Vol. 3, Issue 1, August 2026 Subject-Law ISSN 3049-3099 (Print)
ISSN 3108-0561 (Online)

Peer Reviewed

VIPS JOURNAL OF LAW & DEVELOPMENT

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THE GHOST OF THE TERMINATION TREATY: SUNSET CLAUSES, LEGACY ISDS EXPOSURE, AND SOVEREIGN REGULATORY SPACE

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VIPS Journal of Law & Development
Subject - Law
August 2026, Vol. 3, Issue 1, 277-297
ISSN 3049-3099 (Print)
ISSN 3108-0561 (Online)
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(VIPS-TC)
https://vips.edu/vslls/Publications/VJLD

ABSTRACT

Sunset Clauses are features that can be seen in the majority of International Investment Agreements (IIA). These clauses keep the terminated agreement in force for a specified period mentioned in the IIA, to enable the aggrieved parties to invoke Investor-State Dispute Settlement (ISDS) against the other party in case of any violation of treaty clauses occurring during the sunset clause period. On its face, the clause sounds surprising, but the scheme is constantly upheld by many arbitral tribunals. These clauses have challenged the sovereignty of the host nation that has amended its policy in the best interest of its people, and despite there being mutual acceptance from the counter-party, the investor has initiated proceedings against the host nation for not granting protection under the old regime during the sunset period. These obsolete frameworks are causing chaos in the host nations and blocking their development. This research article does not examine the legality but examines the problems faced by the respective sovereign nations. The solution for the problem is an amendment to the treaty rather than terminating the treaty. Termination triggers the sunset period, whereas an amendment does not do so. The Vienna Convention permits an amendment to the treaty; the same should be done prior to the crystallisation of any dispute. The said paradigm is tested against arbitral jurisprudence and contemporary State practice. It further analyses the European Union's 2020 intra-EU termination agreement,

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Australia's CPTPP-linked bilateral agreements, India's post-dispute 2022 Joint Interpretative Statement with Mauritius, and the temporal ambiguities within the 2016 Indian Model BIT. The research article further addresses the basic objections to the continuation of survival clauses and advocates for a proper structural recalibration over a termination.

Keywords: *Sunset Clauses, Investor-State Dispute Settlement (ISDS), Sovereign Regulatory Space, Treaty Termination, Bilateral Investment Treaties (BITs).*

I. INTRODUCTION

Sovereign states usually retract or terminate BITs either to withdraw their consent to the ISDS, or to rework the leeway in the clauses that grant protections to the investors, or to discard an obsolete framework executed at different times for different reasons.[1]Treaty termination does not bring down the curtains immediately like a commercial agreement. Most current investment treaties have survival or sunset clauses. The said clauses grant extended protections to the investor, and jurisdictional consent dates back to the pre-termination of the treaty for a specified period.[2] The said clauses may generate profound structural asymmetry in the investment treaty. A state's economic policy might change, but its legal exposure to the earlier treaty provision continues. The said residual liability is not restricted to State conduct dating back to the policy change; it also captures regulatory measures enacted after termination, through a survival window specified in the terminated treaty.[3]

1 ALEXANDER THOMPSON, TOMER BROUDE & YORAM Z. HAFTEL, *Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design*, 73 INT'L ORG. 859 (2019); TUULI-ANNA HUIKURI, *Terminating to Renegotiate? Strategic Exit from International Investment Treaties* (Oct. 30, 2024) (unpublished manuscript).

2 CLAUDIA ANNACKER, *Operation and Termination of Sunset Clauses in Bilateral Investment Treaties*, 10 NAT'L L. SCH. BUS. L. REV. 9 (2023); DIMITRY KOCHENOV & NIKOS LAVRANOS, *Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union*, 14 HAGUE J. RULE L. 195, 202 (2021).

3 TANIA VOON & ANDREW D. MITCHELL, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* (HighWire Press Open Archive, Working Paper, 2016); AUGUST REINISCH & SARA MANSOUR FALLAH, *Post-Termination Responsibility of States? – The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors*, 37 ICSID REV. 101 (2021); Zhe Wang, *Survival Clause under the International Investment Treaty Reform: Challenge and Response*, 14 BEIJING L. REV. 1878, 1879 (2023); SEID DEMEKE MEKONNEN & HENOK ASMELASH, *Reforming Ethiopian Bilateral Investment Treaties in Line with Domestic Development*

The prime objective of this article is to conceptualise this asymmetry as the "treaty transition problem." This inquiry deliberately steps away from the broader, ongoing debate over the general legitimacy of ISDS within the international economic order. Rather than challenging the basic validity of ISDS, this article enquires into the mechanics of withdrawn consent: precisely, how international law governs ISDS jurisdiction that a state has prospectively revoked, and how a survival clause artificially sustains it for a class of legacy investments. Part VIII does address the doctrinal objection that even a narrowly tailored survival clause conflicts with a state's sovereign prerogative to determine its arbitral exposure. However, the solution proposed through this article balances these competing imperatives. It intends to preserve the legitimate interests that survival clauses were originally crafted to protect, while parallelly relieving host nations from the prolonged regulatory paralysis caused by the penumbra of a terminated treaty.

The structure of the article is divided into nine parts. To begin, Part II deals with the foundational doctrinal and empirical analysis of survival clauses in the current treaty regime. Part III analyses the friction of transition post-termination of a treaty and examines its direct face-off with sovereign regulatory power. Part IV deals with the evaluation of two inadequate State responses over the termination of a treaty, namely (i) unilateral repudiation and (ii) passive compliance, through arbitral jurisprudence to show how tribunals have enforced survival clauses against abrogation. Part V is the core thesis of the article; it articulates the necessity of an accrual rule calibrated strictly to the timing of State measures, superseding the traditional triggers, i.e., the date of investment and the date of initiation of arbitral proceedings. Part VI tests the proposed mechanism against State practice and analyses four distinct bilateral and multilateral models, including crucial policy lessons derived from India's recent diplomatic shifts. Part VII explains the elements that constitute a functional transition instrument to operationalise the reform. Part VIII addresses all specific doctrinal objections to the proposed accrual rule and the fundamental debate over whether survival clauses should continue to exist in international investment law. Lastly, Part IX provides a conclusion, suggesting suitable methods to overcome the problems faced during the transition created by survival clauses.

Policies: Challenges, Prospects and Simplified Reform Options, 69 J. AFR. L. 73, 89 (2024).

II. The Reliance Rationale: Doctrinal Foundations And Empirical Realities Of Sunset Clauses

Treaty termination travels beyond unilateral denunciation; it involves mutual abrogation and implied termination due to the execution of a new governing treaty that conflicts with the earlier treaty governing the identical subject matter.[4] Much like an arbitral clause in a commercial agreement that survives the frustration of the contract, sunset clauses operate independently from the successor instrument. The enforcement of a new treaty does not extinguish the old regime during the active sunset period specified in the terminated investment treaty. An investor covered under that jurisdiction can invoke the terminated treaty clauses during the survival phase, despite the enforcement of a new bilateral or multilateral treaty regime that governs the prospective relationship. For instance, Australia's practice, extensively dealt with in Part VI.B, analyses this structural friction. Australia replaced its existing bilateral investment treaties with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which mandated certain appended agreements to neutralise the legacy of the survival clauses, precisely because the enforcement of a multilateral instrument cannot automatically override them.

The basic justification for the incorporation of survival clauses in the agreement is investor reliance. Commercially, any capital is deployed based on the legal framework that is in operation at the time of investment.[5] As a result, treaty termination by a host nation renders the reliance given to the investor as illusory.[6] Survival clauses freeze time and neutralise the damage caused by the unilateral termination of a treaty by the host nation, which otherwise abruptly strips the sunk capital deployed based on anticipated transnational protections. The survival clauses grant protections to the said anticipated investments, such as the dispute resolution mechanism per the terminated treaty[7] enforcing a non-derogable protection window following a formal

4 Vienna Convention on the Law of Treaties art. 59, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (termination or suspension implied by conclusion of a later treaty).

5 Dimitry Kochenov & Nikos Lavranos, *Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union*, 14 Hague J. Rule L. 195, 202 (2021).

6 James Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties*, 13 J. World Inv. & Trade 928 (2012); Tania Voon & Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* (HighWire Press Open Archive, Working Paper, 2016).

7 Claudia Annacker, *Operation and Termination of Sunset Clauses in Bilateral Investment Treaties*, 10 Nat'l L. Sch. Bus. L. Rev. 9 (2023); Zhe Wang, *Survival Clause under the International Investment Treaty Reform: Challenge and Response*, 14 Beijing L. Rev. 1878, 1887 (2023).

termination.[8]

A treaty that is terminated either unilaterally or by mutual agreement of the nations shall have consequences through its survival clauses. The presence of survival clauses does not make the terminated instrument history; they shall function during the sunset period in parallel with the newly negotiated treaty that is in force. This might create more chaos when two instruments are in operation, giving different treatments to the investors. The other way of looking at it is that, if we compare the treaty with a statute, any statute that is repealed as a matter of government policy should have a saving clause. In the absence of it, all pending litigations based on the said statute would be orphaned, forcing parties to run to the courts to seek a way forward in the chaos created by the State's decision.

Further, Article 38.3 of the 2016 Indian Model BIT has also guaranteed protection to investments through survival clauses by reducing the survival period from 10–15 years to 5 years; however, the said survival clause consciously avoids restricting the liability strictly to the State's pre-termination conduct.[9] As a consequence, any regulatory measure enacted three years into the said survival period shall trigger the same actionable liability as one enacted right before the expiration of the sunset period. The limitation period invoking the protection is anchored exclusively to the date of the investment. Because the jurisdiction is anchored exclusively to the date of the investment, the actual timeline of the State's offending conduct becomes legally irrelevant. This specific structural flaw is exactly what creates the treaty transition problem.

ISDS is the anchor and core feature of international investment law. To support this statement, an OECD survey and analysis of 1,660 bilateral treaties found that 93% of the treaties comprise dispute resolution provisions.[10] Further, in a companion study by the OECD analysing 2,061 IIAs, it was identified that survival clauses are present in nearly all of the said agreements, with protection periods between 10–15 years.[11]

8 Dimitry Kochenov & Nikos Lavranos, *Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union*, 14 Hague J. Rule L. 195, 202 (2021); Arthur Lauvaux, *Towards a Bumpy Ride into the Sunset: On the Mutual Termination of IIAs and Their Sunset Clauses*, 38 Arb. Int'l 203 (2022).

9 Ministry of Finance, Government of India, Model Text for the Indian Bilateral Investment Treaty art. 24.2 (Dec. 2015), [hereinafter 2016 Model BIT].

10 Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 9 (OECD Working Papers on Int'l Inv., No. 2012/02, 2012).

11 Joachim Pohl, *Temporal Validity of International Investment Agreements: A Large Sample Survey of*

The said data is corroborated by UNCTAD: out of 2,490 bilateral treaties containing survival mechanisms, 1,468 treaties have protection for a period of exactly 10 years, and the rest mandate between 15 to 20 years of survival time.[12] Hence, survival clauses cannot be seen as mere drafting anomalies; they are deployed uniformly as a default structural feature of an investment agreement or treaty with the intention of providing a safety chamber to the investors. However, on a few occasions, the said safety chambers have become wild traps for host nations, who get sued by rogue investors elevating a simple commercial dispute to a treaty violation.

Arbitral jurisprudence has consistently upheld the validity of one- to two-decade sunset periods. In *Magyar Farming Co. Ltd. v. Hungary*, the arbitral tribunal, while adjudicating the dispute, upheld the 20-year survival clause in the Hungary–Cyprus Bilateral Investment Treaty. The tribunal held that survival clauses are acknowledged mutually by sovereign nations to give an assurance to the investments; based on the said assurance, the investment inflow can be seen. For the said reason, despite the treaty termination, the protection will continue to operate during the said sunset phase. [13] Academically, the reasoning may sound correct, but in practice and from the perspective of the host nation, it is a nightmare. Whenever the host State attempts to recalibrate its policy and domestic regulatory space, the survival clause shall be a roadblock for its development to emerge as a strong financial state. However, from another perspective, the above rationale may be seen as an analytical starting point rather than a barrier. So, the objective of the systematic reform is not to defeat investor reliance but to harmonise the interests of both the investor and the state.

III. The Friction Of Transition And Sovereign Regulatory Power

As established, host nations increasingly view survival clauses as a hurdle rather than a mechanism to attract investors.[14] In their initial phases, survival clauses appear harmless because host nations are eager to attract capital that can pump

Treaty Provisions (OECD Working Papers on Int'l Inv., No. 2013/04, 2013), discussed in OECD, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World* 15–17 (OECD Working Papers on Int'l Inv., No. 2015/02, 2015).

12 *Les clauses de survie (sunset clauses)*, 44 Revue Internationale de Droit Économique [Rev. Int'l Droit Écon.] 5 (2024) (citing UNCTAD Investment Policy Hub treaty data); Magyar Farming Co. Ltd. v. Hungary, ICSID Case No. ARB/17/27, Award, ¶¶ 222–23 (Nov. 13, 2019).

13 Magyar Farming Co. Ltd. v. Hungary, ICSID Case No. ARB/17/27, Award, ¶¶ 222–23 (Nov. 13, 2019).

14 Voon & Mitchell, *supra* note 6; Kochenov & Lavranos, *supra* note 2, at 195.

revenue and guarantee employment for their citizens. But once a host nation aims to grow stronger economically and provide better infrastructure by amending taxation policies or enacting environmental protections for the public good, these clauses suddenly stall the State. The defining problem is the sheer length of these survival clauses. A sunset period of 10 to 15 years spans almost three full electoral tenures in most democracies. If a State dares to proceed with regulatory change, it is immediately hit with notices initiating arbitral proceedings for violating the legacy treaty. Therefore, to enact a policy change without facing arbitral disputes, the host State is effectively forced to wait out three democratic electoral cycles.[15]

The procedural overhang of survival clauses creates direct friction because it severely restricts sovereign regulatory space. As noted above, it is nearly impossible for a State to make broad policy decisions regarding fiscal, environmental, or public health frameworks without affecting at least some foreign investors. Therefore, to shield the State from perpetual liability, the treaty must be clear about the limitations of these legacy protections. Without this clarity, government administrations react with legislative hesitation, pre-emptively subjecting novel regulatory policies to exhaustive internal vetting out of fear of triggering legacy treaty claims, thereby creating a severe regulatory chill.[16] When boundaries are precisely drawn, specifying exactly what the survival mechanism is meant to protect and the narrow circumstances under which it can be invoked (such as a State deliberately targeting a specific foreign investor and showing disparity compared to a domestic investor), it replaces blanket immunity with a balanced framework. This clarity enables the State to implement uniform policies that allow the nation to flourish, generating revenue for both investors and governments alike. A sovereign State's development cannot be left at the mercy of a foreign investor; the relationship must be mutually beneficial rather than extortionate. Ultimately, arbitral tribunals must interpret sunset clauses as mutual welfare mechanisms, rather than as instruments of unilateral benefit to the investor.

There is a fundamental distinction between the empirical debates and the underlying doctrinal premise of the survival clause.[17] While empirical data frequently revolves

15 WANG, *supra* note 7, at 1878; LAUVAUX, *supra* note 8, at 203.

16 Gus Van Harten & Dayna Nadine Scott, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada*, 7 J. INT'L DISP. SETTLEMENT 92 (2016); ASHLEY SCHRAM ET AL., *Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill*, 9 GLOBAL POL'Y 193 (2018).

17 Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence* 4–5 (OECD WORKING PAPERS ON INT'L INV., NO. 2018/01, 2018);

around the highly contested concept of 'regulatory chill', [18] this article grounds its critique in doctrine rather than statistics. A purely empirical approach is limited, simply because data is often manipulated to suit predetermined conclusions. A doctrinal critique, however, tests the actual operational realities that arise from these treaty clauses. Ultimately, survival clauses were engineered to protect ongoing investments from a sudden, retroactive withdrawal of an existing legal framework. They were never meant to prospectively immunize legacy capital against future, post-termination changes in host-State law. [19]

This precise distinction, between transitional protection and prospective regulatory immunity, forms the nucleus of the treaty transition problem and dictates the necessity for structural reform

IV. The False Binary: Repudiation Versus Passive Acceptance

The Structural Impracticability of the Default Responses

When a host State attempts to extinguish its exposure to legacy clauses by unilaterally declaring the survival mechanism void upon termination, arbitral tribunals consistently strike the effort down. In *UP and C.D. Holding Internationale v. Hungary*, the tribunal evaluating the France-Hungary Bilateral Investment Treaty observed that neither State had initiated bilateral renegotiations to amend or reduce the survival window. [20] Consequently, the tribunal affirmed that the unamended survival clause remained fully active, preserving jurisdiction over the dispute and rendering the tribunal competent to hear the case.

David Gaukrodger, *The Balance between Investor Protection and the Right to Regulate in Investment Treaties* (OECD Working Papers on Int'l Inv., No. 2017/02, 2017).

18 Carolina Moehlecke, *The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty*, 64 Int'l Stud. Q. 1 (2020); Schram et al., *supra* note 16, at 193; Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 Transnat'l Env't L. 229 (2018); Van Harten & Scott, *supra* note 16, at 92; Mark G. Maffett, Mario Milone & Weijia Rao, *The Impact of Foreign Investors' Challenges to Domestic Regulations*, 68 J.L. & Econ. 269 (2025).

19 Annacker, *supra* note 7, at 9; Kochenov & Lavranos, *supra* note 2, at 195; Harrison, *supra* note 6, at 928.

20 UP (formerly Le Chèque Déjeuner) & C.D. Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Final Award, ¶ 265 (Oct. 9, 2018); Szilárd Gáspár-Szilágyi & Maxim Usynin, *The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's Achmea Judgment*, 4 Eur. Inv. L. & Arb. Rev. 29, 42 (2019); Mélida Hodgson & Edelí Rivera, *UP and CD Holding Internationale v Hungary: Achmea Is Not the End of Intra-EU ICSID Arbitration*, 35 ICSID Rev. 197 (2020).

In a parallel dispute, *Sodexo Pass International SAS v. Hungary*, dealing with identical fiscal measures taken by Hungary, the European Commission intervened as *amicus curiae*. The Commission argued that survival clauses improperly prolong a sovereign's offer to arbitrate well beyond the formal termination of the treaty. [21] Ultimately, the tribunal concluded the proceedings without fully adjudicating this specific structural challenge. Nevertheless, the Commission's intervention severely underscores the systemic problems generated by these legacy clauses. Reading *Sodexo (supra)* alongside *UP & C.D. Holding (supra)*, the doctrinal reality is clear: survival periods represent a hard commercial bargain struck by two sovereign nations. Because it is a bilateral creation, it can only be altered or neutralized by a subsequent bilateral instrument. A host State simply cannot frustrate the clause through unilateral termination.[22]

Up to this point, we have examined the defensive face of survival clauses—protecting legitimate investor reliance. However, as noted above, there are instances where investors exploit the rigidity of these clauses, achieving a consistent success rate in prosecuting legacy arbitral claims. For example, in *Marco Gavazzi & Stefano Gavazzi v. Romania*, the tribunal's jurisdiction rested entirely on the treaty's five-year survival clause.[23] As these cases demonstrate, any unilateral intervention by the State to cure the defective clauses is inadequate. Following this established ratio, domestic legislative interventions, unilateral terminations, or internal amendments simply will not suffice to extinguish the State's legacy exposure.

The Strategic Failure of Current State Practice

Survival clauses cannot simply be left to run their course until they expire. Adopting this posture places sovereign autonomy at severe risk and exponentially increases the regulatory costs detailed in Part III.[24] A passive strategy of "wait and watch" guarantees nothing but a steady proliferation of ISDS claims. By submitting to this

21 Sodexo Pass International SAS v. Hungary, ICSID Case No. ARB/14/20, Award, ¶ 168 (Jan. 28, 2019); Nicolette Butler, *Non-Disputing Party Participation in ICSID Disputes: Faux Amici?*, 66 Neth. Int'l L. Rev. 143, 156 (2019).

22 Catharine Titi, Public Actors in International Investment Law 154 (2021); Clemens Wackernagel, *The Consensual Termination of Investment Agreements Between EU Member States*, in Public Actors in International Investment Law 153 (Catharine Titi ed., 2021); Prabhash Ranjan, *Corruption and Investment Treaty Arbitration in India*, in Corruption and Illegality in Asian Investment Arbitration 235 (Nobumichi Teramura, Luke Nottage & Bruno Jetin eds., 2024).

23 Marco Gavazzi & Stefano Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (Apr. 21, 2015); *id.*, Award (Apr. 18, 2017).

24 Wang, *supra* note 3, at 1891; Reinisch & Mansour Fallah, *supra* note 3.

paralysis, the host State effectively concedes its sovereign authority, along with the democratic will of its citizens, to a poorly anticipated and highly rigid treaty provision. [25] Consequently, international investment law requires a functional structural mechanism to cure this defect. The regime must uphold State sovereignty while concurrently protecting legitimate investor reliance.

V. Calibrating Legacy Claims: The Measure-Date Accrual Amendment

In the field of medicine, it is a fundamental premise to treat the root cause of a symptom rather than suppressing the symptom. At present, all sovereign nations are attempting to suppress the symptom of ISDS claims rather than curing the defect in the survival clause timeline in the treaty.

The proposed structure of the survival clauses is based on a single distinction from the existing structure: the survival clause should be applicable from the date of the investment, and not from the date of the treaty. The reason is if an investor invests in a state and there is an immediate change in law within the proposed 5-year period, then he would not know where to go; in those circumstances, the said investor should be grandfathered. *Per contra*, an investor who enjoys benefits for more than a decade and is imbibed into the system cannot be permitted to claim any protection if there is any change in law. In that way, the protection is not only given to the genuine investor, but also the liability of the state can be brought down.

If the state wants to bring any change to its policy, it has to identify the major investor States and should negotiate and bring an amendment to the existing treaty rather than terminating the clauses. A State which does not have any commercial interest shall accept a genuine request for the said amendment, unless there is heavy influence of the investor or the state itself is an investor. This exercise should happen before the treaty termination rather than realizing it post-termination. It is just like anticipating the challenges and taking support from the opposition before passing a bill to get the majority, rather than passing an ordinance and facing the heat after the lapse of validity of the ordinance. The said suggestion is not novel; Art. 39 of the Vienna

25 Wang, *supra* note 3, at 1891; Christina Binder & Jane A. Hofbauer, *The Temporal Scope of Application of Investment Treaties and the Effects on General International Law*, in Research Handbook on the Interpretation and Application of International Investment Law 107 (2023); Annacker, *supra* note 2, at 9.

Convention on the Law of Treaties permits amendment to the clauses in the treaty. [26] In the survival regime as well, the investor's rights are protected for the actions done in the survival period. [27] This attempt can successfully pre-empt challenges against the post-amendment regulatory conduct of the State, and removes the right of the investors to claim protection simply because their deployment predated the treaty termination.

The proposed amendment is narrow; it does not unilaterally abbreviate the survival period, which forecloses that manoeuvre before the arbitral tribunal. By operating within these bounds, the amendment also leaves the terminated treaty undisturbed. A genuine investor with a genuine treaty violation claim can still raise their claim against the host nation for any treaty violation that actually affects the investor. The amendment also neutralizes the specific interpretative ambiguity; no investor can use the defunct treaty as a weapon, rather than a shield, against sovereign regulation affecting its genuine rights post-injection of capital. [28] To remain strictly in compliance with the provisions of the VCLT, specifically Article 28 and the vested rights protected under Article 70(1)(b), the amendment must operate prospectively. As a prospective measure, it cannot disrupt arbitral consent that was already perfected through a formal notice of dispute, nor can it destabilize proceedings that are pending at the time of the amendment's execution. [29]

In case a treaty is amended or terminated, setting a cut-off date might be practically difficult for the reason that state actions are not always a single or isolated event, especially when a government's "offending act" starts before the treaty ends, but still ghosts post-termination.[30] To resolve this complication, a proper protection or cushion should be in place to avoid post-termination complications, as an amendment or termination is a sovereign act. [31] The ISDS mechanism can kick in under the following circumstances: (i) if the State's wrongful act began before the

26 Vienna Convention on the Law of Treaties art. 39.

27 *See* Vienna Convention on the Law of Treaties art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

28 HARRISON, *supra* note 6, at 928.

29 VCLT, *supra* note 28, at arts. 28, 70(1)(b).

30 Filippo Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory 42* (2018); Nick Gallus, *The Effect of Acts That Begin Before the Main Temporal Limits but That Continue After*, in The Temporal Jurisdiction of International Tribunals 61 (2017); Nick Gallus, *Recent BIT Decisions and Composite Acts Straddling the Date a Treaty Comes into Force*, 56 INT'L & COMP. L.Q. 491 (2007).

31 WANG, *supra* note 3, at 1891; REINISCH & MANSOUR FALLAH, *supra* note 3.

termination and is continuing, the investor can still sue; (ii) if a State's action affects the investor and qualifies as a treaty dispute, the said investor is entitled to claim damages; and (iii) if the State passes a new law after the treaty's termination, which is independent of the treaty protection clauses, the investor cannot take advantage of it and drag the state into arbitration for the said independent action. To put it simply, even under the new regime, the actions of the state must qualify as a treaty dispute; not all commercial disputes shall qualify as treaty disputes. [32]

VI. Designing and Testing the Mechanism

The proposed accrual rule needs a proper mechanism to operationalise the structure. The choice of the instrument shall dictate both the capacity to bind pending disputes and its vulnerability to future ISDS challenges. Thus, analysing contemporary state practice reveals four distinct mechanisms. Among the said mechanisms, two demonstrate a viable structural framework, and the others function as critical cautionary precedents.

Wholesale Termination by Multilateral Instrument: The EU Experience

Let's first analyse the mechanism through the EU experience. In 2020, twenty-three member states of the EU executed the Agreement for the Termination of Bilateral Investment Treaties between its member states. This multilateral instrument effectively extinguished the survival clauses of all intra-EU bilateral investment treaties. Beyond extinguishing these clauses, the treaty attempts to mandate retroactive effect over arbitral proceedings pending at the time of signature.[33] The said new treaty has created structural friction. Several arbitral tribunals have declined to concede their jurisdiction due to the change in law during pending arbitral proceedings, on the principle that an arbitral tribunal is a consent-based authority (party autonomy), rooted in the ICSID Convention, which remains static despite later *inter se* treaty modifications executed by the respondent States. In *Addiko Bank AG v. Croatia*, the tribunal, while dealing with jurisdiction issues, gave a similar decision that refused to apply the EU's *Achmea* judgment as a jurisdictional

32 *See* Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 14–15, in Rep. of the Int'l Law Comm'n, 53d Sess., U.N. Doc. A/56/10 (2001), annexed to G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter ILC Articles on State Responsibility].

33 Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, May 5, 2020.

bar, reflecting the stance taken in the *UP and CD* (*supra*) decision. [34]

From the above, we can infer that although the European framework seems like an aggressive structural intervention for a wholesale, retroactive, and multilateral extinguishment of survival clauses in the treaty, it serves as a stark warning. A decision or policy with retroactive effect, even on pending and crystallised disputes, shall invite immediate jurisdictional pushback from the tribunals.

Bilateral Consent-Based Replacement: The Australian Model

The negotiation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) offered Australia a platform to execute a superior model of treaty transition. Rejecting a monolithic multilateral extinguishment of treaties, Australia negotiated discrete, partner-specific bilateral side letters to dictate the transition from its earlier bilateral treaties to the new multilateral regime. Rather than leaving its prior investment treaties in a state of parallel operational status or relying on the risky doctrine of implied termination, Australia utilised explicit, consent-based agreements to terminate its older treaties with Mexico, Peru, and Vietnam upon the CPTPP's entry into force.

Going beyond mere termination, Australia successfully negotiated the mutual reduction of the grandfathering provisions. Through these bilateral exchanges, the ten-year sunset period with Mexico was reduced to three years, and the fifteen-year sunset periods with Peru and Vietnam were reduced to five years, with legacy investor-State claims strictly barred after three years. This model neutralises the unknown temporal threats of legacy clauses by implementing a strict, mutually agreed chronological discipline. It eliminates the leverage of external actors, such as investors who elevate a trivial commercial contractual dispute into a high-stakes treaty dispute. A state implementing the accrual rule proposed in Part V should adopt this exact strategy. By negotiating a transition instrument in sync with the broader investment policy shift, a state can cleanly sever historical liabilities without triggering the abrupt jurisdictional overhauls that invite investors to weaponise residual sunset clauses.

Interpretation After the Fact: The Cautionary Case of India and Mauritius

India has been the epicentre of this discussion over the last decade. It has terminated

34 Addiko Bank AG v. Croatia, ICSID Case No. ARB/17/37, Decision on the Respondent's Application (June 12, 2020).

almost 82 treaties at once, leaving the old regime exposed to back-to-back ISDS awards costing billions. This serves as a lesson for host nations: if survival clauses are not tight and mutually exclusive, instead of promoting growth, they fall prey to vicious and ruthless investors. Even the involvement of fraud on the investor side cannot save the host nation from claims. This shows how critical these clauses are. A simple omission or addition can change the entire nature of the agreement, leaving tribunals and courts to interpret the clauses for decades. A well-drafted clause anticipating such damages can save both parties, because in these kinds of investment agreements, one doesn't know who the host nation or capital exporter will be.

The termination of the India-Mauritius 1998 BIT was part of this series. On March 22, 2017, the termination date triggered the 10-year survival clause under Article 13(3).[35] However, the two states did not issue any Joint Interpretative Statement clarifying the treaty's substantive scope until July 2022, while the balance of the 5-year survival window was still in operation. A careful observation of the timing reveals that the said instrument was executed only after the shareholders of Devas Multimedia served fresh notices of arbitration under the survival clause, following the Indian Supreme Court judgment holding that the underlying investment of Devas Multimedia was tainted by fraud.[36]

The 2022 statement clarified the definition of a protected investor by eliminating entities implicated in ongoing or concluded fraud and corruption proceedings. However, the instrument is silent on its application to pending disputes.[37] This joint action was scrutinised from a theoretical perspective, tagging the statement as nothing but a dispute-responsive mechanism rather than a genuine interpretative clarification. It was also criticised by comparison with Article 24(2) of the Dutch Model BIT, which immunises pending disputes from subsequent joint interpretations to preserve procedural fairness.[38] This perspective ignores a practical reality: gaps in an instrument are often not foreseen at inception and are only realised when a dispute stands before the State. Instead of letting the damage continue, the states stepped in, acting in the best interests of their people, to rectify past wounds. While

35 Prabhash Ranjan, *Corruption and Investment Treaty Arbitration in India*, in Corruption and Illegality in Asian Investment Arbitration 242, 243 (Nobumichi Teramura, Luke Nottage & Bruno Jetin eds., 2024) (quoting India-Mauritius BIT art. 13(3)).

36 RANJAN, *supra* note 38, at 249-50.

37 RANJAN, *supra* note 38, at 243-44, 250.

38 RANJAN, *supra* note 38, at 250 (quoting Article 24(2) of the Dutch Model BIT).

emphasizing procedural fairness, these criticisms ignore the basic principle that fraud vitiates everything. When an investment is tainted at inception, it cannot claim any protection under the treaty, regardless of whether a joint clarification exists. The exercise by India and Mauritius was done only to put an end to the opportunistic exploitation of the treaty by tainted investors taking advantage of the situation, leaving genuine investors unaffected.

Without prejudice to the above, the instrument's silence regarding application or non- to the pending litigation can bring retractive objections, as being suffered by EU's 2020 termination agreement. Similarly, Indonesia has successfully negotiated the mutual removal of a survival clause with one treaty partner, it has faced with a $600 million legacy claim under the separate treaty is has attempted to terminate the treaty without a companion agreement. [39] Hence, the doctrinal conclusion is a absolute, any proposed accrual amendment must be negotiated proactively and should be executed prior to the date of crystallisation of any dispute.

Shortening Without Restructuring: India's Own 2016 Model BIT

As stated above, India's approach to revising its treaty policy serves as a cautionary tale. Unlike its reactive manoeuvre with Mauritius in 2022, the 2016 Indian Model BIT attempts to manage exposure by altering the shelf life of the survival clause. The survival periods in earlier terminated BITs range between 10 to 15 years; for instance, the BIT with Mauritius provides for 10 years, and the treaty with China stipulates 15 years. [40] The new Article 38.3 of the Model BIT, however, limits the survival clause to 5 years. [41]

Although a model text is not finally authoritative, serving only as an instrument for negotiation that can be altered at the final stages, this timeline reduction clarifies India's position against frivolous, decade-old ISDS claims.[42] It fails, however, to resolve the structural contradiction identified in Part II of this article.

39 RANJAN, *supra* note 38, at 267–68; LUKE ERIC PETERSON, *Indonesia Ramps up Termination of BITs and Kills Survival Clause in One Such Treaty, but Faces New $600 Million Claim from Indian Mining Investor*, INV. ARB. REP. (Nov. 20, 2015).

40 *See India's ban on Chinese apps: Could India face the fire of Investment Treaty Claims?*, AM. REV. INT'L ARB. (COLUMBIA L. SCH.), discussing Article 16(2) of the India-China Bilateral Investment Treaty, which provides a fifteen-year survival period from the date of termination.

41 2016 Model BIT art. 38.3, *supra* note 9.

42 Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1 (2017); Jesse Coleman & Kanika Gupta, *India's Revised Model BIT: Two Steps Forward, One Step Back?*, Investment Claims (Oct. 4, 2017).

Article 38.3 of the 2016 Model BIT operates similarly to its predecessors by merely shrinking the shelf life to 5 years, failing to provide a textual distinction between a state measure taken immediately following termination and one adopted on the verge of the 5-year conclusion. India compressed the survival window but completely ignored the substantive trigger operating within it.

Under the 2016 Model, no cushion is provided to the host State. An investor can still use the terminated treaty as a weapon to challenge regulatory conduct that is entirely disconnected from the legal regime operating at the time of the original investment. This failure provides a baseline for the reform discussed in Part V of this article. As India is committed to streamlining its BIT structure, achieving a natural and logical evolution through negotiated amendments to earlier treaties, as permitted by the VCLT, is far more effective than attempting a radical doctrinal departure.

VII. Architectural Blueprint For A Functional Transition Instrument

Synthesising the above doctrinal analysis and the empirical data with precedents, a transition instrument to be functional should deal with the ISDS exposure carefully by eliminating the features that lead to default or unilateral repudiation causing indefinite regulatory paralysis. To achieve the above structural balance, the instrument should comprise the following architectural features:

- The instrument should consider the Australian approach, being negotiated as a discrete and partner-specific bilateral agreement rather than a monolithic, multilateral discharge across the State's entire treaty network.
- The agreement should conclude in sync with the underlying shift in prospective investment-treaty policy. Executing the instrument midway through the survival clauses after the crystallisation of a dispute shall cast doubt on the credibility of the host State. Proactive negotiations might pre-empt the consequential vulnerabilities that can compromise the host State's regulatory interest, and avoid retroactive objections that can paralyse the said termination agreements.
- The instrument should be framed as structural amendments to the survival clause; any attempt to characterise the said amendment as a retroactive "interpretation" of an unambiguous prior treaty invites invalidation by the arbitral tribunal. A reciprocal amendment negotiated under Art. 39 of the

VCLT provides the legal insulation.

- The text should delineate the jurisdiction when these survival clauses shall trigger, thereby clearing the ambiguity. This shall in a way protect the sovereign interests and can curtail frivolous claims at the threshold. It should deny jurisdiction over post-termination conduct by the State, to neutralise the claims predicated solely on the pre-termination date of the underlying investment.
- The instrument should resolve the jurisdictional ambiguity over continuing internationally wrongful acts. It must dictate a precise characterisation of the sovereign conduct that is limited to the termination at the threshold.
- The amendment should preserve the express arbitral consent which was earlier in place. The instrument should immunise the disputes that are notified formally or pending as on the date the amendment is brought into force, which is in compliance with Arts. 28 and 70(1)(b) of the VCLT.[43]
- The text should establish rigid and determinable boundaries. It should define the operational terms like 'measure', 'act', 'omission', 'continuing breach', 'composite act', 'dispute', and 'conduct', to avoid expansive and creative arbitral interpretations.
- The amended instrument should be published immediately post-conclusion, accompanied by joint explanatory statements detailing the bilateral legislative intent of the new amendment. This transparency shall pre-empt the allegations by investor-sponsored actors.

VIII. Objections And A Challenge To The Premise

No doctrinal thesis without criticism is complete, similarly the present paper is also not immune from such criticisms. Few are anticipated and answered below.

The primary critique might assert that narrowing the survival clause can destabilise the legal certainty an investor seeks. This criticism is a mischaracterisation of the mechanism; the proposed accrual principle grants substantive protection without disturbing pre-termination measures. The mechanism only removes the anticipated vulnerability caused by unnecessary interpretation and tribunal jurisdiction over

43 VCLT, *supra* note 28, at arts. 28, 70(1)(b).

post-termination sovereign conduct, which was never originally intended by the parties to the treaty.

The second objection highlights the ambiguity of applying a measure-date limitation for ISDS jurisdiction—specifically whether it should apply from the date the accrual rule comes into force or to continuing breaches arising at the threshold of treaty termination. Part VII of this article resolves this anomaly by mandating a strict characterisation rule within the treaty. Maintaining the status quo until the completion of the survival period is far worse, as the remaining period grants jurisdiction to arbitral tribunals contrary to the implied intentions of sovereign States when those powers are not expressly stated in the text.

The third objection questions the diplomatic incentive to negotiate a transition instrument before a dispute crystallises. Ongoing State practice demonstrates the opposite. The India-Mauritius joint interpretative statement examined in Part VI.C confirms that retroactive, post-dispute negotiations generate serious legal suspicion and severely undermine the credibility of sovereign States. Conversely, Australia's proactive bilateral transition instruments executed prior to disputes are highly viable. They succeed because they are integrated into a broader renegotiation of the primary investment relationship rather than deployed as defensive, post-dispute retractions.

The final critique questions the legitimacy of the survival clause itself. From this perspective, an instrument that preserves arbitral exposure after both sovereign States have mutually agreed to terminate the underlying treaty is not a modest reliance safeguard. It is a direct assault on the credibility of States anticipating investments. The European Union's termination agreement illustrates this friction perfectly. Both France and Hungary attempted to extinguish their arbitral exposure, yet the arbitral tribunal enforced the survival clauses in *UP and C.D. Holding*, contrary to the sovereign's express intent and the consensual objectives of the agreement.[44] This outcome severely complicates the principles examined in Part II. If a sunset clause is permitted to override the mutual will of contracting treaty parties, a State's foundational sovereign authority is compromised, leaving the application and enforcement of its laws at the mercy of arbitral interpretations.

A natural corollary to this existential objection proposes relocating investment protection entirely outside the bilateral treaty framework. Capital exporters with

44 UP (formerly Le Chèque Déjeuner) & C.D. Holding Internationale v. Hungary, *supra* note 20, at ¶ 265.

substantial leverage routinely negotiate tailored stabilisation clauses within State contracts, securing contractual immunity against adverse regulatory shifts without relying on sovereign treaties. [45] Because the majority of investors lack this massive leverage, critics assert that the host State's domestic law, backed by its administrative and constitutional safeguards, must be entirely sufficient on its own. The core contention is clear: the mere deployment of foreign capital does not entitle an investor to a more durable legal regime than a domestic counterpart receives.

Both elements of this criticism deserve their respective doctrinal force. A simple reiteration of the principles mentioned in Part II of this article is insufficient, as the said premise is exactly what is under attack. Structural limitations foreclose both alternatives. Tailored stabilisation clauses are available only to massive capital deployments in extractive (mineral extraction) or infrastructure sectors, where a single entity commands extreme bargaining leverage. [46] This private contracting mechanism is completely inaccessible to the broader cross-section of everyday foreign investors, the exact people that bilateral treaties were originally created to protect. Critically, contract stabilisation provides zero retroactive protection for sunk capital deployed under a then-existing, now-terminated treaty regime. The only legal architecture governing that capital is the survival clause currently in force.

Relying exclusively on domestic tribunals encounters severe historical and institutional barriers. The modern bilateral investment treaty architecture and its embedded arbitral mechanisms emerged precisely because domestic courts in various jurisdictions failed to adjudicate foreign capital investments impartially. The foundational justifications for ISDS were systemic denial of justice, fragile judicial independence, and severe political interference.[47] This justification remains prima facie asymmetrical across the global landscape, and sovereign risk remains a persistent reality. Any demand for the abolition of survival clauses based on the presumed adequacy of all domestic judiciaries ignores the historical rationale of the treaty regime itself.

In the end, whether investment treaties should continue in their existing form falls outside the scope of this structural critique; the immediate, actionable reality

45 Thomas W. Wälde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215 (1996).

46 *Id.* at 245.

47 *See* Jeswald W. Salacuse, *The Law of Investment Treaties* 87–92 (3d ed. 2021) (tracing the denial-of-justice and political-risk rationale for the emergence of investment treaties and investor-State arbitration).

is much narrower. As long as these treaties exist and carry survival clauses, the choice is not between a sunset clause and no clause. The choice is strictly between the unqualified, perpetually exposing clauses analysed in Part II, and the precision-engineered amendment proposed in Part V. The existential objection to sovereign credibility validates the urgent necessity of this choice. It does not provide any functional excuse to avoid it.

IX. CONCLUSION

Ultimately, navigating a legacy survival clause is much like the pursuit of a relic in an Indiana Jones film. To safely secure the prize of a modernised regulatory regime, the host State cannot just blindly step forward; it must decode the treaty architecture and anticipate the hidden traps. Rather than engaging in frantic, retroactive damage control after a dispute detonates, States must undertake a precise, proactive exercise to disarm the survival mechanism at the threshold.

The current regime did not anticipate the situations discussed above. Historically, these clauses were drafted keeping only the investor in mind. The failure of States to assess their dual roles—as both host nations and capital exporters—has backed survival clauses into a corner, prompting the ultimate question: are they even necessary? From the preceding analysis, the answer remains affirmative. Instead of abandoning the clauses entirely, States must rework them to arrive at a principle that preserves sovereign authority without frustrating genuine investor interests.

If this structural rework is ignored—specifically the blueprint detailed in Part VII and the doctrinal defenses raised in Part VIII—these clauses will certainly become a ghost. They will continually haunt host nations, paralyzing them into rethinking policy decisions at every turn. A State should act like a doctor treating a disease to save the patient, rather than being paralyzed by the fear of a lawsuit. Accordingly, state action must focus on a dual survival: the survival of its sovereign regulatory function, and the survival of legitimate investor capital.

Instead of attempting unilateral terminations, States should focus on the Australian style of negotiating an independent agreement for a safe exit. Crucially, this must be executed through a formal amendment to the survival clauses permitted by the VCLT *before* termination. It cannot be attempted retroactively, after a dispute has already erupted, using random joint-interpretative statements.

No commercial clause should kill the "will of the people" or obstruct the welfare of citizens. At the same time, no State can develop without capital inflow. A State cannot function as both a businessman and a sovereign; it requires private actors to share the economic burden. These investors ensure the survival of the people by providing substantial employment, indirectly developing infrastructure, and infusing domestic business with the foreign capital needed to expand production. This delicate balance is exactly what leads a host nation from being a capital importer to a capital exporter. A precision-engineered survival clause protects that evolution.



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