom	24/04/2008	12 months
113	Yemen – Germany	28/03/2018	12 months
114	Yemen – Sweden	23/02/1994	12 months
115	Yemen – United Kingdom	11/11/1993	12 months
116	Zambia – Germany	25/08/1977	12 months

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Table 1.2: BITs with initial validity periods still running but expiring before 2025

No.	BIT	Expiry date	Deadline for termination notification
1	Angola – Russian Federation	12/01/2021	12/01/2020
2	Bangladesh – Denmark	27/02/2023	27/02/2023
3	Bangladesh – India	07/07/2021	07/07/2020
4	Bangladesh – Indonesia	22/04/2019	22/04/2018
5	Bangladesh – Italy	20/09/2019 20/09/2024	20/09/2018 20/09/2023
6	Bangladesh – Netherlands	01/06/2021	01/12/2020
7	Bangladesh – Poland	19/11/2019	19/11/2018
8	Bangladesh – Singapore	19/11/2019	19/11/2019
9	Bangladesh – Switzerland	03/09/2019 03/09/2021 03/09/2023 03/09/2025	03/03/2019 03/03/2021 03/03/2023 03/03/2025
10	Bangladesh – Uzbekistan	24/01/2021	24/01/2020
11	Burkina Faso – Germany	21/11/2019	21/11/2018
12	Burkina Faso – Republic of Korea	14/04/2020	14/04/2019
13	Burundi – Kenya	01/04/2019	01/04/2019
14	Cambodia – Czech Republic	23/10/2019	23/10/2019
15	Cambodia – Netherlands	01/03/2021	01/09/2020
16	Cambodia – Switzerland	28/03/2020 28/08/2022	28/09/2019 28/09/2021

		28/08/2024	28/09/2023
17	Ethiopia – Algeria	01/11/2025	01/11/2024
18	Ethiopia – Egypt	27/05/2020	27/05/2019
19	Ethiopia – France	07/08/2024	07/08/2024
20	Ethiopia – Netherlands	01/07/2020	01/01/2020
21	Ethiopia – Sudan	15/05/2021	15/05/2020
22	Ethiopia – Sweden	01/10/2025	01/10/2025
23	Ethiopia – Switzerland	07/12/2023	07/12/2022
24	Gambia – Taiwan Province of China	13/10/2020	13/10/2019
25	Gambia – Morocco	12/10/2021	12/04/2021
26	Gambia – Netherlands	01/04/2022	01/10/2021
27	Gambia – Switzerland	30/03/2020 30/03/2022 20/03/2024	30/09/2019 30/09/2021 30/09/2023
28	Guinea – Germany	14/08/2024	14/08/2023
29	Guinea – Switzerland	31/12/2018 31/12/2019	29/09/2018 29/09/2019
30	Guinea – Serbia	13/03/2023	13/03/2022
31	Laos – Netherlands	01/05/2020	01/11/2019
32	Laos – Russian Federation	22/03/2021	22/03/2020
33	Laos – Switzerland	04/12/2020 04/12/2022 04/12/2024	04/06/2020 04/06/2022 04/06/2024
34	Lesotho – Switzerland	07/05/2025	07/05/2024
35	Madagascar – Germany	17/10/2025	17/10/2024
36	Madagascar – Sweden	23/06/2019 23/06/2020	23/03/2019 23/03/2020

		23/06/2021	23/03/2021
		23/06/2022	23/03/2022
		23/06/2023	23/03/2023
		23/06/2024	23/03/2024
		23/06/2025	23/03/2025
37	Madagascar – Switzerland	07/05/2025	07/11/2024
38	Malawi – Italy	21/03/2022	21/03/2021
39	Malawi – Netherlands	01/11/2022	01/05/2022
40	Mali – Egypt	07/07/2020	07/01/2020
41	Mali – Netherlands	01/03/2020	01/09/2019
42	Mali – Switzerland	08/12/2020	08/06/2019
		08/12/2022	08/06/2021
		08/12/2024	08/06/2023
43	Mauritania – Burkina Faso	18/08/2023	18/02/2023
44	Mauritania – Italy	09/12/2019	09/12/2018
		09/12/2024	09/12/2023
45	Mozambique – BLEU	01/09/2019	01/03/2019
46	Mozambique-France	06/07/2021	06/07/2020
47	Mozambique – Germany	15/09/2022	15/09/2021
48	Mozambique – India	23/09/2019	23/09/2018
49	Mozambique – Indonesia	25/07/2020	25/07/2019
50	Mozambique – Italy	17/11/2023	17/11/2023
51	Mozambique – Japan	29/08/2024	29/08/2023
52	Mozambique – Netherlands	01/09/2019	01/03/2019
53	Mozambique – Switzerland	17/02/2024	17/02/2023
54	Myanmar – India	08/02/2019	08/02/2018
55	Myanmar – Japan	07/08/2024	07/08/2023
56	Myanmar – Philippines	11/09/2023	11/09/2022

57	Myanmar – Thailand	17/07/2022	17/07/2021
58	Nepal – Finland	28/01/2021	28/01/2020
59	Rwanda – BLEU	01/08/2020 01/08/2025	01/02/2020 01/02/2025
60	Rwanda – The People’s Republic of Korea	16/02/2023	16/02/2022
61	Rwanda - USA	01/01/2022	01/01/2021
62	Senegal – France	30/05/2020	30/05/2019
63	Senegal – Italy	16/12/2023	16/12/2022
64	Senegal – Romania	19/05/2024	19/05/2023
65	Senegal – South Africa	29/12/2020	29/12/2019
66	Senegal – Spain	04/02/2021	04/02/2020
67	Senegal – Turkey	17/07/2022	17/07/2021
68	Sudan – Ethiopia	15/05/2021	15/05/2020
69	Sudan – India	18/10/2020	18/10/2019
70	Sudan – Jordan	02/02/2021	02/02/2020
71	Sudan – Netherlands	27/03/2022	27/09/2021
72	Sudan – Switzerland	14/12/2019 4/12/2024	14/06/2019 14/06/2024
73	Tanzania – Canada	09/12/2023	09/12/2022
74	Tanzania – Netherlands	01/04/2019	01/09/2018
75	Tanzania – China	17/04/2024	17/04/2023
76	Tanzania – Mauritius	02/03/2023	02/03/2022
77	Timor Leste – Portugal	07/04/2024	07/04/2023
78	Togo – Switzerland	31/12/2018 31/12/2019 31/12/2020 01/12/2021 31/12/2022	01/10/2018 01/10/2019 01/10/2020 01/10/2021 01/10/2022

		01/12/2023 31/12/2024	01/10/2023 01/10/2024
79	Uganda – France	20/12/2024	20/12/2023
80	Yemen – Austria	01/07/2024	01/07/2018 01/07/2019 01/07/2020 01/07/2021 01/07/2022 01/07/2023
81	Yemen – Italy	03/05/2023	03/05/2022
82	Yemen – Netherlands	01/09/2021	28/02/2021
83	Zambia – Italy	02/12/2024	02/12/2023
84	Zambia – Switzerland	07/03/2019 07/03/2021 07/03/2023 07/03/2025	07/10/2018 07/10/2020 07/10/2022 07/10/2024

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Table 1.3: BITs with initial validity periods expiring after 2025

No.	BIT	Expiry date
1	Cambodia – Croatia	15/06/2032
2	Cambodia – Russian Federation	07/03/2031
3	Ethiopia – Finland	03/05/2027
4	Ethiopia – Kuwait	12/11/2028
5	Laos – Cuba	10/06/2028
6	Madagascar – BLEU	29/11/2028
7	Mali – Algeria	16/02/2029
8	Mali – Morocco	02/03/2026
9	Mauritania – Lebanon	30/04/2026
10	Mauritania – Spain	07/03/2026
11	Zambia – France	03/03/2034
12	Zambia – Mauritius	06/05/2026
13	Zambia – Netherlands	28/02/2029

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Table 1.4: The initial validity periods in BITs of LDCs

Initial validity period	Number of BITs	Percentage (%)
Not specified	4	1.878
1 year	3	1.408
2 years	1	0.469
3 years	1	0.469
5 years	9	4.225
10 years	165	77.465
15 years	23	10.798
20 years	6	2.819
30 years	1	0.469
Overall	213	100%

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Table 1.5: Duration periods of survival clauses in LDC's BITs

Survival clause period	Number of BITs	Percentage (%)
5 years	12	5.63
6 years	1	0.45
10 years	106	49.77
15 years	43	20.19
20 years	46	21.61
Not specified	5	2.35
Overall	213	100%