Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law

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In the last decade, international investment law has been on a trajectory of rapid evolution with reform high on agenda priorities. Reform requires a reconciliation of competing interests, which is generally so difficult to achieve that it is often unclear whether an option constitutes 'reform' or unwanted change. Two specific treaty provisions, the most-favoured-nation (MFN) treatment and survival clauses, can interfere with the reform process and become an impediment to changing the rules of the game. This is particularly true when political will is present. The MFN treatment, a guarantee of non-discrimination present in the quasi-totality of investment treaties, can have far-reaching ramifications for newly negotiated provisions, especially where international investment agreements confer pre-establishment rights and a clause expressly covers 'all matters' within a treaty. Survival clauses, a type of provision that extends the validity of an investment agreement beyond its termination, can delay the onset of the new options for an average of between five and twenty years after expiry of the treaty's minimum period of application. This article explores these two types of clauses and discusses their potential impact on the reform of international investment law.

1 INTRODUCTION

In the last decade, international investment law has been on a trajectory of rapid evolution, with reform high on agenda priorities. Increasing unease with the functioning of the system that governs the international protection of investment, coupled with the need to ensure that this system 'works for all stakeholders,' has led to a shared view that reform is both necessary and inevitable.[1] Policy makers in various economies around the globe are currently reviewing outdated and progressively unpopular networks of international investment agreements (IIAs).

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1 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 120 (UN 2015). UNCTAD's work on reform of international investment law predates this report.

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The question is no longer 'about *whether* to reform or not, but about the *what*, *how* and *extent* of such reform'.[2]

Reform requires a reconciliation of competing interests, which is generally so difficult to achieve that it is often unclear whether an option constitutes 'reform' or unwanted change. Sometimes, contracting parties amend investment treaty provisions in order to counteract non-envisaged and unintended interpretations advanced by claimant investors or adopted by arbitral tribunals.[3] The shift in investment policy making of the United States in the early to mid-2000s as a result of the state's experience as respondent in arbitration under the North American Free Trade Agreement (NAFTA) is anecdotal.[4] Recent investment treaty clauses specifying that the most-favoured-nation (MFN) treatment does not apply to investor-state dispute settlement (ISDS) provisions[5] and the new popularity of prudential exceptions or carve-outs[6] are further evidence of this 'responsive' or 'reactive' approach to investment treaty provision drafting.

Older investment treaties have been described as imbalanced instruments; overly protective of investor interests at the expense of host states' normative flexibility and pursuit of public welfare objectives.[7] New generation treaties attempt to remedy these issues by, for instance, including some 'state-friendly' or 'public interest-friendly' provisions, such as exceptions for the protection of human, animal or plant life or health, or the protection of the environment[8]; by clarifying investment protection standards, in order to limit tribunals' interpretive flexibility[9]; or by incorporating provisions on transparency in ISDS proceedings.[10] New model treaty deliberations and IIA negotiations, including in the elaboration of the European Union's (EU's) investment policy, are setting further trends.

The shift from old to new generation IIAs is neither a certainty nor does it always proceed smoothly. When political will is present, and contracting parties

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2 UNCTAD, *supra* n. 1. UNCTAD's work on reform of international investment law predates this report. Notably, UNCTAD has been working on an Investment Policy Framework for Sustainable Development (IPFSD), *see* http://unctad.org/en/Pages/DIAE/International Investment Agreements (IIA)/IIA-IPFSD.aspx.

3 Catharine Titi, *The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration*, 14 (5) JWIT, 829, 843 et seq. (2013).

4 *Ibid.*, at 829, 843–844 (2013).

5 *See* below 2.2.

6 *See*, e.g. EU-Canada Comprehensive Economic and Trade Agreement (CETA), version of Feb. 2016, Art. 13.16.

7 Catharine Titi, *The Right to Regulate in International Investment Law* 72 (Nomos and Hart Publishing 2014).

8 *See*, e.g. Canadian Model BIT (2012), Art. 18.

9 *See* European Commission, Concept Paper, Investment in TTIP and beyond – the path ahead, May 2015. The concept paper is available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

10 CETA, version of Feb. 2016, Art. 8.36.

agree on 'reformed' options, two particular treaty provisions, regularly found in IIAs, can interfere with the process and become an impediment to changing the rules of the game. These two clauses, MFN treatment and survival clauses, are the focus of this article. This article first considers the MFN treatment, a guarantee of non-discrimination present in the quasi-totality of investment treaties. Secondly, it examines survival clauses, which are a type of provision that extends the validity of an investment agreement beyond its originally set date of termination. The objective of this article is to explore both types of clauses from the angle of their potential impact on reform of international investment law. This article does not aim to determine whether a certain reform is 'good', but rather examines how these clauses impact treaty parties' desired changes.

2 MOST-FAVOURED-NATION TREATMENT

2.1 Mfn clauses and reform of investment law in general

MFN treatment clauses commit contracting parties to treating each other's investors no less favourably than investors of any non-party.[11] The standard is intended to establish a level playing field and ensure 'equality of competitive opportunities' between foreign investors from different economies.[12] The MFN treatment can, however, impose constraints on host state investment policy making. In particular, a carelessly drafted MFN clause can nullify reforms undertaken through newer IIAs. The effects of the MFN standard can be particularly far-reaching when IIAs confer pre-establishment rights,[13] and where a clause expressly covers 'all matters' within a treaty.[14]

Broad interpretations of the MFN standard by a number of tribunals, which essentially allow it to encompass all provisions in third party IIAs, have led to the observation that MFN clauses would 'multilateralize' all obligations undertaken in a country's IIAs.[15] Such 'multilateralization' may be capable of uniformizing and harmonizing international investment obligations undertaken by a given country. For example, in 2000, the *Maffezini* tribunal embraced for the first time an interpretation of the MFN treatment that included ISDS provisions. The tribunal welcomed the fact that the 'application of the MFN clause to dispute settlement arrangements in the context of investment treaties might result in the

[11] *See*, e.g. U.S. Model BIT (2012), Art. 4.

[12] UNCTAD, *Most-Favoured-Nation Treatment*, 13-14 (UN 2010).

[13] UNCTAD, *Ibid*., at 98.

[14] Interpretations often perceived as expansive have taken place where the MFN clause included the phrase 'in all matters in the Agreement', such as in the context of the *Maffezini v. Spain* dispute, *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000).

[15] UNCTAD, *supra* n. 12, at 99.

harmonisation and enlargement of the scope of such arrangements'.[16] Although it is unclear why the tribunal estimated that an interpretation that resulted in an 'enlargement' of host states' engagements was a desirable outcome, harmonization in itself is a positive result. Other tribunals, however, have failed to see how harmonization could be achieved through reliance on the MFN clause.[17] In *Plama v. Bulgaria*, the tribunal observed that the 'basket of treatment' and 'self-adaptation' of the MFN treatment results in an investor having 'the option to pick and choose provisions from the various BITs'.[18] MFN clauses can then lead to the application of a *sui generis* standard of treatment, where an investor receives a less favourable *existing* standard, that combines the 'best' of two or more treaties, or a standard which may 'not correspond to any real situation under any treaty'.[19] This in turn means that 'a host state which has not specifically agreed thereto can be confronted with a large number of permutations of … provisions from the various BITs which it has concluded'.[20]

These 'permutations' of substantive – and potentially dispute settlement – standards can have unexpected ramifications. In particular, the standard's *renvoi* to other, older, treaty provisions can invalidate new formulations intended to reform a state's IIAs. For example, Brazil recently developed a model investment treaty and started concluding its first 'cooperation and facilitation investment agreements' (CFIAs) in the Spring of 2015.[21] These IIAs contain innovative features and are based on a particular three-pillar structure[22] that does not have an equivalent in bilateral investment treaties (BITs). The treaties accord foreign investors the MFN standard and subject it to some exceptions, such as for regional economic integration organizations (REIOs) and for taxation issues.[23] But other substantive standards, typically found in investment agreements, are missing.[24] For instance, the CFIAs do not accord fair and equitable treatment or full protection and security, and they are silent on indirect expropriation.[25] If Brazil decided to ratify its earlier BITs signed in the 1990s (an unlikely scenario) or if it decided to enter into one

16 *Maffezini*, *supra* n. 14, para. 62.
17 *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 Aug. 2008), para. 219.
18 *Ibid.*
19 Brigitte Stern's Concurring and Dissenting Opinion in *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award (21 June 2011), para. 12.
20 *Plama Consortium*, *supra* n. 17, para. 219.
21 *See* Catharine Titi, *International Investment Law and the Protection of Foreign Investment in Brazil*, 2 TDM, 2016.
22 In reality, the three-pillar structure seems to have been abandoned in the newer treaties, but the content of the CFIAs has not been impacted.
23 Respectively Brazil-Mozambique CFIA, Art. 11 and Brazil-Angola CFIA (2015), Art. 11 and Brazil-Mexico CFIA, Art. 5.
24 Notably, the Brazilian model does not offer ISDS either. ISDS is examined in the following section.
25 The newer version of the Brazilian CFIA model expressly only covers direct expropriation. *See* further Titi, *supra* n. 21.

single, more 'regular' IIAs, its work and focus on negotiating CFIAs on the basis of the 2015 model would be 'undone.' The MFN clause in its CFIAs would allow an investor to invoke provisions from Brazil's other treaties.

According to UNCTAD's 2015 *World Investment Report*, such MFN 'treaty shopping' and 'cherry-picking' can 'undermine improved formulations of treaty provisions.' In addition, where reform is not comprehensive and instead takes the form of selective adjustments, this can 'lay the groundwork for further change, thus creating uncertainty instead of stability'.[26] A broadly worded MFN clause could undermine 'individual treaty bargains and sidelin[e] the base-treaty'.[27] Thus, states should be 'careful that the desired effects of newly crafted treaty provisions are not obviated by the application of a broadly worded MFN clause'.[28]

Reform may be hindered particularly when the new treaty incorporates clauses considered to be more state-friendly, i.e. less favourable to the investor. However, in a number of situations, it is not easy to determine which IIA offers the 'better' treatment for the investor. Provisions in treaties will often be sufficiently different, rendering a comparison between them particularly difficult. This leads to problems when determining which treaty is more favourable (see below).[29]

When one is confronted with a novel provision in a new treaty with an MFN clause, a final consideration is whether the new provision constitutes a *lex specialis*. According to the *lex specialis* principle, enshrined in Article 55 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, when legal norms 'deal with the same subject matter, priority should be given to the norm that is more specific'.[30] The crucial question is the meaning to give the term 'specific'. The relationship between the *lex specialis* principle and other techniques of interpretation cannot take place *in abstracto*, and instead requires a contextual determination.[31] If one considers an exception clause in an investment treaty, an essential security interests exception for example,[32] this provision constitutes a *lex specialis* in relation to a treaty that does not contain it. The question then becomes whether the MFN standard should be invoked. One may argue that even a self-judging exception, allowing the parties to take those measures *they consider* necessary for the protection of their protected regulatory

26 UNCTAD, *supra* n. 1, at 131, also 136.
27 *Ibid.*, at 136.
28 *Ibid.*
29 *See*, e.g. Brigitte Stern's Concurring and Dissenting Opinion, *supra* n. 19, para. 10.
30 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the study group of the International Law Commission, A/CN.4/L.702, para. 5 (UN 2006).
31 *Ibid.*, para. 6.
32 *See*, e.g. as in the much-discussed United States-Argentina BIT (1991), Art. XI.

interests,[33] is more specific than a non-self-judging exception. But it is much less certain that a tribunal will accept that fair and equitable treatment equated to the minimum international standard under customary international law is the *lex specialis* in relation to an unqualified fair and equitable treatment clause. It is expected that the parties' intention to create a *lex specialis* should also be taken into account, such as if the new provision was introduced with the purpose of digressing from previously burdensome clauses. However, some interpretations of the MFN treatment consider that it can bypass specifically negotiated treaty provisions, in other words that it functions as a *lex specialis*! In *Siemens v. Argentina*, the tribunal reasoned that 'the purpose of an MFN clause was to eliminate the effect of specially negotiated provisions unless they have been exempted'.[34] This interpretation appears to indirectly accept that exceptions clauses cannot be bypassed by invoking the MFN clause.

2.2 MFN clauses and reform of ISDS

The issue of the application of the MFN standard to ISDS provisions deserves particular mention. Such application of the MFN standard is controversial, at least where such application is not clearly foreseen by the applicable investment treaty.

Since the decision in *Maffezini v. Spain*,[35] the question of the application of MFN clauses to ISDS provisions has divided arbitral tribunals.[36] It constitutes today one of the core elements of divergence in arbitral decision-making. A few treaties, however, have explicitly stated that the MFN standard applies to dispute settlement provisions.[37]

33 *See*, e.g. U.S. Model BIT (2012), Art. 18(2).
34 *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004), para. 106.
35 *Maffezini*, *supra* n. 14, para. 64.
36 *See*, e.g. *Siemens A.G. v. Argentina*, *supra* n. 34, paras 94 et seq.; *Gas Natural SDG, S.A. v. Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction (17 June 2005), paras 31 et seq.; *National Grid v. Argentina*, UNCITRAL, Decision on Jurisdiction (20 June 2006), paras 79 et seq.; *Plama Consortium*, *supra* n. 20; *Impregilo S.p.A.*, *supra* n. 19, Award, 21 June 2011, paras 79 et seq.; *Hochtief A.G. v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 Oct. 2011), paras 77 et seq.; *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008); *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009, paras 193 et seq.); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina,* ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 Dec. 2012), paras 137 et seq.; *ICS Inspection and Control Services Ltd. (United Kingdom) v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction (10 Feb. 2012); *Garanti Koza L.L.P. v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013).
37 This is the case of treaties concluded by the United Kingdom. *See*, e.g. Arts 3(3) and 11 of the BITs between the United Kingdom and Azerbaijan, Barbados, Belarus, Bosnia and Herzegovina, Burundi, Côte d'Ivoire, Cuba, Ethiopia, Georgia, Honduras, Kazakhstan, Laos, Pakistan, Slovenia, South Africa, Tonga, Turkmenistan and Uganda, and respectively Arts 3(4) and 10 of the United Kingdom-Chile BIT and United Kingdom-Lebanon BIT; *see also* United Kingdom-Paraguay BIT (1981), Arts 3(3) and 10A, as amended by the Exchange of Notes upon a proposal by Paraguay.

The issue is particularly poignant where the treaty itself is silent on the question of whether its MFN clause covers ISDS provisions. But it may also be controversial where the treaty explicitly covers ISDS. In *Garanti Koza v. Turkmenistan*, the tribunal ruled on jurisdiction in a dispute adjudicated on the basis of the United Kingdom-Turkmenistan BIT which, as is customary in UK BITs, explicitly covers the treaty's arbitration clause.[38] The majority of the International Centre for Settlement of Investment Disputes (ICSID) tribunal in that arbitration imported more favourable treaty provisions to assume jurisdiction, despite the fact that consent to ICSID arbitration was not given under the circumstances on the basis of the BIT's arbitration clause.[39] It is worth noting that even the *Maffezini* tribunal warned that if an agreement provides for a particular dispute resolution forum, this choice cannot be overturned by means of a treaty's MFN clause in order to allow the dispute to be heard in a different forum.[40] The United Kingdom-Turkmenistan BIT's peculiar ISDS clause[41] made it easier for the majority of the tribunal to assume jurisdiction, but it may only be a matter of time before a different tribunal decides to create ICSID or another jurisdiction through application of the MFN clause.

The possibility of variable interpretations of a treaty's ISDS clause raises numerous questions. Perhaps the most essential of these questions is that a large interpretation of a treaty's MFN clause, so as to encompass ISDS provisions where the latter are not expressly covered, may lead to a 'paradox'. In such an instance, arbitrators give access to a treaty's substantive provisions (the MFN clause) before establishing and in order to establish jurisdiction. In the words of Brigitte Stern in her Concurring and Dissenting Opinion in *Impregilo v. Argentina*:

> [t]here are rights and there are fundamental conditions for access to the rights … an MFN clause can only concern the rights that an investor can enjoy, it cannot modify the fundamental conditions for the enjoyment of such rights, in other words, the insuperable conditions of access to the rights granted in the BIT.[42]

38 United Kingdom-Turkmenistan BIT (1995), Art. 3(3). For examples in UK treaty practice, *see* Titi, *supra* n. 7, at 138, fn. 708.

39 United Kingdom-Turkmenistan BIT (1995), Art. 8(2).

40 *Maffezini*, *supra* n. 14, para. 63.

41 United Kingdom-Turkmenistan BIT, Art. 8(2) provides that where a dispute is referred to international arbitration, the disputing parties 'may agree' to refer the dispute, inter alia, to ICSID; if after four months from the notification of the claim there is no such agreement, the dispute can be referred to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

42 Brigitte Stern's Concurring and Dissenting Opinion, *supra* n. 19, para. 47 (emphasis in original omitted).

Arguments against access to the MFN clause before jurisdiction has been established have been repeated in a more recent dissent by Laurence Boisson de Chazournes in *Garanti Koza v. Turkmenistan*.[43]

Given the current ongoing reform of ISDS, the application of the MFN standard to a treaty's arbitration clause is of particular significance. For instance, if new treaties establish an exclusive permanent investment court specific to the investment treaty[44] or a multilateral investment court,[45] investors could resort to an investor-state tribunal and invoke the MFN standard to claim that an arbitral tribunal has jurisdiction rather than the permanent court. Apart from all the other dilemmas that will be raised in such a case, it is uncertain that the tribunal will indeed be a more favourable option compared to a permanent investment court with, for example, better guarantees of independence and impartiality. The *problématique*, although in relation to a different issue, is easily illustrated in Brigitte Stern's Concurring and Dissenting Opinion in *Impregilo v. Argentina*, where the arbitrator noted that:

> According to the majority position, the question is 'whether a *choice* between domestic proceedings and international arbitration, as in the Argentina-US BIT, is more favourable to the investor than compulsory domestic proceedings before access is opened to arbitration.' And the majority does not hesitate 'The answer to this question is in general, and certainly in this case, evident: a system that gives a choice is more favourable to the investor than a system that gives no choice.' [para. 101] This seems a rather quick

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43 Laurence Boisson de Chazournes' Dissenting Opinion in *Garanti Koza L.L.P. v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013), paras 40 et seq.

44 This is the case in the European Union's proposal to the United States for the investment chapter in the Transatlantic Trade and Investment Partnership (TTIP) of 12 Nov. 2015. The proposal is available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf. *See* Catharine Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, TDM (advance publication on 25 May 2016, forthcoming 2016). For an overview of this proposal's drafting document by the European Commission, *see* Catharine Titi, *The European Commission's Approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment Standards and International Investment Court*, 6 TDM 1 (2015). Another proposal for a permanent investment court was put forward in the 'Model bilateral investment treaty with ISDS for industrial countries, giving consideration to the U.S.' of the German Federal Ministry for Economic Affairs and Energy prepared by Markus Krajwski (Project No. 83/15 of the Federal Ministry for Economic Affairs and Energy) [hereinafter 'German Proposal'].

45 A multilateral court is provided for in Art. 12 of Section 3 of the European Union's TTIP Proposal, *supra* n. 44, and, more elaborately, in the European Commission's concept paper 'Investment in TTIP and beyond – the path ahead'. The paper was posted on EU Trade Commissioner Cecilia Malmström's blog on 5 May 2015, http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en.

> conclusion: it is suggested here that it could as well be contended that a system which gives the possibility to use *cumulatively* two different fora (although one being delayed by 18 months) is more favourable than a system that obliges to elect only one possibility to the detriment of the other.[46]

Similar dilemmas can be envisaged in relation to any amended dispute settlement provision. For example, an investor could invoke an MFN provision to bypass transparency requirements or the application of UNCITRAL's Rules on Transparency in Treaty-Based Investor-State Arbitration,[47] or to prevent the host state from accessing a future appellate mechanism.[48] This situation may underline the absurdity of relying too heavily on the MFN clause at the expense of specifically negotiated provisions aimed at reforming international investment law.

States start to take into account in their newer treaties the far-reaching consequences of the MFN clause and try to circumscribe it in order to avoid some of its unintended consequences. For instance, the EU-Canada CETA provides that:

> For greater certainty, the [most-favoured-nation treatment] does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment,' and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.[49]

In this manner, the CETA carves out of the scope of the MFN standard not only third-party treaty ISDS provisions, but also other substantive clauses, which limit its application to the actual treatment received by an investor.

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46 Brigitte Stern's Concurring and Dissenting Opinion, *supra* n. 19, para. 11 (emphasis in original, footnotes omitted). *In casu*, the applicable Argentina-Italy BIT contained an 18-month limited local remedies requirement, which the investor had not respected, while the Argentina-United States BIT whose 'more favourable' provisions were applied by the majority of the tribunal contained a fork-in-the-road clause.

47 UNCITRAL's Transparency Rules, effective as of 1 Apr. 2014, are available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (accessed 16 Sept. 2016).

48 Although in the current system of investor-state dispute settlement, there is no access to an appellate mechanism, such a system has been envisaged by a number of treaties, such as the U.S. Model BIT (2012), Art. 10.20 para. 10; United States-Korea FTA (2007), Art. 11.20 para. 12 and Annex 11:D; United States-Panama FTA (2007), Art. 10.20 para. 10; and the EU's TTIP Proposal of 12 Nov. 2015, Art. 10 of s. 3.

49 CETA, version of Feb. 2016, Art. 8.7(4). *See* further UNCTAD, *Most Favoured-Nation Treatment* (UN 2010), and, for some more recent examples, Titi*, supra* n. 7, at 136–138.

3 SURVIVAL CLAUSES

3.1 Relevance of survival clauses

The majority of BITs contain survival or sunset clauses.[50] Survival clauses extend the application of a treaty's provisions in respect of investments[51] already established in the host state,[52] after the treaty has been terminated. Their role is to protect investments already made in the host state by preventing an overnight change of the legal regime that covers them and allowing them to enjoy the treaty's protections for an additional period of time. The typical duration of a survival clause is between five and twenty years.[53] Long survival clauses may interfere with a state's endeavours to renew its investment treaty network, since, when the state terminates an IIA, the latter continues to subsist through the survival clause.

Many IIAs are 'expired' or 'soon-to-expire'.[54] Between 2014 and 2018, investment agreements that can be terminated at any time by a party will exceed 1,500[55]; a number broadly corresponding to half the world's international investment treaties.[56] The issue is significant given the number of IIAs that have recently been terminated or that are currently in the termination process. BIT denunciations by Ecuador and other Latin American countries were among the first to attract worldwide attention.[57] These denunciations were followed by those (actual or intended) of South Africa[58] and, beginning in 2014,

50 In a recent study, 97% of treaties in the examined sample contained survival clauses. Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World*, OECD Working Papers on International Investment 19 (OECD Publishing 2015).

51 Or 'commitments to invest' (*see* Canadian Model BIT, version of 2012, Art. 42(3)).

52 An alternative phrasing is sometimes found in treaties that cover the establishment phase, to the effect that 'all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments' (A2012 U.S. Model BIT, Art. 22(3)).

53 For example five years in the Colombia-France BIT (2014) and twenty years in the Kuwait-Mauritius BIT (2013).

54 UNCTAD, *supra* n. 1, at 162.

55 *Ibid*.

56 *Ibid*., at 106.

57 This was particularly the case in light of the fact that some of these BIT terminations took place in tandem with a denunciation of the ICSID Convention, which was perceived as a rejection of the current system of international investment law by these countries. *See* UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, 2 IIA Issues Note (2010) www.unctad.org/diae (accessed 16 Sept. 2016); Catharine Titi, *Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas*, 20(2) Arb Intl. 30, 257 (2014).

58 *News in Brief: South Africa Begins Withdrawing from EU-Member BITs*, ITN (2012); Speech of the Minister of Trade and Industry, Dr Rob Davies, at the Discussion of UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) in Geneva, Switzerland (25 Sept. 2012), available at www.thedti.gov.za/editspeeches.jsp?id=2506 (accessed 16 Sept. 2016).

Indonesia.[59] Terminations of intra-EU BITs relating to the heated debate on the compatibility of such treaties with EU law must be added to these.[60] While some EU Member States, such as the Czech Republic and Italy, terminated some or all[61] of their intra-EU BITs, other states have been less proactive in this regard. This prompted the European Commission, in June 2015, to initiate infringement proceedings against five EU Member States in order to terminate the BITs between those states.[62] This move, as well as the Commission's 'administrative dialogue with the remaining 21 Member States who still have intra-EU BITs in place', could lead to the termination of numerous existing IIAs.

The manner of termination itself can have an impact on the survival clause and, indirectly, on the state's ability to effectively reform its investment treaty network. This is true whether states terminate their treaties because they wish to disengage from investment obligations they have undertaken through their treaties, because the agreements are superseded by EU law (for intra-EU BITs), or because they intend to replace them with new amended IIAs, The following section will explore the modes of termination of investment treaties and their impact on survival clauses.

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59 Indonesia has terminated ten BITs, and it is further terminating another eleven. The country is said to intend to renegotiate its investment treaties on the basis of a new Model BIT that it is developing at the moment. *See* http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/Indonesia_side-event-Wednesday_model-agreements.pdf; Luke Eric Peterson, *Indonesia Ramps Up Termination of Bits – And Kills Survival Clause in One Such Treaty – But Faces New $600 Mil. Claim from Indian Mining Investor* IA Reporter (20 Nov. 2015).

60 Christer Söderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24 JOIA 455 (2007); 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*, 39 (2) Legal Issues Econ. Integ. 157 (2012); Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?* 58 (2) ICLQ 297 (2009); Marek Wierzbowski & Aleksander Gubrynowicz, *Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions*, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Christina Binder et al. eds., OUP 2009); Christian Tietje, *Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts*, Beiträge zum Transnationalen Wirtschaftsrecht (2011); August Reinisch, *The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements*, 12 Santa Clara J. Intl. L. 111 (2014). *See* further European Commission – Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, Brussels (18 June 2015).

61 Italy has terminated all its intra-EU BITs. Some uncertainty surrounds the Italy-Malta BIT and the Italy-Poland BIT, which according to the UNCTAD database, are still in force at the time of writing. The European Commission's press release (cited at the end of this footnote), however, indicates that Italy has terminated all its intra-EU BITs. According to the IA Reporter, two recent treaties between Italy and Malta were never ratified and some apparent disagreement exists between Italian and Croatian officials about the status of the Italy-Croatia BIT. Italy claims that it was terminated and Croatia maintains that it not aware of any termination. *See* Jarrod Hepburn & Luke Eric Peterson, *Italy Is the EU's Model Citizen When It Comes to Following European Commission Demands to Terminate Intra-EU Investment Treaties*, IA Reporter (2 June 2015). Ireland's only BIT with the Czech Republic has likewise been terminated. *See* further European Commission – Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, Brussels (18 June 2015).

62 European Commission, *supra* n. 61.

3.2 Modes of termination of an investment treaty and impact on survival clauses

There are two ways to terminate an investment treaty. The first is *unilateral* and involves denunciation by a party. The second is *mutual* or *consensual* and involves an agreement to terminate the agreement by all parties. Given that the majority of IIAs engage only two parties, this type of termination is usually bilateral.

Unilateral termination of an IIA is the regular procedure through which a treaty's survival clause comes to life. For instance, unilateral termination of the BIT between Italy and Croatia in 2013 triggered that treaty's short, five-year, survival clause.[63] A number of other recent terminations of BITs involving South Africa[64] and Indonesia[65] have also been unilateral.

Consensual treaty termination is not uncommon and some treaty partners have proceeded to this method of termination paying particular attention to the survival clause. The Czech Republic's terminations of intra-EU BITs are cases in point.[66] The Czech Republic, however, also tried to ensure that the residual protection conferred on existing investments through the treaty's survival clause would no longer apply, in other words that the IIAs' survival clause would be 'neutered'.[67] The Czech Republic adopted a two-step approach to the termination of its BITs with, at least, Denmark, Italy, Malta and Slovenia.[68] The parties first agreed to amend the treaty by terminating the survival clause and then, secondly, to terminate the treaty itself.[69] In at least one case, the BIT between the Czech Republic and Denmark, amendment of the survival clause and termination of the treaty took place at the same time.[70] Mutual termination in order to ensure that the survival clause will not apply was also the approach followed by Argentina and Indonesia for their 1995 BIT which will be extinguished in October 2016.[71]

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63 Italy-Croatia BIT (1996), Art. 13(2) (terminated). It is of interest to note that all other terminated Italian intra-EU BITs for which information is publicly available were ended by mutual consent. *See* http://investmentpolicyhub.unctad.org/IIA/CountryBits/103#iiaInnerMenu.

64 *See* Herbert Smith Freehills, *South Africa Terminates Its Bilateral Investment Treaty with Spain: Second BIT Terminated, as Part of South Africa's Planned Review of Its Investment Treaties* (2013) http://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties/; Jackwell Feris, *Challenging the Status Quo – South Africa's Termination of Its Bilateral Trade Agreements*, DLA Piper (10 Dec. 2014).

65 Leon E. Trakman & Kunal Sharma, *Indonesia's Termination of the Netherlands-Indonesia BIT: Broader Implications in the Asia-Pacific?* Kluwer Arbitration Blog (21 Aug. 2014); Peterson, *supra* n. 59.

66 *See* http://investmentpolicyhub.unctad.org/IIA/CountryBits/55?type=c#iiaInnerMenu.

67 Luke Eric Peterson, *Czech Republic Terminates Investment Treaties in Such a Way as to Cast Doubt on Residual Legal Protection for Existing Investments*, 4 (2) IA Reporter (2011).

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 Peterson, *supra* n. 59.

Renegotiation of a survival clause is not always intended to terminate the clause. For instance, when Australia and Chile terminated their bilateral investment agreement to replace it with a free trade agreement, the countries amended the former treaty's survival clause to make it applicable for only three, instead of fifteen years.[72]

Although the parties to a treaty may indeed wish to 'neuter' the survival clause through amendment and 'termination', it has also been argued that in *mutual* terminations of an agreement, this process is unnecessary.[73] According to this argument, survival clauses are generally applicable in the case of *unilateral* treaty denunciations. For instance, Article 22 of the US Model BIT of 2012 provides:

> A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination.[74]

The provision appears to indicate that the survival clause applies where a party has given its *unilateral* notice of termination of the BIT. A possible explanation is that survival clauses are intended to function where a party one-sidedly denounces the treaty so that the other party has no control over the continued protection of its investors. The survival clause in this scenario allows the non-terminating party to offer its investors some continued protection for the remaining life of the clause. The situation is different, however, where all contracting parties decide no longer to protect their respective investors. In this case, the treaty's mutual termination could be perceived as a 'renegotiation' that ends with termination of the entire investment agreement. Nonetheless, interpretation of this provision is not quite this simple and the opposite opinion has also been advanced.[75] Some treaties are more unclear than the US Model BIT regarding the trigger of the survival clause. The French Model BIT of 2006, for example, and treaties concluded on its basis, such as the France-Kenya BIT of 2007,[76] provide for treaty termination by one of the parties, and immediately add:

> *A l'expiration de la période de validité* du présent accord, les investissements effectués pendant qu'il était en vigueur continueront de bénéficier de la protection de ses dispositions pendant une période supplémentaire de vingt ans.[77]

72 Australia-Chile FTA, Annex 10-E, para. 3 ('Termination of the Bilateral Investment Agreement').

73 Anthea Roberts is cited as having expressed this opinion in Lise Johnson & Lisa Sachs, *International Investment Agreements, 2011–2012: A Review of Trends and New Approaches*, in *Yearbook on International Investment Law and Policy 2012–2013* 242 (Andrea K. Bjorklund ed., OUP 2014).

74 U.S. Model BIT (2012), Art. 22(2), (3). *See also* Czech Republic-Denmark BIT, Art. 16 (terminated).

75 Tania S. Voon, Andrew D. Mitchell, & James Munro, *Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties*, 4 ICSID Rev (2014).

76 France-Kenya BIT (2007), Art. 14.

77 French Model BIT (2006), Art. 10 (emphasis added).

Thus, where the parties wish the survival clause not to apply, it may be preferable to expressly amend the treaty prior to or in tandem with the termination, and not expressly link the clause to the treaty's termination by one of the parties. In reality, this '*expiration*' can only take place when a party denounces the treaty; otherwise, in accordance with its own terms, the BIT will continue to be in force.

Renegotiation of a treaty and its survival clause may be preferable to termination. Renegotiation was also put forward as a better alternative to BIT denunciations in Latin America in order to disengage from the international investment law system.[78] Any minor controversy that arose in relation to whether treaties offer investors direct rights and create legitimate expectations that states cannot unilaterally revoke or frustrate,[79] does not seem to have gained ground.

In conclusion, where parties terminate an investment treaty and then negotiate a new one, with the express purpose of replacing it, the survival clause will continue to apply until the new treaty enters into force. If the treaty does not enter into force, the survival clause will remain unaffected, unless the above theory is accepted that mutual termination does not trigger the clause. If the parties negotiate a new IIA without expressly terminating or replacing the old one, the old treaty may still be considered in force, to the extent that its provisions are not incompatible with those of the new treaty.[80] Under such an interpretation of the scenario, the survival clause does not come into play. Finally, if the parties renegotiate the agreement, there is no need to amend the survival clause in order to prevent application of the old provisions. The latter will not be effective, since the agreement, including its survival clause, will have been renegotiated.

3.3 Survival clauses' impact on reform of international investment law and interactions with the MFN clause

Survival clauses can have an impact on reform of international investment law, at least to the extent that old treaties are not renegotiated before their termination or are not replaced by new treaties. But their effect does not go so far as to completely hinder reform. Where parties agree to amend the survival clause or renegotiate the treaty, the clause is neutered and does not come into play. For some treaties, the

[78] This opinion has been expressed in Federico M. Lavopa, Lucas E. Barreiros & Victoria Bruno, *How to Kill A Bit and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties*, JIEL (2013) http://jiel.oxfordjournals.org/content/early/2013/12/03/jiel.jgt025.full.pdf+html; Federico M. Lavopa et al., *The Challenges of Denouncing Bits: Why It Is Better to Renegotiate*, UNCTAD Investment Policy Hub Featured Discussion (12 Feb. 2013).

[79] Peterson, *supra* n. 67.

[80] Vienna Convention on the Law of Treaties, Art. 30(3).

validity of the clause is limited in time, such as where the treaty survives for five years.[81] Nonetheless, some treaties provide that the effect of the survival clause continues 'for a period of validity of contracts concluded between the Contracting Party and the investor of the other Contracting Party prior to the notification of termination' of the IIA,[82] or indefinitely for the investments made during the lifetime of the IIA.[83] The 1979 BIT between France and Korea provides that:

> En cas de dénonciation, les dispositions du présent Accord resteront applicables aux investissements visés par ses dispositions et effectués pendant la durée de sa validité.

Despite this, the former of these provisions limits application of the survival clause to contractual relationships, and the latter to investments made during the time the IIA was in effect. A small minority of treaties, such as Australian free trade agreements (FTAs), do not contain survival clauses.[84]

The effect of the survival clause is generally restricted to investment relations that already exist at the time of termination of the investment treaty. An issue may be raised as to whether the MFN clause can be invoked in order to modify the survival clause. In other words, during the lifetime of the survival clause, could a treaty's MFN provision be used in order to import another IIA's more investor-friendly (longer) survival clause so as to extend the treaty's protections in time? In this admittedly far-fetched scenario, the dispute would have to be initiated before the survival clause expires. If the dispute were initiated *after* expiry of the survival clause, the treaty would no longer apply.

A final consideration is that the effect of survival clauses is added to that of the investment treaty's minimum period of application. An IIA often cannot be extinguished before a period of ten years has elapsed. Sometimes, upon completion of these ten years, the IIA is automatically renewed for a further period of time unless denounced. All these elements show the undeniable effect of survival clauses on reform of investment law, which can be delayed (although not indefinitely) through the extended validity of a treaty's provisions.

4 CONCLUSION

The MFN treatment and survival clauses have been included in investment treaties for a legitimate reason. The MFN treatment prevents discriminations among foreign investors of different nationalities and allows the creation of a level playing

[81] However, in the earlier mentioned OECD study the average length of survival clauses was 12.5 years, which was considered to have remained stable in time. Gordon & Pohl, *supra* n. 50.
[82] *See*, e.g. Belgium-Indonesia BIT (1970), Art. 13.
[83] France-Korea BIT (1979), Art. 9(4).
[84] Mark Mangan, *Australia*, GAR (10 Sept. 2014) http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/5/australia/.

field. Survival clauses are drafted to protect investors from sudden changes in the international legal regime that protects their investment. However, both types of clauses can sometimes interfere with IIA reforms which a country wishes to undertake. The effect of the two provisions is different. MFN clauses can overturn reformed options by reviving earlier or unintended provisions, and survival clauses can delay the onset of the new options. For these reasons, MFN clauses can interfere with reform in more far-reaching ways than survival clauses; the former can change the rules of the game while the latter can only create delays. At the same time, the new drafting of MFN provisions seems to better respond to the need to prevent such unintended consequences than the drafting of recent survival clauses. Radical options are not necessary; limiting the MFN clause to make it, for instance, applicable only to actual treatment received by third-party investors, and shortening the survival clause to five or ten years, are 'middle' solutions that states may wish to consider. Although reform of investment law is in no way limited to these two types of provision, this may be a good place to start.