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Handle with care: Umbrella clauses and MFN treatment in investment arbitration

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Abstract
A large number of BITs concluded by France contain quite a peculiar clause (for instance Article 10 BIT with Argentina), which has been recently the object of questionable interpretations and applications in *EDF International S.A. et al.* v. *Argentina* and *Mr. Franck Charles Arif* v. *Moldova*. Both tribunals allowed the claimants to benefit, through the MNF clause, from umbrella clauses contained in BITs with third States. It is argued that neither tribunal has rigorously interpreted the relevant provisions in the basic treaty, nor ensured compliance with the *ejusdem generis* principle. The legal uncertainty that surrounds these provisions is detrimental for foreign investors and States alike. Concerned States should consider taking the measures necessary to clarify, jointly or individually, the content of these provisions and of the obligations stemming from them.

Keywords
foreign investment; umbrella clauses; most favoured nation clause; bilateral investment treaties; investment arbitration

I. Introduction

Within the wide bilateral conventional practice on foreign investment protection, the overwhelming majority of BITs concluded by France contain a very peculiar provision on special commitments undertaken by the host State.[1] As it will be seen further below, this provision may appear at first sight as a specific form of umbrella clause susceptible to attract umbrella clauses contained in other treaties through most-favoured-nation (MFN) clauses. However, this interpretation appears rather problematic and the qualification of this

[1] See below text note 5.

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provision as an umbrella clause as well as the reliance on MFN clauses questionable.

This provision has been the object of two recent arbitral awards and deserves the closest scrutiny for at least four reasons. First, annulment proceeding are currently pending in *EDF International S.A. et. al* v. *Argentina*.[2] Second, given the large number of BITs containing similar provisions, it may be expected that other arbitral tribunals will have to deal in the future with the interpretation and application of this provision.[3] Third, in spite of the two arbitral pronouncements under consideration, the interpretation of this clause remains unclear. Finally, this kind of provisions may have important implications for the host State, possibly much more significant than it was foreseeable at the time of their drafting. This would be particularly the case when such a provision may have to be interpreted and applied in connection with other BITs through MFN clauses.

This short note is not intended to discuss the whole awards at issue, or to provide a detailed treatment of umbrella clauses or MNF clauses. Rather, it confines itself to analysing the tribunals' interpretation of the treaty clauses under consideration, and exploring the implications of such arbitral interpretations from the standpoint of the host State.

II. A peculiar provision on specific agreements

Most of the BITs concluded by France[4] – including Article 10 of the BITs with Argentina – contain the following clause on the obligations undertaken by the host State with regard to specific agreements:

> 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

2) See below note 9.
3) See below note 4.
4) A tentative list of these treaties, based on UNCTAD database, includes the BITs between France and the following States: Albania (Article 12), Algeria (10), Argentina (10), Armenia (9), Azerbaijan (10), Bahrain (10), Bangladesh (10), Bolivia (10), Bulgaria (9), Cambodia (9), Chile (10), China (9), Costa Rica (10), Croatia (8), Dominican Republic (9), Ecuador (11), Egypt (10), El Salvador (10), Equatorial Guinea (10), Estonia (10), Georgia (9), Guatemala (11), Hungary (10), Israel (10), Jamaica (10), Jordan (10), Kuwait (13), Kyrgyzstan (10), Laos (10), Latvia (10), Lebanon (8), Liberia (10), Lithuania (10), Macedonia (9), Madagascar (9), Moldova (9), Mongolia (10), Morocco (10), Namibia (9), Nepal (10), Nicaragua (10), Nigeria (10), Oman (10), Pakistan (10), Panama (10), Peru (Article 10), Poland (10), Qatar (10), Romania (9), Saudi Arabia (10), Slovenia (10), South Africa (9), Sudan (10), Syria (10), Tajikistan (10), Trinidad Tobago (10), Turkmenistan (10), Uganda (9), Ukraine (10), United Arab Emirates (5), Uruguay (9), Uzbekistan (10), Venezuela (10), Vietnam (10), and Zimbabwe* (11). All these BITs contain a MFN clause.

> où celui-ci comporte des dispositions plus favorables que celles qui sont prévues par le présent Accord.[5]

The provision in point may present minor drafting variations, like in Article 9 of the BIT with Moldova, which refers to "nationaux et sociétés de l'autre Partie contractante" instead of "investisseurs de l'autre Partie contractante".

More substantive variations are also to be found. For example, the BIT concluded in 2003 by France with Bosnia-Herzegovina significantly departs from the general pattern. Indeed, Article 10 reads as follows

> 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 également dans le cas d'un engagement particulier ayant pour effet de renoncer à l'arbitrage international ou de désigner un autre organe d'arbitrage que celui qui est mentionné à l'article 8 du présent Accord.[6]

This is an umbrella clause for all practical purposes as through the second sentence the contracting parties have clearly accepted the extension of the procedural obligations contained in the BIT to disputes arising out of specific agreements. In other words, the second sentence imposes upon the parties to the treaty additional obligations with regard to specific agreements.

It is worth pointing out that Article 9 of the French Model BIT, adopted in 2006, contains a provision identical to Article 10 of the BIT between France and Bosnia-Herzegovina.[7] One may wonder whether Article 9 of the 2006 Model BIT was intended by its drafters as a more sophisticated, but

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5) The English version taken from the 2006 French Model BIT reads: "Investments having formed the subject of a special commitment of one Contracting Party, with respect to the nationals or companies of the other Contracting Party, shall be governed, without prejudice to the provisions of this Agreement, by the terms of the said commitment if the latter includes provisions more favorable than those of this Agreement." Article 10 of the BIT between France and Chile reads: "Las inversiones que hayan formado parte de un compromiso especial de una de las Partes Contratantes, con respecto a los nacionales o sociedades de la otra Parte Contratante, se regirán, sin perjuicio de las disposiciones de este Convenio, por los términos de dicho compromiso si éste incluye disposiciones más favorables que aquellas de este Convenio".

6) The treaty has entered into force on 5 December 2005.

7) At http://italaw.com/documents/ModelTreatyFrance2006.pdf. The English version reads: "Investments having formed the subject of a special commitment of one Contracting Party, with respect to the nationals or companies of the other Contracting Party, shall be governed, without prejudice to the provisions of this Agreement, by the terms of the said commitment if the latter includes provisions more favorable than those of this Agreement. The provisions of article 8 of the present Agreement shall apply even in the case of a special commitment to the effect of waiving international arbitration or designating an arbitration body other than that mentioned in article 8 of the present Agreement".

substantially equivalent, version of the corresponding provisions contained in existing BITs (e.g. Article 10 of the BIT with Argentina), or the expression of a new attitude toward umbrella clauses in BITs.

Finally, against the above background, it may be noted that only rarely do BITs concluded by France contain a typical umbrella clause. One such exceptional example is to be found in Article 2(2), second sentence, of the BIT with Yemen, according to which

> Chaque Partie contractante s'engage à honorer les obligations qu'elle peut avoir contracté relativement aux investissements des nationaux ou sociétés de l'autre Partie contractante.[8]

III. *EDF International S.A. et al.* v. *Argentina* and *Mr. Franck Charles Arif* v. *Moldova*

The dispute in *EDF International S.A. et al* v. *Argentina*, [9] arose out of alleged violations of the BIT between France and Argentina, which contains the provision on "special commitments" (Article 10) reproduced above.[10] French claimants invoked the MFN clause contained in Article 4 of the BIT Argentina-France in order to benefit from the protection of umbrella clauses included in Article 10 (2) of the BIT between Argentina and the Belgo-Luxembourg Economic Union[11] and Article 7 (2) of the BIT between Argentina and Germany.[12] They accordingly requested the tribunal to adjudicate alleged

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[8] See also Article 3 of the BIT with Hong Kong, which reads: "Without prejudice to the provisions of this Agreement, each Contracting Party shall observe any particular obligation it may have entered into with regard to investments of investors of the other Contracting Party, including provisions more favourable than those of this Agreement". See also Article 3 of the BIT with the Russian Federation.

[9] *EDF International S.A., SAUR International* S.A. *and León Participaciones Argentinas* S.A. *v. Argentine Republic*, ICSID ARB/03/23, Award, 11 June 2012, at http://italaw.com/sites/default/files/case-documents/ita1069.pdf. The decision on jurisdiction, rendered on 5 August 2008, has not been made available to the public.

[10] Text note 5.

[11] Concluded in Brussels on 18 June 1990. The Tribunal refers to the BIT as concluded between Argentina and Luxemburg. The unofficial English translation included in the award reads: "Each of the Contracting Parties shall respect at all times the commitments it has undertaken with respect to investors of the other Party" (the treaty has been concluded in French, Spanish and Dutch, all three languages being equally authentic).

[12] Concluded in Bonn on 9 April 1991. The award contains an unofficial English translation that reads: "Each Contracting Party shall comply with any other commitment undertaken in connection with the investments made by nationals or companies from the other Contracting Party in the former's territory" (the treaty has been concluded in German and Spanish, both languages being equally authentic).

violations by the host State of special commitments undertaken by it under the concession agreement.

The Respondent State objected to the incorporation of umbrella clauses contained in treaties between Argentina and third States because *inter alia* the principle *ejusdem generis* would have prevented the functioning of the MFN clause.[13]

On this point, the Tribunal laconically concluded that the MFN clause permits recourse to the umbrella clause of third-country treaties as it accords investors anything other than those rights which fall within the limits of the subject matter of the clause.[14] While refraining from interpreting the provision on "special commitments" of the basic treaty (Article 10), it postulated that the BIT between France and Argentina contains an umbrella clause and that such a clause satisfies the *ejusdem generis* principle with regard to the umbrella clauses invoked by the applicants.

The Tribunal eventually found that the Respondent had violated both the special commitments covered by the umbrella clauses as imported in the BIT and the obligation to ensure foreign investors fair and equitable treatment. As a result, the claimants were granted compensation for more than 136 million dollars plus interest.

In *Arif* v. *Moldova*,[15] the claimant complained about alleged violations of the BIT between France and Moldova, which again contains the peculiar provision on "special commitments" (Article 9) referred to in the previous section. The claimant also invoked the MNF contained in Article 4 of the BIT France-Moldova in order to attract the protection of the umbrella clauses contained in Article 2 (2) *in fine* of the BIT between Moldova and the United Kingdom[16] and Article of II (3) (c) of the BIT between Moldova and the United States.[17]

The Respondent argued that Article 9 in the BIT between France and Moldova cannot be considered as an umbrella clause since it does not impose upon the host State any independent obligation to honour special commitments undertaken towards the claimant. It further argued against the incorporation of umbrella clauses through MNF clauses as the former are procedural

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13) Paras 925 and 926. The other two grounds on the respondent's objection were, respectively, the lack of contractual privity as the contract allegedly breached was not signed by Argentina (para 927), and the fact that applying the umbrella clause would have led to the forum selection clause contained in the contract, which granted exclusive jurisdiction to the local competent administrative court (para 928). On the MFN clauses and the principle *ejusdem generis* see below notes 20 to 22.

14) Para 934.

15) *Mr. Franck Charles Arif* v. *Republic of Moldova*, ICSID ARB/11/23, Award, 8 April 2013.

16) It reads "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party".

17) It reads "Each Party shall observe any obligation it may have entered into with regard to investments".

in nature "in that they give an international remedy for a separate undertaking, rather than any particular undertaking", whereas the latter can import into the basic treaty only substantive obligations.

The Tribunal agreed with the Respondent that Article 9 is not an umbrella clause as it does not guarantee – as a matter of treaty law – the compliance of obligations undertaken by the host State towards any specific investor. The Tribunal qualified the provision in point as one simply preserving the rights previously acquired by foreign investors that would be more favourable than those stemming from the BIT.[18] It nonetheless held that the MFN contained in the basic BIT applies to any kind of substantive obligation under the BIT, including umbrella clauses, which were considered as substantive in nature.[19] Eventually the Tribunal found that it was not entitled to decide on the alleged violations of special commitments under Moldovan law as these had been irrevocably annulled by Moldovan Courts.[20] It may also be noted that this award does not contain any reference to *EDF International S.A. et. al* v. *Argentina* or to the *ejusdem generis* principle.

IV. Most favoured nation treatment

Before interpreting Article 10 of the BIT between France and Argentina, it is appropriate to make a few general considerations on MFN clauses and umbrella clauses for the purpose of assessing the relationship between them and the treaty provisions under consideration. MFN treatment clauses can be found across international economic law and may apply to multilateral or bilateral treaties. As it is well known, in investment treaties, they impose upon the host State the obligation to extend to the investors or investments of the other contracting party (or parties) the best treatment it has accorded to investors or investments of any third State.[21]

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18) In para 388, the Tribunal agreed with the Respondent that the purpose of Article "is not to guarantee the observation of obligations assumed by the host State vis-à-vis the investor, but rather to provide investors with the right to claim the application of any rule of law more favourable than the provisions of the BIT".

19) Especially para 396.

20) Especially para 398.

21) See generally, P. Acconci, 'Most-Favoured-Nation Treatment and International Law on Foreign Investment', in P. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford: OUP, Press, 2008), p. 363; A. Ziegler, "Most-Favoured-Nation (MFN) Treatment', in A Reinisch (ed.), *Standards of Investment Protection* (Oxford: OUP, 2008), p. 59. More specifically, on the application of MFN clauses to jurisdictional issues, see, S. Vesel, 'Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties', 32 *Yale Jour. Int. Law* (2007) 125; Z. Douglas, ' MNF Clause in Investment Arbitration: Treaty Arbitration Off the Rails', 2 *Jour. Int. Dispute Settlement* (2011) 97; S. Schill, 'Allocating Adjudicatorry Authority: MFN Clauses as a

Article 4 of the BIT between Argentina and France reads in part as follows

> Chaque Partie contractante applique, sur son territoire et dans sa zone maritime, aux investisseurs de l'autre Partie contractante, 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.

The *ejusdem generis* principle requires that *both* international treaties – that including a MFN clause and that invoked by the applicant – contain a provision dealing with the same subject-matter.[22] According to the International Law Commission,

> The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated. Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.[23]

Indeed, investment arbitration case law has consistently treated the *ejusdem generis* principle as an indispensable legal requirement for the applicability of MFN treatment clauses. In *CMS* v. *Argentina*, in particular, the invocation of the MFN treatment clause contained in the original BIT with regard to the adoption of measures on grounds of necessity (Article XI) was rejected by the Tribunal on the ground that the treaties invoked did not contain any 'Article XI type clauses' and 'would fail under the *ejusdem generis* rule'.[24]

In *Impregilo* v. *Pakistan* the applicant invoked the MNF clause in order to benefit from umbrella clauses contained in BIT concluded by Pakistan with third States, even if the basic treaty between Italy and Pakistan does not

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Basis of Jurisdiction – A Reply to Zachary Douglas', 2 *Jour. Int. Dispute Settlement* (2011) 353. See also the *Report of the Study Group of the International Law Commission*, contained in the ILC Report to the General Assembly (63rd Session, 2011), U.N. Doc. A/66/10, p. 285.

22) In the *Ambatelios Case*, UNRIAA, 1963, p. 107, the Commission of Arbitration held that a MFN clause only attracts matters belonging to the same category of subject as that to which the clause itself relates.

23) 30 *YBILC* (1978-II) Part 2, para 11, p. 30 (footnote omitted). See also OSCE, *Most-Favoured-Nation Treatment*, September 2004, available at http://www.oecd.org/dataoecd/21/37/33773085.pdf.

24) *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID ARB/01/8, Award, 12 May 2005, para 377. In *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID ARB/97/7, Jurisdiction, 25 June 2000, para 56, the Tribunal held that the inclusion of dispute settlement within the scope of the MFN treatment clause could be accepted 'without breaching the *ejusdem generis* principle'.

contain such a clause. The Tribunal rejected the argument by holding *arguendo* that even if the applicant could rely on umbrella clauses through the MNF clause, the contract would fall outside their scope of application.[25] It is submitted that the Tribunal, after admitting that the basic treaty did not contain any umbrella clause should have held that the *ejusdem generis* was not satisfied and therefore the MFN clause could not operate.

V. Umbrella clauses

An umbrella clause can be defined as a clause through which the contracting parties assume – as a matter of treaty law – additional substantive and or procedural obligations with regard to undertakings contained in instruments extraneous to the treaty.[26] In other words, it extends the protection of the treaty to legally binding commitments external to the treaty.

The wording of these clauses and their location within the treaty may vary significantly, thus calling for a rigorous interpretation in accordance with the Vienna Convention on the Law of the Treaties (VCLT).[27] Although there is no generally accepted classification of umbrella clause,[28] three categories seem undisputed.

The first such category pertains to the most commonly found umbrella clause in investment treaties typically providing that "[e]ach Party shall observe any obligation it may have entered into with regard to investments".[29]

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25) *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID ARB/03/3, Jurisdiction, 22 April 2005, para 233.

26) In *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay*, ICSID ARB/07/9, Jurisdiction, 29 May 2009, para 141, the Tribunal held that an umbrella clause "establishes an international obligation for the parties to the BIT to observe contractual obligation with respect to investors". Quoted with approval in SGS *Société Générale de Surveillance* S.A. *v. Paraguay*, ICSID ARB/07/29, Jurisdiction, 12 February 2010, para 170. In literature, S.W. Schill, *The Multilateralization of International Investment Law* (Cambridge: CUP, 2009), p. 84, points out that umbrella clauses create "a separate obligation under the investment treaty in question to observe obligations the host State has assumed in relation to foreign investors, in particular obligations under investor-State contracts".

27) Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, 1155 UNTS 331. Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

28) During the unsuccessful negotiations for the conclusion of a multilateral agreement on investment (MAI), two categories of umbrella clauses were considered: (a) "respect clauses" making respect for specific agreements a MAI obligation and related violations of specific agreements subject to the full range of MAI dispute settlement mechanisms, and (b) procedural provisions granting foreign investor access to MAI dispute settlement mechanisms for alleged violations of specific agreements. See Report of the Drafting Group Concerning the Protection of Investor Right Arising from Other Agreements, DAFFE/MAI/DG1(96)REV1, 18 March 1996, at http://www1.oecd.org/daf/mai/pdf/dg1/dg1961r1e.pdf.

29) Article II (2) (c) of the BIT between the United States and Argentina. See also the clauses referred to above notes 11, 12, 15 and 16. C.S. Miles, 'Where's My Umbrella An Ordinary Meaning

Although the construction of these clauses[30] as well as their interpretation have been the subject of a good deal of controversy – especially in relation to which contracts that may fall into its scope of application[31] – it is generally accepted that violations of umbrella clauses may engage the international responsibility of the host State and may be adjudicated under the relevant treaty provisions on the settlement of disputes.

The second category of umbrella clauses, less popular than the previous one, imposes upon the parties as a matter of treaty law the observance of obligations stemming from external legal instruments, without affecting the relevant provisions of these instruments on the settlement of disputes. According to one of these clauses, which can be found in several BITs concluded by Mexico, "[e]ach Contracting Party shall observe any other obligation it has assumed in writing, with regard to investments in its territory by investors of the other Contracting Party. Dispute arising from such obligations shall be settled under the terms of the contracts underlying the

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Approach To Answering Three Key Questions That Have Emerged From The "Umbrella Clause" Debate', in T.J. Weiler (ed.), *Investment Treaty Arbitration and International Law* (New York: Juris Publishing, 2008) 3, p. 7-8, provides a non-exhaustive list of drafting options of this category of umbrella clauses.

30) Compare, for instance, *Consorzio Groupement L.E.S.I.* v. *Algeria*, ICSID Case ARB/03/08, 10 January 2005, para 25 (ii), where the Tribunal held that "[c]es clauses ont pour effet de transformer les violations des engagements contractuels de l'Etat en violations de cette disposition du traité et, par là même, de donner compétence au tribunal arbitral mis en place en application du traité pour en connaître", with *CMS Gas Transmission Company v. Argentina*, ICSID ARB/01/8, Annulment Decision, 25 September 2007, para 95 (c), where the Tribunal maintained that "[t]he effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause".

31) In *BIVAC BV* v. *Paraguay*, above note 25, para 141, the Tribunal admitted that "there is no *jurisprudence constante* on the effect of umbrella clauses, that the subject is one on which legal opinion is divided, that the relationship between commercial and sovereign acts of government is not free from difficulty, and that each particular clauses falls to be interpreted and applied according to its precise wording and in the context it is included in a BIT". According to R. Dolzer, C. Schreuer, *Principles of International Investment Law*, 2nd ed., (Oxford: OUP, 2012), p. 174, "the survey of the jurisprudence interpreting the umbrella clause indicates that the understanding of the rule remains in a state of flux". In the same sense, K. Yannaca-Small, 'What about this Umbrella Clause', in K. Yannaca-Small (ed.), *Arbitration under International Investment Arbitration* (New York: OUP, 2010) 479. In literature see, in particular: C. Schreuer, 'Travelling the BIT Route. Of Waiting Period, Umbrella Clauses and Forks in the Road', *JWI&T* 5 (2004) 231; S.A. Alexandrov, 'Breaches of Contract and Breaches of Treaty. The Jurisdiction of Treaty-based Arbitration Tribunals to Decide of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*", *JWI&T* 5 (2004) 555; T.W. Wälde, 'The "Umbrella" Clause in Investment Arbitration – A Comment on Original Intentions and Recent Cases', *Journal World Trade & Inv*. 6 (2005) 183; K. Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements', OECD Working Papers on International Investment 2006/3, October 2006; S. Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties', 18 *Minn. J. Int'l L.* (2009) 1.

obligations".[32] Under this formula, a breach of an obligation stemming from a legal instrument other than the treaty continues to amount to a violation of the treaty and to engage the international responsibility of the host State. However, it does not trigger the remedies offered under the treaty. It remains to be seen whether foreign investors could rely, through MNF clauses, on umbrella clauses of the first category, thus eluding the clear wording of the umbrella clause in the basic treaty. The question, which is reminiscent of the most controversial issues surrounding the notion of MFN clauses since *Maffezzini* v. *Spain*,[33] goes beyond the scope of this note.

According to a third type of umbrella clause, which has been included in the 2004 and 2012 United States Model BIT, "the claimant [...] may submit to arbitration under this Section a claim (i) that the respondent has breached (a) an obligation under Articles 3 through 10, (b) an investment authorization, or (c) an investment agreement".[34]

Unlike the two previous types of umbrella clauses, the present one does not apply to any obligations stemming from any legal instrument, but exclusively to investment authorizations and investment agreements.[35] Moreover, it grants foreign investors access to arbitration under the treaty for alleged violations of these instruments, without expressly imposing upon the parties the obligation to respect them as a matter of treaty law.

The above suggested taxonomy indicates that through an umbrella clause the contracting parties may commit themselves to assume – as a matter of treaty law – either or both substantive or procedural obligations in relation to specific undertakings.[36]

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32) Article 10 (2) BIT between France and Mexico.

33) *Maffezini v. Spain*, above note 23. In 2011, the ILC Study Group, see above note 20, para 353, concluded that "there was no consistent approach in the reasoning of tribunals that permitted the use of MFN to incorporate dispute settlement provisions". In a subsequent report, it stressed that "whether or not an MFN provision [is] capable of applying to the dispute settlement provisions [is] a matter of treaty interpretation to be answered depending on each particular treaty, which [has] its own specificities to be taken into account", ILC Report to the General Assembly (64rd Session, 2011), U.N. Doc. A/67/10, p. 127, para 262. For another problematic piece of case law relevant to the point at issue, see *MTD Equito Sdn. Bhd and MTD Chile S.A.* v. *Chile*, ICSID ARB/01/7, 25 May 2004, together with the following commentaries: S. Lopez Escarcena, 'La applicacion de la clausula de la nacion mas favorecida y el trato justo y equitativo en la jurisprudencia de inversion extrangera. El caso MTD', 1 *Revista Chilena de Derecho* (2005) 79; E. Mereminskaya, 'Demandas Contractuales antes los Tribunale Internacionales a la Luz de los Appis Suscritos por Chile', in *Sociedad Chilena de Derecho Internacional. Estudios* (2010) 38, especially 61-63.

34) Article 24 (1) litt. (a) and (b).

35) As defined in Article 1 of the BIT.

36) According to UNCTAD, *BIT Treaties in the Mid-1990s*, Geneva, 1998, p. 56, umbrella clauses have essentially procedural nature as "violations of commitments regarding investment by the host country would be repressible through the dispute settlement procedure of the BIT". In literature, umbrella clauses have often treated as substantive, see, for instance, S. Schill, above note 30, p. 60.

VI. Interpretation of Article 10 of the BIT Argentina-France

Whether claimants may rely on the clauses under discussion in order to import umbrella clauses into BITs containing provisions on specific undertakings commonly found in BITs concluded by France – such as Article 10 of BITs concluded with Argentina and reproduced above[37] – depends on the interpretation of the latter provision in accordance with the rules on interpretation codified in the VCLT.[38]

The ordinary meaning of Article 10 is quite clear to the effect that investments protected by special undertakings between the host State and foreign investors (i.e. contracts) remain governed by the provisions of these undertakings whenever the later are more advantageous for the foreign investor.[39] This is in line with the object and purpose of both the treaty, namely stimulating and protecting foreign investment as indicated in the preamble, and of Article 10, namely ensuring that the BIT is not detrimental to the protection enjoyed by foreign investors under specific agreements.

It must also be noted that the term "engagement particulier" ("special commitment" or "special undertaking") indicates that Article 10 applies to any commitment undertaken towards specific investors, both through contracts or unilateral acts, but not to commitments of a general character as in the case of legislation.[40]

Article 10 on the contrary does not expressly indicate what happens when the BIT offers foreign investors a treatment which is more advantageous than that offered by the specific agreement. It is submitted that the incidental clause "sans prejudice des disposition du present accord" or "without prejudice to the provisions of this Agreement" is to be interpreted as ensuring that foreign investors can always rely on the substantive and procedural provisions of the treaty to vindicate violations of the treaty.

From this perspective, Article 10 does not impose upon contracting parties any additional substantial or procedural obligations. Instead, it co-ordinates

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37) See text at footnote 5.

38) That investment treaties must be interpreted in accordance with the VCLT has been accepted by virtually all investment tribunals, including *EDF International S.A. et al.* v. *Argentina*, above note 9, para 891, and *Arif* v. *Moldova*, above note 14, para 387. France has not ratified the VCLT, but accepts without hesitation most of its provisions – including those on interpretation – as reflecting customary international law.

39) In this sense, with regard to Article 9 BIT France-Moldova, see *Arif* v. *Moldova*, above note 17.

40) See *Enron Corporation and Ponderosa Assets, L.P.* v. *Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras 269-277; Decision on the Application for Annulment of the Argentine Republic, 30 June 2010, paras 317-346. In literature, see M.C. Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?', in C. Binder *et al.*, *International Investment Law for the 21th Century. Essays in Honous of C. Schreuer* (Oxford: OUP, 2009) 490.

the application of the treaty and the application of special agreements. On the one hand, it preserves the rights already acquired by foreign investors on the basis of special agreements by excluding the application to investment or investors covered by these agreements of any disadvantageous treaty provision. On the other hand, it makes sure that foreign investors can fully rely on the treaty whenever it is for them convenient. Yet, claims under special agreements and claims under the treaty remain governed by the respective substantive provisions and settled in accordance to their respective remedies. From this perspective, non-compliance with special undertakings cannot amount in itself to a violation of the treaty, nor trigger the remedies available under the treaty.[41]

This interpretation is not only firmly based on the ordinary meaning of the text of Article 10, which is presumed to reflect that intention of the parties,[42] but is also consistent with the object and purpose of the BIT as a whole, and of Article 10 in particular. No contextual considerations or subsequent practice appear to affect this interpretation. Indeed, the model BIT adopted by France in 2006 in itself has no effects on this interpretation of Article 10 of the BIT between France and Argentina, nor of any other identical or similar clauses contained in BITs with other States. It may indicate or clarify the position of France, but it remains just a model treaty and evidence of the practice of *one* of the parties to the BIT. In itself, it is has no relevance for the purpose of Article 31 (3) (b) according to which the interpreter must take into account any subsequent practice of *both* parties in the application of the treaty which establishes the agreement of the parties regarding to its interpretation.

If it is accepted that the contracting parties have undertaken no separate obligations under Article 10, there are consequently no rights granted to foreign investors[43] that could be compared to those granted under umbrella clauses contained in the BITs with third States. Reliance on the MNF clause, whose function is precisely to prevent any discrimination against French investors in Argentina (or Argentinian investors in France), appears therefore misplaced. From this perspective, the ILC has aptly emphasised that the functioning of the MNF clause presupposes the existence of *rights* on the same

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41) As pointed out by Y. Banifatemi, A. von Walter, 'France', in C. Brown, *Commentaries on Selected Model Investment Treaties* (Oxford: OUP, 2013), 245, at p. 264, Article 10 'adopts a "more favourable treatment" logic'.

42) In *Methanex Corp*. v. *United States*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part II, Chapter B, para 22, the Tribunal held that "the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation".

43) As noted by R. Ago, *Second Report on State Responsibility*, 22 *YBILC* (1970-II), Part 1, at 192–193, 'the correlation between a legal right on the one hand and a subjective right on the other admits of no exception'. The ILC further observes that 'to each and every obligation corresponds per *definitionem* a right of at least one other State', 37 *YBILC* (1985-II), Part 2, p. 25.

subject-matter in both the basic treaty and the treaty with third States. On this score, Article 9 (1) of the ILC Draft Articles on the MNF clause – which was referred to by Argentina in *EDF* v. *Argentina*[44] – reads "Under a MFN clause the beneficiary State acquires, for itself or for the benefit of persons or thing in a determined relationship with it, only those rights which fall within the limits of the subject matter of the clause".[45]

A rigorous application of the *ejusdem generis* principle appears necessary, indeed, in order to avoid that the parties to the basic treaty be bound by obligations they have never contemplated and exposed to claims of alleged breaches of such obligations.[46] On this point, the position taken by the Tribunal in *Arif* v. *Republic of Moldova*[47] is far from convincing. Having found that the relevant provision on "special agreements" does not impose any separate obligation upon the contracting parties, the Tribunal should have rejected the incorporation of umbrella clauses through the MFN clause since there were no rights on the same subject matter granted under the basic treaty and the other treaties invoked.

The interpretation suggested here, nonetheless, is not irrefutable. It may be plausible to argue that Article 10 implicitly states that special agreements are governed by the provisions contained in the BIT when these are more favourable to the foreign investments or investors. From this perspective, Article 10 would allow foreign investors to invoke the application of advantageous BIT's substantive provisions in dispute related to and settled under special agreements, regardless to the applicable law clause contained in the former. Accordingly, Article 10 would embody a concession made by the contracting parties and intended to further enhance the legal protection of the respective investors. Under this interpretation, it could be argued that Article 10 could possibly satisfy the *ejusdem generis* principle for the purpose of activating the MNF clause and attracting umbrella clauses contained in BITs with third States.

Under a more temerary interpretation, one could even argue that the term "governed" under Article 10 is to be understood as referring not only to the BIT substantive provisions, but also to its mechanism(s) for the settlement of dispute. In this case, Article 10 would be the equivalent of an umbrella clause of the first category described above.

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44) See above note 9, para 926.

45) 30 *YBILC* (1978-II), Part 2, p. 27 (emphasis added). In the Commentary to Article 9 (1), idem p. 31, the ILC further maintains that "No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation *rights* in respect of a certain matter, or class of matter, can attract the *rights* conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter" (emphasis added).

46) See the position of the ILC above note 22.

47) Above note 19 (with regard to Articles 4 and 9 BIT France-Moldova).

Although certainly in line with the object and purpose of the treaty, however, both interpretations are based upon an implication that does not seem necessary. Invoking the *effet utile* principle, in particular, appears misplaced as the first interpretation of Article 10 suggested above would not deprive this provision of any meaning.[48] Quite the contrary, Article 10 would retain its own function, namely that of excluding the application of treaty provisions disadvantageous to foreign investments protected by special agreements. Furthermore, it is submitted that the intention of the contracting parties to undertake – as a matter of treaty law – any obligations related to special agreements must be expressly manifested. Such a cautious approach is also dictated by the fact that admitting that the contracting parties have indeed undertaken any such obligations could trigger the MNF clause and pave the way to the incorporation of heavier umbrella clauses contained in BITs with third States.

In conclusion, the interpretation of the clause under discussion remains highly problematic.[49] The treatment of the question in point received in both *EDF International S.A. et al.* v. *Argentina* and *Arif* v. *Moldova* is rather disappointing. On the one hand, the first tribunal summarily dismissed the objection raised by the Respondent on the *ejusdem generis* principle by simply postulating that Article 10 of the BIT between France and Argentina was indeed an umbrella clause susceptible to trigger the functioning of the MFN clause. In so doing, the mere fact that Article 10 deals with "special commitments" was deemed sufficient to satisfy the Tribunal for the purposes of accepting the claimant's invocation of the MFN clause.

On the other hand, the second tribunal convincingly shared the view put forward by the Respondent that Article 9 of the BIT between France and Moldova could not be treated as an umbrella clause, but nonetheless allowed the claimant to rely on the MFN clause to benefit from umbrella clauses contained in other BITs concluded by Moldova.

VII. What next?

The questions related to the interpretation of provisions like Article 10 of the BIT between France and Argentina may be expected to rise again in investment-related disputes. This may occur before arbitral tribunals as well as domestic courts when they are called to apply these provisions autonomously

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48) In this sense, with regard to Article 9 BIT France-Moldova, see *Arif* v. *Moldova*, above note 17.

49) It is interesting to note that K. Yannaca-Small, above note 30, has included the clauses discussed in this note amongst the examples of umbrella clauses (Annex 1, p. 27), but at the same time has maintained that only 4 BITs concluded by France contain umbrella clauses.

or in the context of invocations of MFN clauses. Indeed, this seems quite a likely possibility given the number of BITs concluded by France and other States containing this type of clause.[50] It appears therefore appropriate to explore how such States could reduce the legal uncertainty surrounding provisions like Article 10.

The most efficient manner for the States concerned to contribute to dissipate any legal uncertainty in the matter under consideration would be the adoption of a joint interpretation, in the form of joint declarations, protocols, exchanges of notes, or any other suitable forms.[51] Through a joint interpretation they would clarify whether by accepting any given clause of the kind in hand they intended to undertake, as a matter of treaty law, any obligations in relation to special agreements concluded with an investor of the other party and, if appropriate, the content of such obligations.

Such a joint interpretation would be binding for the parties[52] as expressly foreseen in some BITs.[53] A *caveat* is nonetheless necessary. As the parties to the treaty and those to the dispute are not the same, foreign investors must be protected against the retroactive effects of joint interpretations amounting to disadvantageous modifications of the treaty. Although the distinction between interpretations and amendments is not always clear,[54] foreign investors must be given the possibility to challenge the application of what they perceive as an amendment to the treaty with regard to pending disputes or disputes over

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50) See the tentative list above note 4.

51) Argentina and Panama, for instance, have exchanged diplomatic notes to the effect that the MFN clause contained in the BIT they concluded in 1996 does not extend to dispute resolution clauses. The diplomatic notes were referred to by the Tribunal in *National Grid* v. *Argentina*, UNCITRAL, Jurisdiction, 20 June 2006, para 85.

52) As observed by the ILC, 18 *YBILC* (1966-II), p. 221, "an agreement as to the interpretation of a provision reached after the conclusion of a treaty represents an authentic interpretation by the parties that must be read into the treaty for purposes of its interpretation". A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: CUP, 2007), p. 239, further points out that "[g]iven that the parties can agree later to modify the treaty, they can also subsequently agree on authoritative interpretation of its terms, and this can amount, in effect, to an amendment".

53) Article 17 (2) of the BIT between the United Kingdom and Mexico, for instance, reads: "An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this section".

54) On the difficulties to distinguish interpretations from amendments, see the debate provoked by NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, at http://www.naftaclaims.com/files/NAFTA_Comm_1105_Transparency.pdf. For a sharp critique of the Commission interpretation see *Second Opinion of Professor R. Jennings*, in *Methanex Corporation* v *United States*, UNCITRAL (NAFTA), available at available at http://www.naftaclaims.com/disputes_us_methanex.htm. As pointed out by I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: MUP, 1984), p. 138, "[i]t is inevitably difficult, if not impossible, to fix the dividing line between interpretation properly so called and modification effected under the pretext of interpretation".

facts that have occurred before the adoption of the alleged amendment. It will be for the tribunal to establish whether the parties have merely confirmed their interpretation of a certain provision or altered its meaning.

When States are unable to adopt a joint interpretation, consideration may be given to the appropriateness of issuing unilateral interpretative declarations. Similar declarations are not unknown in investment treaty practice.[55] Although these declarations would not be legally binding *per se*, tribunals could take them into account as potential elements of State practice for the purpose of establishing any agreement between the parties on the interpretation of the treaty provision under Article 31 (3) (b). When no agreement between the parties can be established, the declaration may still have practical consequences as tribunals may take it into account for the purpose of assessing the legitimate expectations of foreign investors.

The above suggested course of action would inevitably involve a risk that the parties would issue conflicting interpretative declarations. Even in this case, one could argue that unilateral declarations would anyhow be beneficial since both investors and tribunals would be aware of the inconsistent positions of the parties as well as the difficulties to predict any future arbitral pronouncement on this point.

States concerned with the incorporation through MNF clauses of umbrella clauses in BITs that contain ambiguous or controversial provisions on special agreements may also be advised to take an initiative additional – or possibly alternative – to the previous ones. They can seek joint interpretations or issue unilateral declarations with a view of clarify whether the relevant MNF clauses apply to provisions on specific agreements.

VIII. Conclusions

In *EDF International S.A. et al.* v. *Argentina* and *Arif* v. *Moldova* the Tribunals allowed the claimants to incorporate, through MNF clauses, umbrella clauses contained in BITs with third States. The Tribunals' reluctance to rigorously interpret the relevant provisions in the basic treaty and to ensure compliance with the *ejusdem generis* principle is at least questionable.

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55) See, for instance, Note on the Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy Secretary-General dated 1 October, 2003, published in 19, *Mealey's Int'l Arb. Rep.* E3, February 2004.

As recognized in *Arif* v. *Moldova*, it is doubtful that the clauses discussed in this note, which are contained in numerous BIT concluded by France,[56] impose, as a matter of treaty law, any separate substantial or procedural obligations upon the contracting parties in relation of special undertakings. Rather, these clauses are merely meant to coordinate the application of the treaty containing them with and the application of special agreements. As a result, umbrella clauses included in treaties with third States can hardly be relied upon through MFN clauses.

The legal uncertainty that still surrounds these provisions is not beneficial either for foreign investors or for States. States, in particular, can be concerned that other tribunals, following *EDF International S.A. et al.* v. *Argentina Arif* v. *Moldova*, could allow claimants to invoke MFN clauses to incorporate umbrella clauses in BITs that impose no separate obligations related to special agreements.

As for any international treaties, States remain "the transaction's exclusive and absolute *domini*"[57] of investment treaties. With regard to existing treaties, they can contribute to the consolidation of a stable and predictable legal environment in the field of foreign investment by clarifying, jointly or individually, the content of the provisions they have accepted and of the obligations they have undertaken. States would also need to be particularly vigilant when negotiating or renegotiating investment treaties containing these clauses in order to make sure that their intentions are translated as clearly as possible in the negotiated text.

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56) See above note 4.

57) The expression has been borrowed from G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Alpheen aan Rijn: Sijthoff & Noordhoff, 1979), p. 284-285, esp. note 183.