6. France

YAS BANIFATEMI AND ANDRÉ VON WALTER*

I. Introduction

In the field of investment protection, France has unquestionably played a central role in establishing a network of international investment relations and promoting this field of the law. With increasing outward flows and investment policy initiated in the early 1960s, France progressively expanded its investment reach to cover all continents and all regions in the world. Today, out of the 121 bilateral investment treaties signed by France, 96 are in force and cover a vast geographic area.1 Although no French Model BIT was formally publicized until 2006,2 French treaty practice clearly shows the trends and consistency achieved over the years by the French negotiators in the formulation of the treaties entered into by France and, thus, in the protection level benefitting French investors in other countries and foreign investors in France.

II. Overview of France’s Investment Policy and Domestic Legal Framework

France’s investment policy has aimed at promoting French investment abroad and foreign investment in France. French investment in- and outflows have registered considerable increase during the last decades. The statistics established by the French Central Bank (Banque de France) show that worldwide foreign direct investment inflows have increased from the equivalent of €88 million in 1960 to €12.8 billion in 2010, whereas outflows have evolved from the equivalent of €41 million in 1960 to €50.7 billion in 2010.3

The methodology used by the French Government for purposes of measuring foreign direct investment flows is built upon internationally agreed standards, such as those elaborated by the Organization for Economic Cooperation and Development (‘OECD’) and the International Monetary Fund (‘IMF’). Under those standards, foreign direct investment is understood as investment made with the objective of establishing a lasting interest in an enterprise resident in another economy.4 The ‘lasting interest’ is evidenced when the investor owns at least 10 per cent of the voting power of

* The views expressed in this article are exclusively those of the authors and in particular may not in any circumstances be regarded as stating a position of the French Government or of the European Commission.

1 For a full list of all French bilateral investment treaties (BITs), their date of signature and date of entry into force, see the website of the French Ministry of Foreign Affairs, Base des Traité et Accords et de la France, available at <http://basedoc.diplomatie.gouv.fr/Traites/Accords_Traites.php> (last accessed 15 June 2012).


3 More detailed data on French investment in- and outflows may be found online at <www.banque-france.fr> (last accessed 15 June 2012).

the foreign enterprise.\footnote{For specific purposes, other criteria are sometimes used by specialized agencies, such as the 'Agence française pour les investissements internationaux', which focuses on 'job creating' investments in France (see the information available online at <WWW.invest-in-france.org/fr> (last accessed 15 June 2012).} Foreign direct investment is also understood as aiming 'to establish or to maintain lasting and direct links'\footnote{See Council Dir 88/361/EEC for the implementation of Article 67 of the Treaty [1998] OJ L-178/5.} between the investor and the State in which the capital is made available in order to carry out an economic activity.

With regard to inward investment, in France, as in other EU Member States, the principle is that capital movements are free, as provided by Article 63 of the Treaty on the Functioning of the European Union. In France, this principle was first set out in the Law of 28 December 1966 on financial relations with foreign countries. Article 1 of this Law provided that 'financial relations between France and other countries shall be free. This freedom shall be exercised in accordance with the arrangements set out in this Law and in compliance with international commitments entered into by France'.\footnote{Law No 66-1008 of 28 December 1966 on financial relations with foreign countries, journal Officiel, 29 December 1966, 11621 (authors’ translation).} This Law was implemented by the Decree of 27 January 1967 and the Decree of 24 November 1968,\footnote{Decree No 67-78 of 27 January 1968, Journal Officiel (29 January 1967), 1073, Decree No 68-1021 of 24 November 1968, Journal Officiel (25 November 1968), 11081.} which in turn were followed by successive decrees designed to improve the inward investment regime by reducing the control of the French Government on foreign investments, in line with the EU principle of the freedom of capital movement. The Law of 1966 was further completed by the Law of 14 February 1996 vesting the French Minister of Economy with the power of injunction against foreign investors whose conduct is in breach of regulations on investment on the French territory.\footnote{Law No 96-109 of 14 February 1996 on the financial relations with foreign countries regarding foreign investments in France, Journal Officiel (15 February 1996), 2385.}

Under current French and European legislation, foreign direct investment in France may be subject to prior governmental approval only under certain limited circumstances. For example, the acquisition of the control of national enterprises or of branches of activities in the areas of security services, dual use technologies, production of arms and weapons, or military services may require prior authorization by the French Ministry of Economic Affairs. Article 153 of the French Code monétaire et financier lists 11 such sectors in which foreign investment cannot be made without prior governmental approval.\footnote{The text of the relevant legislation can be found online at <WWW.legifrance.gouv.fr> (last accessed 15 June 2012).} The regime differs slightly depending on whether or not the investor’s home State is a member of the EU.

Once an investment has been admitted, French law protects private property against governmental takings. This results from Article 17 of the Declaration of Human and Civic Rights of 1789, which allows deprivation of property only in cases of ‘public necessity’ and under the condition of prior payment of just compensation.\footnote{‘La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n’est lorsque la nécessité publique, légalement constatée, l’exige évidemment, et sous la condition d’une juste et préalable indemnité.’} The Declaration of Human and Civic Rights has been incorporated into the French Constitution and has therefore constitutional value.\footnote{See Preamble of the French Constitution of 4 October 1958.} Private property is also protected under
III. France's Bilateral Investment Treaties

It would be both hazardous and overly ambitious to trace back the ancestors of the modern French Model BIT, which is the product of an historical process.

Following World War II, as the United States were seeking to encourage and facilitate private international investment by negotiating Friendship, Commerce and Navigation ('FCN') treaties with over two dozen countries, FCN treaties became one of the main types of intergovernmental agreements used for the protection and promotion of foreign direct investment in developing countries. On 25 November 1959, France concluded a Convention of Establishment with the United States, the Preamble of which expressly refers to the ‘strengthening [of] the ties of peace and friendship traditionally existing between the two countries and of encouraging closer economic intercourse between their peoples, conscious of the contribution which may be made to these ends by arrangements that provide in each country reciprocal rights and privileges on behalf of nationals and companies of the other country, thus encouraging mutually advantageous investments and mutually beneficial commercial relations’. One of the concerns, however, was the inability of FCN treaties to protect businesses from discriminatory treatment which inhibited foreign investment.

The next important phase in the development of French investment treaties started in the 1960s. The exclusive subject and scope of those bilateral treaties was foreign investment and the creation of an international legal framework for the protection of investments made by the nationals of one country in the territory of the other country. France concluded its first BIT with Tunisia on 9 August 1963. The BIT movement was thus launched and soon expanded to other developing countries.

Given that these first bilateral treaties were entered into principally to protect French investments abroad, they were sometimes concluded on a non-reciprocal basis. The first such non-reciprocal agreement was concluded with Tunisia in 1972. The Preamble of the Treaty thus expressed the two governments’ intention to ‘contribûte à the

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13 'Nul ne peut être contraint de céder sa propriété, si ce n’est pour cause d’utilité publique, et moyennant une juste et préalable indemnité."

14 `Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'


19 France–Tunisia BIT (1972).
development of French investments in Tunisia'. Unlike reciprocal agreements which bind the host State by an obligation to grant a national treatment or a most-favoured-nation treatment to foreign investments, non-reciprocal agreements only granted French investors investing in the other Contracting Party a guarantee provided by the State Treasury. Article 1 of the France–Tunisia BIT (1972) reads as follows:

Le Gouvernement français pourra... accorder la garantie de l'État français à des investissements effectués sur le territoire de la République tunisienne par des ressortissants français, personnes physiques ou morales...

Other non-reciprocal agreements were also entered into with countries such as Indonesia in 1973 and Yugoslavia in 1974. France abandoned the practice of non-reciprocal treaties altogether later in the 1970s.

To date, France has concluded a total of 121 BITs, 96 of which are currently in force. France is also a Contracting Party to the Energy Charter Treaty of 1998 which contains a distinct part dedicated to the promotion and protection of investments. Unlike the trend initiated by the United States and Canada, France has so far focussed on the conclusion of investment treaties as opposed to free trade agreements containing an investment chapter, a trend that may change for European countries as a result of the investment matter having become an EU competence and the current negotiations of free trade agreements ('FTAs') by the EU with countries such as Canada.

Different negotiation models have been used by French officials during the expansion of France's worldwide BIT network. These different models have been adapted over time in order to clarify existing provisions or to take into account new policy objectives. The latest Model BIT is that of 2006. A review was envisaged in 2009 but was postponed due to the entry into force of the Lisbon Treaty and the inclusion of foreign direct investment within the common commercial policy of the EU.

To a large extent, the architecture of French BITs is similar to many other BITs concluded by European countries. Following a short preamble, French BITs define covered investments and investors, and specify the scope of application of the treaty. Current French BITs also contain provisions relating to the encouragement and admission of investments, subject, however, to the national legislation of the Contracting Parties. The substantive provisions of French BITs generally cover 'fair and equitable

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20 '... favoriser le développement des investissements français en Tunisie'.
21 Juillard, para 5.
22 'The French Government can... grant the French State guarantee to investments made on the territory of the Republic of Tunisia by French nationals, whether natural or legal persons...' (authors' translation).
24 As regards multilateral treaties relating to dispute settlement in the investment field, France has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), which would become relevant for the enforcement of arbitral awards rendered outside the ICSID system.
25 For the list of concluded and currently negotiated Free Trade Agreements of the EU see <http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm#h2–2> (last accessed 15 June 2012).
27 Treaty on the Functioning of the European Union, Art 207(1).
IV. Internal Government Issues

Decisions on the opening of negotiations of BITs are taken jointly by the Ministry of Economic Affairs and the Ministry of Foreign Affairs. Once started, the French Ministry of Economic Affairs has the main responsibility for the conduct of the negotiations. Other ministerial departments and services participate to different extents in the negotiation process.

Once the agreement has been entered into, the Ministry of Foreign Affairs is responsible for its ratification and publication. The ratification of French BITs requires prior parliamentary approval, pursuant to Article 53 of the Constitution. The duration of the domestic procedures depends on the particular circumstances of each BIT. A review of past practice shows that the average time between signature and ratification is approximately 28 months. Once an agreement has entered into force, it is published in the French *Journal Officiel* and registered with the UN Treaty Section.

French BITs follow the general practice according to which international agreements take effect from the date they are ratified by the Contracting Parties. The Contracting Parties may explicitly protect investments made prior to the entry into force of a given BIT, which can be done in a provision relating to the temporal applicability of the treaty or in the definition of ‘protected investments’, as is the case with Article 1 of the French Model BIT:

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28 'No provision in the present Agreement shall be interpreted as preventing one of the Contracting Parties from taking any measure aimed at governing investments made by foreign investors and the conditions for the activities of said investors in the context of measures designed to preserve and encourage cultural and linguistic diversity' (author's translation).


30 Available at <www.journal-officiel.gouv.fr> (last accessed 15 June 2012).
Il est entendu que lesdits avoirs doivent être ou avoir été investis conformément à la législation de la Partie contractante sur le territoire ou dans la zone maritime de laquelle l’investissement est effectué, avant ou après l’entrée en vigueur du présent accord.\(^{31}\)

Once ratified, French BITs form part of the French legal order and have normative force superior to that of national legislation, pursuant to the hierarchy of norms set forth in Article 55 of the French Constitution:

Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie.\(^{32}\)

The original texts of French BITs, diplomatic documents, and other accompanying documentation are kept in the archives of the Ministry of Foreign Affairs and the Ministry of Economic Affairs. As a general rule, the publication of administrative documents relating to the conduct of France’s foreign policy is restricted under French law.\(^{33}\) In exceptional circumstances, specific inquiries may be addressed to the French Ministry of Economic Affairs\(^{34}\) or the Ministry of Foreign Affairs.\(^{35}\)

V. Commentary on the French Model BIT

A. Preamble

The preamble of BITs generally establishes the long-term goals and purpose of such treaties as instruments of economic cooperation and development. Similarly, the preamble to the French BITs generally emphasize the ‘desire to strengthen the economic cooperation’ between both States and to ‘create favourable conditions for investments’ of each Party’s nationals in the territory of the other Party.

Preamble

Le Gouvernement de la République française et le Gouvernement de la République de \([\]\), ci-après dénommés ‘les Parties contractantes’,

Désireux de renforcer la coopération économique entre les deux Etats et de créer des conditions favorables pour les investissements français en \([\]\) et \([\]\) en France, Persuadés que l’encouragement et la protection de ces investissements sont propres à stimuler les transferts de capitaux et de technologie entre les deux pays, dans l’intérêt de leur développement économique,

Sont convenus des dispositions suivantes:\(^{36}\)

\(^{31}\) France Model BIT, Art 1: ‘It is agreed that such assets must be or have been invested in accordance with the legislation of the Contracting Party on the territory or in the maritime zone of which the investment was made, before or after the coming into force of this Agreement’ (author’s translation).

\(^{32}\) ‘Treaties or agreements that have been duly ratified or approved have, upon their publication, legal force superior to that of the law, subject to the application of each agreement or treaty by the other party.’

\(^{33}\) See Art 6(2) of Law No 78–753 of 17 July 1978 on various measures of improvement of relations between the administration and the public and various administrative, social, and fiscal provisions.

\(^{34}\) Inquiries are normally made to the Investment, Financial Crime and Sanctions Unit, Treasury and Economic Policy Directorate General.

\(^{35}\) Inquiries are normally made to the International Economic Affairs Department, Directorate General of Global affairs, Development and Partnerships.

\(^{36}\) ‘The Government of the Republic of France and the Government of the Republic of \([\]\), hereinafter referred to as ‘the Contracting Parties’, Desiring to strengthen the economic cooperation between both States and to create favorable conditions for French investments in...and...in France, Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and
Interestingly, certain older French BITs which were entered into on a non-reciprocal basis only highlighted the desire to promote French investments in the other Contracting Party’s territory. The main purpose of these treaties was indeed to allow the granting of French public investment guarantees to French investors abroad. This type of unilaterally framed treaty was abandoned in the early 1970s and the promotion of reciprocal investments between the two States has become the standard preambular language of French BITs.

Since the mid-1970s, French BITs generally have referred to the ‘transfer of technology’ as one of the objectives which are emphasized within the preambles. At least one BIT also refers to ‘technical and scientific cooperation’. Another treaty mentions the ‘fair and equitable treatment’ standard as the basis on which favourable investment conditions shall be created.

For the purpose of interpreting the operational parts of French BITs, arbitral tribunals have sometimes referred to the preambles for purposes of determining the ‘object and purpose’ of the treaty. Thus, in the view of the majority of the tribunal in *Suez, Sociedad de Aguas de Barcelona & Vivendi v Argentina*, the wording of ‘economic cooperation’ used in the Preamble of the French-Argentina BIT implied an obligation to provide fair and equitable treatment towards foreign investors. In *Total v Argentina*, the tribunal emphasized the expressed desire to ‘create favourable conditions for investments’ in the treaty’s preamble for the purposes of interpreting the fair and equitable treatment clause. Some years earlier, the same tribunal had also referred to the treaty’s preamble in the context of interpreting the definition of ‘investment’ of the French-Argentina BIT.

**B. Definitions: Qualification for Protection**

As for any other BIT, the definition in the French BITs of the qualified investor, qualified investment, and temporal application of the treaty is an essential element of the scope of protection of each treaty *ratione personae, ratione materiae, and ratione temporis*. The technology between the two countries in the interest of their economic development, Have agreed as follows:

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37 See, eg, the BITs concluded with Tunisia (1972), Indonesia (1973), Yugoslavia (1974), and South Korea (1975).
38 See, eg, the BITs concluded with Zaire (1972), Mauritius (1973), Egypt (1974), Morocco (1975), Singapore (1975), Malta (1976), Romania (1976), and South Korea (1977).
40 France--USSR BIT (1989).
42 See, eg, *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No ARB/97/3, Award of 20 August 2007), para 7.4.4.
43 *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (ICSID Case No ARB/03/17, Decision on Liability of 30 July 2010).
44 *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, para 201. See, however, the separate opinion of Pedro Nikken, para 29.
45 *Total SA v Argentine Republic* (ICSID Case No ARB/04/01, Decision on Liability of 27 December 2010).
46 *Total SA v Argentine Republic*, para 167.
47 *Total SA v Argentine Republic* (ICSID Case No ARB/04/01, Decision on Objections to Jurisdiction of 25 August 2006), para 75.
definition of each of the qualifying 'investor' and qualifying 'investment' are addressed below; the temporal application of the treaty will be dealt with in relation to the latter notion, following the French Model BIT's approach.

Article 1
Définitions

Pour l'application du présent accord:

(1) Le terme 'investissement' désigne tous les avoirs, tels que biens, droits et intérêts de toutes natures et, plus particulièrement mais non exclusivement:
   a) les biens meubles et immeubles, ainsi que tous autres droits réels tels que les hypothèques, privilèges, usufruits, cautionnements et tous droits analogues;
   b) les actions, primes d'émission et autres formes de participation, même minoritaires ou indirectes, aux sociétés constituées sur le territoire de l'une des Parties contractantes;
   c) les obligations, créances et droits à toutes prestations ayant valeur économique;
   d) les droits de propriété intellectuelle, commerciale et industrielle tels que les droits d'auteur, les brevets d'invention, les licences, les marques déposées, les modèles et maquettes industrielles, les procédés techniques, le savoir-faire, les noms déposés et la clientèle;
   e) les concessions accordées par la loi ou en vertu d'un contrat, notamment les concessions relatives à la prospection, la culture, l'extraction ou l'exploitation de richesses naturelles, y compris celles qui se situent dans la zone maritime des Parties contractantes.

Il est entendu que lesdits avoirs doivent être ou avoir été investis conformément à la législation de la Partie contractante sur le territoire ou dans la zone maritime de laquelle l'investissement est effectué, avant ou après l'entrée en vigueur du présent accord.

Aucune modification de la forme d'investissement des avoirs n'affecte leur qualification d'investissement, à condition que cette modification ne soit pas contraire à la législation de la Partie contractante sur le territoire ou dans la zone maritime de laquelle l'investissement est réalisé.48

(2) Le terme d'"investisseur" désigne:
   a) Les nationaux, c'est-à-dire les personnes physiques possédant la nationalité de l'une des Parties contractantes.
   b) Toute personne morale constituée sur le territoire de l'une des Parties contractantes, conformément à la législation de celle-ci et y possédant son siège social, ou contrôlée directement ou indirectement par des nationaux de l'une des Parties contractantes, ou par des personnes morales possédant leur siège social sur le territoire de l'une des Parties contractantes et constituées conformément à la législation de celle-ci.

48 'For the purposes of this Agreement: (1) The term "investment" means every kind of assets, such as property, rights and interests of whatever nature, and in particular but not exclusively: (a) movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights; (b) shares, premium on share and other forms of equity participation in an enterprise, including minority or indirect participation in companies constituted on the territory of one of the Contracting Parties; (c) obligations, claims or any title to performance having an economic value; (d) intellectual, commercial and industrial property rights such as copyright, patent, license, trademark, industrial models and mock-ups, technical process, know-how, trade-names and goodwill; (e) concessions conferred by law or by virtue of an agreement, including concessions to prospect, cultivate, extract or exploit natural resources, including those which are located in the maritime area of the Contracting Parties. It is understood that the said assets must be or have been invested in accordance with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made, prior or subsequently to the entry into force of this Agreement. No alteration of the form in which assets are invested shall affect their qualification as investments, provided that such alteration is not contrary to the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made' (authors' translation).
V. Commentary on the French Model BIT

Sont notamment considérée comme des personnes morales au sens du présent article les sociétés, d'une part, et les organisations à but non lucratif dotées de la personnalité juridique d'autre part.49

(3) Le terme de 'revenus' désigne toutes les sommes produites par un investissement, telles que bénéfices, redevances ou intérêts, durant une période donnée. Les revenus de l'investissement et, en cas de réinvestissement, les revenus de leur réinvestissement jouissent de la même protection que l'investissement.50

(4) Le présent accord s'applique au territoire de chacune des Parties contractantes ainsi qu'à la zone maritime de chacune des Parties contractantes, ci-après définie comme la zone économique et le plateau continental qui s'étendent au-delà de la limite des eaux territoriales de chacune des Parties contractantes et sur lesquels elles ont, en conformité avec le Droit international, des droits souverains et une juridiction aux fins de prospection, d'exploitation et de préservation des ressources naturelles.51

(5) Aucune disposition du présent Accord ne sera interprétée comme empêchant l'une des Parties contractantes de prendre toute disposition visant à régir les investissements réalisés par des investisseurs étrangers et les conditions d'activités desdits investisseurs, dans le cadre de mesures destinées à préserver et à encourager la diversité culturelle et linguistique.52

1. Protected 'Investment'

(i) The Definition of an 'Investment' under the Current French Model BIT

French BITs generally include a broad definition of 'investments', pursuant to their purpose of promoting investments and providing a high level of protection to the investments made by nationals of one Contracting Party in the territory of the other Contracting Party.

Similarly, Article 1(1) of the French Model BIT has adopted a broad, asset-based definition of 'investment'. The evolution of treaty practice shows that France has always adopted an asset-based approach and broad view of how investments should be defined. Although a difference in wording may be noted, as the first BITs did not refer to 'avoirs' but to 'biens',53 the definition remains asset-based and has consistently included elements

49 'The term "investor" means (a) Nationals, namely, physical persons possessing the nationality of one of the Contracting Parties (b) Any legal person constituted on the territory of one of the Contracting Parties, in accordance with the law of that Contracting Party and having its seat on the territory of that Party, or controlled directly or indirectly by the nationals of one of the Contracting Parties, or by legal persons having their seat on the territory of one of the Contracting Parties and constituted in accordance with the law of that Party. In particular, companies on the one hand and non-profit organizations endowed with legal personality on the other, are considered legal persons within the meaning of this Article' (authors' translation).

50 'The term "returns" means any amounts yielded by an investment for a definite period, such as profits, royalties and fees, or interests. The investment returns and, in case of reinvestment, reinvestment returns enjoy the same protection as investments' (authors' translation).

51 'This Agreement applies to the territory of the Contracting Parties and to the maritime area of the Contracting Parties, hereinafter defined as the economic zone and the continental shelf situated beyond the territorial waters of the Contracting Parties, within which the Contracting Parties exercise, in accordance with international law, jurisdiction and sovereign rights for the purposes of exploration, exploitation and conservation of natural resources' (authors' translation).

52 'No provision in the present Agreement shall be interpreted as preventing one of the Contracting Parties from taking any measure aimed at governing investments made by foreign investors and the conditions for the activities of said investors in the context of measures designed to preserve and encourage cultural and linguistic diversity' (authors' translation).

53 See, eg, France–Zaire BIT (1972) or France–Mauritius BIT (1973), which refer to 'all categories of property, in particular but not exclusively' ('toutes les catégories de biens, notamment, mais non exclusivement'). For a reference to 'avoirs' ('avoirs de toutes natures'), see France–Egypt BIT (1974).
such as movable or immovable property, shares and participation in companies, intellectual property, concessions, or title to money. As is often the case in BITs, Article 1(1) of the French Model BIT then provides a non-exhaustive list ('plus particulièrement mais non exclusivement') of the types of investments that are covered.

The broad and diverse nature of this list reflects the variety of the industries in which French companies are involved. Importantly, investments must have been made in accordance with the laws of the host State, which sets a legality condition for investments to be protected under the BIT.

Certain BITs, such as the France–Morocco BIT of 1975, have included the additional condition that the investment be approved in writing by the host State. As is also clear from the Model BIT's provision, the temporal scope of application of the treaty extends to investments made before or after its entry into force. In certain treaties not containing an equivalent wording in the provision defining 'investments', such as the France–Korea BIT of 1977, the Contracting Parties may expressly provide, in a separate provision, that prior investments are covered. On the other hand, nothing is said in the Model BIT as to whether disputes which may be submitted to arbitration must have arisen after the entry into force of the BIT. In this respect, certain treaties such as the France–Chile BIT of 1992 have specifically excluded from the scope of the treaty's protection disputes arising prior to the entry into force of the treaty.

Finally, Article 1(1) in fine provides a fairly classic indication that a modification to the form of an investment does not alter that investment's characterization for purposes of the BIT, provided that the legality condition that the investment be in conformity with the law of the host State be met.

(ii) Interpretation of French Treaty Practice in Relation to the Definition of 'Investment'

The protection expressly granted in French BITs to minority shareholdings in a local company has been tested in practice, based on Article 1(1) of the France–Argentina BIT of 1991, which provides, similarly to the definition contained in the Model BIT, that the term 'investment' shall apply to assets such as property, rights, and interests in any

54 France–Singapore BIT (1975), Art 9: 'Les dispositions du présent Accord ne seront applicables qu'aux investissements, réalisés avant ou après l'entrée en vigueur de cet Accord, s'ils ont été approuvés par écrit par les Parties contractantes sur le territoire desquelles ces investissements ont été ou seront effectués.' (The provisions of the present Agreement shall be applicable to investments made prior or subsequently to the entry into force of this Agreement, only if they have been approved in writing by the Contracting Parties on the territory of which such investments have been or will be made' (authors' translation).)

55 France–Korea BIT (1977), Art 8: 'Le présent Accord s'appliquera également aux investissements sur le territoire d'une Partie contractante effectués conformément à ses lois et règlements avant l'entrée en vigueur du présent Accord par des nationaux ou personnes morales de l'autre Partie contractante.' (The present Agreement shall also apply to investments made on the territory of one of the Contracting Parties by nationals or legal persons of the other Contracting Party in accordance with its laws and regulations prior to the entry into force of the present Agreement' (authors' translation).)

56 On this issue, see Victor Pey Casado and Foundation 'Presidente Allende' v Republic of Chile (ICSID Case No ARB/98/2, Award of 8 May 2008), Section IV.C.3.

57 Chile–France BIT (1992), Art 12: 'Le présent accord s'applique à tous les investissements réalisés par les nationaux ou sociétés de l'une des Parties contractantes sur le territoire ou dans la zone maritime de l'autre Partie contractante mais ne s'applique pas aux différends relatifs à un investissement qui sont nés avant l'entrée en vigueur de l'accord.' (The present Agreement shall apply to all investments made by the nationals or companies of one of the Contracting Parties on the territory or in the maritime area of the other Contracting Party but does not apply to disputes relating to an investment made prior to the entry into force of the Agreement' (authors' translation).)
V. Commentary on the French Model BIT

category, and particularly but not exclusively to shares, issue premiums, and other forms of participation (albeit minority or indirect) in companies constituted on the territory of either Contracting Party. Relying on this definition, the arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* found that under the plain language of the France–Argentina BIT, shares constitute an investment. Thus, it was admitted that minority shareholders ‘benefit from the treatment promised by Argentina to investments made by French...nationals in its territory. Consequently, under Article 8 of the French treaty... these shareholder Claimants are entitled to have recourse to ICSID arbitration to enforce their treaty rights. 58

The existence of an investment was also disputed at the jurisdiction phase of the arbitration initiated by Société Générale against the Dominican Republic on the basis of the France–Dominican Republic BIT of 1999. The respondent argued that there had been no real investment but only transactions that do not qualify under the terms of the applicable BIT. Article 1(1)(b) of the BIT provides that the term ‘investment’ refers to shares, issue premiums, and other forms of participation, even if minority or indirect, in companies constituted on the territory of either Contracting Party. In turn, Article 1(1)(e) of the BIT refers to concessions, accorded by law or by virtue of a contract. The Treaty’s Preamble contained the Contracting Parties’ intention to promote and protect investments in order to ‘stimulate transfers of capital and technology between the two countries in the interest of their economic development’.59 The respondent emphasized the role of the Preamble of the BIT in the BIT’s interpretation pursuant to Article 31(1) and (2) of the Vienna Convention on the Law of the Treaties and argued that, in order to give effect to the express intention of the parties, the wording of Article 1 could not be isolated from the Treaty’s Preamble for purposes of qualification of the investment. The arbitral tribunal rejected this reasoning in finding that ‘the text of Article 1 of the Treaty broadly but non-exhaustively defines the term investment in a detailed manner and therefore expresses unequivocally the intent of the parties’.60 It concluded that any ‘form of investment listed in Article 1 qualifies for protection... independently from the manner in which they each contribute to stimulating the transfer of capital and technology’, 61 ‘an expectation of profitability [being] naturally related to [it]’.62

2. Protected ‘Investor’

Under the French Model BIT, international arbitration is available in the event of a dispute between a Contracting Party and an ‘investor’ of another Contracting Party.63

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58 *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina Republic* (ICSID Case No ARB/03/17, Decision on Jurisdiction of 16 May 2006), para 49.
59 ‘Persuadés que l’encouragement et la protection de ces investissements sont propres à刺激器 les transferts de capitaux et de technologie ‘entre les deux pays, dans l’intérêt de leur développement économique...’
(Persuaded that encouragement and protection of these investments will stimulate the transfer of capital and technology between the two countries, in the interest of their economic development...’ (authors’ translation.).)
60 *Société Générale v Dominican Republic* (Decision on Preliminary Objections of 19 September 2008), para 32.
61 *Société Générale v Dominican Republic*, para 33.
62 *Société Générale v Dominican Republic*, para 43.
63 French Model BIT, Art 8(1): ‘Tout différend relatif aux investissements entre l’une des Parties contractantes et un investisseur de l’autre Partie contractante est réglé à l’amiable entre les deux parties concernées.’
Previous treaty practice alternatively referred to 'nationals' in relation to physical persons and to 'companies', as opposed to 'investor'.

'Investor' is defined by Article 1(2) of the Model BIT. Consistent with general principles of international law, an 'investor' designates either a 'national', in the sense of a physical person having the nationality of one of the Contracting Parties, or a 'legal person' constituted in accordance with the laws of a Contracting Party.

It is noteworthy that, in addition to the traditional condition of incorporation in one of the Contracting Parties, France uses alternatively the criterion of the 'seat' and that of 'control' (direct or indirect control by nationals or by companies in turn incorporated and having their seat in a Contracting Party) to define a protected company. Individual treaties may then choose one or the other criteria; for example, Article 1(3) of the France–Singapore BIT of 8 September 1975 has defined the term 'company' in respect of the French Republic as being any legal person 'constituted in France conforming to the French law and having a Head office in France'.

In other words, the French Model BIT does not use the merely formalistic criterion of incorporation in a Contracting Party, but rather takes into account economic reality and provides protection where a company is integrated within a Contracting Party's economy through the existence of headquarters in that country; at the same time, the Model BIT expands its protection to companies controlled directly or indirectly by nationals or companies established in a Contracting Party.

In practice, French BITs have given rise to intertemporal issues of nationality, namely the time at which the requirement of nationality needs to be met. This question was raised in Société Générale v Dominican Republic. Article 1 of the France–Dominican Republic BIT defines the term 'companies', following the dual criteria approach, as: 'all legal entities incorporated in the territory of one of the parties, in conformity with its legislation and where its headquarters is located'. Article 2 of the BIT provides that the Contracting Parties 'encourage and admit... investments made by the nationals and companies of the other Party on its territory'. In response to an objection made by the respondent according to which the treaty protects only French nationals while the investment in that case had been made at a time when it was owned by a US national, the tribunal in Société Générale v Dominican Republic decided as follows:

if the intention had been to allow for claims relating to any investment, independently of whether the claimant is eligible as a national of the other Contracting Party, one would have expected a clear and unequivocal expression of intention to that effect, which is not the case. Moreover, a close reading of Article 1 shows that the reference to assets invested before or after the entry into force of the Treaty cannot be taken in isolation. Such reference is in fact immediately followed by the

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64 French Model BIT, Art 1(2): 'Le terme "nationaux" désigne les personnes physiques possédant la nationalité de l'une des Parties contractantes.'

65 France–Singapore BIT, Art 1(3): 'Le terme "sociétés" désigne a) En ce qui concerne la République française, toutes les personnes morales constituées en France conformément à la législation française et ayant leur siège social en France'.

66 France–Dominican Republic BIT, Art 1(1): 'Le terme de "sociétés" désigne toute personne morale constituée sur le territoire de l'une des parties contractantes, conformément à la législation de celle-ci et y possédant son siège social....'

67 France–Dominican Republic BIT, Art 2: 'Chacune des parties contractantes encourage et admet, dans le cadre de sa législation et des dispositions du présent accord, les investissements effectués par les nationaux et sociétés de l'autre partie sur son territoire et dans sa zone maritime.'
specific definitions on nationality contained in the Treaty, thus making evident that the investment will be that of those qualifying under the requirements of nationality.68

This solution is hardly surprising, given that nationality is, indeed, a qualifying condition for the protection granted by the treaty. As further emphasized by the tribunal in that case, in light of the dispute resolution provision’s reference to disputes between a Contracting Party and the ‘national or company of the other Contracting Party’, ‘the investment might have been made before or after the date of the Treaty, but... the treaty violation falling under the Tribunal’s jurisdiction must have occurred after the entry into force of the Treaty and the investor became its beneficiary as an eligible national of the relevant Contracting Party’.69

C. Encouragement and Promotion of Investments

The ‘encouragement’ and ‘admission’ of investments is to be distinguished from the standards of protection included in the subsequent provisions of the Model BIT.70 Like the BITs of many other countries, the French Model BIT contains a provision on the promotion of investments. Article 3 of the French Model BIT provides:

Article 3
Encouragement et admission des investissements
Chacune des Parties contractantes encourage et admet, dans le cadre de sa législation et des dispositions du présent Accord, les investissements effectués par des nationaux et sociétés de l’autre Partie sur son territoire et dans sa zone maritime.71

In French treaty practice, the promotion and encouragement of investments has been set forth both as a stand-alone provision, such as in the Model BIT, or as part of another provision relating to the treatment of investments. The France–Yemen BIT of 1984, for example, provides for the encouragement of investments in the first paragraph of its Article 2 on the ‘encouragement and protection of investments’ which also covers fair and equitable treatment.

D. Standards of Protection of Investments

1. Fair and Equitable Treatment

(i) Fair and Equitable Treatment under the Current French Model BIT

The current French Model BIT ensures ‘fair and equitable treatment’ to the investments made on the territory of the host State. Article 4 of the Model BIT provides:

Article 4
Traitement juste et équitable
Chacune des Parties contractantes s’engage à assurer, sur son territoire et dans sa zone maritime, un traitement juste et équitable, conformément aux principes du Droit international, aux

68 Société Générale v Dominican Republic (Decision on Preliminary Objections of 19 September 2008), para 104.
69 Société Générale v Dominican Republic (Decision on Preliminary Objections of 19 September 2008), para 105.
70 See below, Part V(D), Standards of Protection of Investments.
71 ‘Each of the Contracting Parties encourages and admits, in accordance with its legislation and the provisions of the present Agreement, investments made by nationals or companies of the other Party on its territory and in its maritime zone’ (authors’ translation).
It is worthy of note that this provision expressly protects investments against obstructions, be they based on law or as a matter of fact, which would undermine the exercise of the right to be treated fairly and equitably. Examples of factual or legal impediments, such as obstacles to the purchase and transportation of raw materials or production means, provide further indication to arbitral tribunals of the broad protection envisaged by this provision.

More traditionally, the same provision requires the Contracting Parties to favourably examine, within the framework of their national legislation, requests for entry and authorizations to reside, work, and travel made by foreign investors in relation to their investments.

(ii) Evolution of French Treaty Practice

The first French 'fair and equitable treatment' clauses were relatively similar to Article 1 of the 1967 OECD Draft Convention on the Protection of Foreign Property. They only referred to 'fair and equitable treatment' (without reference to 'principles of international law') and included the management, use, and enjoyment of investments in the scope of application of the provision.73 Certain older French BITs also linked the fair and equitable treatment clause to the prohibition of discrimination,74 while others specified that it should, as a minimum, conform to the most-favoured-nation treatment.75

72 'Either Contracting Party shall extend fair and equitable treatment in accordance with the principles of International Law to investments made by investors of the other Contracting Party on its territory or in its maritime area, in accordance with the principles of International Law, and shall ensure that the exercise of the right thus recognised shall not be hindered de jure or de facto. In particular though not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction on the purchase or transport of raw materials and auxiliary materials, energy and fuels, as well as the means of production and operation of all types, any hindrance of the sale or transport of products within the country and abroad, as well as any other measures that have a similar effect. The Contracting Parties shall examine with goodwill, in the context of their internal law, requests for entry and authorization to stay, work authorization and authorization of movement introduced by the nationals of a Contracting Party, pursuant to an investment made on the territory or in the maritime area of the other Contracting Party' (authors' translation).

73 See, eg, the BITs concluded with Zaire (1972), Indonesia (1973), Mauritius (1973), and South Korea (1975). However, some more recent treaties still explicitly extend the scope of fair and equitable treatment to the administration, use and enjoyment of the investment, see, eg, the BITs concluded with Yemen (1984), Bangladesh (1985), Hungary (1986), Poland (1989), Ecuador (1994), Hong Kong (1995), Saudi Arabia (2002), and Kenya (2007).

74 See, eg, the France–Yugoslavia BIT (1974) and Art 3 of the France–Hungary BIT (1986). Compare with Art 3 of the France–Czechoslovakia BIT (1990), which refers to both the conformity with international law and the prohibition on unjustified or discriminatory measures.

75 See, eg, the BITs concluded with Egypt (1974), Romania (1976), and Syria (1977).
Starting at the beginning of the 1980s, protocols to the BITs listed certain possible impediments which were considered contrary to the fair and equitable treatment standard. These included notably the restriction on the purchase or transport of raw materials, energy, and fuels, on the means of production and operation, and hindrance of the sale or transport of products within the country and abroad. These elements have generally been expressly provided in the fair and equitable treatment provisions beginning in the 1990s, similarly to the current French Model BIT. A similar evolution has occurred with regard to the commitment to 'favorably examine requests for entry and authorization to reside, work and travel', which forms part of the French Model.

The fair and equitable treatment did not initially appear as a standard provision included in French BITs. Starting at the end of the 1970s, however, most French BITs started referring to the Contracting Parties' duty to extend fair and equitable treatment 'in accordance with the principles of international law'. By the late 1970s, the provision routinely required that the fair and equitable treatment conform with the principles of international law. Today, most French BITs use the Model BIT's definition of fair and equitable treatment.

(iii) Interpretation of French Treaty Practice in Relation to Fair and Equitable Treatment

The French expression 'juste et equitable' has generally been understood as being equivalent to the English expression of 'fair and equitable'. Even though the words 'just' and 'fair' may have different meanings when used in other contexts, numerous English translations of French BITs employ the words 'fair and equitable', while their French versions refer to 'juste et equitable'. Having analysed the wording in a French BIT as referring to 'just' and equitable treatment, together with the Spanish and English wordings of 'fair' and equitable treatment, the arbitral tribunal in Suez, Sociedad de Aguas de Barcelona & Vivendi v Argentina found that no practical consequences should be
drawn from this linguistic difference and concluded that all three treaty provisions had the same meaning. 82

On the other hand, the reference to 'principles of international law' in the fair and equitable treatment clause has attracted some attention, as it may appear to differ from those fair and equitable treatment clauses that contain no reference to international law, as well as from those that tie the clause to the customary international law minimum standard. However, arguments aiming at interpreting the standard of fair and equitable treatment in French BITs as equating to the minimum standard of customary international law have generally been rejected by arbitral tribunals.

In Compañía de Aguas des Aconquija & Vivendi v Argentina, the tribunal refused to equate the expression 'principles of international law' with the international minimum standard, noting that it rather invited to the consideration of a 'wider range of international law principles than the minimum standard alone'. 83 Similarly, the majority in Suez, Sociedad de Aguas de Barcelona & Vivendi v Argentina found that the ordinary meaning of the clause directed the tribunal to interpret it 'in accordance with all relevant sources of international [law] and that it is not limited in its interpretation to the international minimum standard'. 84

A similar approach was adopted in Total SA v Argentina, where the French wording of the fair and equitable treatment clause prompted the arbitral tribunal to inquire into general principles and into public international law more generally for the purpose of interpretation of the clause. 85 The tribunal decided that if the 'commitment to fair and equitable treatment in Article 3 of the BIT relates to a treatment that must be in conformity with the principles of international law, . . . [it] cannot be read as “treatment required by the minimum standard of treatment of aliens/investors under international law”'. 86

In Gemplus SA, SLP SA, Gemplus Industrial SA de CV v Mexico and Talsud SA v Mexico, the arbitral tribunal considered the legal scope of the fair and equitable treatment standard. The claimants relied on Article 4 of the France–Mexico BIT of 1998 which provides in relevant part as follows:

Protection and Treatment of Investments:
1. Each of the Contracting Parties undertakes to guarantee, within its territory and its maritime zone, the fair and equitable treatment, in accordance with principles of International Law, of investments made by investors from the other Contracting Party and shall guarantee that the exercise of this recognized right shall not be impeded either in law or in practice...

82 Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, para 183: "For purposes of these cases, the Tribunal finds that "fair and equitable" treatment and "just and equitable treatment" mean the same thing, and it therefore will use the term "fair and equitable treatment" to refer to both treaty formulations of the standard."
83 Compañía de Aguas des Aconquija SA and Vivendi Universal v Argentine Republic (ICSID Case No ARB/97/3, Award of 20 August 2007), para 7.4.7.
84 Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic (ICSID Case No ARB/03/19, Decision on Liability of 30 July 2010), para 185. One arbitrator, however, dissented from this view, considering that the 'most reasonable explanation' for this clause was that the Parties considered the fair and equitable treatment to be equivalent to the international minimum standard (Separate Opinion of Pedro Nikken, paras 7–19).
85 Total SA v Argentine Republic (ICSID Case No ARB/04/01, Decision on Liability of 27 December 2010), paras 125, 127.
86 Total SA v Argentine Republic, para 125.
The claimants submitted that the fair and equitable treatment standard has thus been described as a flexible one and comprises a number of distinct and specific elements. They argued on this basis that the fair and equitable treatment standard includes a duty of good faith and the prohibition of arbitrary and/or discriminatory measures or to harm the management, maintenance, use, enjoyment, or order of the investor’s investments. The arbitral tribunal applied the primary wording of the FET standards in the two BITs [France–Mexico and Argentina–Mexico BITs], interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, namely “fair and equitable treatment”; and accepted the claimants’ argument that the phrase ‘fair and equitable treatment’ in both BITs includes the ‘exercise of good faith or the absence of manifest irrationality, arbitrariness or perversity by the Respondent’.

2. National and Most-Favoured-Nation Treatment
(i) National and Most-Favoured-Nation Treatment under the Current French Model BIT
Consistent with French treaty practice, the French Model BIT provides both national and most-favoured-nation (‘MFN’) treatment within a single article. Article 5 of the Model BIT thus reads:

Article 5

Traitement national et traitement de la Nation la plus favorisée
Chaque Partie contractante applique, sur son territoire et dans sa zone maritime, aux investisseurs de l’autre Partie, en ce qui concerne leurs investissements et activités liées à ces investissements, un traitement non moins favorable que celui accordé à ses investisseurs, ou le traitement accordé aux investisseurs de la Nation la plus favorisée, si celui-ci est plus avantageux. A ce titre, les nationaux autorisés à travailler sur le territoire et dans la zone maritime de l’une des Parties contractantes doivent pouvoir bénéficier des facilités matérielles appropriées pour l’exercice de leurs activités professionnelles.

Ce traitement ne s’étend toutefois pas aux privilèges qu’une Partie contractante accorde aux nationaux ou sociétés d’un État tiers, en vertu de sa participation ou de son association à une zone de libre échange, une union douanière, un marché commun ou toute autre forme d’organisation économique régionale.

Les dispositions de cet Article ne s’appliquent pas aux questions fiscales.

In addition to providing for national and MFN treatment, Article 5 also specifies that investors authorized to work on the territory of either Contracting Party shall ‘enjoy the material facilities relevant to the exercise of their professional activities’. Paragraphs 2 and

87 Gempius SA, SLP SA, Gempius Industrial SA de CV v United Mexican States and Talsud SA v United Mexican States (ICSID Cases ARB(AF)/04/03 and ARB(AF)/04/4, Award of 16 June 2010), pt VII, p 2.
88 Gempius SA, SLP SA, Gempius Industrial SA de CV v United Mexican States and Talsud SA v United Mexican States, pt VII, p 42.
89 ‘Each Contracting Party shall apply on its territory and in its maritime area to the investors of the other Party, with respect to their investments and activities related to the investments, a treatment not less favourable than that granted to its investors, or the treatment granted to the investors of the most favoured Nation, if the latter is more favourable. In this regard, nationals authorized to work in the territory or in the maritime area of the Contracting Parties should benefit from the material facilities which are appropriate for the exercise of their professional activity. However, such treatment shall not extend to privileges which either Contracting Party accords to nationals or companies of a third State on account of its membership of, or association with, a free trade area, a customs union, a common market or any other form of regional economic organisation. The provisions of this Article shall not apply to tax matters’ (authors’ translation).
3 exclude from the scope of the provision the privileges arising from regional economic integration organizations, as well as tax matters.

(ii) Evolution of French Treaty Practice

The protection based on national and MFN treatment is standard in French investment treaty practice. Similarly to all national and MFN treatment provisions, the relevant French treaty clauses aim at ensuring a level playing field between, on the one hand, foreign and domestic investors, and, on the other hand, foreign investors from different countries.

As regards national treatment, in particular, French treaty practice did not contain in its early days in the mid-1960s a specific form of national treatment. In the 1970s, State practice continued to be inconsistent with respect to national treatment. Early French BITs sometimes required that each party provide the same security and protection level to covered investments that it provides to its own nationals. For example, Article 2 of the France–Malaysia BIT of 1975 reads as follows:

Chaque Partie contractante accordera aux nationaux et sociétés de l'autre Partie la même garantie et la même protection pour leurs biens, droits et entreprises que celles dont bénéficient ses propres nationaux ou sociétés.

By the early 1980s, however, French BITs included a general national treatment provision applicable to investments and associated activities.

In terms of methodology, except in very rare cases, French BITs do not explicitly provide that national and MFN treatment shall be applied to 'like' investors or in 'like circumstances'. Yet, according to at least one arbitral award rendered on the basis of a French BIT, even in the absence of specific wording to that effect, the test of 'likeness' may be considered to be inherent in any evaluation of discrimination. '([M]easures of general application that have particularly resulted in different treatment being accorded to investors in different sectors and irrespective of their different nationality [cannot] be considered per se discriminatory without any "in like circumstances" analysis.'

Finally, as regards the scope of the treatment, while certain early French treaties only extended national and/or MFN treatment to the 'security', 'protection', and 'taxation' of foreign investors, or linked the national and MFN treatment standards to the fair and equitable treatment clause, most French BITs concluded since the 1970s contain a general national and MFN clause applying in general terms to all 'investments and

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90 However, certain French BITs concluded with non-market economies only provide for most-favoured-nation treatment without providing for national treatment as well. See, eg, the BITs concluded with Romania (1976), China (1984), and Bulgaria (1989). The France–China BIT (2007) provides for national treatment 'without prejudice to legal and regulatory dispositions'.

91 'Each Contracting Party shall accord to nationals and companies of the other Party the same security and protection relating to their assets, rights and enterprises that it accords to its own nationals or companies' (authors' translation).


93 See, eg, the BITs concluded with Tunisia (1963) and South Korea (1977).

94 Total SA v Argentine Republic (ICSID Case No ARB/04/01, Decision on Liability of 27 December 2010), para 213.

95 Total SA v Argentine Republic.

96 See, eg, the BITs concluded with Tunisia (1963), Zaire (1972), Mauritius (1973), and Indonesia (1973).

97 See, eg, the BITs concluded with Egypt (1974), Singapore (1975), Syria (1977), and El Salvador (1978).
activities related to the investments'. Only very few French treaties describe in more detail the scope of application of the clauses as certain other countries have done in their respective BITs. The topical question of whether MFN clauses cover matters relating to dispute settlement is not addressed in French treaty practice.

On the question of taxation more specifically, French BITs generally exclude matters relating to it from the scope of application of the national and MFN treatment clauses. Indeed, while certain older French BITs explicitly extended national treatment to matters of taxation, a certain fiscal policy space was introduced in French treaties as early as at the beginning of the 1970s. Subsequent French treaties often excluded the application of the national and MFN treatment to international taxation treaties. Since the beginning of the 1990s, however, this exclusion has been extended to also cover the national tax law of the Contracting Parties, or, more broadly, to 'all tax matters'.

Given France's membership in the EU, privileges granted to investors of a third State within the framework of 'free trade zone, customs union, common market or any other form of regional economic organization' are generally excluded from the scope of application of national treatment and MFN treatment provisions.

3. Taking into Account Specific Commitments

One of the areas in which French BITs are distinctive as compared to the BITs of other major capital exporting countries is the manner in which specific commitments made by the host State are taken into account in the treaty. This feature is worthy of note given the significance of agreements in the realization of investments, especially when they are entered into directly between an investor and the host State.

98 Some French treaties also use the term 'exercise of professional and economic activities relating to investments', see, eg, the BITs concluded with Yugoslavia (1974), El Salvador (1978), Paraguay (1978), Sudan (1978), and Liberia (1978).

99 Clauses like those referring to the 'management, maintenance, use, enjoyment or disposal' of investments (UK Model BIT (2005)) or to the 'establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition' of investments (US Model BIT (2004)) are relatively rare in French BIT practice. See, however, the BITs concluded with Singapore (1975), Tunisia (1997), and Mexico (1998) for similarly worded national treatment or MFN-treatment clauses.


101 See, eg, the BITs concluded with Tunisia (1963), Zaire (1972), Mauritius (1973), Indonesia (1973), and South Korea (1977).

102 For example, with regard to taxation, Art 7 of the French–Zaire BIT (1972) reserves the right of the Contracting States to allow specific investment incentives to its own investors, under the condition that those incentives do not alter the competition on the domestic market ('dans la mesure où ces avantages ne sont pas de nature à fausser les conditions du marché').


105 See, eg, the BITs concluded with Chile (1992) and Guatemala (1998).

106 This exclusion is standard in French BIT practice since the mid-1970s. See, eg, the BITs concluded with Egypt (1974), Morocco (1975), El Salvador (1978), Jordan (1978), Paraguay (1978), and Liberia (1979).
3 exclude from the scope of the provision the privileges arising from regional economic integration organizations, as well as tax matters.

(ii) Evolution of French Treaty Practice

The protection based on national and MFN treatment is standard in French investment treaty practice.\(90\) Similarly to all national and MFN treatment provisions, the relevant French treaty clauses aim at ensuring a level playing field between, on the one hand, foreign and domestic investors, and, on the other hand, foreign investors from different countries.

As regards national treatment, in particular, French treaty practice did not contain in its early days in the mid-1960s a specific form of national treatment. In the 1970s, State practice continued to be inconsistent with respect to national treatment. Early French BITs sometimes required that each party provide the same security and protection level to covered investments that it provides to its own nationals. For example, Article 2 of the France–Malaysia BIT of 1975 reads as follows:

Chaque Partie contractante accordera aux nationaux et sociétés de l’autre Partie la même garantie et la même protection pour leurs biens, droits et entreprises que celles dont bénéficient ses propres nationaux ou sociétés.\(91\)

By the early 1980s, however, French BITs included a general national treatment provision applicable to investments and associated activities.\(92\)

In terms of methodology, except in very rare cases,\(93\) French BITs do not explicitly provide that national and MFN treatment shall be applied to ‘like’ investors or in ‘like circumstances’. Yet, according to at least one arbitral award rendered on the basis of a French BIT, even in the absence of specific wording to that effect, the test of ‘likeness’ may be considered to be inherent in any evaluation of discrimination:\(94\) ‘[M]easures of general application that have particularly resulted in different treatment being accorded to investors in different sectors and irrespective of their different nationality [cannot] be considered per se discriminatory without any “in like circumstances” analysis.’\(95\)

Finally, as regards the scope of the treatment, while certain early French treaties only extended national and/or MFN treatment to the ‘security’, ‘protection’, and ‘taxation’ of foreign investors,\(96\) or linked the national and MFN treatment standards to the fair and equitable treatment clause,\(97\) most French BITs concluded since the 1970s contain a general national and MFN clause applying in general terms to all ‘investments and

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\(90\) However, certain French BITs concluded with non-market economies only provide for most-favoured-nation treatment without providing for national treatment as well. See, eg, the BITs concluded with Romania (1976), China (1984), and Bulgaria (1989). The France–China BIT (2007) provides for national treatment ‘without prejudice to legal and regulatory dispositions’.

\(91\) ‘Each Contracting Party shall accord to nationals and companies of the other Party the same security and protection relating to their assets, rights and enterprises that it accords to its own nationals or companies’ (authors’ translation).


\(93\) See, eg, the BITs concluded with Tunisia (1963) and South Korea (1977).

\(94\) Total SA v Argentine Republic (ICSID Case No ARB/04/01, Decision on Liability of 27 December 2010), para 213.

\(95\) Total SA v Argentine Republic.

\(96\) See, eg, the BITs concluded with Tunisia (1963), Zaire (1972), Mauritius (1973), and Indonesia (1973).

\(97\) See, eg, the BITs concluded with Egypt (1974), Singapore (1975), Syria (1977), and El Salvador (1978).
(i) The Protection of Contracts and Special Commitments under the Current French Model BIT

Article 10 of the French Model BIT provides that:

**Article 10**

**Engagement spécifique**

Les investissements ayant fait l'objet d'un engagement particulier de l'une des Parties contractantes à l'égard des investisseurs de l'autre Partie contractante sont régis, sans préjudice des dispositions du présent accord, par les termes de cet engagement dans la mesure où celui-ci comporte des dispositions plus favorables que celles qui sont prévues par le présent accord. Les dispositions de l'article 8 du présent Accord s'appliquent même en cas d'engagement spécifique prévoyant la renonciation à l'arbitrage international ou désignant une instance arbitrale différente de celle mentionnée à l'article 8 du présent accord.107

This provision adopts a 'more favourable treatment' logic. It allows the investor who is a party to an agreement to fully enjoy the benefits of that agreement, including its dispute resolution clause, if it contains a more favourable protection than that of the BIT. Nor is the international law protection accorded by the BIT (including access to international arbitration) jeopardized by the mere existence of the agreement and its dispute resolution clause. In all circumstances, the investor may benefit from the better protection offered by each of its agreement or the BIT, at the investor's option. Two series of observations may be made in this respect.

First, this provision does not exclude the parallel application of investment agreements and the BIT, given the wording 'without prejudice to the provisions of this Agreement'. Such provisions also include dispute resolution, given the express reference to the treaty's Article 8, which 'shall apply even if a specific commitment has been made waiving international arbitration or referring to a different arbitral institution than that mentioned at Article 8 of the present Agreement'. In terms of protection, this is critical in circumstances where, for example, an investment agreement contains a dispute resolution clause providing for domestic arbitration or the courts of the country where the investment has been made or even in which the investor has waived its right to international arbitration.

Second, the French approach to the manner in which agreements may be taken into account appears to differ from that adopted by countries such as Switzerland or the UK, which provide in their BIT what is referred to as an 'umbrella' or 'observance of undertakings' clause, which allows a treaty-based arbitral tribunal to determine whether a previous undertaking (be it by contract or otherwise) has been breached, such breach constituting a treaty violation for which the host State would be held liable. In adopting the 'more favourable treatment' approach, the French Model BIT has anticipated possible conflicts between the treaty provisions and those of commitments made by

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107 'Investments which are subject to a specific commitment by one of the Contracting Parties towards investors of the other Contracting Party are, without prejudice to the provisions of the present Agreement, governed by the terms of such commitment to the extent the same includes provisions that are more favourable than those of the present Agreement. The provisions of Article 7 of the present Agreement [governing the settlement of disputes through arbitration] shall apply even if a specific commitment has been made waiving international arbitration or nominating a different arbitral institution than that mentioned in Article 8 of the present Agreement' (authors' translation).
the host State towards specific investors, without possible breaches of such commitments constituting per se an autonomous basis for protection under the BIT.

(ii) Evolution of French Treaty Practice

French treaty practice has evolved in respect of the manner in which specific agreements may or should be taken into account. The first BIT with Tunisia of 1963, for example, contained two provisions. Article 5 of that treaty referred to the situation in which a specific agreement has been entered into, with the requirement that such agreement exclusively govern the matter;108 Article 7 of that treaty in turn provided for a 'more favourable treatment' approach in relation to the concurrent applicability of the BIT and another international treaty entered into by one of the Contracting Parties and a third State, in which case the investor is entitled to seek the protection of the more favourable agreement.109

The regime found in the Model BIT today may be found in Article 10 of the France–Egypt BIT of 1974—and, in fact, in almost all BITs entered into by France since that time—which provides that investments having been the subject of a specific commitment by one of the Contracting Parties towards an investor of the other Contracting Party will benefit of such commitment to the extent it is more favourable than the provisions of the BIT. The wording of 'commitment' ('engagement'), as opposed to 'agreement' ('accord') is fairly consistent in French treaty practice, certain other treaties having referred, in more rare instances, to 'specific agreement'.110 In those treaties in which the latter wording appears, unlike the French Model BIT, it may raise the question whether the host State may be bound by specific commitments which are not agreements, for example a unilateral undertaking by a government representative. The provision in its entirety would indicate that the Contracting Parties had in mind investment agreements entered into by the investor ('governed ... by the terms of said commitment if it includes more favourable provisions'). The question therefore arises whether, in such

108 'Les investissements qui auront fait l'objet d'un engagement particulier de l'une des parties soit à l'égard de l'autre partie, soit à l'égard des ressortissants, personnes physiques ou morales, de cette dernière partie, seront régis exclusivement par les termes de cet engagement.' ('Investments that will have been the subject of a specific undertaking from one of the Parties, either towards the other Party or towards the nationals of the latter, whether natural or legal persons, will be governed exclusively by the provision of this Agreement' (authors' translation)).

109 'Lorsqu'une question est régie à la fois par la présente convention et par un autre accord international liant l'une ou l'autre des parties avec un ou plusieurs États tiers, les ressortissants de chacune des parties pourront se prévaloir des dispositions de l'accord qui leur est le plus favorable.' ('When a question is governed by both the present Convention and another international agreement binding either of the Parties to one or more third States, the nationals of each of the Parties shall be entitled to avail themselves of the provisions of the agreement that is the most favourable to them' (translated by the authors)). See also, following an identical logic, Art 8 of the France–Mauritius BIT (1973) which recognizes the investor's right to seek the better treatment between the BIT and other international instruments or the host State's domestic legislation. See also Art 11 of the France–India BIT (1997).

110 See, eg, France–Malaysia BIT, (1975), Art 5: 'Les investissements effectués en vertu d'un accord spécial de l'une des Parties contractantes dans des entreprises appartenant à des nationaux ou sociétés de l'autre Partie, seront régis par les dispositions dudit accord spécial. Si les investisseurs en font la demande, chacune des Parties contractantes consentira à insérer dans ledit accord spécial une disposition prévoyant le recours, en cas de différend, au Centre international de Règlement des Différends relatifs aux Investissements (CIRDI).’ ('Investments made pursuant to a special agreement of one of the Contracting Parties in companies owned by nationals or companies of the other Party, shall be governed by the provisions of the said special agreement. If the investors so request, each of the Contracting Parties shall consent to insert in the said special agreement a provision allowing, in case of a dispute, recourse to the International Centre for Settlement of Investment Disputes (ICSID)' (authors' translation)).
instances, an investor may seek the benefit of this type of provision in the event of unilateral undertakings by the host State that are more favourable than treaty provisions.

4. Expropriation, Nationalization, and Compensation

(i) Expropriation, Nationalization, and Compensation under the Current French Model BIT

All BITs concluded by France contain specific provisions which set out the conditions of lawful expropriation or nationalization. The relevant provision of the 2006 Model BIT, Article 6(2), reads as follows:

Article 6

Dépøsessorion et indemnisation

(2) Les Parties contractantes ne prennent pas de mesures d'expropriation ou de nationalisation ou toutes autres mesures dont l'effet est de déposséder, directement ou indirectement, les investisseurs de l'autre Partie des investissements leur appartenant, sur leur territoire et dans leur zone maritime, si ce n'est pour cause d'utilité publique et à condition que ces mesures ne soient ni discriminatoires, ni contraires à un engagement particulier.

Toutes les mesures de dépøsessorion qui pourraient être prises doivent donner lieu au paiement d'une indemnité prompte et adéquate dont le montant, égal à la valeur réelle des investissements concernés, doit être évalué par rapport à une situation économique normale et antérieure à toute menace de dépøsessorion.

Cette indemnité, son montant et ses modalités de versement sont fixés au plus tard à la date de la dépøsessorion. Cette indemnité est effectivement réalisable, versée sans retard et librement transférable. Elle produit, jusqu'à la date de versement, des intérêts calculés au taux d'intérêt de marché approprié.

Paragraphs one and three of Article 6 of the current Model BIT address the duty to provide 'full and complete protection and security', as well as treatment in case of losses due to war, armed conflict, revolution, national state of emergency or revolt, and these are considered below.

(ii) Evolution of French Treaty Practice

French treaty language on expropriation and compensation has remained relatively homogeneous throughout the last decades.

111 The use of the two terms 'nationalization' and 'expropriation' is common to the French civil law tradition which distinguishes, on the one hand, administrative acts targeted at individualized assets (expropriation) from, on the other hand, legislative acts targeted at specific sectors of the economy (nationalization); see, eg, D Carreau and P Juillard, Droit international économique, (4th edn, Dalloz, 2010), p 551.

112 'Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments on its territory and in its maritime area, except in the public interest and provided that these measures are neither discriminatory nor contrary to a specific commitment. Any measures of dispossession which might be taken shall give rise to prompt and adequate compensation, the amount of which shall be equal to the real value of the investments concerned and shall be set in accordance with the normal economic situation prevailing prior to any threat of dispossession. The said compensation, the amounts and conditions of payment, shall be set not later than the date of dispossession. This compensation shall be effectively realizable, shall be paid without delay and shall be freely transferable. Until the date of payment, it shall produce interest calculated at the appropriate market rate of interest' (authors' translation).

113 See below Part V(D)(5) on Full Protection and Security under the Current French Model BIT.
The wording adopted is close to that of the OECD Draft Convention on the Protection of Foreign Property (1967), as it applies to measures depriving ‘directly or indirectly’ foreign investors and retains the cumulative conditions of public purpose, non-discrimination, and the observance of specific commitments as criteria for the lawfulness of an expropriation. The language concerning compensation contains elements which may be traced back to the ‘Hull formula’ (namely ‘prompt’, ‘adequate’, and ‘effectively’ realizable). In addition, similarly to the OECD Draft Convention, French treaty practice specifies that compensation must reflect the real value of the investments concerned and shall be paid without delay.

Thus, all French BITs include the well-recognized principles of international law requiring expropriations to be taken in the public interest, without discrimination, and accompanied by the payment of compensation. In addition, many French BITs condition the lawfulness of takings upon the respect of specific commitments, either explicitly within the expropriation clause, or by reference to other articles in the treaty providing for the observance of undertakings. Certain French BITs also require a taking to be carried out according to the applicable national law and to be reviewable under domestic judicial procedures.

From the very beginning, French BITs incorporated the two concepts of ‘expropriation’ and ‘nationalization’, as well as the more generic term of ‘other measures of dispossession’. At the beginning of the 1970s, the words ‘directly or indirectly’ were added in the language so as to explicitly extend the scope of protection to indirect takings. Except in certain rare cases, this language has remained constant in French treaty practice until today.

The majority of French BITs requires ‘prompt and adequate’ compensation in case of expropriations while the BITs entered into the 1970s often referred to ‘just’ compensation. Even though French treaty language has not always been entirely uniform on this
nearly all treaties provide for compensation which is 'equal to the real value of the investment'. In addition, French BITs generally require compensation to be set not later than the date of dispossession, to reflect the investment's value prior to any threat of dispossession, to be effectively realizable, freely transferable, and paid without delay. Since the 1980s, BITs concluded by France generally also specify that compensation produces interest which shall be calculated at the appropriate market rate.

(iii) Interpretation of French Treaty Practice with Regard to Expropriation and Nationalization

In determining whether contract rights are protected against direct and indirect expropriation, the arbitral tribunal in Compañía de Aguas des Aconquija & Vivendi v Argentina referred to the duty to respect special commitments contained in Article 5(2) of the France–Argentina BIT. In determining this question, the tribunal characterized the respondent State's measures as representing not 'simple commercial acts of or relating to non-performance by a contracting counter-party', but as 'sovereign acts', taken in an 'official capacity'. A similar approach was followed in Suez, Sociedad de Aguas de Barcelona & Vivendi v Argentina, where the tribunal dismissed the investor's expropriation claim in the context of what it considered to be an 'essentially contractual' dispute over the termination of a concession contract.

The tribunal in Compañía de Aguas des Aconquija & Vivendi v Argentina has considered an expropriation to have occurred even though 'no taking or dispossession, as such' had taken place, while other tribunals have focused on the term 'dispossession' used in French BITs in order to interpret more narrowly the scope of French expropriation clauses. Thus, in Suez, Sociedad de Aguas de Barcelona & Vivendi v Argentina, the tribunal noted that 'expropriation, at least in the Argentina–France BIT, require[d] a "dispossession" of the investor', before requesting a 'substantial deprivation' for the finding of an indirect

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124 Some BITs refer indeed to 'just and equitable' (France–Morocco (1975)), 'adequate' (France–Indonesia (1973)) or 'appropriate' (France–China (1984 and 2007)) compensation, while specifying, however, that compensation shall always reflect the 'real value' of the investment.


126 See, eg, the BITs concluded with Syria (1977), El Salvador (1978), Jordan (1978), Paraguay (1978), and Sri Lanka (1980).


128 Compañía de Aguas des Aconquija SA and Vivendi Universal v Argentine Republic (ICSID Case No ARB/97/3, Award of 20 August 2007).

129 Compañía de Aguas des Aconquija SA and Vivendi Universal v Argentine Republic, para 7.5.10.

130 Compañía de Aguas des Aconquija SA and Vivendi Universal v Argentine Republic, para 7.5.8.

131 Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic (ICSID Case No ARB/03/19, Decision on Liability of 30 July 2010).

132 Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, para 154--156.

133 Compañía de Aguas des Aconquija SA and Vivendi Universal v Argentine Republic (ICSID Case No ARB/97/3, Award of 20 August 2007).

134 Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic (ICSID Case No ARB/03/19, Decision on Liability of 30 July 2010).

135 Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, para 133.
taking. The tribunal in *Total v Argentina* decided more specifically that the term 'dispossession' requires 'a loss of material control over the investment' and 'appears somehow to be more restrictive than the parallel provisions in the Argentina–US ("tantamount to expropriation") and the Argentina–UK BIT which refer only to "equivalent to nationalisation or expropriation"'. Yet, both tribunals considered it useful to emphasize the consistency of their approach with other arbitral rulings having decided similar Argentine measures under different BITs.

5. **Full Protection and Security**

(i) **Protection and Security under the Current French Model BIT**

The full protection and security standard may be a stand-alone provision or incorporated into the fair and equitable treatment or the treatment provisions of BITs. The 2006 French Model BIT, however, has provided this protection while including it in the expropriation provision in Article 6. For losses due to war, armed conflict, revolution, national state of emergency, or revolt, the last paragraph of the same provision foresees as a minimum national or MFN treatment. Articles 6(1) and 6(3) provide:

**Article 6**

Dépossession et indemnisation

(1) Les investissements effectués par des investisseurs de l'une ou l'autre des Parties contractantes bénéficient, sur le territoire et dans la zone maritime de l'autre Partie contractante, d'une protection et d'une sécurité pleines et entières.

(3) Les investisseurs de l'une des Parties contractantes dont les investissements auront subi des pertes dues à la guerre ou à toute autre mesure conflit armé, révolution, état d'urgence national ou révolte survenue sur le territoire ou dans la zone maritime de l'autre Partie contractante, bénéficieront, de la part de cette dernière, d'un traitement non moins favorable que celui accordé à ses propres investisseurs ou à ceux de la Nation la plus favorisée.

(ii) **Evolution of French Treaty Practice**

The very first French BITs concluded in the early 1960s included the duty to provide protection and security within the broader scope of 'fair and equitable treatment'. Thus, Article 1 of the first French BIT concluded with Tunisia in 1963 starts with the requirement of fair and equitable treatment before turning to the full protection and

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136 *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, paras 134, 145.

137 *Total SA v Argentine Republic* (ICSID Case No ARB/04/01, Decision on Liability of 27 December 2010).

138 *Total SA v Argentine Republic*, para 194.

139 *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (ICSID Case No ARB/03/19, Decision on Liability of 30 July 2010), para 138; *Total SA v Argentine Republic* (ICSID Case No ARB/04/01, Decision on Liability of 27 December 2010), para 196.

140 'The investments made by nationals or companies of one Contracting Party shall enjoy full and complete protection and security on the territory and in the maritime area of the other Contracting Party' (authors' translation).

141 'Investors of one of the Contracting Parties whose investments have suffered losses owing to war or any other type of armed conflict, revolution, a state of national emergency or rebellion in the territory or the maritime area of the other Contracting Party, shall be accorded treatment no less favourable than that which the latter Contracting Party accords to its own investors or those of the Most Favoured Nation' (authors' translation).
security standard in its second paragraph; this second paragraph is introduced by the words 'to this effect', which could be understood as qualifying the duty of protection and security as being only a part of the more general fair and equitable treatment standard.

A similar logic may be perceived in other older generation French treaties which foresee, within the provision providing for fair and equitable treatment, that protection and security shall be granted 'in any event'. This interpretation may explain why several treaties concluded during the 1970s do not contain a separate 'protection and security' requirement, in addition to the standard of fair and equitable treatment. The same logic seems to be followed by Article 5(1) of the France–Argentina BIT in relation to the obligation to provide full protection and security.

Certain early French BITs also link the security and protection clauses to the national treatment standard by providing, 'in any event', for the same security and protection which is granted to the host State's nationals. The addition of the terms 'in any event' within these clauses may point to the conclusion that national treatment only sets a floor, the standard of protection and security being of a higher degree. This conclusion would be in line with other protection and security clauses negotiated during the 1970s, which provide for 'at least' the same protection and security as the one granted to nationals or to investors of third States. References to national treatment have since been abandoned in French treaty practice in relation to 'protection and security' and have only reappeared in the specific context of losses due to exceptional circumstances.

The subsequent evolution of French practice since the end of the 1970s has moved towards the inclusion of the 'protection and security' standard within the provisions dealing with expropriation and compensation, as it is the case in the current Model BIT. At the same time, the wording has consolidated into the current provision, which provides for 'full and complete protection and security'. Except in rare circumstance, this protection is no longer linked to the concept of fair and equitable treatment.

Concomitant to these developments, a new paragraph relating to losses due to exceptional circumstances was introduced at the end of the provision relating to expropriation. In its early versions, only national treatment was owed to foreign investors in

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142 'A cet effet' in the French original text.
143 'En tout état de cause' in the French original text. See, eg, the BITs signed with Zaire (1972) and Mauritius (1973).
144 See, eg, the BITs concluded with Egypt (1974), Yugoslavia (1975), Romania (1975), and Syria (1977).
145 See Art 5(1) of the France–Argentina BIT (1991): 'Les investissements effectués par des investisseurs de l’une ou l’autre des Parties contractantes bénéficient, sur le territoire et dans la zone maritime de l’autre Partie contractante, d’une protection et d’une sécurité pleines et entières, en application du principe de traitement juste et équitable mentionné à l’article 3 du présent Accord.' (‘Investments made by investors of one Contracting Party shall be fully and completely protected and safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in Article 3 of this Agreement’ (authors’ translation)). Note, however, that certain older French BITs also provide for cumulative 'fair and equitable treatment' and 'protection and security' provisions within the same article, without textually including one of the obligations within the scope of the other (see, eg, the BITs concluded with Singapore (1975) and Bangladesh (1985)).
146 See, eg, the BITs concluded with Zaire (1972) and Mauritius (1973).
147 See, eg, France–Morocco BIT (1975).
148 See, eg, the BITs concluded with South Korea (1977), Jordan (1978), Sri Lanka (1980), Equatorial Guinea (1982), Panama (1982), and Pakistan (1983).
149 See the French original text at Art 6(1) of the French Model BIT: ‘[d]’une protection et sécurité pleines et entières’.
such situations.150 Rapidly, however, the provision was extended to cover MFN treatment as well.151 Some treaties provide for adequate compensation to be paid to protected investors in these circumstances, regardless of the treatment of nationals or investors of third States.152 Certain other rare treaties distinguish between losses due to exceptional circumstances (in which cases national and MFN treatment shall apply) and cases of requisitions or unnecessary destructions caused by the host State (in which cases adequate compensation shall be paid).153 These distinctions have not become common in French treaty practice. It may be argued that acts committed by State organs during times of exceptional circumstances may be challenged under other treaty provisions as well.

(iii) Interpretation of French Treaty Practice with Regard to Protection and Security

Clauses relating to 'full', 'complete', or 'constant' protection and security are a common feature in international investment agreements.154 Similarly to most BITs entered into by other countries, French treaties do not describe in detail the exact scope of protection and security owed to the protected investor. The traditional understanding is that these provisions aim at protecting against physical threats to the person and property of foreign investors.155 However, more recent doctrine and jurisprudence have also extended the protection beyond the physical security of investors by including concepts such as 'legal security' within the scope of the clauses.156

This question has been tested by tribunals called upon to interpret the special wording of the 1991 France–Argentina BIT. Article 5(1) of this treaty provides for full protection and security 'in application of the principle of fair and equitable treatment mentioned in Article 3'. In this context, the question is whether the scope of protection can be extended beyond the physical security of investments (equating it with the fair and equitable treatment standard), or whether, as maintained by Argentina, a more traditional view of the 'security and protection' clause should be upheld.

In Compañía de Aguas des Aconquija SA and Vivendi Universal v Argentina,157 the arbitral tribunal held that the security and protection clause of the French–Argentine BIT could also apply to non-physical infringements of an investment. Relying on the link between the concepts of 'security and protection' and 'fair and equitable treatment' in Article 5(1) of the treaty,
the tribunal interpreted the scope of the protection and security clause ‘to apply to reach any measure which deprives an investor’s investment of protection and full security, providing ... the act or measure also constitutes unfair and inequitable treatment’. In the tribunal’s view, had the Contracting Parties intended to limit the obligation to mere physical interferences, they would have included wording to that effect in the treaty.

A similar view was adopted in Total SA v Argentina, where the arbitral tribunal found that such interpretation of Article 5(1) of the France–Argentine BIT was consistent with Article 31 of the Vienna Convention on the Law of Treaties and with the ‘interpretation of differently worded BIT clauses adopted by other tribunals’.

The tribunal in Suez, Sociedad de Aguas de Barcelona & Vivendi v Argentina came to a different conclusion. It found that the link established by Article 5(1) between the two standards was an indication that ‘full protection and security’ was included in the concept of fair and equitable treatment, but that the scope of the former was narrower than the latter:

[T]he concept of full protection and security is included within the concept of fair and equitable treatment, but ... the scope of full protection and security is narrower than the fair and equitable treatment. Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the French BIT. On the other hand, all violations of fair and equitable treatment are not automatically also violations of full protection and security. Under the French BIT, it is possible for Argentina to violate its obligation of fair and equitable treatment toward the Claimants without violating its duty of full protection and security. In short, there are actions that violate fair and equitable treatment that do not violate full protection and security.

Noting that the treaty drafters ‘must have intended them to mean two different things’ when they included the two standards within two distinct articles, and attempting to avoid overlaps between the protection and security standard and other standards of investment protection, the tribunal found that the ‘stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the protection and security standard primarily seeks to protect investments from physical harm’. The tribunal also distinguished the wording of the applicable treaty from other security and protection clauses which explicitly provide for ‘legal’ security. As a result, the tribunal concluded that Article 5(1) of the France–Argentina BIT only encompasses an obligation ‘to exercise due diligence to protect investors and investments primarily from physical injury’.

With regard to a security and protection clause which is more in line with the current French Model BIT, the tribunal in Gemplus SA and Talsud SA v Mexico similarly

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158 Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic.
159 Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic, para 7.4.15.
160 Total SA v Argentine Republic (ICSID Case No ARB/04/01, Decision on Liability of 27 December 2010), para 343.
161 Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic (ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010), para 171.
167 Gemplus SA, SLP SA, Gemplus Industrial SA de CV v United Mexican States and Talsud SA v United Mexican States (ICSID Case Nos ARB(AF)/04/03 and ARB(AF)/04/4, Award of 16 June 2010).
emphasized the need to distinguish the ‘security and protection’ standard from other BIT provisions, such as those regarding fair and equitable treatment and expropriation. According to this tribunal, the latter involve the relations between the investor and the host State, whereas the ‘protection’ provisions also involve the host State protecting the investment from a third party. While not excluding that certain forms of legal protection may also be covered by the ‘security and protection’ standard, the tribunal in that case adopted a cautious interpretation of the standard and dismissed the investor’s claim.

6. Free Transfer of Capital

(i) Free Transfer of Capital under the Current French Model BIT

Article 7

Libre transfert

(1) Chaque Partie contractante, sur le territoire ou dans la zone maritime de laquelle des investissements ont été effectués par des nationaux ou sociétés de l’autre Partie contractante, accorde à ces nationaux ou sociétés le libre transfert:
   a) des intérêts, dividendes, bénéfices et autres revenus courants;
   b) des redevances découlant des droits incorporels désignés au paragraphe 1, lettres d) et e) de l’Article 1;
   c) des versements effectués pour le remboursement des emprunts régulièrement contractés;
   d) du produit de la cession ou de la liquidation totale ou partielle de l’investissement, y compris les plus-values du capital investi;
   e) des indemnités de dépossession ou de perte prévues à l’Article 5, paragraphes 2 et 3 ci-dessus.

(2) Les nationaux de chacune des Parties contractantes qui ont été autorisés à travailler sur le territoire ou dans la zone maritime de l’autre Partie contractante, au titre d’un investissement agréé, sont également autorisés à transférer dans leur pays d’origine une quotité appropriée de leur rémunération.

(3) Les transferts visés aux paragraphes précédents sont effectués sans retard au taux de change normal officiellement applicable à la date du transfert.

(4) Lorsque, dans des circonstances exceptionnelles, les mouvements de capitaux en provenance ou à destination de pays tiers causent ou menacent de causer un déséquilibre grave pour la balance des paiements, chacune des Parties contractantes peut temporairement appliquer des mesures de sauvegarde relatives aux transferts, pour autant que ces mesures soient strictement nécessaires, appliquées sur une base équitable, non-discriminatoire et de bonne foi et qu’elles n’excèdent pas une période de six mois.

(5) Les dispositions des alinéas précédents du présent article, ne s’opposent pas à l’exercice de bonne foi, par une Partie contractante, de ses obligations internationales ainsi que de ses droits et obligations au titre de sa participation ou de sa participation à une zone de libre


169 Gemplus SA, SLP SA, Gemplus Industrial SA de CV v United Mexican States and Talsud SA v United Mexican States, paras 9–10 and 9–11: The tribunal noted that ‘such “protection” provisions... do not generally impose strict liability on a host State under international law; and the mere fact of other unlawful conduct in the form of expropriation or inequitable and unfair treatment by the host State is not, without more, to be treated as a breach of these provisions. The Tribunal also considers that these BIT provisions are directed at different kinds of unlawful treatment from that prescribed by other provisions of the BITs, particularly those regarding FET and Expropriation. The latter involve the investor and the host State, whereas the “protection” provisions also involve the host State protecting the investment from a third party.’
échange, une union douanière, un marché commun, une union économique et monétaire ou toute autre forme de coopération ou d'intégration régionale.\textsuperscript{170}

Article 7 of the 2006 French Model BIT provides that the Contracting Parties guarantee each others' nationals and companies the free transfer of (a) interest, dividends, profits, and other current income; (b) royalties deriving from intangible rights as defined in Article 1 (definition of the term 'investment'); (c) repayments of loans which have been regularly contracted; (d) value of partial or total liquidation or disposition of the investment (including capital gains on the capital invested); and (e) compensation for dispossession or loss described in Article 6 (nationalization and expropriation).\textsuperscript{171}

The second paragraph of the same provision further allows those nationals who have been authorized, within the context of an approved investment, to work in the territory of the other Contracting Party, to transfer an 'appropriate proportion' of their earnings to their country of origin.\textsuperscript{172} The same provision also provides that all transfers shall be executed without delay at the official exchange rate prevailing on the date of transfer.\textsuperscript{173}

The fourth paragraph of the provision contains an explicit exception from the principle of free transfer of capital in cases of serious disequilibrium of balance of payments, or threats thereof. In these situations, either Contracting Party may temporarily apply safeguard measures, provided that these measures are strictly necessary, applied in good faith, in an equitable and non-discriminatory way, and do not exceed six months.\textsuperscript{174} The current French transfer clause also emphasizes that it is without prejudice to the Contracting Parties' other international obligations, as well as their rights and duties deriving from their participation in regional economic integration organizations.\textsuperscript{175}

(ii) Evolution of French Treaty Practice

Free transfer of capital is generally understood to be of utmost importance for foreign investors; equally, the control of capital in- and outflows may be significant for State Parties to an investment protection agreement. The OECD Draft Convention on the Protection of Foreign Property (1967) did not aim at striking a clear-cut balance between

\textsuperscript{170} 'Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party in respect of investments made in its territory or maritime area the free transfer of: a) interests, dividends, profits and other current income; b) royalties from intangible rights as defined in paragraph 1, letters d) and e) of Article 1; c) payments made towards the repayment of loans duly entered into; d) proceeds accruing from the sale of the total or partial liquidation of investments including the capital gains invested; e) compensation for dispossession or loss as provided in Article 5, paragraphs 2 and 3 below. (2) Nationals of the Contracting Party who are authorized to work in the territory or in the maritime area of the other Contracting Party under approved investments shall also be authorized to transfer to their country of origin an appropriate portion of their remuneration. (3) Transfers defined in paragraphs above shall be made without delay and at the official exchange rate applicable on the date of the transfer. (4) If, in exceptional circumstances, movements of capital from or to third countries cause or threaten to cause a severe imbalance of payments, the Contracting Party can temporarily adopt safeguard measures, provided that such measures are strictly necessary, applied on equitable basis, non-discriminatory and in good faith, and they do not exceed a six month period. (5) The provisions of previous subparagraphs of this Article do not preclude the exercise of good faith by the Contracting Party, its international obligations and its rights and obligations on account of its association with a free trade area, a customs union, a common market, an economic or monetary union or any other form of cooperation or regional integration' (authors' translation).

\textsuperscript{171} French Model BIT, Art 7(1).
\textsuperscript{172} French Model BIT, Art 7(2).
\textsuperscript{173} French Model BIT, Art 7(3).
\textsuperscript{174} French Model BIT, Art 7(4).
\textsuperscript{175} French Model BIT, Art 7(5).
the different interests involved, as it only 'recommended' the recognition of the principles of freedom of capital transfer by adhering governments. French BIT practice has varied in this regard, depending on the specific circumstances prevailing at the time of the conclusion of the investment protection treaties.

In the first French BIT concluded in 1963, the Contracting Parties agreed to authorize the free transfer of benefits, interest, dividends, and royalties, by 'taking into account their currency reserves'. Subsequent treaties often guaranteed the freedom of capital 'in accordance with the procedures prevailing in the Contracting States concerned and the rules of the International Monetary Fund'.

From the mid-1970s onwards, French capital transfer clauses became more specifically drafted, guaranteeing notably the transfer of returns, royalties, repayments of loans, the value of liquidation, as well as compensation for loss or dispossession, similar to the current Model BIT. The free transfer of an 'appropriate proportion' of natural persons' earnings has also become a common feature of French investment protection treaties. At the same time, certain French BITs have continued to explicitly require compliance with domestic laws and procedures, being understood that such laws and procedures shall be applied in an equitable manner and not hinder unduly the transfer of the investor's capital.

Several French BITs also explicitly set compliance with domestic tax laws and regulations as a condition for the transfer of the investor's capital.

A number of French BITs concluded since the late 1990s contain a specific paragraph dealing with serious balance of payments problems. For example, the BIT concluded between France and Mexico in 1998 allows Contracting Parties to temporarily restrict the transfer of capital in cases of serious balance of payments problems, provided they implement measures or a program satisfying the criteria of the International Monetary Fund. Subsequent balance of payment exception clauses generally require those restrictions to be strictly necessary, to be applied in good faith, in an equitable and non-discriminatory way, and to not exceed six months, conditions that have been included in the current French Model BIT and also appear in Article 66 of the Treaty on the Functioning of

178 See, eg, the BITs concluded with Zaire (1972) and with Mauritius (1973). In addition, the latter agreement contains a specific MFN commitment with regard to the transfer of capital.
180 Certain French BITs also guarantee the transfer of all earnings and not only of an 'appropriate proportion' thereof, see, eg, the BITs concluded with Slovenia (1998), Venezuela (2001), and Turkey (2006).
183 See the BITs concluded with South Korea (1977), Argentina (1991), Tunisia (1997), and China (2007).
184 See the BITs concluded with Laos (1989) and Kenya (2007).
185 France–Mexico BIT (1998), Art 7: '... à condition que la partie contractante concernée mette en œuvre des mesures ou un programme satisfaisant aux critères du Fonds monétaire International.'
the European Union. More recent French capital transfer clauses also explicitly clarify that they are without prejudice to the Contracting Parties' rights and duties deriving from their participation in regional economic integration organizations, in order to avoid any possible conflicts with the law of the EU concerning capital movements.

E. Settlement of Investment Disputes between the Investor and the Host State

1. Investment Disputes under the Current French Model BIT

The 2006 French Model BIT includes a relatively classic and straightforward dispute resolution clause relating to investment disputes.

Article 8

Règlement des différends entre un investisseur et une Partie contractante

(1) Tout différend relatif aux investissements entre l'une des Parties contractantes et un investisseur de l'autre partie contractante est réglé à l'amiable entre les deux parties concernées.

(2) Si un tel différend n'a pas pu être réglé dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des parties au différend, il est soumis à la demande de l'une ou l'autre de ces parties à l'arbitrage du Centre international pour le règlement des différends relatifs aux investissements (CIRDI), créé par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, signée à Washington le 18 mars 1965.

(3) Dans le cas où le différend est de nature à engager la responsabilité pour les actions ou omissions de collectivités publiques ou d'organismes dépendant de l'une des deux Parties contractantes, au sens de l'article 2 du présent accord, ladite collectivité publique ou ledit organisme sont tenus de donner leur consentement de manière inconditionnelle au recours à l'arbitrage du Centre international pour le règlement des différends relatifs aux investissements (CIRDI), au sens de l'article 25 de la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autre Etats, signée à Washington le 18 mars 1965.

187 Art 66 of the Treaty on the Functioning of the European Union reads: 'Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.'

188 See the BITs concluded with China (2007), Djibouti (2007), Kenya (2007), Senegal (2007), and Mauritius (2010).

189 See, eg, Treaty on the Functioning of the European Union, Arts 64, 66, 75.

190 '(1) Any dispute relating to investments between one Contracting Party and an investor of the other Contracting Party shall be settled amicably between the two parties concerned. (2) If such a dispute has not been settled within a delay of six months from the date it was raised by one of the parties to the dispute, it will be submitted on the request of one or the other of these parties to arbitration under the auspices of the Centre for the Settlement of Investment Disputes (ICSID) created by the Convention for the Settlement of Investment Disputes between States and nationals of other States, which was opened for signature in Washington D.C. on 18 March 1965. (3) In the event that the dispute is of a nature to engage the responsibility of one of the Contracting Parties for the actions or omissions of public entities or instrumentalities depending on one of the Contracting Parties, within the meaning of Article 2 of the present Agreement, the said public entity or instrumentality must give its unconditional consent to recourse to arbitration under the auspices of International Centre for Settlement of Investment Disputes (ICSID), within the meaning of Article 25 of the Convention of the Settlement of Investment Disputes between States and nationals of other States, signed in Washington on 18 March 1965' (authors' translation).
The scope of the arbitration clause extends to any dispute relating to investments between one of the Contracting Parties and an investor of the other Contracting Party. In case of such dispute, the parties to the dispute must first attempt to resolve it by amicable means. Should the parties fail to reach an amicable settlement within six months after the dispute has been raised by either party to the dispute, it can be submitted to ICSID arbitration, by either party. It is worthy of note that the French Model BIT does not provide for other optional arbitration rules outside ICSID. The model clause may of course be adapted in specific circumstances, in particular in the event of negotiations with countries having threatened to withdraw from ICSID or having denounced the ICSID Convention.

The third paragraph of the provision addresses the question of the participation of public entities, which are required to give their unconditional consent to the jurisdiction of ICSID.

A first iteration of this provision can be found in certain treaties entered into in the early 2000s. The reference to Article 2 of the Model BIT provides an indication that a distinction should be drawn between specific consent to arbitration and the international law rules on State responsibility. Article 2 of the Model BIT indeed provides as follows:

Article 2

Champ de l'accord

Pour l'application du présent Accord, il est entendu que les Parties contractantes sont responsables des actions ou omissions de leurs collectivités publiques, et notamment de leurs États fédérés, régions, collectivités locales ou de toute autre entité sur lesquels la Partie contractante exerce une tutelle, la représentation ou la responsabilité de ses relations internationales ou sa souveraineté.

As is clear from Article 2 of the Model BIT and the wording of Article 8(3), what is required—and the resulting limitation—is for the relevant public entity involved in the dispute to have given its specific and unconditional consent for purposes of Article 25 of the Washington Convention. In this respect, Article 25(3) of the Washington Convention provides that: 'Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required'. In other words, the wording of Article 8, paragraph 3, may arguably allow jurisdictional objections to be made on the basis of an absence of specific consent given by the relevant public entity when the dispute may involve a Contracting Party’s international responsibility for the actions and omissions of such entity; however, this is without prejudice to the applicability of the rules of international law regarding the attribution of the acts of a State entity to that State, as set out in Article 2 of the Model BIT.

2. Evolution of French Treaty Practice

French treaty practice is generally in line with the Model BIT provision on the prerequisites to arbitration, namely prior amicable settlement attempts. Certain BITs such as:

191 Eg, France–Tajikistan BIT (2002), Art 8; France–Mozambique BIT (2002), Art 8; France–Uganda BIT (2003), Art 7; France–Bosnia and Herzegovina BIT (2003), Art 8; and France–Djibouti BIT (2007), Art 8.

192 ‘For the purpose of this Agreement, it is understood that the Contracting Parties are responsible for the actions or omissions of their public entities, including their federal States, regions, local governments or any other entity over which the Contracting Party exercises control, which it represents or for which it takes responsibility for its international relations or sovereignty’ (authors’ translation).
as the France–Sri Lanka BIT of 1980 have set forth optional mechanisms such as the exhaustion of local remedies during the period provided for the amicable settlement of the investment dispute.\textsuperscript{193}

Access to international arbitration has been a key feature of the protection granted by French BITs. One of the first BITs entered into by France, the France–Zaire BIT (1972), provided that investment agreements entered into by the nationals of one of the Contracting Parties on the territory of the other Contracting Party should include a provision on the settlement of disputes relating to the investment by way of ICSID arbitration.\textsuperscript{194} The first BIT to have fully recognized reciprocal access to arbitration is the France–Egypt BIT of 1974.\textsuperscript{195} Interestingly, however, certain BITs such as the France–Malta BIT of 1976, have subsequently been entered into with no provision on investor-State arbitration.

Another trend of the French BITs is the investors' limited options as regards the applicable arbitration rules or institution. From the early days until the early 1990s, French treaties almost systematically made ICSID the exclusive forum for dispute resolution. In rare cases, BITs provided for other arbitration rules, such as the ICC in the France–Haiti BIT of 1984\textsuperscript{196} and UNCITRAL Rules in the France–USSR BIT of 1989. Certain BITs such as the France–Panama BIT of 1985 provided for UNCITRAL arbitration absent a specific arbitration clause in the relevant investment agreement.\textsuperscript{197}

\textsuperscript{193} France–Sri Lanka BIT (1980), Art 11(2): '...Pendant la période de douze mois mentionnée ci-dessus, chacune des Parties contractantes peut subordonner son consentement au recours à la conciliation ou à l'arbitrage du Centre à l'épuisement des voies de recours administratives et judiciaires internes.' (During the abovementioned period of twelve months, each Contracting Party may subordinate its consent to conciliation or arbitration under the auspices of the Centre to the exhaustion of administrative and judicial domestic remedies' (authors' translation)).

\textsuperscript{194} France–Zaire BIT (1972), Art 9: 'Les accords relatifs aux investissements à effectuer sur le territoire d'un des Etats contractants, par les ressortissants, sociétés ou autres personnes morales de l'autre Etat contractant, comporteront obligatoirement une clause prévoyant que les différends relatifs à ces investissements devront être soumis, au cas où un accord amiable ne pourrait intervenir à bref délai, au Centre international pour le règlement des différends relatifs aux investissements, en vue de leur règlement par arbitrage, en vertu de la Convention sur le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.' ("Agreements relating to investments to be made on the territory of a Contracting State by nationals, companies or other legal persons of the other Contracting State, must necessarily contain a clause providing that disputes relating to those investments will be submitted, in the event an amicable settlement cannot be reached within a short timeframe, to the Centre for settlement of investment disputes, with the aim of resolving the dispute through arbitration pursuant to the Convention of the settlement of investment disputes between States and nationals of other States' (author's translation).) See also France–Malaysia BIT (1975), Art 5, which provides that at the investors' request, the contracting Parties may include an ICSID arbitration clause in the specific agreement entered into with the investor.

\textsuperscript{195} 'Chacune des Parties contractantes accepte de soumettre au Centre International pour le règlement des différends relatifs aux investissements (CIRDI), les différends qui pourraient l'opposer à un ressortissant ou à une société de l'autre Partie contractante.' ("Each Contracting Party accepts to submit to the International Centre for Settlement of Investment Disputes (ICSID), the disputes that could arise with a national or a company of the other Contracting Party' (authors' translation).)

\textsuperscript{196} See Art 8 of the France–Haiti BIT (1984): '...Si un tel différend n'a pas pu être réglé dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des Parties au différend, il est tranché définitivement, à la demande de l'une ou l'autre de ces Parties conformément au règlement de conciliation ou d'arbitrage de la chambre de commerce internationale. La sentence arbitrale est obligatoire pour les Parties." ("If such a dispute has not been settled within a period of six months from the time it was raised by any Party to the dispute, it shall be finally settled, upon the request of any Party, pursuant to the Rules of conciliation or arbitration of the international chamber of commerce. The arbitral award shall be binding upon the Parties' (authors' translation).)

\textsuperscript{197} France–Panama BIT (1982), Art 8(2).
Other BITs still refer to arbitration governed by the ICC Arbitration Rules in the event ICSID arbitration would not be feasible as a matter of law,198 or to arbitration pursuant to the UNCITRAL Rules until such time as both Parties have acceded to the Washington Convention.199 In the early 1990s, more options started being granted to the investors as between different arbitration rules or institutions: Article 8(3) of the France–Argentina BIT of 1991 thus grants investors an option between ICSID and UNCITRAL arbitration;200 Article 8(2) of the same treaty grants the investor an option between international arbitration and the local courts of the host State, with a fork-in-the-road provision that is not frequent in French treaty practice.201 In other cases, the treaty grants an option but that is limited to the courts of the host State and ICSID arbitration.202 It is only in 1993 with the France–Trinidad and Tobago BIT that the investor was granted unconditional choice as between ICSID, UNCITRAL, and ICC

198 Eg, France–Syria BIT (1977), Art 8: ‘Chacune des Parties contractantes accepte de soumettre au Centre international pour le règlement des différends relatifs aux investissements (CIRDI) ou, si le recours à ce premier organisme se révélait impossible en droit, à la Chambre de commerce internationale, les différends qui pourraient l’opposer à un ressortissant ou à une société de l’autre Partie contractante.’ (‘Each Contracting Party accepts to submit disputes with a national or a company of the other Contracting Party to the International Centre for Settlement of Investment Disputes (ICSID) or, should recourse to this institution be impossible as a matter of law, to the International Chamber of Commerce’ (authors’ translation.) See also Art 8 of the France–El Salvador BIT (1978).

199 See, eg, France–Poland BIT (1989), Art 8(2) in relation to disputes relating to measures of dispossession; Art 8 of France–Bolivia BIT (1989), Art 8; France–Lithuania BIT (1992), Art 8; France–Estonia BIT (1992), Art 8; France–Vietnam BIT (1992), Art 8.

200 See, eg, France–Argentina BIT (1991), Art 8(3): ‘En cas de recours à l’arbitrage international, le différend peut être porté devant l’un des organes d’arbitrage désignés ci-après, au choix de l’investisseur: – au Centre international pour le règlement des différends relatifs aux investissements (CIRDI) …; – à un tribunal d’arbitrage ad hoc, établi selon les règles d’arbitrage de la Commission des Nations Unies pour le droit commercial international (CNUDCI).’ (‘In the event of international arbitration, the dispute may be brought before one of the following arbitration bodies, at the investor’s option: – the International Centre for Settlement of Investment Disputes (ICSID) …; – an ad hoc arbitral tribunal, established pursuant to the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL)’ (authors’ translation.)

201 France–Argentina BIT (1991), Art 8(2): ‘Une fois qu’un investisseur a soumis le différend soit aux juridictions de la Partie contractante concernée, soit à l’arbitrage international, le choix de l’une ou de l’autre de ces procédures reste définitif.’ (‘Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party concerned or to international arbitration, the choice of either procedure shall be final’ (authors’ translation.) For a similar provision, see Art 8 of the France–Chile BIT (1992), Art 8 of the France–Uruguay BIT (1993), Art 8 of the France–Morocco BIT (1996) and Art 8 of the France–Venezuela BIT (2001). Compare with France–Guatemala BIT (1998), Art 8, which provides for the investor’s option between ICSID arbitration and the host State’s domestic courts or domestic arbitration, while preserving the right for the investor to discontinue a procedure it has started under the condition that no definitive award has been rendered (‘3. Une fois que l’investisseur a soumis un différend au tribunal compétent ou à l’arbitrage national de la Partie contractante dans laquelle l’investissement a été réalisé, ou à l’arbitrage CIRDI, il peut renoncer à sa demande et opter pour une autre procédure sous réserve qu’aucune sentence définitive n’ait été prononcée.’ (‘Once the investor has submitted a dispute to the competent tribunal or domestic arbitration of the Contracting Party in which the investment was made, or to ICSID arbitration, it may renounce to its request and choose another procedure, provided that no final award has been made’ (authors’ translation)); similarly, see France–Kenya BIT (2007), Art 8.

202 See Art 7(2) of the France–Jamaica BIT (1993): ‘Si un tel différend n’a pas pu être réglé dans un délai de six mois à partir du moment où il a été soulevé, il est soumis à la demande de l’une ou l’autre de ces Parties: a) L’arbitrage du Centre international pour le règlement des différends relatifs aux investissements (CIRDI) …; ou b) Aux tribunaux de la Partie contractante dans laquelle l’investissement a été effectué.’ (‘If such a dispute was not resolved within a period of six months from the time it was raised, it shall be submitted, at the request of any Party: a) To arbitration under the International Centre for Settlement of Investment Disputes (ICSID) …; or b) To the tribunals of the Contracting Party in which the investment has been made’ (authors’ translation).)
arbitration. At the same time, the treaties concluded in the 1990s and the 2000s have maintained France's seemingly strong preference for ICSID, either as an exclusive choice or with alternative options should ICSID arbitration not be feasible.

Other than choice of forum, it is important to note that certain BITs have adopted a restrictive ratione materiae scope of dispute resolution, limiting arbitration to disputes having resulted in a loss, or to disputes relating to the quantum of damages in case of an expropriation.

As regards the former situation, Article 9(1) of the France–Mexico BIT limits arbitration to alleged breaches of an obligation of the host State which causes loss or damage to the investor or its investment:

Le présent article ne s'applique qu'aux différends opposant l'une des parties contractantes et un investisseur de l'autre partie contractante au sujet d'un manquement allégué à une obligation de la première en vertu du présent accord qui provoque une perte ou un dommage à l'investisseur ou à son investissement.

As regards the latter situation, the 1984 BIT with China is another classic example of limitations to the ratione materiae scope of dispute resolution clauses. The old model France–China BIT thus provided that in the event an investment dispute (covering any dispute relating to investments ('tout différend relatif aux investissements')) was not

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203 France–Trinidad and Tobago BIT (1993), Art 8: '... Si un tel différend n'a pas pu être réglé dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des Parties au différend, il est soumis à la demande du national ou de la société partie au différend:—soit à l'arbitrage du Centre international pour le règlement des différends relatifs aux investissements (CIRDI) ;—soit à la cour d'arbitrage international de la chambre de commerce internationale de Paris;—soit à un tribunal ad hoc de trois membres, établi conformément au règlement d'arbitrage de la Commission des Nations Unies pour le droit commercial international (CNUDCI). ('... If such a dispute was not settled within a period of six months from the time it was raised by any Party to the dispute, it shall be submitted upon the request of the national or the company party to the dispute—either to arbitration under the International Centre for Settlement of Investment Disputes (ICSID) ... ; or to the court of international arbitration of the international chamber of commerce in Paris;—or to an ad hoc arbitral tribunal of three members, established pursuant to the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL)' (authors' translation).) See also France–Croatia BIT (1996), Art 9; France–India BIT (1997), Art 9; France–Kazakhstan BIT (1998), Art 8; France–Honduras BIT (1998), Art 10; France–Dominican Republic BIT (1999), Art 7; all granting an option between ICSID and UNCITRAL arbitrations, and the France–Libya BIT (2004), according to the investor the option between ICSID, UNCITRAL and ICC arbitrations; see also France–Iran BIT (2003), Art 8; France–Ethiopia BIT (2003), Art 9; France–Bosnia and Herzegovina BIT (2003), Art 8; France–Djibouti BIT (2007), Art 8, granting an option between domestic courts, ICSID and UNCITRAL arbitrations, without a fork-in-the-road provision; similarly, see the France–Senegal BIT (2007), providing for an option between UNCITRAL, ICSID, and OHADA arbitrations.


205 See, eg, France–Qatar BIT (1996), Art 8, providing for ICSID arbitration and, in the event the Washington Convention is not applicable, UNCITRAL arbitration. In the same vein, see France–Lebanon BIT (1996), Art 6.

206 'This article only applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment' (authors' translation).
resolved though amicable means within a period of six months, the investor then had the option between one of the two following procedures, both domestic:

a) Par une requête de l’investisseur auprès des autorités administratives compétentes de la Partie contractante sur le territoire ou dans les zones maritimes de laquelle l’investissement est réalisé;
b) Par une action en justice de l’investisseur auprès des tribunaux compétents de la Partie contractante sur le territoire ou dans les zones maritimes de laquelle l’investissement est réalisé. 207

As regards disputes relating to the quantum of compensation in the event of an expropriation or nationalization or measures having the same effect, Article 8(3) of the 1984 France-China BIT provided that such disputes could be submitted to the same procedures and that, failing a settlement of the disputes within a period of one year, they could then be submitted to arbitration. The Annex to the BIT determined the appointment modalities for the constitution of the arbitral tribunal and determined that the arbitration would be governed by the UNCITRAL Arbitration Rules.

The same model was followed in relation to certain countries of the former Soviet block, such as Poland: Article 8(2) of the France-Poland BIT of 1989 provided that disputes relating to measures of dispossession (‘les différends relatifs aux mesures de dépossession’), including disputes relating to the existence, amount and payment conditions of compensation, could be submitted to arbitration under the UNCITRAL Arbitration Rules and, following both Contracting Parties’ accession to the Washington Convention, to the ICSID Arbitration Rules. The France-USSR BIT of 1989, to which the Russian Federation has succeded, has a different limitation of the ratione materiae scope of an arbitral tribunal’s jurisdiction: Article 7 of that BIT limits arbitration under the UNCITRAL Rules to disputes relating to the effects of a measure relating to the management or liquidation of an investment. 208

The 1984 France-China BIT was abrogated by the new BIT with China signed on 26 November 2007, which has now expanded the scope of dispute resolution to ‘any dispute’, in the same way as the Model BIT:

Tout différend relatif aux investissements entre l’une des Parties contractantes et un investisseur de l’autre Partie contractante... 209

Following the general trend in French treaty practice, the dispute resolution options granted under this provision to the investor are the national courts of the host State,

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207 ‘a) by way of a request of the investor to the competent administrative authorities of the Contracting Party on the territory or in the maritime area of which the investment was made; b) by way of judicial action of the investor brought before the competent tribunals of the Contracting Party on the territory or in the maritime area of which the investment was made’ (authors’ translation).

208 France-USSR BIT (1989), Art 7: ‘Tout différend entre l’une des Parties contractantes et un investisseur de l’autre Partie contractante portant sur les effets d’une mesure prise par la première Partie contractante et relative à la gestion, l’entretien, la jouissance ou la liquidation d’un investissement réalisé par cet investisseur...’ (‘Any dispute between a Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party and to the management, the maintenance, the enjoyment or the liquidation of an investment achieved by this investor...’ (authors’ translation)).

209 France-China BIT (2007), Art 7: ‘Any dispute relating to investments between any of the Contracting Parties and an investor of the other Contracting Party...’ (authors’ translation).
UNCITRAL arbitration, or ICSID arbitration, the choice between one of these options being final pursuant to the fork-in-the-road provision contained in the same article.\textsuperscript{210}

The French Model BIT does not contain a fork-in-the-road provision, though certain treaties have provided for this type of provision.\textsuperscript{211} At the same time, certain treaties have achieved a somewhat similar result. Article 9(2)(a) of the France–Mexico BIT of 1998, for example, provides as follows:

S’agissant d’une demande d’arbitrage:

a) Un investisseur de l’une des parties contractantes ne peut alléguer que l’autre partie contractante a manqué à une obligation en vertu du présent accord à la fois dans le cadre d’une procédure d’arbitrage au sens du présent article et dans le cadre d’une procédure engagée devant une cour ou un tribunal administratif compétent de la première, partie d’un différend.\textsuperscript{212}

Although formulated in terms of ‘allegations’ made, respectively before an arbitral tribunal and domestic courts, the effect of this provision is akin to that of a fork-in-the-road provision, namely that the investor may not introduce claims for the same dispute before two different fora.

A more uncommon instance in French BITs is the Contracting Parties’ limitation of the investor’s access to diplomatic protection in the event the dispute has already been submitted to arbitration, diplomatic protection is then limited to circumstances of the host State’s non-compliance with the final award rendered in favour of the investor. The France–Dominican Republic BIT of 1999 is one such example.\textsuperscript{213}

3. Interpretation of French Treaty Practice with Regard to Investor-State Arbitration

To date, the jurisprudence relating to French BITs has not given rise to particular difficulty as regards the various features contained in the investor-State dispute resolution provisions. Nevertheless, it may be worthwhile mentioning the Vivendi case, which has set a very important precedent in investment arbitration relating to the relationship between claims based on an investment treaty and claims based on contracts.

In Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentine Republic,\textsuperscript{214} the specific question was whether parties must have pursued domestic judicial remedies prior to bringing a treaty claim in arbitration. The question arose on the basis of the France–Argentina BIT and related to a complex dispute in relation to a concession contract entered into by the French company and its Argentine affiliate and the Argentine province of Tucuman. The Republic of Argentina was not a party to the

\textsuperscript{210} France–China BIT (2007), Art 7.

\textsuperscript{211} See previously n 201.

\textsuperscript{212} ‘With respect to the submission of a claim to arbitration: a) an investor of one Contracting Party may not allege that the other Contracting Party has breached an obligation under this Agreement both in arbitration under this Article and in a proceeding before a competent court or administrative tribunal of the former Contracting Party, party to the dispute’ (authors’ translation).

\textsuperscript{213} France–Dominican Republic BIT (1999), Art 7(2) \textit{in fine}: ‘Aucune partie contractante n’accorde la protection diplomatique ou ne formule de revendication internationale au sujet d’un différend que l’un de ses nationaux ou sociétés et l’autre partie contractante ont soumis à l’arbitrage dans le cadre du présent accord, sauf si l’autre partie contractante ne s’est pas conformée à la sentence arbitrale rendue à l’occasion d’un différend ou a cessé de s’y conformer. La protection diplomatique susmentionnée ne vise pas les simples démarches diplomatiques tendant à faciliter le règlement du différend.’

\textsuperscript{214} Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentine Republic (ICSID case No ARB/97/3, Award of 21 November 2000), paras 40 et seq.
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contract, which provided for the exclusive jurisdiction of the Contentious Administrative
Tribunals of Tucuman for purposes of interpretation and application of the contract. The claimants submitted the dispute related to the contract to an arbitral tribunal constituted pursuant to Article 8 of the France–Argentina BIT, which provides that in the event of a dispute between an investor of the host State which is not resolved within six months, the investor may at its discretion seek relief in the courts of the Contracting State with which the dispute exists or in international arbitration. The respondent argued that the arbitral tribunal lacked jurisdiction over the dispute which related to a contract to which the Argentine Republic was not a party. The claimants, in turn, argued that notwithstanding the contractual dispute resolution clause providing for the exclusive jurisdiction of local courts, the BIT did not oblige them to pursue a domestic judicial remedy prior to bringing a treaty claim against the Argentine Republic. Article 8 of the France–Argentina BIT entitles an investor to submit to arbitration any 'dispute relating to investment within the meaning of [the BIT]'. Article 1(1) of the BIT in turn includes '[c]oncessions granted by law or by virtue of an agreement' into the scope of protected 'investments'. The arbitral tribunal concluded that the provision on jurisdiction in the concession contract 'did not and could not constitute a waiver by [the claimant] of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic. . . . Thus, Article 16.4 [the jurisdiction clause] of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT'.

The same principle was adopted, as regards French BITs, in the subsequent arbitration between Total and Argentina. Argentina had made an objection to the tribunal's jurisdiction on the basis that what was submitted to the tribunal was not an 'investment dispute' pursuant to Article 8 of the France–Argentina BIT; rather, it argued that the dispute submitted to the ICSID was of a contractual nature and the arbitral tribunal therefore lacked jurisdiction to hear the case. The arbitral tribunal considered the claims brought by Total, which related to measures having had an impact on the local companies in which Total held minority shareholdings and whose value had been affected. Having to consider whether such measures constituted a breach of the protections afforded by the BIT to Total's investments as defined in the treaty, the tribunal decided that such claims ‘fall within its competence since, prima facie, they present conduct by Argentina that may constitute a violation of the BIT obligations and standards of protection to which Total as a French investor is entitled’. The tribunal further held that the ‘claims with respect to Total’s indirect and minority shareholdings . . . are disputes relating to an investment, as defined in the BIT. Thus, the Tribunal finds that it has jurisdiction under Article 25(1) of the ICSID Convention and Article 8(1) of the BIT with respect to these legal disputes arising directly out of an investment’.

215 Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentine Republic, paras 53–54.
216 Total SA v Argentine Republic (ICSID Case No ARB/04/01, Decision on Jurisdiction of 25 August 2006), para 68.
217 Total SA v Argentine Republic, para 76.
F. Guarantee and Subrogation

Article 9 of the French Model BIT provides for the possibility of protecting investments through specific guarantees, which cannot be granted without the host State's approval:

Article 9
Garantie et subrogation

1. Dans la mesure où la réglementation de l'une des Parties contractantes prévoit une garantie pour les investissements effectués à l'étranger, celle-ci peut être accordée, dans le cadre d'un examen cas par cas, à des investissements effectués par des investisseurs de cette Partie sur le territoire ou dans la zone maritime de l'autre Partie.

2. Les investissements des investisseurs de l'une des Parties contractantes sur le territoire ou dans la zone maritime de l'autre Partie ne pourront obtenir la garantie visée à l'alinéa ci-dessus que s'ils ont, au préalable, obtenu l'agrément de cette dernière Partie.

3. Si l'une des Parties contractantes, en vertu d'une garantie donnée pour un investissement réalisé sur le territoire ou dans la zone maritime de l'autre Partie, effectue des versements à l'un de ses investisseurs, elle est, de ce fait, subrogée dans les droits et actions de cet investisseur.

4. Lesdits versements n'affectent pas les droits du bénéficiaire de la garantie à recourir au CIRD ou à poursuivre les actions introduites devant lui jusqu'à l'aboutissement de la procédure.218

Should the guarantee come into play and should the investor receive payments under it, its home State is then subrogated in its rights and claims, without prejudice to the investor's right to pursue an arbitration claim. This provision is almost systematic and appears with the same or consistent wording in French treaty practice.

G. Settlement of Disputes between Contracting Parties

The French Model BIT does not differ from most other BITs with respect to the settlement of disputes between the Contracting Parties. It also contains provisions which are very similar to most BITs in the French treaty practice.

Pursuant to Article 11 of the French Model BIT, any dispute relating to the interpretation and application of the agreement is to be settled through the diplomatic channels first. Absent a settlement of the dispute within a period of six months from the date on which the existence of the dispute was raised by one of the Contracting Parties, the dispute can be submitted to arbitration.

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218 '1. To the extent that the regulation of one of the Contracting Parties provides for a guarantee for investments made abroad, such guarantee may be granted, following a case-by-case examination, to investments made by investors of this Party on the territory or in the maritime area of the other Party. 2. Investments made by investors of one of the Contracting Parties on the territory or in the maritime area of the other Party may obtain the guarantee referred to in the foregoing paragraph only if they have previously obtained the approval of this latter Party. 3. If one of the Contracting Parties, pursuant to a guarantee given for an investment made on the territory or in the maritime area of the other Party, makes payments to one of its investors, the said Contracting Party is, as a result, subrogated in the rights and actions of this investor. 4. The said payments shall not affect the right of the beneficiary of the guarantee to have recourse to ICSID or to proceed with the actions introduced before it until completion of the procedure' (authors' translation).
V. Commentary on the French Model BIT

Article 11

Règlement des différends entre Parties contractantes

1. Les différends relatifs à l'interprétation ou à l'application du présent accord, à l'exclusion des différends relatifs aux investissements mentionnés à l'article 8 du présent Accord, doivent être réglés, si possible, par la voie diplomatique.

2. Si dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des Parties contractantes, le différend n'est pas réglé, il est soumis, à la demande de l'une ou l'autre Partie contractante, à un tribunal d'arbitrage.

3. L'édit tribunal sera constitué pour chaque cas particulier de la manière suivante: chaque Partie contractante désigne un membre, et les deux membres désignent, d'un commun accord, un ressortissant d'un Etat tiers qui est nommé Président du tribunal par les deux Parties contractantes. Tous les membres doivent être nommés dans un délai de deux mois à compter de la date à laquelle une des Parties contractantes a fait part à l'autre Partie contractante de son intention de soumettre le différend à l'arbitrage.

4. Si les délais fixés au paragraphe 3 ci-dessus n'ont pas été observés, l'une ou l'autre Partie contractante, en l'absence de tout autre accord, invite le Secrétaire général de l'Organisation des Nations-Unies à procéder aux désignations nécessaires. Si le Secrétaire général est ressortissant de l'une ou l'autre Partie contractante ou si, pour une autre raison, il est empêché d'exercer cette fonction, le Secrétaire général adjoint le plus ancien et ne possédant pas la nationalité de l'une des Parties contractantes procède aux désignations nécessaires.

5. Le tribunal d'arbitrage prend ses décisions à la majorité des voix. Ces décisions sont définitives et exécutoires de plein droit pour les Parties contractantes. Le tribunal fixe lui-même son règlement. Il interprète la sentence à la demande de l'une ou l'autre Partie contractante. A moins que le tribunal n'en dispose autrement, compte tenu de circonstances particulières, les frais de la procédure arbitrale, y compris les vacations des arbitres, sont répartis également entre les Parties contractantes. 219

The constitution of the arbitral tribunal is determined by the provision itself: each party appoints an arbitrator, and the two arbitrators in turn jointly appoint a presiding arbitrator who must have the nationality of a third State. The constitution of the tribunal is contained within an overall period of two months from the time when one of the Parties has notified its intention to initiate an arbitration. Pursuant to Article 11(4) of the

219 '1. Disputes relating to the interpretation or the application of the present Agreement, excluding disputes relating to investments mentioned at paragraph 8 of the present Agreement, shall be settled, if possible, by diplomatic channels. 2. If the dispute is not settled within a period of six months as from the time it was raised by one of the Contracting Parties, it is submitted to an arbitral tribunal at the request of one of the Contracting Parties. 3. The said tribunal will be constituted in the following manner for each specific case: each Contracting Party shall appoint a member of the arbitral panel, and the two arbitrators shall appoint, by mutual consent, a national of a third Country who be will appointed as Chairman of the tribunal by the two Contracting Parties. All the members of the arbitral panel must be appointed within a period of two months as from the date on which one of the Contracting Parties notified the other Contracting Party of its intention to submit the dispute to arbitration. 4. If the time limits specified in paragraph 3 above have not been observed, a Contracting Party, in the absence of any other agreement, invites the Secretary General of the United Nations to proceed with necessary appointments. If the Secretary General is a national of either Contracting Party or if, for any other reason, is unable to perform this function, the most senior Deputy Secretary General who is not a national of either Contracting Party proceeds with necessary appointments. 5. The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be final and legally binding upon the Contracting Parties. The tribunal shall determine its own procedure. At a request of either Contracting Party the arbitral tribunal provides an interpretation of the award. Unless the tribunal decides otherwise, given the particular circumstances, costs of the arbitral proceedings, including the arbitrators’ fees, shall be borne in equal parts by both Contracting Parties’ (authors’ translation).
French Model BIT, in the absence of an agreement within the time limit of two months and absent any agreement to the contrary, either Party may seize the Secretary-General of the United Nations for purposes of the appointment of the members of the arbitral tribunal. Finally, Article 11(5) provides that the arbitral tribunal determines its own procedure and may provide an interpretation of its award at one of the Parties' requests. The provision also provides for an equal sharing of the arbitration costs as between the Parties, unless the tribunal determines otherwise in view of any specific circumstances.

H. Final Provisions: Entry into Force and Duration

The French Model BIT provides a simplified final clause relating to the treaty's entry into force and duration, which provides in full:

**Article 12**

Entrée en vigueur et durée

Chacune des Parties notifiera à l'autre l'accomplissement des procédures internes requises pour l'entrée en vigueur du présent Accord, qui prendra effet un mois après le jour de la réception de la dernière notification.

L'accord est conclu pour une durée initiale de dix ans. Il restera en vigueur après ce terme, à moins que l'une des Parties ne le dénonce par la voie diplomatique avec préavis d'un an.

À l'expiration de la période de validité du présent accord, les investissements effectués pendant qu'il était en vigueur continueront de bénéficier de la protection de ses dispositions pendant une période supplémentaire de vingt ans.220

This provision contains essentially two aspects. First, the provision provides that the treaty enters into force following the reciprocal notification of the accomplishment of internal procedures. Second, Article 12 of the Model BIT provides for the continued application of the treaty following the initial period of validity of ten years, unless the treaty has been denounced by one of the Contracting Parties with a one-year notice; in case of denunciation, the treaty provides a survival clause of 20 years for investments that were made while the treaty was in force.

VI. General Conclusions and Outlook

Over a period of approximately 50 years, France has created a major legal network covering its investment relations with nearly 100 foreign economies. On substance, France's BITs have clearly evolved over time, without, however, fundamentally departing from the approaches adopted by other major European countries.

Since the entry into force of the Lisbon Treaty on 1 December 2009, the expansion of France's BIT programme has been put on hold, as 'foreign direct investment' is now part of the Common Commercial Policy which is an exclusive competence of the European

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220 "The Parties shall notify each other of the completion of their internal procedures required for bringing into force this Agreement, which shall enter into force one month after the date of the receipt of the latter notification. The Agreement is concluded for the initial period of ten years. It shall continue to remain in force thereafter, unless either Party denounces it through diplomatic channels by giving a one year's written notice. Upon expiry of the period of validity of this Agreement, investments made whilst the Agreement is in force shall continue to benefit from the protection granted under its provisions for a further period of twenty years' (authors' translation).
VI. General Conclusions and Outlook

Existing French BITs, however, remain valid and binding under public international law unless and until they are denounced or replaced according to the applicable rules of international law. From the viewpoint of European Union Law, the principle of maintenance in force of French BITs until their successive replacement by European investment agreements should be confirmed by a European Regulation which is currently under discussion between the European Parliament and the Council of the European Union.

Once this Regulation enters into force, and assuming that the main elements of the Commission’s proposal on future EU Member States’ BITs are maintained, France may continue to negotiate BITs with those countries that do not negotiate agreements on investment protection with the EU. The opening of such negotiations and the conclusion of those treaties will require an authorization by the European Commission. In such cases, French BITs will have to be in line with the European policy on investment protection which is currently developed among the European institutions. Some adaptations to the currently prevailing French BIT practice are likely to occur in this new context.

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221 See Art 207 of the Treaty on the Functioning of the European Union.
