The International Law Framework of National Investment Laws

Dr. Jarrod Hepburn*
Senior Lecturer, Melbourne Law School,
University of Melbourne, Australia.

Abstract

Alongside now-controversial investment treaties, many states also maintain national investment laws. 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 national investment laws 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 from the perspective of international law.

Key words: unilateral acts, investment statutes, foreign investment laws, investment treaties, state responsibility, consent to arbitration, investor-state arbitration, non-state actors.

* This paper draws from earlier work published at Jarrod Hepburn, 'Domestic Investment Statutes in International Law' (2018) 112 *American Journal of International Law*, 658.

1. Introduction

The field of international investment law is usually understood to be based on the extensive network of bilateral and multilateral investment treaties that has been established since the first such treaty was signed in 1959. Nearly every state has signed at least one investment treaty, which now number in the thousands, between all varieties of pairs of states(1). The treaties have sparked hundreds of investor-state claims in international arbitration, and a mass of commentary and discussion.

But alongside these instruments of international law, a recent UNCTAD study notes that 108 states also maintain *domestic* statutes on foreign investment(2). These foreign investment laws (FILs) contain definitions of 'investor' and 'investment' that look very similar to equivalent definitions in investment treaties. FILs also contain investor protections, commonly including guarantees on transfer of capital, expropriation and national treatment(3), again mirroring some of the main protections in investment treaties.

In addition, some FILs include a clause guaranteeing fair and equitable treatment, found almost universally in investment treaties(4). Notably, FILs also sometimes contain the state's prospective consent to the same arbitration mechanisms as investment treaties, allowing investors, as non-state actors, to bring claims for breach of FILs to international tribunals(5). There have already been at least 61 claims relying on a FIL at the International Centre for Settlement of Investment Disputes (ICSID) and in other arbitral forums(6).

(1) UNCTAD, *World Investment Report 2020: International Production Beyond the Pandemic* (UN 2020) 106 at: unctad.org/system/files/official-document/wir2020_en.pdf noted that there were 3,284 investment treaties concluded (but not all in force) at the end of 2019.

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

(3) Ibid, 6.

(4) Eight FILs in UNCTAD's survey included a fair and equitable treatment clause. See ibid at 7. See also Patrick Dumberry, 'Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?' (2017) 8 *Journal of International Dispute Settlement*, 155, 175; Antonio Parra, 'Principles Governing Foreign Investment, as Reflected in National Investment Codes' (1992) 7 *ICSID Review*, 428, 436.

(5) UNCTAD's review counted 26 FILs that contained clear consent to arbitration, similar to clauses found in investment treaties. See note 2 at 10. A further 11 FILs contained unclear clauses which potentially offered consent to arbitration. FILs clearly differ regionally; a recent study of FILs from the ten ASEAN nations observed that none contained consent clauses. See Jonathan Bonnitcha, *Investment Laws of ASEAN Countries: A Comparative Review* (IISD 2017), 4.

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

Arab states including Egypt, Tunisia, Jordan, have been respondents in several of these claims(7). Cases brought under FILs have represented around 10 percent of new cases filed at ICSID in each of the last ten years, reaching up to 17 percent in 2010 and 2013(8).

While the rate of adoption of investment treaties has declined significantly since the mid-1990s(9), there has not been a corresponding decline in the rate of adoption of FILs, which has remained relatively constant since 1990(10). Even as discussions over the future existence of the investment treaty regime are proceeding in earnest, it appears that the proliferation of FILs has continued unabated.

This growth perhaps reflects the increasing difficulty in finding agreement between states on international economic law. Passing a domestic statute establishing foreign investment protections may be easier for a state than expending transaction costs in concluding a treaty with a partner, particularly for capital-importing states, for which the benefits of a reciprocal treaty are limited.

To the extent that domestic legislatures are involved in their creation, FILs might also represent a mode of international law-making offering greater transparency and accountability for citizens than treaties, which are often negotiated and concluded solely by the executive without parliamentary oversight. States may thus have good reasons to prefer FILs over investment treaties.

Despite all of this, FILs have received remarkably little attention. The investment treaty literature and reform projects have entered into extensive policy debates over fundamental questions at the heart of the regime. But similar discussions are almost entirely absent in scholarly discussion of FILs(11). Perhaps finding it easier to analogise to more familiar modes of dispute resolution under treaties, tribunals have also avoided any extensive theorising about the nature of FILs and the international law framework of a dispute based on a FIL. In some cases, tribunals have even directly referred to

(7) See, eg, *SPP v Egypt*; *ABCI v Tunisia*; *Orange v Jordan*; *Champion v Egypt*.
(8) ICSID, 'ICSID, *Caseload – Statistics*,'(2019) at: icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.
(9) UNCTAD, note 1, 106.
(10) UNCTAD, note 2, 2.
(11) Ibid, 11. For a notable recent exception, see Bonnitcha, note 5.

FIL claims as 'treaty claims'[12].

But FILs are clearly not treaties. This raises a host of questions for observers seeking to understand the place of FILs, distinct from investment treaties, in international law. Given that these statutes are instruments of domestic law, should international tribunals use domestic rules of interpretation to understand an arbitral consent clause in a FIL? Can FILs be characterised as unilateral acts in international law, despite their domestic law status? If FILs are unilateral acts, to which entities (states and/or non-state actors) are their obligations owed? Can FILs be revoked by the state? How does the international law of state responsibility apply when a non-state actor invokes an alleged breach of a unilaterally-assumed FIL obligation? If FILs are *not* viewed as unilateral acts, does the law of state responsibility apply at all to what is then merely a claimed breach of domestic law?

Some of these significant questions have arisen already in FIL claims. The first question above, relating to the proper tools for interpretation of FIL arbitration clauses, has received the most attention from tribunals and commentators[13]. Meanwhile, the other questions identified above have not been considered in any meaningful way.

This paper aims to fill that gap. Section 2 considers the characterization of FILs as unilaterally-assumed obligations in international law, tracing the consequences of this characterization for several issues arising in FIL cases. Section 2 contends that there is a good case for treating FILs as unilateral acts, owed by states directly to investors. On this view, apart from certain defences, the law of state responsibility would apply largely as normal, perhaps even with less conceptual difficulty than in investor-state claims under treaties. Section 2 further suggests that viewing FILs as unilateral acts permits states

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

(13) David Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law' in Mahnoush Arsanjani, Jacob Cogan, Robert Sloane et al (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Brill, Leiden, 2010), 649; Michele Potestà, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27 *Arbitration International*, 149; Yulia Andreeva, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions' (2011) 27 *Arbitration International*, 129; Makane Moïse Mbengue, 'National Legislation and Unilateral Acts of States' in Tarcisio Gazzini and Eric de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Brill, Glasgow, 2012), 183.

to terminate them immediately, except in certain circumstances.

Section 3, by contrast, considers the alternative characterization of FILs as merely regular instruments of domestic law. Some tribunals have assumed or implied this view, while others have ignored the question entirely. Addressing the issue directly, section 3 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.

The treatment of FILs raises a number of broader conceptual and institutional issues. States that adopt FILs would seem to have no predetermined reason to prefer one characterization of them over the other; as this paper demonstrates, where outcomes or doctrines differ based on the chosen frame, they sometimes favour governments and at other times favour 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 non-state actors.

Using an analytical and doctrinal methodology, this paper proposes a conceptual framework to analyze these issues, providing a comprehensive account of FILs that situates these hybrid instruments(14) from the perspective of public international law.

2. FILs as Unilateral Acts

One possible way of understanding FILs from the perspective of international law is to treat them as unilateral acts of states, creating binding international obligations in the manner recognised by the International Court of Justice

(14) cf Roberts' description of the US Alien Tort Statute as 'something that cannot easily be categorized as domestic or international law … but rather is some hybrid in between each set of poles': A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *ICLQ*, 57, 77. The analogy is likely even stronger where domestic courts are called on to apply FIL norms, which is envisaged by many FILs but not discussed in this Chapter.

(ICJ) in the *Nuclear Tests* case[15].

This section considers whether FILs can be so characterised, and what consequences this characterization would entail 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.

2.1 Characterising FILs

Domestic laws purporting to have effects on the international plane have often been analyzed as unilateral acts in international law[16]. The *Norwegian Fisheries* case at the ICJ, for instance, centred on Norway's unilateral claim of rights to maritime areas, vis-à-vis other states, made by way of domestic law. Domestic laws on nationality have also been construed as unilateral acts.[17] While the clearest example of a unilateral act in international law is undoubtedly an oral statement or declaration made by a state official (such as the French declarations at issue in the *Nuclear Tests* case), it is nevertheless 'unquestionable that the word "act" is broad enough to embrace legislative acts'[18].

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'[19]. As state organs, national legislatures can undoubtedly breach international obligations (for instance, by passing laws expropriating the property of aliens) and thereby incur secondary international obligations (of reparation) for their state. Legislative action might also therefore incur new *primary* obligations as well, by constituting unilateral acts.

In numerous cases to date, investment tribunals have treated the arbitration consent clauses of FILs as a unilateral act of a domestic legislature that binds the state internationally[20]. However, it is perhaps arguable that the consent

(15) *Nuclear Tests (Australia v. France)*, *Judgment*, I.C.J. Reports 1974, p. 253.

(16) Przemysław Saganek, *Unilateral Acts of States in Public International Law* (Brill, Leiden, 2015), 70–73; Caron, note 16, 649.

(17) Saganek, note 16, 255.

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

(19) Caron, note 13, 653.

(20) *Lighthouse Corporation Pty Ltd v East Timor* (ICSID Case No ARB/15/2), Award, 22 December 2017 [151]; *CEMEX Caracas Investments BV v Venezuela* (ICSID Case No ARB/08/15), Decision on Jurisdiction, 30 December 2010 [77]-[79]; *Mobil Corporation v Venezuela* (ICSID Case No ARB/07/27), Decision on Jurisdiction, 10 June 2010 [83]-[85]; *SPP v Egypt*, note 6, [61]; *PNG Sustainable Development Program Ltd v Papua New Guinea* (ICSID Case No ARB/13/33), Award, 5 May 2015 [258]-[265]. None of these tribunals were troubled that the unilateral act was contained in domestic legislation rather than executive action.

clause represents a unilateral act while the remainder of the FIL, including the substantive investor protections, is characterised purely as domestic law. Neither tribunals nor commentators have explicitly drawn conclusions on this question.

Given this, examination of the basic principles of unilateral acts is useful. These principles have been synthesized in the International Law Commission's Guiding Principles on unilateral declaration of states(21). The Guiding Principles do not identify FILs in particular as a category of domestic laws that might qualify as unilateral acts(22).

However, they do offer support for such a claim, both in relation to consent clauses and substantive protections. The Principles relate to 'declarations', and require that these declarations be 'publicly made' in 'clear and specific terms' by 'an authority vested with the power to do so', and '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(23).

FILs are good candidates to qualify as unilateral acts in most of these respects. As (typically) acts of national parliaments, FILs are clearly declarations of states, made by an authority vested with the power to bind states internationally. 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 clearly also publicly made, perhaps even more so than other domestic statutes since they are frequently posted on websites and online databases(24), often with unofficial translations into English. The 'clear and specific' terms of FILs adds to evidence that they manifest the state's will to be bound(25).

Similarly, framing a declaration in the language of obligations, using mandatory

(21) International Law Commission, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations* (2006), available at legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_9_2006.pdf.

(22) Caron, note 16, 669; Mbengue, note 16, 194.

(23) ILC Guiding Principles, note 24, 1, 3, 4 and 7.

(24) As envisaged by Reisman and Arsanjani generally in relation to inducements for foreign investment: Michael Reisman and Mahnoush Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 *ICSID Review*, 328, 329. See UNCTAD, *Investment Laws Navigator* at: investmentpolicyhub.unctad.org/InvestmentLaws; ICSID, *Investment Laws of the World* at: icsid.worldbank.org/en/Pages/resources/Investment-Laws-of-the-World.aspx.

(25) Christian Eckart, *Promises of States under International Law* (Hart, Oxford, 2012), 213.

language, providing for remedies, specifying a date of entry into force, and allowing for judicial settlement of disputes in relation to the declaration will all assist a case for intention to be bound[26]. The *CEMEX* and *Mobil* tribunals viewed FIL arbitration clauses similarly to the Optional Clause declarations that underpin jurisdiction at the ICJ[27]. Such declarations are often categorised as a *sui generis* form of unilateral act[28].

Rather than a binding promise, however, it might be argued that (at least some) FILs are better qualified only as an *offer* to protect foreign investors in the specified ways. It is true that, unlike bilateral investment treaty (BIT) protections, some FILs require a specific application by foreign investors and approval by the state before the FIL protections apply[29]. Where the state has reserved itself discretion to refuse an investor's application, it is more difficult to view the FIL as a unilateral act: these acts must express 'a state's *unconditional* decision to follow a certain line of future action'[30].

Such a situation arguably looks more like a traditional contractual frame, where the FIL protections might even be characterised as an invitation to treat, and the investor's application characterised as an offer, followed by the state's acceptance. After an application is approved, rather than constituting 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[31].

Even where the FIL does not require prior approval of investment applications, it might still be seen as an offer of specified protections which the investor accepts by investing in the state in accordance with the FIL. This contractual, offer-and-acceptance frame would take the FIL outside the purview of a unilateral act[32].

However, the contractual argument appears to have found very limited

(26) Ibid, 218–19.
(27) See Section 2.4, however, for discussion of the appropriateness of this analogy.
(28) Eva Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law* (Brill, Leiden, 2015), 51–54, 99.
(29) See *Société Resort Company Invest Abidjan v Ivory Coast* (ICSID Case No ARB/16/11), Decision on the Respondent's Preliminary Objection to Jurisdiction, 1 August 2017 for discussion of one such FIL.
(30) Eckart, note 28, 219 (emphasis added).
(31) 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, note 31, 81-84.
(32) Arguably similar to Albania's declaration at issue in the *Minority Schools* advisory opinion at the PCIJ: Kassoti, note 31, 107–109; cf Eckart, note 28, 88-93.

favour in tribunal practice. One tribunal appeared to consider that an initial investment approval process was contractual in nature, but once approval had been granted, bringing the investor under the protection of the FIL, the law's arbitration clause was to be treated as a unilateral act(33).

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 dissenter all treated the FIL as a unilateral act(34), with the respondent state explicitly *rejecting* the application of contractual principles?(35).

Thus, application of basic principles on unilateral acts suggests a plausible argument that both the substantive provisions(36) of FILs and the arbitral consent clause can be characterised as unilaterally-binding sets of obligations in international law. The remainder of this section considers the important consequences for application of state responsibility and termination of FILs that follow from characterizing FILs as unilateral acts. Firstly, however, section 2.2 addresses two preliminary questions: the identity of the beneficiaries of unilateral FIL obligations, and the nature of the rights held by those beneficiaries.

2.2 Beneficiaries and Nature of FIL Rights

Despite their one-sided nature, unilaterally assumed obligations in international law are owed to certain identifiable beneficiaries or addressees(37). The precise beneficiary or addressee of a unilateral obligation will depend on the act in question. The ILC's Guiding Principles cite 'one or several states' as potential addressees of unilateral acts, but they also recognise that unilateral acts may be addressed to 'the international community as a whole' or 'other entities'(38). Private entities – non-state actors such as individuals or corporations – could certainly be an 'other entity' in the ILC's terms. It is now well-accepted that

(33) *Lighthouse v East Timor*, note 20, [151], [333].
(34) *Societe Resort v Ivory Coast*, note 29, [60], [79] and [157], and [5] in the dissenting opinion.
(35) Ibid, [73].
(36) Some FILs impose obligations on *investors*, which obviously could not be classified as unilateral obligations on states. See, eg, the environmental obligations in Article 7.2.4, Mongolian Law on Investment (2013) at: investmentpolicy.unctad.org/investment-laws/laws/124/investment-law. But it is accepted that parts of a declaration can qualify as a unilateral act while the rest does not: Eckart, note 28, 223.
(37) Eckart, note 28, 41; Thomas Franck, 'Word Made Law: The Decision of the ICJ in the Nuclear Test Cases' (1975) 69 *American Journal of International Law*, 612, 615 (unilateral acts can be made to 'unspecified but ascertainable beneficiaries').
(38) ILC Guiding Principles, note 24, Principle 6.

treaties may create rights in international law for individuals[39].

(It is less clear whether *investment* treaties actually do so[40], 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[41].

Commentators have uniformly assumed that, if FILs represent unilateral acts, private investors are the entities to which the state owes the FIL obligations[42]. However, FIL obligations have sometimes been described as being owed to the international community as a whole, as well as to the worldwide class of qualifying investors[43].

This seems doubtful. Unlike the French declarations in *Nuclear Tests*[44], 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* generally as to suggest that the international community as a whole might be addressed. Further, as unilateral acts, FILs impose obligations on states in relation to investors only, without any involvement of the investors' home states.

Unlike BITs, FILs do not contain inter-state dispute settlement clauses, do not impose any reciprocal obligations on home states, and otherwise do not refer to home states at all. Thus, it is most plausible to suggest that a FIL's

(39) *LaGrand (Germany v. United States)*, *Judgment*, I.C.J. Reports 2001, p. 466 [77]; *Avena (Mexico v. United States)*, *Judgment*, I.C.J. Reports 2004, p. 12 [40]; Kate Parlett, *The Individual in the International Legal System* (Cambridge University Press, Cambridge, 2011), 3.

(40) See, e.g., Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, Cambridge, 2009), chapter 1; Anastasios Gourgourinis, 'Investors' Rights *Qua* Human Rights? Revisiting the 'Direct'/'Derivative' Rights Debate' in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Brill, Leiden, 2012), 147; Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *American Journal of International Law*, 179, 184–85.

(41) 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* (Oxford University Press, Oxford, 2013), 252.

(42) Potestà characterises FILs as 'assurances given by host states … to every possible foreign investor': note 16, 150; see also 162. While not discussing FILs, Reisman and Arsanjani suggest that unilateral acts in general can be addressed to investors: note 27, 339, 341. Eckart, note 28, 308, although at 8 he appears to suggest that FIL obligations would be owed to the international community, rather than investors. See also Mbengue, note 16, 187, 205; Andreeva, note 16, 138. Caron, note 16, 653 suggests that FIL obligations are owed to 'the international community and foreign nationals simultaneously'.

(43) Eckart, note 28, 8; Caron, note 16, 653.

(44) The ICJ characterised the French declarations as being made *erga omnes*, to the international community as a whole: *Nuclear Tests*, note 18, [50].

obligations, when conceived of as unilateral acts, are unilaterally assumed towards every worldwide member of the class of investors defined in that FIL.

This position suggests an answer to the related question of the *nature* of the rights granted to investors by FILs. In the BIT context, three potential characterizations of investment treaty rights have been put forward, affecting questions such as waiver of treaty rights and the availability of the defence of countermeasures(45).

First, investors might hold direct rights under investment treaties, which they enforce in their own capacity through arbitration. Second, investors might act as agents of their home state, exercising rights derived from, and delegated to them by, their home states. Third, investors might instead be viewed as third-party beneficiaries of a set of rights granted between the treaty partner states.

In the FIL context, the second and third characterizations are hardly plausible in the absence of a treaty partner state. One writer has maintained that 'the strongest argument in support for the direct rights approach would draw upon … the possibility of parallel exercise of the [home] State's and investor's rights'(46). Where this possibility of dual invocation of responsibility does not exist, as with FILs (given the absence of inter-state arbitration clauses), the argument in support of the direct rights approach becomes even stronger. Thus, under the unilateral act characterization, FILs grant direct rights to investors.

2.3 State Responsibility under FILs

If FILs grant direct rights to foreign investors to invoke breaches, then, the next question is how or whether the international law of state responsibility might apply to such claims.(47) Viewing FIL obligations as unilaterally-adopted international obligations of the host state means that the primary rules allegedly breached in FIL claims are rules of international law. As a result, it might then follow that the secondary rules of the international law of state responsibility will be applicable. Those rules are intended to apply generally, to any kind of international obligation (including unilateral acts), regardless of its source(48).

(45) Paparinskis, note 60, 622–27.

(46) Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 *British Yearbook of International Law*, 264, 335.

(47) The law of state responsibility sets out rules on the conditions for, invocation of, remedies for and defences to the responsibility of states in international law.

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

However, the law of state responsibility was developed in the context of inter-state claims. As has been examined in the context of investor-state claims based on treaties[49], further analysis is required to explain state responsibility's application in investor-state claims based on investment laws, viewed as unilateral acts. This section undertakes that analysis in relation to each of the three parts of the ILC's Articles on State Responsibility.

Chapters I–III of Part One of the ILC Articles set out rules on attribution of conduct to states and breach of international obligations. As with BIT claims, these 'largely commonsensical' rules are likely to apply in the ordinary fashion in a FIL claim, 'unaffected by the identity of the beneficiary of the obligation'[50]. Also as with BIT claims[51], the rules on complicity, control and coercion in Chapter IV have not featured in FIL claims to date and are perhaps unlikely to do so.

Chapter V of Part One of the ILC Articles addresses 'circumstances precluding wrongfulness'. Reliance on one of these circumstances, the defence of countermeasures, by a respondent requires a prior unlawful act by the claimant. But investors are 'structurally incapable'[52] of committing the necessary prior breach of international law in response to which the respondent state's measures could be characterised as a valid countermeasure. This would rule out the application or relevance of countermeasures in FIL claims[53].

By contrast, the defence of necessity – like the other circumstances precluding wrongfulness, distress and *force majeure* – does not require a prior breach of international law, and thus could more easily apply to obligations owed directly to investors[54]. BIT tribunals applying the necessity defence have not been troubled by the requirement that the respondent's conduct not seriously impair an essential interest of the home state; they have simply substituted the investor for the home state[55]. FIL tribunals would likely take the same approach.

Part Two of the ILC Articles, on remedies, would also be expected to apply to FIL claims without difficulty, based on the BIT experience. The remedies rules in the law of (inter-)state responsibility have been applied without

(49) Paparinskis, note 60.
(50) Ibid, 627.
(51) Ibid.
(52) Paparinskis, note 46, 336.
(53) And self-defence: Ibid, 342.
(54) Ibid, 342–343.
(55) Paparinskis, note 60, 635.

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'[56].

The 'technically accurate'[57] explanation for this development – that tribunals are implicitly treating investor-claimants as agents of their home state, rather than as direct rights-holders – could not apply to the FIL context, where the agency argument fails since rights are granted directly to investors. But the rules in Part Two may simply 'reflect general principles and customary rules on the responsibility of states'[58], and apply in any situation where the responsibility of a state is established, regardless of the claimant's identity.

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 to an investment treaty claim[59].

Part Three's rules on invocation of responsibility, meanwhile, are arguably even clearer in FIL claims than in BIT claims. In the latter context, Paparinskis rejects Douglas' view that a BIT breach does not injure the home state at all, and that the home state therefore has no rights of invocation[60]. In the FIL context, Douglas' view seems much more natural. If FIL obligations are not owed to any state, it is difficult to accept that any state (including an injured investor's home state) has suffered injury from a breach. For this reason, debates over how or when a home state might *lose* its right to invoke the host state's responsibility for a BIT breach have no application to FIL claims[61].

Whether a home state could waive its national's FIL rights, meanwhile, would be analyzed similarly to BIT rights: if such rights are directly granted to one party (the investor), waiver by another party (the home state) is not possible[62]. An investor's ability to waive its own FIL rights might depend on the purpose of FILs: if FIL rights are created for investors' own protection, like human rights, then waiver might appear doubtful[63], but if they are merely dispositive

(56) Articles on State Responsibility, Art 33(2). See also Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart, Oxford, 2011), 222–23.
(57) Paparinskis, note 60, 636.
(58) Ibid, 637.
(59) Particularly since Article 39 already envisages an assessment of the conduct of 'any person or entity in relation to whom reparation is sought.'
(60) Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 *European Journal of International Law*, 640–41; cf Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law* 151, 190–91.
(61) cf the similar debate in relation to BIT claims: Paparinskis, note 60, at 643.
(62) Ibid, 645.
(63) Ibid, 644.

rights that can be removed by the home state at any time[64], then they can surely be waived by the investor as well. The rule in ILC Article 45 permitting injured states to waive claims would then apply, by analogy, with 'injured investor' replacing 'injured State'.

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

2.4 Terminating FILs

In general, investment treaties usually permit unilateral termination, but subject to a 'sunset' clause guaranteeing continued operation of the treaty for 10 or more years after termination. These sunset clauses make unilateral termination more difficult (although many states have pursued termination nonetheless)[65].

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 FIL termination might encourage states to use these instruments instead of treaties, where state partner interests might need to be taken into account upon termination.

If FILs are characterised as unilateral acts, the question of termination then parallels the long-controversial question of revocation of unilateral acts. As Eckart observes, if states are permitted to bind themselves in international law via unilateral acts, they must also be restrained in some way from revoking those acts, to avoid undermining the acts' binding nature[66]. At the same time, though, treating unilateral acts as irrevocable would render states reluctant to

(64) Subject to the discussion below on revocation of FILs.

(65) 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' (2018) 25 *Review of International Political Economy*, 75, 75. 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 and Luke Peterson, 'INVESTIGATION: Denmark Proposes Mutual Termination of Its Nine BITs with Fellow EU Member-States, Against Spectre of Infringement Cases' 2 March 2016, *Investment Arbitration Reporter* at: www.iareporter.com/articles/investigation-denmark-proposes-mutual-termination-of-its-nine-bits-with-fellow-eu-member-states-against-spectre-of-infringement-cases.

(66) Eckart, note 28, 251.

take such acts, potentially impeding international relations. Even treaties that do not provide for termination may sometimes be terminated(67). It would be strange to think that unilateral commitments were *more* binding on states than bilateral or multilateral commitments(68).

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'(69). 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(70), 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.

2.4.1 Revocation of arbitration clauses

The situation of revoking consent to arbitration in a FIL will first be examined, before turning to revocation of a FIL's substantive protections.

2.4.1.1 Easy cases

At the outset, certain scenarios can be analyzed quite easily. First, a party that has not yet invested in a state will not be able to benefit from FIL protections if the FIL is repealed before an investment is made(71). Second, it is also clear that a state would not be permitted to terminate a pending claim by repealing the FIL on which the claim is based. This would also apply where the investor has given its own consent to arbitration over future disputes in the terms of the

(67) 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.

(68) Eckart, note 28, 253.

(69) *Nuclear Tests*, note 18, [51].

(70) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, I.C.J. Reports 1984, p. 392 [51]; *Fisheries Jurisdiction (Germany v. Iceland)*, *Judgment*, I.C.J. Reports 1973, p. 49 [36]; *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, *Judgment*, I.C.J. Reports 1997, p. 7 [104].

(71) Jurisdiction over one claimant was rejected for this reason in *Caratube International Oil Company LLP v Kazakhstan* (ICSID Case No ARB/13/13), Award, 27 September 2017, [695]. If a FIL was expressed to extend also to pre-investment activity, this 'easy case' would apply only where a claimant had not yet engaged even in the covered pre-investment activities.

FIL, for instance in a separate letter to host state authorities, before the FIL is terminated(72). In these circumstances, a tribunal would simply ignore the termination and proceed with the case(73).

Thirdly, some FILs contain stabilization clauses (similar to investment treaties' 'sunset clauses'), which purport to preserve the law's guarantees for a specified minimum duration (usually five, ten or twenty years) after termination(74). Where such clauses exist, a defence from the respondent state that the FIL was terminated and cannot form the basis of an investor's claim will be rejected if the claim was brought within the stabilization period(75).

Some FILs, going even further than stabilization clauses that are limited in duration, purport to maintain protections for existing investments indefinitely(76). This form of self-limitation is clearly more extreme, and goes far beyond the 'sunset clauses' in investment treaties(77). Ultimately, though, this kind of unlimited commitment would likely be analyzed similarly to the time-limited clauses. States are allowed to self-impose constraints on their international freedom of action.

In any case, while the restriction might appear extreme, it 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(78). Second, most existing investments in a state will have a natural life span of perhaps thirty

(72) eg *Societe Resort v Ivory Coast*, note 29.

(73) In the context of state contracts, Schwebel has contended that a repudiation or purported termination of an arbitration clause (even before any arbitration is on foot) would constitute a denial of justice: S Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publication, Cambridge, 1987), chapter 2. The argument may similarly apply to the FIL context where the investor has perfected consent by commencing a claim or consenting in advance in a separate letter.

(74) See, e.g., the FILs of Armenia, Azerbaijan, Kyrgyzstan, Mauritania, Tajikistan and Turkmenistan.

(75) cf Potestà, note 16, 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 Investments NV v Tunisia* (ICSID Case No. ARB/04/12), Décision sur la Compétence, 18 February 2011 [126]–[128] might also suggest that stabilization clauses are ineffective in the absence of an 'acquired right' (i.e., in this context, perfected consent to arbitration) – although the discussion on that point in *ABCI* was technically *obiter*, since the majority held that there *was* an acquired right to arbitration prior to the FIL's repeal.

(76) 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, note 24.

(77) 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 and Joachim Pohl, 'Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Papers on International Investment 2015/02, 19.

(78) As Eckart observes, permitting revocation in this situation is hardly arbitrary, making Principle 10(c) of little added value. Eckart, note 28, 259.

years at most (say, for a complex, large-scale oilfield or mining investment). In practice, then, the 'indefinite' protection applying to these existing investment will last only for a certain (even if long-term) period.

2.4.1.2 Hard cases

The above three scenarios are therefore relatively straightforward. More difficult questions arise in a fourth scenario: where no provision (including a stabilization clause) relating to termination exists at all[79], as in the large majority of FILs[80]. In relation to treaties, an agreed rule (VCLT Article 56) sometimes permits parties to terminate a treaty unilaterally, even where the treaty contains no clause permitting this. However, the equivalent rules for unilateral acts in this scenario are less clear. ILC Guiding Principle 10 prevents arbitrary revocation. But what amounts to an 'arbitrary' revocation where there is no apparent restriction on (or permission for) revocation?

2.4.1.2.1 Irrevocability: accrued rights and estoppel

One possible response is that, in this scenario, the fact that conditions for revocation are not specified indicates that revocation is simply not permitted; *all* revocations are arbitrary. *Rumeli v Kazakhstan* appears to support this view, relying on an estoppel-based argument, but the tribunal's reasoning was strictly *obiter* since the FIL already contained a stabilization clause preventing the revocation[81].

In any case, it is not clear that estoppel applies to the investor-state relationship; it is arguably reserved instead for situations of interaction between juridically equal actors[82]. Even if estoppel does apply, requirements of *reasonable* reliance and detriment may not be satisfied, since investors should know of the possibility that a FIL may be revoked, and since it is not clear that investors

(79) This scenario also assumes no fundamental change of circumstances, since the contrary assumption would similarly justify revocation even where there is no stabilisation clause.

(80) UNCTAD, note 2, indicates that only 27 of the laws in UNCTAD's sample have stabilization clauses, suggesting that most FILs do not contain such clauses. UNCTAD's online database in fact counts only 19 FILs with stabilization clauses: UNCTAD, note 24. Patrick Dumberry, 'The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws' (2015–16) 2 *McGill Journal of Dispute Resolution*, 67, 76 counts only 16.

(81) *Rumeli Telekom AS v Kazakhstan* (ICSID Case No ARB/05/16), Award, 29 July 2008 [335]. In *ABCI*, Tunisia contended that the *Rumeli* tribunal's reasoning on accrued rights was only *obiter*: note 78, [128].

(82) Paparinskis, note 41, [253]; Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, Oxford, 2017), 157–58. cf Eckart, note 28, 281, who 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.

actually rely on FIL (or BIT) protections when making investment decisions. There is in fact little support for the argument that unilateral obligations are generally irrevocable or persist indefinitely(83). The ILC itself finds 'no doubt that unilateral acts may be withdrawn or amended in certain specific circumstances'(84).

2.4.1.2.2 Instant revocation: Optional Clause declarations and contractual offers

At the other end of the spectrum, a second possible response is that revocation is *never* arbitrary and always permitted, in the absence of specific rules restricting it. Arbitration clauses in FILs might be analogized to Optional Clause declarations for jurisdiction of the International Court of Justice, since they offer prospective consent to international adjudication with any party accepting the same terms. Relying on the separate opinions of some judges in the ICJ *Nicaragua* case, these clauses could thus be viewed as 'inherently terminable' (as Judge Schwebel said)(85).

Nevertheless, the analogy with Optional Clause declarations is not perfect. When a state issues such a declaration, it joins a 'reciprocal and mutual network'(86), establishing 'a series of bilateral engagements with other States accepting the same obligation'(87). 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 seized(88). 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.

Alternatively, then, FIL arbitration clauses might be viewed as unilateral offers of arbitration, awaiting acceptance by an investor. Schreuer supports this contractual, offer-and-acceptance analysis, stating that 'the host State may repeal its offer [of arbitration in a FIL] at any time unilaterally' before

(83) Eckart, note 28, 253 notes that some authors appear to support this view, but nevertheless allow for exceptions, drawing analogies with the rules for treaties.
(84) ILC Guiding Principles, note 21, commentary to Principle 10 [2].
(85) *Military and Paramilitary Activities*, note 70, Dissenting Opinion of Judge Schwebel [101].
(86) Robert Kolb, *The International Court of Justice* (Hart, Oxford, 2013), 455.
(87) *Military and Paramilitary Activities*, note 73, [60].
(88) 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 (1927–28) 416.

acceptance[89].

2.4.1.2.3 Reasonable notice: a middle ground

The ICJ majority in *Nicaragua* provides a different view on revocation[90]. The Court considered that 'the right of *immediate* termination of declarations with indefinite duration is far from established'[91]. Drawing a comparison with the law of treaties, the Court held that reasonable notice must be given before termination of an Optional Clause declaration. Authors have proposed durations for 'reasonable notice' of between three months and one year[92]. However, as explained above, it is doubtful that the Optional Clause provides the best analogy for FIL consent clauses. This would leave the contractual analysis above as the preferable view, permitting (instant) revocation of a FIL before a claim is in progress.

2.4.2 Revocation of substantive protections

This discussion has focused on revocation of *consent to arbitration* contained in a FIL. Revocation of the rest of the FIL (i.e. the substantive investment protections) might be treated differently, since no Optional Clause or contractual analogies could apply[93]. However, the analysis would then return to Principle 10's prohibition on 'arbitrary' revocation. Eckart has concluded that no firm rules on general revocability of unilateral acts currently exist, given 'too much disagreement, too little state practice and only limited jurisprudence'[94]. *Lex ferenda*, Eckart supports drawing an analogy with the law of treaties as the best available guidance, concluding that 'arbitrary' revocation is revocation

(89) Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008), 834. See also Potestà, note 13, 153, who maintains that consent in FILs is 'much more precarious' than in treaties. As noted above (note 75), Potestà appears to accept that FILs might be instantly terminable even where they contain stabilisation clauses. The conclusion is somewhat curious given Potestà's acceptance that sunset clauses in BITs are effective to prevent instant termination of those instruments: Ibid, 154.

(90) Kolb contends that a 'close reading' of the minority opinions indicates that they were only discussing when a declaration may be terminated, not when that termination takes effect: note 88, 525. This would suggest that even the *Nicaragua* minority accepts the need for a reasonable notice period before revocation is effective.

(91) *Military and Paramilitary Activities*, note 73, [63] (emphasis added).

(92) Christian Tomuschat, 'Article 36' in Andreas Zimmermann and Christian J. Tams, *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, Oxford, 2012), 679.

(93) Under the principle of separability, arbitration clauses are often treated differently to the surrounding instrument in which they are contained, particularly following termination of that instrument. However, that principle applies only where consent is perfected – most often where both parties have already agreed to arbitration in a contract. The present scenario assumes that the investor has not yet given its consent to arbitration under the FIL.

(94) Eckart, note 28, 276.

without reasonable notice of (by default) twelve months(95).

This may make sense in the inter-state context, where good faith is an important overriding principle. But, like investment treaties, FILs entail grants of rights by states to individuals, creating a different kind of relationship than one between equals governed by good faith. Investors must expect the law to change, and cannot complain purely because such changes might affect their rights(96).

Applying a 'public law paradigm' to FIL arbitration, similar to that applied in analyses of investment treaty arbitration, it could thus be concluded 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, meaning that – as for FIL consent clauses – instant termination of substantive FIL provisions is permissible.

3. FILs as Domestic Law

The discussion in section 2 assumed that FILs are characterized as unilateral acts with binding effects in international law. However, if this characterization is rejected – or at least if the characterization applies only to the arbitral consent clause, not to the substantive protections of the FIL – the situation must then be analyzed differently. The FIL will remain an ordinary domestic statute, breach of which is to be determined by an international tribunal(97).

3.1 The Role of International Law

In this situation, an international tribunal will be ruling on a primary claim of breach of domestic law(98). In a FIL claim, two main questions arise: whether a tribunal would draw on international law to interpret the primary rules of the FIL as an instrument of domestic law, and how or whether the secondary rules of international law (particularly the law of state responsibility) would apply.

(95) Ibid, 290, 297.

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

(97) Kjos appears to treat FIL claims as claims where domestic law primarily applies, due to the 'national nature of the claim': Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press, Oxford, 2013), 176. However, Kjos does not explicitly reject the characterization of FILs as unilateral acts.

(98) 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. See, e.g., *Illinois Central Railroad Company v Mexico* (US–Mexican General Claims Commission, 31 March 1926). Early ICSID cases were also largely contractual disputes: see, e.g., *Maritime International Nominees Establishment v Guinea* (ICSID Case No. ARB/84/4), Award), 6 January 1988).

FIL case law provides only minimal guidance on these questions. Although 61 known claims under FILs have been brought before tribunals, very few of these cases have reached the merits(99). There is thus little guidance to draw general conclusions about the proper approach to interpretation, responsibility, and remedies.

International law can, however, retain various roles even in proceedings where the claim under jurisdiction is governed by domestic law. Importantly, even in such cases, given that no publicly available FIL appears to contain an applicable law clause alongside a dispute settlement provision, international law will still fall within the tribunal's applicable law(100).

3.1.1 International law as an interpretive tool

Investment treaty tribunals typically apply *depeçage*, meaning that a different law (domestic or international) can govern different issues in a case(101). Thus, a tribunal might determine that international law governs a reference to expropriation in a FIL, since expropriation is a well-known concept of international law. Even without this determination, international law could also play an interpretive role for FIL provisions that mirror the substantive investor protections of custom or investment treaties(102). Indeed, the limited FIL case-law available demonstrates already that tribunals have drawn on

(99) 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 (owing to a finding of jurisdiction on some other basis) or declined (often owing 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.

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

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

(102) Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, Oxford, 2017), 42. 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' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review*, 133. 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 the discussion in Olga Frishman and Eyal Benvenisti, 'National Courts and Interpretive Approaches to International Law' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity Diversity, Convergence* (Oxford University Press, Oxford, 2016), 317.

international law as an interpretive tool, in relation to 'expropriation'[103], 'investment'[104], and 'fair and equitable treatment'[105].

Nevertheless, the interpretive process for FILs as domestic law 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 under international law, only covering property rights and excluding investors' claims of expropriation of contract rights[106]. 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 favour investors.

3.1.2 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 the international law of state responsibility. If the primary breach found is a breach of domestic law (i.e. a FIL), one might expect that the law of state responsibility will not be relevant[107].

However, the law of state responsibility has proven highly adaptable[108], and the position may be more nuanced. Certainly, 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[109].

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

(104) *Tradex v Albania*, ibid, [106].

(105) *Lahoud v Democratic Republic of the Congo* (ICSID Case No ARB/10/4), Award, 7 February 2014 [356]-[365].

(106) This was argued by Egypt in *SPP*, although ultimately rejected by the tribunal, which drew on the international law understanding of expropriation as covering contract rights: *SPP v Egypt*, note 103, [160], [164].

(107) 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'.

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

(109) A German court has held that the international law defence 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 (8 May 2007). See André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, Oxford, 2011), 185; also Alvik, note 59, 76. However, in *Brazilian Loans*, the PCIJ entertained (but rejected) a plea of *force majeure* even though only a domestic law obligation was at stake. The ILC Commentary (at 77) 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.

In other cases where international adjudicators have ruled on breaches of domestic law, states have never attempted to rely on any of the international law circumstances precluding wrongfulness.

By contrast, the rules on remedies in the law of state responsibility may be of relevance in FIL claims. If these rules simply reflect general principles in any case, as suggested above, tribunals could refer to them for general guidance, if not applying them directly(110). Even so, 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(111). Alongside domestic law rules that sometimes prohibit awards of interest on compensation, 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.

The state responsibility rules on attribution, meanwhile, might be relevant even where a state's international responsibility is not in issue. This is because, unlike the circumstances precluding wrongfulness, attribution rules are not premised on a finding of international responsibility, but instead come prior to such a finding(112). In contract claims(113), and indeed in some FIL claims, the rules on attribution have been readily applied 'by analogy'(114), without concern for the domestic law basis of the tribunal's jurisdiction.

In fact, in the same way that the content of a FIL's primary rules might entail definition via '*renvoi*' to international law as suggested above, it might also be argued that the reference to international law entails reference to *secondary* rules as well. Nollkaemper has suggested that 'primary and secondary norms are interdependent and inseparable, and that '[e]ven when the rule of

(110) See *Khan Resources Inc v Mongolia* (PCA Case No 2011-09), Award on the Merits, 2 March 2015 [368]; *SPP v Egypt*, note 103, [183], [189]; *Lahoud v DRC*, note 105, [564], [632].

(111) Irmgard Marboe, 'State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010), 378.

(112) As Vidmar notes, the fact that the law of state responsibility relates only to 'secondary' rules of international law does not mean that these rules are only relevant *after* a breach of a primary rule is found: J Vidmar, 'Some Observations on Wrongfulness, Responsibility and Defences in International Law' (2016) 63 *Netherlands International Law Review*, 335.

(113) See, e.g., *Autopista Concesionada de Venezuela, CA v Venezuela* (ICSID Case No. ARB/00/5), Award, 23 September 2003 [126].

(114) *Lahoud*, note 105, [375]. See also *SPP*, note 103, [82]–[85]; *Tradex*, note 103, [104].

international law on which the claim is based is incorporated in domestic law, it retains its international character'[115].

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[116]. Even if direct *application* of international secondary rules goes too far, the lesser argument that domestic courts should at least draw guidance from those rules seems acceptable, since it converges on the interpretive use discussed in Section 3.1.1.

If this is true for domestic courts dealing with domestic rules sourced from international law, it is also surely true for international tribunals dealing with such rules. The 'fundamental connection between primary and secondary norms'[117], might therefore lead to application of (or at least reference to) the international law of state responsibility in FIL claims even where FILs are viewed as domestic law.

3.2 Revocation

The position on revocation of FILs becomes more straightforward when FILs are treated purely as domestic law instruments than when FILs are viewed as unilateral acts. The 'easy cases' discussed in Section 2 remain easy. First, if no investment has yet been made, a state's revocation of a FIL will result in a denial of jurisdiction by the tribunal. Second, even if characterised as domestic law, clauses on consent to arbitration in FILs nevertheless unavoidably carry international effects, given that they represent the state's offer of consent to international arbitration with foreign investors.

Thus, if consent is perfected via acceptance by a claimant, either before revocation or during a post-revocation stabilization period, revocation will be ineffective to deny jurisdiction, drawing on the principle that consent to international adjudication, once given, cannot be unilaterally withdrawn.

Meanwhile, Section 2's 'hard cases' – where the FIL is silent on termination – also become somewhat easier. Even if the consent clause is viewed purely as domestic law, the contractual analogy is still apposite, and withdrawal of

(115) André Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 *American Journal of International Law*, 760, 783–84.

(116) André Nollkaemper, 'The Power of Secondary Rules to Connect the International and National Legal Orders' in Tomer Broude and Yuval Shany, *Multi-Sourced Equivalent Norms in International Law* (Hart, Oxford, 2011), 45.

(117) Ibid, 59.

the offer via repeal before acceptance will be effective to deny jurisdiction. Similarly, the substantive protections of the FIL will also immediately terminate, as long as domestic constitutional requirements for a valid repeal were met.

4. Conclusion

The characterization of foreign investment laws as either unilaterally-assumed international obligations or ordinary domestic statutes will have a variety of effects on an arbitration proceeding brought by a non-state actor under such instruments. In some cases, the characterization will lead to diverse conclusions: when viewed as unilateral acts, certain defences (such as necessity) will be available for the respondent, in contrast to a characterization of domestic law.

The process of interpretation will also be different, which may alter the meanings of clauses where domestic standards diverge from international law. In other cases, the analysis will reach the same conclusions, but for different reasons: the defence of countermeasures will be unavailable, and repeal of substantive FIL provisions will be immediately effective (absent a stabilization clause), whether FIL protections are unilaterally-assumed international obligations or domestic obligations, but the explanation for this in each situation 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.

Scholars of investment law are, of course, familiar with the possibility that diverging underlying assumptions about the system can produce diverging justifications and outcomes. The growth of investor-state arbitration under investment treaties has prompted efforts to understand those strange new beasts(118) by drawing on analogies to more recognizable systems. Similarly, understanding arbitration with non-state actors under FILs will also require conceptual 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.

At a minimum, the existence of FILs complicates the familiar treaty/

(118) cf Roberts, note 96, 45.

contract distinction made by investment lawyers[119]. This paper has sought to demonstrate that claims under FILs are not merely treaty claims, as several tribunals have suggested[120], 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. In light of continuing concern over investment treaties and ongoing reform projects, there are urgent reasons for scholars of investment law to understand FILs better, as FILs represent one potential alternative to investment treaties into the future.

The claims brought by non-state actors under FILs also deserve greater attention from commentators outside investment law. The statutes have a potential role in creating custom[121]. Viewing them also as unilateral acts reminds observers of this under-appreciated 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[122]. States might begin to make promises to non-state actors, who are still largely excluded from formal international lawmaking[123], 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. The paper's analysis of FILs offers guidance in identifying such statutes, and in addressing the questions of state responsibility and termination, among others, that could

(119) James Crawford,'Treaty and Contract in Investment Arbitration' (2008) 24 *Arbitration International*, 351, 355–56; Yuval Shany, 'Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims' (2005) 99 *American Journal of International Law*, 835; Anthony Sinclair, 'Bridging the Contract/Treaty Divide' in Christina Binder, Ursula Kriebaum, August Reinisch et al, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford 2009).

(120) See the cases cited in note 12.

(121) See Dumberry, note 83.

(122) Reisman & Arsanjani, note 27; Paparinskis, note 41, 252.

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

arise in those contexts.

FILs might also provide a new, fertile ground on which to study references to international law by domestic courts. Domestic courts are not yet known to have heard any claims under FILs, but the continuing uncertainty over investment treaties may push claimants away from international arbitration, giving domestic courts an opportunity to interpret these rules. 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(124). 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 paper seeks to shed light on that mystery, aiming to illuminate both an overlooked category of participation by non-state actors in international dispute settlement and a further instance of international law's ever-widening horizons.

(124) Helmut Philipp Aust, 'Between Universal Aspiration and Local Application: Concluding Observations' in Aust and Nolte, note 104, 344; cf Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press, Oxford 2015), 245.

Table of Contents