Many countries seek to offer protection to foreign investments using international instruments such as bilateral investment treaties. These treaties establish mechanisms for the resolution of foreign investment disputes, most notably via arbitration at the International Centre for Settlement of Investment Disputes (ICSID).

But treaties and international instruments are not the only mechanism available for states to protect and promote foreign investment. Indeed, many countries have also passed national laws on foreign investment, often referred to as Foreign Investment Laws (FILs). FILs offer many of the same substantive protections for foreign investors as investment treaties. FILs also sometimes offer the state’s consent to the same arbitration mechanisms as investment treaties. Around 70 claims relying on a FIL, instead of (or as well as) an investment treaty, have now been brought to ICSID and other forums of international arbitration.

Despite this, there has been remarkably little research on these national laws on foreign investment. By contrast, there is an extensive research literature now available studying bilateral investment treaties. Scholars may have concluded that, because FILs are so similar to investment treaties, FILs therefore raise no distinct issues and there is no need to study them separately. In some of the arbitration claims already brought under FILs, tribunals have even directly referred to the FIL claims as ‘treaty claims’.

But FILs are clearly not treaties, and they provoke numerous questions for observers seeking to understand the place of these national laws within international law. For instance, given that they are instruments of domestic law, should international tribunals use domestic rules of interpretation to understand an arbitral consent clause in a FIL? Can FIL claims be time-barred by domestic statutes of limitation? Can FILs be characterised as unilateral acts in international law, despite their domestic law status? If FILs are unilateral acts, to which entities are their obligations owed? Can FILs be revoked by the state? How does the international law of state responsibility apply to a claimed 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. One case was dismissed when a sole arbitrator determined that a domestic law limitations period applied, time-barring the FIL claim. Other cases have held that the repeal of a FIL does not affect investors’ ability to commence arbitration under it, in relation to pre-existing investments.

The growth of FILs perhaps reflects the growing 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 concluding a treaty, 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.

There are urgent reasons to understand FILs, if states begin turning to them more frequently to avoid the downsides of treaty-making. The article proposes an analytical framework to do this, providing a comprehensive account of FILs that situates these hybrid instruments from the perspective of public international law.