

# *Manchester Journal of International Economic Law*

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### **WTO Dispute Settlement at 30: A Period of Embedded Internal Reform**

*Müslüm Yilmaz and Jenya Grigorova*

### **Investment Treaty Clauses for Revoking and Reclaiming Subsidization and State Aid**

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### **Protection of Foreign Investments in the Maldives**

*Nuha Mohamed Didi*

# Manchester Journal of International Economic Law



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— Asif H Qureshi, Editorial, MJIEL, 2004, Volume 1, Issue 1

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- ❖ Fuller coverage of international economic relations in all its spheres;
- ❖ A holistic focus on international economic issues; and
- ❖ Awareness of a development dimension in international economic relations.

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# **Manchester Journal of International Economic Law**

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## Protection of Foreign Investments in the Maldives

Nuha Mohamed Didi\*

**ABSTRACT:** *FDI is pivotal to the Maldivian economy. The country's first national foreign investment law was enacted in 1979. During its tenure, the Maldives faced ups and downs including stable attraction of foreign investment and significant losses before arbitral tribunals. Though the Maldives has not rectified a single Bilateral Investment Treaty (BIT) to date, the country has enacted a new and improved version of its national foreign investment law in 2024 (FIL24). FIL24 is complete with foreign investor protection standards that mimic those usually found in BITs, including FET. This study weighs the resilience of this successor Law against investor protection standards found in BITs. The comparison between the standards of FIL24 and those in BITs demonstrates factors that undermine the provisions in FIL24, predominantly because it is a domestic law. However, the global trends where developing countries are no longer the sole recipients on FDI inflows, developed countries are more willing to accept investment policy standards paving way for a more generous policy space in the host country, drastically shifting from the traditional standards. Furthermore, as a developing nation in the Global South, this study compares the decision by the Maldives to introduce a new domestic legislation. The study found that this shift in dynamics does not necessarily match with the trends followed by other Global South nations. While FIL24 and its impact on investor protection would take some time to materialize, FIL24 carries the potentiality to assert itself as a standalone framework providing protection to investments in this archipelago.*

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### 1. INTRODUCTION

Foreign Direct Investment (FDI hereinafter) is pivotal to the Maldivian economy.<sup>1</sup> Maldives enacted its first Foreign Investment Law in 1979 (FIL79 hereinafter)<sup>2</sup> shortly after the

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\* Nuha Mohamed Didi, Legal Officer, Supreme Court of the Maldives, Maldives. Email: nuhamohamedd@gmail.com. This article is part of the author's dissertation at the University of the West of England for the degree of Master of Laws in Commercial Law. The author wishes to thank her supervisor, Mr Mohd Imran, for his unwavering support throughout this journey.

<sup>1</sup> Maldives Monetary Authority, 'Annual Report 2023', 2023, [www.mma.gov.mv/documents/Annual%20Report/2023/AR2023%20\(English\).pdf](http://www.mma.gov.mv/documents/Annual%20Report/2023/AR2023%20(English).pdf) (accessed 6 January 2025), pp. 5 and 64; Maldives Monetary Authority, 'Monthly Statistics, December 2024, Volume 25, Issue 12', 2024, [www.mma.gov.mv/documents/Monthly%20Statistics/2024/MS-Dec-2024.pdf](http://www.mma.gov.mv/documents/Monthly%20Statistics/2024/MS-Dec-2024.pdf) (accessed 6 January 2025), at 73; In the year 2023, the Maldives received US\$751.4 million in inward FDI.

<sup>2</sup> Law on Foreign Investments in the Republic of Maldives 25/79.



introduction of its tourism sector in 1972.<sup>3</sup> However, arguably due to hasty drafting, FIL79 was devoid of critical investor protections, expropriation terms, and dispute resolution mechanisms, leading to significant arbitration losses over the years.<sup>4</sup>

This decade commenced with the Maldives making significant strides in standardizing FDI, by signing the Singapore Convention<sup>5</sup>, ratifying the New York Convention<sup>6</sup>, and finally, introducing the Foreign Investment Law 2024 (FIL24 hereinafter)<sup>7</sup>. FIL24 addresses the deficiencies of FIL79 by incorporating investor-friendly provisions such as fair and equitable treatment (FET), profit repatriation rights, and guarantees of fair compensation in exceptional expropriation cases.<sup>8</sup> This domestic law largely mimics elements of BITs, in the absence of any active investment treaties.

The applicable law for foreign investments is a crucial factor negotiated by the investor and host State. While the host State seeks to safeguard sovereignty, investors prioritize stability and impartial dispute resolution mechanisms.<sup>9</sup> FIL24's emphasis on investor protections and treaty law integration may enhance investor confidence. However, whether these measures effectively strengthen the Maldives' bargaining power, and asserts this legislation as a standalone legal framework for investment protection as a Global South country remains to be seen.

This study hypothesizes that FIL24 provides comprehensive protection to foreign investment under domestic law through standards and principles of international law. In order to test this hypothesis, this study first examines the two national investment legislations of the Maldives in a comparative light, providing emphasis on the distinctiveness of the new Law. Next, the study magnifies on BIT standards to compare and contrast provisions contained in them throughout their history and in recent years, against provisions in FIL24, critically evaluating which of these instruments, BIT or FIL24 as a domestic law, could potentially

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<sup>3</sup> Harshad Pathak, 'Consent to Investor-State Arbitration Through Municipal Law – Conceptualizing A Model Provision for Maldives', *Cambridge International Law Journal Blog*, 2022, <https://cilj.co.uk/2022/12/17/symposium-on-decoding-maldives-foreign-investment-and-arbitration-law-regime-consent-to-investor-state-arbitration-through-municipal-law-conceptualizing-a-model-provision-for-maldives/> (accessed 6 January 2025), at 7; Husnu al Suood, 'An Analysis of the Role of English Common Law in the Development of the Maldivian Company Law' *Maldives Law Institute* (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4241241](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4241241) (accessed 6 January 2025), at 1; Mohd Imran, 'Cowrie, Coir and Commercial Diplomacy of Dhivehi Rajje', *Cambridge International Law Journal Blog*, 2022, <https://cilj.co.uk/2022/12/16/symposium-on-decoding-maldives-foreign-investment-and-arbitration-law-regime-cowrie-coir-and-commercial-diplomacy-of-dhivehi-rajje/> (accessed 6 January 2024), at 6.

<sup>4</sup> These include compensation of millions of dollars paid to GMR Group and Nexbix Pvt Ltd in the years 2016 and 2018 respectively; *Maldives Airports Co Ltd and Anor v GMR Male International Airport Pte Ltd*, [2013] SGCA 16; *Platinum Blackstone PTY LTD (formerly known as Nexbis Pty Ltd) v. Republic of Maldives*, SIAC Case No. ARB003 of 2014; 'Maldives settles US\$18m arbitration payout to Nexbis' *Maldives Independent* (2019), <https://maldivesindependent.com/business/maldives-settles-us18m-arbitration-payout-to-nexbis-143655> (accessed 6 January 2024); 'Government pays GMR US\$ 4 million in arbitration fees' *Maldives Independent* (2014), <https://maldivesindependent.com/news-in-brief/government-pays-us-4-million-in-arbitration-fees-to-gmr-88640> (accessed 6 January 2024).

<sup>5</sup> United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) (adopted 20 December 2018, entered into force 12 September 2020), UN Doc A/RES/73/198.

<sup>6</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (adopted 10 June 1958, entered into force 7 June 1959), 330 UNTS 3.

<sup>7</sup> Foreign Investment Law 11/2024.

<sup>8</sup> *Ibid.*, s. 28, 29 and 32.

<sup>9</sup> Rudolf Dolzer and others, *Principles of International Investment Law* (3<sup>rd</sup> edition, Oxford University Press, 2022), at 124.

declare its dominance over the other in terms of protection provided to investors. In doing so the study briefly sheds light on BIT termination trends by Global South nations, contrasting this trend with the introduction of FIL24.

### 1.1. Methodology

This study adopts a purely doctrinal approach, relying on both primary and secondary sources of law. Qualitative research is utilized to determine the presence or absence of hypothesized reality. The qualitative materials analysed include conventions and treaties, Maldives' legislations – FIL79 and FIL24 – minutes and committee reports of the People's Majlis on FIL24 including readings and debates, relevant case law, and scholarly texts on domestic foreign investment law and investment treaty law. The study briefly looks at domestic foreign investment laws of other Global South countries to draw comparisons based on recent BIT trends. Aside from the scholarly texts, the aforementioned sources constitute original and primary materials. In this research, a comparative approach is employed, in order to test the formulated hypothesis on the new foreign investment law of the Maldives.

## 2. MALDIVIAN DOMESTIC INVESTMENT LAW AND INVESTOR PROTECTION

Capital-rich countries colonized natural resource-rich poor countries. Although the Maldives, a capital-poor country, was not an official colony, it remained as a British Protectorate from 1887 to 1965.<sup>10</sup> The foreign investment tales of this archipelago, however, began way before the activation of the Protectorate Agreement, with the first foreign investor establishments in the country dating back to the 1850s when Indian Bohras, British subjects, established their companies in the Maldives.<sup>11</sup> Back then, the trading ground of these corporations was made untouchable against their European counterparts through an agreement between the British and the local Sultan.<sup>12</sup> Modern substantive investment standards such as FET and Most Favoured Nation Treatment (MFN) were largely irrelevant at the time. The need for such a law was lacking on a global scale, since colonization and imperialism were inherently sufficient to provide adequate protection.<sup>13</sup> Where colonization and imperialism were absent, gunboat diplomacy worked just as well.<sup>14</sup> In this sense, it may be argued that investment protection, at the time, could very well have been derived from an agreement the British investors had made with the Crown. Hence, investor protection, at least in its contemporary sense, was an alien concept not only in the Maldives, but also for the rest of the world.

To attract foreign investment in a globalized world, the Maldives enacted several pieces of new legislation, FIL79 being one of them.<sup>15</sup> After four decades, this Law has now been

<sup>10</sup> Thamil Venthan Ananthavinayagan and others, 'International Law and Maldives: Navigating Geopolitics, Trade and Sovereignty', *Cambridge Open Engage*, 2024, doi:10.33774/coe-2024-gfg4w-v2 (accessed 5 February 2025), at 3.

<sup>11</sup> Husnu al Suood, *supra* note 3, at 3.

<sup>12</sup> *Ibid.* Mohd Imran, *supra* note 3, pp. 5-6.

<sup>13</sup> M. Sornarajah, *The International Law on Foreign Investment* (5th Edition, Cambridge University Press, 2021), at 27.

<sup>14</sup> *Ibid.*

<sup>15</sup> Husnu al Suood, *supra* note 3, at 1.

repealed, and the Maldives is currently abiding by the second investment-related domestic law in its history – FIL24. Before delving into the contents of this Legislation, it is essential to investigate its predecessor and what it had engendered in the wake of its recent abolishment.

### 2.1. Foreign Investment Law 25/79

The first foreign investment law of the Maldives, FIL79, gushed forth with several other pieces of legislation in the late 1970's. This phenomenon was predominantly attributed to the country's newly sprouting tourism industry.<sup>16</sup> FIL79 consisted of no provisions whatsoever on investor protection and conditions for legitimate expropriation, rendering it barely anything more than a legal placebo. Enacted in January 1979, this Law initially contained thirteen sections, and four additional sections came about via an amendment implemented a decade after the Act came to force. The following paragraphs provide a detailed overview of the provisions contained in FIL79 that are primarily relevant to this research.

The Law contained no preamble. It began with the categories of eligible foreign investors, i.e. a foreign government or a foreign national or a body incorporated outside the Republic of Maldives.<sup>17</sup> Furthermore, to be eligible, the bank or a foreign government must be recognized by the Maldives. Here it is not clear whether the recognition of foreign government meant that both the countries must have established diplomatic relations. Similarly, the financial status of eligible investors were restricted depending on recognition by bank or a government recognized by the Maldives' Government (the Government), or the person or corporate body whose financial status ought to be guaranteed by a bank or an institution acceptable to the Government to be eligible.<sup>18</sup> Eligible investors were required to be registered with the relevant ministry.<sup>19</sup>

FIL79 had restrictions concerning the type and the nature of investments, whereby the Ministry concerned was bestowed powers to set parameters to determine the kind of investments that foreigners were allowed to undertake, given the investors possessed capital deemed adequate by the Government.<sup>20</sup> It can be argued that given the lack of legal certainty, actual legal obligations were to be decided on *ad-hoc* basis between the investors and the relevant ministry. Under FIL79, in addition to registering the investment with the relevant Ministry, such registration was required to be accompanied by the signing of an investment contract.<sup>21</sup>

This was arguably the most material provision contained in this legislation, as investment contracts have been at the core of foreign investments for almost four decades in the country, without any backing from supplementary treaties or International Investment Agreements (IIAs hereafter). Minimum requirements of an investment contract, as per the legislation, included

<sup>16</sup> Suresh Kumar Kundur, 'Development of Tourism in Maldives', *International Journal of Scientific and Research Publications*, 2012, 2(4), at 223.

<sup>17</sup> Law of Foreign Investments in Maldives 25/79, *supra* note 2, s. 1(a).

<sup>18</sup> *Ibid.*, s. 4.

<sup>19</sup> Tourism Ministry if the investment is tourism-related, and the Trade Ministry, if related to any other sector.

<sup>20</sup> *Ibid.*, s. 2.

<sup>21</sup> *Ibid.*, s. 1(b).

terms of the investment and complete details of investment undertaking and execution.<sup>22</sup> Compared to this, minimum requirements of an investment contract as provided in FIL24 demonstrate a higher standard, likely learning from the bitter experiences before arbitral tribunals and perhaps, boosting trust of foreign investors.

Furthermore, the absence of substantive provisions on protection of foreign investment in FIL79 allowed the Government to temporarily suspend investments with or without due notice, if the investor's conduct were in a manner that threatened national security, or in a manner that the Government deemed would pose a potential threat to national security. In such circumstances, neither the Government nor the citizens of the country would be liable for any losses suffered by the investor due to the suspension.<sup>23</sup> However, if the Government failed to prove existence or potential possibility of a threat to national security within 60 days from the date of suspension, the Government was required to provide fair compensation for the loss suffered by the investor due to suspension.<sup>24</sup> Whether an investment is suspended due to existing threat or potential arousal of a threat to national security, or whether due to illegal conduct by the investor, the investor and the Government were to come to mutually agreed terms on how to repatriate the investment property and related funds to the investor's home country.<sup>25</sup> Due to absence of copy of investment contracts between the investors and the Government in the public domain, it is difficult to articulate what rights and obligations were guaranteed beyond FIL79.

First amendment to FIL79 contained a rather vague dispute resolution provision, barely adding any useful weight to the legislation. The provision stated that if an issue could not be resolved after discussion between the Government and the investor, then the issue should be resolved as set out in the investment contract.<sup>26</sup> Finally, under FIL79, the Government was required to advise the investor in case of illicit conduct, which would then be followed up by a warning. Failure to respond positively to these measures granted the Government the discretion to terminate the investment contract.<sup>27</sup> In such a case, the investment property could still be repatriated as agreed between both parties.<sup>28</sup> It is not known that the Government followed these procedures in the infamous cases of Nexbiz and GMR.

## 2.2. Arbitration Failures

In case of investor-State disputes, the Maldives underwent two significant and conspicuous arbitration failures. These failures were a clear spectacle of FIL79 being wholly dependent on the investment contract to encapsulate every aspect that was pivotal for balancing investor protection and State sovereignty.

In the *GMR case*, the Maldives Airports Company Limited (MACL), which was wholly owned by the Maldives Government (claimant), entered into a 25 year concession agreement

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<sup>22</sup> *Ibid.*, s. 3.

<sup>23</sup> *Ibid.*, s. 6.

<sup>24</sup> *Ibid.*, s. 7.

<sup>25</sup> *Ibid.*, s. 9.

<sup>26</sup> *Ibid.*, s. 15.

<sup>27</sup> *Ibid.*, s. 8.

<sup>28</sup> *Ibid.*, s. 9.

with GMR-MAHB consortium (respondents), on 28 June 2010, to expand, rehabilitate, maintain and modernize the international airport in Hulhule' Island of Male' City.<sup>29</sup> This allowed the Respondents to levy a charge of US\$25 along with US\$2 per passenger, as Airport Development charge and fuel surcharge respectively.<sup>30</sup> However, following a domestic civil judgment, which ruled on the illegality of these charges, the respondents were confronted with a significant loss. The claimant, via a letter, agreed to pay compensation for the respondent's loss in revenue.<sup>31</sup> Soon after, however, the claimant backtracked on this commitment, subsequent to a change in the administration, citing misplaced authorization by the company's former chairman.

The respondents resorted to arbitration, attempting to restore their right to collect fees as per the concession agreement.<sup>32</sup> The claimant filed a second arbitration right after issuing the respondents an ultimatum of seven days to vacate the airport. The claimant sought to declare the concession agreement, void ab initio or frustrated on account of the civil judgment, allegedly bolstered by irregularities in the bidding process.<sup>33</sup> This pushed the respondents to seek an injunction at the Singapore High Court, to restrain the State from taking any step to take control of the airport and to stop the respondent from acting in accordance with the agreement.<sup>34</sup> When the matter escalated to the Singapore Court of Appeal, the Court decided in favour of not granting the injunction as requested by the respondent.<sup>35</sup> Though the Maldives Government succeeded in this phase, the State went on to lose the case at the tribunal, which awarded the respondents USD 250 million.<sup>36</sup> Due to the unavailability of the concession agreement in the public domain it is challenging to discuss the specific issues dealt with by the tribunal in terms of investor protection.

In the *Platinum Blackstone case*, Platinum Blackstone (the claimant), entered into a concession agreement with the Maldives Government (the respondent), to conduct immigration border control in the Maldives.<sup>37</sup> Appellant won this project through a bidding process where it had competed with three other firms.<sup>38</sup> Dispute triggered when a series of invoices were left unpaid upon respondent's decision to adopt the parliamentary budget review committee's recommendation to terminate the agreement by dropping it from the budget, the financial obligation created under it.<sup>39</sup> The claimant made several attempts to resolve the dispute

<sup>29</sup> *Maldives Airports Co Ltd v GMR*, *supra* note 4, para. 1.

<sup>30</sup> Shaun Lee, 'Case Update: GMR and Male Airport Dispute' *Singapore International Arbitration Blog* (2013), <https://singaporeinternationalarbitration.com/2013/02/25/case-update-gmr-and-male-airport-dispute/> (accessed 22 February 2025).

<sup>31</sup> The Airport Service Charge Act, Law No. 71/78; *Maldives Airports Co Ltd v GMR*, *supra* note 4, para. 4.

<sup>32</sup> *Ibid.*, paras. 5 and 6.

<sup>33</sup> *Ibid.*, para. 7; Shaun Lee, *supra* note 30.

<sup>34</sup> *Ibid.*, para. 8.

<sup>35</sup> *Ibid.*, para. 54.

<sup>36</sup> Press Release, 'Arbitration between the Government of Maldives, MACL, and GMR-MAHB Consortium, comes to a Close' *The President's Office* (2016), <https://presidencymaldives.gov.mv/Press/Article/17341> (accessed 22 February 2025).

<sup>37</sup> *Platinum Blackstone Pty Ltd v. The Republic of Maldives 19-cv-00255-BAH, Petition to Confirm Arbitral Award*, paras. 3 and 12.

<sup>38</sup> *Ibid.*, para. 14.

<sup>39</sup> *Ibid.*, para. 15.

amicably, before invoking the arbitration clause.<sup>40</sup> Thus began the respondent's lengthy, two-year journey, making numerous submissions in an attempt to win a lost battle.<sup>41</sup>

Several defences were taken by the Respondent for non-performance including frustration due to budgetary cuts, rendering the commitment impossible to be performed. Additionally, similar to the *GMR case*, the respondent presented an argument regarding corruption in the bidding process. However, this argument also failed to convince the arbitrator of any significant irregularities that could invalidate the contract.<sup>42</sup> In the end, the appellant was granted an amount of more than \$17.8 million, which included lost profits due to misinterpretation of a clause in the agreement, alongside fees and expenses.<sup>43</sup> This amount elevated by nearly \$20 million when post-award interest was accumulated.<sup>44</sup>

### 2.3. Foreign Investment Law 11/2024

This Law came into force on 3 December 2024 with promises to establish sectors in which foreign investments are admitted; to enact procedures for issuing investment licenses; to set out protections eligible to these investors; to stipulate circumstances under which expropriation becomes legal; on how such measures will be compensated, along with other relevant rules that may apply to foreigners looking to invest in the Maldives.<sup>45</sup>

Consistent with FIL79, this Law classifies economic sectors into four distinct categories regarding foreign investment: unrestricted, partially restricted, conditionally restricted and fully-restricted for foreign investments.<sup>46</sup> These restrictions are based on several factors, including potential threats to national security, obstruction to a competitive market in certain sectors or industries as a consequence of entry by large multinational corporations, and the level of progress achieved by local businesses in a given sector.<sup>47</sup> Additionally, if foreign investments are found to be crucial for the development of certain sectors, investment restrictions may be alleviated.<sup>48</sup> While some of the sectors are open for investment without any limitations, some are restricted by certain preconditions to be met by prospective investors.<sup>49</sup> The Law stipulates these sectors to be determined and published in the government gazette within three months from the Law's implementation.<sup>50</sup> To the date of this study, such a publication remains absent, hence the preconditions along with the open and restricted sectors are currently ambiguous.

Sectoral restrictions are revised once every three years. If such revisions bring changes to the sectors open to foreign investment, an already existing investor would be allowed to operate in a sector, which may have become restricted after re-evaluation by the Ministry, until

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<sup>40</sup> *Ibid.*, para. 16.

<sup>41</sup> *Ibid.*, para. 38.

<sup>42</sup> *Ibid.*, paras. 22 and 23.

<sup>43</sup> *Ibid.*, paras. 26 and 27.

<sup>44</sup> *Ibid.*, para. 28.

<sup>45</sup> Foreign Investment Law 11/2024, *supra* note 7, s. 1(a).

<sup>46</sup> *Ibid.*, s. 6.

<sup>47</sup> *Ibid.*, s. 11(b)(1), (2), (3).

<sup>48</sup> *Ibid.*, s. 11(b)(4).

<sup>49</sup> *Ibid.*, s. 7.

<sup>50</sup> *Ibid.*, s. 11(c).

the maturity of the approval granted to them.<sup>51</sup> Same applies to those investors who have already made their investment under this Law or any other law prior to the novel preconditions freshly laid out by the Ministry, which must be met by foreigners who wish to invest in that sector.<sup>52</sup>

Unlike FIL79, FIL24 spells out the stages of approval and granting of license for foreigners to undertake their investments. It commences with the issuance of no-objection statement by the Ministry to all investors meeting the relevant criteria, followed by the fulfilment of responsibilities and procedures by these investors.<sup>53</sup> Failure to undertake the responsibilities and procedures within the granted timeframe would lead to revocation of the no-objection. This will lead the investor back to square one, where they are once again required to apply for approval with the Ministry.<sup>54</sup> Once all procedures are undertaken, the Ministry shall grant the investment license.<sup>55</sup> The investor is required to reapply for the renewal of this license six months before it expires.<sup>56</sup> The final step involves signing the investment contract with the State.<sup>57</sup> This contrasts with FIL79, which makes no explicit mention of parties to the investment contract.

In granting investment licenses under FIL24, the preservation of national interest is foremost, enlisted as a factor to be considered alongside other conditions needed to be met by interested investors.<sup>58</sup> To this effect, there are aspects that the Ministry must account for in order to ensure national interest is protected in granting license. These include potential threat to national security, anti-competitive impact in the industry upon entry by a foreign investor, and the level of saturation in the industry by local investors. Additionally, the creation of employment opportunities upon entry of foreign investors, and the potentiality of human resource development are weighed in. Furthermore, the Ministry shall consider the impact on the environment and the level of technology transfer resulting from the investment.<sup>59</sup>

FIL24 is comprehensive in what needs to be minimally contained in the investment contract, when compared to FIL79. They include, details of the investment to be undertaken, permitted activities under the contract, the number of investments planned to be undertaken, maturity of the contract, the non-transferability of investment approval granted by the Ministry to a third party, procedures that need to be undertaken by the investor under the Maldivian Laws in order to proceed with the investment, rules in dealing with land-related matters, investor's responsibility towards the host environment when conducting activities, investor's duty towards abiding by the domestic laws, acquiring required licensing from the local government authorities, rules on human resource employment, the right of investor to repatriate profits, fees and charges needed to be settled with respective government offices, terms on renewal of the

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<sup>51</sup> *Ibid.*, s. 11(g).

<sup>52</sup> *Ibid.*, s. 11(h).

<sup>53</sup> *Ibid.*, s. 12(b).

<sup>54</sup> *Ibid.*, s. 17(b).

<sup>55</sup> *Ibid.*, s. 12(c).

<sup>56</sup> *Ibid.*, s. 22(a).

<sup>57</sup> *Ibid.*, s. 12 (d).

<sup>58</sup> *Ibid.*, s. 15(c).

<sup>59</sup> *Ibid.*, s. 15(e).

investment, terms on conducting Environment Impact Assessment if so required, fulfilment of conditions depending on the sector, dispute resolution terms, anti-corruption clause, and other terms set out in the regulations empowered by this Law.<sup>60</sup> Overall, FIL24 appears to have covered potentially most of the problematic areas as the minimum required terms of the investment contract that will be signed. Though this may aid in balancing investment protection and sovereignty to some extent, the level of effectiveness would depend on the negotiating power of the parties.

FIL24 does not necessarily spell out a multi-tier dispute resolution procedure. Rather, it contains a provision for when an investor is aggrieved with any action by a government office or any other government body in relation to an investment established in the Maldives. The investor may file a complaint with the Ministry in order to address such grievance, which will then be addressed by the review committee established at the Ministry.<sup>61</sup> Hence, similar to FIL79, dispute resolution procedures are for the parties to negotiate when signing the investment contract.

FIL24 stands out in a manner that neither FIL79, nor normally found domestic investment laws of other jurisdictions do. This is because FIL24 contains clauses that closely mirror provisions originally found in BITs. For instance, this Law contains a FET provision, which is not shy to declare outright that the investor has absolute right over the investment made under this Law and the income generated from it. It sets out that such investments shall be dealt with in a transparent manner.<sup>62</sup> Similar is the provision that dictates the investor's right to transfer the investment capital and profits back to the investor's home country, albeit with an exception. The Maldives has carved out its right to set conditions in transferring capital and profits in case of balance of payment difficulties or an ongoing economic crisis.<sup>63</sup>

A provision which may appear unappealing to investors in this Law is it has granted unrestricted power to future legislations to trim down the rights contained herein. However, these legislations are limited to those which aim maintenance of sovereign power, jurisdictional security and protection, environmental preservation, securing human rights, and to overcome famine or natural disasters.<sup>64</sup> The Law stipulates that rights originally conferred on the investor shall only be restricted proportionally to achievement of the aforesaid goals.<sup>65</sup>

While FIL79 left the terms of expropriation to be determined by the investment contract, FIL24 stipulates that neither the Government nor a government body shall take any action with the aim of taking over the investment or the business set up by the investor, through another legislation or any enforcement procedure.<sup>66</sup> The Law also states the exceptions to this general rule by setting out preconditions that need to be simultaneously met in order for such expropriation to become legal. The expropriation must be executed in order to achieve general

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<sup>60</sup> *Ibid.*, s. 26(b).

<sup>61</sup> *Ibid.*, s. 36.

<sup>62</sup> *Ibid.*, s. 28.

<sup>63</sup> *Ibid.*, s. 29.

<sup>64</sup> *Ibid.*, s. 30(a).

<sup>65</sup> *Ibid.*, s. 30(b).

<sup>66</sup> *Ibid.*, s. 31(a).



public welfare or to achieve jurisdictional security, in a manner that is compliant with the stipulated procedures in this Law and upon making adequate compensation to the investor.<sup>67</sup> The adequate compensation is calculated based on the fair market value at the time of expropriation.<sup>68</sup>

Moreover, as per FIL24, there are certain circumstances under which it will not be regarded as expropriation. These include taxes collected without any discrimination between investors, enactment of legislation without targeting specific investors, erosion of investor rights as a result of passing of laws and regulations that are not prejudiced towards investors, taking legal action towards consumer protection, warding off criminal activity, prevention of economic crisis, safety of the jurisdiction without targeting specific investors. The cancellation of investor license as set out in this Law is also not regarded as expropriation.<sup>69</sup>

Another unique feature of FIL24 is precedence granted to investment-treaty provisions, in cases where an investor, belonging to a State which is also a party to the same treaty, makes an investment in the Maldives, if the provisions differ from those set out in this legislation.<sup>70</sup> To this effect, BITs, multilateral investment treaties and trade agreements are included within the meaning of investment-related treaty.<sup>71</sup> Further, once the Maldives becomes a party to such a treaty, then it must be made publicly available. And if the citizens of Maldives have any obligation under the treaty, then it must be published in the official government gazette. Doing so renders the treaty, part of FIL24, and the citizens are bound by the relevant provisions once the treaty becomes active.<sup>72</sup>

The aforementioned rule applies to all treaties that the Maldives has entered into prior to the enactment of this legislation.<sup>73</sup> This would have resulted in an interesting turn of events, if the government had treaties signed before implementation of FIL24. However, the only treaty that had been signed by the Maldives in regard to investment was the Maldives-UAE BIT, which has yet to come into effect to the date of this study. Further, FIL24 applies retrospectively to the investments that had been established under FIL79, given the investments are registered in accordance with FIL24's provisions within 12 months.<sup>74</sup>

Finally, under this Law, the Economic Ministry bears the burden of promoting investment and arousing interest of foreigners in the Maldives as an appealing host to their FDI.<sup>75</sup> This includes actively advertising the opportunities available to foreign investors in the country's investment market.<sup>76</sup> Hence, under this Law, both protection and promotion of investment are shouldered by the Maldives.

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<sup>67</sup> *Ibid.*, s. 31(b).

<sup>68</sup> *Ibid.*, s. 32(a).

<sup>69</sup> *Ibid.*, s. 31(d).

<sup>70</sup> *Ibid.*, s. 37(a).

<sup>71</sup> *Ibid.*, s. 37(b).

<sup>72</sup> *Ibid.*, s. 38.

<sup>73</sup> *Ibid.*, s. 39.

<sup>74</sup> *Ibid.*, s. 40(a), (b).

<sup>75</sup> *Ibid.*, s. 4.

<sup>76</sup> *Ibid.*, s. 5(b).

### 3. CONTEXTUALIZING FIL24 IN LIGHT OF BITs

The following sections analyse the most prominent provisions in FIL24 that closely resemble BITs, and the potential factors that could weaken or boast superiority of FIL24 as a foreign investor protection tool.

FET, as the most frequently found BIT standard, also holds the record of the most invoked provision of the investment protection standards before arbitral tribunals.<sup>77</sup> FET standard limits or entirely mitigates the arbitral behaviour of the host State, depending on its scope.<sup>78</sup> Hence, it is crucial to provide the intended definition of this standard, to restrict tribunals from interpreting it in an unanticipated manner. This is illustrated in the FIL24's FET provision, which reads,

Full protection and security are conferred on investments established as per this legislation and the profit generated from such investments. Further, such investments shall be dealt with in a manner that is transparent and based on open policies.<sup>79</sup>

There is reason to believe that FIL24 standards, including the FET provision, sprouted from customary practices. While FIL24 was a bill being debated at the parliament, some of the members were fixated on the mention of expropriation in the preamble of the legislation. They saw it as a potential reason investors may be averted to making investments in the country.<sup>80</sup> This argument was refuted by other members highlighting that similar is the design of investment legislations in developed countries such as the US and Australia. Notwithstanding, members in support of the bill further made the connection between foreign investments and national security threat and asserted emphasis on securing sovereignty and public welfare, no matter how pivotal FDI was for the economy.<sup>81</sup> It is unclear as to why these discussions failed to consider the drastic changes effected by developing countries to BIT provisions in recent years, involving resistance to include comprehensive standards of treatment as may be seen in recent BITs brought forth by developing nations, including FET.<sup>82</sup> One such example is the India-UAE BIT signed in the year 2024.<sup>83</sup>

FET's strong link to customary international law stems from the practice where some treaties mandate the standard to be interpreted in accordance with international law.<sup>84</sup> Customary international law is known to evolve overtime. If the FET provision of FIL24 is left unamended as per such evolutions, the provision may come to be considered more outdated

<sup>77</sup> Rudolf Dolzer and others, *supra* note 9, at 186.

<sup>78</sup> M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015), pp. 89 and 243.

<sup>79</sup> Foreign Investment Law 11/2024, *supra* note 7, s. 28.

<sup>80</sup> People's Majlis Minutes, *28<sup>th</sup> Sitting of the 20<sup>th</sup> Majlis* (People's Majlis, 2024), <https://majlis.gov.mv/en/20-parliament/sittings/term/42> (accessed 7 February 2024), pp. 31-32.

<sup>81</sup> *Ibid.*, pp. 49-50.

<sup>82</sup> Shivang Agarwal, 'Construction and (Re)Construction of Model BITS in the Global South: Contextualizing the Policy Preferences of India, Brazil and the SADC', LLM Final Thesis (Central European University, 2023), *supra* note 102, at 15.

<sup>83</sup> Agreement between the Government of the Republic of India and the Government of the United Arab Emirates on the Promotion and Protection of Investments (signed 13 February 2024, entered into force 31 August 2024).

<sup>84</sup> *Ibid.*, at 200.

than the same standard found in future BITs, weakening FIL24's provision as an acceptable protection mechanism.

The negotiation process involved in BITs sets them distinctly apart from domestic law. Such negotiation also allows for any potential gaps to be filled in the treaty provisions, mitigating unforeseen and unwarranted interpretation by courts and tribunals.<sup>85</sup> This is unlike domestic laws such as FIL24, where only the host country has a say in its provisions, potentially placing the investor at a disadvantage.

The existence of BITs creates the illusion that it provides protection that is more comprehensive than what the host countries' domestic laws have to offer.<sup>86</sup> However, this did not stop countries such as Indonesia from terminating all of its active BITs in recent years.<sup>87</sup> Newer treaties are more conducive to environmental impact and climate change and other factors found in the UN's Sustainable Development Goals.<sup>88</sup> For instance, Angola-China BIT (2024) recognizes the parties' right to regulate when it comes to public welfare aspects such as public health and safety, and the conservation of the environment and its living and non-living resources.<sup>89</sup> Developed countries are more willing to buy into these ideas, because they are increasingly on the receiving end of the investment flows, gradually realizing the need to safeguard their sovereignty alongside investment protection.<sup>90</sup> Hence, onboarding investors from developed countries to adhere to the standards laid down by the Maldives as a developing country, in FIL24 could hardly be an impediment.

When talking about investor protection standards, it is often assumed that the terms agreed on initial negotiations need not change since the host State would be well-aware of its own economy. As a consequence, the host State need not take drastic measures that could potentially shift the terms, and as a result deter from the legitimate expectations of the investor. In reality, however, economic conditions are highly unpredictable even for a sovereign State.<sup>91</sup> The same appears to be foreseen in FIL24, as modifications to sectors in which foreign investment is freely permitted and conditionally restricted are subject to review once in every three years.<sup>92</sup> At the moment, it is challenging to illustrate permitted and conditionally restricted sectors since the delegated legislation under this Law is yet to come into force. As developed countries increasingly lean towards an unrestricted policy space, exercise of sovereign that would only mildly trigger investor protection could pass without significant complications.

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<sup>85</sup> *Ibid.*, at 227.

<sup>86</sup> *Ibid.*

<sup>87</sup> Hamzah, 'Bilateral Investment Treaties in Indonesia: A Paradigm Shift, Issues and Challenges', *Journal of Legal, Ethical and Regulatory Issues*, 2018, 21, at 1.

<sup>88</sup> *Ibid.*

<sup>89</sup> Agreement between the Government of the Republic of Angola and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (signed 6 December 2023, entered into force 29 June 2024), <https://edit.wti.org/document/show/204d9ee9-be60-4df0-8a7d-b429fdd4e769> (accessed 10 December 2025), preamble.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, at 34.

<sup>92</sup> Foreign Investment Law 11/2024, *supra* note 7, s. 11(g).

In situations of economic crises, the host country's temptation to resist discharging its duties in providing the expected protection to investors is supposedly diluted by BITs.<sup>93</sup> Such resistance measures can be found in FIL24, where the Maldives has carved out conditions for repatriation of profits and capital transfer to the home country under circumstances of balance of payment difficulties.<sup>94</sup> This may be an ideal measure in terms of executing sovereign powers, but not so much when it comes to boosting investor confidence.

#### 4. THE CO-EXISTENCE OF BITS WITH NATIONAL INVESTMENT LAW

The re-introduction of investment-specific legislation could well be regarded as a pro-investment move. This comes as a surprise in light of the Maldives' fraught history with investor-State arbitration. FIL24 seemingly contains no provisions to serve as a safeguard from these unfavourable experiences, which had greatly hindered State sovereignty and caused upheaval in its balance of payments.

This new piece of legislation of the Maldives has taken extensive measures in providing protection and security to foreign investors, when contrasted with its predecessor. Moreover, with s. 37, the Maldives has extended reassurance to foreign investors that more favourable BIT standards would always surpass over this domestic legislation, by allowing absolute recourse to treaty standards, if it is applicable to a particular investor and the standards differ from those set forth in FIL24.

FIL24 has debatably attempted to override some of the country's constitutional provisions. According to the Maldives Constitution, treaties imposing obligations on citizens can only be entered into and ratified with the approval from the legislative body, the People's Majlis.<sup>95</sup> Citizens are only required to act on such obligations as per legislation enacted by the Majlis.<sup>96</sup> However, s. 38 of FIL24 states that if an IIA has been entered into by the Maldives, it must be published. Whether this provision is to be considered a predisposed consent by the People's Majlis, or whether FIL24 has attempted to cause a shift from dualism to monism is a discussion for another time. In any event, the language of s. 38 indubitably creates serious questions regarding its alignment with the aforesaid constitutional provisions.

International investments simply cannot do without adherence to domestic law of the host State when shaping the investment contract.<sup>97</sup> Due to this standard, FIL79, though was devoid of any sort of protection to investors, makes greater sense when it is viewed as an instrument that was introduced to execute convenient admission and approval of the investment, to facilitate an organized interface between the State and the investor, and to some extent, to screen the investment inflows into the country.<sup>98</sup> National investment laws are seen as effective

<sup>93</sup> Josef C. Brada and others, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis', *Journal of Economic Surveys*, 2021, 35, at 3.

<sup>94</sup> Foreign Investment Law 11/2024, *supra* note 7, s. 29.

<sup>95</sup> Constitution of the Maldives, art. 115(k)(2).

<sup>96</sup> *Ibid.*, art. 93(b).

<sup>97</sup> *Ibid.*, at 165.

<sup>98</sup> Jonathan Bonnitcha and others, 'Rethinking National Investment Laws' *International Institute for Sustainable Development* (2023), pp. 9-11.

if they could successfully address existing State norms and policies, and reduce the legal risks involved in foreign investment protection, more specifically when it comes to dispute resolution mechanisms and the legislation's role in maintaining a reasonable State policy space.<sup>99</sup>

However, States must be weary of what they choose to include and forgo in these legal frameworks.<sup>100</sup> In case of FIL24, it is yet to be seen whether the inclusion of s. 37 in the legislation is a lapse of judgment, similar to Azerbaijan, which chose to include stabilization clause in their national investment law, which could render it fully or partially ineffective.<sup>101</sup>

All-encompassing BIT standards can rarely be found in national investment laws.<sup>102</sup> This stance is substantiated by FIL24's s. 32, which stipulates that equitable compensation shall be made to the investor in case of expropriation. Notwithstanding, the determination of compensation value and the procedures to be undertaken in providing such compensation has been left to be set out by the delegated legislation that is yet to come into force.<sup>103</sup> Similarly, the discretion to restrict funds transfer to the home country has also been granted to the relevant State authorities under certain circumstances including balance of payment difficulties.<sup>104</sup>

National investment laws have diverse methods of providing to resolve investor-State disputes. FIL24 has laid down grievance procedures that can be undertaken via domestic institutions during early stages of the investment.<sup>105</sup> The downside of provisions necessitating reliance on host States local institutions is that, even with reasonable stability in the administrative and judicial systems, investors would find contentment in approaching an independent tribunal rather than forums established by their opponent, being required to do so with the unfaltering belief that such forums would act justly and impartially towards an alien.

Due to the competing objectives between host nation and the foreign investor, a secure policy space is as appealing for the host nation, as it is horrifying from the perspective of the foreign investor. Admission criteria, for instance, compels prospective investors to agree to the conditions set out in the domestic law, significantly securing the public policy of the host nation.<sup>106</sup> This is presumed to be what FIL24 has attempted to achieve by preconditioning the issuance of investment permits upon the fulfilment of criteria set in this legislation and regulations derived from it.<sup>107</sup>

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<sup>99</sup> *Ibid.*, pp. 37-38.

<sup>100</sup> *Ibid.*, at 33.

<sup>101</sup> As per s. 37 of FIL24, precedence granted to investment-treaty provisions, in cases where an investor, belonging to a state which is also a party to the same treaty, makes an investment in the Maldives, if the provisions differ from those set out in this legislation. In the presence of such a treaty, it can be foreseen that provisions of FIL24 would become wholly redundant for investment contracts to which such a treaty is applicable. This is similar to the potential impact of a stabilization clause. For instance, some countries, including Azerbaijan, go as far as to provide a stabilization clause in the national investment law, often seen as a blunder because policy changes would not apply to existing investors, making the changes, more or less, redundant in achieving the intended purposes.

<sup>102</sup> For instance, South Africa's domestic legislation stipulates national treatment, terms of expropriation and funds transfer processes, but these standards are conditioned to be in alignment with the nation's Constitution, unlike some of the provisions of BITs that had previously been in force; Mohammad Mossallam, 'Process Matters: South Africa's Experience Exiting its BITs', *The Global Economic Governance Programme*, 2015, at 13.

<sup>103</sup> Foreign Investment Law 11/2024, *supra* note 7, s. 32(c).

<sup>104</sup> *Ibid.*, s. 29(b).

<sup>105</sup> Foreign Investment Law 11/2024, *supra* note 7, s. 36.

<sup>106</sup> Rudolf Dolzer and others, *supra* note 9, at 136.

<sup>107</sup> Foreign Investment Law 11/2024, *supra* note 7, s. 15(c).

Host nations further secure their policy space through performance requirements.<sup>108</sup> While explicit provisions obligating performance requirements are found in FIL79, FIL24 appears to have abstained from doing so.<sup>109</sup> However, under FIL24, the factors taken into account when approving investments include the extent of employment generation by the foreign investor, and the level of opportunities created to bolster exports for local goods and services. This means that, while FIL24 has not expressly provided for this condition to be met, it is up to potential investors to meet these criteria to be successful in their application. BITs often prohibit performance requirements, presumably because such terms are cumbersome for the investor and for the most part, only benefit the host State. Given the Maldives has so far not suffered from the absence of treaties in force even in the era of FIL79, it is unlikely that FIL24's indirect performance requirements would cause a significant investor aversion.

Finally, it is at times challenging for domestic law to override customary international law, even if a clause in the investment contract provides for the applicability of the domestic law.<sup>110</sup> In the presence of a forum selection clause that steers a dispute towards host State courts, it is an unlikely win, especially if there is an investment treaty in the picture.<sup>111</sup> Domestic law is hardly ever regarded as a standard to measure discrimination against investor. On the contrary, tribunals eye domestic law as a framework which potentially contains a discriminatory measure or may lack a provision that facilitates prevention of discriminatory measures against investors.<sup>112</sup>

## 5. CONCLUSION

A generous number of provisions, especially those dealing with investor protections is found in FIL79. FIL24 is undisputedly more comprehensive in comparison to FIL79. While it is true that investment contract negotiations may be crucial even with the implementation of FIL24, with its unique provisions, including FET and precedence granted to investment-treaty provisions, investor protection is comparatively more guaranteed.

BIT renegotiations have been noted to be prominent, in order to restore lost sovereignty and to mitigate getting entangled in ISDS. FIL24, in contrast, is embedded with BIT-like investor protection standards, such as FET and compensation in case of expropriation. No provision in FIL24 suggests the country's aversion to ISDS.

BITs started off as unilaterally and predominantly favourable to the multinational corporations of developed countries. Even though developing countries have begun to re-model BIT provisions they continue to be inspired by customary law. Similar is the case with FIL24 when referring to the parliamentary debates that ensued on this bill. Though FIL24 contains uncannily similar provisions to BITs, there are factors that would restrict FIL24 from surpassing BITs, when it comes to earning investor confidence. These include, the international nature

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<sup>108</sup> Rudolf Dolzer and others, *supra* note 9, at 140.

<sup>109</sup> Law on Foreign Investments 25/79, *supra* note 2, s. 11 and 12.

<sup>110</sup> Rudolf Dolzer and others, *supra* note 9, at 125.

<sup>111</sup> *Ibid.*, at 126.

<sup>112</sup> *Ibid.*, at 259.

promulgated by BITs, the negotiation process that allows for both State parties to have a say in its provisions, and treaties supplementing each other in gap-filling and judicial interpretations. Nevertheless, the current global trends have taken a turn where BITs are no longer a crucial necessity for developing countries to attract FDI.

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Permanent Court of International Justice:

*Mavrommatis Palestine Concessions*, 1924 PCIJ Series A, No. 2.

WTO/GATT:

*Brazil – Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WTO Appellate Body Report, WT/DS46/AB/RW, 4 August 2000.

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Sungjoon Cho, 'The WTO Doha Round Negotiation: Suspended Indefinitely', *ASIL Insights*, 5 September 2006, 10(2), [www.asil.org/insights060905.cfm](http://www.asil.org/insights060905.cfm) (accessed 20 June 2006).

**Non-periodical online documents, web pages and newspaper articles:**

Please list as much of the following information as possible:

- author's/editor's names (first name(s) and surname)
- complete title (in inverted commas)
- publisher's name

web link of source  
date of publication  
retrieval date

Example reference:

Geoff Dyer, Jamil Anderlini & Henny Sender, 'China's lending hits new heights' *Financial Times* (17 January 2011), [www.ft.com/intl/cms/s/0/488c60f4-2281-11e0-b6a2-00144feab49a.html#axzz24vMXkj9a](http://www.ft.com/intl/cms/s/0/488c60f4-2281-11e0-b6a2-00144feab49a.html#axzz24vMXkj9a) (accessed 19 November 2011).