



# Terminating a Bilateral Investment Treaty

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### Terminating a Bilateral Investment Treaty

March 2020

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# Table of Contents

<b>1.0 Introduction .....</b>	<b>1</b>
<b>2.0 Background .....</b>	<b>2</b>
2.1 Termination of a Bilateral Investment Treaty Under Public International Law .....	2
2.2 Termination Clauses in BITs .....	2
2.2.1 The “Tacit Renewal” Termination Clause .....	2
2.2.2 The “Fixed-Term” Termination Clause .....	3
2.2.3 Difference Between the Tacit Renewal and Fixed-Term Termination Clauses .....	3
2.3 Survival Clauses in BITs .....	4
<b>3.0 State Practice .....</b>	<b>5</b>
3.1 Trends in Drafting Termination and Survival Clauses .....	5
3.2 Trends in Implementing the Termination of BITs .....	6
3.2.1 Termination by Consent with Renegotiation .....	6
3.2.2 Termination by Consent Without Renegotiation .....	7
3.2.3 Unilateral Termination .....	7
3.3 Trends in Addressing the Survival Clause When Terminating a BIT .....	8
<b>4.0 Considerations for Terminating BITs .....</b>	<b>10</b>
4.1 Terminating by Consent .....	10
4.1.1 Form .....	10
4.1.2 Options and Considerations for Terminating by Consent .....	11
4.2 Terminating Unilaterally .....	12
4.2.1 Form .....	12
4.2.2 Options and Considerations for Terminating Unilaterally .....	12
4.3 Addressing the Survival Clause .....	13
4.4 Keeping Track of Key Dates on Termination and Survival .....	14
<b>5.0 Drafting Termination and Survival Clauses in New BITs .....</b>	<b>16</b>



# 1.0 Introduction

The termination of bilateral investment treaties (BITs) is a growing issue as more countries re-evaluate their costs and benefits. A large and increasing number of states and other stakeholders now acknowledge the need for reform, perceiving the investment treaty regime to be unbalanced and inadequate. Various reform initiatives are ongoing at the global, regional and national levels. For an increasing number of countries, the response at the national level has been to terminate or renegotiate their old-generation BITs. This approach is one of the 10 policy options that the United Nations Conference on Trade and Development (UNCTAD) presents in its Phase II for international investment agreement (IIA) reform, which focuses on “modernizing the existing stock of old-generation treaties.”<sup>1</sup>

In 2017, for the first time, the number of effective terminations outpaced the number of new treaties signed, with 22 terminations taking effect and only 18 new treaties concluded. The following year saw similar figures, with at least 24 terminations taking effect.<sup>2</sup> As a result, the total number of effective terminations was 309 at the end of 2019.<sup>3</sup> The trend to terminate old-generation BITs began less than a decade ago<sup>4</sup> and will likely intensify in coming years with the increased awareness about the problems with BITs and investor–state dispute settlement (ISDS), along with developments in the EU regarding the legality of intra-EU BITs.

This Best Practices paper examines recent state practice in BIT terminations and related drafting. It then presents options and recommendations for states interested in addressing their stock of older BITs through termination and renegotiation.

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<sup>1</sup> United Nations Conference on Trade and Development. (2017). *World investment report 2017: Investment and the digital economy*. Chapter III. United Nations. [https://unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf)

<sup>2</sup> United Nations Conference on Trade and Development. (2018). *Recent development in the international investment regime*. United Nations. [https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf); United Nations Conference on Trade and Development. (2019). *World investment report 2019*, p. 100. United Nations. <https://investmentpolicy.unctad.org/publications/1204/world-investment-report-2019---special-economic-zones#targetText=World%20Investment%20Report%202019%20%2D%20Special,UNCTAD's%20World%20Investment%20Report%202019>

<sup>3</sup> United Nations Conference on Trade and Development. (2019). *World investment report 2019*, p. 100. United Nations. <https://investmentpolicy.unctad.org/publications/1204/world-investment-report-2019---special-economic-zones#targetText=World%20Investment%20Report%202019%20%2D%20Special,UNCTAD's%20World%20Investment%20Report%202019>

<sup>4</sup> Voon, T. & Mitchell, A. (2016). Denunciation, termination and survival: the interplay of treaty law and international investment law. *ICSID Review-Foreign Investment Law Journal*, 31(2), 413–433. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735974)



## 2.0 Background

### 2.1 Termination of a Bilateral Investment Treaty Under Public International Law

How and when a state can terminate a BIT—and when that termination will become operational—is determined by customary international law as reflected in the Vienna Convention on the Law of Treaties (VCLT),<sup>5</sup> as well as the provisions of the BIT itself. The key provisions are the termination clause and the so-called “survival clause.” Article 54 of the VCLT provides:

*Article 54: Termination of or withdrawal from a treaty under its provisions or by consent of the parties*

The termination of a treaty or the withdrawal of a party may take place:

- a) in conformity with the provisions of the treaty; or
- b) at any time by consent of all the parties after consultation with the other contracting States.

Therefore, a state wishing to terminate a BIT unilaterally or withdraw from it must do so in accordance with the BIT’s termination provisions. Most BITs contain such provisions, but these may differ significantly. Article 54 also makes clear that if contracting parties agree to terminate, they may do so at any time.

### 2.2 Termination Clauses in BITs

There are two main models of termination clauses used in BITs. One is the “tacit renewal” termination clause, used in the 2004 Dutch Model BIT (which has now been replaced by the 2019 version). The other is the “fixed-term” termination clause, used in the 2004/2012 U.S. Model BIT. Most BITs follow one of these two models of termination clauses. New and different drafting approaches to termination and survival clauses are emerging, which are discussed in Section 3.0.

#### 2.2.1 The “Tacit Renewal” Termination Clause

Under BITs with a tacit renewal termination clause, the BIT is in force for a specified number of years (or “term”). At the end of that term, the BIT is automatically (or “tacitly”) renewed for an additional term, unless either party decides to use the limited window of time (often six months) available to terminate it before the first term expires. Once tacitly renewed, the BIT cannot be terminated before the expiry of the second term. Accordingly, the BIT is

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<sup>5</sup> The Vienna Convention on the Law of Treaties establishes the rules and procedures in relation to treaties. It was adopted and opened to signature on May 23, 1969, and entered into force on January 27, 1980. While recognized by the majority of (but not all) states, parts of the Convention have been recognized as a restatement of customary international law.



successively and periodically renewed unless terminated within the limited window of time provided before the end of each term. Termination under this type of clause takes effect as soon as the termination is notified, subject to the survival clause (explained below).

Article 26.2 of the 2019 Dutch Model BIT is an example of this type of termination clause:

Unless notice of termination has been given by either Contracting Party at least six months before the date of its expiry, the present Agreement shall be extended tacitly for periods of five 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.<sup>6</sup>

In the BITs following this model, the initial term of the BIT varies, setting out timeframes of 5, 10, 15 or 20 years, for example. Subsequent terms are usually equal to or shorter than the initial term. According to the UNCTAD IIA Mapping Project,<sup>7</sup> just over 20% of mapped treaties include the tacit renewal termination clause.

## 2.2.2 The “Fixed-Term” Termination Clause

Under the fixed-term termination clause, the BIT enters into force for an agreed period of time that is set out in the treaty, and after the expiry of that term, either party can terminate it at any time by sending a notice to the other party. Termination under such a clause does not take effect immediately upon notification, but only after a certain period of time has elapsed since the notification. This is usually a period of one year. Article 22 of the U.S. Model BIT (2004 and 2012) uses this type of termination clause:

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.
2. 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.

Just over 60% of investment treaties mapped by the UNCTAD IIA Mapping Project use the fixed-term termination clause.<sup>8</sup>

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<sup>6</sup> Netherlands Model Investment Agreement. <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>

<sup>7</sup> This amounts to 616 out of a total of 2,536 BITs, see <https://investmentpolicyhub.unctad.org/IIA/mappedContent>

<sup>8</sup> This amounts to 1,621 out of a total of 2,536 BITs, see <https://investmentpolicyhub.unctad.org/IIA/mappedContent>



### 2.2.3 Difference Between the Tacit Renewal and Fixed-Term Termination Clauses

The key difference between these two types of clauses is that the tacit renewal termination clause involves a “window” for a state to terminate, which if missed, will not come around again for a certain period of time. The fixed-term clause, on the other hand, does not involve a “window”; the BIT can be terminated at any time after the first term has elapsed.

## 2.3 Survival Clauses in BITs

Most BITs include so-called “survival” clauses. These types of clauses are a unique BIT feature, allowing for the BIT to continue producing legal effects after it has been terminated, for a specified period of time. These legal effects will typically only apply to investments established in the host country after the BIT came into force, but before it was terminated. In practice, this means that those investors can use a terminated BIT to launch an international arbitration against the state during the survival period. However, it does not grant any rights to the other party’s investors that establish in the host country after the BIT is terminated.

Many BITs have survival clauses ranging from 10 to 20 years. In 56% of the treaties mapped by UNCTAD, the survival clause has a period of 10 years, and in 20% the survival clause lasts 15 years.<sup>9</sup>

For example, the 2019 Dutch Model BIT’s survival clause is formulated as follows (Article 26.3):

In respect of investments made before the date of the termination of the present Agreement, this Agreement shall continue to be in effect for a further period of fifteen years from that date.

The survival clause of the 2004/2012 U.S. Model BIT, in turn, is formulated as follows (Article 22.3):

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, [...]

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<sup>9</sup> Currently, 15% of mapped treaties have a survival clause of 20 years, and 3% have a survival clause of 5 years. Almost 3% of treaties mapped by UNCTAD have no survival clause. See <https://investmentpolicyhub.unctad.org/IIA/mappedContent>



## 3.0 State Practice

### 3.1 Trends in Drafting Termination and Survival Clauses

While most BITs use the tacit renewal termination clause or the fixed-term termination clause outlined above, different practices in termination clause drafting are emerging. For instance, the 2004 Canadian Model BIT provides for the flexible approach of an indefinite term, with the possibility of unilateral termination at any time. Article 52(3) of the 2004 Canadian Model BIT provides:<sup>10</sup>

This Agreement shall remain in force unless either Party notifies the other Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Party. [...]

The 2015 Indian Model BIT provides for a single fixed term, after which the parties must confirm their willingness to renew the BIT; otherwise, it expires and ceases to be in force. The Indian Model BIT also allows for unilateral termination at any time with 12 months' notice. Article 38.2 of the Indian Model BIT provides:<sup>11</sup>

This Treaty shall remain in force for a period of ten years and shall lapse thereafter unless the Parties expressly agree in writing that it shall be renewed. This Treaty may be terminated anytime after its entry into force if either Party gives to the other Party a prior notice in writing twelve (12) months in advance stating its intention to terminate the Treaty. The Treaty shall stand terminated immediately after the expiry of the twelve (12) month notice period.

The 2016 Morocco–Nigeria BIT<sup>12</sup> includes a similar provision. It provides for an initial duration of 10 years, which may be renewed upon mutual agreement, but it also allows either party to terminate “at any time” with six months' advance notice.

Some recent treaties—such as the 2016 Morocco–Nigeria BIT and the Cooperation and Facilitation Agreements (CFIAs) signed by Brazil since 2015—do not contain survival clauses. Others include a survival clause that is shorter in duration; for instance, Article 24.2 of the 2015 Indian Model BIT provides for only a five-year survival clause.

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<sup>10</sup> Canadian Model BIT 2004, Art. 52(3). <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download>. This approach is included in 36 Canadian BITs mapped by UNCTAD, such as the 2016 Canada–Mongolia BIT, the 2016 Canada–Hong Kong BIT and the 2015 Canada–Guinea BIT.

<sup>11</sup> India Model Bilateral Investment Treaty (2015). <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download>; see also India–Belarus BIT (2018). <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3839/belarus---india-bit-2018->

<sup>12</sup> Morocco–Nigeria BIT (2016). <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/other/3711/morocco---nigeria-bit-2016->





## 3.2 Trends in Implementing the Termination of BITs

Recent state practice illustrates the wide range of options available to states in terminating their stock of old-generation BITs. The decision to terminate may be mutual (‘by consent’) or unilateral, and a new BIT may or may not be negotiated to replace the terminated one. Where a new BIT is negotiated, states may conclude a new BIT that terminates and replaces the old one, or the old BIT may be terminated first, with negotiations for a replacement BIT taking place afterwards.

### 3.2.1 Termination by Consent with Renegotiation

The state parties may both agree to negotiate a new BIT, which will terminate and replace an existing one. For example, in early 2019, Australia negotiated two new BITs, one with Hong Kong<sup>13</sup> and one with Uruguay,<sup>14</sup> both of which terminated and replaced older BITs from 1993 and 2001, respectively.

Mutual termination of BITs with a new replacement treaty also takes place in some instances where the states involved negotiate trade agreements containing investment chapters. The new agreement may serve as the instrument of termination, or the termination may take place through a separate, though related, process. For example, Australia exchanged side letters with Mexico,<sup>15</sup> Peru,<sup>16</sup> and Viet Nam<sup>17</sup> in which the parties agreed to the termination of BITs between them upon the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). In the case of the Canada–EU Comprehensive Economic and Trade Agreement (CETA),<sup>18</sup> the text of that agreement provides that the eight BITs between Canada and some EU member states,<sup>19</sup> which are listed in an annex to the agreement, “shall cease to have effect, and shall be replaced and superseded by this Agreement” with effect

<sup>13</sup> Australian Department of Foreign Affairs and Trade. (2019). *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China*. <https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/Pages/the-investment-agreement-text.aspx>

<sup>14</sup> Australian Department of Foreign Affairs and Trade. (2019). *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*. <https://dfat.gov.au/trade/investment/Documents/agreement-between-australia-and-uruguay-on-the-promotion-and-protection-of-investments.pdf>

<sup>15</sup> Australian Department of Foreign Affairs and Trade. (2019). *Letter from Andrew Robb, Minister for Trade and Investment of Australia to Ildelfonso Guajardo Villarreal, Minister of Economy of Mexico*. <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/australia-mexico-termination-of-investment-promotion-and-protection-agreement.PDF>

<sup>16</sup> Australian Department of Foreign Affairs and Trade. (2019). *Letter from Andrew Robb, Minister for Trade and Investment of Australia to Ana María Sánchez de Ríos, Minister of Foreign Affairs of Peru*. <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/australia-peru-termination-of-investment-promotion-and-protection-agreement.PDF>

<sup>17</sup> Australian Department of Foreign Affairs and Trade. (2019). *Letter from Andrew Robb, Minister for Trade and Investment of Australia to Dr. Vu Huy Hoang, Minister of Industry and Trade of Vietnam*. <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/australia-vietnam-termination-of-investment-promotion-and-protection-agreement.PDF>

<sup>18</sup> European Commission. (n.d.). *CETA chapter by chapter*. <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>

<sup>19</sup> Croatia, Czech Republic, Hungary, Latvia, Malta, Poland, Romania and the Slovak Republic.



from the entry into force of the CETA.<sup>20</sup> The investment chapter of the 2017 Argentina–Chile free trade agreement (FTA) contains an annex providing for the termination of the 1991 Argentina–Chile BIT upon entry into force of the trade agreement.<sup>21</sup>

### 3.2.2 Termination by Consent Without Renegotiation

State parties to a BIT may agree to terminate that BIT without concluding a new one to replace it. For instance, in 2009 and 2010 the Czech Republic terminated its BITs with Denmark, Italy, Malta and Slovenia by mutual agreement, in an exchange of notes (*note verbale*) that was deemed to constitute an agreement to terminate the BIT.<sup>22</sup> These terminations took place in the context of the European Commission encouraging EU member states to terminate intra-EU BITs, on the grounds that these are unnecessary and in conflict with EU law. As such, the parties have not negotiated new BITs to replace the terminated ones.

Termination without the negotiation of a new agreement is also possible through a multilateral instrument. For example, the remaining intra-EU BITs will be terminated by a mutual, plurilateral termination treaty, which is now awaiting signature and ratification, and these BITs are not to be replaced with any new ones.<sup>23</sup>

### 3.2.3 Unilateral Termination

Some states choose to unilaterally terminate BITs without simultaneously entering into new negotiations for a replacement BIT. Ecuador, for instance, unilaterally terminated nine BITs in 2008, namely those involving Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. This followed the country's promulgation of a new constitution in the same year, with a provision preventing treaties in which the state "yields its sovereign jurisdiction to international arbitration." Ecuador also terminated one BIT in 2011 and a further 16 BITs in 2017, all unilaterally.<sup>24</sup>

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<sup>20</sup> European Commission (2016). *Comprehensive Economic and Trade Agreement between the European Union and Canada: Article 30.8*. <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter>

<sup>21</sup> Argentina–Chile FTA (2017), Annex 8.2. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3796/argentina---chile-fta-2017->

<sup>22</sup> Voon, T. & Mitchell, A. (2016) Denunciation, termination and survival: the interplay of treaty law and international investment law. *ICSID Review-Foreign Investment Law Journal* 31(2), 413–433. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735974)

<sup>23</sup> European Commission. (2019). *Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection*. [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties\\_en](https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en)

<sup>24</sup> Jaramillo, J. & Muriel-Bedoya, C. (2017). *Ecuadorian BITs' termination revisited: Behind the scenes*. <http://arbitrationblog.kluwerarbitration.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes/>



Similarly, between 2014 and 2017, Indonesia unilaterally terminated BITs with 25 states.<sup>25</sup> In 2016, India sent official notices to unilaterally terminate BITs with 61 partner states,<sup>26</sup> for which the initial term had already expired or was due to expire in the near future.<sup>27</sup> This followed the internal approval and publication of India's revised model BIT in 2015. This revised model has formed the basis of new negotiations entered into by India since that time.<sup>28</sup>

### 3.3 Trends in Addressing the Survival Clause When Terminating a BIT

Some states have agreed to extinguish or shorten the survival clause as a part of the termination or renegotiation process.

Both the new Australia–Hong Kong and Uruguay–Australia BITs mentioned above contain provisions to terminate and replace the old BIT and to specifically nullify the survival clauses of those BITs. As an illustration, the new Australia–Hong Kong BIT provides:<sup>29</sup>

[The 1993 BIT] shall terminate on the date of entry into force of this Agreement. From that date, all provisions of the [BIT], including the provisions for termination contained in Article 14 (Entry into Force and Duration and Termination) [containing a 15-year survival clause], and any rights or obligations arising from those provisions, shall cease to have effect.

Article 30.8 of CETA replaces the survival clauses of each of the terminated BITs between Canada and various EU member states with the following three-year survival clause, which applies specifically to dispute settlement:

2. Notwithstanding paragraph 1, a claim may be submitted under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement if:
  - a) the treatment that is object of the claim was accorded when the agreement was not terminated; and
  - b) no more than three years have elapsed since the date of termination of the agreement.

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<sup>25</sup> Belgium, Bulgaria, Cambodia, China, Denmark, Egypt, Finland, France, Germany, Hungary, India, Italy, Kyrgyzstan, Lao PDR, Malaysia, the Netherlands, Norway, Pakistan, Romania, Singapore, Slovakia, Spain, Switzerland, Turkey and Vietnam.

<sup>26</sup> UNCTAD Investment Policy Hub. (n.d.). *India bilateral investment treaties*. <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india>

<sup>27</sup> IISD Investment Treaty News. (2016). *India takes steps to reform its investment policy framework after approving new model BIT*. <https://www.iisd.org/itn/2016/08/10/india-takes-steps-to-reform-its-investment-policy-framework-after-approving-new-model-bit/>

<sup>28</sup> International Institute for Sustainable Development. (2018). *11th Annual Forum of Developing Country Investment Negotiators Meeting Report*. <https://www.iisd.org/sites/default/files/meterial/11th-annual-forum-report-en.pdf>

<sup>29</sup> Article 39(2) of the *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China*. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5830/download>



The 2017 Argentina–Chile FTA, which was incorporated into the existing Chile–Mercosur Economic Complementation Agreement, adopted a similar approach. The parties agreed to terminate the 1991 BIT between them upon entry into force of the trade agreement. In addition, they agreed that the BIT would continue to apply to situations that took place before the entry into force of the trade agreement, provided that the investor initiates any ISDS claim under the BIT within three years of entry into force of the FTA.<sup>30</sup> Accordingly, the parties have effectively limited the application of the survival clause to three years.

The bilateral exchange of side letters between Australia and its partner states Mexico, Peru and Viet Nam referred to above (Section 3.2.1) in the context of the CPTPP contained an agreement to terminate the relevant BITs. Survival clauses were also shortened: in the case of Australia–Mexico to three years, and in the case of Australia–Viet Nam and Australia–Peru to five years.

States have also dealt with the survival clause when terminating a BIT without negotiating a new agreement. For example, in the exchange of notes between the Czech Republic and various EU member states discussed above (Section 3.2.2), the parties explicitly agreed to amend the survival clause in their respective BITs so that it “shall not further apply,” effectively extinguishing it.<sup>31</sup>

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<sup>30</sup> Argentina–Chile FTA (2017), Annex 8.2. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3796/argentina---chile-fta-2017->

<sup>31</sup> Peterson, L. (2011). Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments. *IARReporter*. <https://www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-doubt-on-residual-legal-protection-for-existing-investments/>



## 4.0 Considerations for Terminating BITs

The remainder of this Best Practices brief sets out factors that states may wish to take into consideration in deciding how to terminate a BIT, and recommendations for preparing for and carrying out termination.

Depending on the situation, the party wishing to terminate may prefer to terminate the BIT by consent or unilaterally. As mentioned earlier, unilateral termination of a BIT is permitted under public international law but must occur “in conformity with the provisions of the treaty.”<sup>32</sup> The conditions for unilateral termination therefore vary depending on what type of termination clause the BIT contains. By contrast, a BIT may be terminated “at any time by consent of all the parties”<sup>33</sup> and under conditions agreed upon. If both states agree to terminate the BIT, doing so by consent allows them, in the same occasion, to define a schedule for any negotiations of a new BIT or to neutralize or shorten the survival clause of the terminated BIT, or both.

States wishing to terminate a BIT therefore have different options for how to proceed. A 2017 UNCTAD study<sup>34</sup> found that out of 212 BITs terminated as at March 2017, 9% were jointly terminated without the parties negotiating any replacement BIT, 28% were unilaterally terminated without a replacement, and 63% were replaced by a new treaty.

### 4.1 Terminating by Consent

#### 4.1.1 Form

States have complete flexibility as to the form of the instrument to be adopted to terminate a BIT by consent. International law does not require states to adopt a specific form to terminate a BIT by consent; all it requires is agreement to terminate the BIT. In its commentary to the draft article of the VCLT governing termination of treaties by consent, the United Nations International Law Commission (ILC) explained:<sup>35</sup>

The Commission considered that, whatever may be the provisions of a treaty regarding its own termination, it is always possible for all the parties to agree together to put an end to the treaty. It also considered that the particular form which such an agreement may take is a matter for the parties themselves to decide in each case. ... **The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty.** ... [I]nternational law requires no more than that they should consent to the treaty's termination [emphasis added].

<sup>32</sup> Art. 54(a) of the *Vienna Convention on the Law of Treaties* (1969). <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

<sup>33</sup> Art. 54(b) of the *Vienna Convention on the Law of Treaties*. The condition under this provision that termination may occur only “after consultation with the other contracting States” is not relevant in the context of a BIT, which has no “other contracting States”; consent of both parties suffices.

<sup>34</sup> United Nations Conference on Trade and Development. (2017). *Phase 2 of IIA Reform: Modernizing the existing stock of old-generation treaties*. [https://unctad.org/en/PublicationsLibrary/diaepcb2017d3\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf)

<sup>35</sup> International Law Commission. (1966). *Draft articles on the Law of Treaties with commentaries*. Art. 51, para. 3. [http://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_1\\_1966.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf)



As noted above, in practice some states have effected termination through a provision in a new treaty, such as the CETA and the Australia–Hong Kong and Australia–Uruguay BITs. Others have done so through an exchange of notes, such as the Czech Republic’s BITs with various EU member states, or the negotiation of side letters alongside a trade agreement, as seen with Australia’s BITs with Mexico, Viet Nam and Peru in the context of the CPTPP.

#### 4.1.2 Options and Considerations for Terminating by Consent

One approach to mutually terminating a BIT is to negotiate a new BIT, which will include a clause terminating the old one. This option is particularly relevant when termination by consent is the only available option for termination, due to a restrictive termination clause. It may also be the most suitable approach for simultaneously neutralizing or shortening the survival clause, as seen in the above-mentioned approach taken by Australia in its new BITs with Hong Kong and Uruguay. The main drawback of this option is that it can carry a risk of states feeling pressure to conclude negotiations for a new BIT in order to terminate and replace the old one, even if the countries’ model BITs or positions are irreconcilable.

Long renegotiation processes also carry the risk for a state to miss the opportunity to terminate (unilaterally) under the limited termination window in the context of a tacit renewal termination clause. It is therefore important that states in the process of a renegotiation be aware of the applicable termination clauses to avoid the renewal of an outdated BIT for another multi-year period, in case the negotiations cannot be successfully concluded.

Likeminded state parties to a BIT may agree to terminate that BIT without concluding a new one to replace it. This could be a solution for states that want to exit the international investment protection system or are part of a regional body, such as the EU. It could also be a solution for governments that are covered by multiple investment treaties at the bilateral and regional levels and wish to simplify and reorganize overlapping treaties and commitments. The advantage of mutual termination as opposed to unilateral termination in this context is that it allows the parties to reach an agreement for dealing with the survival clause (explained in more detail below in Section 4.3).

Finally, termination of BITs by consent could also be done at the multilateral level. As mentioned earlier, this is the approach taken for the termination of intra-EU BITs. The advantage of a multilateral approach is that it is a simpler and more systematic way of terminating and reforming outdated BITs because it does not require individual bilateral terminations or renegotiations. Like bilateral termination, a multilateral approach to termination could be done in connection with the negotiation of a new investment treaty among the state parties (for example a regional agreement), or it could have the sole goal of terminating the BITs between the state parties (for example the EU plurilateral termination treaty).





Multilateral termination could be an issue to discuss at UNCITRAL, where at the time of publication, ISDS reform is being discussed under the Working Group III process. An alternative to multilateral termination could also be the multilateral, consensual withdrawal of consent to ISDS, or by restricting access to ISDS to certain types of disputes.<sup>36</sup>

## 4.2 Terminating Unilaterally

### 4.2.1 Form

In some cases, a state may prefer resorting to unilateral termination. This could be the result of a failed attempt to terminate by consent, or another reason, such as the decision to terminate various BITs simultaneously or the risk of missing a termination window. In the case of unilateral termination, it will be necessary for a state to send a diplomatic notification to the other party of its intent to terminate the BIT. There is no predetermined wording for how states would need to express this intent.

Unless a BIT provides otherwise, a notice of unilateral termination—like any other notification or communication—is considered as having been made by the terminating state not on the date of submission, but “only upon its receipt by the State to which it was transmitted.”<sup>37</sup> Accordingly, terminating states that are subject to a termination window (in the case of a tacit renewal termination clause) should be careful to allow sufficient time so that the other state receives the notice within that window. If the notice is sent by the terminating state during the termination window but only received by its partner state after the window has closed, under some agreements the notice may not be considered timely and effective.

### 4.2.2 Options and Considerations for Terminating Unilaterally

Some states may prefer to send a notice of termination along with an offer to enter into negotiations for a new BIT after the termination has come into effect. An advantage of this is that once the old BIT is terminated, the terminating state will have time to prepare for a new negotiation, and negotiations can be conducted without pressure or urgency. The terminating state will have the time and opportunity to develop its new BIT model if it has not already done so.

If no common ground can be found to conclude a deal or the political circumstances or priorities of the terminating state subsequently change, there is no binding obligation to conclude a new BIT. However, if the negotiations for a new BIT are discontinued, it may be more difficult to negotiate a solution to deal with the effects of the survival clause.

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<sup>36</sup> International Institute for Sustainable Development (IISD), Columbia Center on Sustainable Investment (CCSI), & International Institute for Environment and Development (IIED). (2019). *Draft treaty language: Withdrawal of consent to arbitrate and termination of international investment agreements*. <https://www.iisd.org/sites/default/files/uploads/uncitral-submission-termination-withdrawal-en.pdf>

<sup>37</sup> Vienna Convention, Article 78 on Notifications and communications.



Alternatively, some states may prefer to send a notice of termination without including an offer to negotiate a new BIT. Terminating without an offer to negotiate a new BIT may be the preferred option for a terminating state that:

- Has a national policy to phase out the use of BITs in favour of an alternative method of governing foreign direct investment (FDI) inflows, such as domestic laws, regional instruments, or both;
- Has not yet undertaken, is in the process of undertaking, or has only recently undertaken a reform process relating to BITs, and therefore needs time to develop its policy and priorities in this regard; or
- Has a new national policy on BITs, perhaps including a new model BIT (national or regional) and wants to avoid any pressure to negotiate a new BIT under terms not in line with that policy.

Not offering to renegotiate at the time of termination does not prevent the terminating state from proposing to negotiate a new BIT in the future.

### 4.3 Addressing the Survival Clause

A survival clause may mean that the advantages from terminating a BIT, in terms of reduced ISDS risk, will not be felt for some time after termination. Therefore, a key question is whether and how a state can “neutralize” the effects of a survival clause to ensure the termination takes effect as soon as possible.

In practice, neutralizing a survival clause must be done with the consent of both parties, regardless of whether the termination of the BIT itself is unilateral or by consent. While a BIT’s terms may allow for its unilateral termination, this power will not extend to permitting the terminating state to unilaterally neutralize the effect of the survival clause. Therefore, the terminating state must negotiate with the other state to neutralize the provision by consent after the BIT is unilaterally terminated. In the case of termination of a BIT by consent, both the termination and neutralization of the survival clause will occur through a consensual process.

While some investment law academics and practitioners hold the view that state parties cannot neutralize the survival clauses by mutual consent,<sup>38</sup> others consider that states do have this option.<sup>39</sup> Those holding the latter view argue that a BIT “is a treaty entered between States parties and depends on their continuing consent for its operation, notwithstanding the

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<sup>38</sup> They argue that investors have “direct (rather than derivative) rights under the treaty, which cannot be terminated at whim.” For an example of this argument see Zarowna, A. (2017). Termination of BITs and sunset clauses – What can investors in Poland expect? *Kluwer Arbitration Blog*. <http://arbitrationblog.kluwerarbitration.com/2017/02/28/booked-22-february-polish-bits/?print=pdf>

<sup>39</sup> See for example, Voon, T., Mitchell, A., & Munro, J. (2014). Parting ways: The impact of mutual termination of investment treaties on investor rights. *ICSID Review*, 29(2), 451–473. [https://www.researchgate.net/publication/270482566\\_Parting\\_Ways\\_The\\_Impact\\_of\\_Mutual\\_Termination\\_of\\_Investment\\_Treaties\\_on\\_Investor\\_Rights](https://www.researchgate.net/publication/270482566_Parting_Ways_The_Impact_of_Mutual_Termination_of_Investment_Treaties_on_Investor_Rights). “In terminating an IIA on the basis of mutual agreement States parties also have (and have been shown to exercise) the power to override so-called ‘survival’ clauses commonly found in [BITs], thereby excluding all future rights and claims under the treaty. This conclusion is based on fundamental precepts of the law of treaties and is unaffected by any alleged doctrine of ‘acquired rights’” (p. 452).





benefits that investors may obtain under the treaty.”<sup>40</sup> This position is also supported by recent state practice regarding survival clauses, referred to above. The guidance provided in this brief presumes that the mutual neutralization of the survival clause is permissible.

A terminating state could include in its notice of termination a proposal aimed at mitigating the impacts of the survival clause. For example, it could propose:

- Immediately extinguishing the survival clause upon termination of the BIT;
- Shortening the duration of the clause, for instance to a period of two to five years; or
- Maintaining the duration of the clause but limiting its application by carving out some guarantees, such as access to ISDS or the most problematic substantive provisions in the BIT (fair and equitable treatment, for example).

As outlined above, a negotiating partner may be more likely to agree to extinguish or at least shorten the survival clause when the notice of termination of the BIT is accompanied by a proposal to replace it with a newly negotiated BIT. As such, even for states that would prefer not to negotiate a new BIT, it may be advantageous in those circumstances to do so. This is because the opportunity to immediately terminate the old BIT and extinguish or shorten its survival clause may be more beneficial under the circumstances than having no new BIT but having to bear the application of the survival clause of the old BIT for up to 20 years.

## 4.4 Keeping Track of Key Dates on Termination and Survival

It is recommended that states keep track of key dates in their stock of BITs. This is especially important once a state decides to terminate some or all of its BITs, either by consent or unilaterally, with or without negotiation of a new BIT. Keeping track of dates is key, particularly for the tacit renewal termination clause, since a party can only unilaterally terminate within a set period of time before the first term ends. If this termination window is missed, a party wishing to terminate will have to wait another term, usually 10 or 15 years, to be able to do so, unless the partner country consents to an earlier termination. Some key dates would include:

- The date of the BIT’s entry into force.
- The date of the next tacit renewal (if applicable).
- The window for unilateral termination and deadline for receipt of the termination notice to avoid tacit renewal (if applicable).
- The period during which the BIT remains in force, based on the survival clause.
- The date of termination (date of receipt of the notice of termination by the other state).
- The date of expiry of the survival clause, based on the date of termination.

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<sup>40</sup> Voon, T. & Mitchell, A. (2016) Denunciation, termination and survival: The interplay of treaty law and international investment law. *ICSID Review-Foreign Investment Law Journal* 31(2), 413–433. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735974)

**Table 1. Possible approaches and considerations for BIT termination**

Terminating by consent	Terminating multilaterally	Terminating unilaterally
<p><b>With negotiation of a new treaty</b></p> <ul style="list-style-type: none"> <li>Useful if parties agree on the need for reform and wish to replace the old treaty with a new one (at bilateral, regional or other level)</li> <li>Allows parties to neutralize or shorten the survival clause</li> <li>Risks putting pressure on states to rush negotiations and rapidly conclude a new BIT even when positions are not sufficiently aligned</li> </ul>	<p><b>Multilateral instrument</b></p> <ul style="list-style-type: none"> <li>Avoids the need for multiple bilateral terminations and renegotiations</li> <li>Can feed into the UNCITRAL Working Group III process on ISDS reform</li> </ul>	<p><b>With negotiation of a new treaty</b></p> <ul style="list-style-type: none"> <li>Useful where there is a failed attempt to terminate by consent</li> <li>Useful where there is risk of missing the termination window</li> <li>Useful for negotiating a new treaty without time pressure, allowing time for developing a BIT model first or getting internal alignment, for example</li> <li>Risks making it more difficult for parties to agree to address the survival clause without a replacement treaty immediately in place</li> </ul>
<p><b>Without negotiation of a new treaty</b></p> <ul style="list-style-type: none"> <li>Useful if parties seek to terminate the old BIT and not replace it or wish to more generally exit investment protection system</li> <li>Useful if both states are part of a regional body with an intra-regional investment agreement in force or in negotiation</li> <li>Useful for simplifying overlapping commitments across multiple BITs</li> <li>Allows parties to neutralize or shorten the survival clause</li> </ul>		<p><b>Without negotiation of a new treaty</b></p> <ul style="list-style-type: none"> <li>Useful where there is a failed attempt to terminate by consent</li> <li>Useful where there is risk of missing the termination window</li> <li>Useful where a party has a national policy for BIT phase-out and aims to use domestic laws or regional instruments to govern FDI</li> <li>Useful if a party has not yet completed, or has not yet begun, internal BIT reform processes and needs time to do so</li> </ul>



## 5.0 Drafting Termination and Survival Clauses in New BITs

Where a state develops a model BIT or negotiates a new BIT, it will be important to consider how to better address the issues of termination, tacit renewal and survival going forward. In this respect, states could consider the various new approaches recently taken by states as described above. These approaches consider the risks inherent to older-style termination clauses and could be designed as follows:

On termination clauses:

- A termination clause with no fixed term, with the possibility to terminate unilaterally at any time (as seen in the 2004 Canadian Model BIT);
- A clause setting out a fixed term, whereby the BIT ceases to be in force at a predetermined time unless the parties expressly agree to renew it, without tacit renewal (as seen in the Indian Model BIT); or
- A clause setting out tacit renewal for shorter periods, such as five years (as seen in the 2019 Dutch Model BIT).

On survival clauses:

- No survival clause (as seen in the 2016 Morocco—Nigeria BIT); or
- A shorter survival period such as 5 years (as seen in the Indian Model BIT).

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