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Post-Termination Responsibility of States?—The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors

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Abstract—The recent practice of States to amend, suspend or terminate investment treaties has moved questions of potential 'post-termination responsibility' to the forefront of the contemporary legal discourse in international investment law. Although States have often included provisions in their respective treaties to regulate post-termination protection of investments, some aspects of the aftermath of treaty terminations are still unsettled. This article defines and discusses various types of 'post-termination responsibility' by reviewing current practice, doctrine and jurisprudence on the matter. In that vein, it examines terminations, modifications and suspensions that were unlawful and ineffective, or effective but not capable of releasing the State from all treaty obligations either by virtue of survival clauses or separate principles of vested or third-party rights. It then elaborates on denunciations of the ICSID Convention or terminations of BITs and their effects on pending proceedings or the right to initiate proceedings in the future. Moreover, the article discusses whether survival clauses apply solely to unilateral or also to mutual terminations of investment treaties. It will also address the question whether investor rights may continue to be protected as a result of acquired/vested rights or third-party rights. By analysing the most recent jurisprudence and practice of States, as well as more general foundations of general international law, this article aims to contribute to a clarification of these questions.

I. INTRODUCTION

For this special issue on State responsibility and investment law, the editors requested that the authors examine the amendment, suspension and termination of investment treaties and their impact on vested rights of investors. This topic raises the more general question of whether States may continue to be internationally responsible for violations of a treaty after it has been terminated, amended or suspended. Clearly, this is an issue that has received increased practical attention over

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the last couple of years. Denunciations of the International Centre for Settlement of Investment Disputes (ICSID) Convention[3] by a few Latin American States,[4] a broader trend to terminate investment treaties in other regions of the world[5] and, in particular, the European Union (EU) Commission's long-standing policy to challenge so-called intra-EU bilateral investment treaties (BITs) triggering a wave of terminations of such BITs by some EU Member States[6] have contributed to this attention.[7] These incidents moved issues of 'post-termination responsibility' from the ivory tower of theoretical considerations to the hearing rooms of investment tribunals, as well as domestic and regional courts, forcing them to decide whether investments continue to be protected by amended, suspended or terminated treaties.

This article addresses the question of the extent to which host countries may continue to be responsible for breaches of investment standards despite having ended their membership in ICSID or terminated, suspended or amended investment treaties. To answer this question, it will first explore, from a theoretical viewpoint, implications of the law of State responsibility for treaty termination, suspension or modification, define three types of 'post-termination responsibility' and discuss rules applicable to the termination of both the ICSID Convention and of BITs (Section II). With these preliminary issues in mind, the article will explore post-termination responsibility in the context of international investment agreement (IIA) terminations and what possibilities remain to invoke host State responsibility for violating investor rights after such terminations have taken place (Section III). Lastly, the conclusion will summarize findings on continued responsibility for investment treaty commitments (Section IV).

II. THE BROADER CONTEXT—TERMINATIONS, SUSPENSIONS AND AMENDMENTS/MODIFICATIONS OF TREATIES, THE LAW OF STATE RESPONSIBILITY AND RESULTING TYPES OF 'POST-TERMINATION RESPONSIBILITY'

When States move to terminate, suspend or amend/modify treaty obligations, several points of contact between the law of treaties and the law of State responsibility come

[3] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

[4] Notably, by Bolivia (notified depositary on 2 May 2007, denunciation took effect on 3 November 2007), Ecuador (notified depositary on 6 July 2009, denunciation took effect on 7 January 2010) and Venezuela (notified depositary on 24 January 2012, denunciation took effect 25 July 2012). See ICSID, 'List of Contracting States and other Signatories of the Convention (as of 9 June 2020),' Doc ICSID/3 at 5 <https://icsid.worldbank.org/sites/default/files/ICSID-3.pdf> accessed 1 February 2021.

[5] South Africa, for instance, terminated its BITs with Argentina, Austria, the Belgium–Luxembourg Economic Union (BLEU), Denmark, Germany, Italy, Netherlands, Switzerland and the UK. See United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 21 February 2021.

[6] Johannes Tropper, 'The treaty to end all investment treaties. The Termination Agreement of intra-EU BITs and its effect on sunset clauses' (*Völkerrechtsblog*, 12 May 2020) <https://voelkerrechtsblog.org/articles/the-treaty-to-end-all-investment-treaties/> accessed 18 February 2021.

[7] European Commission Press Release, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties' (18 June 2015) <https://ec.europa.eu/commission/presscorner/detail/ en/IP_15_5198> accessed 1 February 2021; Declaration of the Representatives of the Governments of the Member States, 'The Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union' (15 January 2019) <https://ec.europa.eu/info/sites/info/files/business_economy_euro/ banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf> accessed 18 February 2021.

into play. A rather central inter-linkage has been dealt with by the International Court of Justice (ICJ) in the *Gabcíkovo-Nagymaros* case, when it clarified that:

> A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.[8]

This first point of contact is thus well recognized: The determination of an internationally wrongful act requires, apart from attribution to a State, a breach of an international obligation of that State.[9] Whether such a breach occurred when withdrawing from or amending treaty obligations is necessarily a question of the law of treaties.[10] Hence, when a termination, suspension or amendment/modification of a treaty is at issue, the law of State responsibility is dependent on pertinent primary rules of treaty law (such as grounds for treaty termination, suspension or modification, or their procedural modalities) for a finding of wrongfulness.[11] The Vienna Convention on the Law of Treaties (VCLT)[12] lays down such grounds and rules. Contraventions of such rules constitute treaty breaches, but it is the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[13] that govern the 'aftermath' of such treaty breaches.[14] The ARSIWA are hence not only a useful, but often an indispensable clarification tool in the specific context of withdrawals or terminations of investment treaties and potential 'post-termination responsibility'. They shall be used in the following elaboration of potential types of post-termination responsibility. Three main scenarios may be distinguished in that respect.

First, when a treaty termination does not comply with one or more of the rules set out in the treaty or the VCLT, one may examine whether such an attempt at terminating the treaty or subsequent non-compliance with its obligations qualifies as an internationally wrongful act entailing the State's responsibility. The second type of potential post-termination responsibility is responsibility of a State for obligations under a treaty that continue to bind the State after termination due to transitional provisions. This is the case for investment treaties that contain so-called 'survival' or 'sunset' clauses, which may preserve an investor's right to initiate proceedings, to have current proceedings litigated, or to enjoy certain substantive rights.[15] A third, related, case of post-termination responsibility could arise, independent from

[8] *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* Merits [1997] ICJ Rep 7 para 47.

[9] International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries', UN GAOR 56th Session Supp 10, ch 4, UN Doc A/56/10 (2001) (ARSIWA) art 2.

[10] See generally Serena Forlati, 'The Relationship between the Law of Treaties and the Law of International Responsibility' in Serena Forlati, Makane Moïse Mbengue and Brian McGarry (eds), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (Brill Nijhoff 2020) 109, 110, 124; Sotirios-Ioannis Lekkas and Antonios Tzanakopoulos, 'Pacta sunt servanda versus flexibility in the suspension and termination of treaties' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar Publishing 2014) 312, 327.

[11] ARSIWA (n 9) art 2, commentary para 7.

[12] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[13] ARSIWA (n 9).

[14] See generally on the phenomenon of 'A Law of Treaties without Rules on Treaty Breaches', Christian J Tams, 'Regulating Treaty Breaches' in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 443–4; Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 302.

[15] See text accompanying nn 34 and 64.

survival clauses, out of a theory of third-party rights or acquired rights that exist regardless of the continuing consent of the contracting States and may therefore continue to bind contracting parties even after they have terminated a treaty. Before moving on to a more thorough examination of these types, a fourth option of post-termination responsibility should be pointed out that is not really one arising out of treaty obligations, but deserves mention here. It is clear that termination, suspension or modification of investment treaties do not affect any corresponding customary international law obligations that continue to bind states.[16] In the field of investment law this is particularly relevant in regard to those investment protection standards that may also be contained in customary international law, such as some aspects of the law on expropriation as well as the international minimum standard reflected in fair and equitable treatment (FET) and full protection and security (FPS).[17]

A. *When a State's Termination, Suspension or Amendment/Modification of a Treaty was in Breach of Treaty Law*

It is generally accepted that States are not only free to enter into treaty obligations, but also to change them (amendment/modification)[18] or to bring them to an end either temporarily (suspension) or finally (termination).[19] Modalities for proper termination, suspension or modification of a treaty will usually be provided for in the treaty itself or agreed upon by mutual consent.[20] A pertinent example of treaty-specific termination provisions can be found in the ICSID Convention, which prescribes in its article 71 a notice period of six months for denunciations.[21] Similarly, investment treaties, such as BITs, also regularly contain their own rules on termination, usually providing for the right of each party to terminate them unilaterally after an initial period of validity.[22] Often, they also contain so-called 'survival' or 'sunset' clauses delaying the full effect of unilateral termination for a certain period of time, equally modifying the 'normal' consequences of treaty termination under article 70 VCLT.[23]

In the absence of such treaty provisions, and sometimes in addition to termination options in the treaty, the VCLT contains supplementary grounds. States are, of course, free to decide whether or not they want to include such specific rules in treaties. As a result, specific rules on amendment/modification, suspension or termination, including the consequences thereof, are often contained in a non-exhaustive,

[16] VCLT (n 12) art 43; Aust (n 14) 303.

[17] See Stephan Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Nomos/Hart 2015) 6–22.

[18] Mark E Villiger, *Commentary on 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 511 ('Part IV of the Convention (Articles 39–41) refers in its title to the amendment and modification of treaties. An amendment, as in Articles 39 and 40, implies changes in the text of the treaty; it can concern parts of the treaty or its entirety. Modification, as in Article 41, relates to an agreement concluded *inter se* between some of the parties and intended to vary treaty provisions solely between them.').

[19] Aust (n 14) 288.

[20] See VCLT (n 12) art 54 ('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').

[21] ICSID Convention (n 3) art 71.

[22] James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 JWIT 928–50, 941.

[23] VCLT (n 12) art 70(1)(a) stipulates that treaty termination releases 'the parties from any obligation further to perform the treaty'. However, it also clarifies that that consequence only kicks in '[u]nless the treaty otherwise provides or the parties otherwise agree'. 'Survival' or 'sunset' clauses should be regarded as such specific agreements since it is the express intention of such clauses to postpone the 'release' from treaty obligations for a certain period of time.

rudimentary way meant to either complement or partially derogate from the general (VCLT) rules on these issues. This fact may raise complicated interpretation issues,[24] particularly in the specific context of investment treaties, which often contain provisions regulating the continued effect of certain rights and obligations in the form of survival clauses.[25]

The supplementary termination grounds in the VCLT are, on the one hand, article 56 VCLT, which clarifies that a treaty that does not include a provision on its termination may still be terminated with 12-months' notice, if the parties intended to admit the possibility of denunciation or withdrawal, or if it is implied by the nature of the treaty.[26] On the other hand, additional rules give treaty parties such rights under particular circumstances that include, for instance, a material breach by the other party, a fundamental change of circumstances, or impossibility of performance, and they are often similar to the ones that may preclude the wrongfulness of State acts and omissions under the law of State responsibility as found in the ARSIWA (such as countermeasures, *force majeure* or a state of necessity).[27] However, while the treaty law grounds may be invoked to end or suspend treaty obligations, the corresponding ARSIWA circumstances usually merely suspend obligations to comply with treaty obligations.[28]

When a purported treaty termination does not comply with one or more of the conditions set out in the treaty or the VCLT, one may examine whether that attempt at terminating the treaty qualifies as an internationally wrongful act entailing the State's responsibility. One, almost paradoxical, consequence would be that the other party is now entitled to terminate or suspend the treaty for such unlawful repudiation.[29] Since the other party/parties will usually prefer to maintain treaty relations this is unlikely to be invoked; another more practical consequence of such 'unlawful' termination is that it is ineffective.[30] The ineffectiveness of an attempted treaty termination carries with it the continued responsibility of the State for the obligations under the treaty. Hence, where the treaty at issue or the VCLT prescribe a certain notice period for termination to take effect, the terminating State remains bound by

[24] Lord McNair, *The Law of Treaties* (OUP 1986) 520 ('[When] all parties agree to terminate a treaty, they usually enter into a fresh agreement as to the effect of the abrogation upon the position of the parties, if that is likely to give rise to any doubts. If no such agreement is made, difficult questions may arise. One of the points relevant to the solution of those questions may sometimes be whether the parties intended to terminate the treaty *ab initio* or as from a later time. An *ab initio* termination would usually remit the parties to the *status quo ante foedus*.').

[25] See text accompanying n 65.

[26] VCLT (n 12) art 56.

[27] Forlati (n 10) 124.

[28] ibid 110; *Gabcíkovo-Nagymaros Project* (n 8) para 101 ('The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but - unless the parties by mutual agreement terminate the Treaty - it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.').

[29] See VCLT (n 12) art 60(3)(a) and previous suggestions in the ILC using the phrasing 'unfounded repudiation of the treaty'; see also ILC, 'Fifth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur' 15 November 1965 (4 December 1965–18 January 1966) UN Doc A/CN.4/183 and Add.1-4, ILC YB 1966 vol II 37 para 9; Villiger (n 18) 742 fn 48.

[30] Laurence R Helfer, 'Terminating Treaties' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (2nd edn, OUP 2020) 624, 626 ('Unilateral exit attempts that do not comply with these conditions or restrictions are ineffective. A State that ceases performance after such an attempt remains a party to the treaty, albeit one that may be in breach of its obligations.'); Anthony Aust, 'Treaties, Termination' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* vol X (OUP 2012) 17 ['To be effective, termination or suspension may only take place as a result of the application of the provisions of the treaty itself or the VCLT (Art. 42 (2)')].

the treaty obligations until such notice period elapsed,[31] and a premature termination will not take effect until that date.[32] Similarly, where the terminating State bases its withdrawal on a termination ground the conditions of which have not been fulfilled, the termination does not free the State of its obligations under the treaty and subsequent non-compliance constitutes a breach of international law.[33]

B. *When an Effective Termination, Suspension or Amendment/Modification Does Not Release a State from Certain Treaty Obligations by Virtue of Survival Clauses*

The most likely and currently most debated situation of post-termination responsibility may occur where investment treaties contain so-called 'survival' or 'sunset' clauses.[34] Such clauses, regularly contained in IIAs, typically provide that treaty provisions remain effective for a certain ('sunset') period of time after termination.[35] This implies that investors will continue to enjoy substantive rights, to have current proceedings litigated and possibly also to preserve their right to initiate proceedings after the termination of the treaty.

From a treaty law perspective, survival clauses are an expression of party autonomy as acknowledged in the VCLT. Article 70(1) VCLT states that:

> Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) releases the parties from any obligation further to perform the treaty;
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

Since survival clauses expressly provide 'otherwise', they have the effect of not releasing a terminating party from the obligation to perform the treaty and hence preserve a State's responsibility for certain treaty obligations even after a termination has been effected. Similarly, article 72 ICSID Convention regulates the effect of denunciation on arbitration proceedings by stipulating that such notice

[31] Helfer (n 30) 631 ('During the notice period, the legal obligations of all States parties – including the nation that seeks to withdraw from or terminate the agreement – continue unabated. States also remain responsible for any breaches that occur prior to or during the notice period, a responsibility that survives the State's withdrawal or the treaty's end.').

[32] *Gabcíkovo-Nagymaros Project* (n 8) paras 109, 115 ('The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature. [. . .] the Court, [. . .] finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.').

[33] Andrea Carska-Sheppard, 'Issues Relevant to the Termination of Bilateral Investment Treaties' (2009) 26 J Intl Arb 755, 763.

[34] See literature on unilateral or mutual termination of investment treaties with survival clauses: Noah Rubins and Ben Love, 'The Scope of Application of International Investment Agreements I. *Ratione Temporis*' in Bungenberg and others (eds) (n 17) 481, 492; Tropper (n 6); additionally, on treaty terminations and their effect on vested rights: Harrison (n 22); Tania Voon, Andrew Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29 ICSID Rev—FILJ 451–73; Anthea Roberts, 'Triangular treaties: the nature and limits of investment treaty rights' (2015) 56 Harvard Intl LJ 353–417; Catharine Titi, 'Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law' (2016) 33(5) J Intl Arb 425–40; Carska-Sheppard (n 33) 755–71.

[35] An IISD report suggests that most BITs have survival clauses ranging between 10 and 20 years, with 56% of the treaties mapped by UNCTAD stipulating a period of 10 years and 20% a period of 15 years. See Nathalie Bernasconi-Osterwalder and Sarah Brewin, 'IISD Best Practices Series: Terminating a Bilateral Investment Treaty' (March 2020) 4, <https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf> accessed 21 February 2021; for examples of survival clauses in IIAs see: Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) (ECT) art 47 para 3; Finland–Mauritius BIT (signed 12 September 2007, entered into force 17 October 2008) art 17(3); Argentina–Spain BIT (signed 3 October 1991, entered into force 28 September 1992) art XI.

> [. . .] shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.[36]

The ICSID Convention's termination provisions do not exhaustively address or modify the VCLT rules on treaty termination either. Rather, the ICSID Convention provides specific, additional rules on the effect of denunciation on arbitration proceedings, supplementing and only partially derogating from the dispositive provisions of article 70 VCLT.[37] Whether survival clauses apply to all types of terminations (in particular, also to mutual treaty termination) is subject to debate and will be discussed in detail below.[38]

From a State responsibility law perspective, survival clauses ensure that the principle of intertemporal law enshrined in article 13 ARSIWA is complied with.[39] When a State terminates an investment treaty containing a survival clause, such State, although no longer bound by the treaty in its entirety, will still be bound by some of its provisions. As a result it may still commit an internationally wrongful act by contravening a specific IIA obligation by which it is bound solely on the basis of a survival clause.

C. *When an Effective Termination, Suspension or Amendment/Modification Does Not Release a State from Treaty Obligations Directly Accruing to a Person or Entity other than a State*

Post-termination responsibility could also arise out of a theory of acquired or vested rights that exist independently from the consent of the contracting States and may therefore not be terminated by these contracting States. Debates in this context seek to assess foundations for continued enjoyment of rights by individuals primarily based on the notion that these rights directly accrue to the investors. In this regard, article 33 ARSIWA clarifies that the scope of international obligations may include 'any right, arising from the international responsibility of a State, which may accrue

[36] ICSID Convention (n 3) art 72.

[37] See Emmanuel Gaillard, 'The Denunciation of the ICSID Convention' (2007) 237 New York LJ 122; Julien Fouret, 'Denunciation of the Washington Convention and Non-contractual Investment Arbitration: "Manufacturing Consent" to Arbitration?' (2008) 25(1) J Intl Arb 71–87; Christian Tietje, Karsten Nowrot and Clemens Wackernagel, 'Once and Forever? The Legal Effect of a Denunciation of ICSID' (2008) 74 Beiträge zum Transnationalen Wirtschaftsrecht 1, 13–28, Oscar M Garibaldi, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy' in Christina Binder and others (eds), *International Investment Law for the 21st Century* (OUP 2009) 251–77 Christoph Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration' in Michael Waibel and others (eds), *The Backlash against Investment Arbitration* (Kluwer Law 2010) 353–68; see also the inconsistent jurisprudence on the effect of a notice of denunciation on the consent to arbitrate in, on the one hand *Transban Investments Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/24, Award (22 November 2017) paras 75, 76, 85; *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/23, Award (12 December 2016) paras 91, 98, 143; *Venoklim Holding BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/22, Award (3 April 2015) paras 65–79; *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Award (26 April 2017) paras 119–20); and, on the other hand, *Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/21, Award (13 November 2017) para 282.

[38] See text accompanying n 65.

[39] ARSIWA (n 9) art 13 ('An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs'); see generally Christina Binder and Jane A Hofbauer, 'The Temporal Scope of Application of Investment Treaties and the Effects on General International Law' in Stephan Schill, Christian Tams and Rainer Hoffmann (eds), *Investment Law as a Motor of Legal Development: Assessing Radiating Effects in General International Law* (Edward Elgar Publishing 2021).

directly to any person or entity other than a State',[40] but it does not go beyond that mention to identify the rights potentially owed directly to individuals.[41] Whether a right is directly owed to the investor, or solely a derivative right granted to it and revocable by the State, will result either from the specific language of the treaty at issue or from other rules of international law (eg from a principle of vested or acquired rights), which shall be discussed in more detail below.[42]

III. THE INVOCATION OF HOST STATE RESPONSIBILITY FOR VIOLATING INVESTOR RIGHTS AFTER TREATY SUSPENSION, TERMINATION OR AMENDMENT/MODIFICATION

In practice, the abovementioned BIT terminations by a number of countries[43] have raised questions concerning the effect of such terminations on ongoing proceedings as well as on the continued possibility of investors to bring claims based on the procedures provided for in such terminated BITs. This latter option primarily results from the existence of 'survival' or 'sunset' clauses. The termination of intra-EU BITs by quite a number of EU member States means that this question is likely to arise with a certain frequency, and has already arisen in a number of investor–State arbitrations. The following overview shows that the most important questions in such situations relate to the effect that IIA termination has on investor rights and on potential post-termination responsibility. While it is rather uncontroversial that termination does not affect pending proceedings (Subsection A), this is less clear in regard to the ability to institute proceedings after termination (Subsection B).

A. *Treaty Termination Effect on Pending Proceedings*

The termination of an investment treaty would appear to have no impact on pending investor–State arbitrations. The jurisdiction of adjudicatory bodies based on consent is determined at the time the proceedings are instituted. This is confirmed by ICJ jurisprudence, such as in *Nottebohm*[44] and *Nicaragua*,[45] or most recently in the *Case concerning the Iran-US Treaty of Amity*,[46] as well as by the principle enshrined in the final sentence of article 25(1) ICSID Convention, which explicitly provides that '[w]hen the parties have given their consent, no party may withdraw its consent unilaterally'.[47] It is hence rather undisputed that once a case is pending before a court or

[40] ARSIWA (n 9) art 33(2).

[41] ARSIWA (n 9) art 33, commentary para 4 ('Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State"'); Clemens Wackernagel, 'The twilight of the BITs?: EU judicial proceedings, the consensual termination of intra-EU BITs and why that matters for international law' (2016) 140 Beiträge zum Transnationalen Wirtschaftsrecht 1, 17.

[42] See text accompanying n 93.

[43] See text accompanying n 5.

[44] *Nottebohm (Liechtenstein v Guatemala)* Preliminary Objections [1953] ICJ Rep 111, 122–3; Malcolm N Shaw, 'Termination of the Title of Jurisdiction' in *Rosenne's Law and Practice of the International Court: 1920-2015* vol 2 ch 14 (2017) para 241 <doi:http://dx.doi.org/10.1163/2468-5992_rose_COM_0241> accessed 21 February 2021.

[45] *Military and Paramilitary Activities in und against Nicaragua* (*Nicaragua v United States of America)*, Merits [1986] ICJ Rep 14 para 36.

[46] *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* [2021] ICJ Rep paras 24, 94.

[47] ICSID Convention (n 3) art 25(1).

tribunal whose jurisdiction is based on a treaty which is later terminated, the jurisdiction of the court or tribunal remains in place.[48]

The impact of treaty termination on pending investor–State arbitrations has to be distinguished from an argument frequently raised by host States as well as the EU Commission in intra-EU cases considering them incompatible with EU law. Such an incompatibility argument basically has two aspects: a treaty law aspect and an EU law aspect.

According to the EU doctrine of supremacy of EU law, both the treaties establishing the EU as well as secondary law (such as EU regulations, directives, etc) prevail over the law of its Member States, with the effect that the latter becomes inapplicable.[49] The argument suggests that this effect may also extend to treaties concluded by Member States.[50]

Under treaty law, litigants have invoked article 59 VCLT pursuant to which a treaty may be considered as terminated when the parties concluded a subsequent treaty contradicting it.[51] In the view of the EU Commission and some EU Member States, the accession of BIT contracting parties to the EU had such an effect.[52] According to them, the EU treaties, as treaties later in time, related to the same subject-matter as the previous intra-EU BITs and since they could not be applied simultaneously they had become automatically void and thus could not provide a jurisdictional basis for such proceedings.

In fact, EU Member States, so far unsuccessfully, relied upon both the implied treaty termination and the EU supremacy arguments in investment arbitration proceedings. Tribunals have rejected arguments that BITs had been terminated implicitly by the accession to the EU pursuant to article 59 VCLT or that they were superseded by virtue of their incompatibility with EU law.[53]

This attitude was not significantly altered after the 2018 judgment of the Court of Justice of the European Union (CJEU) in the *Achmea* case.[54] Therein, the CJEU

[48] Hervé Ascensio, 'Art.70 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) 1604–5; see also Helfer, (n 30) 631 (referring to the 2017 ICC Pre-Trial Chamber decision confirming its jurisdiction for an investigation commenced prior to the effective withdrawal of Burundi from the Rome Statute).

[49] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, 593.

[50] European Commission, Letter of 13 January 2006, as quoted in *Eastern Sugar BV (Netherlands) v The Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007) para 119; European Commission, Observations of 7 July 2010 and Submissions of the Respondent, as quoted in *Achmea BV (formerly Eureko BV) v Slovak Republic I*, PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) paras 180 and 59, respectively; Submissions of the Respondent, as quoted in *Rupert Joseph Binder v Czech Republic*, Award on Jurisdiction (6 June 2007) para 16.

[51] VCLT (n 12) art 59 ('1. 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. 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.').

[52] Bruno Simma and Dirk Pulkowski, 'Two Worlds, But Not Apart: International Investment Law and General International Law' in Bungenberg and others (n 17) 361, 366.

[53] *Eastern Sugar BV v The Czech Republic* (n 50) paras 174–6; *Rupert Joseph Binder v Czech Republic* (n 50) para 63 ('The Arbitral Tribunal further cannot find that the invoked substantive provisions of the Czech-German BIT, [. . .] are in any way in conflict with EC law. Consequently, there is no substantive conflict with EC law, and the question of the primacy of EC law does not arise in respect of these provisions.'); *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010) paras 72–88; *Achmea BV (formerly Eureko BV) v Slovak Republic I* (n 50) paras 231–67; *Electrabel SA* v *Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) paras 4.192–4.197; *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No ARB/17/27, Award (13 November 2019) paras 238–9; see also August Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action—The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations' (2012) 39(2) Legal Issues of Economic Integration 157–77.

[54] *Slovak Republic v Achmea BV*, Case C-284/16, Judgment of the CJEU, 6 March 2018, EU:C:2018:158.

held that the applicable law clause of The Netherlands–Slovak BIT implied that tribunals could apply EU law without being able to request rulings from the CJEU concerning its interpretation. Such a power would encroach upon the CJEU's 'monopoly' on the interpretation of EU law; it thus threatened the uniform application of EU law and was therefore contrary to it. So far, tribunals have lessened the impact of the *Achmea* case as relating only to United Nations Commission on International Trade Law (UNCITRAL) proceedings and thus not affecting the power of ICSID tribunals.[55]

Although all EU Member States declared in early 2019 that intra-EU BITs violated EU law, implying that the BITs did not contain a valid consent to arbitration,[56] this was also generally not seen as having automatically terminated them.[57] Thus, in October 2019, EU Member States agreed on a draft version of a plurilateral treaty on the termination of intra-EU BITs.[58]

In spite of these developments, it appears that investment tribunals are likely to uphold the abovementioned principle that once a case is pending before a court or tribunal whose jurisdiction is based on a treaty which is later terminated, the jurisdiction of the court or tribunal remains in place. Thus, even a mutual termination will not affect pending proceedings, as tribunals have been careful to point out in regard to the *Achmea* defence.[59]

B. *Treaty Termination Effect on the Possibility of Instituting Proceedings after Termination*

The possibility of investors to institute arbitration proceedings against host States on the basis of offers of consent contained in investment agreements depends on the acceptance of such offers, leading to what in ICSID parlance is called 'perfected

[55] *Landesbank Baden-Württemberg and others v Kingdom of Spain*, ICSID Case No ARB/15/45, Decision on the Intra-EU Jurisdictional Objection (25 February 2019) para 150; *Eskosol SpA in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Decision on Termination Request and Intra-EU Objection (7 May 2019) para 76, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No ARB/15/36, Award (6 September 2019) para 384.

[56] Declaration of the Representatives of the Governments of the Member States (n 7) 3.

[57] See eg *Eskosol SpA in liquidazione v Italian Republic* (n 55) para 217; *Rockhopper Italia SpA, Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v Italian Republic*, ICSID Case No ARB/17/14, Decision on the Intra-EU Jurisdictional Objection (29 June 2019) para 180; also *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi* v *Republic of Estonia*, ICSID Case No ARB/14/24, Award (21 June 2019) para 558.

[58] In May 2020, a finalized version was signed by 23 Member States of the EU, excluding Austria, Ireland, Finland and Sweden. See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (opened for signature 5 May 2020, entered into force 29 August 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01)> accessed 12 February 2021; European Commission Press Release, 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (5 May 2020), <https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en> accessed 12 February 2021.

[59] *CMC Africa Austral, LDA, CMC Muratori Cementisti CMC Di Ravenna SOC Coop, and CMC MuratoriCementisti CMC Di Ravenna SOC Coop ARL Maputo Branch and CMC Africa v Republic of Mozambique*, ICSID Case No ARB/17/23, Award (24 October 2019) para 326 ('[a]n offer to arbitrate the present dispute had thus been made and accepted before the decision in *Achmea* was issued or the member states issued their declaration. A valid and binding agreement to arbitrate has thus been formed. That agreement is subject to international law, not to EU law. The ICSID Convention provides that, "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally."'); *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary* (n 53) para 214 ('the consent to arbitrate, in the sense of a meeting of the minds, which is perfected by the investor's acceptance of the State's offer to arbitrate expressed in the BIT would not be retroactively invalidated by a subsequent termination of the BIT. In other words, even if the Tribunal were to regard the 2019 Declarations as an agreement to terminate the BIT, *quod non*, that agreement could not have invalidated the consent to arbitrate because it was entered after the consent was formed'); see also *Eskosol SpA in liquidazione v. Italian Republic* (n 55) para 226 ('In the Tribunal's view, it would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a pending case, simply by issuing a joint document purporting to interpret longstanding treaty text so as to undermine the tribunal's jurisdiction to proceed.').

consent'.[60] When States terminate investment treaties containing offers of consent, such offers are equally terminated and can no longer be accepted. Thus, as a matter of principle the possibility of investors instituting legal proceedings on the basis of offers of consent contained in terminated investment agreements no longer exists.

The notion of 'perfected consent' implies, however, that if a host State's offer of consent to investment arbitration has already been accepted by an investor before the termination of the treaty it can be regarded as 'perfected' and thus having become irrevocable.[61] In practice, cases of perfected consent or exercised rights are rare because investors usually accept offers of consent to arbitration by instituting proceedings, but it is not excluded that they do so separately and in advance, either in a separate notification to the host State or in a notice of dispute triggering an amicable dispute settlement phase,[62] as provided for in many BITs as a precondition to arbitration.[63]

Thus, as a matter of principle, the termination of investment treaties containing offers of consent implies that such offers are equally terminated and can no longer be accepted. Qualifications of this principle may, however, stem from a number of specific features and reasons, among them 'sunset'/'survival' clauses (Subsection III.B.i), rights of third parties (Subsection III.B.ii) and vested/acquired rights (Subsection III.B.iii).

(i) *Limitations stemming from 'sunset'/'survival' clauses*

As already mentioned, parties to investment protection treaties regularly include so-called 'sunset' or 'survival' clauses pursuant to which treaty provisions remain effective for a certain period of time after termination.[64] This implies that States continue to be bound by the protection standards contained in the terminated treaty during the 'sunset' period. It would also permit investors to continue accepting offers of host country consent to investment arbitration even after the treaty has been formally terminated.

There is some uncertainty, however, as to whether typical 'sunset' clauses are intended to apply only in cases of unilateral termination of investment treaties or also in cases of mutual agreement of the parties to terminate such treaties.[65] Arbitral practice appears rather scant. A number of tribunals appear to consider that the survival period also attaches to mutually terminated agreements.[66] Other tribunals seem to

[60] Schreuer (n 37) 361.

[61] *Transban Investments Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/24, Award (22 November 2017) paras 85, 93.

[62] Some commentators argue, however, that pursuit of mediation by the investor cannot lead to the rights being considered as 'exercised': Voon, Mitchell and Munro (n 34) 462.

[63] Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 237; Milanka Kostadinova, 'Aspects of Procedure for Institution of Proceedings and Establishment of Tribunals in Investment Treaty Arbitration' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements* (2nd edn, OUP 2018) 114, 117.

[64] See text accompanying n 34.

[65] Yun-I Kim, 'Investment Law and the Individual' in Bungenberg and others (n 17) 1585, 1600.

[66] See eg *Walter Bau AG (in liquidation) v Thailand*, UNCITRAL, Award (1 July 2009) para 9.5 ['Article 14(3) of the 1961 Treaty provides "*in respect of investments made prior to the date of termination of the present Treaty, the provisions of Articles 1 to 13 shall continue to be effective for a further period of ten years from the date of termination of the present Treaty.*" The 1961 Treaty was terminated upon the date of the entry into force of the 2002 Treaty (see Article 11(2) of the 2002 Treaty). Accordingly, [. . .] it is still possible for a state-state claim to be made under the 1961 Treaty until October 2014.']; *Eastern Sugar BV (Netherlands) v The Czech Republic* (n 49) para 175 ['The Arbitral Tribunal can only reject the Czech Republic's argument that the implied termination of the BIT through accession also terminated the continuing effect expressly guaranteed by Art. 13 (3) of the BIT']; *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt*, PCA Case No 2012-07, Decision on Jurisdiction (30 November 2017) para 313 ['the Tribunal considers that the text of Article 9(3) provides that investors, following any kind of termination of investment protections, should benefit from a survival clause.'].

limit the effect of survival clauses to cases of unilateral terminations.[67] However, they usually have not addressed the issue in detail.

In fact, the question should be regarded first as one of interpretation of the survival clauses. A typical 'sunset' or 'survival' clause of a BIT, as contained in article 13(3) of the 2009 German Model BIT, provides as follows:

> In respect of investments made prior to the date of termination of this Treaty, the provisions of Articles 1 to 12 above shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.[68]

While such language is not in itself explicit as to whether it refers only to unilateral or also to mutual termination of the BIT, the context of such clauses often suggests that they apply to cases of unilateral termination only.[69] Thus, where 'sunset' clauses refer to a termination effected by one of the contracting parties, it seems that they apply to unilateral terminations only.[70] Such a contextual interpretation seems rare in arbitral practice.[71] Also, from a policy perspective, taking into consideration the long-term nature of foreign investments, it makes sense to prevent one treaty party from bringing the protection of investors from the other party to a sudden end. Thus, it would appear that 'sunset'/'survival' clauses were in first line included in order to protect against the sudden effect of a unilateral treaty termination.

Nevertheless, the plain wording of many 'survival' clauses does not exclude that they may be understood as also encompassing cases of mutual termination, as has been suggested in regard to the Italian Model BIT[72] or the Russian Model BIT,[73] although this was referred to as 'a debatable issue not yet tested in arbitral practice'.[74]

[67] See *Jan de Nul NV and Dredging International NV v Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006) para 24 (affirming the application of the 1999 BIT immediately replacing the earlier 1977 BIT in spite of the latter's survival clause).

[68] German Model BIT (2009) art 13(3).

[69] In the case of the German Model BIT, the immediately preceding sentence in art 13(2) provides that '[a]fter the expiry of the period of ten years this Treaty may be denounced at any time by either Contracting State giving twelve months' notice'. It thus appears logical that the treaty termination mentioned in art 13(3) refers to the termination effected by unilateral 'denunciation' according to art 13(2). See also Christina Binder, 'A Treaty Law Perspective on Intra-EU BITs' (2016) 17 JWIT 964, 978 fn 47 (arguing that the German Model BIT's 'sunset' clause may be read to apply to mutual termination only if 'paragraph 3 is understood as a stand-alone provision and [. . .] not in conjunction with paragraph 2 which merely refers to unilateral termination').

[70] Another example of a 'survival' clause that most likely relates to unilateral termination only is found in art 16(3) of the Singapore Model BIT, which refers to the 'notice of termination' which is characterised in the preceding paragraph as the unilateral action of 'either Contracting Party'. A similar argument could be made in regard to the United Kingdom IIPA 2008, which contains a survival period of 20 years after the date of termination, which in the preceding sentence is characterised as a termination by 'either Contracting Party'.

[71] In *Bahgat v Egypt* the Tribunal focused on the 'survival' clause without taking into account its context ['The Tribunal is unconvinced by Respondent's argument that the survival clause in Article 9(3) will only apply in circumstances where the 1980 BIT has been unilaterally terminated according to the terms of Article 9(2) [. . .] the Tribunal considers that the text of Article 9(3) provides that investors, following any kind of termination of investment protections, should benefit from a survival clause']; see *Bahgat v Egypt* (n 66) para 313.

[72] See Federico Ortino, 'Italy' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 321, 345; Italian Model BIT (2003) art XIV ('1. This Agreement shall remain effective for a period of 10 years and shall remain in force for a further period of 5 years thereafter, unless either Contracting Parties [*sic*] decide to denounce it not later than one year before its expiry date. 2. In case of investment effected prior to the expiry date, as provided for under paragraph 1 of this Article, the provision of Articles one I to XII shall remain effective for a further period of five years after the aforementioned date.').

[73] Sergey Ripinski, 'Russia' in Brown (n 72) 593, 620; Russian Model BIT art 12(4) ('With respect to investments made prior to the date of termination of this Agreement and covered by it, the provisions of all other articles of this Agreement shall continue to be in effect for a period of 15 years following the date of its termination.').

[74] ibid.

a) 'Survival' clauses applying to unilateral terminations only

Where survival clauses are meant to apply only to unilateral treaty terminations, it follows that the 'sunset' effect of such clauses would not extend to situations of mutually agreed upon treaty termination. Thus, in such cases a 'survival' clause contained in a terminated treaty would remain without effect. All obligations owed by the States under the treaty would come to an end after the mutually agreed upon termination came into effect.

b) 'Survival' clauses applying to mutual terminations

More difficult questions arise if 'survival' clauses also apply to cases of mutual termination of investment treaties. When treaty parties terminate such a BIT or an IIA it would follow that investors continue to be protected and to have the possibility of instituting investment arbitration during the 'sunset' period.

A 'survival'/'sunset' clause also relating to mutual termination should be regarded as a specific agreement to change the usual consequence of treaty termination, ie to release 'the parties from any obligation further to perform the treaty'.[75] Article 70(1) VCLT expressly makes clear that this usual consequence of treaty termination may be changed if 'the treaty otherwise provides or the parties otherwise agree'.[76] Thus, the consequence of a mutually agreed termination of an investment treaty containing a survival clause that also applied to such mutual termination would be that the parties' release 'from any obligation further to perform the treaty' would be modified (ie postponed in accordance with the content of such clause).

This result could change, however, when the parties agree to terminate a BIT or an IIA with the intention to bring all effects of the treaty to an end, including or notwithstanding any 'sunset' or 'survival' clauses. The question then arises whether the pre-agreed 'sunset' clause or the *post-hoc* agreement to bring the entire treaty to an end should prevail.

General treaty law, as enshrined in the VCLT, provides for an answer in favour of the latter solution. Article 54 VCLT states that 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'. Article 54 VCLT offers a choice to the parties to either follow the pre-agreed mode of termination ('in conformity with the provisions of the treaty') or a subsequent agreement ('at any time by consent of all the parties'). The wording of this provision does not indicate that, if a treaty contains provisions on its termination, subsequent mutual termination would be precluded.[77]

A contrary interpretation, letting the pre-agreed 'survival' clause prevail, would in fact raise the complicated issue of whether States are able to bind themselves through 'survival' clauses to particular forms and effects of treaty termination and to thus deprive themselves of the future possibility to terminate treaties without any remaining

[75] VCLT (n 12) art 70(1)(a).
[76] ibid art 70(1).
[77] See Vincent Chapaux, 'Art. 54 1969 Vienna Convention' in Olivier Corten and Pierre Klein (n 48) 1236, 1243 para 20.

'sunset' effect. The latter situation would be similar to the problem of 'eternity provisions' in domestic constitutions and seems contrary to the notion that States are free to change the law (by mutual consent).[78]

In order to avoid this dilemma, States have pursued an approach based on the consideration that contracting parties are free to amend treaties containing 'survival' clauses with the effect of removing such clauses before termination is effected.[79] This (so-called 'two-step') approach was taken by the Czech Republic as well as by Australia and Indonesia.[80] The possibility of modifying a 'survival' clause also seems to have been (at least) indirectly recognized by the ICSID Tribunal in *UP v Hungary*.[81]

It has been suggested though that the permissibility of such modifications may depend on whether they completely erase certain protections without replacing them in a renegotiated treaty.[82]

While general treaty law rules on termination thus do not appear to limit the power of contracting parties to investment treaties to terminate them with the effect that also any 'survival' or 'sunset' effect is terminated, limitations of such power may stem from other principles, most importantly from the rights of third parties, or from considerations concerning the protection of vested or acquired rights of private parties.[83] In fact, also some ICSID jurisprudence suggests that IIA modifications may not affect acquired rights of investors.[84]

(ii) *Limitations stemming from rights of third parties*

It has also been suggested that a protection of investors against treaty termination, suspension or amendment/modification could be anchored in the VCLT's regime concerning rights of third parties.[85] More specifically it has been argued that the rule

[78] Karlheinz Rode, *Verfassungsidentität und Ewigkeitsgarantie* (Peter Lang 2011); Ulrich K Preuss, 'The Implications of "Eternity Clauses": The German Experience (2011) 44 Israel L Rev 429–48.

[79] Binder (n 69) 978.

[80] Luke Eric Peterson, 'Czech Republic Terminates Investment Treaties In Such A Way As To Cast Doubt On Residual Legal Protection For Existing Investments' *Investment Arbitration Reporter* (1 February 2011) <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/> accessed 22 February 2021; Titi (n 34) 436.

[81] *UP and CD Holding Internationale v Hungary*, ICSID Case No ARB/13/35, Award (9 October 2018) para 265 ('Even further assuming *arguendo* that the France-Hungary BIT was retroactively terminated as of 1 May 2004, the BIT—including the submission to ICSID arbitration in Art. 9(2) of the BIT—would still remain in force for a period of 20 years as a result of the "survival clause" contained in Art. 12(2) of the BIT as this provision does not contain any limitation or exception as to its application and applies to all investments made prior to the expiry of this Agreement. Thus, investments made prior to the expiration of this BIT remain submitted to it for a period of 20 years from the date of expiry. In the present case, the investments were made prior to 1 May 2004. Therefore, the Claimants would still benefit from the protection offered by the ICSID Convention until 2024. *As is undisputed, neither Hungary nor France has made any attempt to renegotiate, modify, or shorten the relevant "survival" period.* Accordingly, even on the Respondent's own analysis regarding the BIT, the Claimants would still benefit from Art. 9(2) of the BIT and the ICSID Convention, and the Tribunal would still have jurisdiction to hear this case.' [emphasis added]).

[82] Karsten Nowrot, 'Termination and Renegotiation of International Investment Agreements' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 227, 245; Voon, Mitchell and Munro (n 34) 468; Katharina Gatzsche, *Aufhebungen und Abänderungen von Investitionsschutzabkommen* (Nomos 2019) 193.

[83] See McNair (n 24) 506 ('As a general statement it can be said that the parties who concluded a treaty can lawfully terminate it by agreement, express or implied. This statement presupposes that they alone are interested in the continued existence and that no third party has acquired an interest in its preservation, either directly under some provision of the treaty vesting rights in favour of such a third party or indirectly on the ground that the treaty created certain rights of the *erga omnes* type ').

[84] *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) para 386 ('States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries. In fact, Article XIV of the Treaty provides that in case of termination, the investment will continue to be protected under its provisions "for a further period of ten years."').

[85] See Kim (n 65) 1600; Gatzsche (n 82) 159.

in article 37(2) VCLT 'represents a general principle which is applicable to all third party right holders'.[86]

In fact, article 37(2) VCLT limits the power of States to revoke or modify a right a third party has assented to without the consent of such third party.[87] However, the wording of the VCLT very clearly relates to 'third States' and although the ILC initially considered including other third parties, such as individuals and juristic persons,[88] it expressly confined itself to suggesting a third-party regime limited to States.[89] The scarce State practice in this regard[90] has not been able to rebut this deliberate choice to limit the third-party regime to third States.[91]

Thus, an analogous application of the principle to investors is largely rejected.[92] However, the underlying notion of protecting third parties who have relied on rights derived from a treaty may be found in the related concept of the protection of vested/acquired rights.

(iii) *Limitations stemming from vested/acquired rights*

In addition to 'survival' clauses, the most interesting debate concerning possible limits to the power of States to change or end treaty protections concerns the question of vested or acquired rights of investors[93] that may shield them from such moves.[94]

The principle of acquired rights has received some confirmation in international jurisprudence and scholarship. In *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice (PCIJ) confirmed 'the principle of respect for vested rights, a principle which [...] forms part of generally accepted international law'.[95] The principle of acquired or vested rights originated in the realm of State succes-

[86] Harrison (n 22) 944.

[87] VCLT (n 12) art 37(2).

[88] ILC, Third report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, A/CN.4/167 and Add.1-3 [1964] II ILC YB, 45, art 66 ['Where a treaty provides for obligations or rights which are to be performed or enjoyed by individuals, juristic persons, or groups of individuals, such obligations or rights are applicable to the individuals, juristic persons, or groups of individuals in question: (a) through the contracting States by their national systems of law; (b) through such international organs and procedures as may be specially provided for in the treaty or in any other treaties or instruments in force.'].

[89] ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries' UN Doc A/56/10 (2001/2) ILC YB 1966 vol II, 265 art 66 para 3 ['the Commission wished to make it clear that paragraph l(b) relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the "vested interests" of individuals.'].

[90] Pierre D'Argent, 'Article 37' in Corten and Klein (n 48) 943, 944.

[91] Alexander Proelss, 'Article 34. General rule regarding third States' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 655, 661; Aust (n 14) 256.

[92] Binder (n 69) 979; Federico M Lavopa, Lucas E Barreiros and M Victoria Bruno, 'How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties' (2013) 16 J Intl Econ L 869, 889.

[93] Pierre A Lalive, 'Doctrine of Acquired Rights' in *Rights and Duties of Private Investors Abroad* (Mathew Bender 1965) 145–200.

[94] Stephan Wittich, 'Article 70' in Dörr and Schmalenbach (n 91) 1296, fn 74 ('the doctrine of acquired rights is a general principle of law which States are bound to respect and comply with even in the absence of a corresponding treaty obligation. Thus even after termination of the treaty and the end of the continuing effects, acquired rights may remain protected according to general international law and Art 43 VCLT. The content and scope of the general rule will, to be sure, not necessarily be identical to the treaty rule').

[95] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* Merits [1926] PCIJ Rep Series A No 7, 42; *German Settlers in Poland*, Advisory Opinion [1923] PCIJ Rep Series B No 6, 40 ('The settlers were already in legal possession of the lands in which they had invested their money, and to which they had already acquired rights enforceable at law').

sion,[96] where it is seen to ensure that vested rights of individuals are not affected by State succession and remain enforceable against the new sovereign.[97] While some suggest that, in the field of State succession, the doctrine of acquired rights is—albeit 'not adequately defined'—still 'long accepted in international law',[98] others note that there is no support for the notion that rights acquired before a change of sovereignty must be maintained by the new sovereign.[99]

Even if accepted in the context of State succession, such principle is not automatically applicable outside of it, in particular in cases where rights of individuals may be affected by States terminating treaties.[100] An application of the principle to the situation of investors after termination of an IIA, although similarly motivated by considerations of legal certainty and non-retroactivity,[101] appears unclear not only in its legal quality, but also in its extent and scope.[102]

A previous draft of what is now article 70(1) VCLT included in relevant part that a lawful termination of a treaty 'shall not affect the validity of any act performed or of any right acquired under the provisions of the treaty prior to its termination'.[103] In subsequent drafts, the mentioning of 'any right acquired' was, however, substituted by 'situation resulting from the application of the treaty',[104] and ultimately 'legal situation of the parties created through the execution of the treaty prior to its termination'.[105] According to the ILC, this wording intentionally left the issue of acquired/vested rights outside the scope of the provision dealing with the effect of treaty termination.[106]

[96] *Atlantic and Hope Insurance Companies v Ecuador (Case of the Schooner Mechanic)*, Opinion of the Commissioner, Mr Hassaurek, 8 January 1865 ('When this treaty was made, the subsequent Republic of Colombia was part of the Spanish Empire, and the public laws and treaties of Spain were binding on all her subjects, whether in Europe or America. From the obligations that treaty imposed on the whole Spanish nation the Republic of Colombia could not and did not free herself by her subsequent declaration of independence. Third parties had acquired rights and interests under the treaty which Colombia was not at liberty to disregard, and the United States had a right to expect that the Colombian cruisers and prize courts would respect the property covered by the American flag.'); Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 757; Daniel Patrick O'Connell, *The Law of State Succession* (CUP 1956) 78.

[97] Shaw (n 96) 757.

[98] O'Connell (n 96) 78; Lalive (n 93) 165.

[99] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 418; Lalive (n 93) 167 ('It has never been contended that the principle deprives the acquiring state of its power to legislate for the future.').

[100] On the main difference between these contexts, see Lalive (n 93) 159, 162 ('[T]his example, i.e. of annexation or cession of territory, seems to have been used by several writers on acquired rights as a link between the field of private intertemporal law and the field of private international law. In the latter case the change in the governing law is brought about – not, as in the former case, of intertemporal law by a new intervention of the same legislator but by the fact that the same territory and persons come under a new sovereignty.')

[101] Max Sørensen, 'Le problème dit du droit intertemporel dans l'ordre international—Rapport provisoire' (1973) 55 Annuaire de l'Institut de Droit International 1, 46 ('On ne saurait tirer argument de cette jurisprudence pour transposer la doctrine dans le domaine des problèmes intertemporels. D'un autre côté, il faut reconnaître que le même besoin de sécurité juridique, qui est à la base de la doctrine des droits acquis dans le contexte de la succession d'Etats, peut se faire valoir dans le domaine intertemporel.'); Lalive (n 93) 153; Wittich (n 94) 1283, 1295.

[102] Ascensio (n 48) 1596; Wittich (n 94) 1283, 1295; Lalive (n 93) 146, 149; see also IUSCT Judge Ameli opining that when facing a lack of consistency or uniformity of practice (in that case as to the valuation standards for compensation), tribunals 'after confessing helplessness, [have] proceeded to call on either the principle of "acquired rights", "unjust enrichment", "equity" or other variations and then fashioned its own ad hoc methods' (*INA Corporation v The Government of the Islamic Republic of Iran*, IUSCT Case No 161, Dissenting Opinion of Judge Ameli, paras 40–1).

[103] ILC, Second Report on the Law of Treaties by Sir Humphrey Waldock Special Rapporteur, A/CN.4/156 and Add.1-3 ILC YB 1963 vol II 94.

[104] ILC, Report of the International Law Commission covering the Work of its Fifteenth Session, (6 May–12 July 1963) A/5509 ILC YB 1963 II, 216.

[105] ILC Draft Articles on the Law of Treaties with commentaries, ILC YB 1966 II, 187 art 66(1)(b); VCLT (n 12) art 70(1)(b).

[106] ILC Draft Articles on the Law of Treaties with commentaries, ILC YB 1966 II, 187, 265 ['by the words "any right, obligation or legal situation of the parties created through the execution of the treaty", the Commission wished to make it clear that paragraph 1(b) relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the "vested interests" of individuals'].

Judicial practice of applying a principle of vested rights in cases of treaty termination remains rather scarce. In *Saudi Arabia v Arabian American Oil Company (Aramco)*,[107] the Tribunal held that Aramco's rights as concession holder 'have the character of acquired or "vested" rights [. . .] which cannot be taken away [. . .] by the Government by means of a contract concluded with a second concessionaire'.[108] Pursuant to this principle of respect for acquired rights, which it called 'one of the fundamental principles both of public international law and of the municipal law of most civilized States', the party that has 'granted certain rights to the other contracting party [. . .] can no longer dispose of the same rights, totally or partially, in favour of another party'.[109] On the relationship between acquired rights and state sovereignty, the Tribunal stated in relevant part that:

> Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irretractable rights. Such rights have the character of acquired rights.[110]

The case dealt, however, with rights arising out of a concession contract, and not a treaty that may be later terminated in compliance with applicable rules.

Similarly, in *Amco Asia v Indonesia*,[111] the Tribunal held that by granting an authorization to invest pursuant to Indonesian law, the investor was 'bestowed with acquired rights (to realize the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law)' which could not be withdrawn by Indonesia 'except by observing the legal requisites of procedural conditions established by law'.[112] Here, too, the central issue did not relate to the effect of treaty termination in light of acquired rights *per se*, but rather to the non-compliance with procedural requirements under national law.

Parallels may be drawn from an examination of pertinent practice in the case of human rights treaties. Some pertinent advances towards acquired rights seem to have been made by not allowing denunciations of a human rights treaty not including a termination provision because 'the rights enshrined in the [ICCPR] belong to the people living in the territory of the State party'.[113] In a similar vein, the Inter-American Court of Human Rights (IACtHR) did not allow withdrawal from declarations accepting its jurisdiction without following the provisions to denounce the entire Convention because it held that the Convention's provisions must not be interpreted 'as permitting [States] to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention'.[114] However, these examples are not

[107] *Saudi Arabia v Arabian American Oil Company (Aramco)* [1958] 27 ILR 117.
[108] ibid 205–6.
[109] ibid 206.
[110] ibid 168.
[111] *Amco Asia Corporation (AMCO) v Republic of Indonesia* Decision on Jurisdiction (25 September 1983) 89 ILR 366.
[112] ibid 497–8.
[113] The UN Human Rights Committee (HRC)'s concluded that since the ICCPR does not include a provision on denunciation and such possibility is not implied from the nature of the treaty, the Democratic Republic of North Korea's denunciation was not possible. See HRC, General Comment No 26, 'Continuity of Obligations' (8 December 1997) CCPR/C/21/Rev.1/Add.8/Rev.1 paras 1–5; Report of the Secretary-General, 'Status of withdrawals and reservations with respect to the International Covenants on Human Rights' E/CN.4/Sub.2/2000/7 (29 May 2000) 12 ('As elaborated in this aide-mémoire, the Secretary-General was of the opinion that a withdrawal from the Covenant would not appear possible unless all States parties to the Covenant agreed with such a withdrawal.'); Ascensio (n 48) 1598.
[114] The IACtHR held that Peru's withdrawal of its declaration accepting the Court's jurisdiction under art 62(1) of the American Convention on Human Rights was only valid if it withdrew from the Convention in its entirety. See *Case of Ivcher-Bronstein v Peru*, Judgment on Competence, Inter-American Court of Human Rights Series C No 54 (24 September 1999) paras 32, 46; Ascensio (n 48) 1598.

persuasive in allowing the recognition of a general principle of acquired rights protecting them from treaty termination: the impermissibility of the former withdrawal essentially resulted from the terminating State not following the treaty's or the VCLT's termination rules, while in case of the latter, the IACtHR, by advising termination of the entire Convention, did not show much concern about preventing a loss of acquired human rights. This is further supported by other denunciations of human rights treaties or their optional protocols that have been held to be valid and not limited by purported acquired rights of the individuals.[115]

The human rights discourse shows that there are two distinct questions with respect to vested rights of investors. The first relates to the quality such rights must possess to be considered 'acquired' or 'vested rights'. The second, and entirely different, question relates to whether such rights are deemed incapable of modification or termination by States following proper procedures. As to the first issue, pertinent scholarship considers property rights (both immovable and movables) and rights arising out of concessions to be included, whereas the inclusion of contractual rights will depend on how property is defined in the applicable law (either as encompassing contractual rights or not)[116] and favourable business conditions or goodwill will usually not qualify at all.[117] In the context of investor rights, the first issue is linked to the debate whether and to what extent rights contained in IIAs are 'direct' or 'derivate' rights of investors.[118] On the one hand, investors are granted rights by virtue of States' consent that hence depend on these States' continuous approval. On the other hand, these rights are enforced by investors through direct access to ISDS and do not depend upon their 'home States', making it implausible to argue that investors would exercise such rights on behalf of their home States. While investment jurisprudence is still unsettled,[119] a growing number of scholars argue that investor rights pertain to the category of direct rights of individuals.[120]

The second question relating to vested rights is highly disputed. Where a State or States terminated a treaty by following rules of the treaty or the VCLT, it is difficult to assume that rights acquired through the treaty continue to remain in effect against the explicit will of the masters of the treaty. While the jurisprudence of investment tribunals has in some cases endorsed the idea of direct investor rights and notions that they continue to be protected as vested or acquired rights, such conclusions have

[115] For instance, withdrawals by Jamaica, Trinidad and Tobago, and Guyana from the ICCPR or Jamaica from the American Convention on Human Rights, see Ascensio (n 48) 1598.

[116] Lalive (n 93) 183–5.

[117] *Oscar Chinn (United Kingdom v Belgium)* Merits [1934] PCIJ Series A/B No 63, 88 (rejecting that measures by Belgium 'constituted a breach of the general principles of international law, and in particular of respect for vested rights' because '[f]avourable business conditions and goodwill are transient circumstances' and not genuine vested rights').

[118] Zachary Douglas, 'Hybrid Foundations of Investment Treaty Arbitration' (2003) 74(1) BYBIL 151, 163; José Enrique Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 Collected Courses of The Hague Academy of International Law, 197, 488; Voon, Mitchell and Munro (n 34) 463.

[119] *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc* v *United Mexican States*, ICSID Case No.ARB(AF)/04/5, Award (21 November 2007) para 168 ('The Respondent is correct in its position that Section A of Chapter Eleven sets forth substantive obligations which remain inter-State, without accruing individual rights for the Claimants'); *Corn Products International, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility (15 January 2008) para 167 ('In the Tribunal's view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals'); see also *Occidental Exploration & Production Company v Ecuador* [2005] EWCA Civ. 1116, [2006] QB, paras 17–18 (noting that the right under investment treaties belong to investors and that '[i]t would potentially undermine the efficacy of the protection held out to individual investors, if such protection was subject to the continuing benevolence and support of their national State').

[120] Gatzsche (n 82) 116; Douglas (n 118) 163; Harrison (n 22) 943.

mostly been based on the principle of legal certainty, rather than an independent principle of acquired rights prohibiting treaty parties to dispose of investment protection. Usually, they also involved circumstances in which the investor has set procedural steps prior to the taking effect of a termination.

For instance, the ICSID Tribunal in *Magyar Farming v Hungary*[121] found that although 'the Contracting States remain masters of their treaty, their control is limited by the general principles of legal certainty and *res inter alios acta, aliis nec nocet nec prodest*',[122] and that by including a survival clause 'they acknowledge that long-term interests of investors who have invested in the host State in reliance on the treaty guarantees must be respected'.[123] This approach is interesting, not only because it concludes that 'survival' clauses retain their effect even in cases of mutual termination, but also because of its consideration of general principles of 'legal certainty' and *res inter alios acta, aliis nec nocet nec prodest*.

In *Eskosol v Italy*[124] another ICSID tribunal even expressly relied on the concept of acquired rights to reject the possibility that States could have revoked the right of investors to litigate an investment dispute.[125] The Tribunal in *AMF v Czech Republic*[126] similarly rejected the contention that it lacked jurisdiction for proceedings initiated by the investor before the issuance of the 2019 Declaration by EU Member States based on the principle of acquired rights, which 'does not permit States to deprive investors of their right to arbitration under a long-standing BIT mid-way through the arbitration by simply issuing an interpretative declaration'.[127]

However, these examples do not furnish much proof for an all-encompassing principle of acquired rights protecting against treaty termination. Rather, they appear to revolve around considerations of legal certainty and protection of legitimate expectations and mostly have an additional justification in the law (either because the termination rules have not been followed, or the termination has not yet taken effect, or because an investor has already initiated an arbitration that cannot be affected by a termination taking effect subsequently). In that sense, the principle of acquired rights rather seems to furnish additional support to protect beneficiaries of a treaty where other types of post-termination responsibility, as defined above,[128] are applicable.[129]

IV. CONCLUSION

The present elaboration of scenarios of post-termination responsibility of States has revealed both clear and less clear implications. On the one hand, it is established that terminations, suspensions and amendments must follow the respective rules in the

[121] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary* (n 53).
[122] ibid para 222.
[123] ibid para 223.
[124] *Eskosol SpA in liquidazione v Italian Republic* (n 55).
[125] ibid para 226 ('In the Tribunal's view, it would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a pending case, simply by issuing a joint document purporting to interpret longstanding treaty text so as to undermine the tribunal's jurisdiction to proceed').
[126] *AMF Aircraftleasing Meier & Fischer GmbH & Co. KG v Czech Republic*, PCA Case No 2017-15, Final Award (11 May 2020), paras 336–8.
[127] ibid para 338.
[128] See text accompanying n 14.
[129] Lalive similarly argues that where pecuniary rights of an alien are injured, that injury may be unlawful and that determination of unlawfulness 'could not and cannot be restricted to a consideration of the doctrine of acquired rights', but needs an inquiry into 'vast fields of international law, such as that of state responsibility, status of aliens, etc.' (Lalive (n 93) 192).

treaty or the VCLT to be effective, and that responsibility for treaty obligations may remain in place until these procedural rules are implemented correctly. It is also clear that when an effective termination of a treaty containing a 'survival' clause is unilateral, the 'survival' clause will regularly provide continued protection for rights specified in the provisions. Moreover, there are no indications in international jurisprudence that the termination of a treaty after proceedings were initiated may be capable of impacting the jurisdiction of tribunals for such pending cases.

On the other hand, contradictions still exist with respect to mutual terminations of such treaties, particularly when they explicitly address 'survival' clauses by either attempting to eliminate or to amend them. Determinations of whether such terminations or amendments of survival clauses are valid will largely depend on the wording of the particular 'survival' clause, as general treaty law, particularly articles 70 and 54 VCLT, does not appear to entirely exclude States' rights to mutually agree on different consequences of a treaty termination. Furthermore, although considerations arising out of a principle of acquired or vested rights are increasingly discussed in this context, they do not seem to be widely accepted as providing for an independent basis for continued investor protection in the aftermath of treaty termination. Similarly, an analogous application of the VCLT's third-party rights regime to rights of investors is not really supported by practice or jurisprudence—a fact that may not change, considering the many clear indications in the drafting process that the VCLT's provisions were in no way meant to establish rights for individuals. In light of these conclusions, it remains to be seen whether investment tribunals or States may bring about more clarity in future considerations of the matter.