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Domestic Investment Statutes In International Law

*By Jarrod Hepburn**

Abstract

Alongside now-controversial investment treaties, many states also maintain domestic investment statutes. Although these laws offer protections similar to investment treaties and are increasingly applied in investor-state arbitration, they have—unlike the treaties—attracted limited scholarly scrutiny. This article argues that investment statutes can plausibly be characterized either as unilateral acts in international law or as domestic law. The article examines the significant consequences that follow from these characterizations, providing the first comprehensive analysis of these hybrid statutes.

I. Introduction

Most scholarship on international investment law focuses on the extensive network of thousands of bilateral and multilateral investment treaties that have been concluded over the last sixty years. Nearly every state has signed at least one investment treaty, and these treaties have sparked hundreds of investor-state claims in international arbitration and generated a surfeit of commentary and debate.[1]

Alongside these international instruments, 108 states also maintain *domestic* statutes on foreign investment.[2] These foreign investment laws (FILs) offer many of the same substantive protections as investment treaties. FILs adopt definitions of "investor" and "investment" that strongly resemble equivalent definitions in investment treaties. FILs commonly include guarantees on transfer of capital, expropriation, and non-discrimination (national treatment),[3] again mirroring core protections in investment treaties. Some FILs also include a guarantee of fair and equitable treatment found almost universally in investment treaties.[4] Notably,

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[1] UNCTAD, World Investment Report 2017: Investment and the Digital Economy 111 (2017) (there were 3,324 investment treaties concluded (but not all in force) at the end of 2016).

[2] UNCTAD, Investment Policy Monitor: Investment Laws 1 (2016), *available at* unctad.org/en/PublicationsLibrary/webdiaepcb2016d5_en.pdf.

[3] *Id.* at 6.

[4] Eight FILs in UNCTAD's survey included a fair and equitable treatment clause. *Id.* at 7. *See also* Patrick Dumberry, *Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?*, 8

some FILs also provide the state's prospective consent to the same dispute settlement mechanisms as investment treaties, allowing investors to file claims for breach of FILs before international arbitral tribunals.[5] At least sixty-one claims relying on a FIL have now been brought to the International Centre for Settlement of Investment Disputes (ICSID) and other arbitral forums. FIL cases have represented roughly 10 percent of new cases filed at ICSID in each of the last ten years, peaking at 17 percent in 2010 and 2013.[6]

The rate of adoption of new investment treaties has declined significantly since the mid-1990s,[7] likely due to the significant controversies these instruments have created. However, there has not been a corresponding decline in the adoption rate of FILs, which has remained relatively constant since 1990.[8] Even as the investment treaty regime undergoes a soul-searching period of reflection, the proliferation of FILs has continued unabated.

Despite the significance of FILs for the international investment regime and for international law more generally, they have received remarkably little attention.[9] The extensive policy debates characterizing the current investment treaty literature and reform projects are almost entirely absent in discussions of FILs.[10] In addition, arbitral tribunals have shown little willingness to theorize about the nature of FILs or the international law framework of disputes based on a FIL. In some cases, tribunals have even referred to FIL claims as "treaty claims."[11]

But FILs are not treaties, and their many similarities with investment treaties conceal questions crucial to understanding their place in the investment regime and in international law more generally. This article focuses on one fundamental puzzle relating to these questions: how should FILs be characterized? It argues that there are two plausible ways to view these laws. First, despite their domestic law origins, FILs may be characterized as unilateral acts in international law—i.e., as obligations taking effect on the international plane, assumed by states unilaterally. Second, FILs may instead be ordinary instruments of domestic law.

J. Int'l Disp. Settlement 155, 175 (2017); Antonio Parra, *Principles Governing Foreign Investment, as Reflected in National Investment Codes*, 7 ICSID Rev. 428, 436 (1992).

[5] UNCTAD's review counted twenty-six FILs that contained clear consent to arbitration, similar to clauses found in investment treaties. *See supra* note 2, at 10. A further eleven FILs contained unclear clauses that potentially offered consent to arbitration. FILs differ regionally; a recent study of FILs from the ten ASEAN nations observed that none contained consent clauses. Jonathan Bonnitcha, Investment Laws of ASEAN Countries: A Comparative Review 4 (2017).

[6] ICSID, *Caseload – Statistics*, *at* icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

[7] UNCTAD, *supra* note 1, at 111.

[8] UNCTAD, *supra* note 2, at 2.

[9] The existing literature on FILs has mostly been confined to analyzing the proper tools for interpreting FIL arbitration clauses. *See, e.g.*, David Caron, *The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law*, *in* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 649 (Mahnoush Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner eds., 2010); Michele Potestà, *The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws*, 27 Arb. Int'l 149 (2011); Yulia Andreeva, *Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions*, 27 Arb. Int'l 129 (2011); Makane Moïse Mbengue, *National Legislation and Unilateral Acts of States*, *in* International Investment Law: The Sources of Rights and Obligations 183 (Tarcisio Gazzini & Eric de Brabandere eds., 2012).

[10] UNCTAD, *supra* note 2, at 11. For a notable recent exception, see Bonnitcha, *supra* note 5.

[11] *See* Getma Int'l v. Guinea, ICSID Case No. ARB/11/29, Decision on Jurisdiction, para. 106 (Dec. 29, 2012); AES Corp. v. Kazakhstan, ICSID Case No. ARB/10/16, Award, para. 219 (Nov. 1, 2013) [hereinafter *AES*]. See also Caratube Int'l Oil Co. LLP v. Kazakhstan, ICSID Case No. ARB/13/13, Award, para. 419 (Sept. 27, 2017) [hereinafter *Caratube*]; and Interocean Oil Dev. Co. v. Nigeria, ICSID Case No. ARB/13/20, Decision on Preliminary Objections, para. 124 (Oct. 29, 2014) [hereinafter *Interocean*], describing FIL claims as "international law" claims.

These competing characterizations have important consequences for doctrinal questions that arise in disputes relating to FILs. In particular, whether or how the international law of state responsibility applies to investor claims under FILs, and whether or how FILs may be terminated, depend on which approach is adopted. The characterization also affects other issues, such as the interpretation of FILs and the determination of compensation.

The remainder of this article proceeds as follows. Part II lays the groundwork by comparing FILs to their better-known international cousins, investment treaties. It reviews the origins of FILs and explains the independent motivations for states to adopt these laws in tandem with the investment treaties whose contents they often closely replicate. Part II then argues that many of the ongoing debates about investment treaty arbitration, and the interpretive paradigms that feature in that field, are likely to be replicated in FIL arbitration.

Part III considers the first possible characterization of FILs—as unilaterally assumed obligations in international law—and traces its doctrinal consequences. There is a good case for treating FILs as unilateral acts owed by states directly to investors, and several tribunals have taken this approach in reviewing FIL arbitration consent clauses. I contend that a unilateral act characterization plausibly extends as well to the substantive protections offered in FILs. On this view, FIL breaches are unlikely to breach treaty-based "umbrella" clauses, in contrast with the domestic law characterization discussed below. In addition, apart from certain defenses including countermeasures, the ordinary rules of state responsibility would apply, perhaps with less conceptual difficulty than in investor-state claims under treaties. A further implication of viewing FILs as unilateral acts is that, subject to certain exceptions (such as where there are stabilization clauses or pending claims), states may terminate them immediately.

Part IV considers the alternative characterization of FILs as ordinary instruments of domestic law. Some tribunals have assumed or implied this view, while others have ignored the question entirely. Addressing the issue directly, Part IV identifies several doctrinal implications that flow from this conceptual framing. Differing domestic statutory construction rules could result in divergent interpretations of similar terms in FILs, although international law may also play an interpretive role. In addition, the law of state responsibility (particularly attribution) is likely to apply in a more indirect manner than under the unilateral act characterization.

Other differences may be more consequential. For example, compensation awards may be lower when FILs are treated as domestic law, due to prohibitions on compound interest or remedial rules that balance public and private interests. Further, the customary international law defense of necessity will not apply to FILs as ordinary domestic legislation, unlike under the unilateral act framing. Other consequences of the characterization include a greater likelihood of cost-shifting orders, fewer concerns about arbitrator "double-hatting," and a greater possibility of investors seeking to abrogate prior waivers of their FIL rights. Part IV contends, however, that domestic law time-bars are unlikely to affect FIL claims under either characterization. Part IV concludes by arguing that, as domestic law, FILs can be immediately terminated, but for different reasons than under the unilateral act characterization.

The treatment of FILs raises a number of broader conceptual and institutional issues. States have no predetermined reason to prefer one characterization over the other; as this article demonstrates, where outcomes or doctrines differ based on the chosen frame, they sometimes

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favor governments and at other times favor investors. Nevertheless, as with investment treaties, the origins, motivations, and underlying structures of FILs need to be grasped to lay the groundwork for evaluating any FIL reform agenda that may emerge. There are also urgent reasons to understand these laws if states begin to (or continue to) adopt them as an alternative to beleaguered investment treaties. Most broadly, the alternative characterizations of FILs imply different allocations of authority between domestic and international law, a perennial concern of states and nonstate actors. This article proposes a conceptual framework to analyze these issues, providing the first comprehensive account of FILs that situates these hybrid instruments from the perspective of public international law.

II. Drivers and Paradigms

The many similarities between investment treaties and FILs mask important overlooked differences, which must be properly identified before characterizing FILs as international or domestic law, and before addressing the doctrinal issues implicated by that choice. This Part argues that FILs differ from investment treaties in the drivers that led to their adoption and in the degree to which various analytical paradigms that characterize investment treaty arbitration apply to FIL arbitration. These drivers and paradigms, in turn, affect the resolution of various doctrinal issues that follow from how FILs are characterized.

Drivers of FILs

The reasons why states began signing investment treaties in the 1960s, the drivers of their explosive growth in numbers in the 1990s, and the factors leading to the more recent slowdown in that growth have all been well documented.[12] By contrast, although states also began enacting FILs in the 1960s and did so in increasing numbers in the 1990s,[13] the reasons for those enactments have received significantly less attention.

Given the ubiquity of investment treaties, the concurrent growth of FILs appears puzzling. Under the traditional "grand bargain" of investment treaties, a host state assumes the burdens of offering protections for foreign investors, and in return receives the twin benefits of potential inward investment flows and reciprocal protection of its outward investors in the partner state.[14] At first glance, under the traditional bargain, it may seem strange that a state would *unilaterally* offer protections to foreign investors in FILs, rather than pursuing bilateral or multilateral treaties. While a unilateral offer may still promote inward foreign investment flows, it eliminates the possibility of reciprocity, arguably removing any incentive for a partner state to offer protections in a treaty in return for securing protections for its own investors.[15]

[12] *See, e.g.*, Lauge Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries (2015).

[13] UNCTAD, *supra* note 2, at 2.

[14] Jeswald Salacuse & Nicholas Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L.J. 67 (2005).

[15] *See, e.g.*, CEMEX Caracas Investments B.V. v. Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, para. 126 (Dec. 30, 2010) [hereinafter *CEMEX*] ("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, para. 105 (Aug. 2, 2011) [hereinafter *Brandes*].

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Despite the arguable drawback of non-reciprocity, there are underappreciated reasons why states would nonetheless enact FILs.[16] First, in recent times it has become increasingly difficult for states to reach agreement on international economic law. Passing a domestic statute establishing a state's desired level of foreign investment protection may be easier than incurring the transaction costs of negotiating a treaty with one or more partners.

Second, to the extent that domestic legislatures are involved in their creation,[17] FILs represent a mode of international lawmaking that offers greater transparency and accountability for citizens than treaties, which are often negotiated and concluded by the executive without parliamentary oversight.[18] These concerns may lead states to prefer FILs over investment treaties.

Third, FILs may be designed in ways that allow states to retain sufficient bargaining chips to negotiate for reciprocity. Although often closely following the terms of investment treaties, FILs do not necessarily contain the full suite of investor protections found in those international instruments. For instance, only a handful of FILs contain a guarantee of fair and equitable treatment, and not all FILs contain clear consent to international arbitration. These missing protections could induce a partner state to conclude a treaty despite a preexisting investment protection law. Some FILs encourage this possibility, incorporating more investor-favorable provisions from subsequent treaties into the statute itself.[19]

Fourth, some states may place a lower value on reciprocity. Most FILs have been enacted by developing countries, capital-importing states for which the benefits of reciprocity are often limited. Such states may be more interested in attracting inward investment than protecting outward investors, meaning that they give up little even when they unilaterally offer very strong protections. Indeed, if FILs are an effective means of attracting foreign investment,[20] it may be more surprising that states with little or no outward investor interests would expend any effort on concluding bilateral treaties rather than simply relying on FILs.

Fifth, unlike most investment treaties, FILs do not focus solely on investment protection. They often serve many additional functions, including investment promotion and regulation. Some FILs establish "one-stop shops" for foreign investors, such as Indonesia's Investment Coordinating Board (BKPM), which handles all permits and approvals required for investors seeking to enter the country.[21] Other FILs establish investment-screening bodies and

[16] VLADIMIR DEGAN, SOURCES OF INTERNATIONAL LAW 288 (1997) ("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] FILs are typically legislative instruments, although some have been enacted via executive action. Venezuela's FIL, for instance, is an "executive decree with the rank and force of Law" issued by former President Chavez, using powers delegated by the National Assembly. *See Brandes*, *supra* note 15, para. 25.

[18] National parliaments may, of course, become involved at the ratification stage. *See, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 103–04 (2007).

[19] UNCTAD, *supra* note 2, at 5.

[20] Many commentators analyze FILs, like investment treaties, as purported tools for attracting foreign investment. *See, e.g.*, Richard Buxbaum & Stefan Riesenfeld, *Investment Codes*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolf Bernhardt ed., 1985); Parra, *supra* note 4; MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES 51 (1993); INTERNATIONAL FINANCE CORPORATION/WORLD BANK, INVESTMENT LAW REFORM: A HANDBOOK FOR DEVELOPMENT PRACTITIONERS, at ix (2010); UNCTAD, *supra* note 2, at 4; CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 44 (2017).

[21] BONNITCHA, *supra* note 5, at 8. *See also* UNCTAD, *supra* note 2, at 9.

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monetary thresholds, create tax or financial incentives for foreign investment, or specify the legal forms in which foreign investors can establish themselves in the state.[22] Still other statutes combine all the relevant business-related laws (on contracts, tax, intellectual property, corporate forms, etc.) into one instrument to simplify the legal rules applicable to foreign investors.[23]

Sixth, and relatedly, it is now well known that the potential adverse effects of investment treaties were not widely appreciated when most of those treaties were negotiated prior to the mass onset of investor-state claims in the 2000s.[24] Although the risks associated with FILs are less certain, states could have been equally blasé about the investor protection provisions of those instruments given their similarities to investment treaties. On this view, one would not expect any concern that adopting a FIL would discourage the negotiation of investment treaties.

Seventh, historical evidence suggests that FILs were not perceived to be in competition or tension with investment treaties.[25] 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.[26] 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.[27] 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 treaties) and to prevent later governments from regressing to illiberal policies.[28]

As this discussion has shown, the drivers for enacting FILs and concluding investment treaties were largely independent. 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

[22] *See generally* BONNITCHA, *supra* note 5; UNCTAD, *supra* note 2; MCLACHLAN, SHORE & WEINIGER, *supra* note 20, at 44.

[23] Buxbaum & Riesenfeld, *supra* note 20; International Finance Corporation, *supra* note 20, at ix, 18; Parra, *supra* note 4, at 428; WORLD BANK, LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT, VOL. II, at 19 (1992).

[24] *See* POULSEN, *supra* note 12, at xv–xvi; JONATHAN BONNITCHA, LAUGE POULSEN & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 223–26 (2017).

[25] Commentators in the 1990s viewed investment treaties and investment laws as complementary tools to attract foreign investment. *See, e.g.*, Bertrand Marchais, *The New Investment Law of the Arab Republic of Egypt*, 4 ICSID REV. 297, 308 (1989); Ndiva Kofele-Kale, *Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary*, 15 N.C. J. INT'L L & COM. REG. 361, 363 (1990); Bertrand Marchais, *The 1989 Investment Code of Madagascar*, 5 ICSID REV. 73, 79 (1990); Chris Maina Peter, *Promotion and Protection of Foreign Investments in Tanzania: A New Investment Code*, 6 ICSID REV. 42, 44–45 (1991).

[26] 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. POULSEN, *supra* note 12, at 12, 76–81, 84, 101, 180.

[27] BONNITCHA, POULSEN & WAIBEL, *supra* note 24, at 211; OPIC Karimun Corp. v. Venezuela, ICSID Case No. ARB/10/14, Award, para. 114 (May 28, 2013).

[28] Kenneth Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 634 (1993); POULSEN, *supra* note 12, at 86.

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with various states after enacting their FILs in 1994 and 1997 respectively.[29] Even for states with strongly investor-protective FILs that have led to monetary awards following findings of breach, partners have nevertheless been willing to conclude subsequent treaties containing essentially the same protections.[30] Recent research on the origins of investment treaties indicates why this is 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.[31] Enacting a FIL in the national parliament does not offer officials the same attractive travel perks as a treaty negotiation. Moreover, another early driver of investment treaties in developed states was a desire to solidify an investment-friendly view of customary international law. Thus, U.S. and European negotiators pursued investment treaties as a response to the New International Economic Order, aiming to shape custom in a direction supportive of rich-country interests.[32]

Regardless of any FIL, then, both developing and developed states likely had other reasons to continue to seek investment treaties alongside FIL protections. Part III of this article examines what these independent drivers of FILs and investment treaties imply about the legal characterization of the statutes.

Paradigms of FILs

Anthea Roberts has described investment treaty arbitration as a hybrid, *sui generis* system, drawing elements from multiple competing fields of law (or "paradigms"): public international law, international commercial arbitration, domestic public law, international trade law, human rights law, and third-party beneficiaries.[33] Although based on treaties, classic instruments of public international law, the system utilizes the dispute resolution and enforcement mechanisms of international commercial arbitration. Meanwhile, investment treaty disputes often resemble public law regulatory disputes that adjudicate the relationship between the state and the individual; trade law disputes that balance economic and noneconomic interests; and human rights disputes, with individuals challenging government action before an international body. Doctrines relating to third-party beneficiaries, drawn from both public international law and domestic contract law, are relevant too, given that investment treaties create rights, or at least benefits for non-parties (i.e., investors).

These competing paradigms each privilege different aspects of investment treaty disputes, and suggest different answers to questions arising from those disputes.[34] For instance, the

[29] *See* UNCTAD, Investment Laws Navigator, *available at* investmentpolicyhub.unctad.org/InvestmentLaws; UNCTAD, International Investment Agreements Navigator, *available at* investmentpolicyhub.unctad.org/IIA.

[30] 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. DRC*, at paras. 488 and 516). 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 v. Guinea*, at paras. 383 and 387).

[31] Lauge Poulsen & Emma Aisbett, *Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime*, 7 J. INT'L DISP. SETTLEMENT 72 (2016); *see also* BONNITCHA, POULSEN & WAIBEL, *supra* note 24, at 220–23.

[32] BONNITCHA, POULSEN & WAIBEL, *supra* note 24, at 198–200.

[33] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AJIL 45 (2013).

[34] *Id.* at 74.

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public law paradigm would favor admission of amicus curiae briefs, while the international commercial arbitration paradigm would view this as an inappropriate intrusion into a confidential dispute between two equal parties, the investor and the state.[35] The third-party beneficiary paradigm might impose constraints on certain modes of amendment or termination of investment treaties, even though a strict application of the public international law paradigm would not.[36] The human rights paradigm suggests that states should pay their own legal costs, even if successful, while the international commercial arbitration paradigm tends to the view that the losing party bears the successful party's costs,[37] and the public international law paradigm would likely disfavor any cost-shifting at all.

Commentators have not yet considered how or whether FIL disputes are similarly subject to this "clash of paradigms." For investment treaties, Roberts has offered three reasons why the different paradigms have emerged.[38] First, the investment treaty system is "new and undertheorized," encouraging its participants to borrow from related fields to fill gaps. Second, investment treaties are vaguely worded, and rules of treaty interpretation are often unhelpful in determining the meaning of key concepts like expropriation or "fair and equitable treatment." Third, the system is decentralized, with thousands of treaties and no singular authoritative voice to favor a particular paradigm or facilitate cohesion.

These reasons apply equally to FIL disputes. First, although in existence since the 1960s, FILs were invoked in only four known cases before 2000, two of which settled,[39] leaving the bulk of FIL claims to arise at around the same time as the flood of investment treaty claims in the 2000s. Second, the key investor protections offered in FILs are no clearer than their counterparts in investment treaties. Article 25(1) of Ethiopia's 2012 FIL, for instance, provides that "[n]o investment may be expropriated or nationalized except for public interest and then, only in conformity with the requirements of the law," and that "[a]dequate compensation, corresponding to the prevailing market value, shall be paid" for expropriation. Article 25 of the Democratic Republic of the Congo's 2002 FIL offers investors "fair and equitable treatment, in accordance with the principles of international law." These provisions do not contain any greater definition of expropriation or fair and equitable treatment than in the typical investment treaty. Third, although the maximum number of FILs is bound by the number of states, this still leaves roughly two hundred potentially different FIL texts. Moreover, as noted above, where FILs contain a clause consenting to investor-state arbitration, they rely on the same decentralized dispute resolution mechanisms as investment treaties, typically arbitration before ad hoc tribunals at ICSID and/or under the UNCITRAL arbitration rules, which have no formal precedent constraints or appeal possibilities.

This suggests that a clash of paradigms could also emerge in FIL arbitration. However, this clash will not necessarily involve the same paradigms as those at play in investment treaty arbitration. In particular, given that FILs are not treaties, it is not immediately clear whether

[35] *Id.* at 48.

[36] Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 403–16 (2015).

[37] Roberts, *supra* note 33, at 47.

[38] *Id.* at 50–53.

[39] *Southern Pacific Prop. v. Egypt* was filed in 1984, and *Tradex Hellas v. Albania* was filed in 1994. *Manufacturers Hanover Trust v. Egypt* commenced in 1989 but was settled in 1993, while *Ghaith Pharaon v. Tunisia* was filed in 1986 and settled in 1988.

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the public international law paradigm can apply to FIL arbitration. (Part III of this article argues, however, that one way in which this paradigm might apply is by characterizing FILs as unilateral acts under public international law.) It is also not obvious that a third-party beneficiary paradigm has any relevance to FILs; only one party (the state) is involved in creating FIL obligations, even if those obligations are granted in favor of another party (the investor). Furthermore, given that international trade and human rights law are both part of public international law, comparisons with those fields might again beg the question of whether FIL arbitration is part of public international law. For example, one prominent use of trade law in investment arbitration has been in analyzing the "essential security" clause, where World Trade Organization (WTO) case law on "necessity" has been applied to interpret an equivalent term in certain investment treaties.[40] Existing FILs, however, do not contain essential security clauses,[41] reducing the utility of the trade law comparison in FIL arbitration.

Nevertheless, there are good reasons to conclude that other investment treaty paradigms do apply to FILs. Since FILs employ the same commercial arbitration and enforcement mechanisms as investment treaties, the commercial arbitration paradigm is an important feature. A FIL tribunal is arguably a creature of the two disputing parties' exercise of autonomy, owing no wider duties to other parties, and in this sense perhaps similar to an investor-state contract dispute. At the same time, the public law paradigm also seems apt. Two theories support the application of this paradigm to investment treaty arbitration.[42] The "public action" theory emphasizes that the state acted in its public capacity when assuming the relevant investment obligations (i.e., when concluding the investment treaty). The "public interest" theory, meanwhile, highlights various factors demonstrating that the dispute involves "significant matters of public concern": namely, the dispute's substance relates to regulatory or governmental (as opposed to commercial) conduct, concerns public services, and/or has large implications for the public purse. Both these theories apply equally to FIL arbitration, where the subject matter and potential financial implications of the disputes are largely identical to investment treaty arbitration, and where the relevant obligations flow from an exercise of state power in a public capacity—i.e., passing legislation (whether or not this legislation creates a unilaterally assumed international obligation, as discussed in Part III).

In addition, international public law fields such as trade and human rights can serve as models for FIL arbitration, despite some limitations in the FIL context. Like trade and human rights law, FILs deal with "the ability of states to act and regulate domestically,"[43] affecting the vertical relationship between the state and the individual. Even if FILs are merely domestic law and international human rights law is not a relevant comparator, one might draw on individual rights found in *domestic* law, including its concern for standards of review and judicial deference to other government actors.[44] Similarly, analyses of non-

[40] Roberts, *supra* note 33, at 47, 70; *see also* Continental Casualty Co. v. Argentina, ICSID Case No. ARB/03/9, Award, paras. 189–230 (Sept. 5, 2008).

[41] Based on a review of UNCTAD, Investment Laws Navigator, *supra* note 29.

[42] Roberts, *supra* note 33, at 64–65.

[43] *Id.* at 69.

[44] In the investment treaty context, Schill has similarly advocated an interpretive approach based on both domestic and international public law, including human rights law. INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan Schill ed., 2010).

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discrimination in trade law might well be relevant, given the frequent presence of national treatment obligations in FILs. Lastly, despite the presence of only two parties in the FIL context, questions of reliance that arise in the third-party beneficiary paradigm may be relevant to termination of FILs and the consequences for investors.

None of the paradigms entirely explains investment treaty arbitration,[45] and it is not surprising that no one paradigm explains FIL arbitration. As will be seen in Parts III and IV, however, different features of each paradigm are relevant to a range of doctrinal issues that arise in FIL arbitration.

III. FILs as Unilateral Acts

Perhaps the most obvious way to understand FILs is to treat them as simple domestic laws; they are, after all, products of domestic legislatures. This view will be examined in Part IV. But a more interesting characterization is also plausible—FILs as unilateral acts that create binding international obligations for a state. This Part considers whether FILs can be so characterized, and what consequences follow from this characterization for the beneficiaries of FIL obligations, the nature of the rights granted in FILs, the application of the international law of state responsibility, and the revocation of FILs.

Characterizing the Legal Nature of FILs

In its 1974 *Nuclear Tests* judgment, the International Court of Justice (ICJ) recognized that states may incur international obligations by means of a unilateral act.[46] The Court held that numerous statements made in press conferences and at the United Nations by the French president, minister of defence, and minister of foreign affairs, to the effect that France would cease atmospheric nuclear weapon tests in the South Pacific Ocean, constituted binding international obligations. As the Court put it:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. . . . When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking . . . .[47]

The judgment engendered a range of reactions. While previous cases and state practice supported the concept of unilateral acts creating international obligations,[48] it "remained a leap for the Court to assume that the general bindingness of unilateral assurances made by a state

[45] Roberts, *supra* note 33, at 94 (theories about the nature of investment arbitration "will likely draw on insights from multiple paradigms"). Roberts's view of investment arbitration endorses a model based on a combination of the public international law, third-party beneficiary and public law paradigms. Roberts, *supra* note 36.

[46] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 ICJ Rep. 253 (Dec. 20) [hereinafter *Nuclear Tests*].

[47] *Id.*, para. 43.

[48] See, e.g., the Permanent Court of International Justice's (PCIJ) indication that it was "beyond all dispute" that a declaration of Norway's Foreign Minister made to a Danish Minister was binding on Norway: *Legal Status of Eastern Greenland* (Den. v. Nor.) para. 192, 1933 Series A/B 53, 22 (Apr. 5); James Garner, *The International Binding Force of Unilateral Oral Declarations*, 27 AJIL 493 (1933). *See also* South West Africa Cases, Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, 1962 ICJ Rep. 465, 478 (Dec. 21) ("Unilateral declarations may contain undertakings, and can certainly create valid international obligations.").

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was not subject to debate but was simply 'well recognised.'"[49] Some commentators, and two of the dissenting judges in the case, disagreed with the decision on the facts, seeing the French declarations as mere statements of government policy with no legal import.[50] Nevertheless, the basic principle set out in *Nuclear Tests* also found contemporaneous support,[51] and was applied again by the Court in the *Nicaragua*, *Armed Activities*, and *Frontier Dispute* cases.[52] Closely tracking the ICJ jurisprudence, the International Law Commission (ILC) gave a further endorsement of the principle in its study of unilateral acts and the resulting "Guiding Principles" published in 2006.[53]

Domestic laws as unilateral acts

Unilateral acts in international law are generally associated with statements or declarations made by executive branch officials, such as the French declarations at issue in the *Nuclear Tests* case. Most instances of state practice typically cited in discussions of unilateral acts, including by the ILC, involve such declarations.[54] This is likely because most interactions between states occur between such officials, who are tasked with representing the state in the conduct of its foreign affairs. States usually do not "speak to the world" through their legislatures or judiciaries.

However, 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."[55] 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. Certain kinds of domestic statutes purporting to have effects on the international plane have indeed been analyzed as unilateral acts.[56] Nationality laws are one example.[57] Laws on neutrality

[49] Christian Eckart, Promises of States Under International Law 125 (2012).

[50] Nuclear Tests (Austl. v. Fr.), Dissenting Opinion of Judge de Castro, 1974 ICJ Rep. 372, 375; Nuclear Tests (Austl. v. Fr.) , Dissenting Opinion of Judge Sir Garfield Barwick, 1974 ICJ Rep. 391, 448–49. For criticism, see, e.g., Alfred Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AJIL 1 (1977), and the discussion in Eckart, *supra* note 49, at 123–37.

[51] *See, e.g.*, Thomas Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AJIL 612, 615 (1975) (calling the decision "a most useful step forward in international jurisprudence").

[52] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14, 132 (June 27) [hereinafter *Military and Parmilitary Activities*, June 27, 1986]; Armed Activities on the Territory of the Congo, New Application (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 ICJ Rep. 6, 26–29 (Feb. 3) [hereinafter *Armed Activities*]; Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 ICJ Rep. 554, 573–74 (Dec. 22) [hereinafter *Frontier Dispute*].

[53] Int'l Law Comm'n, Guiding Principles Applicable to Unilateral Declarations of States, Capable of Creating Legal Obligations (2006) [hereinafter ILC Guiding Principles], *available at* legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_9_2006.pdf.

[54] For instance, Egypt's 1957 declaration on the Suez Canal, Jordan's 1988 declaration waiving claims to West Bank territories, or the "Ihlen" declaration of Norway at issue in the *Eastern Greenland* case. See Eighth Report of the Special Rapporteur, UN Doc. A/CN.4/557.

[55] Caron, *supra* note 9, at 653. Saganek similarly finds it "unquestionable that the word 'act' [in the concept of unilateral act] is broad enough to embrace legislative acts." Przemysław Saganek, Unilateral Acts of States in Public International Law 255 (2016).

[56] Saganek, *supra* note 55, at 70–73. Examples include claims of maritime zones, grants of nationality to a person, plane, or ship, permission of overflight of national territory, and declarations of a commercial embargo, war or neutrality. Pierre-Marie Dupuy, Droit international public 355 (2006).

[57] Saganek, *supra* note 55, at 255.

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are another.[58] Legislation establishing maritime zones has also been characterized as a unilateral act. The *Norwegian Fisheries* case, for instance, centered on Norway's unilateral claim of rights to maritime areas, vis-à-vis other states, made by way of domestic law. The ICJ considered that "the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it," even if the validity of the delimitation with regard to other states depended on international law.[59] Although this was primarily a unilateral claim of *rights* via legislation, "[i]t is equally possible . . . for a state to undertake *obligations* . . . simultaneously under both national and international law."[60] Lastly, Dehaussy includes domestic laws on personal jurisdiction with regard to foreigners as unilateral acts.[61]

If, however, every domestic law qualified as a unilateral act, this could "lead to complete confusion."[62] As the *Tidewater v. Venezuela* tribunal put it, "[t]he great majority of legislation enacted by states produces its effects solely on the municipal plane, and one must carefully distinguish the much smaller category of cases in which the state *intended* its legislation to produce opposable effects in international law."[63]

Do FILs display the intention to be considered as international unilaterally assumed obligations? It is necessary here to make two distinctions: first, between the arbitration consent clause of a FIL and the remainder of the statute, including the substantive investor protections;[64] and second, between unilateral acts adopted "in the framework of a treaty" and unilateral acts "*stricto sensu*."[65]

[58] Austria's Federal Constitutional Act of 26 October 1955, declaring the state's permanent neutrality, has been characterized as a legislative unilateral undertaking. Camille Goodman, Acta Sunt Servanda*?: A Regime for Regulating the Unilateral Acts of States at International Law*, 25 AUST. Y.B. INT'L L. 43, 50, 58 (2006). Some authors debate this conclusion, denying that such laws could have international effects. *See* DEGAN, *supra* note 16, at 299; Josef Kunz, *Austria's Permanent Neutrality*, 50 AJIL 418, 421 (1956). The better view is that the neutrality law imposed certain unilaterally assumed obligations on the neutral state, matched by other states undertaking obligations to respect this neutrality in later unilateral or multilateral acts. ECKART, *supra* note 49, at 107.

[59] Fisheries Case (UK v. Nor.), Merits, Judgment, 1951 ICJ Rep. 116, 132 (Dec. 18).

[60] Caron, *supra* note 9, at 653 (emphasis added). See also DEGAN, *supra* note 16, at 333–38 on unilateral claims of maritime rights; First Report of the Special Rapporteur, UN Doc. A/CN.4/486, at para. 113 ("[I]t is not inadmissible for a State, through its internal legislation, to grant certain rights to another State or States.").

[61] Jacques Dehaussy, *Les actes juridiques unilatéraux en droit international public: à propos d'une théorie restrictive*, 92 J. DROIT INTERNATIONAL 41, 55–56 (1965).

[62] *Id.* at 73.

[63] Tidewater Inc. v. Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction, para. 89 (Feb. 8, 2013) [hereinafter *Tidewater*] (emphasis added). *See also* First Report of the Special Rapporteur, *supra* note 60, para. 109 (identifying the relevant distinction between "internal legal acts of States which have international effects" and "internal legal acts which do not produce international effects and which therefore cannot be regarded as unilateral acts of States").

[64] There is no problem in analyzing some parts of a declaration as a binding unilateral act while other parts are not. ECKART, *supra* note 49, at 223. Many FILs contain provisions imposing obligations on *investors*. Mongolia's FIL, for instance, provides that investors have an obligation "to conduct environmentally friendly investment activities that respect consumer interests and support human development," while Kyrgyzstan's FIL requires foreign investors to make social insurance contributions for their employees. *See* Law on Investment, Art. 7.2.4 (2013), *available at* investmentpolicyhub.unctad.org/InvestmentLaws/laws/124; Law on Investments, Art. 17(1) (2003), *available at* investmentpolicyhub.unctad.org/InvestmentLaws/laws/111. Such provisions obviously cannot be considered as unilaterally assumed obligations of the host state.

[65] On the second distinction, see Final Report of the Working Group, UN Doc. A/CN.4/L.703, at para. 3; *Tidewater*, *supra* note 63, para. 92. The *Tidewater* tribunal also identified a third category of unilateral acts required to be done "in the formation or the execution of [a] treaty," which are clearly not unilateral acts relevant to present analysis.

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Arbitration consent clauses

Many arbitral tribunals have characterized clauses in FILs consenting to ICSID arbitration as a unilateral act adopted in the framework of a treaty, namely the ICSID Convention. In doing so, they have drawn an analogy to Optional Clause declarations adopted under Article 36(2) of the ICJ Statute, which are frequently viewed as a *sui generis* category of unilateral act.[66] The *Tidewater* tribunal saw the Optional Clause as "very similar to a unilateral offer to arbitrate . . . both being offers that will deploy their effect on the international plane."[67] The *CEMEX* and *Mobil* tribunals (both chaired by former ICJ President Gilbert Guillaume) found parallels in the offer of consent to international jurisdiction, made within an instrument adopted under a treaty framework (the ICJ Statute or the ICSID Convention) but not itself governed by the rules of treaty interpretation.[68] Meanwhile, citing *Tidewater* and *Mobil*, the tribunal in *Lighthouse Corporation v. East Timor* held simply that "[i]t is well established that legislation expressing consent to ICSID jurisdiction constitutes a unilateral declaration of a state formulated in relation to a treaty."[69] None of these tribunals were troubled that the unilateral act was contained in domestic legislation rather than executive action.

This characterization of "unilateral act adopted in the framework of a treaty" has a number of consequences. While unilateral acts *stricto sensu* are said to require a restrictive interpretation (as discussed below), interpretation of a treaty-based unilateral act is more flexible.[70] For present purposes, however, a more important consequence is that the arbitration clause creates an international obligation. Given the parallels identified by the *CEMEX* and *Mobil* tribunals, the characterization is entirely plausible for FILs granting consent to ICSID arbitration.

But does it also apply to FILs granting consent to arbitration under UNCITRAL or other rules, which are not covered by any treaty framework like the ICSID Convention? For the tribunals just discussed, the important factor was less the surrounding treaty framework and more the analogy to Optional Clause declarations. In interpreting the consent clauses, the cases rely on ICJ jurisprudence interpreting the Optional Clause, including the *Fisheries Jurisdiction* and *Anglo-Iranian Oil* cases.[71] The *Tidewater* tribunal noted that it was "in particular the effect of submission to the jurisdiction of an international tribunal" that placed the FIL consent clause into this category of unilateral acts.[72] The *Pac Rim* tribunal applied this

[66] Eva Kassoti, The Juridical Nature of Unilateral Acts of States in International Law 51–54, 99 (2015); Eckart, *supra* note 49, at 74.

[67] *Tidewater*, *supra* note 63, para. 94.

[68] *CEMEX*, *supra* note 15, paras. 77–79; Mobil Corp. v. Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, paras. 83–85 (June 10, 2010) [hereinafter *Mobil*].

[69] Lighthouse Corp. Pty Ltd. v. East Timor, ICSID Case No. ARB/15/2, Award, para. 151 (Dec. 22, 2017) [hereinafter *Lighthouse Corp.*]. *See also* Southern Pacific Prop. (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, para. 61 (Apr. 14, 1988) [hereinafter *SPP* Jurisdiction]; PNG Sustainable Dev. Prog. Ltd. v. Papua New Guinea, ICSID Case No. ARB/13/33, Award, paras. 258–65 (May 5, 2015) [hereinafter *PNG*]; *OPIC*, *supra* note 27, paras. 75–79; *Brandes*, *supra* note 15, para. 36; all adopting the characterization of unilateral act in the framework of a treaty and (apart from the earlier *SPP* case) citing *CEMEX* and *Mobil*.

[70] *See, e.g.*, *Tidewater*, *supra* note 63, para. 99.

[71] Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 ICJ Rep. 432 (Dec. 4); Anglo-Iranian Oil (UK v. Iran), Judgment, 1952 ICJ Rep. 93 (July 22).

[72] *Tidewater*, *supra* note 63, para. 99. On non-ICSID tribunals as international tribunals, see Chester Brown, A Common Law of International Adjudication 11 (2007).

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analysis even though the FIL in that case contained consent both to arbitration under a treaty (the ICSID Convention) and to arbitration outside a treaty framework (under the ICSID Additional Facility Rules).[73] On this basis, non-ICSID consent clauses can also plausibly be treated as unilateral acts in this sense.

Substantive protections

If a FIL's arbitral consent clause constitutes a unilateral act, can the same characterization apply to the statute's other provisions, most importantly its substantive investor protections? There is little direct tribunal support for this proposition. As discussed below, *ABCI v. Tunisia* explicitly rejects it, although the tribunal's reasons for doing so are opaque. Other tribunals may have implicitly rejected the proposition; some have suggested that FIL breaches amount to breaches of an investment treaty's "umbrella" clause,[74] perhaps implying that substantive FIL protections are only domestic statutory obligations, to be transformed to international breaches by way of the umbrella clause.[75] Other tribunals have characterized FILs as part of domestic law,[76] found that domestic law governed the claim,[77] or distinguished FIL claims from treaty claims,[78] with no mention of unilateral acts. Still other decisions have described FILs as unilateral acts without explicitly limiting this characterization to the consent clause.[79] However, these descriptions were included as part of an analysis of the consent clause itself, suggesting that they do not carry any wider implications. Thus, no tribunal has offered clear reasoning to reject the view that substantive FIL protections are unilateral acts, at best implying or assuming the issue to be inapplicable.

Scholarship on FILs similarly leaves the characterization of the statutes unresolved. Authors such as Caron purport to address whether "national foreign-investment laws [can be viewed] as unilateral acts under international law" without restricting this inquiry to consent clauses.[80]

[73] Pac Rim Cayman LLC v. El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, paras. 5.32–.34 (June 1, 2012) [hereinafter *Pac Rim* Jurisdiction]; *see* El Salvador's 1999 FIL, Art. 15 (prior to amendments in 2013). Arbitration under the ICSID Additional Facility Rules is not governed by the ICSID Convention. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 240 (2012).

[74] Some investment treaties contain umbrella clauses, which enable investors to claim violations of any other obligations assumed by the state with respect to investors, such as contractual or legislative obligations (although the clauses' exact scope is debated). *See* DOLZER & SCHREUER, *supra* note 73, at 166–78.

[75] *AES*, *supra* note 11, para. 333; Khan Resources Inc. v. Mongolia, PCA Case No. 2011-09, Award on the Merits, para. 366 (Mar. 2, 2015) [hereinafter *Khan*]; Liman Caspian Oil B.V. v. Kazakhstan, ICSID Case No. ARB/07/14, Award, para. 448 (June 22, 2010).

[76] Petrobart Ltd v. Kyrgyzstan, Award, 50 (UNCITRAL Feb. 13, 2003); *Caratube*, *supra* note 11, para. 655; Iurii Bogdanov v. Moldova, Arbitral Award, 4, 12–13 (SCC Sept. 22, 2005) [hereinafter *Bogdanov*].

[77] Zhinvali Development Ltd. v. Georgia, ICSID Case No. ARB/00/1, Award, para. 375 (Jan. 24, 2003); Ruby Roz Agricol LLP v. Kazakhstan, Award on Jurisdiction, para. 147 (UNCITRAL Aug. 1, 2013) [hereinafter *Ruby Roz*].

[78] Metal-Tech Ltd. v. Uzbekistan, ICSID Case No. ARB/10/3, Award, para. 389 (Oct. 4, 2013).

[79] Antoine Lahoud v. Democratic Republic of the Congo, ICSID Case No. ARB/10/4, Award, para. 281 (Feb. 7, 2014) [hereinafter *Lahoud*]; Société Resort Company Invest Abidjan v. Ivory Coast, ICSID Case No. ARB/16/11, Decision on the Respondent's Preliminary Objection to Jurisdiction, para. 157 (Aug. 1, 2017) [hereinafter *Société Resort*] ("the 2012 Code is a unilateral act on the part of the Côte d'Ivoire"); Venoklim Holding B. V. v. Venezuela, ICSID Case No. ARB/12/22, Award, para. 87 (Apr. 3, 2015) ("in this case the unilateral act (the promulgation of the Investment Law) is allegedly the act by which the Venezuelan state expressed its consent to submit itself to an international jurisdiction").

[80] Caron, *supra* note 9, at 649.

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Nevertheless, despite this broadly framed question, Caron's conclusions are targeted only at "assessing whether the text of a national foreign investment law constitutes a consent to ICSID arbitration."[81] Similarly, Potestà notes broadly that "these laws . . . contain assurances given by host states," but ultimately only discusses consent clauses.[82] Mbengue also appears to assume that FILs can be construed as unilateral acts "[t]o a certain extent," but suggests that "only some of their provisions" (namely, sufficiently clear arbitral consent clauses) qualify as such.[83] Conversely, Kjos appears to treat FIL claims as domestic law claims, but without considering the unilateral act issue.[84]

Another possibility is that the investor protections in FILs are unilateral acts "*stricto sensu*." This second category of unilateral acts, identified above, was the focus of the ILC study and Guiding Principles, synthesizing the ICJ's pronouncements in *Nuclear Tests* and later cases.[85] The category covers unilateral acts "formulated by States in exercise of their freedom to act on the international plane,"[86] including the kind of declarations made by France in *Nuclear Tests* itself. To qualify as a unilateral act, according to the ICJ and the Guiding Principles, declarations must 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 were made," and "reactions to which they gave rise" will also affect a determination of whether a unilateral declaration is legally binding.[87]

Neither the Guiding Principles nor the ILC study identify FILs as a particular category of domestic laws that might qualify as unilateral acts.[88] Nevertheless, FILs appear to fulfill some of the basic requirements of such acts, as articulated, for example, in the ICJ's *Nuclear Tests* decision. As legislation adopted by national parliaments, FILs are formal declarations, made by an authority with power to bind the state. As discussed above, even if executive conduct is more typically at issue in unilateral act analyses, there is no good reason to exclude legislative conduct, and there are existing instances of legislation being taken to bind the state internationally. FILs are also publicly made declarations, since they are frequently posted on websites and online databases,[89] often with unofficial translations into English. Although the publicity requirement does not necessarily require broadcasting the declaration to the entire world, it does require communication to intended addressees.[90] Where those addressees are diffuse and not specifically identified in advance, as in the case of foreign investors, publishing the

[81] *Id.* at 673.

[82] Potestà, *supra* note 9, at 150, 160.

[83] Mbengue, *supra* note 9, at 183, 204.

[84] Hege Elisabeth Kjos, Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law 176, 188–89 (2013).

[85] Final Report of the Working Group, *supra* note 65, para. 3; ILC Guiding Principles, *supra* note 53, pmbl.

[86] Final Report of the Working Group, *supra* note 65, para. 3.

[87] ILC Guiding Principles, *supra* note 53, Principles 1, 3, 4, 7; *Nuclear Tests*, *supra* note 46, paras. 43–46; *Armed Activities*, *supra* note 52, paras. 49–50.

[88] Caron, *supra* note 9, at 669; Mbengue, *supra* note 9, at 194.

[89] See the public databases at UNCTAD, Investment Laws Navigator, *supra* note 29, and ICSID, Investment Laws of the World, *available at* icsid.worldbank.org/en/Pages/resources/Investment-Laws-of-the-World.aspx. Reisman and Arsanjani observe that this widespread publication often occurs in relation to inducements for foreign investment. Michael Reisman & Mahnoush Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 ICSID Rev. 328, 329 (2004).

[90] Eckart, *supra* note 49, at 242; *see also* Kassoti, *supra* note 66, at 33; Eric Suy & Nicolas Angelet, *Promise*, *in* Max Planck Encyclopedia of Public International Law, at para. 14 (Rüdiger Wolfrum ed., 2007).

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legislation available to anyone in the world may well be the only means to satisfy this requirement. The content of FILs can also be characterized as "clear and specific." While the precise meaning of "expropriation" and other investor protections in FILs terms may be undefined or contestable, these terms are no less so when used in a FIL than when they are in a BIT or in custom. The lack of clarity is therefore unlikely to prevent the terms from qualifying as "clear and specific."

As for the reactions of addressees, Eckart observes that the ILC's reference to this factor appears to contradict the ICJ's insistence that reliance on or acceptance of a unilateral declaration is not required in order for the declaration to be binding.[91] Eckart resolves this contradiction by treating addressees' reactions as relevant in a negative sense: where addressees actively *reject* the state's undertaking, it will not be binding in relation to those addressees.[92] This factor is unlikely to affect the characterization of FILs, since investors would seem to have no reason to actively reject FIL protections.[93]

The intention to be bound requirement, however, is likely to be the major point of debate in any argument that substantive FIL provisions qualify as unilateral acts *stricto sensu*. As the ICJ explained in *Frontier Dispute*, "it all depends on the intention of the State in question."[94] An initial issue is whether intent is to be assessed subjectively or objectively. The Court has said that it must "form *its own* view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation."[95] The state's subjective (or actual) intent is thus not the focus of the inquiry. But neither does intention depend on the subjective understanding of the addressee. In *Nuclear Tests*, the applicants (Australia and New Zealand) both argued that they did *not* view France's statements as internationally binding obligations, and yet the Court determined otherwise.[96] Instead, as commentators have said, "the only sensible approach"[97] is to identify the state's "declared intent" by considering "whether other states . . . could reasonably assume that the statement constituted a commitment."[98] This test has been followed in state practice; in pleadings on unilateral acts in their dispute before the ICJ, for example, both Bolivia and Chile have accepted that an objective test applies.[99]

Can it be said that states objectively intend substantive FIL provisions to "produce opposable effects in international law"?[100] FILs do have some characteristics suggesting this

[91] ECKART, *supra* note 49, at 248–50; *see also Nuclear Tests*, *supra* note 46, para. 43.

[92] ECKART, *supra* note 49, at 250; *see also* 205.

[93] Rejecting FIL protections before accepting them can be contrasted with *waiving* breaches after having accepted them, discussed below, which might arise as part of a negotiated deal between an investor and a host state.

[94] *Frontier Dispute*, *supra* note 52, para. 39.

[95] *Nuclear Tests*, *supra* note 46, para. 48 (emphasis added). *See also Frontier Dispute*, *supra* note 52, para. 39.

[96] France did not appear in the case. However, certain views that it expressed elsewhere suggest that it would even have agreed with the applicants that its statements were not intended as unilaterally assumed international obligations. *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 351 (2006).

[97] ECKART, *supra* note 49, at 209, citing Franck (*supra* note 51) and Goodman (*supra* note 58), amongst others.

[98] Franck, *supra* note 51, at 616–17.

[99] Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Memorial of the Government of the Plurinational State of Bolivia, para. 334 (Apr. 17, 2014), (the question is whether "a party in good faith would understand that text as embodying an international legal commitment" when "viewed objectively"). Counter-Memorial of the Republic of Chile, 63 n. 204 (July 13, 2016) ("what is crucial is the intention of the declaring State, objectively assessed").

[100] *Tidewater*, *supra* note 63, para. 89.

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intention. Even if form is not determinative,[101] compared to oral declarations, written legal instruments—particularly those, like FILs, debated in national parliaments and often drafted with assistance from international institutions[102]—are more likely to "manifest the will to be bound" to a reasonable addressee.[103] As with statutes on nationality, neutrality, and maritime zones, and unlike most domestic legislation, FILs have a clear international element, addressing the state's relations with foreigners. As the *Lahoud* tribunal noted, FILs often make direct or indirect reference to international law in their substantive provisions, perhaps indicating the state's desire to "produce effects in the international legal order."[104] Moreover, FILs cannot be viewed as mere political promises of the kind noted by the ICJ in *Nicaragua*.[105] The statutes are framed in the language of obligation, use mandatory phrases, provide for remedies, specify a date of entry into force, and allow for judicial settlement of disputes—all features that suggest an intention to be legally, rather than politically, bound.[106]

Of course, states do not *need* to enact FILs in order to offer investment protections, since treaties are an available (and often utilized) option. Does this affect a finding of objective intention? Commenting on its earlier decision in *Nuclear Tests*, the Court in *Frontier Dispute* identified as a relevant circumstance that France "could not express an intention to be bound otherwise than by unilateral declarations," since it could not have concluded a treaty with Australia and New Zealand without "jeopardizing its contention that its conduct was lawful."[107] This made it more likely that France objectively intended to assume a legal obligation.[108] In the investment context, states' eagerness to conclude new investment treaties is waning,[109] probably as a result of the significant controversies these treaties have recently created. If states that still desire to offer strong investment protections are unable to find willing treaty partners, they might turn to FILs instead.[110] But it does not follow that such states could not otherwise express an intention to be bound; they could, for example, likely convince partner states to conclude investment treaties that offer protections to partner state investors but impose no reciprocal obligations on the partner states.

Nevertheless, this possibility does not preclude the unilateral act argument. The Court in *Frontier Dispute* may not have meant to suggest that binding unilateral acts may *only* be found when concluding a treaty is impossible; this would "basically abolish" the *Nuclear Tests*

[101] *Nuclear Tests*, *supra* note 46, para. 45; ILC Guiding Principles, *supra* note 53, Principle 5.

[102] See *supra* note 26. The World Bank's International Finance Corporation also maintains a set of "good practice" recommendations for the content of FILs. BONNITCHA, *supra* note 5, at 1 n. 1.

[103] Eckart envisages that a formal national act or "parliamentary involvement" can "be indicative of a state's intention to become legally bound." ECKART, *supra* note 49, at 188, 225.

[104] *Lahoud*, *supra* note 79, para. 281.

[105] *Military and Paramilitary Activities*, June 27, 1986, *supra* note 52, at 132.

[106] ECKART, *supra* note 49, at 218–19, drawing from British and Egyptian state practice, as well as an analogy with factors used to determine whether a bilateral act constitutes a treaty.

[107] *Frontier Dispute*, *supra* note 52, at 574, para. 40.

[108] By contrast, in *Frontier Dispute*, the Court saw no hindrance to Burkina Faso and Mali concluding a formal agreement on their border's location, and therefore rejected the argument that Mali was bound by a statement of its president on the topic. *Id.*

[109] UNCTAD, *supra* note 1, at 111.

[110] In an analogous context, the *Brandes v. Venezuela* tribunal had "no doubt" that Venezuela's FIL was one mechanism used to attract foreign investment given the political difficulties involved at the time in concluding an investment treaty with the United States. *Brandes*, *supra* note 15, para. 104.

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doctrine one paragraph after reaffirming it.[111] The possibility of concluding a treaty is best seen as one relevant factor, leaving the door open for FILs to be characterized as unilateral acts.

A further potential roadblock to the unilateral act argument can also be dismissed. Unilateral acts must express "a state's *unconditional* decision to follow a certain line of future action."[112] Rather than a binding unilateral promise, it might be argued that at least some FILs are intended only as an *offer* to protect foreign investors in specified ways, which would require an acceptance from the investor before becoming binding. It is true that, unlike investment treaties, some FILs require foreign investors affirmatively to apply to and be approved by the state before the statute's protections apply.[113] Where the state has reserved discretion to refuse an investor's FIL application in this way, it is more difficult to view the FIL as a unilateral act. Such a situation looks more like a traditional contract, where the FIL might be seen as a preliminary expression of willingness to negotiate,[114] and the investor's application characterized as the formal offer, followed by the state's acceptance. Once an application is approved, rather than representing unilaterally assumed international obligations, such FILs might perhaps be viewed as contracts between the investor and the host state, the terms of which are the provisions of the FIL.[115] Even FILs not requiring prior approval of investment applications might still be seen as an offer of specified protections, which the investor accepts by investing in the state in accordance with the FIL. Either version of this contractual, offer-and-acceptance frame would take the FIL outside the purview of a unilateral act.[116]

This characterization has, however, found very limited favor in tribunal practice. Most decisions that address the point have downplayed or rejected the contractual argument when characterizing FIL arbitration clauses.[117] At first glance, the argument is supported in *ABCI v. Tunisia*, the only case that explicitly rejects the unilateral act characterization. The tribunal majority held that "[t]he investor's argument according to which the 1969 law constitutes a unilateral act within the meaning of international law is not sustainable, due as much to the distinct nature of these acts as to the investor's recourse to procedures

[111] ECKART, *supra* note 49, at 159; *see Frontier Dispute*, *supra* note 52, at 573–74. *See also* Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, at para. 96 (Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat & Christian J. Tams eds., 2012).

[112] ECKART, *supra* note 49, at 219 (emphasis added).

[113] For discussion of one such FIL, see *Société Resort*, *supra* note 79.

[114] MINDY CHEN-WISHART, CONTRACT LAW 52 (2012); UN Convention on Contracts for the International Sale of Goods, Art. 14(2), *entered into force* January 11, 1988, 1489 UNTS 3.

[115] This argument recalls the "deniers" discussed in Kassoti, who deny that obligations can arise from acts of purely unilateral origin, and treat all unilateral acts instead as, one way or another, part of the formation of an agreement. KASSOTI, *supra* note 66, at 81–84.

[116] Arguably similar to Albania's declaration at issue in the *Minority Schools* advisory opinion at the PCIJ. *Id.* at 107–109; *cf.* ECKART, *supra* note 49, 88–93.

[117] In an ICSID case where a FIL requiring state approval of investments was in issue, the tribunal appeared to consider that the initial approval process was contractual in nature, but once an investment certificate had been granted, bringing the investor under the protection of the FIL, at least the law's arbitration clause was to be treated as a unilateral act (if not the substantive provisions, on which the tribunal did not comment). *See Lighthouse Corp.*, *supra* note 69, paras. 151, 333. In a similar ICSID case concerning a FIL requiring prior state approval, the tribunal did not place any significance on the approval requirement, and both the parties, the tribunal majority, and the dissent all treated the arbitration clause as a unilateral act. *Société Resort*, *supra* note 79, paras. 60, 79, 157; Société Resort Company Invest Abidjan v. Ivory Coast, ICSID Case No. ARB/16/11, Dissenting Opinion of Kaj Hobér, para. 5 (Aug. 1, 2017). In fact, the respondent state explicitly *rejected* the application of contractual principles. *Société Resort*, *supra* note 79, at para. 73.

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specified by Tunisian legislation."[118] This holding followed a brief discussion of the investor's efforts to have its investment approved by Tunisian authorities, perhaps suggesting that the majority saw the FIL in a contractual context of negotiations, offers, and acceptances. The tribunal majority did not, however, offer any explanation of how unilateral acts have a "distinct nature" from FILs or why the investor's recourse to legislative procedures was relevant, limiting the persuasive value of its conclusions. This analysis preserves space for the view that substantive FIL provisions are not part of a contractual offer-and-acceptance process but are objectively intended as binding unilateral promises.

Finally, do any of the seven reasons discussed in Part II for why states have adopted FILs alongside investment treaties rule out the possibility of an objective intent to undertake internationally enforceable commitments when enacting such laws? In general, these reasons do not preclude the unilateral act characterization. The first two reasons discussed—that states find enacting FILs easier than negotiating treaties, and that FILs have stronger democratic credentials—might even provide a stronger basis for viewing FIL protections (at least in more recent FILs) as unilateral international obligations, since they offer positive reasons for preferring FILs over treaties as commitment tools for foreign investment protection. The seventh reason—that states enacted FILs because they (and their international and U.S. advisers) saw them as easily terminable domestic instruments that were merely precursors to locking in international obligations via treaties—may suggest a different conclusion. But even if states viewed FILs as precursor instruments to be jettisoned once a treaty was adopted, this does not imply that states did not intend the FIL commitments to be internationally binding; like any legal instrument, they would simply remain binding until revoked. A treaty that provides for immediately effective unilateral termination cannot be considered non-binding solely for that reason.[119] Moreover, other states arguably have good reasons to think that FILs' substantive commitments *are* intended to have international effect, given their unique blend of specific application to foreigners and reference to international law principles combined with consent to international adjudication.[120]

The question of objective intention is finely balanced, and what may sway the final outcome is the principle of restrictive interpretation of unilateral acts. The ICJ has made it clear that "[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."[121] The Court has put this into practice, interpreting state declarations restrictively and declining to find binding unilateral acts in the cases since *Nuclear Tests*. Caron has argued, however, that this principle does not apply to FILs because they are carefully considered documents rather than an "unscripted statement by a diplomat," and because they do not limit sovereign rights on "territorial boundaries or military practices."[122] Indeed, to the extent that FILs largely mirror customary obligations on the treatment of aliens, states that

[118] ABCI Inv. N.V. v. Tunisia, ICSID Case No. ARB/04/12, Décision sur la Compétence, para. 101 (Feb. 18, 2011) [hereinafter *ABCI*] (author's translation). The dissenter did not squarely address the question. ABCI Inv. N.V. v. Tunisia, ICSID Case No. ARB/04/12, Opinion dissidente du Professeur Brigitte Stern (Feb. 14, 2011) [hereinafter *ABCI Dissent*].

[119] Most treaties do not permit instant unilateral termination. Laurence Helfer, *Terminating Treaties*, *in* THE OXFORD GUIDE TO TREATIES 641 (Duncan Hollis ed., 2012). Nevertheless, instant termination clauses are not unknown. Article XV(1) of the Articles of Agreement of the International Monetary Fund permits withdrawal upon notice with immediate effect.

[120] *See Lahoud*, *supra* note 79, para. 281.

[121] *Nuclear Tests*, *supra* note 46, para. 44; *see also* ILC Guiding Principles, *supra* note 53, Principle 7.

[122] Caron, *supra* note 9, at 671.

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enact such laws are not adopting greater limitations on their freedom of action than those that already exist. Nevertheless, the ICJ's dictum suggests that some arbitral tribunals may apply a high threshold before finding a FIL to be a binding unilateral act.[123]

The remainder of this Part considers the important consequences for application of state responsibility and termination of FILs that follow from characterizing FILs as unilateral acts. Before this, two preliminary questions must be addressed: the identity of the beneficiaries of unilateral FIL obligations, and the nature of the rights that those beneficiaries hold.

Beneficiaries of FIL Rights

Despite their one-sided nature, unilaterally assumed obligations in international law are owed to certain identifiable beneficiaries or addressees.[124] The precise beneficiary or addressee of a unilateral obligation will depend on the act in question. The ILC's Guiding Principles, in addition to citing "one or several states" as potential addressees of unilateral acts,[125] recognize that unilateral acts may be addressed to "the international community as a whole" or to "other entities."[126] The ILC cites the French declarations in *Nuclear Tests* as an example of an act addressed *erga omnes*, to the international community generally, despite the special interest in those declarations for Australia and New Zealand.[127]

As for "other entities," the ILC gives only the United Nations and the Palestine Liberation Organisation as examples.[128] However, there is no reason to think that private entities—individuals or corporations—could not also be the addressees of a unilateral act. It is now well accepted that treaties may create rights for individuals.[129] (Whether investment treaties in fact do so is, of course, contested,[130] but there is agreement on the principle.) Presumably, there is no greater objection to individuals (or corporations) enjoying rights granted by a unilateral act than by a treaty.[131]

Commentators have uniformly assumed that if FILs represent unilateral acts, private investors are the entities to which the state owes the obligations in the statute.[132] FIL obligations

[123] ECKART, *supra* note 49, at 213.

[124] *Id.* at 41; Franck, *supra* note 51, at 615 (unilateral acts can be made to "unspecified but ascertainable beneficiaries").

[125] In the *Nuclear Tests* case, the ICJ commented that "interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected." *Nuclear Tests*, *supra* note 46, para. 46.

[126] ILC Guiding Principles, *supra* note 53, Principle 6.

[127] *Id.*, Commentary to Guiding Principle 6, at para. 2.

[128] *Id.* (citing state practice from Switzerland and Jordan).

[129] LaGrand (Ger. v. U.S.), Judgment, 2001 ICJ Rep. 466, para. 77 (Jun. 27); Avena (Mex. v. U.S.), Judgment, 2004 ICJ Rep. 12, para. 40 (Mar. 31); KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM 3 (2011).

[130] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, at ch. 1 (2009); Anastasios Gourgourinis, *Investors' Rights* Qua *Human Rights? Revisiting the "Direct"/"Derivative" Rights Debate*, *in* THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS 147 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 179, 184–85 (2010).

[131] Paparinskis, for instance, has suggested that the protection of investors' legitimate expectations by BIT tribunals might be explained by reference to unilateral acts. MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 252 (2013).

[132] Potestà characterizes FILs as "assurances given by host states . . . to every possible foreign investor." Potestà, *supra* note 9, at 150; *see also* 162. While not discussing FILs, Reisman and Arsanjani suggest that unilateral acts in

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have, however, occasionally been described as being owed to the international community as a whole, as well as to the worldwide class of qualifying investors.[133] This seems doubtful. Unlike the French declarations in *Nuclear Tests*,[134] FILs are at least targeted at a defined class (if not specific members of that class)—namely, those private investors that meet the laws' definitions. They are not framed so broadly as to encompass the international community as a whole. Further, FILs as unilateral acts impose obligations in relation to investors only, not to their home states. There is no indication in a typical FIL that the state intends to assume obligations toward any other party. Admittedly, some FILs confirm investors' rights to transfer their profits abroad, including to their home states.[135] Others provide (alongside any dispute settlement mechanisms in the FIL itself) that investors may bring disputes to arbitration under any applicable investment treaties signed with home states.[136] But unlike BITs, FILs do not contain interstate dispute settlement clauses and do not impose any reciprocal obligations on home states; in fact, they do not refer to home states at all. Thus, the most plausible understanding of FIL obligations, conceived as unilateral acts, is as commitments unilaterally assumed toward every member of the worldwide class of investors defined in the statute.

Nature of FIL Rights

The foregoing discussion suggests an answer to the related question of the *nature* of the rights granted to investors by FILs. In the BITs context, tribunals and writers have debated three potential characterizations of investment treaty rights in international law.[137] First, investors might hold direct procedural and substantive rights under investment treaties, which they enforce in their own capacity through arbitration (the "direct" view). Second, investors might hold only procedural rights directly, enforcing substantive rights held by the treaty parties (the "intermediate" view). Third, investors might act as agents of their home state, not holding any rights themselves but exercising procedural and substantive rights derived from, and delegated to them by, their home states (the "derivative" view).[138]

general can be addressed to investors. Reisman & Arsanjani, *supra* note 89, at 339, 341. *See also* ECKART, *supra* note 49, at 308; Mbengue, *supra* note 9, at 187, 196, 205; Caron, *supra* note 9, at 653 (suggesting that FIL obligations are owed to "the international community and foreign nationals simultaneously"); Andreeva, *supra* note 9, at 138; *Tidewater*, *supra* note 63, para. 94.

[133] ECKART, *supra* note 49, at 8; Caron, *supra* note 9, at 653.

[134] The ICJ characterized the French declarations as being made *erga omnes*, to the international community as a whole. *Nuclear Tests*, *supra* note 46, para. 50.

[135] *See, e.g.*, Law of the Republic of Tajikistan on Investments, Art. 7.2 (2007), *available at* investmentpolicyhub.unctad.org/InvestmentLaws/laws/62; Burundi Investment Code, Art. 11 (2008), *available at* investmentpolicyhub.unctad.org/InvestmentLaws/laws/41.

[136] *See, e.g.*, Madagascar Investment Law, Art. 21 (2008), *available at* investmentpolicyhub.unctad.org/InvestmentLaws/laws/120; Foreign Investment Law of Somalia, Art. 19 (1987), *available at* investmentpolicyhub.unctad.org/InvestmentLaws/laws/65.

[137] Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUR. J. INT'L L. 617, 622–27 (2013); Roberts, *supra* note 130, at 184–85; DOUGLAS, *supra* note 130; Tillmann Braun, *Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law*, 15 J. WORLD. INV. & TRADE 73, 83–89 (2014).

[138] The different paradigms discussed in Part II may affect the appropriate characterization. For instance, the trade law paradigm would emphasise the interstate nature of WTO rights and construe investors' rights as derivative of home state rights, while a human rights paradigm would tend toward the direct rights view. Paparinskis,

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In relation to investment treaties, these debates are premised on a plausible claim that the home state holds rights, and that the relation between these rights and the rights of investors needs to be determined. In the FIL context, by contrast, investors' home states simply do not appear in the analytical frame, limiting the relevance of the third-party beneficiary paradigm. Given that there are only two relevant parties (the host state and the investor), the "intermediate" and "derivative" characterizations—under which certain rights are held by the home state—cannot be maintained. Under the unilateral act characterization, the most plausible view is that FILs grant rights directly to investors.

State Responsibility Under FILs

If FILs conceived of as unilateral acts grant direct rights to foreign investors, the next question is whether or how the international law of state responsibility applies to such claims. If the primary rules allegedly breached in these claims (the substantive FIL provisions) are primary rules of international law unilaterally adopted by the host state, it might follow that the secondary rules of the law of state responsibility will also be applicable. These rules are expressed in general terms to apply to any kind of international obligation binding on a state, regardless of its source.[139] However, the law of state responsibility was developed in the context of interstate claims, and—as has been examined in the context of investor-state treaty claims[140]—certain elements of the law require further analysis to explain how they do or do not apply to investor-state claims based on FILs as unilateral acts. The analysis in this section thus shines a light on the application of state responsibility in a previously unexamined context: breach of a unilateral act owed directly and solely to a private actor.

As with investment treaty claims, parts of the law of state responsibility, such as rules on attribution of conduct to states, are likely to apply in the ordinary fashion in a FIL claim, "unaffected by the identity of the beneficiary of the obligation."[141] However, the various "circumstances precluding wrongfulness" of breaches of international law call for further analysis, in particular in relation to consent (Article 20), countermeasures (Article 22), and necessity (Article 25), as do the ILC rules on remedies and on invocation.

Consent

The rule on consent provides that the wrongfulness of a breach will be precluded if the claimant has consented in advance to the breaching conduct. However, in the investment treaty context, when viewing investors as holding direct rights under treaties, it has been suggested, drawing on the human rights paradigm, that investors could only give advance

supra note 137, at 623, 627; Roberts, *supra* note 33, at 71, 73. Roberts notes that neither paradigm would support the "intermediate" view. *Id.* at 71.

[139] Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 33, UN Doc. A/56/10 (2001) [hereinafter Articles on State Responsibility and ILC Commentary] (the law of state responsibility applies to "any violation by a State of any obligation, of whatever origin" (citing the *Rainbow Warrior* case)). The circumstances precluding wrongfulness similarly apply to breach of any obligation "arising under a rule of general international law, a treaty, a unilateral act or from any other source." *Id.* at 71. A breach of a unilateral act entailing state responsibility was currently alleged by Bolivia against Chile before the ICJ. *See* Memorial of Bolivia, *supra* note 99.

[140] Paparinskis, *supra* note 137.

[141] *Id.* at 627; *see also* James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351, 355–56 (2008).

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consent to breaches of a treaty rule if the particular rule allowed for it.[142] The same position is likely to apply to FILs. Thus, consent by an investor to a state's purported breach of a FIL obligation would not preclude wrongfulness, but may instead result in a finding of *no* breach, depending on the content of the particular obligation. For instance, the fact that an investor consented to have a particular administrative procedure applied to it might mean that the procedure would not be found to breach a FIL's fair and equitable treatment obligation. Questions have also been raised in the investment treaty context over the relevance of advance consent by the *home state* to the host state's breach of an obligation toward an investor.[143] In FIL claims, by contrast, consent by the investor's home state would be entirely irrelevant, since FIL obligations are owed only to investors, not to home states.

Countermeasures

The responsibility of a respondent state toward a claimant state will be precluded if the respondent's breach was in response to a prior breach by the claimant of an obligation due to the respondent.[144] Such countermeasures may incidentally affect the *interests* of third parties, such as private traders bankrupted by countermeasures against breaches of an interstate trade agreement,[145] but they may not infringe *rights* held by third states which have not breached an international obligation to the respondent.[146] The ILC Articles do not, however, clarify whether these interstate rules apply when the claimant is a non-state actor, "so the analysis requires reasoning by analogy."[147]

Commentators have drawn numerous potential analogies to suggest the role of countermeasures in investment treaty arbitration. Few of these analogies, however, apply easily to FIL arbitration. First, if the "intermediate" or "derivative" characterizations of investment treaty rights discussed above were correct, it would be clear that respondent states could rely on countermeasures as a defense to investment treaty breaches, since investors would enjoy no substantive rights, and would be in an equivalent position to private traders in the trade law paradigm described in Part II.[148] In the FIL context, however, this does not resolve the matter, since —as discussed above—the "intermediate" and "derivative" characterizations are inapplicable.

Second, investment law is distinct from the WTO regime for trade, which establishes a *lex specialis* regime of responsibility that excludes countermeasures entirely.[149] Investment treaties "do not seem to have moved beyond their bilateral origins to form a unified system,"[150]

[142] Paparinskis, *supra* note 137, at 629–30; *see* Articles on State Responsibility and ILC Commentary, *supra* note 139, at 74 ("The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.").

[143] Paparinskis, *supra* note 137, at 630–31.

[144] Articles on State Responsibility and ILC Commentary, *supra* note 139, Art. 22. Articles 49–54 impose further conditions on the exercise of countermeasures; for instance, the countermeasure taken by the respondent must be proportional to the claimant's prior breach.

[145] *Id.* at 130, para. 5.

[146] *Id.*, para. 4.

[147] Roberts, *supra* note 36, at 399.

[148] *Id.* at 400.

[149] Joanna Gomula, *Responsibility and the World Trade Organization*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 791, 798–801 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

[150] Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 BRIT. Y.B. INT'L L. 264, 346 (2008).

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making it difficult to argue that, like the WTO, they establish any kind of separate regime that similarly excludes countermeasures. Given the necessarily decentralized nature of FILs, with each state enacting its own legislative instrument, such a unified regime is even less plausible in the FIL context, meaning that countermeasures cannot be ruled out by *lex specialis* in FIL arbitration.

Third, under ILC Article 50(1), states cannot plead countermeasures as a defense to breaches of peremptory norms, "obligations of a humanitarian character," and "fundamental human rights." As with investment treaties, however, it is difficult to argue that FIL obligations fall within any of these categories. Protection of investment does not rank as a peremptory norm, such as torture or genocide,[151] and it is unlikely to amount to "obligations of a humanitarian character."[152] Even if certain investment treaty obligations overlap with human rights obligations (such as the right to property or fair trial), they are unlikely to count as "fundamental" human rights, in part because they are not seen as non-derogable rights.[153] The same argument applies to FILs, given the similarities in content with investment treaties.

Fourth, the reference to "fundamental human rights" in ILC Article 50(1) might perhaps refer to the *structure* or nature of human rights obligations, rather than to their *content*, creating a different possible analogy with this paradigm. However, human rights obligations are usually viewed as "objective," "integral" obligations that flow from multilateral conventions or customary international law. They are not reciprocal, bilateral obligations that can be subject to countermeasures to induce compliance.[154] If investment treaty or FIL obligations were similarly "integral," this would provide a workable analogy preventing states from pleading countermeasures in investment cases. However, this is not the usual understanding of investment treaties; their obligations are typically seen as bilateral, even when expressed in the form of multilateral treaties (such as the Energy Charter Treaty or NAFTA), rather than interdependent and integral. While it is difficult to view unilateral FIL obligations as reciprocal, bilateral, *quid pro quo* obligations similar to investment treaty obligations, neither are FIL obligations equivalent to *erga omnes* human rights obligations. Thus, as with investment treaties, the differences between the structure of human rights and FIL obligations mean that a countermeasures defense is unlikely to be ruled out under Article 50(1)'s reference to "fundamental human rights."

A fifth analogy, viewing investors as holding direct rights equivalent to rights-holding third states in public international law, provides the strongest argument for the impermissibility of countermeasures. According to Paparinskis, under the direct rights model, countermeasures are not applicable in investment treaty arbitration because "the precluding wrongfulness of countermeasures, while opposable to one beneficiary (the home state), is not opposable to the

[151] *See* Valentina Vadi, Jus Cogens *in International Investment Law and Arbitration*, 46 NETH. Y.B. INT'L L. 357, 361 (2015); Paparinskis, *supra* note 150, at 318–19.

[152] Paparinskis, *supra* note 150, at 319–25.

[153] Roberts, *supra* note 33, at 71; PIETER VAN DIJK, FRIED VAN HOOF, ARJEN VAN RIJN & LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 893, 1068 (4th ed. 2006); Paparinskis, *supra* note 150, at 325–30.

[154] Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 364–76 (1994); Lea Brilmayer, *From Contract to Pledge: The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. INT'L L. 163 (2006); Paparinskis, *supra* note 150, at 330–31.

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other beneficiary (the investor)."[155] In other words, the investor and home state are viewed as distinct entities, and even if the respondent's breach is a justified countermeasure with regard to a prior breach by the home state, it cannot be so with regard to the innocent investor. Under FILs, however, there is only one beneficiary—the investor—meaning that a prior breach by the investor's home state is entirely irrelevant. Further, given that FILs as unilateral acts only create obligations for the enacting state, the investor itself has no obligations the prior breach of which might justify countermeasures. This argument would rule out the application of countermeasures in FIL claims.[156]

In relation to investment treaties, Roberts takes a different view, rejecting Paparinskis's analogy with third state rights. Her approach accepts the public international law premise that interstate countermeasures are permissible. However, Roberts adds a qualification drawn from the third-party beneficiary paradigm, arguing that investor rights "might better be understood as qualified by the initial treaty and contingent to some extent on the ongoing actions of [the treaty parties]."[157] In particular, she contends, an investor's rights under an investment treaty should be seen as contingent on continued compliance with the treaty by the home state.[158] Similarly, Roberts observes, third-party doctrines from contract law should also prevent a respondent being worse off when sued by a third party (because no defense is available) than when sued by the promisee directly.[159] Roberts thus concludes that prior home state breaches will justify countermeasures as a defense to investors' claims in investment treaty arbitration.[160]

While this analysis might make sense for investment treaty arbitration,[161] it does not apply to FIL arbitration. Investors' rights under FILs cannot be seen as conditional on their home states' conduct when those states are not party to the unilateral act creating the rights. Similarly, the contractual analogy is inapposite since, under FILs, the beneficiary and promisee are the same party. Thus, Paparinskis's two-party, absolute rights analysis, ruling out the availability of countermeasures, is a better fit for FIL arbitration.

Necessity

Unlike the defense of countermeasures, the defense of necessity does not require a prior breach of international law by the claimant, and thus could more easily apply to statutory obligations owed directly to investors.[162] This necessity defense has already been applied

[155] Paparinskis, *supra* note 137, at 632. Some cases have also taken this position. *See* Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, paras. 153–92 (Jan. 15, 2008); Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, paras. 420–30 (Sept. 18, 2009).

[156] For the same reasons, a self-defense claim would similarly be ruled out. Paparinskis, *supra* note 150, at 342.

[157] Roberts, *supra* note 36, at 400. For a similar dependent rights view, *see* Junianto James Losari & Michael Ewing-Chow, *A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law*, 16 J. WORLD INV. & TRADE 274 (2015).

[158] Roberts, *supra* note 36, at 401.

[159] *Id.*

[160] At least where the necessary prior breach by the home state has already been admitted, or ruled on by a separate tribunal given investment treaty tribunals' lack of jurisdiction to assess this. *Id.* at 402.

[161] Paparinskis labels it a "creatively rethought" version of the law of countermeasures. Martins Paparinskis, *Circumstances Precluding Wrongfulness in International Investment Law*, 31 ICSID REV. 484, 497 (2016).

[162] Paparinskis, *supra* note 150, at 342–43.

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in numerous investment treaty cases involving Argentina.[163] By and large, the tribunals in these cases have not been troubled by the defense's requirement that the respondent's conduct "not seriously impair an essential interest" of the home state; they have simply replaced the home state with the investor.[164] Necessity should similarly apply to a FIL claim, which involves unilaterally assumed obligations owed not to any state but directly to qualifying investors.

Remedies

The ILC Articles on remedies should also apply to FIL claims without difficulty. Arbitral tribunals have applied the remedies rules in the law of state responsibility 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."[165] One "technically accurate"[166] explanation for this development is that tribunals are implicitly treating investor-claimants as agents of their home state, rather than as direct rights holders, meaning that the claim remains at the interstate level. But this explanation could not apply to FILs, where the agency argument fails, as explained above.

Other possible justifications have been offered. For instance, certain remedies, such as cessation, might inherently apply whenever responsibility is established[167] and not be dependent on the state/non-state identity of the claimant. Alternatively, separate investor-state remedies rules with identical content may exist in custom, similar to the ILC's relaxed transfer of interstate rules to the Articles on Responsibility of International Organisations.[168] A related reason —and the most intuitive to justify application of the interstate rules in FIL cases—is that the rules concerning remedies are general principles that apply whenever responsibility is established regardless of the entity invoking it.[169]

However, the public law paradigm offers an important qualification here (both for investment treaty claims and FIL claims). Acknowledging the concerns of state sovereignty and eminent domain that underpin this paradigm, there may be a weaker claim that the remedy of restitution of property applies where claimants are private parties.[170] FILs do not typically

[163] *See, e.g.*, Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT'L & COMP. L. Q. 325 (2010); Robert Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AJIL 447, 497–502 (2012).

[164] Articles on State Responsibility, *supra* note 139, Art. 25(1)(b) (states may not invoke necessity unless their act "does not seriously impair an essential interest of the State or States toward which the obligation exists"); *see also* Paparinskis, *supra* note 137, at 635.

[165] Articles on State Responsibility, *supra* note 139, Art. 33(2). *See also* IVAR ALVIK, CONTRACTING WITH SOVEREIGNTY: STATE CONTRACTS AND INTERNATIONAL ARBITRATION 222–23 (2011); *cf.* Zachary Douglas, *Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID*, *in* Crawford, Pellet & Olleson, *supra* note 149, at 820.

[166] Paparinskis, *supra* note 137, at 636.

[167] Olivier Corten, *The Obligation of Cessation*, *in* Crawford, Pellet & Olleson, *supra* note 149, at 545–46; Paparinskis, *supra* note 137, at 637.

[168] Int'l Law Comm'n, Draft Articles on the Responsibility of International Organizations, with Commentaries, at 79, UN Doc. A/66/10 (finding "no reason that would suggest a different approach"). *See also* Paparinskis, *supra* note 137, at 638.

[169] The ILC relied on individual-state as well as interstate cases in developing the Articles. *See* SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 28–32 (2008); Paparinskis, *supra* note 137, at 637–38.

[170] Paparinskis, *supra* note 137, at 638, 646. *See* James Crawford, *Third Report on State Responsibility*, at para. 143, UN Doc. A/CN.4/507/Add.1.

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contain provisions specifying the consequences of a violation, but such provisions are contained in some investment treaties that limit tribunals' powers to order restitution.[171] Otherwise, the remedial rules in Part Two of the ILC Articles would most likely be applied without concern in FIL cases. Indeed, certain rules—such as on a claimant's contribution to its own injury in ILC Article 39—seem more naturally applied to a FIL claim, without the "triangular" presence of a home state, than an investment treaty claim.[172]

Invocation

The application of the ILC rules on invocation of responsibility is arguably even clearer in FIL claims than in investment treaty claims. In the latter context, Paparinskis rejects Douglas's view that a treaty breach does not injure the home state at all, and that the home state therefore has no right to invoke the host state's responsibility.[173] In the FIL context, Douglas's position seems much more apposite. If FIL obligations are not owed to any state, it is difficult to accept that an injured investor's home state has suffered injury from a breach. Certainly, the home state may have suffered a breach of customary obligations, or even treaty obligations, that have essentially the same content as the FIL obligations. The home state may be in a position to invoke responsibility for these separate breaches,[174] but that is a different matter to invoking responsibility for the FIL breach itself.[175]

Since home states have no rights, debates over when a home state might *lose* its right to invoke responsibility for an investment treaty breach therefore have no application to FIL claims.[176] Whether a home state could waive its national's FIL rights, meanwhile, would be analyzed similarly to treaty rights: if such rights are directly granted to one party (the investor), waiver by another party (the home state) is not possible.[177] An investor's ability to waive its own FIL rights might depend on the strength of the analogy to the human rights paradigm. If FIL rights are created for investors' own protection, waiver might appear doubtful,[178] but if (as is more likely) they are merely dispositive rights that can be removed by the host state at any time,[179] then they can surely be waived by the investor as well. The rule on waiver in ILC Article 45 would then apply, by analogy, with the "injured State" being replaced by the "injured investor."[180]

[171] See, e.g., NAFTA Article 1135(1), which permits tribunals to order restitution, but also permits states to elect to pay compensation instead of the restitution ordered.

[172] Particularly since Article 39 already envisages an assessment of the conduct of "any person or entity in relation to whom reparation is sought."

[173] Paparinskis, *supra* note 137, at 640–41; *cf.* Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 190–91 (2003).

[174] The home state may of course face various obstacles, including fulfilling customary rules on exhaustion of local remedies, or meeting a different definition of investment under the investment treaty compared to the FIL.

[175] FILs *could*, of course, grant such rights to states, and the argument here would then be different. However, based on a review of UNCTAD's database (*supra* note 29), no FIL currently in existence does so.

[176] For a similar debate in relation to treaty claims, see Paparinskis, *supra* note 137, at 643.

[177] *Id.* at 645; Paparinskis, *supra* note 161, at 489. Roberts's' "triangular" analysis (*supra* note 36, at 396) might entail a different view under investment treaties—the third-party beneficiary paradigm suggests that investor rights are conditional on home state conduct, including waiver. However, as explained in relation to countermeasures above, the third-party beneficiary paradigm cannot affect this issue in the FIL context.

[178] Paparinskis, *supra* note 137, at 644.

[179] Subject to the discussion below on revoking FILs.

[180] ILC Articles on State Responsibility, Article 45 provides that "[t]he responsibility of a State may not be invoked if . . . the injured State has validly waived the claim."

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Conclusions

In sum, apart from certain defenses, 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 (on consent and waiver) will disappear, and certain remedies rules may apply more easily than in BIT claims. While other defenses will remain applicable, the defense of countermeasures (and of self-defense) is more clearly excluded in FIL claims, short-circuiting the debates that have arisen on this question in the BIT context.

Revoking FILs as Unilateral Acts

If the substantive and procedural provisions of FILs are characterized as unilateral acts, when and how can those acts be revoked? The rules governing revocation of unilateral acts are unclear, leaving space for constructing new rules by analogy. This section argues that analogies drawn from public international law, in particular the practice regarding the termination of ICJ Optional Clause declarations and treaties, do not apply to FILs. Further, termination rules drawn from the third-party beneficiary paradigm, based on reliance, are also inapplicable. The section contends that analogies drawn from the commercial arbitration paradigm and public law paradigm (for FIL arbitration clauses and substantive protections, respectively) are most apposite. Both paradigms suggest that, where a FIL is silent on revocation (as in most cases), states may terminate their FILs with immediate effect.

Termination rules for investment treaties are well-established. The Vienna Convention on the Law of Treaties permits termination either by mutual consent or in accordance with the treaty's terms.[181] In general, investment treaties permit unilateral termination with prior notice, subject to a "sunset" period of continued effect for a specified number of years, often ten. Although the presence of sunset clauses has not prevented states from terminating investment treaties,[182] it naturally makes it more difficult for states to end their investment treaty commitments unilaterally. By contrast, at first glance, it might be thought that FILs are much more easily terminable via unilateral state action simply by repealing the law. Indeed, the perceived ease of termination of a FIL might encourage states to use these instruments instead of treaties, where partner state interests might be taken into account in a decision to terminate.

If FILs are characterized as unilateral acts, the question of their termination parallels the long-controversial question of revocation of unilateral acts. As Eckart observes, a corollary of allowing states to bind themselves in international law via unilateral acts is that there must also exist limits on revocation of those acts, to avoid undermining their binding nature.[183] At the

[181] Vienna Convention on the Law of Treaties, Art. 54, *opened for signature* May 23, 1969, 1155 UNTS 331 [hereinafter VCLT] (entered into force Jan. 27, 1980).

[182] States including India, South Africa, and Ecuador have terminated many of their investment treaties. *See, e.g.*, Julia Calvert, *Constructing Investor Rights? Why Some States (Fail To) Terminate Bilateral Investment Treaties*, 25 Rev. Int'l Pol. Econ. 75, 75 (2018). Many EU member states have also begun terminating intra-EU investment treaties in recent years, in light of concerns expressed over these instruments by the European Commission. *See, e.g.*, Joel Dahlquist & Luke Peterson, *INVESTIGATION: Denmark Proposes Mutual Termination of Its Nine BITs with Fellow EU Member-States, Against Spectre of Infringement Cases*, Inv. Arb. Rep. (May 2, 2016), *at* www.iareporter.com/articles/investigation-denmark-proposes-mutual-termination-of-its-nine-bits-with-fellow-eu-member-states-against-spectre-of-infringement-cases.

[183] Eckart, *supra* note 49, at 251.

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same time, however, treating unilateral acts as irrevocable would render states reluctant to undertake such acts, potentially impeding international relations by discouraging the use of a valuable commitment tool. Even treaties that do not provide for termination are terminable under certain conditions;[184] it would be curious to think that unilateral commitments were *more* binding on states than bilateral or multilateral commitments.[185]

As one FIL tribunal has acknowledged,[186] the question is not whether states can repeal FILs; they clearly have the power to do so, and the repeal might well be effective in the host state's domestic legal system. The question is the effect of such a repeal on the continuation of the rights and protections in the FIL at the international level, and the continued ability for investors to bring claims to international arbitration.

As discussed above, FIL arbitration clauses can be treated as unilateral acts "in the framework of a treaty" by analogy to the ICJ Optional Clause declaration. There were no grounds to treat substantive FIL provisions in the same way, but such provisions at least arguably fell under the separate, more general category of unilateral acts *stricto sensu*. In the interstate context, rules on termination of each category of unilateral act may not necessarily be the same.

For Optional Clause declarations, the *Nicaragua* case provides the most prominent example. In that case, the United States had purportedly withdrawn its Optional Clause declaration three days before Nicaragua filed a claim against it. The United States contended that it had a right to withdraw its declaration with immediate effect.[187] However, the ICJ considered that "the right of *immediate* termination of declarations with indefinite duration is far from established."[188] The Court then drew an analogy between unilateral declarations and treaties, based on "the requirements of good faith," and observed that treaties containing no provision on their intended duration were only terminable upon notice lasting a "reasonable time."[189] Applying this to unilateral declarations, and in particular the U.S. Optional Clause declaration, the Court held that reasonable notice must be given before a termination takes effect. The ICJ declined to define a "reasonable" notice period, but observed only that three days would not qualify.[190]

Although the analogy with Optional Clause declarations is straightforward when applied to FIL arbitration clauses, it is less convincing in the context of termination of those laws. When a state issues an Optional Clause declaration, it "makes a standing offer to the other States party to the Statute [of the ICJ] which have not yet deposited a declaration of acceptance,"[191]

[184] 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.

[185] ECKART, *supra* note 49, at 253.

[186] *AES*, *supra* note 11, para. 218.

[187] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 ICJ Rep. 392, para. 55 (Nov. 26) [hereinafter *Military and Paramilitary Activities*, Nov. 26, 1984]. The U.S. declaration in fact contained a six-month notice period, but the United States argued that reciprocity permitted it to ignore that period, since Nicaragua's own declaration allowed immediate termination.

[188] *Id.*, para. 63 (emphasis added).

[189] *Id.* Compare this to VCLT Article 56(2), which provides that parties must give twelve months' notice to terminate a treaty which contains no provisions on termination.

[190] *Id.*

[191] Land and Maritime Boundary (Cameroon v. Nigeria), Preliminary Objections, Judgment, 1998 ICJ Rep. 275, para. 25 (June 11) [hereinafter *Land and Maritime Boundary*].

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similar to a FIL offer of arbitration. But the declarant state also joins a "reciprocal and mutual network,"[192] establishing "a series of bilateral engagements with other States accepting the same obligation."[193] The state has effectively perfected its consent to adjudication with other Optional Clause states; nothing further is needed from either party before the ICJ can be seised.[194] When a state consents to arbitration in a FIL, by contrast, it has not established any engagement or joined any network, and there is not yet any perfected consent.[195] Kolb treats Optional Clause declarations as hybrids—"unilateral acts with bilateral or multilateral effects"; the unilateral element predominates in some respects, such as on interpretation, but the bilateral or multilateral element predominates in other respects, preventing immediately effective terminations.[196] FIL arbitration clauses might instead be closer to purely unilateral acts, with the adopting state's intent predominating for both interpretive and revocation purposes.

This suggests that the reasonable notice requirement for terminating unilateral acts, formulated by analogy to treaty withdrawals, will not necessarily apply to termination of FIL arbitration clauses. The rules on termination of other unilateral acts, however, might be relevant. Indeed, in discussing termination of Optional Clause declarations, the Court in *Nicaragua* notably relied on its findings from *Nuclear Tests*,[197] suggesting that—at least in relation to termination—the categories are not watertight. Furthermore, if substantive FIL clauses are viewed as unilateral acts *stricto sensu*, their termination will also be governed by general rules.

The ICJ has given only minimal guidance on the rules applicable to revocation of unilateral acts in general. In *Nuclear Tests*, the Court asserted that "the unilateral undertaking resulting from [the French] statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration."[198] Based on this statement, as well as comments in *Nicaragua* concerning reliance by addressees and an analogy with the fundamental change of circumstances doctrine in treaty law,[199] ILC Guiding Principle 10 provides that unilateral acts "cannot be revoked arbitrarily." Principle 10 further provides that, in determining arbitrariness, consideration should be given to any specific terms on revocation, any reliance by addressees, and any fundamental changes of circumstances. These considerations provide a starting-point for analyzing the termination of FILs.

[192] Robert Kolb, The International Court of Justice 455 (2013).

[193] *Military and Paramilitary Activities*, Nov. 26, 1984, *supra* note 187, para. 60.

[194] *Land and Maritime Boundary*, *supra* note 191, para. 25.

[195] The analogy might be more apt where a state is the very first to adopt an Optional Clause declaration: at that time, there is no other state in the "reciprocal and mutual network," and revocation of the declaration would have no effect on other states. It appears to be unclear which, if any one, state was in fact the first to issue such a declaration. *See* Fourth Annual Report of the Permanent Court of International Justice, Series E No. 4, 416 (1927–28).

[196] Kolb, *supra* note 192, at 455–56; cf. *PNG*, *supra* note 69, para. 265, which referred to the "hybrid" nature of FIL consent clauses in discussing appropriate interpretive principles.

[197] *Military and Paramilitary Activities*, Nov. 26, 1984, *supra* note 187, paras. 59–60.

[198] *Nuclear Tests*, *supra* note 46, at para. 51.

[199] *Military and Paramilitary Activities*, Nov. 26, 1984, *supra* note 187, para. 51; Fisheries Jurisdiction (Ger. v. Ice.), Jurisdiction, Judgment, 1973 ICJ Rep. 49, at para. 36 (Feb. 2); Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 ICJ Rep. 7, para. 104 (Sept. 25).

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Easy cases

Certain scenarios are straightforward. First, a party that has not yet invested in a state will not be able to benefit from FIL protections (either procedural or substantive) if the FIL is repealed before the investment is made.[200] Without an investment as defined in the FIL, the protections will not even apply.

Second, a state cannot terminate a pending claim by repealing the FIL on which the claim is based.[201] Once accepted, consent to arbitration cannot be revoked. Article 25(1) of the ICSID Convention, for instance, specifies that, "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally."[202] This principle would also apply where the investor has given its consent to arbitration over future FIL disputes, for instance in a separate letter to host state authorities, before the FIL is repealed. (This situation is analogous to an arbitration clause in a state contract, which is commonly treated as irrevocable because the contract itself has already perfected the parties' consent.[203]) In these circumstances, a tribunal would simply ignore the termination and proceed with the case.[204] The more difficult question, discussed below, concerns the effect of termination on future investor claims in relation to preexisting investments where the investor has not previously consented.

Third, similar to investment treaties' "sunset" clauses, some FILs contain stabilization clauses, some of which purport to preserve the law's procedural and substantive guarantees for a specified minimum duration (usually five, ten, or twenty years).[205] Where such clauses exist, they will constitute "specific terms of the declaration relating to revocation," in the words of Guiding Principle 10, and a termination in accordance with the stabilization clause (i.e., taking effect once the time period has expired) would therefore not be arbitrary. Conversely, a defense from the respondent state that the FIL was terminated will be rejected if the investor's claim was brought within the stabilization period.[206] This reasoning was on display in *Rumeli v. Kazakhstan*, where the investors' claim, commenced in 2005, was held not to be barred by the fact that Kazakhstan had repealed its FIL in 2003. The statute

[200] Jurisdiction over one claimant was rejected for this reason in *Caratube*, *supra* note 11, para. 695.

[201] In the investment treaty context, see Tania Voon, Andrew Mitchell & James Munro, *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights*, 29 ICSID REV. 451, 463–65 (2014).

[202] *See also Military and Paramilitary Activities*, Nov. 26, 1984, *supra* note 187, para. 54; Nottebohm (Liech. v. Guat.), Judgment, 1953 ICJ Rep. 111, 122 (Nov. 18) ("Once the Court has been regularly seised, the Court must exercise its powers.").

[203] *See, e.g.*, ALVIK, *supra* note 165, at 99–102.

[204] Roberts proposes the more radical view that investment treaty tribunals must relinquish jurisdiction over a pending case if the home and host states jointly terminate the treaty (acting as a unitary lawmaking sovereign). This is grounded on the public law position that states can revoke rights in the public interest, even if compensation must be paid. Roberts, *supra* note 36, at 411–14. Applied to FIL disputes, this would suggest that the state (as legislator, rather than as disputing party) could similarly terminate pending claims by repealing the statute. This may be true in a domestic context, but it takes the public law paradigm too far in the international context, and—particularly in the two-party FIL setting—downplays the disputing parties' consent to international jurisdiction.

[205] The FILs of Armenia (Article 7), Azerbaijan (Article 10), Kyrgyzstan (Article 2(2)), Mauritania (Article 5), Tajikistan (Article 5(2)), and Turkmenistan (Article 19(1)) are examples. UNCTAD, *supra* note 89.

[206] Cf. Potestà, *supra* note 9, at 154, who (without further elaboration) considers it only "arguable" that, where a FIL contains a stabilisation clause, the state's consent to arbitration cannot be instantly revoked via repeal of the FIL. *ABCI*, *supra* note 118, paras. 126–28 might also suggest that stabilisation 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 dictum, since the majority held that there *was* an acquired right to arbitration prior to the FIL's repeal.

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contained a stabilization clause purporting to guarantee that the law applicable when a long-term investment contract was signed would continue to apply until the contract expired. According to the tribunal, this meant that the investors' legal position (including their FIL rights) could not be changed until 2009.[207] Similarly, in *AES v. Kazakhstan*, a case brought under the same law, the tribunal considered whether the 2003 repeal affected the claimants' ability to commence arbitration in 2010, during the stabilization period. The tribunal held that repeal of the law would only affect investments made after repeal, "in particular" because of the stabilization clause.[208] Further, a change in available remedies for foreign investors should not affect preexisting investments, "which were meant to be protected for a certain duration" (i.e., the length of the stabilization period).[209]

Some FILs go beyond time-limited stabilization clauses and purport to maintain protections for existing investments indefinitely.[210] This more extreme self-limitation goes far beyond the "sunset" clauses in investment treaties.[211] However, ultimately such a commitment would likely be analyzed in the same manner as the time-limited clauses. There is no reason in principle why states cannot self-impose such constraints on their international freedom of action. Moreover, the apparently extreme nature of the restriction is tempered in at least two respects. First, the exception for fundamental changes in circumstances identified in Guiding Principle 10(c) would continue to apply.[212] Second, the indefinite protection applies only to existing investments, most of which are likely to have a natural life span of perhaps thirty years at most (say, for a complex, large-scale oilfield or mining investment). In practice, then, "indefinite" protection will persist only for a certain (albeit long-term) period.

Hard cases

The above three scenarios are relatively straightforward. More difficult questions arise in a fourth scenario: where no provision (including a stabilization clause, time-limited or not) relating to termination exists at all, as in the large majority of FILs.[213] Unlike for treaties, where VCLT Article 56 permits parties to unilaterally terminate in certain circumstances even where the treaty is silent on termination, the rules for unilateral acts in this scenario

[207] Rumeli Telekom A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, paras. 333–34 (July 29, 2008) [hereinafter *Rumeli*]. The tribunal did not discuss the legal characterization of the FIL as a unilateral act or otherwise.

[208] *AES*, *supra* note 11, para. 222.

[209] *Id.*, para. 221.

[210] See, for example, the FILs of Bosnia (Article 20), Côte d'Ivoire (Article 10), Democratic Republic of Congo (Article 40), Guinea (Article 14), and Togo (Article 54). UNCTAD, *supra* note 89.

[211] No known sunset clause purports to maintain BIT protections indefinitely. The longest such clause extends twenty-five years after the treaty's termination. Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World*, at 19 (OECD Working Papers on International Investment 2015/02, 2015).

[212] As Eckart observes, permitting revocation in this situation is hardly arbitrary, making Principle 10(c) of little added value. ECKART, *supra* note 49, at 259.

[213] UNCTAD, *supra* note 2, at 5 indicates that only twenty-seven of the laws in UNCTAD's sample have stabilisation clauses, suggesting that most FILs do not contain such clauses. UNCTAD's online database in fact counts only nineteen FILs with stabilisation clauses. UNCTAD, *supra* note 89. Patrick Dumberry, *The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws*, 2 MCGILL J. DISP. RES. 67, 76 (2015–16) counts only sixteen.

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are less clear. ILC Guiding Principle 10 precludes arbitrary revocation. But what amounts to arbitrariness for FILs that contain no provisions relating to that topic?

In a recent study of unilateral acts in general, Eckart concluded that it was not possible to state any firm rules on revocability, given "too much disagreement, too little state practice and only limited jurisprudence."[214] *Lex ferenda*, Eckart supported drawing an analogy with the law of treaties as the best available guidance, meaning that unilaterally assumed obligations could be renounced as long as reasonable notice was given. In his view, by analogy to VCLT Article 56(2), the default notice period should be a twelve-month minimum.[215] This approach makes sense in the classical public international law paradigm, where both promisors and promisees are states, and where good faith is an important overriding principle. But, like investment treaties, FILs entail grants of rights by states to private parties, creating a different kind of relationship than one between equals governed by good faith. In the context of revocation, the other paradigms analyzed in Part II might be more useful in advancing the analysis.

The previous discussion of countermeasures dismissed the relevance of the third-party beneficiary paradigm. Nevertheless, the paradigm introduces concepts of reliance by beneficiaries on rights granted by others that are worth considering in the revocation analysis. While it is difficult to view investors as third parties in the FIL context, they might perhaps be viewed as *second*-party beneficiaries of FIL rights conferred by states, similar to viewing two investment treaty states parties as a unitary "joint sovereign" that confers rights on investors.[216] If a second- or third-party beneficiary has relied on rights, they may become irrevocable[217] or only conditionally revocable. Guiding Principle 10(b) endorses this idea, requiring consideration of addressees' reliance on a state's unilaterally assumed obligations in order to determine whether revocation would be arbitrary.[218]

At first glance, the *Rumeli v. Kazakhstan* tribunal appears to support this view, relying on the concept of "accrued rights" to suggest that FIL protections in that case were irrevocable. In the tribunal's view, this position was "well established in international law," and stemmed from "the principles of good faith, estoppel and *venire* [*contra*] *factum proprium*."[219] In this portion of its reasoning, the tribunal placed no explicit timeline on the FIL's operation, apparently indicating a view that the rights continued indefinitely. However, as noted above, the Kazakh FIL contained a stabilization clause. The tribunal's ultimate finding of jurisdiction relied both on its general analysis based on accrued rights and on the stabilization clause. It is unclear whether the tribunal would have reached the same result in the absence of the stabilization clause.[220]

[214] ECKART, *supra* note 49, at 276.

[215] *Id.* at 290, 297.

[216] *See* Roberts, *supra* note 36, at 375 (discussing "joint sovereigns"). The "second-party beneficiary" view recalls Special Rapporteur Fitzmaurice's proposal for a VCLT rule on unilateral declarations benefiting another state, alongside the rule on treaty provisions benefiting a third state. *See* Int'l Law Comm'n, Fifth Report on the Law of Treaties, Draft Art. 22, UN Doc. CN.4/130, [1960] 2 Y.B. INT'L L. COMM. 69, 81. The draft rule was later removed as not strictly relating to treaties.

[217] Where addressees have reasonably and detrimentally relied on a unilateral promise, it may become "de facto irrevocable." ECKART, *supra* note 49, at 267.

[218] *Cf.* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 421–22 (2012) (distinguishing unilateral acts from acts giving rise to estoppel).

[219] *Rumeli*, *supra* note 207, para. 335.

[220] In *ABCI*, *supra* note 118, para. 128, Tunisia contended that the *Rumeli* tribunal's reasoning on accrued rights was only *obiter*, because the stabilisation clause answered the point already.

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AES v. Kazakhstan also appears to support a reliance approach. There, the tribunal rejected the extreme position that states could never retract consent to arbitration made in a FIL.[221] At the same time, the tribunal also rejected the view that repealing a FIL meant instant revocation of consent. Instead, the question depended on "the specificities of ICSID arbitration, the sovereignty of States with regard to their national legislation, the aim and object of the relevant national law and the protection afforded therein, as well as the specific wording of the relevant legal instruments."[222] Given the "objectives of the ICSID Convention and the nature of treaty [sic] claims,"[223] the tribunal appeared to favor an "international public law" approach, based on unilateral declarations, estoppel, and good faith, limiting a state's freedom to withdraw a unilateral commitment "when such declaration was made in unequivocal terms and the other party has relied upon it."[224] This meant that FILs could not be terminated "unilaterally and *with immediate effect*."[225] Although, as discussed above, the tribunal resolved the issue by applying the statute's stabilization clause, the reasoning supports the "reasonable notice" view even in the absence of such a clause.

However, as to whether FIL rights are irrevocable or only conditionally revocable, the concept of reliance in the third-party (or second-party) beneficiary paradigm, and the *Rumeli* and *AES* tribunals' references to estoppel, are unlikely to be relevant.[226] First, it is not clear that estoppel applies to the investor-state relationship; it is arguably reserved for situations of interaction between juridically equal actors.[227] Second, even if estoppel does apply, it is intended to be a last resort argument, and would prevent revocation only in the "probably rather rare" situation that no alternative measure (such as sufficient advance notice) could adequately protect investors' reliance interests.[228] Third, the investor's reliance must be reasonable. It is arguably not reasonable for an investor to "make far-reaching arrangements to its future detriment in reliance on the perpetual existence" of FIL protections when there is at least a possibility that those protections might be revoked.[229]

A fourth reason relates to the detrimental nature of the investor's reliance.[230] This would require evidence that the investment had been made after the FIL was

[221] *AES*, *supra* note 11, at para. 215.

[222] *Id.* at para. 216. The tribunal also cited another factor pointing against instant termination: a lack of "evidence beyond the general repeal of the 1994 FIL that Respondent had any intention of cancelling its 'standing consent' to arbitration." *Id.*, para. 220. However, this reasoning is doubtful. A deliberate, considered, parliamentary decision to repeal a law granting consent to arbitration is surely persuasive evidence that a state no longer consents to arbitration. In *AES*, further evidence actually existed, since Kazakhstan replaced the repealed FIL with a new law that contained no advance consent to arbitration. *See* Article 9(2) of the 2003 FIL, *available at* www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ42_LEG_1.pdf.

[223] *AES*, *supra* note 11, para. 219.

[224] *Id.*, para. 208.

[225] *Id.*, para. 220 (emphasis added).

[226] *Cf.* Lucy Reed, Jan Paulsson & Nigel Blackaby, Guide to ICSID Arbitration 54 (2011) (suggesting that estoppel may prevent a state from revoking an offer of consent).

[227] Roberts, *supra* note 130, at 214; Paparinskis, *supra* note 131, at 253; Jarrod Hepburn, Domestic Law in International Investment Arbitration 157–58 (2017); *cf.* Andrea Steingruber, Consent in International Arbitration 221 (2012). Eckart consolidates other authors' views into the position that estoppel applies to conduct of states in relation to "another subject of international law," thus likely including investors. Eckart, *supra* note 49, at 281.

[228] Eckart, *supra* note 49, at 290.

[229] *Id.* at 289; Roberts, *supra* note 130, at 210; Roberts, *supra* note 36, at 409–10.

[230] *Cf.* Eckart, *supra* note 49, at 283.

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adopted,[231] and would not have been made without the FIL. This will be difficult to prove for any specific investment. It is uncertain whether investors actually rely on investment *treaty* protections in making investment decisions.[232] The same uncertainty presumably applies to *statutes* that protect investments. And there is little support for the argument that unilateral acts in general are irrevocable or persist indefinitely.[233] The ILC finds "no doubt that unilateral acts may be withdrawn or amended in certain specific circumstances."[234]

Other paradigms discussed in Part II have greater relevance and favor separate treatment of FIL arbitration clauses and substantive provisions.[235] For arbitration clauses, the commercial arbitration paradigm and its contractual basis[236] provide a useful reference point. Even for unilateral acts adopted in the framework of a treaty, FIL arbitration clauses bear similarities to contractual offers, which require acceptance before becoming binding, and may be revoked without notice prior to acceptance. A former secretary-general of ICSID, Antonio Parra, has suggested that "the State may, by repeal or amendment of the investment law, withdraw its consent to arbitration" at any time until an investor lodges its own consent by filing an arbitration, or by filing a notice of advance consent at the time of making its investment (as some FILs require).[237] Once the mutual consent is in place, the arbitration "cannot be upset by any subsequent modification or repeal of the investment law concerned";[238] but before this point, repeal is effective to remove jurisdiction. Parra also contrasts FILs with investment treaties, where a state's consent to arbitration is "more difficult to withdraw" because of treaty sunset clauses.[239] In the absence of the FIL equivalent to a sunset clause—a stabilization clause—Parra's comparison supports the view that unilateral termination with immediate effect is permissible.[240] Schreuer also supports this contractual, offer-and-acceptance analysis, stating

[231] Many FILs also protect investments in existence before the statute entered into force.

[232] Geoffrey Gertz, Srividya Jandhyala & Lauge Poulsen, *Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?*, 107 WORLD DEV. 239, 239 (2018).

[233] ECKART, *supra* note 49, at 253 notes that some authors appear to support this view but nevertheless allow for exceptions, drawing analogies with the rules for treaties.

[234] ILC Guiding Principles, *supra* note 53, Commentary to Guiding Principle 10, para. 2.

[235] It might be curious to think that different parts of a FIL would be characterized differently upon repeal. But it would be possible to find that the consent clause has been validly revoked even if the substantive protections remain in force; in this situation, an investor may be able to rely on them before a tribunal constituted under some other basis, such as an investment treaty with a wide jurisdictional clause. (For instance, the claimant in *Bogdanov v. Moldova* alleged violations of a FIL even though the tribunal's jurisdiction was based on a treaty. *Bogdanov*, *supra* note 76, at 6, 12–13.) Conversely, the consent clause may remain in force while the substantive protections are validly revoked; in this situation, the claim would proceed but necessarily fail on the merits.

[236] Roberts, *supra* note 33, at 45.

[237] Antonio Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. 287, 319–20 (1997).

[238] *Id.* at 319.

[239] *Id.* at 341. UNCTAD's database (*supra* note 89) records seventy-four out of 2,573 investment treaties that do not contain a sunset clause. Similarly, an OECD review indicated that only 3% of investment treaties do not have sunset clauses (although most investment chapters of trade agreements fall into this category). Gordon and Pohl, *supra* note 211, at 19.

[240] Dissenting in *Nicaragua*, Judge Schwebel came to the same result in relation to the Optional Clause, though not by adopting a contractual position. Schwebel rejected the ICJ majority's analogy with treaties, commenting that unilateral declarations were not negotiated instruments like treaties, were not governed by rules on treaty interpretation, and had a substantially different nature to treaties, making Optional Clause declarations "inherently terminable." *Military and Paramilitary Activities*, Nov. 26, 1984, Dissenting Opinion of Judge Schwebel, *supra* note 187, para. 101. However, Schwebel did not elaborate on how the nature of unilateral declarations differed substantially from treaties.

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that "the host State may repeal its offer [of arbitration in a FIL] at any time unilaterally" before acceptance.[241]

For substantive FIL provisions, the public law paradigm is instructive. This paradigm acknowledges that "[t]he state possesses the constitutional power to redefine and readjust the relationship between private interests and the public interest."[242] Investors must expect the law to change, and cannot complain purely because such changes might affect their rights.[243] As with joint termination of an investment treaty, revocation of substantive FIL provisions is therefore instantly effective to end investors' rights under this paradigm.[244] Giving content to the public international law rule against "arbitrary" termination of unilateral acts, the public law paradigm suggests that arbitrariness only arises where revocation occurs contrary to a FIL stabilization clause. If the state did not itself provide for a stabilization clause, a tribunal cannot imply a reasonable notice survival period for FIL protections. In practice, however, some formal or informal notice period is likely to apply, since repeal processes often require some time to complete and may not come into force immediately.

In sum, for both the arbitration clause and the substantive provisions of FILs, when viewed as a unilateral act, the public international law rules—analyzed in light of the competing paradigms applicable to FIL arbitration—are best seen as providing that an instantly effective revocation is permissible.

IV. FILs as Domestic Law

Part III proceeded on the basis that FILs are characterized as unilateral acts with binding effect in international law. This conclusion, while clear in relation to arbitral consent clauses, is more debatable with respect to the substantive protections in FILs. If substantive FIL protections are not unilateral acts, they can alternatively be characterized as provisions of an ordinary domestic statute.

What are the practical and doctrinal consequences of this alternative framing? This Part argues that the characterization will affect the process of interpretation of FILs, the application of international law defenses such as countermeasures and necessity, and the calculation of compensation. It also argues that, although termination with immediate effect is permitted under either characterization, the reasons for this differ under each. Lastly, this Part contends that, whether domestic or international instruments, the international nature of FIL consent clauses will rule out application of domestic law limitations periods.

A domestic law characterization could also affect other issues in FIL cases, such as costs determinations and the question of arbitrator "double-hatting." In brief, if FILs are purely

[241] Christoph Schreuer, *Consent to Arbitration*, *in* The Oxford Handbook of International Investment Law 834 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, The ICSID Convention: A Commentary 618 (2012). *See also* Potestà, *supra* note 9, at 153 (maintaining that consent in FILs is "much more precarious" than in treaties). As noted above (*supra* note 206), Potestà appears to accept that FILs might be instantly terminable even where they contain stabilization clauses. The conclusion is somewhat curious given Potestà's acceptance that sunset clauses in BITs are effective to prevent instant termination of those instruments. *Id.* at 154.

[242] Santiago Montt, State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation 7 (2009).

[243] Roberts, *supra* note 33, at 66.

[244] Roberts, *supra* note 36, at 411.

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domestic law, the public international law paradigm discussed in Part II cannot apply. As a result, FIL tribunals would be less likely to follow the typical public international law approach to costs (disfavoring costs-shifting) and more likely to make costs orders than under a unilateral act analysis.[245] Similarly, without a public international law framework, a FIL tribunal is likely to be somewhat less focused on developing systemic precedent, and more inclined to follow the commercial arbitration paradigm of simply resolving the dispute before it. This could reduce concerns about FIL arbitrators serving as counsel in other cases—a concern expressed in investment treaty arbitration.[246]

Further, a domestic law characterization may have concrete effects for an arbitration under a parallel treaty with the investor's home state, in particular where that treaty contains an "umbrella" clause.[247] This clause is typically understood to transform (some) contractual breaches by the state into treaty breaches, and it is sometimes contended that the clause similarly transforms breaches of legislative commitments. As noted in Part III, these commitments could include FILs, if seen as domestic obligations.[248] By contrast, it is unlikely that umbrella clauses cover a state's *international* obligations to investors, such as those entailed by the unilateral act characterization, since there would be no reason to elevate already-international breaches to the international level. Thus, FIL breaches will only violate treaty-based umbrella clauses under the domestic law characterization.

The Role of International Law in Domestic Law Claims

An international tribunal that views FILs as domestic law will be ruling on a primary claim of breach of that law. This is not a new situation; the PCIJ ruled on questions of domestic law in the *Serbian Loans* and *Brazilian Loans* cases, and early twentieth century claims commissions often ruled on alleged breaches of contracts governed by domestic law.[249] More directly relevant are numerous ICSID tribunal decisions, issued before the current investment treaty era, that involved purely contractual claims against states.[250] 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 whether or how the secondary rules of international law (in particular the law of state responsibility) would apply.

FIL case law provides only minimal guidance on these questions. Although sixty-one known claims under FILs have been brought before tribunals, very few of these cases have

[245] See the discussion in Part II.

[246] *Cf.* Roberts, *supra* note 33, at 62.

[247] Although a claim under a parallel treaty could be affected by the characterization of the FIL, the reverse is not true: characterization of a FIL is not affected by the mere existence of (or claim under) a parallel treaty. The two instruments provide independent causes of action (such that a FIL claim could proceed even if the treaty is terminated), and the FIL will be characterized on its own terms.

[248] *See supra* note 74.

[249] *See, e.g.*, Illinois Central Railroad Co. v. Mexico (U.S.–Mexican General Claims Commission Mar. 31, 1926).

[250] *See, e.g.*, Maritime International Nominees Establishment v. Guinea, ICSID Case No. ARB/84/4, Award (Jan. 6, 1988); Adriano Gardella S.p.A v. Ivory Coast, ICSID Case No. ARB/74/1, Award (Aug. 29, 1977); Kaiser Bauxite Co. v. Jamaica, ICSID Case No. ARB/74/3, Decision on Jurisdiction (July 6, 1975). The Iran-U.S. Claims Tribunal also decides contractual claims. *See, e.g.*, KJOS, *supra* note 84, at 47.

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reached the merits.[251] There is thus little guidance to draw general conclusions about the proper approach to interpretation, responsibility, and remedies.

As the earlier ICSID and other cases mentioned above indicate, however, international law retains various roles even in proceedings where the claim is governed by domestic law. Importantly, international law still falls within the law applied by the tribunal. FILs do not typically contain applicable law clauses, unlike many BITs.[252] Where FIL cases are heard at ICSID, the tribunal will apply the default applicable law specified in the ICSID Convention—namely, "the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[253] Where FIL cases are heard under UNCITRAL rules, the default applicable law is "the law which [the tribunal] determines to be appropriate,"[254] giving significant leeway for an UNCITRAL tribunal also to apply international law.

International law as an interpretive tool

The presence of international law as part of the applicable law raises the possibility of *depeçage*, an approach practiced by investment treaty tribunals. On this approach, the tribunal itself determines whether domestic or international law governs any particular issue in a case, and applies the appropriate law to that issue.[255] For example, determination of property rights or claimant nationality entails a *renvoi* from international law to domestic law,[256] calling for the application of domestic law by a treaty tribunal to determine the incidental issue of the claimant's nationality, within the overall framework of a primary determination of breach of international law. In the same way, a tribunal might consider that a FIL's reference to expropriation entails a *renvoi* in the other direction, from domestic law to international law. An

[251] Based on the author's own figures, fifteen claims were settled, discontinued, or withdrawn before an award was issued. Jurisdiction or admissibility under a FIL was either not considered (due to a finding of jurisdiction on some other basis) or declined (often due to a finding that the relevant FIL did not contain the state's consent to arbitration) in twenty-four cases. Ten cases remain pending. Of the twelve concluded cases that discuss merits issues, three took the view that no separate discussion of FIL breaches was necessary since breach of another instrument provided a concurrent basis of jurisdiction (e.g., a BIT), or since no FIL breaches were alleged. A further four found no breach of the FIL on the merits, leaving limited scope for discussion of state responsibility, while in one case the merits ruling remains unpublished.

[252] No FIL containing dispute settlement provisions in the UNCTAD database (*supra* note 29) includes an applicable law clause. Around 32% of BITs, meanwhile, contain applicable law clauses. Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, at 29 (OECD Working Papers on International Investment 2012/02, 2012).

[253] ICSID Convention, Art. 42(1). *See also* Pac Rim Cayman LLC v. El Salvador, ICSID Case No. ARB/09/12, Award, para. 5.61 (Oct. 14, 2016) [hereinafter *Pac Rim* Merits]. The fact that Article 42(1) lists domestic law before international law does not imply that instruments underpinning claims at ICSID are more likely to be domestic law instruments. Even if this was envisaged by the Convention drafters before investment treaties were commonplace, treaty claims now predominate at ICSID. Rather than the applicable law changing the nature of the instrument under jurisdiction, the *reverse* is in fact more defensible. Lorand Bartels, *Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before it?*, *in* Multi-Sourced Equivalent Norms in International Law 123–24 (Tomer Broude & Yuval Shany eds., 2011). Characterization of FILs as domestic or international law will therefore be more affected by the factors discussed in Part III than the ICSID Convention's applicable law clause.

[254] UNCITRAL Arbitration Rules, Art. 35(1).

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

[256] Hepburn, *supra* note 227, at 106; Monique Sasson, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law 3 (2017).

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international law finding on expropriation might then inform the analysis of whether, under domestic law, the FIL provision on expropriation has been breached. This could also apply to a FIL clause guaranteeing fair and equitable treatment; the tribunal might take that clause to be a *renvoi* to the meaning commonly given to fair and equitable treatment guarantees either in investment treaties or in customary international law, depending on the tribunal's view of the connection between fair and equitable treatment and custom.

Even without a formal *renvoi*, international law could play other interpretive roles. It is well established that international tribunals must apply domestic law as it would be applied in its domestic context.[257] Where the tribunal's primary task is to determine a breach of a domestic law, it will need to determine how the FIL is interpreted according to the law of the host state. This will require reference to domestic law materials that establish the state's approach to statutory interpretation. The results of this interpretive process will, of course, vary across states, depending on the materials that may permissibly be used. In some cases, domestic law principles of statutory interpretation might bar reference to international law, leaving FIL protections to be interpreted solely under domestic law. However, in most cases, given the nature and content of FILs, it is likely that the legislature intended to refer to the cognate concepts of international law.[258] Where this intention can be established (and where the domestic legal system treats legislative intent as relevant to statutory interpretation),[259] international law could serve as a tool to interpret FIL provisions that mirror the substantive investor protections of custom or investment treaties, such as with respect to expropriation.[260] Indeed, the limited FIL case law available reveals that tribunals have used international law as an interpretive tool in relation to expropriation,[261] investment,[262] and fair and equitable treatment.[263]

Elaborating the meaning of FIL provisions by reference to international case law examining similar phrases in investment treaties is potentially just as problematic as using one investment treaty to interpret another.[264] References to custom are more justifiable, since it is more likely

[257] Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Braz.), Series A No. 21, at 124 (Perm. Ct. Int'l Just. 1929) [hereinafter *Brazilian Loans*]; Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.) Judgment, 1989 ICJ Rep. 15, 47 (July 20); HEPBURN, *supra* note 227, at 108–11.

[258] In the human rights context, "[i]t is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations." UN Committee on Economic, Social and Cultural Rights, at para. 15, General Comment No. 9, UN Doc. A/CONF.39/27.

[259] In *Petrobart v. Kyrgyzstan*, the tribunal (apparently viewing the substantive FIL provisions as domestic law) sought the Kyrgyz legislator's intention in the FIL text itself. *Petrobart*, *supra* note 76, at 49–50.

[260] MCLACHLAN, SHORE & WEINIGER, *supra* note 20, at 46. In this respect, FILs might be an example of the "consubstantial norms" discussed in Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 LOY. LA INT'L & COMP. L. REV. 133 (2011). However, reliance on the manner in which a domestic court would interpret norms of international law might not necessarily produce the same result as if an international tribunal interpreted the international norms itself. *See* Olga Frishman & Eyal Benvenisti, *National Courts and Interpretive Approaches to International Law*, *in* THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE 317 (Helmut Philipp Aust & Georg Nolte eds., 2016).

[261] Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Award on the Merits, paras. 160–68 (May 20, 1992) [hereinafter *SPP* Merits]; Tradex Hellas S.A. v. Albania, ICSID Case No. ARB/94/2, Award, paras. 69, 135, 200 (Apr. 29, 1999) [hereinafter *Tradex*]. Note that it was not entirely clear in these cases whether the tribunal treated the substantive FIL protections as rules of domestic or international law.

[262] *Tradex*, *supra* note 261, para. 106.

[263] *Lahoud*, *supra* note 79, paras. 356–65.

[264] Andrew Mitchell & James Munro, *Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements*, 28 EUR. J. INT'L L. 669 (2017); Martins Paparinskis, *Sources of Law and*

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that states' use of particular terms or concepts in FILs was intended to reflect the equivalent terms or concepts in customary international law.[265] This is particularly so where the FIL makes this link explicit, as in Article 25 of the Democratic Republic of the Congo's FIL, which offers investors "fair and equitable treatment, in accordance with the principles of international law."[266] Even in relation to custom, however, reliance on international case law may overlook the varied institutional settings in which similar concepts (like expropriation) are interpreted,[267] casting doubt on whether those interpretations are apposite for a FIL tribunal.

A further potential complicating factor is the fact that FILs, unlike BITs, often apply to both foreign *and* domestic investors. In some cases, the possibility of a domestic investor bringing its own state to arbitration will be foreclosed, either explicitly in the FIL (which might provide only for host state courts to hear national claims) or because the domestic claimant will not fulfill the ICSID Convention requirement of diversity of nationality.[268] Nevertheless, the substantive protections are sometimes still expressed to apply to host state nationals. In other cases, FILs appear to permit even domestic investors to access arbitration (e.g., under UNCITRAL rules).[269] In *James v. UK*, the European Court of Human Rights observed that, although the right of property applied both to respondent state nationals and non-nationals, the reference to the "general principles of international law" in its expropriation clause applied only to non-nationals.[270] National claimants, in contrast, only received the (arguably) lower standard of protection in the European Convention itself.[271] If FIL tribunals were to apply a similar approach, referring to international law to interpret FIL provisions would be inappropriate where a local investor is the claimant.

The interpretive process for FILs as domestic law thus could be quite different from that applied to FILs as unilateral acts, with potentially diverging outcomes. Domestic law standards of expropriation, for instance, might establish a more restrictive definition than

Arbitral Interpretation of Pari Materia *Investment Protection Rules*, *in* THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 87 (Ole Kristian Fauchald & André Nollkaemper eds., 2012).

[265] Paparinskis has contended that, just as treaty references to "expropriation" are routinely interpreted to make reference to the customary law notion of expropriation, treaty references to "fair and equitable treatment" should similarly refer to the customary law minimum standard of treatment. PAPARINSKIS, *supra* note 131, ch. 6.

[266] Author's translation. Perhaps in reference to the debate over whether investment treaties have contributed to custom in this area, the *Lahoud* tribunal noted that the concept of fair and equitable treatment, as referred to in the DRC FIL, "draws its origin from international law and has been developed there to the point of figuring almost systematically in the many bilateral and multilateral agreements for promotion and protection of investments in force today." *Lahoud*, *supra* note 79, para. 361.

[267] Steven Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AJIL 475 (2008).

[268] Under Article 25 of the ICSID Convention, claimants at ICSID cannot hold the nationality of the respondent state, except in certain circumstances.

[269] See, e.g., the DRC FIL, Art. 38, which is not explicitly limited to foreign investors.

[270] James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A), para. 66 (1986). Article 1, Protocol 1 of the Convention provides in part that "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

[271] Since *James v. UK*, the European Court has ignored the reference to international law even for non-national claimants, instead applying the arguably lower Convention-specific standard to them as well. *See, e.g.*, East/West Alliance Ltd v. Ukraine, App. No 19336/04, Judgment (Eur. Ct. H.R. Jan. 23, 2014).

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under international law, only covering property rights and excluding investors' claims of expropriation of contract rights.[272] At the same time, however, domestic law interpretation rules might prevent tribunals from importing "balancing" tests such as proportionality from trade law or human rights law, leading to more absolutist views that may favor investors.

State responsibility in domestic law disputes

The second main question for the role of international law in a domestic law dispute is the relevance of state responsibility. If the primary breach found by a FIL tribunal is a breach of domestic law, one might expect that the law of state responsibility will not feature at all in the tribunal's analysis. Article 1 of the ILC Articles provides that state responsibility arises from an "internationally wrongful act," and Article 2 confirms that such an act requires a breach of an "international obligation of the State." The Articles do not appear to envisage that state responsibility might also arise from breaches of domestic obligations, instead stating the well-known principle that domestic unlawfulness is irrelevant to international responsibility.[273]

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.[274] States appear to accept this: in other cases where tribunals have ruled on breaches of domestic law, most notably in investor-state contractual claims at ICSID or elsewhere, states have never attempted to rely on any of the international law circumstances precluding wrongfulness. Unlike in the unilateral act analysis, therefore, respondent states in FIL claims viewed as domestic law could not invoke the customary defense of necessity, and would need to rely instead on any defenses in the primary rules of the FIL itself, analogous to the "essential security" clause in certain BITs.[275] Similarly, the international rules on waiver would not apply, leaving waiver to be governed by the respondent's domestic law. This law might well contain equitable principles permitting an individual to invoke a statutory right despite an earlier purported waiver of it, unlike in the unilateral act analysis.

However, the law of state responsibility has proven highly adaptable,[276] and its applicability in a domestic law analysis may be more nuanced. The remedial provisions in the law of state responsibility may be relevant to FIL claims, since neither FILs nor applicable arbitral

[272] 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* Merits, *supra* note 261, paras. 160, 164.

[273] Articles on State Responsibility, *supra* note 139, Art. 3.

[274] A German court has held that the international law defense of necessity does not apply to a private law contractual relationship between individuals and a state. Federal Constitutional Court, *Argentine Bondholder* case, Order of the Second Senate, 2 BvM 1-5/03, 1-2/06 (May 8, 2007). *See* ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 185 (2011); *see also* ALVIK, *supra* note 165, at 76. However, in *Brazilian Loans* (*supra* note 257, at 120), the PCIJ entertained (but rejected) a plea of *force majeure* even though only a domestic law obligation was at stake. The ILC Commentary (*supra* note 139, at 77) nevertheless appears to treat the case as an instance of consideration of *force majeure* as a circumstance precluding wrongfulness in international law, not merely domestic law.

[275] The "essential security" clause, and its relationship to thecustomary necessity defence, has featured in the numerous well-known claimsagainst Argentina cases. *See, e.g.*, Kurtz, *supra* note 163.

[276] For instance, the interstate remedial rules in the ILC Articles are frequently applied in investor-state treaty claims. *See* text accompanying note 165 *supra*.

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rules specify the remedies for breach. If these rules simply reflect general principles of law, as suggested above, tribunals could refer to them for guidance on remedies, if they do not apply them directly. For instance, after finding breaches of both a FIL and a treaty, the *Khan v. Mongolia* tribunal was content to derive its damages analysis from both instruments, "as well as both Mongolian and customary international law."[277] The *SPP v. Egypt* tribunal similarly drew on customary international law damages principles to determine compensation for a FIL breach.[278] The only hint that a domestic law lay behind the tribunal's findings was in the determination of interest, where the tribunal applied Egyptian law (including its prohibition on compound interest) on the grounds that international law contained no mechanism for fixing the interest rate and no rule that would bar the application of the domestic compound interest prohibition.[279] The *Lahoud* tribunal, meanwhile, drew its principles on interest from international case law,[280] and also cited the ILC Articles' principle of causation.[281]

Nevertheless, given tribunals' large discretion in awarding damages, they would be equally justified in turning to domestic principles of state liability, which may differ from state to state. In general, however, national laws typically aim to balance public and private interests in awarding compensation for state breaches and thus diverge from the "full reparation" envisaged by international law.[282] Alongside prohibitive domestic rules on interest, this suggests that compensation awards are likely to be lower in FIL claims viewed as domestic law than under the unilateral act characterization, where international principles apply directly.

Next, international attribution rules may be relevant even where a state's international responsibility is not in issue. In contract claims,[283] the rules on attribution have been readily applied, without concern for the domestic law basis of the tribunal's jurisdiction. Some FIL cases, in which a domestic law characterization was at least arguably present, have also applied international attribution rules. The *Lahoud* tribunal, for instance, asserted that the ILC Articles "are both pertinent and regularly applied by analogy in cases opposing states and private investors, as is the case here."[284] The *SPP* and *Tradex* tribunals also applied international rules of attribution,[285] in order to determine whether state conduct that could potentially violate the FIL was at issue. These applications can be justified on the grounds that, unlike the circumstances precluding wrongfulness, attribution rules are not premised on a finding of

[277] *Khan*, *supra* note 75, para. 368.

[278] The *SPP* tribunal's Merits Award appeared to view the substantive FIL clauses as domestic law, despite drawing on a unilateral act analysis in the jurisdictional decision in relation to the arbitration clause. *SPP* Jurisdiction, *supra* note 69, para. 61. The Merits Award's *dispositif* does not actually indicate which legal obligations were found breached by Egypt, but other indications in the award suggest that the ultimate finding was of an expropriation in breach of the FIL. *SPP* Merits, *supra* note 261, paras. 163, 172, 183.

[279] *SPP* Merits, *supra* note 261, paras. 222, 224. The tribunal returned to international law to fix the *dies a quo* and *dies ad quem*, reasoning that domestic law was silent on these issues. *Id.*, paras. 233–35; cf. Christina Beharry, *Prejudgment Interest Rates in International Investment Arbitration*, 8 J. INT'L DISP. SETTLEMENT 56, 59 (2017), who asserts that domestic rules on interest could be relevant in a FIL claim.

[280] *Lahoud*, *supra* note 79, para. 632.

[281] *Id.*, para. 564.

[282] Irmgard Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, *in* Schill, *supra* note 44, at 378.

[283] *See, e.g.*, Autopista Concesionada de Venezuela, C.A. v. Venezuela, ICSID Case No. ARB/00/5, Award, para. 126 (Sept. 23, 2003).

[284] *Lahoud*, *supra* note 79, para. 375. The tribunal's view of the substantive FIL protections was unclear.

[285] *SPP* Merits, *supra* note 261, paras. 82–85; *Tradex*, *supra* note 261, para. 104.

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international responsibility, but instead arise prior to such a finding.[286] Subject to any *lex specialis* definition in a FIL itself of the state or state entities to which the statute applies, international attribution rules can be applied by FIL tribunals on incidental questions of state definition.[287]

In fact, just as a FIL's primary rules might require application of international law via *renvoi*, as suggested above, the reference to international law might also entail reference to *secondary* rules. Nollkaemper has suggested that "primary and secondary norms are interdependent and inseparable," and that "[e]ven when the rule of international law on which the claim is based is incorporated in domestic law, it retains its international character."[288] In Nollkaemper's view, this implies that domestic courts should apply secondary rules of international law when dealing with "domesticated international norms," primary rules of international law that have been transformed or incorporated into the domestic legal order.[289]

Nollkaemper's argument is explicitly normative; he admits that domestic courts at present generally apply domestic rules of responsibility "without considering what international law might have had to say."[290] Indeed, based on current evidence from domestic systems, Nollkaemper accepts that "[d]omesticated obligations start a new life as domestic norms, governed by separate secondary norms,"[291] rather than retaining their international character. But, he suggests, applying international secondary rules would help to avoid this "threat to the uniform interpretation and application of international law" by encouraging equivalent results regardless of the forum in which the claim is brought.[292] Furthermore, applying international secondary rules to domesticated norms can prevent national courts from committing a breach of international law by failing to provide an international-law-compliant remedy for the original breach of the domesticated norm.[293] It may also strengthen the effectiveness of international law, at least indirectly.[294]

Applying international rules will not always be possible, however, since domestic and international courts often have different remedial powers and objectives.[295] Nevertheless, if

[286] As Vidmar notes, the fact that the law of state responsibility relates to secondary rules of international law does not mean that these rules are only relevant *after* a breach of a primary rule is found. Jure Vidmar, *Some Observations on Wrongfulness, Responsibility and Defences in International Law*, 63 NETH. INT'L L. REV. 335 (2016).

[287] International law rules may, of course, direct the tribunal back to domestic law. ILC Commentary, *supra* note 139, at 42.

[288] André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AJIL 760, 783–84 (2007); *see also* NOLLKAEMPER, *supra* note 274, at 186; Tzanakopoulos, *supra* note 260, at 143.

[289] André Nollkaemper, *The Power of Secondary Rules to Connect the International and National Legal Orders*, *in* Broude and Shany, *supra* note 253.

[290] NOLLKAEMPER, *supra* note 274, at 167.

[291] *Id.* at 219; *see also* 225.

[292] *Id.* at 220.

[293] *Id.* at 228; Tzanakopoulos, *supra* note 260, at 149–54.

[294] Stephan Wittich, *Domestic Courts and the Content and Implementation of State Responsibility*, 26 LEIDEN J. INT'L L. 643, 665 (2013).

[295] NOLLKAEMPER, *supra* note 274, at 187–89. For instance, domestic courts may be restricted to issuing declarations of incompatibility or unconstitutionality, while international courts may be authorized to award monetary remedies. Similarly, state liability under national law typically aims to balance public and private interests, while state responsibility under international law typically aims to grant "full reparation" to the injured claimant. *See, e.g.*, Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, *in* Schill, *supra* note 44, at 721; Marboe, *supra* note 282. Although state responsibility is sometimes roughly analogized to domestic tort law, "[r]eparation for the violation of an international obligation . . . may take forms that do not exist in national tort law." Sloane, *supra* note 163, at 479.

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confined to the more realistic view that domestic courts should draw guidance from the secondary rules of international law when ruling on domesticated norms, the argument seems to converge on the interpretive use of international law discussed above. If this is permissible for domestic courts dealing with domestic rules sourced from international law, it is certainly permissible for international tribunals dealing with such rules, where international law forms part of the tribunal's applicable law. The "fundamental connection between primary and secondary norms"[296] can therefore lead to application of (or at least reference to) some parts of the international law of state responsibility in FIL claims, even where FILs are viewed as domestic law.

Revoking FILs as Domestic Law

If FILs are treated purely as domestic law instruments, their revocation is more straightforward than where FILs are viewed as unilateral acts. The "easy cases" discussed in Part III remain easy. First, if no investment has yet been made, revocation is effective to deny jurisdiction. Second, despite a domestic law characterization, arbitral consent clauses nevertheless unavoidably carry international effects (as just discussed above in relation to *Pac Rim*), given that they represent the state's offer of consent to international arbitration with foreign investors. Thus, if consent is perfected, either before revocation or during a post-revocation stabilization period,[297] revocation of domestic law is ineffective to deny international jurisdiction.

Part III's "hard cases"—where the FIL is silent on termination and consent remains unperfected—also become somewhat easier. Even if the consent clause is viewed purely as domestic law, it retains its similarity with a contractual offer. Withdrawal of the offer via repeal before acceptance will thus be effective to deny jurisdiction.[298] Similarly, the continued existence and validity of the FIL's substantive protections will be governed by domestic law.[299] Thus, upon repeal of the FIL, the substantive protections also immediately terminate, assuming the law was validly repealed under the state's constitutional system.

The Effect of Domestic Limitations Clauses

Many cases and commentators have held that domestic statutes of limitation do not apply to claims before international tribunals.[300] This principle is perhaps confined to situations where an international tribunal is ruling on an alleged breach of *international* law. Most of the cases addressing the issue have related to international law breaches: of investment treaties (in *Wena v. Egypt*, *Biedermann v. Kazakhstan*, *Maffezini v. Spain*, *Bogdanov v. Moldova*, and

[296] Nollkaemper, *supra* note 288, at 59.

[297] The *Ruby Roz* tribunal (which arguably viewed FILs as domestic law) held a stabilization clause to be effective. *Ruby Roz*, *supra* note 77, para. 168. However, the claim there had been filed *after* the stabilization period had ended, meaning that jurisdiction was declined.

[298] The dissenter in *ABCI* probably took this approach, *ABCI* Dissent, *supra* note 118, para. 45. The views of Parra, *supra* note 237, at 319–20 and Schreuer, *supra* note 241, at 834, are equally applicable here.

[299] *Cf.* NOLLKAEMPER, *supra* note 274, at 231 ("Where the domesticated international norm is embedded in a domestic statute, in many respects its status and effects will be governed by domestic law"); SASSON, *supra* note 256, at 10 ("[t]he municipal law of the host State determines whether a [contractual or proprietary] right exists . . ."); *Tidewater*, *supra* note 63, para. 102 (asserting in relation to arbitral to consent clauses, that "[m]unicipal law is relevant to determine the existence and validity of the instrument at issue").

[300] *See, e.g.*, JOHN SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION 124 (1959).

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Energoalians v. Moldova) or custom (in the *Gentini* and *Spader* arbitrations).[301] The *Wena* tribunal even specified that, in its view, domestic time-bars "do not necessarily bind a claim for a violation of *an international treaty* before an international tribunal."[302] If FIL protections are treated as unilaterally assumed international obligations, as considered in Part III, then FIL claims are equivalent to claims under treaty or custom, and domestic time-bars would not be applied. But the cases just cited arguably say nothing about claims before international tribunals for breaches of *domestic* law.[303] If, therefore, FIL protections are treated as domestic law obligations, the application of domestic time-bars might be plausible.

However, contract claims before international tribunals have also rejected the application of domestic time-bars. In *Craig v. Iran*, the Iran-U.S. Claims Tribunal recalled the usual rule that "[m]unicipal statutes of limitation have not been considered as binding on claims before an international tribunal," without placing any relevance on the fact that it was ruling on a claimed breach of contract.[304] In *Caratube v. Kazakhstan*, the tribunal upheld its jurisdiction on the basis of a contract, but held that a Kazakh law time-bar was not applicable.[305]

Regardless of whether a domestic or international instrument is within the tribunal's jurisdiction, the reference to international law within the tribunal's applicable law might allow it to apply international time-bar rules, overriding domestic ones if necessary.[306] The *Caratube* and *Wena* tribunals connected their decisions to ignore domestic time-bars to the applicability of international law under the ICSID Convention.[307] Similarly, in an UNCITRAL rules case, the *Energoalians* tribunal held that it would apply international law to questions of jurisdiction, disregarding a Moldovan law time-bar.[308]

Even FIL cases have ignored domestic time-bars.[309] The *Interocean v. Nigeria* tribunal did so, although its position was simplified by the fact that it treated the case as a claim for violation of *international* law, thus putting the case in the same, less problematic category as

[301] Wena Hotels Limited v. Egypt, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000) [hereinafter *Wena*]; Jarrod Hepburn, *Looking Back: In First Treaty Claim Under SCC Rules, Arbitrators in the Long-Opaque* Biedermann *Case Held Kazakhstan Liable for Breaching US-Kazak BIT, and Rejected Counterclaim on Merits*, INV. ARB. REP. (Nov. 1, 2017), *at* www.iareporter.com/articles/looking-back-in-first-treaty-claim-under-scc-rules-arbitrators-in-the-long-opaque-biedermann-case-held-kazakhstan-liable-for-breaching-us-kazak-bit-and-rejected-counterclaim-on-merits; Emilio Maffezini v. Spain, ICSID Case No. ARB/97/7, Award (Nov. 9, 2000) [hereinafter *Maffezini*]; *Bogdanov*, *supra* note 76; SARL Energoalians v. Moldova, Arbitral Award (UNCITRAL Oct. 23, 2013) [hereinafter *Energoalians*]; *Gentini*, X RIAA 551 (1903); *Spader*, IX RIAA 223 (1903).

[302] Wena, *supra* note 301, para. 106 (emphasis added). The tribunal did not elaborate on why "necessarily" was included; other statements of the rule do not insert this qualifier.

[303] However, the *Biedermann* tribunal held that a Kazakh law time-bar did not apply to the claimant's treaty claim, but that it would have applied to a contract claim. *See* Hepburn, *supra* note 301.

[304] Alan Craig v. Ministry of Energy of Iran, 3 Iran-U.S. Claims Tribunal 280, 287 (1984). *See also* GEORGE ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 480 (1996).

[305] *Caratube*, *supra* note 11, paras. 415–21.

[306] The *Gavazzi* tribunal commented that "[i]n arbitration proceedings governed by international law, only international law—and not domestic law—can introduce time-bars." Marco Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, para. 147 (Apr. 21, 2015).

[307] *Caratube*, *supra* note 11, para. 415; *Wena*, *supra* note 301, para. 107. The *Caratube* position is slightly complicated by the fact that the tribunal majority sometimes appeared to treat the breach of contract claims as international law claims of expropriation. *Caratube*, *supra* note 11, para. 415.

[308] *Energoalians*, *supra* note 301, para. 122.

[309] The issue was side-stepped in *AES v. Kazakhstan*, where the tribunal found no breach of the FIL anyway. *AES*, *supra* note 11, para. 430.

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investment treaty claims.[310] *Pac Rim v. El Salvador* also disregarded a domestic time-bar in a FIL case. The tribunal focused on neither the nature of the applicable law nor the nature of the law on breach, but instead on the nature of the law conferring jurisdiction. Although without explicitly referring back to its earlier finding that the FIL arbitration consent clause was a unilateral act adopted in the framework of a treaty,[311] the tribunal confirmed that the state's consent to ICSID arbitration in the FIL created an "international obligation" that could not be avoided by reliance on domestic law.[312] Indeed, whether or not a consent clause is a unilateral act, as suggested in Part III, and whether or not the consent is to ICSID[313] or non-ICSID arbitration, the clause nevertheless creates an international obligation, being a state's commitment to arbitrate with foreign investor. A state's interference with its own commitment to arbitrate has been characterized as a denial of justice in non-ICSID cases such as *Swissbourgh v. Lesotho* (based on a treaty) and *Himpurna v. Indonesia* (based on a contract).[314] This suggests a broader application for the *Pac Rim* tribunal's argument.[315]

V. Conclusion

The characterization of foreign investment laws—as either unilateral acts creating international obligations or as ordinary domestic statutes—has a variety of consequences for investment arbitrations involving such statutes. If FILs are characterized as unilateral acts, certain defenses (such as necessity) will be available to the respondent, unlike under a domestic law characterization. The interpretive process will also differ, which may create differences in meaning where domestic standards diverge from international law. Further, under the unilateral act view, compensation may be higher (avoiding domestic prohibitions on compound interest and "balanced" rules on state liability); cost-shifting is less likely; arbitrator "double-hatting" poses more of a concern; and investors are more likely to be held to waivers of their FIL rights. The characterization can also affect investment treaty cases: FILs are not likely to

[310] *Interocean*, *supra* note 11, para. 124.

[311] *Pac Rim* Jurisdiction, *supra* note 73, paras. 5.32–.33.

[312] *Pac Rim* Merits, *supra* note 253, para. 5.71.

[313] The treaty basis of ICSID claims was perhaps what the *Maffezini* tribunal had in mind in its unreasoned assertion that domestic time-bars "cannot apply to claims filed under the ICSID Convention" without distinguishing between contract, FIL, or treaty claims. *Maffezini*, *supra* note 301, para. 93.

[314] Luke Peterson, *Arbitrators Hold State Liable for a Denial of Justice Occurring in Relation to Actions Taken in International Forums; "Rule of Law" Treaty Obligation Also Breached*, Inv. Arb. Rep. (July 14, 2016), *at* www.iareporter.com/articles/arbitrators-hold-state-liable-for-a-denial-of-justice-occurring-in-relation-to-actions-taken-in-international-forums-rule-of-law-treaty-obligation-also-breached; Himpurna California Energy Ltd. v. Indonesia, Interim Award, para. 184 (UNCITRAL Sept. 26, 1999). *See also* Stephen Schwebel, International Arbitration: Three Salient Problems 61–143 (1987).

[315] In *Burlington v. Ecuador*, the ICSID tribunal applied a domestic law time-bar to elements of Ecuador's counterclaim brought against Burlington for alleged breaches of Ecuadorian law. Neither party appeared to suggest that the international character of the ICSID claim ruled out the relevance of a domestic time-bar. However, the tribunal seemingly treated the time-bar as a substantive element of liability under Ecuadorian tort law, rather than a procedural bar on the claim at the international or domestic level. *See* Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, para. 253 (Feb. 7, 2017). Thus, *Burlington* does not necessarily go against the trend observed above. Meanwhile, the sole arbitrator in *World Wide Minerals v. Kazakhstan* reportedly applied a domestic time-bar in an UNCITRAL-rules case alleging violations of a loan agreement, a FIL, and customary international law. The award in that case is unpublished, leaving any potential reconciliation with other cases unclear. *See* Luke Peterson, *Mining Company's Arbitration Against Kazakhstan Under Foreign Investment Statute is Dismissed Due to Time-Bar*, Inv. Arb. Rep. (May 3, 2011), *at* www.iareporter.com/articles/mining-companys-arbitration-against-kazakhstan-under-foreign-investment-statute-is-dismissed-due-to-time-bar.

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breach treaty-based umbrella clauses if seen as unilateral acts, contrasting with the domestic law characterization.

On other issues in FIL claims, both characterizations will lead to the same results, but for different reasons. For instance, whether FIL protections are unilaterally assumed international obligations or domestic obligations, the defense of countermeasures will be unavailable, and repeal of substantive FIL provisions will be immediately effective (absent a stabilization clause), but the explanation for this under each characterization is distinct. In yet other cases, the conclusions and reasons are both likely the same regardless of the characterization. A contractual analysis will apply to repeal of consent to arbitration under either characterization, making it immediately effective, and domestic time-bars are unlikely to affect FIL claims because perfected consent to international arbitration (whether rooted in a domestic law or a unilateral act) creates an international obligation that cannot be interfered with by domestic law.

These differences, where they exist, do not necessarily provide states with positive reasons to prefer one characterization of FILs over another. For example, while a unilateral act characterization would grant states access to international law defenses such as necessity, it would also grant investors access to international law remedies, which may be more favorable than domestic law (for instance, on calculation of interest). Domestic law interpretive principles could favor states, but could equally favor investors, depending on the particular country.

Even where the consequences are the same, the characterization adopted by the tribunal still matters. Treating FILs as domestic instruments allows the state to retain greater control over issues such as interpretation and termination, which international tribunals must then apply more or less faithfully.[316] Treating FILs as international instruments, by contrast, permits a tribunal to take greater authority over the interpretive process, for instance in ascertaining and applying the uncertain rules on termination of unilateral acts in international law.

Internationalizing a statute in this way has notable parallels with the contested idea of the internationalized contract, a twentieth-century invention intended to provide a theoretical basis for subjecting investor-state contracts to international rather than domestic law.[317] Commentators have viewed the internationalized contract both as a useful means to remove foreign investment disputes from the potentially biased national sphere, and as one in a series of exploitative tools used by industrialized states to universalize and thereby privilege certain values in the international order at the expense of developing states.[318] Characterizing FILs as either domestic laws or "internationalized statutes" may raise the same debates. States might avoid these issues by making their intentions clearer in a FIL, for example by including provisions declaring it to be an "international instrument,"[319] or, conversely, by adopting an applicable law clause in which the sole choice of domestic law might more noticeably signal a lack of objective intention to undertake an international obligation.

[316] *See supra* note 257.

[317] *See, e.g.*, ALVIK, *supra* note 165, chs. 2–3.

[318] *See, e.g.*, Francis Mann, *The Law Governing State Contracts*, 21 BRIT. Y.B. INT'L L. 11 (1944); Francis Mann, *State Contracts and State Responsibility*, 54 AJIL 572 (1960). *Cf.* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 223–35 (2005); SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2011) (especially chapter 4).

[319] Cf. Egypt's 1957 declaration on the Suez Canal, which indicated that it "constitutes an international instrument." The declaration was one instance of state practice discussed by the ILC. *See* Eighth Report of the Special Rapporteur, *supra* note 54, para 58.

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For investment lawyers, the fact that diverging underlying assumptions can produce diverging justifications and outcomes is a familiar phenomenon. Just as the rise of investor-state arbitration under investment treaties has led to efforts to understand those strange new beasts[320] by way of analogies to more recognizable systems, understanding mixed arbitration under foreign investment laws will also require applying a conceptual lens.

At a minimum, the existence of FILs complicates the familiar treaty/contract distinction made by investment lawyers.[321] This article has sought to demonstrate that claims under FILs are not merely treaty claims, as several tribunals have suggested,[322] nor contract claims, but have a separate and distinct nature raising unique questions of general international law, particularly the law of state responsibility and unilateral acts. Analogies to ICJ Optional Clause declarations, contractual offers, third-party beneficiary rules, public law systems, human rights regimes, state contracts, and even investment treaties themselves will assist in maturing this source of international investment law alongside its treaty-based cousin.

FILs also deserve greater attention from commentators outside investment law. The statutes have a potential role in creating custom.[323] Viewing them also as unilateral acts reminds observers of this underappreciated source of rights and obligations in international law, and pushes thinking on boundaries between domestic and international law. Scholars have already identified certain kinds of promises made to foreign investors outside FILs that could be characterized as unilateral acts.[324] States might begin to make promises to non-state actors, who are still largely excluded from formal international lawmaking,[325] in other fields too, whether in domestic legislation or via more traditional executive declarations. Alongside laws on nationality, neutrality, and maritime zones, there may be statutes in these fields for which a unilateral act characterization might also fit, particularly where they display plausible similarities to FILs, with their combination of specific application to foreigners, reference to international law principles and consent to international adjudication.[326] The article's analysis of FILs offers guidance in identifying such statutes, and in addressing the questions of state responsibility and termination, among others, that could arise in those contexts.

FILs might also provide a new, fertile ground on which to study references to international law by domestic courts. While FILs are not yet known to have been invoked before domestic courts, the continuing convulsions of investment treaties may push claimants into fora other than international arbitration, giving domestic courts an opportunity to interpret these rules.

[320] *Cf.* Roberts, *supra* note 33, at 45.

[321] Crawford, *supra* note 141; Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AJIL 835 (2005); Anthony Sinclair, *Bridging the Contract/Treaty Divide*, *in* International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009).

[322] *See supra* note 11.

[323] *See* Dumberry, *supra* note 213.

[324] Reisman & Arsanjani, *supra* note 89; Paparinskis, *supra* note 131, at 252.

[325] Jean d'Aspremont, *International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?*, *in* Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers 178 (Math Noortmann & Cedric Ryngaert eds., 2010); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 Yale J. Int'l L. 107, 111–15 (2012).

[326] See text accompanying note 120 *supra*.

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Different international law regimes might encourage differing degrees of faithfulness in their application by domestic courts. Human rights agreements, for instance, "may be more open to divergence in application . . . as compared to highly technical regimes" such as tax law.[327] Investment protection might appear more mundane, but domestic interpretations of FILs would not necessarily trace any closer parallels with international law than domestic interpretations of human rights treaties.

Despite their domestic law origins, FILs still occupy a mysterious position in public international law. In highlighting these issues, this article seeks to shed light on that mystery, aiming to illuminate both an overlooked category of international dispute settlement and a further instance of international law's ever-widening horizons.

[327] Helmut Philipp Aust, *Between Universal Aspiration and Local Application: Concluding Observations*, *in* Aust & Nolte, *supra* note 260, at 344; *cf.* EIRIK BJORGE, DOMESTIC APPLICATION OF THE ECHR: COURTS AS FAITHFUL TRUSTEES 245 (2015).

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