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Survival Clause under the International Investment Treaty Reform: Challenge and Response

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Abstract

The survival clause plays a key role in the reform of international investment treaties because it concerns the transition between old and new treaties. The legislative purpose of the survival clause is to provide investors with survival protection and prevent investors' interests from being affected by sudden changes in policy and investment environment, so as to ensure the stability of investment protection and legal certainty. Over the past decade, many investment treaties have faced termination or been effectively terminated. However, the current rules and practices of survival clauses lack the certainty and consistency, which has caused certain obstacles to the reform of international investment law. Therefore, to study and improve the text of the survival clause will help China to make favorable policy choices on the issue of survival clauses and contribute to the reform of China's investment treaties.

Keywords

Survival Clause, VCLT, Unilateral Termination, Mutual Termination

1. Introduction

International investment law has countered legitimacy crisis over the past decade, mainly due to the imbalance of obligation between the host country and the investor in the international investment treaties (IITs), and the increasing mistrust of the investment arbitration mechanism. As a result, the reform of international investment law system is underway. After substantive provisions in IITs have been transformed in a more balanced manner, there needs to be a proper transition between the old and new IITs (UNCTAD, 2017). As an important aspect of transition issue, survival clause has now become a major challenge for the

reform of IITs.

The survival clause, also known as sunset clause or grandfather clause, (the term "survival clause" is uniformly used here for the purpose of avoiding word confusion) is a special clause in international investment treaties that maintains the treaty effect on the existing investment for around 5 to 20 years after an investment treaty is terminated. The significance of the survival clause is that after the termination of an IIT, investors can still initiate investment arbitration under the investor-state dispute settlement mechanism for violations of the treaty obligations by the state before or after the termination (Voon, Mitchell, & Munro, 2014). Therefore, the survival clause mainly deals with the issue of the continued effectiveness of the treaty after its termination. Effectively terminated IITs accounted for 70% of all treaties terminated in the past decade. However, the current international legislation on survival clauses cannot provide legal certainty, and there is great inconsistency between treaty texts and investment arbitration practices (UNCTAD, 2017). The reason of such inconsistency is twofold: on the one hand, due to the crisis and reform of the international investment legal system, more and more contracting parties have chosen to terminate existing treaties, which highlighted the problem of the survival of the treaty. For example, when several bilateral investment treaties between certain EU members cease to exist, problems arise when the EU Council made corresponding resolutions concerning the effect of such treaty termination. On the other hand, the loopholes within the text of the survival clause have led to the expansive interpretation made by arbitral tribunals. The inconsistency between legal text and judicial practice caused the delay in the reform of the international investment legal system to a great extent. Therefore, in the context of the reform of IITs, this paper will analyze the international treaty text of the survival clause and the disputes in arbitration practice, and then put forward some proposals concerning the revision of the survival clause and how China should deal with such issue.

2. The Common Features and Legislative Status of Survival Clause under IITs

Before analyzing the practical challenges of the survival clause, it is necessary to understand the aim and features of the survival clause, so as to grasp the underlying rationale of its rule design. At the same time, this section will also elaborate on the status quo of the survival clause in IITs, so as to get a general understanding of its legislation.

2.1. Features of the Survival Clause

The legislative purpose of the survival clause is to give investors special protection based on the long-term nature of the international investment cycle, which can prevent investors' interests from being affected by sudden and negative changes in the investment environment and policy to a certain extent. To put it simply, the core purpose of the survival clause is to ensure the stability and legal

certainty of investment protection, so that investors believe that investment is protected by international law (Harrison, 2012). Therefore, some scholars regard the survival clause as the "immune system" of IITs, which has the function of protecting investments under the treaty against sudden termination (Lavopa, Barreiros, & Bruno, 2013).

Judging from the concept and purpose of the survival clause, it has several prominent features. First, the survival clause is temporally cohesive. Survival clauses often form the "final provisions" of an IIT together with rules such as the entry into force and termination of the treaty. The survival clause is neither a substantive clause nor a procedural clause, but a rule dealing with the effectiveness of a treaty in terms of time, so as to solve the problem of whether the terminated treaty continues to be effective after it is terminated due to the discharge of treaty obligations or replaced by a new treaty. Therefore, when we discuss the survival clause, we cannot ignore the analysis of the relevant termination rules. Second, the survival clause is comprehensive in investment protection, including both substantive protection and procedural protection. Generally speaking, the survival clause can provide all-round protection, and investors can initiate investment arbitration under the procedural clauses of the treaty with respect to the substantive clauses of the terminated treaty.

2.2. Legislative Status Quo of the Survival Clause

In the field of IITs, survival clauses mainly exist in BITs and FTAs. According to a report by the Organization for Economic Cooperation and Development (OECD), among 2061 samples, 97% of the investment treaties have stipulated the survival clause (Gordon & Pohl, 2015). BITs are the main carriers of survival clauses, and almost all first-generation BITs stipulate survival clauses. Some typical national BIT models, such as Article 22 of the 2012 US BIT Model, Article 13 of the 2008 German BIT Model, Article 52 of the 2004 Canadian BIT Model, and some newly revised National BIT Models, such as Article 38 of the 2015 Indian BIT Model and Article 34 of the 2012 Southern African Development Community (SADC) BIT Model, all stipulate survival clauses. Although other IITs seldom use survival clauses, there are still exceptions (Gordon & Pohl, 2015). For example, Article 45, Paragraph 3 and Article 47, Paragraph 3 of the Energy Charter Treaty (ECT) stipulate the survival clauses for the termination of provisional application and general termination respectively. Although these two rules are slightly different, they produce the same effect and are typical survival clauses. As another example, Article 10, Paragraph 22 of the Comprehensive Economic Partnership Agreement (CEPA) between India and South Korea stipulates that in case this agreement is terminated, the investment dispute chapter and some specific important substantive provisions will continue to apply to the investment established before the termination for 15 years. In addition, a relatively special legislative practice distinguishes between mutual termination and unilateral withdrawal of a treaty. The Investment Agreement for the Common

Market for Eastern and Southern Africa (COMESA) Common Investment Area concluded in 2007, stipulates that if the contract is not renewed by consensus before the treaty expires, the survival period of the treaty should be 10 years; if a contracting party unilaterally withdraws from the treaty, the survival period should be 5 years.

3. Analysis of the International Legal Text of the Survival Clause

Under international law, the Vienna Convention on the Law of Treaties (VCLT) provides for the termination of treaties, but it does not explicitly deal with the rights and obligations of investors who are not parties to the VCLT. That is to say, VCLT has very limited competence to deal with issues concerning the survival clause. From further text analysis, the survival clause in IITs generally includes four elements: the duration, the investment scope, the content, and the restrictions of survival clause, and each element needs to be carefully handled and formulated so as to control the risks and challenges thereof.

3.1. VCLT Cannot Properly Deal with the Issue of Investors' Survival Rights and Obligations

VCLT does not specifically address the survival clause, but it does provide for the termination of the treaty. The termination of a treaty is a prerequisite for the survival clause. Therefore, it is necessary to discuss the termination rules in VCLT that are closely related to the survival clause, mainly including Articles 54, 59 and 70, so as to better analyze the potential impact of international treaty rules on the interpretation of the survival clause.

Articles 54 and 59 respectively stipulate the conditions of termination. Article 54 states that a treaty may be terminated at any time by the consent of all the parties. This clause not only applies as a customary international law, but also underpins the joint termination of IITs. Article 59 provides that a treaty may also be terminated by a subsequent treaty of the same parties on the same matter, provided that a certain relationship is established between the latter treaty and the earlier treaty. This clause supports the possibility that the old treaty will be terminated by the new treaty. This possibility depends either on the common will of the parties to make the relevant matters under the treaty only governed by the new treaty, or whether the two treaties cannot be applied simultaneously due to incompatibility. However, these two clauses only stipulate the conditions for the termination of the treaty, and do not explicitly deal with the effect of the termination, that is, what impact it will have on the relevant rights and obligations after the termination. Therefore, the two clauses do not give clear guidance, at least in the case of joint termination of IITs.

Article 70 stipulates the effect of termination, but the relationship between this article and the survival clause is still disputed. Article 70, paragraph 1, states that the termination of a treaty cannot affect the rights, obligations or circumstances of the parties prior to the termination, unless otherwise provided. In oth-

er words, this article provides a presumption that the termination of the treaty cannot affect the prior rights, but it can be negated by mutual agreement. Therefore, one view is that the proviso indicates that contracting parties can modify the presumption rules of this article based on mutual consent, and even exclude the application of the survival clause when terminating the treaty, resulting in the immediate termination of the treaty. On the other hand, there is an opposite view that this article refers to the rights and obligations of "states" rather than that of "individuals". Therefore, this article cannot be invoked as an international law basis for the survival clause (Voon & Mitchell, 2011). That is to say, this article has no direct relationship with whether the survival clause applies to mutual termination of an IIT. The report of the International Law Commission also tried to clarify that the so-called "non-derogable rights, obligations or circumstances" here only refer to those rights, obligations or circumstances of the contracting parties to the treaty arising from the treaty implementation, not those vested interests of individual investors (ILC, 1966). As mentioned above, there are still many ambiguities and disputes in the interpretation of VCLT regarding the rights and obligations of investors after the termination of the treaty.

3.2. Elements Analysis of the Survival Clause in IITs

1) Duration of the Survival Protection

Generally speaking, an IIT will go through several periods from its entry into force to its termination, including the initial valid period, automatic renewal period, termination notification period, and survival period (duration of the survival protection). Together, these different periods contribute to the "duration of effect" of an IIT. As far as the survival period is concerned, after the termination of an IIT, the duration can be divided into the definite and the indefinite periods.

The definite period varies from 5 to 20 years. For the long-term period, the 2008 German Model BIT stipulates a 20-year duration of the survival protection, the 2004 Canadian Model BIT and the 2015 Norwegian draft Model BIT stipulate a 15-year duration. While some recent Model BITs stipulates a shorter duration, such as the Indian Model BIT in 2015 that only stipulates a duration of 5 years. Of course, this does not mean that the duration of the survival protection features the difference between the old and the new BITs. According to the OECD, the duration may be related to the preference of the contracting parties, and has no obvious connection with the year in which the Model BITs are published (Pohl, 2013).

The indefinite period means that the duration covers the entire "life" of the prior investment until the relevant investment is closed. Survival clauses under some earlier BITs provided that the duration of protection depends on the existence of the investment contract, rather than specifying a definite period. In short, no matter what kind of survival period, it will affect the effectiveness of the treaty after it is terminated for a long time. According to statistics, survival

clauses extend the investment protection period by an average of at least 12.5 years after the termination of the treaty (Gordon & Pohl, 2015). Such a lengthy period is somewhat unfriendly to international investment law reform, especially to those countries exercising unilateral termination.

2) Investment Scope under the Survival Protection

Firstly, the scope of investment under the survival protection could be divided into two categories: unlimited investment and limited investment under the BITs. Among them, the unlimited rules account for the majority of the current survival clauses, which stipulates that the treaty continues to apply to the investment made under the treaty before termination, and in many survival clauses, such investment includes not only the investment during the effective period of the BIT but also that before its effective period (Harrison, 2012). However, some other survival clauses only apply to the investment during the effective period of BITs, such as Article 15 of the 2008 British Model BIT, and Article 34, Paragraph 4 of the 2012 SADC (The Southern African Development Community) Model BIT, which stipulates that survival clause applies to "investments made during the period the Agreement was in force". This kind of regulation will lead to a practical problem, that is, the investor has invested before the BIT takes effect, but decides to expand the original investment after the BIT takes effect. In this case, the problem is whether the investor's newly expanded investment can be recognized as a new investment made during the BIT's effective period. The answer to this question is crucial because it determines whether the extended protection of the survival clause can be obtained after the termination of the BIT. Under limited investment rules, only a limited scope of investment has the opportunity to enjoy the survival protection of the treaty. For example, in the Belgian-Indonesian BIT in 1970, Article 13 stipulated that the survival clause only applies to "the contracts between a contracting party and investors of the other contracting party", which is far limited than the scope under the BIT.

In addition, the scope of investment protected by survival clauses can also be divided into investment before termination and investment before termination notification is issued. According to the OECD report, 39 out of 2061 BITs stipulate that the investment scope under the survival protection is limited to the investment before the country issues the notification of termination, that is to say, the investment during the period after the notification and before the termination takes effect is not protected by the survival clause, the stipulation of survival clause in China-Lebanon BIT in 1996 is a typical example. This increases the uncertainty risk for investors to a large extent, because it is generally difficult for investors to predict when the country will issue a termination notification. The period between the issuance of the notification and the official termination of the treaty is generally 6 - 12 months, during which investors are likely to be at the risk of being unprotected without awareness (Pohl, 2013).

3) Content of the Survival Protection

The content of the survival protection can be generally divided into two categories. One is the survival protection of treaty provisions, that is, the provisions

of the treaty continue to be effective for investors after the termination. This type can be further divided into full survival protection of the provisions and the restrictive survival protection of the provisions. The scope of the former covers all the provisions of the treaty, as in the Models BIT of the United Kingdom, India, and Norway mentioned above. The latter often excludes some specific provisions, such as the preamble or final provisions of the treaty, and some also exclude protocols or amendments. For example, some survival clauses adopt the general approach of "all other provisions" or "all provisions before this Article", such as the Model BITs of the United States and Germany mentioned above, while other survival clauses adopt enumeration method. For example, the 1995 Swiss Model BIT and the 2002 Swedish Model BIT both stipulate that the provisions of Articles 1 to 10 continue to apply. In addition, Article 16 of the China-Portugal BIT in 2005 and Article 18 of the China-Uzbekistan BIT in 2011 both excluded the continued application of the Protocol by way of enumeration. This is mainly due to the fact that these excluded parts have certain impact on the interpretation of the treaty, especially the preamble. Because the core purpose of the BIT is usually reflected in the preamble, the preamble is often used by the arbitral tribunal as an auxiliary tool for interpreting the terms of the treaty (Shan & Gallagher, 2015). In addition, there are some special examples of the restrictive survival protection rules. These rules only contain a few specific provisions which are actually the core rules of investment protection and dispute settlement mechanism under the BITs (Pohl, 2013). For example, the Energy Charter Treaty specifies that, when a country terminates the provisional application of the treaty, only the "investment promotion and protection" and "dispute settlement" have a survival duration of 20 years. However, only enumerating certain provisions will actually separate the most-favored-nation treatment clause and other closely-related clauses, so there are few similar legislative practices.

The other is the survival protection of the treaty content, which stipulates that the agreement or the agreement's "protections" or "rights" will continue to apply. For example, the survival clause in Hong Kong-Australia BIT in 1993 stipulated that "this agreement will continue to apply for 15 years". The SADC Model BIT stipulates that the "Rights of Investors and Contracting States" will continue to apply. Article 12 of the 1999 French Model BIT stipulates that investments made during the effective period of the treaty continue to enjoy the "protection of the provisions of the treaty". At the same time, China-France BIT also includes this regulation. This kind of rule may provide a broad interpretation space for the applicable scope of the treaty survival, because the "rights" of investors and contracting states, and the "protection of treaty provisions" are more abstract and inclusive than "provisions", which is different from expressly specified provisions, or directly indicating the full survival protection of the "provisions".

4) Exception of the Survival Clause

There is a saying in German law: "There are no rules without exceptions". There are also exceptions to the application of the survival clause. As stipulated

in Article 12 of the China-UK BIT, the survival protection "does not prevent the application of subsequent rules of general international law accepted by the Contracting Parties". This explicitly emphasizes the external restrictions on investment treaties by the rules of general international law, that is, if the survival effectiveness of an IIT conflicts with the rules of general international law after its termination, it will be restricted. In such cases, the rules of general international law take precedence. However, the international community does not currently have a systematic and universal understanding about the scope of general international law, though we can still get a glimpse from the international customary law embodied in the VCLT and typical general international law. Under the VCLT framework, Articles 61 and 62 respectively provide for extremely special grounds for the termination of treaties. Article 61 stipulates that a treaty may be terminated by performance impossibility of the treaty, and Article 62 provides that a treaty may be terminated by an unforeseen fundamental change of circumstances. In theory, these rules could serve as grounds for states to unilaterally terminate IITs, but in practice the conditions of the rule are difficult to satisfy. And in the current practice, no claim was supported by the arbitral tribunal based on these two types of reasons. In addition, jus cogens is also a typical type of general international law, and any violation of such rules cannot be justified by consent, acquiescence or recognition. Article 64 stipulates that new jus cogens has priority, and treaties that conflict with it shall be void and terminated. Whether survival clauses that stipulate the rights and obligations violate international jus cogens requires a specific judgment on the rules, therefore jus cogens does not necessarily disqualify all protections under the treaty from continuing to apply (Harrison, 2012).

4. Investment Arbitration on the Survival Clause

As to the effectiveness of the survival clause in different ways of termination, the attitudes in arbitration practice are not consistent. Termination of IITs can be divided into unilateral termination and mutual termination. According to data retrieval on the Investment Policy Hub, as of 2022, 390 IITs have been terminated, including unilateral termination and mutual termination in a narrow sense. Whether it is unilateral or mutual termination, states need to have a clear understanding of the meaning and effect of these termination-related provisions. The author will analyze the application of the survival clause under the two termination methods separately from the perspective of arbitration practice in the following paragraphs.

4.1. Investment Arbitration Concerning Unilateral Termination

At present, in terms of the arbitration concerning unilateral termination, the disputes are mainly over the survival protection when withdrawing or terminating the provisional application of the Energy Charter Treaty. In the *Yukos Universal v Russian Federation* case, the dispute over arbitration jurisdiction lies in

the interpretation of Article 45 of the Energy Charter Treaty concerning the exception rule of provisional application, that is, the scope of the provisional application of the treaty. The arbitral tribunal held that, according to Article 45, paragraph 1, the criterion for judging whether provisional application is compatible with the domestic constitution or laws should be understood as "All-or-Nothing", rather than analyzing with "Piecemeal Approach". Therefore, the arbitral tribunal finally held that the circumstances of this case did not meet the conditions of the proviso, so Russia met the conditions of provisional application. Therefore, even if Russia sent a notification of termination of provisional application, the treaty would continue to be in force due to its survival clause, including the dispute settlement rules in the fifth part of the treaty. Accordingly, the arbitral tribunal concluded that it had jurisdiction.

Judging from the practice, in the case of unilateral termination, as long as a prerequisite is met, that is, to confirm that the contracting party is bound by the IIT, then the application of the survival clause is beyond doubt, unless otherwise exception, and the circumstances satisfy this exception. Those countries or regions that requested unilateral termination, such as Latin America, India, Indonesia, and South Africa, will still not be able to get rid of the impact of the terminated treaty in the next 5, 10 years or even longer (Crockett, 2015; Schlemmer, 2016). Therefore, in the process of reforming the international investment treaty system, some countries' efforts to unilaterally terminate IITs in order to express their dissatisfaction with the old generation of investment treaties and their eagerness to reform of the investment system ended up in vain. Instead, they would be constantly constrained by the survival clause, and the old generation of investment treaties would cause postponement of reform.

4.2. Investment Arbitration Concerning Mutual Termination

The situation of mutual termination is more complicated than unilateral termination, and there is no consensus internationally on whether the survival clause can be terminated in this case. At present, there roughly are three opinions. The pros holds that the contracting parties have the right to mutually terminate the IIT, including the survival clause; on the contrary, the cons believes that the survival clause is not affected by the mutual termination; and the compromised views that mutual termination should be subject to certain restrictions, and under certain conditions, the survival clause may have effect.

On the one hand, in some arbitration cases, the survival clause applicable to mutual termination has been broadly interpreted by the arbitral tribunal or agreed by both parties to the dispute, which has led the arbitral tribunal to have jurisdiction. For example, in the case of *Impresa Grassetto SPA*, *in Liquidation v. Republic of Slovenia*, the arbitral tribunal held that it had jurisdiction. Although Article 14 of the Italy-Slovenia BIT only stipulated that "termination of this agreement" would activate the survival clause, the arbitral tribunal held that in the case of mutual termination the investors also have the right to initiate in-

vestment arbitration in accordance with this clause.

On the other hand, the tacit termination of the intra-EU BIT when new member states joined the EU has also triggered investment arbitration disputes over the effectiveness of the survival clause. Arbitral tribunals often hold that the mutual termination of the BIT does not affect the effectiveness of the survival clause. For example, the arbitral tribunal in the *Eastern Sugar B.V. v. The Czech Republic* held that none of the treaties of the European Union, the treaty of accession to the European Union, and the Netherlands-Czech BIT clearly indicated the validity of the BIT under the existing circumstances. Therefore, in the absence of specific rules, the effect of joining the EU on intra-EU BIT needs to be judged according to the VCLT. The arbitral tribunal put forward three reasons, refuting Czech Republic's argument that the latter treaty takes precedence over the earlier treaty under Article 59 of the VCLT, thus denying the defense that the intra-EU BITs were tacitly terminated mutually. This is also why the arbitral tribunal has always followed its long-standing arbitration theory, which is, EU law and the intra-EU BITs do not conflict with each other, and the latter cannot be implicitly terminated by joining the EU (Tropper, 2020). To say the least, the obiter dictum notes that, according to the survival clause of Article 13 (3) of the Netherlands-Czech BIT, the arbitral tribunal also rejected the claim that accession to the EU implied the termination of the intra-EU BITs and also terminated the survival clause under the BITs. That is, the arbitral tribunal held that even if joining the EU meant terminating the intra-EU BITs, the BITs would continue to have effect based on the survival clause. Another example is that, in the case of *Marco Gavazzi and Stefano Gavazzi v. Romania*, the arbitral tribunal also holds that even though the Italian-Romanian BITs have been mutually terminated according to the proposal of the European Commission, the survival clause still grant the arbitral tribunal jurisdiction (Wilske & Edworthy, 2016).

Similar logic can also be reflected in the arbitral awards when contracting parties jointly concluded a new treaty and terminated the old treaty. For example, the arbitral tribunal in the *Walter Bau v. The Kingdom of Thailand* case held that the 1961 BIT between Germany and Thailand was terminated when the new BIT signed in 2002 came into effect (October 2004). And according to Article 14, paragraph 3 of the 1961 BIT, Articles 1 to 13 would continue to be valid for 10 years after the termination. Accordingly, the ISDS mechanism under the 1961 BIT would still apply until October 2014, and investors would accordingly enjoy such remedy right. To be clear, even if the contracting parties agree that the later BIT indicates the termination of the previous BIT, the previous BIT will continue to apply due to the survival clause. Some scholars believe that these two arbitral awards can be regarded as the development of international law and a reconstruction of existing theoretical terms (Wackernagel, 2016). In addition, In the case of *Ping An v Belgium*, the arbitral tribunal rejected the Ping An's claims based on the 1986 BIT (old BIT) as the substantive basis and the 2009 BIT (new BIT) as the jurisdictional basis, but agreed that the 1986 BIT would guarantee the investors' investment interests and the right to submit to arbitration for 10

years after the termination of the treaty.

To sum up, the arbitral tribunals hold a similar view, if there is no provision for the effectiveness of the modification or termination of the survival clauses in the old treaty, the arbitral tribunals will tend to support that the survival clauses continue to have effect. From the perspective of VCLT, this inference actually conforms to the logic of presumption in Article 70. In addition, the theories in VCLT have also been used to explain the effectiveness of survival clauses, including third party rights, legitimate expectations, and vested interests (Tropper & Reinisch, 2022). In detail, first of all, the contracting parties to IITs are countries or regions, but the beneficiaries of investment protection are investors. Therefore, according to legal certainty and "*res inter alios acta*, *aliis nec nocet nec prodest*", even if the parties mutually terminate the treaty, it should not immediately affect the legitimate interests of third-party investors. Second, from the perspective of legitimate expectations, some argue that investors rely on the protections of the investment treaty when setting up their investment, and that they are therefore entitled to expect these protections against an abrupt mutual termination of the contracting parties. Finally, it is argued that investors have a vested interest in investment protection rights when they invest, and survival clauses are no exception. However, these interpretations have also caused great controversy in international investment law, and there are endless voices of criticism. For this reason, some countries and regions try to clarify the effectiveness of the survival clause in a consensual way. For example, the exchange of letters between the Czech Republic and Malta clearly stipulates that according to Article 12, paragraph 3 (survival clause) of the BIT between the two countries, the rights or legal expectations acquired before the termination of the BIT will be respected under the framework of EU law. In 2016, Indonesia and Argentina reached an agreement to mutually terminate the BIT between the two countries and at the same time terminate the survival clause under the BIT (Yeo & Menon, 2016). On January 15, 2019, the governments of the 22 EU member states made a statement that since EU law takes precedence over the BIT between member states, the investor-state arbitration clauses in the BIT, including the survival clause, which violate EU law, will no longer have any effect. In 2020, EU member states signed the "Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union" ("Termination Agreement"), and decided to terminate the intra-EU BIT and at the same time terminate the survival clauses in these BITs. The practice of terminating the survival clause at the same time as terminating the treaty reflects the consideration of the contracting parties to the possible disputes arising from the survival clause, but this approach has also caused many controversies. In particular, the Termination Agreement stipulates that "new arbitration proceedings" on and after March 6, 2018, and "pending arbitration proceedings" before the exact date, shall not rely on the intra-EU BITs terminated by the agreement, which seems to be contrary to the principle of non-retroactivity of the law.

5. China's Response to the Reform of the Survival Clause

5.1. Improvement of the Survival Clause in IITs

Based on the existing legislative texts and arbitration practice, this part puts forward the key points of improving the textual rules of the survival clauses of Chinese International Investment Treaties (Chinese IITs), hoping to benefit the reform on Chinese IITs.

1) Duration of the Survival Protection

As mentioned above, there is no obvious trend in the duration of the survival protection. As far as the three versions of China's Model BIT are concerned, the 10-year duration has been adopted, and there is no tendency to change in the proposed draft of the new model. But as for the current arbitration practice on the unilateral termination, the longer the duration is stipulated, the longer the effect of the treaty will last, and the longer it will hinder the country's reform related to international investment treaty system. In the case of mutual termination of the investment treaty, the effectiveness of the survival clause is still controversial, but there is still the possibility that the survival clause is considered to be validly applicable, which will have the same impact as the unilateral termination. Therefore, while some countries tried to break through the rules of the existing model by establishing a new model, they also unanimously expressed their intention to shorten the duration of the survival protection. As mentioned in the comments to Article 34 of the 2012 SADC Model BIT, the Drafting Committee agreed that the duration should end within a shorter time frame. There is even a point of view that summarizes the new features of the termination rules of IITs, with the lack of provisions on the initial period of validity and the survival protection after termination (Pohl, 2013).

This paper believes that at the current stage, the duration of the survival protection has little impact on China. On the one hand, from the perspective of the legislative purpose of the survival clause, the long-term nature of the investment cycle determines the long-term nature of the duration itself. On the other hand, judging from the status quo of China's international investment, China is in the dual status of a capital importing and exporting country, and it is unlikely that China will unilaterally terminate the investment treaty, resulting in rare impact on China in this respect.

2) Investment Scope under the Survival Protection

From the perspective of the scope of investment, most of the survival clauses directly use the "investment definition" as the scope of investment for survival protection. However, as mentioned above, it is necessary to clarify the time and type of investment, otherwise it will not be conducive to the predictability of arbitration interpretation. On the one hand, the survival clause should explicitly stipulate whether survival protection applies to the investment established before the IIT takes effect. On the other hand, it should also consider whether to limit the investment sector that is protected by survival clause to certain extent. There are only a few survival clauses that distinguish different survival protections ac-

cording to different investment sectors. For instance, in 1984, paragraph 3 of Article 13 of the Costa Rica-France BIT stipulates that there are two kinds of survival protection. The duration of general investment survival protection is 15 years after the termination of the treaty, while the duration of investment survival protection in the mining sector is 20 years. In this sense, this paper believes such methods with limitation can provide certain restrictions on the effectiveness of the survival clauses and provide a textual example for China's specific policy choices.

3) Content of the Survival Protection

Chinese BITs are focused on the survival protection of treaty provisions, among which the restrictive approach accounts for a relatively large proportion, accounting for 96 of the 118 Chinese BITs available in the Investment Policy Hub. To protect the treaty provisions is more definite than to simply protect the treaty itself, though the former often excludes the survival protection of the preamble, final clauses and the protocol, which are usually inseparable from the systematic interpretation and purpose interpretation of the treaty. Therefore, it can be argued that, in potential investment arbitration, the survival protection by this approach would be limited to a certain extent. However, there are also some BITs that specifically stipulate the survival protection of appendices and footnotes. For instance, Article 35 of the China-Canada BIT provides that Articles 1 to 34, and paragraph 4 of Article 35, will continue to apply after the termination of the treaty, while paragraph 4 provides that the annexes and footnotes contribute to the integrity of the treaty. The provisions of the China-Nigeria BIT signed in 2001, including the revised rules, would continue to apply after termination. Article 52 of the 2004 Canadian Model BIT and Article 38 of the 2016 Agreement between Canada and Hong Kong, China SAR Protection and Promotion of Investments have added the survival application of paragraphs 1 and 2 of the final clauses. These final clauses respectively stipulate the integrity of the treaty and the annexes and the rules for the effectiveness of the treaty. This reflects the legislators' consideration of the survival protection of the treaty as a whole, as well as the impact of the specific effective time on the scope of survival protection.

This paper believes that the restrictive approach is aimed for clarity, but it often lacks integrity, which inevitably restricts the protection of Chinese investors' overseas investment. Therefore, the approach of full survival protection of provisions with higher integrity, or the restrictive approach of specifically listing the contents such as attachments, should be considered by Chinese Investment Treaties.

4) Exception of the Survival Clause

At present, only the China-England BIT stipulates exception rules among Chinese BITs. Analyzing the exception in the legislation of the survival clause can clarify the scope and limitations of the rule, and to figure out the connection and common attributes between international investment treaty law and international law. However, there is little practical experience about exception rule

and it is not quite operable. At the same time, the concept of "rules of general international law" will more or less affect the space for discretion. This paper believes that invoking general international law to clarify the scope of application of the survival clause would add uncertainty of law, and from the perspective of pragmatism, general international law also lacks legislation practice. Therefore, there seems to be no urgency for legislating the exception for the survival clause at present.

5.2. China's Stand on the Survival Clause Disputes

Based on the arbitration practice concerning unilateral termination and mutual termination, this section looks for how China should response to the different legal effects produced by these two approaches of termination.

1) Unilateral Termination

Only a few states terminated IITs unilaterally. For instance, in 2017, India unilaterally terminated 17 IITs (UNCTAD, 2018). China so far has no such example. The application of the survival clause after unilateral termination is not controversial, as long as the specific circumstances do not fall into the exception of these clauses. Perhaps it can be said that to unilaterally terminate is a compromise between long-term interests and short-term interests for these countries. In other words, the choice of unilateral termination means that the states grant foreign investors ten or twenty years of survival protection in exchange for the longer-term IIT reform benefits.

2) Mutual Termination

The mutual termination may seem to bypass the defect of the survival protection. However, whether the survival clause would automatically terminate as a result of mutual termination is still controversial. China's current practice of BIT is to replace the old treaty with a new treaty, which does not involve the effectiveness of survival clause. In contrast, the Czech Republic has terminated the BIT in recent years by adopting a two-step approach. The first step is to mutually terminate the BIT. The two contracting parties reach a consensus through an exchange of letters on the termination of the BIT. In the second step, the contracting parties mutually agree that the survival clause is no longer applicable (Miron, 2014). In addition, as mentioned above, EU clearly states that the termination of the intra-EU BITs will terminate the survival clauses at the same time. Although such an approach still needs to be verified in practice, it provides a constructive method for countries to mutually terminate IITs. In practice, the arbitral tribunal may choose the object and purpose of the BIT and the language of the survival clause as guiding principles in the absence of explicit provisions on the application of the survival clause (Harrison, 2012). This means that when terminating a treaty, a contracting party must clearly indicate the termination of the survival clauses as well as the rights and obligations arising from the treaty.

The clear indication can be divided into two types.

The first is to expressly state the termination of the survival clause when terminate the treaty, such as "terminate the rights and obligations of contracting

parties and any rights and obligations of investors arising from the treaty, including resorting to domestic or international dispute settlement for violations of the treaty after termination" and "provisions shall not survive or apply after termination" in Article 21.4 of South Korea-Chile FTA, which terminates the BIT between the two countries in 1996 and at the same time terminates the rights and obligations derived from the BIT. These clauses expressly state that the termination of the rights and obligations under the BIT means the intention of both parties to terminate the application of the survival clause. The above-mentioned Termination Agreement of EU is also an example, but it should be noted that these clauses should not violate the principle of non-retroactive law.

The second is to clear indicate that the survival clauses are revised when the treaty is terminated. Such as expressly terminating the treaty but retaining a specific survival protection for the specific investment for a shorter period, which constitutes an amendment to the final clause of the terminated treaty and effectively terminates the treaty. For example, Annex 10-E of the investment chapter of the Australia-Chile FTA clearly stipulates that the 1996 Australia-Chile BIT and its protocol will be terminated on the effective date of the FTA, while paragraphs 2 and 3 of this article provide for the proviso of termination, prohibiting the conduct-related prior investment that occurred before the FTA from immediate termination, and giving such investment a three-year time limit to bring claims after the FTA comes in effect. This paper believes that although the clause does not specify the application of the survival clause, the proviso can be regarded as a new quasi-survival clause agreed by the contracting parties, which provides investors with certain original investment protection after the termination. Such protection is consistent with the legislative purpose of the survival clause, but it adds certain restrictions on the duration and scope of protection, shortening the period of survival protection to 3 years, and the scope of survival protection is also limited only to those affected by the behaviors, facts or situations. The legislator's intention to establish a new survival rule can also be glimpsed from paragraph 4 of this article, which indicates that both parties agree that this article "constitutes an amendment to Article 12 (Final Clause) of the previous BIT and effectively terminates this BIT". In this sense, the rule aims to restrict the simultaneous application of the old and new treaties, and effectively modify the application of the survival clauses in the old treaties. Similar state practices include Article 10, Paragraph 20 of the Peru-Singapore FTA, but this article does not clearly express the revision of the final clause that includes the survival clause in the previous treaty.

6. Conclusion

At present, international community has come to realize the necessity of reforming the international investment law system, and constant efforts are made to improve the drafts of BIT negotiations. Just like any other legal issues, there is a tension between legal stability and flexibility in survival clauses. Judging from

the current legislation and state practice of survival clauses, most of them still prefer legal stability to legal flexibility. At the same time, with the signing of the EU Termination Agreement, the current state practice of mutual termination of treaties has greatly influenced the situation in EU, while for other countries or regions, there still exist certain difficulties in mutual termination. Whether it is mutual termination of treaty obligations or to jointly reach a new treaty to replace the old treaty, the political and economic costs for the parties are relatively high. This paper believes that certainty is a bridge that eases the tension between stability and flexibility. Therefore, strengthening and clarifying the provisions that stipulate the relationship between the terminated treaty and subsequent treaty, is of great significance to international investment law reform. Under the reform of the international investment law system, the expiry of the investment treaty provides a good opportunity for the reform of the system, and the country can take some effective actions to deal with the challenges of current international investment law system.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

Crockett, A. (2015). Indonesia's Bilateral Investment Treaties: Between Generations. *ICSID Review-Foreign Investment Law Journal, 30,* 437-448. https://doi.org/10.1093/icsidreview/siv003

Gordon, K., & Pohl, J. (2015). *Investment Treaties over Time—Treaty Practice and Interpretation in a Changing World*. OECD Working Papers on International Investment, 2015/02, OECD Publishing. https://doi.org/10.2139/ssrn.2555606

Harrison, J. (2012). The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties. *The Journal of World Investment & Trade, 13,* 928-950. https://doi.org/10.1163/22119000-01306002

ILC (1966). *Yearbook of the International Law Commission 1966* (Vol. II Pt. 1). International Law Commission.

Lavopa, F. M., Barreiros, L. E., & Bruno, M. V. (2013). 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, 16,* 869-891. https://doi.org/10.1093/jiel/jgt025

Miron, S. (2014). The Last Bite of the BITs—Supremacy of EU Law versus Investment Treaty Arbitration. *European Law Journal, 20,* 332-345. https://doi.org/10.1111/eulj.12039

Pohl, J. (2013). *Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions*. OECD Working Papers on International Investment, 2013/04, OECD Publishing. https://doi.org/10.2139/ssrn.2366465

Schlemmer, E. C. (2016). An Overview of South Africa's Bilateral Investment Treaties and Investment Policy. *ICSID Review-Foreign Investment Law Journal, 31,* 167-193. https://doi.org/10.1093/icsidreview/siv040

Shan, W., & Gallagher, N. (2015). *Research on Sino-Foreign Investment Treaties*. Beijing

Law Press.

Tropper, J. (2020). *The Treaty to End All Investment Treaties: The Termination Agreement of Intra-EU BITs and Its Effect on Sunset Clauses*. Völkerrechtsblog.

Tropper, J., & Reinisch, A. (2022). The 2020 Termination Agreement of Intra-EU BITs and Its Effect on Investment Arbitration in the EU—A Public International Law Analysis of the Termination Agreement. *The Austrian Yearbook on International Arbitration, 16,* 301-340. https://doi.org/10.5771/9783214164997-301

UNCTAD (2017). *World Investment Report 2017: Investment and the Digital Economy.* United Nations.

UNCTAD (2018). *IIA Issues Note: Recent Development in the International Investment Regime.* United Nations.

Voon, T., & Mitchell, A. (2011). Time to Quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia. *Journal of International Economic Law, 14,* 515-552. https://doi.org/10.1093/jiel/jgr030

Voon, T., Mitchell, A., & Munro, J. (2014). Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights. *ICSID Review, 29,* 451-473. https://doi.org/10.1093/icsidreview/sit051

Wackernagel, C. (2016). *The Twilight of the BITs? EU Judicial Proceedings, the Consensual Termination of Intra-EU BITs and Why That Matters for International Law*. Institute of Economic Law, Transnational Economic Law Research Center (TELC), School of Law, Martin Luther University Halle-Wittenberg.

Wilske, S., & Edworthy, C. (2016). The Future of Intra-European Union BITs: A Recent Development in International Investment Treaty Arbitration against Romania and Its Potential Collateral Damage. *Journal of International Arbitration, 33,* 331-351. https://doi.org/10.54648/JOIA2016020

Yeo, A., & Menon, S. (2016). Indonesia-Arbitrating with Foreign Parties: A Closer Look at Indonesia's Approach to Investor-State Dispute Settlement. *Asian Dispute Review*, *18,* 124-131.