TRADELAB MEMORANDUM

Reform Options – Bosnia and Herzegovina's Bilateral Investment Treaties

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Supervisors

Mr Nicolas Jansen Calamita *Research Associate Professor*	**Ms Ayelet Berman** *Senior Research Fellow*	**Mr Eugenio Gomez-Chico Barbara** *Research Associate*	**Ms Charis Tan** *Director*
Centre for International Law, National University of Singapore	Centre for International Law, National University of Singapore	Centre for International Law, National University of Singapore	DWF (Singapore)
n.j.calamita@nus.edu.sg	*cilayel@nus.edu.sg*	*eugenio.gomezchico@nus.edu.sg*	*charis.tan@dwf.law*

Authors

Ms Anmol Kaur Gill *Undergraduate*	**Ms Fong Han Tan** *Undergraduate*	**Mr Lance Junhong Tay** *Undergraduate*	**Ms Violet Qianwei Huang** *Undergraduate*
National University of Singapore, Faculty of Law	National University of Singapore, Faculty of Law	National University of Singapore, Faculty of Law	National University of Singapore, Faculty of Law
anmolgill.akg@gmail.com	*tanfonghan@gmail.com*	*lance.tay.jh@gmail.com*	*violethqw@gmail.com*

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I. EXECUTIVE SUMMARY

1. Bosnia and Herzegovina (BiH) is a potential candidate country looking to accede to the European Union (EU). In May 2018, the Court of Justice of the European Union (CJEU) ruled in Achmea v Slovak Republic that the arbitration clauses in intra-EU Bilateral Investment Treaties (BITs) were incompatible with EU law. Following this, the EU Commission (the Commission), re-emphasised the need for intra-EU BITs to be terminated. If and when BiH accedes to the EU, BiH's BITs with EU member states will become intra-EU BITs, which are incompatible with EU law.

2. Thus, this paper examines and evaluates reform options such as amendment of BIT provisions and termination of the BITs to ensure compliance with EU law. A summary of the key points of the paper is provided as follows.

A. Termination, Suspension and Amendment Options

3. We first examine options such as termination, suspension and amendments. The VCLT is used as a roadmap for organising these options as it concerns the law of treaties and has generally been taken to reflect or codify the customary international law on this area.

4. States can unilaterally terminate their BITs in accordance with the provisions of the treaty under Article 54(a) of the VCLT. To do so, the state effecting the termination must have regard to the BIT provisions that may prevent them from terminating with immediate effect. States may have to comply with provisions on notice requirements and have regard to locked period provisions that qualifies when unilateral termination may be effected. It is uncontentious that this form of termination would trigger the sunset clause, which provides for BIT protection to investors for a stipulated duration after the BIT is terminated.

5. Another option is to terminate the BITs through mutual termination under Articles 54(b) of the VCLT. States can, with the consent of their counterparties, terminate the BITs at any time. Whether sunset clauses would apply in the case of mutual termination would depend on the wording of the BIT. If the sunset clause broadly refers to "termination" instead of termination under a particular provision of the BIT, mutual termination is likely to trigger the sunset clause. Thus, some EU member

states saw the need to mutually terminate their BITs and simultaneously amend the sunset clauses with the effect of extinguishing it.

6. Apart from mutual termination, mutual suspension also releases states from their obligations under the BITs under Article 57(b) of the VCLT. States which enter into successive treaties may adopt this option as it allows the BIT to be revived as a fall back. In the event a successive treaty fails, a suspended BIT may be revived to offer investors protection. However, if there is no successive treaty, suspension is likely to result in a gap in investment protection, as suspension does not trigger sunset clause.

B. Claims available to investors upon termination of the BIT

7. Next, we consider that on termination of the BIT, investor protection under the BIT will cease. In defence, investors may argue that states are unable to terminate their rights without their consent as they have "direct rights". States on the other hand may argue that investors' rights are "intermediate" or "derivative" and can be revoked. It is suggested that the nature of the investors' rights is based on an interpretation of the specific treaty language. At this point, we note that there is no known case where an investor has relied on these concepts of rights to argue against the termination of its rights under a BIT.

8. Yet, even if investors succeed in arguing that their rights are direct, states are likely to be able to mutually terminate any rights conferred on third parties as long as the treaty provides, or states otherwise agree under Article 70(1)(b) of the VCLT. Investors are also unlikely to succeed in arguing that they are 'third states' whose rights cannot be revoked under Article 37(2) of the VCLT.

9. For investors who have filed a claim prior to termination, there are strong arguments that states are estopped from frustrating their claim or are bound to arbitrate the moment the investor accepts the offer to arbitrate.

10. As a final attempt, all investors, whether they have submitted their claim to arbitration or not, may argue that states have denied them justice by terminating the BIT. However, investors may have difficulty justifying that there is a customary international law preventing states from terminating their BIT obligations.

C. Composite Options

11. Next, on recognising that BiH's unique political and economic circumstances would not make any single reform option practicable or acceptable, we propose composite options drawing on all the reform options presented thus far and their implications.

12. The first composite option involves agreeing to terminate the intra-EU BIT and extinguishing the sunset clauses only on accession to the EU. Termination on accession draws on the mechanism in a free trade agreement that triggers the withdrawal of candidate countries on accession to the EU.

13. The second composite option considers that a multilateral solution could be preferable to a bilateral solution, given BiH's extensive network of BITs. We propose a multilateral arrangement to mutually terminate all BITs BiH has with EU member states in "one strike", followed by implementing a transitional arrangement which in a second "strike" terminates on BiH's accession to the EU. We propose three permutations such a multilateral solution can take, and also support our proposal with a case study on a similar multilateral effort between then-acceding and candidate countries and a third country, facilitated by the Commission.

D. Sit back and wait?

14. Last, we consider the viability of not taking any action until BiH accedes to the EU. Some states have argued that accession to the EU leads to an implied termination of intra-EU BITs under Article 59 of the VCLT. This argument has not succeeded before any tribunal. Hence, it is likely that BiH's BITs with EU member states will survive if it does not terminate them by the time it accedes to the EU. BiH would have to consider the potential consequences of being party to intra-EU BITs if it chooses this course of (in)action.

II. INTRODUCTION

15. This paper begins in Part III by providing a background to recent developments on intra-EU BITs, as well as the significance of these events to BiH. In Part IV.A, we justify the use of the Vienna Convention on the Law of Treaties (VCLT) as a roadmap for our reform options. The reform options are then laid out in Parts IV.B to IV.G. Traditional options such as termination under the provisions of the BIT (Part IV.B) and termination by consent of the parties (Part IV.C) are first discussed, alongside considerations of the consequences that these options may have on investors and BiH owing to so-called 'sunset clauses' in BiH's BITs. In Part 90 we look at options to address these consequences, such as the possible amendment of BiH's BITs. Part IV.E considers arguments that investors may raise should BiH terminate the BIT.

16. With these deeper issues resolved, we build upon the previous options discussed in proposing the novel option of amending the BIT to provide for termination on accession to the EU (Part IV.F). In Part IV.G, we also consider a multilateral arrangement involving EU member states and third-party states that are candidates or potential candidates for accession such as BiH.

17. With reform options properly laid out, we conclude our paper by considering that accession to the EU without taking further steps will not implicitly terminate the BITs. (Part IV.F) Hence, the discussion on reform options remain relevant even if BiH were to act only upon accession.

III. BACKGROUND

A. Intra-EU Bilateral Investment Treaties

18. Prior to 2004, there were only two intra-EU BITs.[1] After the enlargement rounds in 2004 and 2007 and 2013 where several Eastern European and Western Balkan states acceded to the EU, the total number of intra-EU BITs increased from the original two to more than 200.[2]

[1] Treaty between the Federal Republic of Germany and the Kingdom of Greece on the Requirement and Mutual Protection of Capital Investments (Germany-Greece) (adopted 27 March 1961, entered into force 15 July 1963) and Convention of 16 September 1980 between the Federal Republic of Germany and the Portuguese Republic on the Requirement and Mutual Protection of Capital Investments (Germany-Portugal) (adopted 16 September 1980, entered into force 23 April 1982)
[2] Tom Fecak, *International Investment Agreements and EU Law* (Kluwer Law International 2016) ('Fecak') 372

1. European Commission's Position pre-Achmea

19. Since 2006, the Commission has openly expressed objections towards intra-EU BITs. In November 2006, the Commission sent a letter to the Economic and Financial Committee of the European Council stating that intra-EU BITs created a number of 'risk(s)' to the functioning of the internal market as they allow investors to forum shop, they allow non-judicial bodies to interpret questions of EU law, and they may lead to unequal treatment of investors amongst member states.[3]

20. In its letter of observation submitted to the *Eureko v Slovak Republic (Eureko)*[4] tribunal in 2012, the Commission reiterated its view that intra-EU BITs undermine the primacy and harmonisation of EU laws.[5] It also stated that the resolution of intra-EU investor-state disputes before an arbitral tribunal is an 'anomaly' and 'conflict(s) with the EU judicial system' because the EU courts should have exclusive jurisdiction to determine whether member states have fulfilled their EU obligations and give preliminary rulings on questions of EU law.[6]

21. In 2015, the Commission, noting that many member states had not terminated their intra-EU BITs, commenced infringement actions against five member states (Austria, the Netherlands, Romania, the Slovak Republic, and Sweden).[7]

2. EU member states' Positions

22. Despite the Commission's long-standing stance against BITs, EU member states have only recently begun to take active steps to terminate the intra-EU BITs. Recently, member states such as Italy,[8] Romania,[9] and Ireland,[10] have unilaterally terminated

[3] The Free Movement of Capital, Note for the Economic and Financial Committee, prepared by the European Commission, Internal Market and Services DG, 26-27
[4] *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic) Award on Jurisdiction, Arbitrability and Suspension (26 October 2010)
[5] European Commission Observations mentioned in *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic) Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) para 106
[6] In its observations submitted to the tribunal of *Eureko v Slovak Republic*, the CJEU noted that under Article 267 of the Treaty on the Functioning of the European Union (TFEU), only the CJEU has the power to interpret the provisions of the BIT, *Eureko* (n4) para 178
[7] 'Commission asks member states to terminate their intra-EU bilateral investment treaties' (2018) < http://europa.eu/rapid/press-release_IP-15-5198_en.htm> accessed 17 October 2018
[8] L. Ilie, Wolters Kluwer Arbitration, 'What is the Future of Intra-EU BITs?' (21 January 2018), <http://arbitrationblog.kluwerarbitration.com/2018/01/21/future-intra-eu-bits/> accessed 17 October 2018
[9] Law 18/2017 was passed to approve the termination of intra-EU BITs, V. Ionescu. Lexology.'Romania – the end of intra-EU Bilateral Investment Treaties' (23 March 2017)<

their intra-EU BITs, while states such as Poland are preparing to do so.[11] Member states such as Denmark have approached their intra-EU BIT counterparts to request for mutual termination.[12] Some member states have indicated their willingness to terminate their intra-EU BITs provided that all member states do so in a coordinated manner and that a subsequent agreement be established to provide an alternative regime of investor protection.[13]

3. Implications of the Achmea Judgement on the Commission's Position

23. In March 2018, in the watershed case of *Slovak Republic v Achmea B.V. (Achmea)*,[14] the CJEU ruled that the arbitration clause contained in Article 8 of the 1991 Netherlands-Slovakia BIT had an adverse effect on the autonomy of EU law and was thus incompatible with EU law. In so ruling, the CJEU's decision contradicted the holdings of an earlier arbitral tribunal that had been established under the BIT.[15]

24. The CJEU in *Achmea* specifically took issue with the arbitration clause in the Netherlands-Slovakia BIT without addressing other issues on the compatibility between EU Law and intra-EU BITs (such as the compatibility of substantive protections).[16] The Court emphasised the primacy of EU law over the laws of the member states,[17] and found that Article 8 of the BIT – the investor-state arbitration clause - was not compatible with Article 267 and Article 344 of the Treaty on the

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https://www.lexology.com/library/detail.aspx?g=9616fe69-dc21-4476-8ea9-b2deb760b86e> accessed 11 November 2018

[10] Ireland terminated its only BIT with the Czech Republic on 1 December 2011. See 'International Investment Agreements Navigator Czech Republic-Ireland BIT 1996', UNCTAD Investment Policy Hub,<http://investmentpolicyhub.unctad.org/IIA/country/100/treaty/1192> accessed 11 November 2018

[11] M. Orecki, 'Let the Show Begin: Poland has Commenced Process of BITs' Termination', Wolters Kluwer Arbitration (8 August 2017), <http://arbitrationblog.kluwerarbitration.com/2017/08/08/let-show-begin-poland-commenced-process-bits-termination/>accessed 10 November 2018

[12] Joel Dahlquist and L.E. Peterson, 'Investigation: Denmark Proposes Mutual Termination of its Nine BITs with Fellow EU Member States, Against Spectre of Infringement Cases', Investment Arbitration Reporter (2 May 2016) <https://www.iareporter.com/articles/investigation-denmark-proposes-mutual-termination-of-its-nine-bits-with-fellow-eu-member-states-against-spectre-of-infringement-cases/> accessed 10 November 2018

[13] Council of the European Union General Secretariat, Trade Policy Committee (Services and Investment), 'Intra-EU Investment Treaties – Non-paper from Austria, Finland, France, Germany and the Netherlands' (7 April 2016) m.d. 25/16 ('2016 Non-paper')

[14] *Case C-264/16 Slovak Republic v Achmea B.V.*[2018] ECLI:EU:C:2018:158

[15] *Eureko* (n4), The tribunal found that as Article 8 was consented to by the state, EU law could not supercede states' consent at international law and rejected arguments on incompatibility.

[16] A. Dimopoulos, 'Achmea: The principle of autonomy and its implications for intra and extra-EU BITs' (March 27, 2018) <https://www.ejiltalk.org/achmea-the-principle-of-autonomy-and-its-implications-for-intra-and-extra-eu-bits/> accessed 5 October 2018

[17] *Achmea* (n14) para 33

Functioning of the European Union (TFEU)[18] and the principle of sincere cooperation.[19] The CJEU noted that Article 8 allowed Contracting Parties to submit their disputes to a tribunal that was not within the 'judicial system of the EU',[20] and that such a tribunal might have the occasion to interpret EU law[21] without the protection of the judicial safeguards in the EU system.

25. The full legal effects of the *Achmea* decision are uncertain. *Achmea* was a non-ICSID arbitration seated in Germany. Slovakia was thus able to ask the German courts to set aside the arbitral tribunal's award, which, in turn, permitted the German courts to refer the question of compatibility with EU law to the CJEU. In an ICSID arbitration, however, the only recourse against an ICSID award is that which is available under the ICSID Convention, particularly Article 53. Recently, in *UP and CD Holding Internationale v Hungary*,[22] an ICSID tribunal drew upon this difference to distinguish *Achmea* on its facts. It noted that in an ICSID arbitration there was no option of appeal to the EU system of courts. Thus, according to the tribunal, the CJEU's ruling in *Achmea* could not deprive it of jurisdiction under the France-Hungary BIT.[23] In an unpublished award, the tribunal in *Greentech v Spain*[24] also considered that the law of the EU was not relevant for their jurisdiction.[25] No other tribunals appear to have addressed the applicability of *Achmea* to arbitrations concerning intra-EU BITs.

26. The *Achmea* decision, however, has provided legal backing for the Commission's stance that intra-EU BITs are incompatible with EU law. In a press release accompanying a communication released after the *Achmea* decision,[26] in addition to

[18] member states undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.
[19] *Achmea* (n14) para 56
[20] *Achmea* (n14) 58
[21] Article 267 of the TFEU states that it is within the jurisdiction of the CJEU to give 'preliminary ruling over the a) interpretation of treaties…'. Tribunals will be interpreting EU law by interpreting the BIT, as well as other forms of EU law incorporated into the domestic law of the EU State (see Achmea (n14) para 42)
[22] *UP and CD Holding Internationale v Hungary ICSID Case No. ARB/13/35*
[23] *UP and CD Holding Internationale v Hungary* (n22), paras 257-258.
[24] *Greentech Energy Systems and Novenergia v. Italy* SCC Case No. 095/2015
[25] See Lisa Bohmer, 'Analysis: Arbitrators in Greentech v. Spain Award agree that Achmea ruling is not relevant to their jurisdiction, but ultimately disagree whether Spain is liable for breach of Energy Charter Treaty', Investment Arbitration Reporter (1 February 2011) https://www.iareporter.com/articles/analysis-arbitrators-in-greentech-v-spain-award-agree-that-achmea-is-not-relevant-to-their-jurisdiction-but-ultimately-disagree-whether-spain-is-liable-for-breach-of-energy-charter-treaty/> accessed 22 November 2018
[26] European Commission, 'Communication from the Commission to the European Parliament and the Council – Protection of Intra-EU Investment' (19 July 2018) COM/2018/547 (Achmea Communication) 1, 3

citing *Achmea* as legal basis that the arbitration clause within intra-EU BITs are unlawful, the EU reiterated its stance that intra-EU BITs also conflict with the principle of non-discrimination among EU investors. The Commission also stated that it will continue to 'intensify its work with the member states' to 'ensure that the [*Achmea*] judgement is fully implemented. [27]

B. Extra-EU BITs

27. As BiH is currently not part of the EU, its BITs with EU member states are considered extra-EU BITs. Extra-EU BITs have also come under increasing scrutiny in recent years and the Commission has stated that it intends eventually to terminate the member states' extra-EU BITs and replace them with agreements between the third-party states and the Commission.[28]

28. The concern underlying EU BITs with third-party states is different from that of intra-EU BITs. In the case of BITs with non-EU states, the issue is whether EU member states continue to have the competence to conclude such BITs after the entry into force of the Lisbon Treaty in 2009.[29]

C. Bosnia & Herzegovina's Investment Treaty Portfolio and Possible Accession to the EU

1. BiH's Portfolio

29. Currently, BiH has 20 BITs with EU member states (including the United Kingdom). Annex A sets out the list of all of BiH's BITs with EU member states. Some of these BITs are fairly young and have not yet completed their minimum period of duration, [30] meaning that until the end of the initial period provided for in the BITs, neither party may unilaterally terminate them. Further, all of the BiH's BITs with EU

[27] 'Commission Provides Guidance on Protection of Cross-Border EU Investments – Questions and Answers' (2018) <http://europa.eu/rapid/press-release_MEMO-18-4529_en.htm> accessed 17 October 2018
[28] See EU Regulation 1219/2012, Preamble 5
[29] The Treaty of Lisbon included foreign direct investments into and out of the EU under the common commercial policy of the EU. The Commission has asserted its exclusive competence over the common commercial policy since the Lisbon Treaty. See European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European international investment policy' (7 July 2010) COM/2010/343, 2
[30] See BiH-BLEU BIT (date of entry into force: 16/09/2010), BiH-Lithuania BIT (date of entry into force: 16/03/2009), BiH-Portugal BIT (date of entry into force: 03/02/2009). 'International Investment Agreements Navigator Bosnia and Herzegovina BITs', UNCTAD Investment Policy Hub, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/25#iiaInnerMenu> accessed 11 November 2018

member states have clauses which extend protection to investors for several years after termination (a 'sunset clause'). We discuss the role of minimum periods and sunset clauses, and whether they should be amended in greater detail below at Part IV.B.

2. Active Arbitrations

30. BiH is also involved as a Respondent state in three ongoing arbitrations with investors. Two cases are under the Slovenia-BiH BIT. The third case concerns an arbitration with an Indian investor under the India-BiH BIT.[31] The effect of BIT termination on ongoing arbitrations will be covered in Part IV.E.4.

3. BiH's Status as a Potential Candidate for EU Accession

31. In 2016, BiH submitted its application to accede to the EU, and has since completed an EU questionnaire ascertaining its suitability for accession.[32] It is now a potential candidate for accession to the EU. Prior to accession, BiH needs to be confirmed as a candidate and negotiate with the EU before signing an accession treaty.

4. Implications of BiH's Potential Accession on its BITs with EU member states

32. As the Commission takes a strong stance against intra-EU BITs, BiH is likely to need to terminate its intra-EU BITs upon accession, especially in light of the CJEU's pronouncement in *Achmea*.[33] While the implications of the *Achmea* decision are not entirely clear, the Commission's policies, as they stand, require member states to terminate their intra-EU BITs.[34]

33. Hence, in order to comply with EU law, BiH is likely to need to terminate its BITs with EU member states eventually. In what follows, we lay out the main reform options and their consequences.

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[31] 'International Investment Agreements Navigator Bosnia and Herzegovina Investor-State Disputes', UNCTAD Investment Policy Hub, <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/25?partyRole=2> accessed 8 November 2018

[32] European Commission: European Neighbourhood Policy and Enlargement Negotiations, Bosnia and Herzegovina Membership Status <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_en> accessed 18 October 2018

[33] *Achmea* (n14)

[34] 'Commission asks member states to terminate their intra-EU bilateral investment treaties' (2015) <http://europa.eu/rapid/press-release_IP-15-5198_en.htm> accessed 17 October 2018

IV. REFORM OPTIONS

34. This Part will begin by justifying the use of the VCLT as a roadmap to lay out available reform options. Using this roadmap, we will consider reform options used by other states. We will also consider the consequences these options have on investors' rights.

A. Vienna Convention on the Law of Treaties

35. The VCLT concerns the law of treaties, which is the body of rules which determines whether an instrument is a treaty, how it is made, brought into force, amended, terminated and operates generally.[35] As of 2018, 116 states are parties to the VCLT[36] out of 193.[37] BiH and all EU member states except France and Romania are parties to the VCLT.[38]

36. The approach of the International Court of Justice (ICJ) is to take the VCLT as its starting – and normally also its finishing – point when considering issues of customary international law with respect to treaties.[39] In several cases,[40] the ICJ has suggested or held that certain provisions of the VCLT reflect or codify customary international law. The ICJ has also applied certain provisions of the VCLT retrospectively in cases involving parties for whom the VCLT had not yet entered into force. [41] Given this, Aust suggests it is fair to assume that the ICJ will take the same approach in respect of virtually all of the provisions of the VCLT, especially since there has as yet been no case where the Court has found that the Convention does not

[35] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) ('Aust') 6
[36] United Nations Treaty Collection, Depository, Status of Treaties, 'Chapter XXIII Law of Treaties – Vienna Convention on the Law of Treaties' (*United Nations Treaty Collection Website*) < https://treaties.un.org/PAGES/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed on 14 October 2018
[37] United Nations, 'Growth in United Nations membership, 1945-present' (United Nations Website) < http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html#2000-Present> accessed on 14 October 2018
[38] United Nations Treaty Collection, Depository, Status of Treaties, 'Chapter XXIII Law of Treaties – Vienna Convention on the Law of Treaties' (*United Nations Treaty Collection Website*) <https://treaties.un.org/PAGES/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed on 14 October 2018; European Union, 'About the EU – Countries' (EUROPA website) <https://europa.eu/european-union/about-eu/countries_en>
[39] Aust (n. 35) 12
[40] *Namibia (South West Africa) (Legal Consequences for States of the Continued Presence of South Africa)* [1971] ICJ Reports 3 [94]; 49 ILR 2; *Fisheries Jurisdiction (United Kingdom v. Iceland) (Jurisdiction),* [1973] ICJ Reports 3 [36]; 55 ILR 183 as cited by Aust (n. 35) 12-13
[41] *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045 [18]; [2000] ILM 310, 320; 119 ILR 467; *Gabcikovo (Hungary v. Slovakia)* [1997] ICJ Reports 3 [42]-[46] and [99]; [1998] ILM 162; 116 ILR 1 as cited by Aust (n. 35) 12-13

reflect customary law.[42] In any case, it has been argued that whether the VCLT reflects customary international law is not a great concern in practice, since states that are not parties 'invariably rely' on the VCLT during negotiations.[43]

37. Therefore, the VCLT will be used as a roadmap in setting out the reform options available for BiH's BITs, despite not all EU member states being parties as mentioned above. The relevant VCLT provision(s) will be referenced in each reform option.

38. The nature of state consent in particular is more fully addressed in Part IV.E.

B. Unilateral Termination or Suspension

39. The first reform option that BiH may consider is termination or suspension according to the terms set out in the respective BITs. Termination in conformity with the provisions of the treaty is ordinarily effected through unilateral notice and, as such, this method of termination is often referred to as "unilateral termination". The legal bases for this option are Articles 54(a) and 57(a) of the VCLT, which state that the suspension of a treaty or the withdrawal of a party may take place is '[i]n conformity with the provisions of the treaty.' The main difference between termination and suspension is that termination is permanent while suspension is merely temporary. However, none of BIH's BITs contain provisions for unilateral suspension, therefore BiH will not be able to effect unilateral suspension as per Article 57(a) VCLT. Suspension will be elaborated on further below (see Part IV.C).

40. The BIT being terminated sets the precise requirements and consequences of unilateral termination. In the case of BiH's BITs, there are three provisions in particular which affect the way in which unilateral termination takes place: provisions addressing "locked" periods, notification requirements, and sunset clauses. (See Part VI for a list BiH's treaties and these provisions). We examine each of the provisions next.

[42] Aust (n. 35) 12-13 See also at Aust (n. 35) 133 where he cites Sir Arthur Watts, who in the foreword to the first edition of his text suggested that the modern law of treaties is authoritatively set out in the VCLT, although Sir Arthur Watts also adds that the VCLT is far from a complete code on the subject, and also not free from continuing controversy even in respect of matters it deals with.
[43] Aust (n. 35) 12

1. "Locked" Period Provisions in BiH's BITs

41. BiH's BITs typically contain a clause stipulating a minimum period that the BIT shall remain in force before any termination may be effected. Some of BiH's BITs further stipulate that the BIT shall be extended for additional fixed periods of time should the parties fail to terminate the BIT within a specified window ("window period"). During both the minimum and the window periods, the parties are not permitted to unilaterally terminate their BITs under the provisions of the treaties and are therefore "locked" into the BITs. These "locked" periods reduce investors' risk and gives them the security that they can rely on the treaty for some period of time during which the parties are temporarily prohibited from unilaterally terminating their BITs.[44]

42. If states unilaterally terminate before the minimum period, investors may arguably have a claim in the breach of legitimate expectation, as suggested by one academic commentator:

> 'When a BIT is terminated not in accordance with its terms, the investors will be strongly inclined to challenge such an act, especially if they would perceive it as an arbitrary and capricious decision.'[45]

Given the locked in period provision in the BIT, investors may argue that they have expected the treaty to last for a minimum period of time. Thus, termination outside of the locked period may have breached such an expectation (see Part IV.E.5). To avoid such a situation, should BiH opt for unilateral termination, it should consider either doing so outside of the "locked" periods or after amending the locked periods, as will be addressed below at Part IV.D.

43. Generally, BiH's BITs with EU member states contain one of the following three types of provisions relating to "locked" periods:

[44] Harrison J, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 The Journal of World Investment & Trade 934 <http://booksandjournals.brillonline.com/content/journals/10.1163/22119000-01306002> accessed 10 November 2018

[45] Andrea Carska-Sheppard, 'Issues Relevant to the Termination of Bilateral Investment Treaties', Journal of International Arbitration, (Kluwer Law International; Kluwer Law International 2009, Volume 26 Issue 6), 755

Type A : **No Time Restriction**	**Type B :** **Minimum Period**	**Type C :** **Window Period**
BiH-Slovakia BIT, Art 12(2)[46]	BiH-UK BIT, Art 14[47]	BiH-Spain BIT, Art 13(1), 13(2)[48]
This Agreement shall remain in force for an infinite period of time. Each Contracting Party may terminate this Agreement by giving a written notice with a twelve-month period.	This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other.	(1) [This Agreement] shall remain in force for an initial period of ten years and, by tacit renewal, for consecutive periods of two years. (2) Either Contracting Party may terminate this Agreement by prior notification in writing, six months before the date of its expiration.

Figure 1: Table comparing the three different types of termination clauses stipulating a 'lock-in period' for BiH's BITs

44. Type A clauses, or "no restriction" clauses, allow for termination upon notice at any time; they are in this sense "unlocked". Type B clauses, or "minimum period" clauses, provide that the treaty must remain in force for a certain minimum period, and only thereafter can termination be effected by one of the parties in accordance with the treaty provisions. Type C clauses provide a minimum period like Type B clauses, and also include further "locked" periods as well as a "window period". It is only within this window period that parties can terminate their BIT unilaterally in accordance with the terms of the treaty. Article 13 of the BiH-Spain BIT provides an illustration. Under Article 13(1), the treaty contains a minimum ten-year period after which it automatically renews for additional ten-year terms unless (under Article 13(2)) either party elects to terminate the treaty during a six-month window prior to the date of the

[46] BiH-Slovakia BIT, Art 12(2)
[47] BiH-UK BIT, Art 14
[48] BiH-Spain BIT, Art 13(1) and 13(2)

treaty's expiration. Should a state fail to elect termination within that period, it may have to wait for the next window (over nine years) to terminate unilaterally.

45. Eleven of BiH's BITs with EU member states contain Type B clauses with minimum periods. Eight contain Type C clauses with minimum durations, additional locked periods and window periods, and only one BIT contains a Type A clause with no minimum time restriction. (See Part VI.)

46. Presently, a total of twelve of BiH's BITs are still within the "locked" period during which the treaty cannot be unilaterally terminated under its provisions. (See Part VI.)

47. For the treaties within the "locked period", a party seeking to terminate unilaterally must wait out the locked period and may terminate the BIT only after the period has expired. For treaties not restricted by a locked period, or which have already been in force for their minimum periods, BiH may terminate the treaties unilaterally in accordance with the other provisions in the treaty (see Part IV.B.2).

48. Other countries such as India, Indonesia and South Africa have unilaterally terminated treaties on their respective expiry dates. In 2016, India served notice to terminate 57 bilateral investment treaties where the initial period of duration provided in the treaty had either expired or was expiring soon, in line with the unilateral termination requirements in the respective BITs. The BITs terminated included those with a number of EU member states, such as the France, Germany and Sweden, UK.[49]

49. In 2014 Indonesia announced its intention to terminate more than 60 BITs by giving notice following the expiry of the treaties' initial periods.[50] According to UNCTAD, 29 of Indonesia's BITs appear to have been terminated in this way.[51] Experts

[49] Davoise, M., 'Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?'. (2018) <http://arbitrationblog.kluwerarbitration.com/2018/08/11/another-one-bit-dust-netherlands-termination-intra-eu-treaties-latest-symptom-backlash-investor-state-arbitration/> accessed 19 October 2018

[50] Voon, Tania, Andrew Mitchell, and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29(2) ICSID Review: Foreign Investment Law Journal 425.

[51] "International Investment Agreements Navigator Indonesia Bilateral Investment Treaties (BITs) "(*UNCTAD Investment Policy Hub*) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu> accessed 9 November 2018

predicted that Indonesia will continue to progressively terminate the rest of its BITs in accordance with the terms of each treaty.[52]

50. South Africa's approach has been to terminate BITs with its counterparty states as soon they become ready for termination, that is, following the expiration of the minimum period. Starting in 2012 with its BIT with the Belgo-Luxembourg Economic Union, South Africa began giving notice to unilaterally terminate all their treaties as their respective expiries approached.[53] To date, 10 of South Africa's BITs have been terminated.[54]

51. From the above examples, it can be seen that unilateral termination outside the "locked" period is an effective method of treaty termination typically employed by states. BiH may similarly consider such an approach.

2. Notification Requirements

52. In BiH's BITs, the termination clauses require the effecting party to serve notice on the other contracting party in order to unilaterally terminate the BIT. In eight treaties, BiH's BITs further specify a window period within which notice is to be given – the Type C variety discussed above.

53. For Type C clauses, the exact time when the parties must give notice is clear (six months before the date of expiration of the initial ten-year period or subsequent two-year period).

54. However, in other BITs, such as those containing Type B clauses, it is not always clear when the parties can give notice, for clauses that merely state that termination shall 'take effect x months after notice is given.' An example of such a clause is found in Figure 1, Type B. There are two possible interpretations of such a clause:

[52] Crockett A, 'The Termination of Indonesia's BITs: Changing the Bathwater, But Keeping the Baby?' (2017) 18 Journal of World Investment & Trade 842
[53] Voon, Tania, Andrew Mitchell, and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29(2) ICSID Review: Foreign Investment Law Journal 424.
[54] "International Investment Agreements Navigator South Africa Bilateral Investment Treaties (BITs) ", UNCTAD Investment Policy Hub, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu> accessed November 9, 2018

(1) the six-month notice can be given six months prior to the end of the ten-year minimum period with the effect that the termination is effected immediately after the expiration of the ten year minimum period; or

(2) the six-month notice can only be given after the conclusion of the ten-year minimum period such that, at the earliest, the treaty can be terminated 10 years and six months after its entry into force.

55. It is likely that position (1) above is to be adopted, allowing the treaty to be terminated immediately upon the expiration of the locked period as position (2) would artificially extend the minimum period to the minimum period plus the notice period.

3. Sunset Clause

56. The third kind of provision relevant to unilateral termination under BiH's BITs is the sunset clause. In the event of termination, sunset clause is likely to be triggered. We begin by providing a definition of a sunset clause, and then address the consequences of triggering a sunset clause upon termination.

a) Definition of Sunset Clause

57. The sunset clause may be known by many other names including 'the survival clause', 'the continuing effects clause', 'the tail-end clause', 'grandfathering clause' and the 'transitional clause'.[55] For the purposes of this paper, it will be primarily referred to as "sunset clause". Although there are some variations in the wording of the sunset clauses in different BITs, a sunset clause generally provides that that upon termination, investments made while the BIT was in force will continue to enjoy the protections provided by the treaty (dispute settlement provisions included) for a period of time.[56]

b) Rationale for Sunset Clause

58. The rationale for the sunset clause is to give foreign investors a sense of stability with respect to their rights under an investment treaty by providing for transitional

[55] Fry & Repousis 'Intertemporality and international investment arbitration: protecting the jurisdiction of established tribunals' (2015) 31(2) Arbitration International 213
[56] Voon, Tania, Andrew Mitchell, and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29(2) ICSID Review: Foreign Investment Law Journal 451.

protection to investors in the event of treaty termination.[57] Thus, in the event of termination by a party to an investment treaty, investors are guaranteed continued protection for a period of time, as stipulated in the investment treaty. Unless otherwise specified, the continued protection includes both **substantive protection**, which includes investment protection clauses such as the minimum standard of treatment, and **procedural protection**, which includes the dispute settlement clause that enables investors to bring a claim.[58]

c) Sunset Clauses in BiH's BITs

59. All of BiH's BITs contain sunset clauses. There are two main types of sunset clauses in BiH's BITs:

Type 1: **Termination**	**Type 2:** **Unilateral Termination**
Czech-BiH BIT, Art 13(4)	Italy-BiH BIT, Art 14(2)
With respect to investments made or acquired prior to the *date of termination of this Agreement*, the provisions of all of the other Articles of this Agreement shall continue to be effective for a further period of ten years from such date of termination. *[Emphasis added]*	With respect to investments made or acquired prior to the date of *termination of the agreement as provided under paragraph l of this Article*, the provisions of the Articles l to 12 shall remain effective for a further period of five years after the aforementioned date. *[Emphasis added]*

Figure 2: Table comparing the two different types of sunset clauses found in BiH's BITs

60. Type 1 clauses are triggered upon "termination" while Type 2 clauses are triggered specifically upon unilateral termination, *viz.* where one party terminates the treaty unilaterally, in accordance with the treaty provisions. It is not contentious that should

[57] Voon, Tania, Andrew Mitchell, and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29(2) ICSID Review: Foreign Investment Law Journal 424. Since the nature of foreign direct investment tends to be long-term and resource-intensive, stability is crucial to investors. See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press) 4. By providing for both substantive protection and procedural protection in a sunset clause, host states may achieve the objective of creating a stable investment environment. See Harrison J, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 The Journal of World Investment & Trade 928, 932.

[58] For instance, in the Italy-BiH BIT, Article 14(2) states that "the provisions Articles 1 to 12 shall remain effective for a further period of five years after the aforementioned date". This includes the dispute settlement clause Article 9 which prescribes for ways in which investors submit a claim against one of the Contracting Parties.

BiH elect unilateral termination, the sunset clause will be triggered for both Type 1 and Type 2 sunset clauses.

d) Effect of Sunset Clause on Claims

61. If the sunset clause is triggered, claims based upon breaches of the BIT alleged to have occurred prior to termination could still be brought within the sunset period. This is because sunset clauses typically extend the operation of the all of the BIT's provisions, including the operation of the dispute settlement mechanism.

C. Mutual Termination or Suspension

62. The next reform option to consider is whether BiH can terminate or suspend its BITs through mutual consent with its counterparties.

63. Articles 54 and 57 of the VCLT provide that a treaty may be terminated (Article 54(b)) or suspended (Article 57(b)) 'at any time by consent of all the parties after consultation with the other contracting states.' As noted in the preparatory works, Article 54 and 57 are parallel provisions, and both highlight the requirement of consent of state parties before mutual termination or suspension can be effected.[59]

1. Article 54(b) and 57(b) of the VCLT

a) Termination

64. Mutual termination has been used by other states seeking to modernize or reform their investment treaty portfolios. Some EU member states have terminated their intra-EU BITs using this method, such as Czech, Denmark and Netherlands.[60] Through mutual agreements, states can terminate their BIT obligations at "any time", as provided under Article 54(b) of the VCLT.

[59] ILC, 'Reports of the International Law Commission on the work of the second part of its seventeenth session' (1966) 2 ILC YB 249

[60] See Luke Eric Peterson, 'Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments', Investment Arbitration Reporter (1 February 2011) < https://www.iareporter.com/index.php?p=17718 > accessed 21 September 2018; Joel Dahlquist And Luke Eric Peterson, 'Investigation: Denmark Proposes Mutual Termination of its Nine BITs with Fellow EU Member-States, Against Spectre of Infringement Cases', Investment Arbitration Reporter (2 May 2016) <https://www.iareporter.com/index.php?p=25080> accessed 21 September 2018; Marie Davoise and Markus Burgstaller, 'Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?', Kluwer Arbitration Blog (11 August 2018) < http://arbitrationblog.kluwerarbitration.com/2018/08/11/another-one-bit-dust-netherlands-termination-intra-eu-treaties-latest-symptom-backlash-investor-state-arbitration/> accessed 18 November 2018

b) Suspension

65. Suspension is another reform option BiH can consider. Suspension through mutual consent has been used by states to manage their investment treaty portfolio, especially as a method of consolidation of treaties with overlapping investment protection where *subsequent* multilateral treaties have been entered into.[61] For instance, Article 27 of the 2005 Switzerland-Liechtenstein-Iceland-South Korea Investment Treaty states that the treaty 'replaces and suspends the "Agreement between the Government of the Swiss Confederation and the Government of the Republic of Korea concerning the Encouragement and Reciprocal Protection of Investments" (of 1971)'.[62]

66. There is a conceptual difference between suspension and termination. Suspension is temporary, as it presumes that the states may lift the suspension and re-activate the treaty. Termination, on the other hand, is permanent. The effect of suspension is that it prevents states from being exposed to claims under the suspended treaty. But since the VCLT did not require states to suspend the treaty only for a limited period of time, states may suspend a treaty indefinitely. If the state suspends the treaty indefinitely, one may argue that *the effects* of suspension and termination are the same, as both release states from their obligations under the suspended or terminated treaty.

67. Even though the effects between termination and indefinite suspension may be the same, there is a practical reason for states to choose suspension for the old BIT when they wish to enter into a successive treaty. Suspension provides the option of reviving the treaty, which would not be available should the old BIT be terminated. The example of the Canada-Peru Free Trade Agreement (FTA) (2008) illustrates this point. In the FTA, Article 845 suspends the 2006 Canada-Peru BIT in the following terms:

> 'The Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments done in Hanoi on 14 November 2006 (the "FIPA") shall be *suspended* from the date of entry into force of this Agreement

[61] W. Alschner, 'Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?' [2005] Journal of International Economic Law 17(2), 282
[62] Article 27, 'As long as it is in force or remains effective, this Agreement replaces and suspends the "Agreement between the Government of the Swiss Confederation and the Government of the Republic of Korea concerning the Encouragement and Reciprocal Protection of Investments" of 7 April 1971.'

> and *until such time as this Agreement is no longer in force.* '[63] *[Emphasis added]*

68. This clause expressly and clearly states that the earlier treaty is suspended for a determinable period of time, i.e. from the date of entry into force of the FTA, until when the FTA is no longer in force. Thus, it may seem that suspension offers a safeguard for investor protection, because even if the new FTA is terminated, the old BIT will be revived to grant investors protection. Hence, suspension is an option to consider especially if there is a successive treaty.

c) Whether Minimum Period Applies

69. As noted above [41], most BITs contain provide for a minimum duration, which is the period in which the treaty is in force before one party can elect to terminate by giving notice. Article 54(b) of the VCLT, however, allows parties to terminate "at any time" upon mutual agreement. Hence it seems that, based on the wording of the VCLT, parties who choose to terminate through mutual consent are not bound by the minimum period of the BITs.

70. This view is supported by the preparatory work of VCLT, which shows that the position of the International Law Commission was clear with regard to termination through consent:

> 'The Commission considered that, whatever may be the provisions of a treaty regarding its own termination, it is always possible for all the parties to agree together to put an end to the treaty.'[64]

71. Therefore, mutual termination does not need to be based on any BIT provisions. Even where the BIT does not explicitly provide for mutual termination, states can still terminate through mutual consent as a matter of customary international law.

72. One example where states have terminated through consent before the expiry of the minimum period is the Czech-Malta BIT. That BIT was signed on 4 April 2009,

[63] Canada-Peru Free Trade Agreement, Chapter 8; see also US-Panama Free Trade Agreement, Chapter 10
[64] ILC, 'Reports of the International Law Commission on the work of the second part of its seventeenth session' (1966) 2 ILC YB 249

entered into force on 9 July 2003, and was terminated on 30 September 2010.[65] Under Article 12(2) of the Czech-Malta BIT, the treaty was to have 'remain[ed] in force for a period of ten years.'[66] By mutual consent, however, the parties terminated the treaty after only seven years.

73. This example shows that as a matter of state practice, states have terminated BITs through mutual consent before the expiry of the minimum period. But whether terminating through consent before minimum period is lawful and valid will be considered again in Part IV.E.

2. Operation of Sunset Clause

a) Termination by Consent

74. As discussed above in Part IV.B.3, in the context of unilateral termination, a sunset clause will extend the protection of the treaty upon unilateral termination. A separate question, however, is whether a sunset clause will operate similarly when the parties have agreed to terminate through mutual consent. In our view, this will depend on the wording of the treaties.

1) Broad vs. Narrow Sunset Clauses

75. We suggest distinguishing between broadly-worded and narrowly-worded sunset clauses.

76. As described further below, broad sunset clauses are those in which the event triggering the sunset period is described as any kind of termination of the treaty, while narrow sunset clauses refer to termination under specific provisions of the treaty.

77. It is suggested that when sunset clauses are narrow, mutual termination is unlikely to trigger the sunset clause, given that a mutual termination does not occur pursuant to specific provisions of the treaty but rather pursuant to the parties' subsequent agreement. On the other hand, broad sunset clauses – those that indicate that they will be triggered upon any kind of termination of the original treaty -- are likely to be

[65] see International Investment Agreements Navigator Malta BITs, UNCTAD Investment Policy Hub, < http://investmentpolicyhub.unctad.org/IIA/CountryBits/130 > accessed 22 November 2018
[66] Agreement between the Czech Republic and Malta for the Promotion and Reciprocal Protection on Investments (Czech-Malta) (signed 9 April 2002, entered into force 9 July 2003)

triggered regardless of the method of termination, unless the states amend the sunset clause.

2) Broad Sunset Clauses

78. An example of a broad sunset clause is Article 27(3) of the Austria-BiH BIT, which indicates that the sunset period will be triggered upon "termination" of the BIT *simpliciter*, not termination pursuant to specific provisions of the BIT:

> '(3) In respect of investments made prior to the date of *termination* of the present Agreement the provisions of Articles 1 to 26 of the present Agreement shall continue to be effective for a further period of ten years from the date of termination of the present Agreement.'*[Emphasis added]*

79. Based on the plain wording of such a broadly-worded clause, so long as the investment treaty is "terminated", the sunset clause would come into play. Hence, this means that regardless of the mode of termination, whether states terminate unilaterally or through mutual consent, investments "shall continue to" be protected by the BIT for the stipulated period of time after termination.

80. This reading is consistent with the tribunal's findings in *Walter Bau v Thailand.*[67] In that case, the 1961 BIT between Germany and Thailand was terminated through mutual consent, upon the entry into force of a new BIT on 20 October 2004, signed on 24 June 2002.[68] The sunset clause in the 1961 treaty, Article 14(3), provided that the provisions of the 1961 treaty 'shall continue to be effective for a further period of ten years from the date of *termination.*' On this basis, the tribunal held that the provisions of the 1961 BIT remained in effect until 20 October 2014, *i.e.*, the end of the sunset period.[69]

81. However, Article 13 of the France-BiH BIT provides another example of a broadly-worded clause, as it stipulates that the triggering event is 'expiration' of the treaty, rather than its 'termination':

[67] *Walter Bau v The Kingdom of Thailand* (UNCITRAL), Award, July 1 2009
[68] *ibid*
[69] *ibid* at [9.67]-[9.68]

> '*At the expiration* of the period of validity of this Agreement, investments made while the Agreement is in force shall continue to benefit from the protection of its provisions for a further period of twenty years.'[70] *[Emphasis added]*

82. It is not clear if 'expiration' is the same as termination. In the official translation of the French-Malta BIT, the term 'd'expiration' mentioned in Article 10(3) of the French version of the BIT was translated as 'termination'. Hence, it seems that the translations did not distinguish 'expiration' and 'termination' and treated them as synonymous.

83. However, it is still likely that tribunals may draw a distinction between 'expiration' and 'termination', which may affect whether the sunset clause is triggered. The Claimant in *Ping An v Belgium*[71] argued that there was a distinction. In that case, the BLEU-China BIT was in French and referred to 'expiration' as the triggering event in the sunset clause. Hence the Claimant sought to *Walter Bau v Thailand*, since the sunset clause in that case referred to "termination". Hence, the sunset clause in the BLEU-China BIT would only apply to *unilateral termination* or *expiry* of the 1986, but not termination. The Tribunal did not expressly rule on this matter, but observed that there is a risk that there may thus be an arbitration gap before the 2009 BIT, such that the investors may have a right but no remedy.[72]

84. Given that there is no express ruling, doubt lingers as to whether "expiration" is distinguished from "termination", such that mutual termination does not trigger a sunset clause that refers to "expiration", as opposed to "termination".

85. However, given the English translation seen in the example of the France-Malta BIT, this may also be an issue with translation, rather than a substantive difference between "expiration" and "termination".

[70] Unofficial Translation, original: 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….
[71] *Ping An Life Insurance Company v the Government of Belgium*, ICSID Case No. ARB/12/29
[72] *ibid* at 207

3) Narrow Sunset Clauses

86. As noted above, narrow sunset clauses are those in which the event triggering the sunset period is defined with reference to specific provisions of the treaty, usually provisions addressing unilateral termination. An example of a narrow sunset clause is seen above in the Type 2 clause in [59].

87. Based on the plain wording of the narrow sunset clauses, the sunset clause may only be triggered upon the happening of the specifically identified events, for instance, unilateral termination pursuant to the terms of the BIT. That being so, it is further arguable that a narrow sunset clause would not be triggered by a termination of the treaty brought about by mutual consent, when it is not pursuant to the terms of the treaty but pursuant to the parties' subsequent agreement.[73]

88. However, a counter-argument suggesting why sunset clause should apply is based on the rationale of sunset clauses.[74] Since the rationale of the sunset clause is to provide for a stable investment environment[75] and guard against the sudden change of policies by the states,[76] the sunset clause should apply so long as the treaty is terminated, regardless of the method of termination.

89. We are not aware of any publicly decided cases in which these issues have been addressed. As a consequence, while we believe that there are valid reasons for believing that a narrow sunset clause should be interpreted as being limited to specifically identified triggers, states may not want to risk mutually terminating a treaty without also extinguishing the sunset clause, if the intention of the parties is to terminate the treaty with immediate effect. Thus, as we discuss in detail below, some states have adopted a "double-barrelled" approach whereby they agree to mutually terminate the BIT *and* to amend the sunset clause at the same time with the effect of extinguishing it. This double-barrelled approach has been used by the Czech Republic in particular in terminating its intra-EU BITs. This approach makes sure that the treaty

[73] See above at [60]
[74] Article 31(a) of the VCLT states that interpretation of the treaty must take into account its "object and purpose".
[75] See n. 57
[76] See M. Sornarajah, The International Law on Foreign Investment (3rd edn, Cambridge University Press 2010), 34; Catharine Titi, "Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law" Journal of International Arbitration, (Kluwer Law International; Kluwer Law International 2016, Volume 33 Issue 5) 425 - 440

as a whole is terminated with immediate effect, regardless of the wording of the sunset clauses. The effects and legality of amending the sunset clause will be examined in detail in Part IV.D.3.

b) Suspension and Sunset Clauses

90. By their terms, the sunset clauses in BiH's BITs are triggered upon "termination", whether specifically defined or generally expressed. Thus, upon a literal interpretation of the wording of these clauses, the sunset period would not be triggered upon the event of a suspension of the treaty, as suspension is conceptually distinct from termination.

91. However, since suspension is not likely to trigger the sunset clause, investors may find themselves deprived of any protection when there is indefinite suspension, as explained above at [67]. But this concern may be merely theoretical, because suspension is mostly adopted, as illustrated above at [64], when states wish to enter into a successive treaty. Hence, the investors are still likely to enjoy protection under the successive treaty and there is no gap in investment protection.

D. Amendment in Conjunction with Termination and Suspension

92. As noted above in Part III.A, in the event of BiH's accession to the EU, all of its intra-EU BITs will need to be terminated with immediate effect. Under the terms of these treaties, however, there are obstacles to their immediate termination: (1) where "minimum period" and "window period" clauses restrict when termination can be effected and (2) where the relevant sunset clauses extend protection even after termination. As a consequence, states in BiH's position may wish to amend the provisions of their BITs to address these issues prior to terminating them.

93. Moreover, states in BiH's position may wish to consider the possibility of amending their BITs in order to clarify the effect of successive treaties. In BiH's case, the succession of EU protection laws on accession, or a future EU-wide investment protection mechanism which has been contemplated by the EU[77] may be prospective mechanisms that may overlap with the current BIT.

[77] "Commission Provides Guidance on Protection of Cross-Border EU Investments – Questions and Answers" (European Commission - PRESS RELEASES - Press release - Commission provides guidance on protection of

94. This section will set out the general rules for treaty amendments under the VCLT, before moving on to suggest how states can amend their BITs.

1. General Rules for Treaty Amendment

95. Much like the rules regarding termination discussed above, the VCLT leaves the parties as masters of their treaty. Thus, a treaty can be amended either in accordance with the procedures for amendment set out within it, or by agreement of the parties pursuant to Article 39 of the VCLT.[78]

2. Amendment of the Window Period or Minimum Period

96. As noted above, the provisions of some of BiH's BITs create "locked" periods such that they may be unilaterally terminated only after the stipulated minimum period of duration has expired or if notice of termination is given within a specific window period.[79]

97. As a consequence, BiH may wish to seek amendment of these provisions with its relevant treaty counterparties to shorten or extinguish the applicable minimum period or window period.

98. Many states have amended their BITs due to requirements related to European Union membership, as explicitly stated in the preambles to the amending documents. Examples of such amendments include the BITs between Bulgaria and India and China and Romania.[80]

3. Amendment of Sunset Clauses

99. Another clause states could consider amending is the sunset clause. Sunset clauses prolong BIT protection after its termination. In light of the *Achmea* Judgment and the Commission's stance discussed above at Part III.A.3, BIT protection that persists under the sunset clause is likely to be inconsistent with EU law. Thus, to comply with

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cross-border EU investments – Questions and Answers, July 19, 2018) <http://europa.eu/rapid/press-release_MEMO-18-4529_en.htm> accessed 17 October 2018

[78] J. Klabbers, 'Treaties, Amendment and Revision, Max Planck Encyclopedia of Public International Law (December 2006) at [2]).

[79] see above at [41]

[80] Gordon, K. and Pohl, J. (2015), 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World'< http://dx.doi.org/10.1787/5js7rhd8sq7h-en> accessed 19 October 2018

EU law, the acceding states may need to consider options to amend the sunset clauses in the intra-EU BITs with the effect of either extinguishing, or shortening them.

100. An example of states amending their sunset clause to shorten the sunset period is seen in Australia and Peru agreeing to terminate their 1995 BIT upon the entry into force of the Peru-Australia Free Trade Agreement (PAFTA) signed on 12 February 2018. The initial sunset period provided for under Article 16(3) of the 'Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments' (IPPA) extended protection of the IPPA for a period of fifteen years. In an exchange of notes between Australia and Peru, the parties agreed that they would shorten the sunset period and allow the IPPA to 'apply for a period of *five* years from the date of termination to any investment … which was made before the entry into force of PAFTA.'[81] Further, the parties agreed to allow investors to 'submit a claim' under the dispute settlement provisions of the BIT 'within three years of the date of termination'. [82]

101. An example of what an EU member state has done is the Czech Republic and their double-barrelled method of termination. The Czech method[83] involved a two-step approach. First, parties terminated the BITs through consent. Second, the parties agreed to 'amend' the sunset clause of the relevant treaty so that it 'shall not further apply'. The second step is thus an amendment with mutual consent, provided for under the respective BITs and international law, with the effect of terminating the sunset clause. The second step was done despite the specific wording of the some of the sunset clauses that only referred to unilateral termination. Hence it was observed by the IA Reporter that the second step may not be necessary. However, states nevertheless erred on the side of caution and terminated the sunset clause, so as to neuter the effect of sunset clauses [84] and foreclose any possibility of residual protection by the terminated BIT.

[81] Letter Terminating the Agreement Between Australia and the Republic of Peru on the Promotion and Protection of Investments (Official diplomatic correspondence dated 5 Feb 2018)
[82] *ibid*
[83] See Luke Eric Peterson (n. 60)
[84] Titi C, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 European Journal of International Law 639

102. In the recent note verbale exchanged between the Czech Republic and the Republic of Poland[85], both states took care to set out that in respect to investments made prior to the date when the Agreement terminates, 'none of its provisions remains in force, including Article 12, paragraph 3.' Article 12, paragraph 3 states that:

> (W)ith respect to investments made prior to the termination of this Agreement, its provisions shall remain in force for a period of ten years from the date of its expiry.[86]

103. It is noteworthy that the states explicitly referred to the termination of the sunset clause. This will avoid any doubt that the sunset clause would apply, as stating that 'none of the provisions remains in force' alone may leave room for the interpretation that only the substantive protection of the treaty has been revoked, excluding the sunset clause.

104. However, the Czech-Malta example showed a different approach as to how sunset clause can be amended. In the note verbales exchanged between the Czech Republic and Malta, both agreed to terminate, and both stated that 'in accordance with Article 12(3), any possible acquired rights or legitimate expectations of the Parties … shall be respected within the framework of the EU Acquis.'[87] The EU Acquis refers to the body of EU laws that are binding on EU member states.[88] Article 12(3) referred to the sunset clause in the Czech-Malta BIT. This method of termination subjected any further investment protection under the BIT during the sunset period to EU law, without directly extinguishing the sunset clause, which is what Czech had done in terminating other BITs. This should be contrasted with other note verbales between Czech and EU member states, where they stated clearly that the sunset clause shall no longer apply.[89]

[85] Letter from the Ministry of Foreign Affairs of the Republic of Poland to the Embassy of the Czech Republic (16 January 2018)
[86] Unofficial Translation, see original: "w odniesieniu do inwestycji dokonanych przed wygaśnięciem niniejszej Umowy, jej postanowienia pozostana w mocy przez okres dziesięciu lat od daty wygaśnięcia jej ważności."
[87] Embassy's Note Verbale No 9/2009 dated 5 January 2009 concerning the proposal by the Czech authorities to terminate the Agreement between Malta and the Czech Republic for the Promotion and Reciprocal Protection of Investments (Official diplomatic correspondence 14 March 2009)
[88] European Commission, *Acquis* <https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/acquis_en> accessed on 11 November 2018
[89] See Note of the Ministry of Foreign Affairs of the Republic of Poland dated 10 January 2018 No (Official diplomatic correspondence 10 January 2018) DPT.2701.6.2018/1; Note of the Embassy of the Kingdom of Denmark dated 6 January 2009 ((Official diplomatic correspondence 6 January 2009)

105. We will not go further to suggest why the note verbales between the Czech Republic and Malta were phrased as such. But the timing of the note verbale dated 2 April 2009 coincided with the ECJ ruling on the incompatibility of Swedish and Austrian BITs with third party states with EU law.[90] However, after the Achmea decision, it is likely that subjecting the sunset clause to member states' obligations under EU law has the effect of extinguishing the sunset clause, due to the EU. This is because the sunset clause is unlikely to be compatible with EU law, as it allows investors access to the investor-state dispute mechanism for a period of time after termination. Thus, if EU Acquis takes precedence, the sunset clause may not apply at all.

E. Whether Investors Continue Having Rights or Remedies After Termination of the BITs

106. In the event of an amendment or termination of the BITs along the lines discussed above, investors may be deprived of their protection under the BITs. Entire termination of the BITs aside, states may also reduce the minimum period or sunset clauses within the BITs. Amendments to remove the dispute resolution clause within the BIT may also effectively cause the investor to have no procedural means to bring a claim against the state.

107. In this situation, investors may pursue two lines of argument in defence of their rights. First, they may argue that states cannot agree to terminate their rights under the BIT and their rights continue to subsist. Second, they may argue that they are entitled to a claim of denial of justice under customary international law.

108. This section addresses these arguments. As to the first argument, it begins by examining the three main approaches to characterising investors' rights in international law. It then examines the limitations placed upon states' rights to terminate and amend of treaties under Articles 37(2) and 70(1)(b) of the VCLT. It also considers arguments that investors can make under the acquired rights doctrine. It argues that regardless of the different approaches to investors' rights, these considerations are unlikely to prevail over the rights that states possess to terminate and amend their treaties under the VCLT. It concludes by considering whether investors whose claims have already been initiated may be in a different position from those who have not yet exercised their rights under the BIT.

[90] Case C-205/06 *Commission of the European Communities v Republic of Austria* [2009] (OCJ, 1 May 2009)

109. The section next addresses the second argument as to whether investors may be able to rely on customary international law for a claim of denial of justice. It argues that while a denial of justice claim may be founded in customary international law, it is less likely that its scope would extend to when states terminate their treaties. Furthermore, it suggests that in the event of the mutual termination of a BIT, investors may have no venue within which to bring a claim.

1. Different Approaches to Investors' Rights

110. Investors' rights under investment treaties have been characterised in international law jurisprudence in three different ways. We distinguish between these three approaches:

(1) Investors have both substantive and procedural rights such that the investor is able to invoke a claim for its own substantive rights under the procedure of the BIT (**'Direct Rights'**)

(2) Investors' rights are procedural in nature, meant to enforce the substantive rights of the Contracting Party States (**'Intermediate Rights'**)

(3) Investors do not have rights of their own under the treaty and are only allowed to enforce the substantive and procedural rights of their home State for convenience (**'Derivative Rights'**)

111. An investor may argue that its rights under the BIT are direct and cannot be revoked by the states whether unilaterally or by mutual consent. Conversely, states may argue that the investors' rights are either intermediate or derivative since states are the actual parties to the BIT and therefore the holder of the substantive rights under the BIT. This will be addressed in detail below.

a) Direct rights

112. According to the direct rights theory, by providing investors with a direct means to seek relief under the investor-state dispute mechanism, the rights conferred on investors through BITs are directly vested in the investors themselves. Hence, this approach supports the argument that investors' rights should not be taken away at the will of states.

113. The rationale of the direct rights theory is the underlying assumption that 'the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state.'[91] Bjorklund has argued that 'the third-party benefit approach strips away the fiction that the state is the injured party in favour of a straightforward recognition of the fact that most of the time, the injury is done to the claimant.'[92]

114. The direct rights approach was recognised in *Cargill v United Mexican States*,[93] where the tribunal viewed the investors' rights as being direct rights under Chapter 11 of the NAFTA. The tribunal there recognised that Article 1116 of the NAFTA allowed the investor to submit to arbitrate a claim and did not qualify the investor's rights in relation to its home state. Accordingly, it determined that the rights directly resided in the investor such that Mexico's retaliatory actions could not be justified as a countermeasure.[94]

115. Similarly, in *Corn Products International v United Mexican States*,[95] the tribunal relied on the wording of the NAFTA and further emphasised that any claim that the injury was suffered by the state and not the investor was a fiction that need not be continued. In practice, it noted that the state 'does not control the conduct of the case', is not paid compensation, and the claimant may advance a claim of which the state disapproves.[96] It regarded these as indicating that the rights of the investor in that case were direct.

116. The direct rights theory has also gained traction with increasing recognition that states are 'no longer the exclusive actors in international law.'[97] In other regimes, such as human rights, international criminal law and environmental law, non-state actors have acquired rights to bring claims under public international law.

117. Hence, if investors have direct rights, were the states amend or terminate the minimum period or sunset clauses, investors would be able to argue that states are not

[91] Z. Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', British Yearbook of International Law, 74 (2003), 182
[92] Andrea K. Bjorklund, 'Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is Not Working', Hastings Law Journal, 59 (2007), 126
[93] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2
[94] *Ibid* at 425
[95] *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1
[96] *Ibid* at 173
[97] Voon & Mitchell, 'The Impact of Mutual Termination on Investors' Rights' (2014) 29 ICSID Review 2, 454

simply modifying or terminating the states' own rights and obligations but are modifying and/or terminating rights held directly by the investors themselves.

b) Intermediate rights

118. According to the intermediate rights approach, investors obtain procedural rights to bring claims while the substantive obligations of treatment remain as obligations between the state parties. The substantive rights are therefore vested in the state parties. Under this approach, states can in principle agree to terminate their own substantive rights under the BIT without objection from the affected investors. Hence, if states were to terminate the treaty or vary the sunset clause, the implication would be that not only do the investors no longer have a procedural means to bring a claim, the investors also have no longer have any substantive protections on which to base a claim.[98]

119. The intermediate rights approach was recognised in *Archer Daniels Midlands v United Mexican States.*[99] There, the tribunal took into consideration that Chapter 11 of the NAFTA is divided into two sections. It noted that only the second section, which sets out the dispute settlement procedure, refers to the rights of investors. As a result, it concluded that the first section, covering substantive protections, should be interpreted as providing for rights belonging to the states, while the second section, addressing the procedure for bringing a claim, should be interpreted as providing for rights belonging directly to investors.

120. It is worth noting that *Archer Daniels Midlands v Mexico*[100] and *Cargill v Mexico*[101] concerned the interpretation of the same provisions of the NAFTA and reached different conclusions about the nature of investors' and states' rights. The fact that the same agreement may be interpreted in such divergent ways by different arbitral tribunals highlights the uncertainty as to whether tribunals will rule in favour of the investor or of the state.

[98] Z. Douglas argues this as a 2nd model of direct rights where the substantive obligations exist purely on the inter-state plane, and investors only have procedural rights. As a result substantive obligations exist as adjudicative standards for when the claimant brings a cause of action under his procedural right. (see Z. Douglas, *The International Law of Investment Claims* (first published 2009, CUP), 36)
[99] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas,* Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5
[100] *Ibid*
[101] Cargill (n 93). See also Corn Products (n96)

c) Derivative Rights

121. The derivative rights approach states that the position of investors under a BIT is derived from the rights of the states which are parties to the treaty. Under this approach, investors do not have rights under the BIT. When an investor brings a claim under the BIT, it is really asserting rights held by its home state. The procedural mechanism of allowing the investor to raise claims of rights held by the state is nothing more than a matter of convenience. It does not reflect a transfer of rights from the state to the investor. Hence, states can amend or terminate a BIT without concern for the position of investors as the treaty concerns the state's own rights.

122. The origins of this approach can be traced back to the precursor to investment treaty arbitration – diplomatic protection. Prior to BITs and the development of investor-state arbitration, states had set up claims commissions to address allegations of wrongful acts by one state to another state's investors. Hence, the prevailing view in the past was that 'once a State has taken up a case on behalf of its subjects before an international tribunal in the eyes of the latter the State is the sole claimant.'[102]

123. On this view, BITs continue to reflect the rights available in diplomatic protection such that the substantive protections contained within them continue to be owed to the contracting states.[103] Thus, even as states have moved away from claims commissions to investor-state arbitration, the rights remain those of the state since a BIT is ultimately an interstate agreement to which individual investors are not privy.[104]

124. Ultimately, which approach of investors' rights to adopt would depend on the interpretation of the specific BITs. We now examine the VCLT Articles permitting or limiting states' ability to vary investors' rights conferred under the BIT.

2. VCLT Basis for Varying Third Party Rights

a) Article 37(2) of the VCLT on the Revocation or Modification of Rights of Third States

125. There is an argument that Article 37(2) of the VCLT may limit states' ability to revoke or modify investors' rights. Arguably, once a BIT has conferred a right on

[102] *Mavrommatis Palestine Concessions* (*Great Britain v Greece*), PCIJ Rep Series A No. 2, 12
[103] J.O. Voss, The Impact of Investment Treaties on Contracts, Martinus Nijhoff (December 10, 2010)
[104] James Crawford, 'The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 9 AJIL 874, 887–8

investors, states may not abrogate it without the investors' consent. Article 37(2) of the VCLT states:

> When a right has arisen for a third *State* in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was *intended* not to be revocable or subject to modification *without the consent of* the third State. *[Emphasis added]*

126. For Article 37(2) to apply, a right must first arise under Article 36. Article 36 states:

> 1. A right arises for a third State from a provision of a treaty if the parties to the treaty *intend* the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the *third State assents thereto*. Its assent shall be *presumed so long as the contrary is not indicated*, unless the treaty otherwise provides.
>
> 2. A State exercising a right in accordance with paragraph 1 *shall comply with the conditions for its exercise* provided for in the treaty or established in conformity with the treaty. *[Emphasis added]*

127. Hence, under Article 36, a right arises for a third State when states *intend* to accord that right to the third State, and the third State *assents* to it. Article 36(1) also presumes that the third State has assented to the right being accorded to it, unless the treaty otherwise provides.

128. In a BIT context, state parties may have intended for a right to be conferred on the investor. The nature of the right conferred may be a direct, intermediate, or derivative right as examined above.[105] Second, as Article 36 allows for the third State's assent to be presumed, it may be argued that an investor may also be presumed to have assented the moment state parties conclude the BIT should the BIT not otherwise provide. In certain BITs where investors are required to comply with host state legislation to admit their investments,[106] or a further agreement is required before an

[105] 'It is a matter of interpretation whether the primary obligations . . . created by such a treaty are owed to qualified investors directly, or only to the other contracting state(s) . . .'. See James Crawford, 'The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 9 AJIL 874, 887–8
[106] See for example, Article 2(1) of the Austra-BiH BIT ('Each Contracting Party shall, according to its laws and regulations, promote and admit investment by investors of the other Contracting Party'), Article 1 of the Denmark-BiH BIT ('"investment"… made in accordance with the laws and regulations of the Contracting

investment qualifies for protection under the BIT,[107] the investor in complying with these requirements may be considered assenting to the right conferred.[108]

129. Two main issues arise with arguing that Articles 36 and 37(2) of the VCLT apply to investors' rights under the BIT. First, on its face the two Articles apply to third *States,* and a question arises as to whether they can apply to non-state beneficiaries of treaties, such as investors. Second, even if they applies to non-state-like investors, an issue arises as whether the rights created under BITs are intended not to be revocable.

130. On the question of whether the Articles 36 and 37(2) apply to investors, some commentators acknowledged that the term 'third State' may refer to third party investors that are beneficiary of rights akin to a third state. For instance, Harrison argues that the notion of irrevocability without consent of third State rights has been considered under the Vienna Convention on the Law of Treaties between States and International Organisations (VCLTSIO) in the context of non-state international organisations. Given this, he postulates that this 'could represent a general principle which is applicable to all third-party right holders.'[109] The direct rights approach is likely to assist the investor such that he is in effect like a third-party state benefitting from the treaty.

131. On the other hand, this interpretation of 'third State' remains one held by the minority. Voon and Mitchell caution against importing general notions of rights to third parties from one context to another. They note that the VCLTSIO has not come into force, and that even if it were, international organisations were required to

Party'), Article 2 of the Lithuania-BiH BIT ('Each Contracting Party… shall admit such investments in accordance with its laws and regulations'), Article 2 of the Switzerland-BiH BIT ('investments… made in accordance with its laws and regulations by investors'), Article 1(1) of the Sweden-BiH BIT ('… provided that the investment has been made in accordance with the laws and regulations of the latter…')

[107] See for example, Article 2(5) of the Italy-BiH BIT ('The Contracting Parties will stipulate with investors of the other Contracting Party… an investment agreement, which will govern the specific legal relationships related to said investment')

[108] Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility'(2013) 24 EJIL 619 , 624

[109] James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 J of World Investment & Trade 928, 944. See also Pierre D'Argent, 'Article 37 of the 1969 Vienna Convention', in The Vienna Conventions on the Law of Treaties: A Commentary, vol. 2, ed. Olivier Corten and Pierre Klein (Oxford; New York: Oxford University Press, 2011), 944

positively assent in accordance with its rules to the grant of a right, unlike third party States which may not have to do so. [110]

132. A further point against extending the application of Articles 36 and 37(2) to non-states is that Article 2 of the VCLT clarifies that 'third State' refers to a state which is not party to the treaty. The commentaries to the draft articles also affirm that Articles 36 and 37 referred to third party states. [111] Thus, even if investors' rights are interpreted as being direct rights under the specific BIT (as discussed above), to treat investors as being subsumed within the term 'third State' may overly stretch the application of Articles 36 and 37(2).

133. Even if one were to accept that the two Articles do covers investors, there are additional conditions for the application of Article 37(2). In order for a third state right under a treaty to be treated as irrevocable, it must be 'established that the right was not intended to be revocable or subject to modification without the consent of third states.' Commentators have doubted that the drafters of investment treaties intended to restrain their ability to make and amend these treaties. Paparinskis for instance states that 'it does not mean that investors have safeguards to the alteration of their legal rights under the investment protection law analogous to those of third parties in the more accepted sense.'[112]

134. Therefore, even if Article 37(2) were understood as covering third party investors, it is unlikely that this second condition would be fulfilled, meaning that states would not be prevented by it from altering or terminating their BITs. That said, every BIT would have to be examined on a case-by-case basis to assess the state parties' intent.

b) Article 70(1)(b) VCLT on the Consequences of the Termination of the Treaty

135. Another question that has arisen is whether Article 70(1)(b) of the VCLT permits states to retroactively terminate the rights of investors (created before its termination).

136. Article 70(1)(b) provides:

[110] Voon & Mitchell (n106)
[111] ILC Draft Articles on the Law of Treaties with Commentaries (1966)II YB ILC 187, 278
[112] M Paparinkis, 'Investment Arbitration and the Law of Countermeasures' (2008) British Yearbook of International Law, vol 79 342

> 1. *Unless the treaty otherwise provides or the parties otherwise agree*, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> …
>
> (b) Does not affect any right, obligation or legal situation of the parties *created through the execution of the treaty prior to its termination. [Emphasis added]*

137. The argument that Article 70(1)(b) may prohibit states from retroactively terminating investors' rights on the grounds that states cannot 'affect any right, obligation or legal situation of the parties created by the treaty before its termination' does not seem strong.

138. In the first place, Article 70(1)(b) does not appear to concern investors' rights. The ILC commentary to the VCLT clarifies that Article 70 does not touch upon the rights of private individuals.[113] If Article 70 does not contemplate individual rights, then prima facie, those rights can be affected by the termination of a treaty in accordance with the VCLT.

139. Second, even if Article 70 was understood to encompass investors' rights, the plain wording of the Article indicates that states are entitled to make retroactive changes provided that the treaty permits such changes or 'the parties otherwise agree.'

140. Hence, according to Article 70(1)(b), so long as the treaty allows, or the parties otherwise agree, a BIT may be modified or amended so as to 'affect any right, obligation or legal situation' created by the treaty, including, it would seem, the extinguishment of the investor's rights.

141. This means that states can mutually amend or terminate the sunset clause discussed above at Part IV.D.3. Investors that argue that the sunset clause has conferred irrevocable rights that subsist after the termination of the BIT are unlikely to succeed. The subsequent amendment to extinguish the sunset clause would fall within the situation where 'the parties otherwise agree' under Article 70(1)(b).

[113] ILC Draft Articles on the Law of Treaties with Commentaries (1966) (II) YB ILC 211, art 24. See also Sir Ian Sinclair, The Vienna Convention on the Law of Treaties (2nd edn, Manchester University Press 1984), 248

142. This means that states can mutually amend or terminate the sunset clause discussed above at Part IV.D.3.

3. Doctrine of acquired rights

143. There is one further argument with respect to the rights of investors that should be considered. According to this view, notwithstanding the precise wording of the provisions of the VCLT, the law of treaties should be understood in line with the acquired rights doctrine in public international law. Under the doctrine, investors may argue that they are entitled to the protection of the treaty starting from the date when the investment was made, as that is the date on which their rights have accrued. Thus, states cannot retroactively deprive them of such rights.

144. The doctrine of acquired rights refers to the notion that rights once vested should be respected.[114] The doctrine is considered to be a general principle of law[115] and a reflection of the principles of legal certainty and non-retroactivity.[116]

145. In the context of BITs, it has been argued that Article 70(1)(b) of the VCLT may be interpreted in light of the doctrine of acquired rights to allow rights of individuals conferred by the treaty to continue to exist even after modification or amendment by the parties.[117] While there has been no case referring to acquired rights following the termination of a BIT, the case of *Amco Asia Corporation v Indonesia (Amco)*[118] is an example of the acquired rights doctrine being recognised within an investment context, albeit in the context of rights created under the host state's domestic law.

146. In *Amco,* the tribunal affirmed that the claimant was bestowed with 'acquired rights (to realise the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law)'.[119] According to the tribunal, the investors acquired these rights the moment the host state gave them the authorisation to invest. Once those rights had been acquired, they could not be

[114] *Case of Certain German Interests in Polish Upper Silesia(Merits)* (1926) PCIJ Ser A No.7, 42
[115] *Questions relating to Settlers of German Origin in Poland (Advisory Opinion) (*1923) PCIJ Ser B No 6, 36, and *Certain German Interest in Polish Upper Silesia (Merits)* (1926) PCIJ Ser A No. 7, 42
[116] Nollkaemper A (2003) Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties. In: Dekker IF, Post HHG (eds) On the Foundations and Sources of International Law. TMC Asser Press, The Hague, 187
[117] O. Dorr, K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer Nature, Switzerland 2017), 1295
[118] Amco Asia Corporation and others v Republic of Indonesia (1984) 1 ICSID Rep 413,
[119] *Ibid* at 493

withdrawn later, except by observing the procedural conditions established by law. On the facts of the case, the host state was found to have revoked the licence it had given to the claimant without following the required procedural conditions and was held, therefore, to have infringed the claimant's acquired rights.

147. An argument founded on this doctrine may be weak as it is uncertain whether the doctrine of acquired rights applies after the termination of a BIT. Voon and Mitchell argue that the presence of a sunset clause in a BIT may be interpreted to exclude any customary doctrine of acquired rights.[120] Furthermore, it can be argued that the VCLT does not state any further qualification to states' retroactive termination of their treaties apart from those under Article 70(1) and that, accordingly, it would be improper to import additional requirements by application of the doctrine of acquired rights [121]

148. Therefore, given that the primary position, as recorded in Article 70(1)(b) of the VCLT, is that states can terminate their treaties and affect the rights of non-states such as investors, arguments on the theory of the investors' rights and the doctrine of acquired rights are unlikely to aid the investors should states agree to terminate their BITs.

4. Effect on Investors Who Have Already Filed a Claim

149. The next issue to consider with respect to the question of investors' rights and the modification or termination of BITs concerns the position of investors who, at the time of the modification or termination, have already filed a claim under the BIT. Some commentators argue that investors who have already filed an investor-state arbitration claim under the BIT may be in a stronger position than investors who have not. There are two different ways to make this argument. The first line of argument is based on the distinction between exercised and unexercised rights. The second is relies on the 'offer-to-arbitrate theory'.

[120] Voon & Mitchell (n106)
[121] F.M. Lavopa, L.E. Barreiros, M.V. Bruno, 'How to kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties', Journal of International Economic Law (2013) 16, 463

a) Distinction between Exercised and Unexercised Rights

150. Investors who have already exercised their rights under a BIT by filing a notice of arbitration may distinguish their position from other investors that have not done so by highlighting that their rights have already been exercised.

151. As mentioned above in Part IV.E.2.b), Article 70(1)(b) of the VCLT appears to allow states to retroactively terminate rights created prior to termination unless the BIT otherwise provides, or if states agree otherwise. Investors, however, may argue that exercised rights cannot be terminated even if the states agree to do so. Although no case has specifically argued this within the situation of states seeking to extinguish jurisdiction after the termination of a BIT, this argument is based on the doctrine of estoppel and other jurisprudence prohibiting the unfair subversion of investors' legitimate expectations.

152. Having considered the jurisprudence[122] on estoppel in public international law, Voon and Mitchell suggest that it can be argued that when a state makes an offer to arbitrate, it has made a 'representation' of its 'willing(ness) to be made accountable to investors' through arbitration. As a result, because investors have relied on such representation by bringing a claim under the BIT, the state should be estopped from later denying jurisdiction.[123]This is also consistent with the practice of the ICJ, which although not expressly relying on the doctrine of estoppel, have rejected arguments that the termination of a treaty would result in the removal of its jurisdiction after claims have been commenced.[124]

153. Tribunals have also emphasised the importance of investors' legitimate expectations in cases denying the retroactive application of denial of benefit provisions. In *Plama v Bulgaria*, the tribunal noted that denial of benefits provisions represents to investors that they will be protected under the BIT. A retroactive application of the provision to

[122] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 101, *RSM Production Corporation and others v Grenada*, ICSID Case No ARB/10/16 Award (10 December 2010) para 7.1.2, *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic* ICSID Case No. ARV/03/13, Decision on Preliminary Objections (27 July 2006) para 159, *Pope & Talbot v Canada*, UNCITRAL (26 June 2000) para 111

[123] Voon & Mitchell (n106)

[124]See *Nottebohm Case (Liechtenstein v Guatemala) (Preliminary Objections)* [1953] ICJ Reports 111. The ICJ rejected the argument that as Guatemala's Declaration accepting the compulsory jurisdiction of the ICJ had expired, the claim filed before the expiration was frustrated. The ICJ held that the filing of the claim was merely a condition that upon satisfaction, the Court will be competent to adjudicate on its own jurisdiction.

deny BIT protection to the investors may undermine the expectations of investors who had relied on that representation to invest in the host state.[125] In addition, retroactively terminating investors' rights when they have already commenced arbitration may also be unfair as the state is in effect deciding 'as a judge in its own interest, to thwart such an arbitration after its commencement.'[126]

154. There are two problems with arguing that the states are estopped from terminating the BIT. First, there may be no reliance by the investor if the home state of the investor agrees to terminate the BIT.[127] Second, in a case of mutual termination, the home state of the investor is responsible for terminating the BIT, as much as the host state. In this case, even before estoppel applies at international law, the investor may have to first seek remedy from the home state.

155. The arguments based on estoppel and the investors' legitimate expectations may not be strong in the context of a mutual termination of the BIT. The argument that the host state is estopped from retroactively terminating their extinguished rights may be stronger in cases of unilateral termination however.[128]

b) Offer-to-Arbitrate Theory

156. Another argument that suggests that BIT termination cannot affect the rights of investors who have commenced arbitration is the offer-to-arbitrate theory. The theory states that the offer to arbitrate can only be rescinded by the state before the offer is accepted by the investor.[129] If the investor fails to bring a claim before the state withdraws such an offer by terminating the BIT, he will have no recourse. Where the investor has commenced arbitration prior to termination, however – in effect

[125] *Plama Consortium Limited v Republic of Bulgaria* ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) at 162
[126] *Pac Rim Cayman LLC v The Republic of El Salvador* ICSID Case No ARB/09/12, Decision on Jurisdiction (1 June 2012) para 4.8.3
[127] While there are conflicting views on the content of estoppel at international law, it is generally agreed that 'the most characteristic element of estoppel is … the confidence that is created in the other State'. See International Law Commission (ILC), 'Seventh Report of Special Rapporteur Victor Rodrígues Cedeño on Unilateral Acts of States' (22 April 2004) A/CN.4/542, 200. See also P*ope & Talbot v The Government of Canada*, UNCITRAL, Interim Award (26 June 2000), 111
[128] Joe Dahlquist, Hannes Lenk, Love Ronnelid, 'The Infringement Proceedings over intra-EU Bilateral Investment Treaties – An Analysis of the Case Against Sweden' Swedish Institute for European Policy Studies, < http://ssrn.com/abstract=2749153> accessed 21 November 2018, 11
[129] Michael Nolan and Frederic Caivano, 'Limits of Consent—Arbitration without Privity and Beyond' in M A Fernandez-Ballesteros and David Arias (eds), Liber Amicorum Bernardo Cremades (La Ley 2010) 873, 875; Andre´s Mezgravis and Carolina Gonza´lez, 'Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked' (2012) 7 Transnatl Dispute Management 1, 5.

accepting the state's offer to arbitrate as contained in the dispute settlement provisions of the BIT – then the state cannot subsequently resile from the perfected agreement to arbitrate.

157. This point was illustrated in the 2017 ICSID arbitration of *Fabrica de Vidrios v Venezuela*,[130] where the tribunal rejected jurisdiction over a claim submitted after Venezuela's denunciation of the ICSID Convention. This case should be contrasted with an earlier case submitted by its parent company before Venezuela's denunciation, which was accepted.[131]

158. In *Fabrica de Vidrios v Venezuela*, the tribunal observed that for Venezuela's denunciation to be effective, investors should not be able to bring a claim after the denunciation. The claimants argued that Venezuela's unilateral consent to arbitration under the ICSID Convention bound them to arbitrate the moment a claim was submitted by the investor. The tribunal disagreed, noting that if unilateral consent of the states sufficiently bound them to arbitration, this would expose Venezuela to unlimited and unforeseeable number of ICSID arbitration notwithstanding its denunciation of the Convention.[132] It also noted that any system founded on consent is vulnerable to the possibility of consent being withdrawn.[133]

159. Furthermore, to hold that the host state's unilateral offer to submit to arbitration is always binding under public international law is odd as it would escalate any revocation of rights under the BIT to an international wrong.[134] This is especially if there is nothing on the face of the BIT to indicate the states' intentions to be bound.

160. This is subject to the exception that the BITs do expressly state the states' intentions to be bound. Some BITs may state that the contracting parties' submission to arbitration is 'unreservedly and bindingly consent.'[135]This treaty language may mean

[130] *Fabrica de Vidrios and Owen Illinois de Venezuela v Bolivarian Republic of Venezuela* ICSID Case No. ARB 12/21
[131] *OI European Group B.V. v Bolivarian Republic of Venezuela* ICSID Case No ARB/11/25
[132] *Fabrica* (n137) [289]
[133] *Fabrica* (n137) [290]
[134] Nolan and Caivano (n 43) 880–90. See also Oscar Garibaldi, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy' in Christina Binder and others (eds), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (OUP 2009) 251.
[135] 2008 German Model BIT art 10(2). See also Austria-BiH BIT Article 13(1) ('Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration…'), BLEU-BiH BIT Article 9(2) ('each Contracting Party agrees in advance and irrevocably…'),

that an offer to arbitrate is legally binding on the conclusion of the BIT, notwithstanding that it has not been accepted.[136] For BITs that have such language, even investors who have not commenced arbitration may argue that their rights cannot be revoked.

161. On the other hand, some BITs require host states to consent to the submission by the investor to arbitration upon the initiation of a claim.[137] Alternatively, the BIT may state that consent is only perfected when the investors submit a claim. [138]These types of treaty language would support investors who have commenced arbitration to differentiate themselves from those that have not and argue that their rights cannot be revoked by state consent. Hence, whether the host state's unilateral offer is binding may be dependent on the specific terms, the context and the BIT's object and purpose.[139]

162. Alternatively, if investors are understood to have derivative rights, state consent may be revoked at any time, including if a claim has already been submitted since the rights reside with the state.

5. Can Investors Make a Denial of Justice Claim?

163. As a result of the above analysis, the prevailing opinion is likely that states can amend or terminate the sunset clause, even though it may have a retroactive effect on investors who, at the time of making their investment, may have expected the protection of the sunset clause. This is because, as illustrated above at [150], investors who have yet to bring a claim have not exercised their rights and thus states may be able to revoke the treaty protection retroactively.

164. Ordinarily, the protection for denial of justice falls under the fair and equitable treatment clause in the BIT. However, if states terminate the BITs, the issue is whether investors can make out a claim for denial of justice under customary

[136] Voon & Mitchell (n106)
[137] Agreement between Japan and the Islamic Republic of Pakistan concerning the Promotion and Protection of Investments, art 10.2.
[138] See also Denmark-BiH BIT Article 8(5) ('the consent given by each Contracting Party in paragraph 2 and the submission of a dispute by an investor under the said paragraph shall constitute the written consent and written agreement of the parties to the dispute in its submission for the purposes of Chapter II of the Washington Convention…')
[139] Voon & Mitchell (n106)

international law. It is likely that tribunals will find that there is a customary international law principle of denial of justice.[140]

165. But a preliminary question to that is if investors can bring a claim. When the BIT is terminated, the state's consent to arbitration is withdrawn. Thus, arbitral tribunals have no jurisdiction to hear the claim due to the lack of state consent. Hence unless the investors resort to traditional methods to bring a claim, such as by seeking diplomatic protection. arbitration is founded upon consent. Otherwise, the investors would have no independent standing in international adjudications in customary international law.[141]

166. Even if there is a dispute mechanism for investors to bring a claim, it is doubtful whether terminating the treaty and amending the sunset clause amounts to denial of justice. In *Himpurna v Indonesia*, the tribunal held that it is a denial of justice for the courts of a state to prevent a foreign party from pursuing its remedies before a forum the state consented to.[142] On the facts, there was denial of justice, as the state sought to halt the arbitral proceedings by obtaining an injunction in the Indonesian court. However, this is different from the present scenario. The tribunal in *Himpurna v Indonesia* was vested with jurisdiction, and thus Indonesia should not 'prevent an arbitral tribunal from fulfilling its mandate'. But it is different when the investor has not filed a claim under the BIT, and the BIT was terminated with immediate effect, as the tribunal is *without* jurisdiction in the absence of states' consent manifested in the BIT. Hence, the situation in *Himpurna v Indonesia* can be distinguished.

167. In any event, arbitral justice is not the only justice.[143] Even if investors can bring a claim before a tribunal, the investors may need to show that they cannot bring their disputes through other mechanisms, such as under national laws.

[140] Patrick Dumberry, The Formation and Identification of Rules of Customary International Law in International Investment Law (Cambridge, 2016) 108
[141] Patrick Dumberry, The Formation and Identification of Rules of Customary International Law in International Investment Law (Cambridge, 2016), 388-389
[142] (2000) XXV Yearbook Commercial Arbitration 109, 182–183
[143] J. Paulsson, Denial of Justice in International Law (2005) 156

F. Articles 54(a)/57(a) with Article 39 VCLT: Termination on accession to the EU

168. In this section we outline an option for reform that addresses the unique circumstances of a capital-importing state such as BiH that is involved in the EU accession process. It proposes the possibility of amending BiH's BITs to automatically terminate upon accession to the EU (Figure 3). As this reform option encompasses both mutual termination and amendment, it concerns both Articles 54(a)/57(a) and 39 of the VCLT.

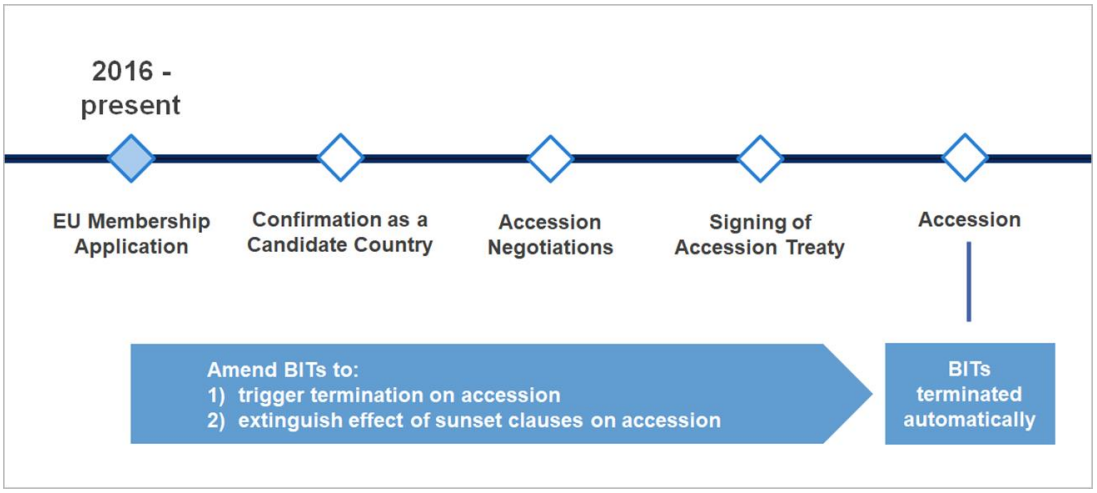

Figure 3: Timeline for accession to the EU showing when amendment and automatic termination can occur

169. In this scenario, BiH would agree with its BIT counterparts to amend its BITs to provide that mutual termination will occur upon BiH's accession to the EU, and that the effect of sunset clauses will extinguish at this point. Staging termination and the extinguishing of sunset clauses at this point may be an agreeable option to the BIT counterparts of BiH, as this would not leave a perceived 'gap' in investment protection until BiH accedes to the EU and, under EU law, its intra-EU BITs will no longer be permissible.

170. A useful case study to consider in this regard is the Central European Free Trade Agreement (CEFTA). The 2006 consolidation of CEFTA incorporated an automatic exit clause providing that EU accession automatically triggers exit from CEFTA. The relevant clause is as follows:

> **Article 51**
>
> **Duration and Denunciation**
>
> 3. The Parties agree that in the event of any eligible Party becoming a member of the European Union, that Party will withdraw from this Agreement. Withdrawal shall take place at the latest the day before membership takes effect and without any compensation to the other Parties subject to the altered conditions of trade.[144]

171. This automatic withdrawal mechanism was inserted as the EU Treaties of Accession required acceding countries to withdraw from any free trade agreements with third parties upon acceding to the EU.[145]

172. A similar clause can be incorporated into existing BITs by a consensual amendment to provide for mutual termination upon BiH's accession to the EU, in accordance with Arts 54(a)/57(a) and 39 of the VCLT. However, care must be taken in using the clause above as it is in the context of a free trade agreement. In adapting the clause for use in a BIT, the substantive and procedural aspects of termination covered in the earlier sections need to be considered, such as what kind of termination 'withdrawal' will entail (unilateral or mutual), as well as issues such as the extinguishing of sunset clauses.

[144] Agreement on Amendment of and Accession to the Central European Free Trade Agreement, Annex 1, Consolidated Version of the Central European Free Trade Agreement (CEFTA 2006)

[145] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [2003] OJ L236/33 Article 6(10); Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded [2005] OJ L157/203 Article 6(10); Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community [2012] OJ L112/6 Article 6(9)

G. Multilateral arrangements for termination on accession

173. A further option for consideration is whether a multilateral arrangement aimed at termination on accession might be agreed to efficiently address the numerous BITs BiH has with EU member states. Such a multilateral arrangement could involve BiH and its various EU counterparties exclusively or it could involve other prospective EU candidate states as well. In our analysis we focus on the possibility of a multilateral arrangement involving both BiH and other states in the current group of candidate and potential candidate countries.

174. This multilateral arrangement under consideration, whatever form it would take, would involve a two-stage termination process (Figure 4). The first stage would involve the candidate and potential candidate countries mutually terminating BITs with EU member states and extinguishing the effect of sunset clauses when they enter into the proposed multilateral arrangement, in accordance with Articles 54(a)/57(a) and 39 of the VCLT. The second stage would involve automatically exiting the multilateral arrangement and automatically extinguishing the effect of any new sunset clauses in the multilateral arrangement upon a candidate state's accession to the EU. The automatic exit and extinguishing of sunset clauses would be implemented by a termination on accession mechanism in the multilateral arrangement. The mechanism was previously discussed (Part IV.F).

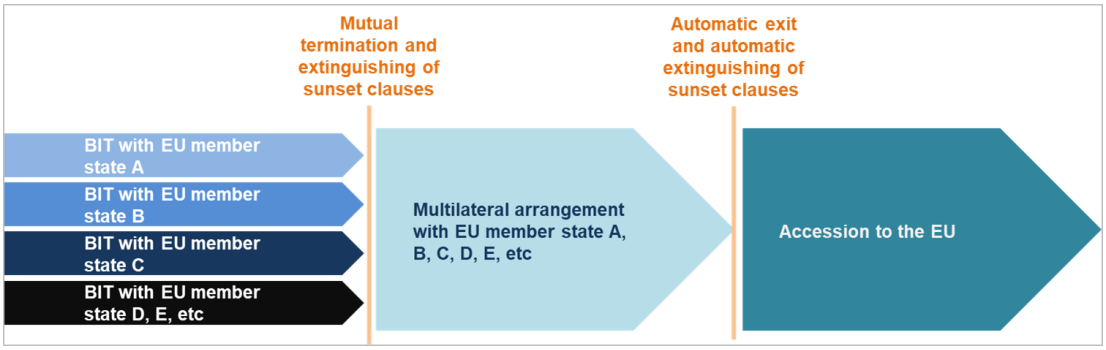

Figure 4: The two-stage termination process.

1. Three permutations of the multilateral arrangement

175. There are three ways in which such a multilateral arrangement can take shape. The arrangement may be:

1) a multilateral investment treaty[146] between the EU member states and third countries (Figure 5),

2) a multilateral investment treaty[147] between the EU and third countries (Figure 6), or

3) an arrangement to have parallel but identical BITs between the member states and third countries (Figure 7).

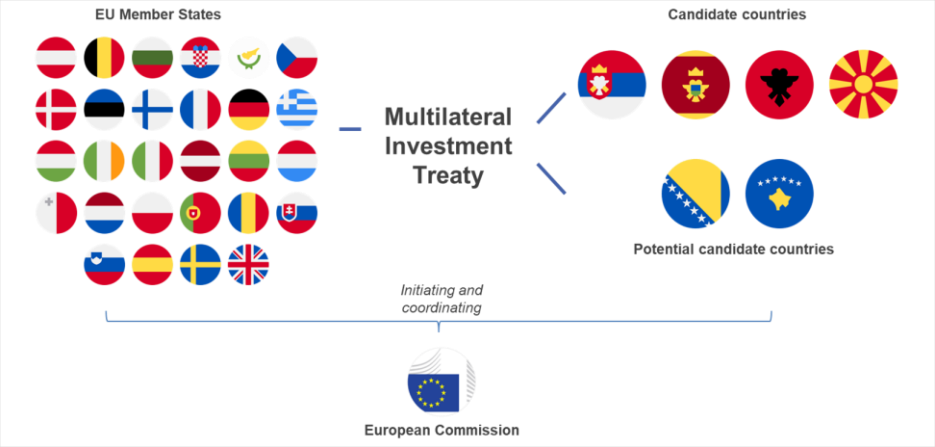

Figure 5: Multilateral Investment Treaty between the EU member states and current third countries

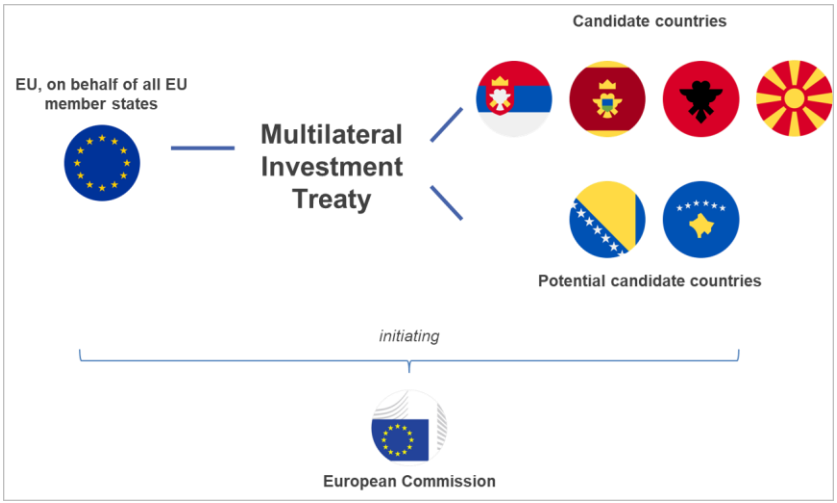

Figure 6: Multilateral Investment Treaty between the EU and current third countries

[146] This multilateral investment treaty would contain substantive and procedural protections, as it would aim at reflecting a model BIT that will be modified to comply with EU law.
[147] See n. 146

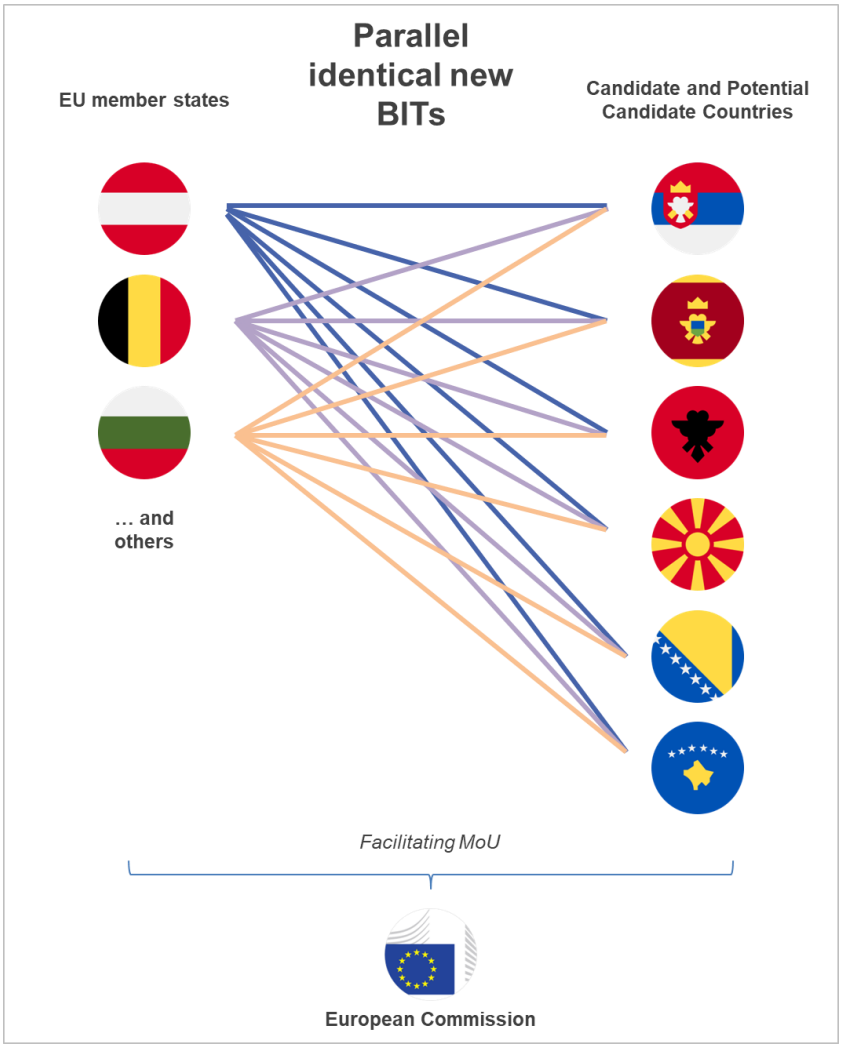

Figure 7: Multilateral agreement to enter into identical BITs on a parallel bilateral basis. All flag icons are abstractions; except the EU and ECflags/logos, all are designed by Freepic on Flaticon.

176. The advantage of arrangements 1 and 2 is that it is a neater solution both legally and in practice, and the thorny issue of terminating existing BITs and extinguishing the effect of sunset clauses can be done all at once in a single multilateral agreement, perhaps by annexing a list of all existing BITs, and providing that by entering into the multilateral agreement all BITs in the annex are terminated mutually and the sunset clauses extinguished. As for the Commission's role, all of these options require different levels of involvement and coordination by the Commission. Option 1 involves the Commission as the coordinator, while Option 2 relies upon the Commission's competence to enter into treaties on behalf of its member states.[148]

[148] Questions about the legal position of the Commission's competence in these scenarios are beyond the scope of this paper.

Option 3 results in all the member states agreeing to alter their BITs, which may create a complex web of BIT amendments.

2. Role of the Commission in supporting the above permutations

177. The above permutations of a multilateral arrangement involve massive coordination and negotiation efforts between all parties. This is one challenge in having a 'one-stop shop' arrangement to deal with all BITs. As a result, we suggest that the Commission might play a crucial role in supporting whichever permutation is adopted as it has previously done something similar. A recent investigative report [149], published sometime end-2018, found that the EC was pushing for a multilateral solution in the shape of a single termination instrument to deal with intra-EU BITs. Reportedly negotiations on the form this termination instrument would take are currently underway. While this recent development is relevant as it indicates the EC's preference and support for a multilateral solution in dealing with BITs, it nonetheless concerns an intra-EU context, so we will proceed to consider a case study.

a) The 2003 MoU between the US and acceding and candidate countries

178. Inspiration for the Commission's role in this regard can be drawn from the 2003 memorandum of understanding between the US, the then acceding and candidate countries, and the Commission (Figure 8).[150]

[149] Joel Dahlquist, 'Investigation: European Commission's Push For Termination Of Intra-Eu Investment Treaties Shifts To Multilateral Plane, But Member-States At Odds Over Scope Of Effort' Investment Arbitration Reporter (15 November 2018) < https://www-iareporter-com.libproxy1.nus.edu.sg/articles/investigation-european-commissions-push-for-termination-of-intra-eu-investment-treaties-shifts-to-multilateral-plane-but-member-states-at-odds-over-scope-of-effort/> accessed 17 November 2018

[150] Understanding Concerning Certain U.S. Bilateral Investment Treaties, signed by the U.S., the European Commission, and acceding and candidate countries for accession to the European Union (September 22, 2003) <https://www.state.gov/s/l/2003/44366.htm> accessed on 15 October 2018

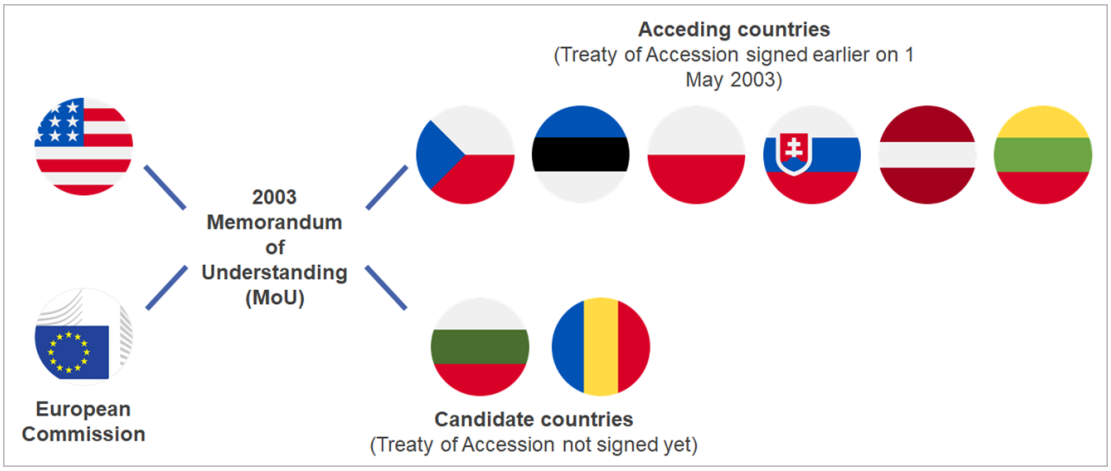

Figure 8: Parties to the 2003 MoU. All flag icons are abstractions; except the EU and ECflags/logos, all are designed by Freepic on Flaticon.

179. The 2003 MoU was aimed at dealing with BITs between the then acceding and candidate countries as shown above, and the US. In the MOU, the participants made it clear that their aim was to strike the balance between two main interests: on the one hand, the maintenance and enhancement of a positive framework for US investment in the eight accession and candidate countries and, on the other hand, the full compliance and implementation of the *acquis communautaire* by the soon-to-be new members of the EU. [151] From the internal communications between the US Department of State, White House and Senate, the US took the view that their BIT counterparts would be required to terminate their BITs with the US otherwise.[152]

180. The MoU was non-binding, presenting the parties' best efforts to find a solution to the problem.[153] It set out a draft text containing several draft 'Interpretations' and draft 'Amendments'.[154] Following that, the then acceding and candidate states engaged in renegotiating their BITs with the US, leading to binding Protocols to amend their BITs according to the MoU.[155]

[151] Panos Koutrakos, *EU International Relations Law* (Bloomsbury 2006) ('Koutrakos') 322
[152] Senate Journal, 108th Congress, 2nd session, 12 March 2004, Treaty Doc. 108–18 ('US-Czech Republic Additional Protocol')
[153] Angelos Dimopoulos, EU Foreign Investment Law (OUP 2011) ('Dimopoulos') 311; Anca Radu, 'Foreign Investors in the EU—Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law' (2008) 14 European Law Journal 237 ('Radu'), 238
[154] Markus Burgstaller, 'European Law and Investment Treaties' (2009) 26 Journal of International Arbitration, Kluwer Law International 2009) 181 ('Burgstaller'), 201
[155] Markus Burgstaller, 'European Law and Investment Treaties' (2009) 26 Journal of International Arbitration 181 ('Burgstaller'), 202; for an example see US-Czech Republic Additional Protocol (n. 152)

b) The Commission's pro-active role in coordinating the MoU

181. For the 2003 MoU, it was recognised that the Commission took a proactive approach above and beyond its duty not to impede a member state in fulfilling its duties under international agreements.[156] It liaised with third countries and acceding and candidate countries, bringing them together under a common umbrella to renegotiate their BITs, rather than preparing for another round of disputes.[157]

182. The Commission, in a press release on the 2003 MoU, stated that it was 'pleased that a satisfactory solution has been found, showing that EU enlargement can be beneficial to third countries'.[158] This suggests the Commission could be keen to take a similar approach in the present situation.

183. Some member states may also be keen on the idea. A number of member states (Austria, Finland, France, Germany and the Netherlands) have previously, in 2016, released a non-paper stating their position that they would be willing to terminate their intra-EU BITs provided that all member states could successfully negotiate a subsequent multilateral agreement providing for a multilateral investor-state dispute settlement mechanism compliant with EU law.[159] These five members states believe there would be 'gaps' in investor protection should intra-EU BITs be terminated.[160] They have indicated that they would favour a coordinated termination of intra-EU BITs, instead of parallel unilateral or bilateral processes of denunciation.[161]

H. Implied Termination under Article 59 of the VCLT

184. Should BiH choose not to adopt any of the options suggested above to terminate its BITs, on accession, these BITs will survive and take on the nature of intra-EU BITs. Notwithstanding the decision of the CJEU in *Achmea* that intra-EU BITs violate EU

[156] Panos Koutrakos, *EU International Relations Law* (Bloomsbury 2006) ('Koutrakos') 324-325
[157] Panos Koutrakos, *EU International Relations Law* (Bloomsbury 2006) ('Koutrakos') 325
[158] European Commission, 'European Commission, eight acceding countries and US sign Bilateral Investment Understanding' (Press Release, 23 September 2003) IP/03/1284 ('US-EC-Eight acceding and candidate countries MoU Press Release')
[159] Council of the European Union General Secretariat, Trade Policy Committee (Services and Investment), 'Intra-EU Investment Treaties – Non-paper from Austria, Finland, France, Germany and the Netherlands' (7 April 2016) m.d. 25/16 ('2016 Non-paper') para 2, 3 and 6
[160] Council of the European Union General Secretariat, Trade Policy Committee (Services and Investment), 'Intra-EU Investment Treaties – Non-paper from Austria, Finland, France, Germany and the Netherlands' (7 April 2016) m.d. 25/16 ('2016 Non-paper') para 6, 8 and 9
[161] Council of the European Union General Secretariat, Trade Policy Committee (Services and Investment), 'Intra-EU Investment Treaties – Non-paper from Austria, Finland, France, Germany and the Netherlands' (7 April 2016) m.d. 25/16 ('2016 Non-paper') para 3

law, as a matter of public international law the mere fact of accession to the EU would not lead to the implied termination of any intra-EU BITs under Article 59 of the VCLT. This is as EU investment protection law does not relate to the same subject-matter as the BITs.

185. Article 59 of the VCLT states:

> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty *relating to the same subject-matter* and…' *[Emphasis added]*

186. In a number of arbitrations brought under intra-EU BITs, various EU member states have attempted to rely on Article 59 to argue that their BITs were terminated upon accession to the EU as EU law was of the same-subject matter as the BITs (*Jan Oostergetel v Slovak Republic*; *Eastern Sugar v Czech Republic* and *Eureko v Slovak Republic*). These arguments were all rejected by the tribunals for two main reasons:

(1) BITs concern specific protection standards for admitted investments to be enforced through arbitration while EU law has a broader consideration to provide measures to create a comprehensive economic union[162]

(2) BITs concern guarantees for investments after they are made ('during the investor's investment in the host State') while EU trade liberalisation laws focus on providing investors with access to other member state markets (Pre-establishment phase)[163]

187. Furthermore, it was noted by the tribunal in *Eureko v Slovak Republic* that Article 59 of the VCLT is still subject to the requirements under Article 65 of the VCLT being fulfilled. Article 65 establishes 'a procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty', which has to be invoked. The VCLT does not provide for the 'automatic termination of treaties by operation of law'

188. Hence, BiH cannot rely on the mere fact of a future accession to argue that its BITs are terminated. If BiH decides that termination of intra-EU BITs on accession is a

[162] *Jan Oostergetel v Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010), 75
[163] *Eastern Sugar B.V. v Czech Republic*, SCC Case No. 088/2004, Partial Award (27 March 2007), 164

desirable outcome, the discussion on termination above from Part IV.B to Part IV.E will be relevant.

V. CONCLUSION

189. In conclusion, it now seems clear that termination of all intra-EU BITs is required under EU law. Not only has this been the long-stated position of the Commission, but the CJEU has now ruled that this is the case in the recent decision in *Achmea*.

190. We note that termination can be effected immediately or conditionally upon the accession of BiH to the EU, and it is suggested that the latter is preferred to ensure continued investor protection and prevent any gap in investor protection.

191. Owing to the existence of various clauses such as the sunset clause, the minimum period and window period clauses, which may impede termination, amendments should be made prior to actual termination of the treaties or simultaneously with the termination of treaties to abrogate or vary these clauses. The consequences of changes in this respect are unlikely to affect any arbitrations under the BITs pending at the time of the changes, but they are likely to affect any investors who have not commenced arbitration.

192. An overview of the reform options presented thus far can be illustrated in the diagram at Annex B.

VI. ANNEX A: SUMMARY OF BIH'S BIT PROVISIONS

Countries	Min Period	Notice Period	Window Period	Duration of Sunset Clause	Years Left in Locked Period	Method of Termination Under Sunset Clause
Austria	10 years	1 year	-	10 years	-	Termination
Belgium-Luxembourg	10 years	6 months prior to expiry of each 10 year period	10 year periods	10 years	2	Termination
Czech Republic	10 years	1 year	-	10 years	2	Termination
Croatia	10 years	1 year before the expiry of each 10 year period	10 year periods	10 years	9	Termination
Denmark	10 years	1 year	-	10 years	-	Termination
Finland	20 years	1 year	-	20 years	3	Termination
France	10 years	1 year	-	20 years	-	Termination
Germany	10 years	1 year	-	20 years	-	Termination
Greece	10 years	1 year	-	10 years	-	Termination
Hungary	10 years	1 year before expiry of each period	10 year periods	10 years	7	Termination
Italy	10 years	1 year before expiry of each period	5 year periods	5 years	2	Unilateral Termination
Lithuania	15 years	1 year	-	10 years	6	Termination
Netherlands	10 years	6 months before the date of expiry of the 10 year period	10 year periods	15 years	4	Termination

Portugal	10 years	1 year notice at the end of each ten year period	10 year periods	10 years	1	Termination
Romania	10 years	1 year		10 years	4	Termination
Slovakia	-	1 year	-	10 years	-	Termination
Slovenia	10 years	6 months before the date of expiry of any of the periods of its validity	10 year periods	10 years	4	Termination
Spain	10 years	6 months before date of expiration	2 year periods	10 years	-	Termination
Sweden	20 years	1 year	-	20 years	4	Termination
UK	10 years	1 year	-	15 years	-	Termination

VII. ANNEX B: DIAGRAM OF PROPOSED ACTION