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ORIGINAL ARTICLE

The Past, Present, and Future of Domestic Investment Laws and International Economic Law

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Abstract

This article considers the past, present, and future of domestic investment laws. Its focus is on the 'facilitative' investment law, which aims to encourage foreign investment by granting substantive protections to foreign investors and consent to international arbitration over disputes with foreign investors. The article first contends that states had independent reasons to enact such facilitative investment laws alongside investment treaties, even though investment treaties perform very similar functions. Secondly, the article argues that investment laws can be characterized either as unilaterally assumed international obligations of states or simply as domestic laws of states, with differing consequences under each characterization. Thirdly, the article proposes four possible futures for facilitative investment laws: contamination, continuation, compromise, and contestation.

Keywords: foreign investment laws; unilateral acts; state responsibility; consent to arbitration

1. Introduction

A key element of the liberal international order (LIO) developed since 1945 has been the investment treaty, setting out substantive protections for foreign investment in international law, and offering state consent to international arbitration to allow investors to enforce those protections against states. Most scholars have focused their attention on international law as the primary domain of inter-state economic relations given that investor–state claims under these treaties began mounting in the late 1990s.

However, as explained in the introduction to this special issue, international economic law has recently experienced a shift towards 'domestication'.[1] One of the major instruments in this process is arguably the domestic investment statute, often also referred to as a state's foreign investment law (FIL). As also explained in the introduction to the special issue, FILs can be classified into two types – regulatory and facilitative FILs.[2] Regulatory FILs generally aim to restrict or control foreign investment in a state. Such FILs might contain provisions on the legal forms permitted for foreign investors (for example, requiring that foreign investment be conducted only via a joint venture with a locally established company, or requiring local incorporation). They might also impose maximum shareholding limits on foreign ownership of local companies (sometimes restricted to certain sectors). Regulatory FILs might also place outright prohibitions on the

[1]J. Chaisse and G. Dimitropoulos, Domestic Investment Laws and International Economic Law in the Liberal International Order, this special issue.

[2]Ibid. The two types outlined in the introduction are named 'investment screening laws' and 'investment promotion and facilitation laws' respectively. These two types essentially map onto the two types identified by M. Burgstaller and M. Waibel (2011), 'Investment Codes', *Max Planck Encyclopaedia of Public International Law*[6], which Burgstaller and Waibel call 'regulatory FILs' and 'facilitative FILs' respectively. For convenience, this article adopts the latter terminology.

participation of foreign investment in certain sensitive sectors of the local economy, or might subject such investments to screening prior to admission.[3]

On the other hand, facilitative FILs aim to encourage foreign investment by liberalizing market access, offering incentives such as tax concessions, and offering guarantees of protection for foreign investment once admitted. However, a FIL might display both regulatory and facilitative elements, for instance by allowing the entry of foreign investment into a previously constrained sector but imposing a maximum shareholding limit, or by controlling the corporate form of foreign investment but offering protection to such investment.

This contribution studies the past, present, and future of FILs, in light of current challenges to the LIO. Leaving aside situations where general laws are used to regulate and encourage foreign investment (as is more common in developed states), the article focuses on specialized investment laws.[4] The article does not distinguish between investment laws that apply the same treatment to domestic and foreign investors and investment laws that apply different treatment to foreign investors.[5] Instead, its focus is on any investment law that has foreign investors as its addressees, whether or not the law also applies to domestic investors. More particularly, the article's focus is on facilitative FILs, comparing this type of FIL with its international law 'cousin', the investment treaty. Section 2 examines the complementary origins of these FILs and the likely reasons why states began enacting facilitative FILs in parallel to investment treaties containing very similar provisions, arguing that states concluded FILs and investment treaties with partly independent considerations in mind and, hence, concurrently. Section 3 considers one prominent use of facilitative FILs in the present era – namely, investor–state arbitrations initiated based on arbitration clauses in FILs and alleging breach of investment protections in FILs. Complicating the claim of domestication of international economic law, Section 3 also argues that there are two possible ways in which FILs might be characterized from the perspective of international law: either as unilateral acts of states that produce binding international obligations or as domestic law instruments, the alleged breach of which can be adjudicated by an international tribunal. Section 3 traces the consequences of each characterization. Section 4, finally, considers the future use of FILs as potential alternatives to investment treaties. As the introductory article explains, a shift to domestic law does not necessarily mean a 'new era of economic isolation for States'.[6] Indeed, to the extent that facilitative FILs might replace treaties as the primary instrument of investment protection, this can certainly be seen as 'an effort to achieve similar ends … using different means',[7] as discussed in Section 4 below. However, Section 4 also suggests that other futures for FILs are possible too.

2. Past

Burgstaller and Waibel date the earliest FILs – in the sense of standalone codes containing all the rules relevant to inward foreign investment – to the post-World War II period,[8] citing the examples of a 1944 Mexican Emergency Decree and a 1950 Israeli statute.[9] By contrast, the earliest FIL included in a recent UNCTAD study dates from the 1960s.[10] Nevertheless, there seems to be some agreement in legal commentary that these initial FILs, enacted in the decades after World War II, generally tended to be regulatory in nature, in a climate of relative suspicion of foreign investment and discrimination against foreign investors.[11]

[3]See Chaisse and Dimitropoulos, supra n. 1, for further discussion of investment screening.

[4]See ibid., 13–14 on the distinction between general investment laws and specialized investment laws.

[5]Ibid., 14.

[6]Ibid., 11.

[7]Ibid.

[8]Burgstaller and Waibel, supra n. 2 [9].

[9]Ibid. [11].

[10]UNCTAD notes that its study examines 'laws that cover (or aim to cover) the basic legal framework for investment and [that] include key investment provisions', excluding laws that only cover 'specific elements of this framework, such as incentives, access to land or national security': UNCTAD (2016) *Investment Policy Monitor: Investment Laws.* UNCTAD, 2.

[11]Burgstaller and Waibel, supra n. 2 [12].

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However, from the 1980s onwards, and particularly in the 1990s, national sentiment towards foreign investment shifted, and FILs began adopting more facilitative provisions.[12] Importantly for the present article, around this time, FILs began including the same kinds of substantive and procedural protections for foreign investment that were beginning to be included in the new Bilateral Investment Treaties (BITs) concluded at around the same time.[13] These protections comprise guarantees on matters such as expropriation, discrimination, and fair and equitable treatment, and also include offers of consent to international arbitration at ICSID or under other arbitral rules such as the UNCITRAL rules.

The evidence suggests that states began enacting these investor protections in FILs primarily because, as with investment treaties, states viewed the protections as useful for attracting investment.[14] Nevertheless, as between treaties and FILs, one might expect host states to favour the former instrument, since, alongside potential inward investment, treaties bring the added benefit of reciprocal protections for the state's outward investors. Indeed, it might be thought that offering protections unilaterally would limit host states' bargaining power to obtain treaties, if that added benefit was desired.[15]

However, apart from the basic goal of attracting investment, host states may have enacted FILs for several reasons regardless of their reasons for pursuing treaties.[16] First,[17] unilateral FILs are easier to enact than treaties, which require expending effort on negotiations with a partner state. Second, the process of enacting FILs in a national legislature may be more transparent and accountable than the process of treaty making, which is typically conducted by the executive, potentially without parliamentary oversight.[18] Third, the investment protections in FILs can be more easily tailored, allowing states to set protections at a (frequently lower) level that is sufficient, in their view, to attract investment. Fourth, some states may not need or want the reciprocity of a treaty if they do not have many outward investors or if they actively seek to discourage capital outflow; instead they end up placing a higher value on attracting inward investment. Fifth, as with investment treaties,[19] in the 1980s and 1990s states may not have understood the risks of offering investment protections in FILs, meaning that they saw no reason to refrain from adopting these instruments alongside treaties.

[12]Ibid. [19].

[13]Both the UNCTAD FIL database and Berge and St John identify the 1987 Somalian FIL as the earliest statute offering consent to international arbitration; see UNCTAD, supra n. 10; T. Berge and T. St John (2021) 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws', *Review of International Political Economy* 28, 584, 592.

[14]Many commentators analyse FILs, like investment treaties, as purported tools for attracting foreign investment. See, e.g., R. Buxbaum and S. Riesenfeld (1985) 'Investment Codes', *Encyclopedia of Public International Law*. Rudolf Bernhardt edn; A Parra (1992) 'Principles Governing Foreign Investment, as Reflected in National Investment Codes', *ICSID Review* 7, 428; M. Hirsch (1993) *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes*. Martinus Nijhoff, 51; International Finance Corporation/World Bank (2010) *Investment Law Reform: A Handbook for Development Practitioners*. World Bank, ix; UNCTAD, supra n. 10, 4; C. McLachlan, L. Shore, and M. Weiniger (2017), *International Investment Arbitration: Substantive Principles*, 2nd edn. Oxford University Press, 44.

[15]See, e.g., *CEMEX Caracas Investments BV v Venezuela* (ICSID Case No. ARB/08/15), Decision on Jurisdiction, 30 December 2010 [126] ('For a State to commit itself through treaties creating reciprocal obligations is one thing; to commit itself unilaterally without counterpart is another'). See also *Brandes Investment Partners LP v Venezuela* (ICSID Case No. ARB/08/3), Award, 2 August 2011 [105].

[16]Vladimir Degan, *Sources of International Law*. Kluwer 1997, 288 ('International relations are so rich in various situations that it is quite conceivable that a State can find it suitable to its own interests to assume precise and definite legal obligations unilaterally, instead of entering into negotiations with other States in order to conclude a treaty.').

[17]See J. Hepburn (2018), 'Domestic Investment Statutes in International Law', *American Journal of International Law* 112, 658, 661–664 for more detail on these reasons.

[18]Cf Berge and St John, supra n. 13, 605, who find evidence that Kyrgyzstan's FIL was adopted after very limited deliberation in the national parliament.

[19]See, e.g., L. Poulsen (2015) *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*. Cambridge University Press, xv–xvi; J. Bonnitcha, L. Poulsen, and M. Waibel (2017) *The Political Economy of the Investment Treaty Regime*. Oxford University Press, 223–226.

Sixth, historical evidence suggests that FILs were not perceived to be in competition or tension with investment treaties.[20] Instead, FILs were commonly adopted as part of a broader package of domestic investment regime reforms, often on the advice of the United Nations, the World Bank, or the United States.[21] As the introductory article suggests, the World Bank in particular played a key role in encouraging developing countries to enshrine investment protections, notably including consent to international arbitration, in FILs. Indeed, Berge and St John contend that the presence of a team from the World Bank's Foreign Investment Advisory Service in a state is central to explaining why that state subsequently enacted a FIL containing consent to arbitration.[22] In some cases, FILs paved the way for investment treaties to be signed by preparing the state to make liberal commitments on matters such as expropriation, full compensation, free transfers of capital, and non-discrimination.[23] Once these commitments were included in domestic instruments, some states then used treaties to 'lock-in' the domestic commitments (given a perceived greater difficulty in amending or terminating treaties) and to prevent later governments from regressing to less liberal policies.[24] Table 1

Thus, states had separate (but partly overlapping) reasons to enact FILs whether or not they pursued investment treaties. This conclusion also matches state practice. If enacting a FIL removed potential partner states' incentives to seek an investment treaty, one would expect states enacting FILs to have difficulty concluding any subsequent treaties. However, this does not appear to be the case. Tunisia, for instance, concluded several investment treaties following the adoption of its 1969 FIL; similarly, Kazakhstan and Kyrgyzstan concluded treaties with various states after enacting their FILs in 1994 and 1997 respectively.[25] Even states that have been subjected to monetary awards following breach of investor-friendly FILs have nevertheless been willing to conclude subsequent treaties containing essentially the same protections.[26] Recent research on the origins of investment treaties suggests why this might be so. Poulsen and Aisbett have demonstrated that investment treaties were sometimes concluded not for any purpose relating to investment, but instead as a marker of diplomatic friendship between states and as a personal fillip to the reputation and salary of the diplomats involved.[27] Enacting a FIL in the national parliament does not offer officials the same attractive travel perks as a treaty negotiation. Moreover, another early

[20]Commentators in the 1990s viewed investment treaties and investment laws as complementary tools to attract foreign investment. See, e.g., B. Marchais (1989) 'The New Investment Law of the Arab Republic of Egypt', *ICSID Review* 4, 297, 308; N. Kofele-Kale (1990) 'Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary', *North Carolina Journal of International Law and Commercial Regulation* 15, 361, 363; B. Marchais (1990) 'The 1989 Investment Code of Madagascar', ICSID Review 5, 73, 79; C.M. Peter (1991) 'Promotion and Protection of Foreign Investments in Tanzania: A New Investment Code', *ICSID Review* 6, 42, 44–45.

[21]The World Bank's Foreign Investment Advisory Service, the Multilateral Investment Guarantee Agency, the UN CTC, and private lawyers funded by USAID were instrumental in drafting and advising on many developing and post-Communist countries' FILs, particularly during the 1990s; see Poulsen, supra n. 20, 12, 76–81, 84, 101, 180. See also T.G. Berge and O.K. Fauchald, The International Sources of National Legislation: International Organizations and Domestic Investment Laws, this special issue.

[22]Berge and St John, supra n. 13.

[23]Bonnitcha, Poulsen, and Waibel, supra n. 19, 211; *OPIC Karimun Corp v Venezuela* (ICSID Case No. ARB/10/14), Award, 28 May 2013 [114].

[24]K. Vandevelde (1993) 'US Bilateral Investment Treaties: The Second Wave', *Michigan Journal of International Law* 14, 621, 634; Poulsen, supra n. 19, 86.

[25]See UNCTAD, *Investment Laws Navigator*, investmentpolicyhub.unctad.org/investment-laws (accessed 1 November 2021); UNCTAD, *International Investment Agreements Navigator*, investmentpolicy.unctad.org/international-investment-agreements (accessed 1 November 2021).

[26]The Democratic Republic of the Congo's 2002 FIL contains provisions on expropriation and fair and equitable treatment, which were held to have been breached in the 2014 award in *Lahoud v Democratic Republic of the Congo* (ICSID Case No. ARB/10/4), Award, 7 February 2014. Nevertheless, the DRC signed eight BITs after enacting its FIL (although none is yet in force). Guinea has also signed many investment treaties since enacting its 1985 FIL, which was found breached in 2016 in *Getma International v Guinea* (ICSID Case No. ARB/11/29), Award, 16 August 2016.

[27]L. Poulsen and E. Aisbett (2016) 'Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime', *Journal of International Dispute Settlement* 7, 72; see also Bonnitcha, Poulsen, and Waibel, supra n. 19, 220–223.

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Table 1. Potential Reasons Why States Enacted FILs Despite Parallel Investment Treaties

1. Easier to conclude
2. More transparent
3. Ability to tailor protections
4. Reciprocity not useful
5. Risks not understood
6. Encouragement from international organizations

driver of investment treaties in developed states was a desire to solidify a view of customary international law that was favourable to outward investors from those states. Thus, US and European negotiators pursued investment treaties as a response to the New International Economic Order, aiming to shape custom in a direction supportive of developed-country interests.[28] Home states may also have sought treaties despite a pre-existing unilateral offer of protection in a FIL because the FIL protections were weaker, as mentioned above, or because a treaty offered the possibility to lock in protections via a sunset clause, if the FIL did not have one already.

Both developing and developed states therefore likely had other reasons to continue to seek investment treaties alongside FIL protections. As a result, FILs grew in number to the point where more than 100 states today maintain these instruments.[29]

3. Present

In the present era, FILs have been most prominent as instruments underpinning investor–state claims in international arbitration. A steady stream of such claims relying on arbitration consent clauses in FILs has persisted in recent years alongside the more conspicuous claims under investment treaties. There have already been more than 70 claims relying on a FIL at the ICSID and in other arbitral forums.[30] Cases brought under FILs represent 8% of all cases filed at ICSID until 30 June 2021, reaching up to 17% of the cases filed in the 2010 and 2013 calendar years.[31]

Despite this, FILs have received relatively little attention. While there have been extensive policy debates over investment treaty literature and reform projects on fundamental questions at the heart of the treaty regime, similar discussions are almost entirely absent in scholarly discussion of FILs.[32] Tribunals have also avoided any extensive theorizing about the nature of FILs and the relevance of international law in a dispute based on a FIL, perhaps finding it easier to analogize to more familiar modes of dispute resolution under treaties. In some cases, tribunals have even directly referred to FIL claims as 'treaty claims' – despite FILs existing distinctly from treaties.[33]

This raises a host of questions for observers seeking to understand the place of FILs today, distinct from investment treaties, in international law. One such question – whether international or

[28]Bonnitcha, Poulsen, and Waibel, supra n. 19, 198–200.

[29]UNCTAD, supra n. 10.

[30]Indeed, the very first case at ICSID confirming the validity of consent to arbitration in two separate instruments (such as a treaty or statute, on the part of the state, and a request for arbitration, on the part of the claimant), rather than a single instrument such as a contract, was a case under a FIL: *Southern Pacific Properties (Middle East) Ltd v Egypt* (ICSID Case No. ARB/84/3), Decision on Jurisdiction, 14 April 1988 [70] [101].

[31]ICSID (2021) 'ICSID, *Caseload – Statistics*', icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx (accessed 1 November 2021).

[32]UNCTAD, supra n. 10, 11. For a notable recent exception, see J. Bonnitcha (2017) *Investment Laws of ASEAN Countries: A Comparative Review*. IISD, 4.

[33]*Getma International v Guinea* (ICSID Case No. ARB/11/29), Decision on Jurisdiction, 29 December 2012 [106]; *AES Corporation v Kazakhstan* (ICSID Case No. ARB/10/16), Award, 1 November 2013 [219]. See also *Caratube International Oil Company LLP v Kazakhstan* (ICSID Case No. ARB/13/13), Award, 27 September 2017 [419] and *Interocean Oil Development Company v Nigeria* (ICSID Case No. ARB/13/20), Decision on Preliminary Objections, 29 October 2014 [124], describing FIL claims as 'international law' claims.

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domestic rules of interpretation should be used to understand an arbitral consent clause in a FIL – has received some attention.[34] This section considers several other important questions, drawing on recent work.[35] Section 3.1 considers whether FILs can be characterized as unilateral acts in international law, and examines some consequences of this view. Section 3.2 then considers the alternative characterization of FILs as merely regular instruments of domestic law and demonstrates the doctrinal implications that flow from this conceptual framing. Notably, both characterizations complicate an argument that FILs represent the 'domestication' of international economic law. To the extent that these instruments represent (unilateral) commitments under international law even if their form is determined by domestic law, FILs are indeed adopted towards the same end as investment treaties albeit by way of different means,[36] perpetuating the dominance of international law in the field of international investment law.

3.1 FILs as Unilateral Acts

One possible way of understanding FILs from the perspective of international law is to treat them as unilateral acts of states, creating binding international obligations in the manner recognized by the International Court of Justice (ICJ) in the *Nuclear Tests* case.[37] This section considers whether a FIL can be characterized as a unilateral act, and the consequences that would flow from this characterization for the application of the international law of state responsibility and the revocation of FILs.

3.1.1 Characterizing FILs

Domestic laws purporting to have effects on the international plane have often been analysed as unilateral acts in international law.[38] The *Norwegian Fisheries* case at the ICJ, for instance, centred on Norway's unilateral claim of rights to maritime areas, vis-à-vis other states, made by way of domestic law. Domestic laws on nationality have also been construed as unilateral acts.[39] While the clearest example of a unilateral act in international law is undoubtedly an oral statement or declaration made by a state official, it is nevertheless 'unquestionable that the word "act" is broad enough to embrace legislative acts'.[40] As Caron has observed, '[a] legislative act of any state, like all other acts of a state, can have a meaning within several legal systems simultaneously'.[41] As state organs, national legislatures can undoubtedly breach international obligations (for instance, by passing laws expropriating the property of aliens) and thereby incur secondary international obligations (of reparation) for their state. Legislative action might also, therefore, incur new *primary* obligations as well, by constituting unilateral acts.

In numerous cases to date, investment tribunals have treated arbitration clauses of FILs as a unilateral act of a domestic legislature that binds the state internationally.[42] None of these

[34]D. Caron (2010) 'The Interpretation of National Foreign Investment Laws as Unilateral Acts under International Law', in M. Arsanjani, J. Cogan, R. Sloane et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman*. Brill, 649; M. Potestà (2011) 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws', *Arbitration International* 27, 149; Y. Andreeva (2011) 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case against Conventions', *Arbitration International* 27, 129; M.M. Mbengue (2012) 'National Legislation and Unilateral Acts of States', in T. Gazzini and E. de Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations*. Brill, 183.

[35]Hepburn, supra n. 17.

[36]Chaisse and Dimitropoulos, supra n. 1, 11.

[37]*Nuclear Tests (Australia v France), Judgment* (1974) ICJ Rep 253.

[38]P. Saganek (2015) *Unilateral Acts of States in Public International Law*. Brill, 70–73; Caron, supra n. 34, 649.

[39]Saganek, supra n. 38, 255.

[40]Ibid. See also First Report of the Special Rapporteur, UN Doc A/CN.4/486, [113] ('[I]t is not inadmissible for a State, through its internal legislation, to grant certain rights to another State or States.').

[41]Caron, supra n. 34, 653.

[42]*Lighthouse Corporation Pty Ltd v East Timor* (ICSID Case No. ARB/15/2), Award, 22 December 2017 [151]; *CEMEX Caracas Investments BV v Venezuela* (ICSID Case No. ARB/08/15), Decision on Jurisdiction, 30 December 2010

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tribunals was troubled that the unilateral act was contained in domestic legislation rather than executive action. However, it is perhaps arguable that the consent clause represents a unilateral act while the remainder of the FIL, including the substantive investor protections, is characterized purely as domestic law.[43] Neither tribunals nor commentators have explicitly drawn conclusions on this question.

Given this, an examination of the basic principles of unilateral acts is useful. These principles have been synthesized in the International Law Commission's Guiding Principles applicable to unilateral declaration of States (Guiding Principles).[44] The Guiding Principles do not identify FILs in particular as a category of domestic laws that might qualify as unilateral acts.[45] However, they seem to indicate that FILs (including arbitration clauses and substantive protections) may qualify as unilateral acts. The Guiding Principles require unilateral declarations be 'publicly made' in 'clear and specific terms' by 'an authority vested with the power to do so', and must 'manifest … the will to be bound'. The 'content', 'factual circumstances in which they (the unilateral declarations) were made', and 'reactions to which they (the unilateral declaration) gave rise' will also affect a determination of whether a unilateral declaration is legally binding.[46]

FILs are good candidates to qualify as unilateral acts in most of these respects.[47] As (typically) acts of national parliaments, FILs are clear declarations of states, made by an authority vested with the power to bind states internationally. The content of FILs has an international element, being directed (sometimes exclusively) towards foreigners. As discussed above, even if executive conduct more typically constitutes unilateral acts, there is no good reason to exclude legislative conduct. Domestic legislation has been used to bind states internationally (including arbitration consent clauses in FILs, which are routinely accepted as unilateral declarations with international effect). FILs are also publicly made, even more so than other domestic statutes since they are frequently posted on websites and online databases[48] – often with unofficial translations into English. The 'clear and specific' terms of FILs add to evidence that FILs demonstrate the state's will to be bound.[49] Similarly, framing a declaration in the language of obligations, using mandatory language, specifying a date of entry into force, and allowing for judicial settlement of disputes in relation to the declaration indicate an intention to be bound.[50]

Thus, the application of basic principles on unilateral acts suggests that both the substantive provisions of FILs and the arbitration clause can be characterized as unilaterally binding sets of obligations in international law.

3.1.2 State Responsibility under FILs

If FILs are characterized as unilaterally assumed obligations of states under international law, the next question is how or whether the international law of state responsibility might apply to claims

[77]–[79]; *Mobil Corporation v Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, 10 June 2010 [83]–[85]; *SPP v Egypt*, supra n. 30, [61]; *PNG Sustainable Development Program Ltd v Papua New Guinea* (ICSID Case No. ARB/13/33), Award, 5 May 2015 [258]–[265].

[43]Some parts of an instrument might represent a unilateral act while other parts do not: C. Eckart (2012) *Promises of States under International Law*. Hart, 223.

[44]International Law Commission (2006) *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, legal.un.org/ilc/texts/instruments/english/draft_articles/9_9_2006.pdf (accessed 1 November 2021).

[45]Caron, supra n. 34, 669; Mbengue, supra n. 34, 194.

[46]ILC, supra n. 44, Guiding Principles 1, 3, 4, and 7.

[47]See Hepburn, supra n. 17, for more detail.

[48]As envisaged by Reisman and Arsanjani generally in relation to inducements for foreign investment: M. Reisman and M. Arsanjani (2004) 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes', ICSID Review 19, 328, 329. See UNCTAD, *Investment Laws Navigator*, supra n. 25; ICSID, *Investment Laws of the World*, icsid.worldbank.org/resources/publications/Investment-Laws-of-the-World (accessed 1 November 2021).

[49]Eckart, supra n. 43, 213.

[50]Ibid., 218–219.

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of breach of these obligations. Viewing FIL obligations as unilaterally adopted international obligations of the host state would mean that the primary rules allegedly breached in FIL claims are rules of international law. As a result, it might then follow that the secondary rules of the international law of state responsibility will be applicable. Those rules are applicable to any kind of international obligation (including unilateral acts), regardless of its source.[51]

Even though the law of state responsibility was developed in the context of inter-state claims,[52] most of that law can be readily applied in FIL claims. The 'largely commonsensical' rules on attribution of conduct to states, for instance, are likely to apply ordinarily in a FIL claim, 'unaffected by the identity of the beneficiary of the obligation'.[53] The rules on remedies would also be expected to apply to FIL claims without conceptual difficulty.[54] The remedies rules in the law of (inter-)state responsibility have been applied without controversy in investment treaty claims, despite Article 33(2)'s caveat that they are without prejudice to the responsibility of states to 'any person or entity other than a State'.[55] These rules may simply 'reflect general principles and customary rules on the responsibility of states',[56] and likely apply in any situation where the responsibility of a state is established, regardless of the claimant's identity.

At the same time, most of the international law defences ('circumstances precluding wrongfulness') are also likely to be available to respondent states in FIL claims, when FILs are viewed as unilateral acts. Certainly, reliance on the defence of countermeasures by a respondent requires a prior unlawful act by the claimant, and investors are 'structurally incapable'[57] of committing the necessary prior breach of international law in response to which the respondent state can adopt valid countermeasures. This would rule out the application or relevance of countermeasures[58] in FIL claims, perhaps even more clearly than in BIT claims.[59] By contrast, the defence of necessity – like the other circumstances precluding wrongfulness, distress, and *force majeure* – does not require a prior breach of international law, and thus could more easily apply to obligations owed directly to investors.[60] BIT tribunals applying the necessity defence have not been troubled by the requirement that the respondent's conduct must not seriously impair an essential interest of the home state; they have simply substituted the investor for the home state.[61] FIL tribunals would likely take the same approach.

Thus, it can be expected that the law of state responsibility will apply largely as usual in FIL claims under the unilateral act characterization, with perhaps even greater justification than in BIT claims. Arguments over the role of the home state (for instance, on waiver of claims) would disappear. The defence of countermeasures (and of self-defence) is more clearly excluded in FIL claims, short-circuiting the debates that have arisen on this question in the BIT context, while other defences will remain applicable.

[51]International Law Commission (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 71, legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 1 November 2021): the circumstances precluding wrongfulness apply to any obligation 'arising under a rule of general international law, a treaty, a unilateral act or from any other source'.

[52]M. Paparinskis (2013) 'Investment Treaty Arbitration and the (New) Law of State Responsibility', *European Journal of International Law* 24, 617.

[53]Ibid., 627.

[54]The customary rules could of course be displaced by specific remedies rules in a FIL, but, like investment treaties, FILs typically do not contain such rules.

[55]Articles on State Responsibility, Art 33(2). See also I. Alvik (2011) *Contracting with Sovereignty: State Contracts and International Arbitration.* Hart, 222–223.

[56]Paparinskis, supra n. 52, 637.

[57]M. Paparinskis (2008) 'Investment Arbitration and the Law of Countermeasures', *British Yearbook of International Law* 79, 264, 336.

[58]And self-defence: ibid. 342.

[59]In relation to BIT claims, the role of the home state has complicated debates over the countermeasures defence: see Hepburn, supra n. 17, 680–682. In FIL claims, by contrast, the home state plays no role, making it even easier to argue that the countermeasures defence is not applicable.

[60]Paparinskis, supra n. 57, 342–343.

[61]Paparinskis, supra n. 52, 635.

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3.1.3 Terminating FILs

Investment treaties usually permit unilateral termination subject to a 'sunset' clause safeguarding continued operation of the treaty for ten or more years after termination. These sunset clauses make unilateral termination more difficult (although many states have pursued termination nonetheless).[62] By contrast, at first glance, FILs seem much more easily terminable via unilateral state action, simply by repealing the law. The perceived ease of FIL termination might encourage states to use these instruments for investment protection instead of treaties.

If FILs are characterized as unilateral acts under international law, the question of termination requires examination of the controversial question of revocation of unilateral acts. As Eckart observes, if states are permitted to bind themselves in international law via unilateral acts, they must also be restrained in some way from revoking those acts, to avoid undermining the acts' binding nature.[63] At the same time, treating unilateral acts as irrevocable would render states reluctant to adopt such acts, potentially constraining a useful tool for international relations. Even treaties that do not provide for termination may sometimes be terminated.[64] It would be surprising to think that unilateral commitments were *more* binding on states than bilateral or multilateral commitments.[65]

At the outset, certain scenarios can be analysed quite easily. First, a party that has not yet invested in a state will not be able to benefit from FIL protections if the FIL is repealed before an investment is made.[66] Second, it is also clear that a state would not be permitted to terminate a pending claim by repealing the FIL on which the claim is based. This would also apply where the investor has given its own consent to arbitration over future disputes in the terms of the FIL, for instance in a separate letter to host state authorities, before the FIL is terminated.[67] In these circumstances, a tribunal would simply ignore the termination and proceed with the case.[68]

Third, some FILs contain stabilization clauses (similar to investment treaties' 'sunset clauses'), which purport to preserve the law's guarantees for a specified minimum duration (usually five, ten, or 20 years) after termination.[69] Where such clauses exist, a defence from the respondent state that the FIL was terminated and cannot form the basis of an investor's claim will be rejected if the claim was brought within the stabilization period.[70]

More difficult questions arise in a fourth scenario: where an investment has already been made but no case is pending, and no provision (including a stabilization clause) relating to termination exists in the FIL (as in the large majority of FILs).[71] Guiding Principle 10 prevents arbitrary revocation of unilaterally assumed obligations. But what amounts to an 'arbitrary' revocation where there is no apparent restriction on (or permission for) revocation? In relation to FIL arbitration

[62]States including India, South Africa, and Ecuador have terminated many of their investment treaties. See the introduction to this special issue.

[63]Eckart, supra n. 43, 251.

[64]VCLT Article 56(1) provides that treaties that are silent on termination may nevertheless be unilaterally terminated if it is established that parties intended a possibility of termination, or if a right of termination may be implied by the nature of the treaty.

[65]Eckart, supra n. 43, 253.

[66]Jurisdiction over one claimant was rejected for this reason in *Caratube,* supra n. 33 [695].

[67]See, for example, *Société Resort Company Invest Abidjan v Ivory Coast* (ICSID Case No. ARB/16/11), Decision on the Respondent's Preliminary Objection to Jurisdiction, 1 August 2017 [2].

[68]Nevertheless, a tribunal's jurisdiction in these circumstances might be limited to assessing breaches of the FIL arising prior to termination. This point is not pursued further here.

[69]See, for example, the FILs of Armenia (art 7), Azerbaijan (art 10), Kyrgyzstan (art 2(2)), Mauritania (art 5), Tajikistan (art 5(2)), and Turkmenistan (art 19(1)).

[70]*ABCI Investments NV v Tunisia* (ICSID Case No. ARB/04/12), Décision sur la Compétence, 18 February 2011 [126]–[128] might suggest that stabilization clauses are ineffective in the absence of an 'acquired right' (i.e., in this context, perfected consent to arbitration) – although the discussion on that point in *ABCI* was technically *obiter*, since the majority held that there *was* an acquired right to arbitration prior to the FIL's repeal.

[71]UNCTAD, supra n. 10 indicates that only 27 of the laws in UNCTAD's sample have stabilization clauses, suggesting that most FILs do not contain such clauses.

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clauses, such clauses are most plausibly viewed as unilateral offers of arbitration, awaiting acceptance by an investor. Schreuer supports this contractual offer-and-acceptance analysis stating that 'the host State may repeal its offer [of arbitration in a FIL] at any time unilaterally' before acceptance.[72] In relation to the substantive protections in the FIL, a contractual analysis would not apply, since the investor is (usually) not required to accept the FIL protections through an instrument of acceptance, unlike a notice of arbitration accepting the state's offer of arbitration. However, a 'public law paradigm' can be applied to FIL arbitration, as applied to analyses of investment treaty arbitration. Under this paradigm, investors must expect the law to change, and cannot proceed against the state purely because such changes might affect their rights.[73] It could thus be concluded that an arbitrary revocation only arises where revocation occurs contrary to a FIL stabilization clause. If the state did not itself provide for a stabilization clause, instant termination of substantive FIL provisions must be deemed permissible.

3.2 FILs as Domestic Law

The discussion in section 3.1 assumed that FILs are characterized as unilateral acts with binding effects in international law. However, if this characterization is rejected – or at least if the characterization applies only to the arbitration clause rather than the substantive protections of the FIL – the situation must then be analysed differently. The FIL will remain an ordinary domestic statute, a breach of which is to be determined by an international tribunal.

3.2.1 The Role of International Law

In this situation, an international tribunal will be ruling on a primary claim of breach of domestic law. In a FIL claim, two main questions arise: whether a tribunal would draw on international law to interpret the primary rules of the FIL as an instrument of domestic law, and how or whether the secondary rules of international law (particularly the law of state responsibility) would apply. Prior investment arbitrations brought under FILs provide minimal guidance on these questions despite investment tribunals deciding more than 70 known claims under FILs.[74] A small proportion of these cases have reached the merits. Thus, there is little guidance to draw general conclusions about the proper approach to interpretation, responsibility, and remedies of FILs.

International law can, however, retain various roles even in proceedings where the claim in question is governed by domestic law. Importantly, international law can continue to apply to FIL-based investment arbitrations because no publicly available FIL appears to contain an applicable law clause barring a tribunal's application of international law. In such cases, the default applicable law clauses in the commonly used arbitration rules permit the application of international law.[75]

First, tribunals constituted under arbitration clauses in FILs might use international law as an interpretive tool. Investment treaty tribunals typically apply *depeçage*, a principle by which a different law (domestic or international) can govern different issues in a case.[76] A FIL tribunal might similarly determine that the meaning of the term 'expropriation' in a FIL, for instance, is governed by international law since expropriation is a well-known concept of international

[72]C. Schreuer (2008) 'Consent to Arbitration', in P. Muchlinski, F. Ortino, and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*. Oxford University Press, 834. See also Potestà, supra n. 34, 153, who maintains that consent in FILs is 'much more precarious' than in treaties.

[73]A. Roberts (2013) 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', *American Journal of International Law* 107, 45, 66.

[74]Chaisse and Dimitropoulos, supra n. 1, 10.

[75]ICSID Convention Article 42(1) permits application of international law unless the parties have otherwise agreed. UNCITRAL Rules Article 35(1) permits application of 'the law which [the tribunal] determines to be appropriate', giving significant scope to apply international law.

[76]See, e.g., *Churchill Mining PLC v Indonesia* (ICSID Case No. ARB/12/14), Award, 6 December 2016 [235].

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law. Even without this determination, international law could also play an interpretive role for FIL provisions that mirror the substantive investor protections provided by custom or investment treaties.[77] Indeed, the limited FIL case law available demonstrates that tribunals have drawn on international law as an interpretive tool, in relation to 'expropriation',[78] 'investment',[79] and 'fair and equitable treatment'.[80]

Nevertheless, there could be potentially divergent outcomes in interpretation depending on whether FILs are viewed as domestic law or as unilateral acts. For instance, expropriation may be defined more restrictively by domestic law as compared to international law covering only property rights and excluding investor claims of expropriation of contract rights.[81] However, at the same time tribunals may be restricted by domestic law from importing 'balancing' tests such as proportionality from trade law or human rights law, leading to more absolutist views that may favour investors.

Second, given the highly malleable nature of the international law of state responsibility,[82] FIL tribunals might be expected to refer to it despite ruling on a claimed breach of domestic (rather than international) law. However, it seems unlikely that the international law circumstances precluding wrongfulness would be relevant; these are predicated on a finding of international responsibility, which will not arise if a FIL is merely a domestic law instrument.[83] In other cases where international adjudicators have ruled on breaches of domestic law, states have never attempted to rely on any of the international law circumstances precluding wrongfulness. By contrast, the rules on remedies in the law of state responsibility may be of general relevance in FIL claims, particularly since FILs do not specify the remedies for breach. If these rules simply reflect general principles of law common to domestic legal systems, as suggested above, tribunals could refer to them for general non-binding guidance or inspiration, even if not treating the rules as formally binding.[84] For instance, the *Lahoud v DRC* tribunal consulted international case-law to determine the interest payable by the state.[85]

Even so, tribunals may be equally justified in turning to domestic principles of state liability (which may differ from state to state) given their broad discretion in awarding damages. In general, national laws typically aim to balance public and private interests in awarding compensation for state breaches and thus diverge from the 'full reparation' standard envisaged by international law.[86] Further, domestic law rules may prohibit awards of interest on compensation. Therefore, compensation awards are likely to be lower in FIL claims where FILs are viewed as domestic law rather than unilateral acts where international principles would apply directly.

[77]McLachlan, Shore, and Weiniger, supra n. 14, 42.

[78]See *Southern Pacific Properties (Middle East) Ltd v Egypt* (ICSID Case No. ARB/84/3), Award on the Merits, 20 May 1992 [160]–[168] and *Tradex Hellas SA v Albania* (ICSID Case No. ARB/94/2), Award, 29 April 1999) [69], [135], [200]. Note that it was not clear in these cases whether the tribunal treated the substantive FIL protections as rules of domestic or international law.

[79]*Tradex v Albania*, supra n. 78 [106].

[80]*Lahoud v DRC,* supra n. 26 [356]–[365].

[81]This was argued by Egypt in *SPP*, although ultimately rejected by the tribunal, which drew on the international law understanding of expropriation as covering contract rights: *SPP v Egypt*, supra n. 78) [160], [164].

[82]For instance, the ILC Articles are frequently applied in investor–state treaty claims, despite the express 'without prejudice' clause in Article 33(2).

[83]A. Nollkaemper (2011) *National Courts and the International Rule of Law.* Oxford University Press, 185; Alvik, supra n. 55, 76.

[84]See *Khan Resources Inc v Mongolia* (PCA Case No. 2011-09), Award on the Merits, 2 March 2015 [368]; *SPP v Egypt*, supra n. 78 [183], [189].

[85]*Lahoud v DRC,* supra n. 26 [564] [632].

[86]I. Marboe (2010) 'State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests', in S. Schill (ed.), *International Investment Law and Comparative Public Law.* Oxford University Press, 378.

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3.2.2 Terminating FILs

The position on termination of FILs becomes more straightforward when FILs are treated purely as domestic law instruments rather than unilateral acts. First, if no investment has yet been made, revocation is effective to deny jurisdiction, since the claimant will have no protected investment.[87] Second, even if characterized as domestic law, clauses on consent to arbitration in FILs unavoidably carry international effects, given that they represent the state's offer of consent to international arbitration with foreign investors.[88] Thus, if consent is perfected via acceptance by a claimant, either before the revocation or during a post-revocation stabilization period,[89] the revocation will be ineffective to deny jurisdiction, drawing on the principle that consent to international adjudication, once given, cannot be unilaterally withdrawn.[90]

Meanwhile, where the FIL is silent on termination, even if the arbitration consent clause is viewed purely as domestic law, the contractual analogy is still apposite. Thus, the clause represents an offer of arbitration, and withdrawal of the offer via repeal will be effective to deny jurisdiction provided that the withdrawal occurred before acceptance by an investor.[91] Similarly, the substantive protections of the FIL will also immediately terminate, as long as domestic constitutional requirements for a valid repeal were met.[92]

Section 3 has demonstrated that FILs can be characterized in two different ways – with differing consequences for their use in investor–state claims. Notably, though, Section 3 showed that, depending on various factors, FILs may end up reflecting international law standards on either characterization. Section 4 proceeds to consider how FILs might be used in the future, particularly as compared to investment treaties, including how the future of FILs might be affected by the different characterizations identified in this section.

4. Future

Investment treaties have been prominent instruments of international investment law in recent decades. With their substantive investment protections and procedural consent to arbitration, investment treaties share similarities with facilitative FILs, aiming to encourage foreign investment. However, as the introductory article explains, investment treaties are currently facing a range of criticisms, and states are beginning to ask questions about the future of the treaty regime.[93] The number of new treaties concluded in 2020 was the lowest since the 1980s, and, in both 2019 and 2020, the number of treaty terminations exceeded the number of new treaties.[94] In this climate of uncertainty over the future role of investment treaties in facilitating foreign investment, what future role might facilitative FILs play as an alternative to treaties?

This section discusses four possible and partly overlapping futures for facilitative FILs.[95] The present concerns over investment treaties might lead to *contamination* of FILs with the same concerns, leading to amendment or termination. The perception that FILs remain useful to attract

[87]See, e.g., *Caratube*, supra n. 33 [695].

[88]See, e.g., *Pac Rim Cayman LLC v El Salvador* (ICSID Case No. ARB/09/12), Award, 14 October 2016 [5.71].

[89]The *Ruby Roz* tribunal (which arguably viewed FILs as domestic law) held a stabilization clause to be effective: *Ruby Roz Agricol LLP v Kazakhstan* (UNCITRAL), Award on Jurisdiction, 1 August 2013 [168]. However, the claim there had been filed after the stabilization period had ended, meaning that jurisdiction was declined.

[90]On this principle, see, e.g., *Nottebohm (Liechtenstein v Guatemala), Judgment*, (1953) ICJ Rep 111, 122 ('Once the Court has been regularly seised, the Court must exercise its powers').

[91]A. Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' (1997) 12 ICSID Rev 287, 319–20; C. Schreuer, supra n. 72, 834.

[92]*Tidewater Inc v Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction, 8 February 2013 [102] ('[m]unicipal law is relevant to determine the existence and validity of the instrument at issue').

[93]Chaisse and Dimitropoulos, supra n. 1, 7.

[94]UNCTAD (2021) *World Investment Report 2021: Investing in Sustainable Recovery*. UN, 122.

[95]On the possible futures of FILs, see also K.F. Olaoye and M. Sornarajah, Domestic Investment Laws, International Economic Law, and Economic Development, this special issue.

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investment might lead some states to pursue *continuation* of FILs, while other states might seek a middle ground leading to *compromise*. Finally, even if consent to arbitration is removed, FILs might remain in *contestation* before domestic or international courts and tribunals.

4.1 Contamination

In Section 2 above, it was suggested that states adopted facilitative FILs fundamentally as a tool to attract foreign investment. Under this broad objective, six reasons that are more specific were suggested for the growth of facilitative FILs alongside investment treaties which were perceived to perform a similar function. The fifth and sixth reasons – the possibility that states did not understand the risks of investor protections in FILs, and the prominent role of the World Bank in encouraging states to enact FILs – are likely to be less applicable to today's world. This might lead to contamination of FILs with the concerns of investment treaties, if states reject the fundamental assumption that FIL investor protections are necessary or useful for attracting foreign investment.

Given the similarities between investment treaties and FILs, this contamination would not be surprising, with fewer states willing to continue using FILs as tools of investment protection.[96] Some observers have now begun highlighting these concerns in relation to FILs.[97] Certain states (such as El Salvador and Egypt) have also appeared to acknowledge this, amending their FILs to remove arbitration clauses, shielding themselves from adjudicatory forums that may impose international liability upon them.[98] On this view, assuming that states act consistently, it might be expected that states that amend or terminate their investment treaties would take the same course of action in relation to their FILs.

Such a contamination would not necessarily mean that states no longer maintain any kind of FIL. Even if the facilitative functions of FILs (the focus of this article) are amended or removed, the regulatory functions of FILs may well continue.[99] In the current climate of challenges to the LIO, states are seeking to impose new restrictions on inward investment, most notably including heightened screening requirements[100] and performance requirements.[101] FILs will likely remain important domestic instruments relating to foreign investment, but their nature might shift from facilitative to regulatory as these restrictions and requirements are enacted.

Furthermore, any winding-back of facilitative protections in FILs, and an associated shift back towards regulatory FILs is not necessarily a permanent change. 'Approaches to foreign investment … oscillate between the encouragement of foreign investment and concern about the

[96]As Dimitropoulos mentions, some countries have expressed concerns over the perceived reverse discrimination inherent in the investment treaty regime (namely the perception of special privileges for foreigners, bypassing systems available to locals): G. Dimitropoulos, 'The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest', this special issue. The same concerns might apply to FILs too.

[97]S. Nikièma and N. Maina (2020) *The Risk of ISDS Claims Through National Investment Laws*. IISD; Bonnitcha, supra n. 32.

[98]L. Peterson, 'Growing Number of Governments are Amending Domestic Investment Laws so as to Preclude Unilateral Recourse by Investors to International Arbitration', *Investment Arbitration Reporter*, 10 September 2013), www.iareporter.com/articles/growing-number-of-governments-are-amending-domestic-investment-laws-so-as-to-preclude-unilateral-recourse-by-investors-to-international-arbitration/ (accessed 1 November 2021). See also Berge and St John, supra n. 13, Appendix A for a list of states that have removed consent.

[99]'Over the medium-term, regulatory investment codes [as opposed to facilitative ones] could stage a comeback': Burgstaller and Waibel, supra n. 2.

[100]Chaisse and Dimitropoulos, supra n. 1, 16–17.

[101]For discussion of such requirements in China's new FIL, see D. Collins (2021) 'Performance Requirement Prohibitions in International Investment Law', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Springer, 372; Y. Li and C. Bian (2016) 'A New Dimension of Foreign Investment Law in China – Evolution and Impacts of the National Security Review System', *Asia Pacific Law Review* 24, 149.

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consequences of unregulated investment flows.'[102] This oscillation seems likely to continue as states negotiate between political, economic, social, cultural, and other forces at both the domestic and international levels.

Nevertheless, the contamination of FILs with the concerns of treaties may not be the only driver of changes to FILs. A second set of states have also removed clauses offering consent to arbitration in their FILs for different reasons. Georgia's amendment of its FIL in 2010 was reportedly done on the grounds that foreign investors already enjoyed similar protections in Georgia under investment treaties.[103] The state thus viewed the removal of consent in the domestic law simply as a shift away from 'redundant' domestic protection and towards international protection in treaties.[104] Of course, this argument only applies to foreign investors from states with which Georgia has investment treaties;[105] arguably, domestic protection remains essential for investors from other states. The approach may also prove short-sighted if the future of the treaties themselves is in doubt. However, Georgia's recent practice suggests that it continues to support investment treaties with traditional protections such as FET and consent to arbitration, even if with some amendments aimed to preserve state sovereignty elsewhere.[106] For other states that similarly persist with investment treaties, the facilitative functions of FILs might also appear redundant.

4.2 Continuation

By contrast, seemingly challenging the contamination thesis, a third set of states appears to continue to accept the fundamental assumption that FILs attract investment. These states might therefore pursue a *continuation* of FILs on the basis of the first, second, third, and fourth reasons suggested in Section 2 – the ease and potential transparency of FILs compared to treaties, the ability to tailor investor protections to be weak or strong, and the lack of need for reciprocity for outbound investors. Since these four reasons are essentially inherent features of FILs, they are not subject to change over time, and might remain important for such states.

This category appears to include Burkina Faso, Laos, and Yemen, which have recently enacted new FILs, containing strong investor protections such as FET clauses and relatively clear consent to international arbitration.[107] Given the concerns over investment treaties, states (or at least particular ministries within states)[108] that continue to believe that offers of strong international law protections are effective in attracting foreign investment may well be forced to enact such strong FILs, if they cannot find willing partners for treaties.[109] Of course, one benefit of treaties is that they permit each state to choose its partners and thereby encourage investment from only certain countries[110] if that is what the state desires. To the extent that states seeking to offer strong

[102]Burgstaller and Waibel, supra n. 2 [51].

[103]Reflecting Georgia's approach, Burgstaller and Waibel suggested in 2011 that '[t]he importance of investment codes has declined', attributing this decline partly to 'the advent of BITs': ibid. [24].

[104]L. Peterson, 'Georgia Amends Foreign Investment Law so as to Remove International Arbitration and Legal Stabilization; One Claim is Pending under the Law', *Investment Arbitration Reporter*, 2 July 2010, www.iareporter.com/articles/georgia-amends-foreign-investment-law-so-as-to-remove-international-arbitration-and-legal-stabilization-one-claim-is-pending-under-the-law/ (accessed 1 November 2021).

[105]Georgia currently has 32 BITs in force, and is party to certain investment-related multilateral instruments including the Energy Charter Treaty: UNCTAD, *International Investment Agreements Navigator*, supra n. 25.

[106]See, e.g., the 2021 Japan–Georgia BIT and 2016 Turkey–Georgia BIT, and Georgia's submissions in the ECT modernisation process, energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf.

[107]See, e.g., the 2010 Yemen FIL, 2016 Laos FIL, and 2018 Burkina Faso FIL in UNCTAD, *Investment Laws Navigator*, supra n. 25.

[108]As Sands demonstrates, states are not necessarily monolithic; one ministry might favour strong investment protections in treaties or statutes while another ministry opposes the protections: A. Sands, Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo, this special issue.

[109]See Berge and Fauchald, supra n. 21, for consideration of why poor countries such as Burkina Faso continue to grant strong investor rights.

[110]Setting aside the possibility of indirect investment in the host state via a shell company in the partner state.

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protections in FILs nevertheless wish to block or discourage investment from certain countries (perhaps for fear of an excessive cultural influence of those countries), this could still be achieved in screening laws,[111] provided that this is consistent with the state's other international obligations (such as commitments on non-discriminatory trade in services).

4.3 Compromise

Other futures for FILs are also possible. For instance, FILs might represent one way to maintain but limit investor protections, as a compromise between preserving state regulatory powers and attempting to attract foreign investment.[112] As explained in Section 3, arbitrations under FILs may differ in some respects from arbitrations under treaties, depending on the characterization of FILs adopted. These differences do not necessarily favour states in the abstract. If FILs are viewed as domestic law instruments (rather than unilateral acts under international law), for instance, compensation awards for investors may be lower than in treaty claims, but the international law defences (such as necessity) will not be available to states. Similarly, if tribunals interpret FIL provisions according to domestic law, this might result in reliance on more restrictive domestic definitions of (for example) expropriation, favouring respondent states, but might also prevent importation of 'balancing' tests such as proportionality from international trade law or human rights law, thereby perhaps encouraging a sole focus on an investor's burden rather than any accompanying public benefit.[113] Whether FIL arbitration favours respondent states over claimant investors, then, depends on the peculiarities of each state's rules on matters such as statutory interpretation and remedies. However, for states with the appropriate rules in their domestic law, it may make sense to replace treaties with FILs, if those states are seeking to limit the risks of adverse claims while preserving an international forum to encourage foreign investors.[114]

The possibility that interpretations of FILs by tribunals would be substantively more 'state-friendly' than interpretations of treaties aligns with another – perhaps the major – perceived 'state-friendly' benefit of FILs compared to treaties: the ease of amendment or termination. At least in the absence of a stabilization clause in the FIL, the consent to arbitration and the substantive protections of FILs can essentially be revoked immediately by a state.[115] This may contribute to the sense that FILs represent an appropriate compromise between state powers and investor rights; states may feel more comfortable granting strong rights if those rights can also be revoked relatively easily, unlike the need for partner state agreement on termination of a treaty and the frequent presence of 'sunset clauses' in treaties.[116] Of course, given this ease of termination, investors may be more reluctant to view FILs as meaningful commitments, thereby undermining the asserted role for FILs in attracting investment.[117] Whether the ease of termination does then represent a benefit of FILs for states, all things considered, is unclear.

[111]Or in FILs themselves, which need not be (even if they typically are) generally applicable to investors from all states.

[112]See G. Dimitropoulos (2020) 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform', *Journal of World Investment & Trade* 21, 71.

[113]Proportionality tests in investment treaties have developed in response to perceptions that earlier treaties were insufficiently deferential to host states: C. Henckels (2015) *Proportionality and Deference in Investor–State Arbitration.* Cambridge University Press, 1–7, 22, 196. Nevertheless, the *Tecmed* case demonstrates that tribunals applying proportionality tests may sometimes view the public interest as outweighed by the burden on the investor: *Tecnicas Medioambientales Tecmed SA v Mexico* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003 [122], [151].

[114]Of course, the same result could also be achieved by amending investment treaties. Since replacing treaties with FILs would require partner state agreement on termination, this path would be no less difficult than amending treaties, which would also require partner state agreement.

[115]See Section 3 for discussion of terminating FILs.

[116]Cf J. Chaisse and G. Dimitropoulos (2021) 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law', *Journal of International Economic Law* 24, 229, 240, identifying a similar benefit of special economic zones.

[117]FILs might nevertheless retain an 'expressive' function in communicating the state's general favorability towards foreign investment: G. Dimitropoulos (forthcoming) 'The Viability of the Alternatives to International Investment Law and

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4.4 Contestation

Finally, if the facilitative functions of FILs are retained, provisions on investment incentives and protection in FILs are likely to continue being contested before courts and tribunals. First, even if consent to international arbitration is removed from FILs, these laws might be applied in claims before *domestic* (host state) courts. This would align with the 'return of Calvo' mooted by some observers, in which domestic courts would revert to their former position as the primary forum hearing investor–state disputes.[118] South Africa's 2015 FIL is one example of this, including some traditional investor protections such as national treatment and transfer of funds, but eschewing international arbitration in favour of domestic courts.[119] In this situation, domestic courts may face very similar questions to those facing international tribunals as outlined in section 3.2 above, including the proper role for international law in defining terms (such as 'expropriation') used in a FIL. Of course, the alleged bias or dysfunction of domestic courts in many states has long been suggested as justifying the need for international arbitration for investment disputes. As a result, this future for FILs may depend on the willingness of foreign investors to take their disputes to host state courts.

Second, FIL incentives or protections might be in contestation as substantive law in other international arbitration claims, under either investment treaties (via the umbrella clause, which potentially allows investors to transform a breach of domestic legislative obligations into a breach of a treaty) or investment contracts (where the tribunal's jurisdiction might extend to alleged breaches of host state law, including the FIL itself). In *Khan v Mongolia*, for instance, the tribunal held that Mongolia had expropriated the claimants' investment in breach of Mongolia's FIL, which in turn entailed a breach of the umbrella clause in the Energy Charter Treaty.[120] This future for FILs, though, depends partly on states' and tribunals' future attitudes towards the umbrella clause. Some recent investment treaties, such as those based on the 2016 Indian model, simply remove the umbrella clause, thus preventing this use of FILs in future. Meanwhile, some tribunals have interpreted the umbrella clause to exclude coverage of legislative obligations,[121] similarly meaning that claimants could not rely on FIL protections to invoke a breach of the umbrella clause.

5. Conclusion

The ideas of economic liberalism that were central to the LIO encourage states to permit free flow of goods, services, and capital around the world. In implementing the LIO, states used a variety of instruments over time, both international and domestic. The history of FILs demonstrates that the domestic and international instruments used by states can be seen as complementary, working to achieve the same goals of the LIO, even if with sometimes different drivers behind each instrument. The LIO was therefore crucial for the origins of investment protections in FILs.[122]

In the present era of investor–state arbitration, those FIL protections have been overshadowed in practice and scholarship by treaty protections. However, claims under FILs raise complex

Arbitration: International and Domestic Perspectives', in M. Reisman and N. Blackaby (eds.), *Arbitration Beyond Borders: Essays in Memory of Guillermo Aguilar Alvarez*. Kluwer.

[118]C. Schreuer (2005) 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration', *Law & Practice of International Courts and Tribunals* 4,1; L. Trakman (2012) 'Choosing Domestic Courts over Investor–State Arbitration: Australia's Repudiation of the Status Quo', *UNSW Law Journal* 35, 979; M. Brauch (2017) *Exhaustion of Local Remedies in International Investment Law*. IISD; S. Puig and G. Shaffer (2018), 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law', *American Journal of International Law* 112, 361, 388–390.

[119]See Dimitropoulos, supra n. 112, 79–82.

[120]*Khan v Mongolia* (PCA Case No. 2011-09), Award on the Merits, 2 March 2015 [366].

[121]See, eg, *9REN Holding v Spain* (ICSID Case No. ARB/15/15), Award, 31 May 2019 [342]; J. Salacuse (2021) *The Law of Investment Treaties*, 3rd edn. Oxford University Press, 371–378.

[122]Cf K.F. Olaoye and M. Sornarajah, Domestic Investment Laws, International Economic Law, and Economic Development, this special issue.

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questions about their interaction with public international law, leading to uncertainty over the very nature of FILs as either domestic or international instruments. While FILs might appear domestic in form, the fact that the substance of their investment protections is arguably tied quite strongly to international law might raise questions over the extent of the domestication of international economic law that they appear to entail.

Meanwhile, just as the LIO was central to the origins of FILs, the current backlash against the LIO may become central to a possible future demise of FILs in their facilitative aspects. FILs may nevertheless continue in their regulatory aspects, or they may adapt to permit an easier compromise between state interests and investor protection than can be achieved via treaties. FILs are ultimately flexible tools, and their future is likely to reflect states' attitudes towards the future of the LIO itself.

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