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Ordinary Meaning of the Terms of the Treaty

I. Textual Interpretation

The textual approach is deeply rooted in international jurisprudence. In 1950, well before the conclusion of the VCLT, the ICJ forcefully held that

the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.¹

The Court promptly clarified that when the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, ‘then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.’² Building on this basic assumption, the VCLT adopted a more sophisticated approach which takes into account, in a logical sequence, all the elements expressly indicated in Articles 31–33, without ruling out the possibility of resorting to other means and techniques not expressly indicated. Interpretation under the VCLT can be seen as an exercise intended to examine the text as a legal document recording the common intention of the parties as well as unwind the process leading to the conclusion of the treaty and consider the practice related to its application. Being the final outcome of this process and the object of this practice, the text of the

¹ *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, *ICJ Reports 1950*, p 4 at 8, quoted with approval in *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment, *ICJ Reports 1991*, p 53, para 48.

² *ibid.*

treaty is normally—but not necessarily always³—the logical starting point of the exercise.⁴

In the search for the meaning ordinarily attached to a given term or expression, the interpreter may use all the sources that may be appropriate, including not only linguistic, legal or professional dictionary,⁵ but also official documents related to professional practice and State practice. Should the term have assumed in a peculiar professional field or context a meaning departing from the ‘ordinary’ one, Article 31(4) VCLT, allowing the interpreter to consider a special meaning, may come into play.⁶

The importance of the text has been emphasised as follows by Reuter:

[t]he primacy of the text, especially in international law, is the cardinal rule for any interpretation. It may be that in other legal systems, where the legislative and judicial processes are fully regulated by the authority of the State and not by the free consent of the parties, the courts are deemed competent to make a text say what it does not say or even the opposite of what it says. But such interpretations, which are sometimes described as teleological, are indissociable from the fact that recourse to the courts is mandatory, that the court is obliged to hand down a decision, and that it is moreover controlled by an effective legislature whose action may if necessary check its bolder undertakings.⁷

The conclusion is even more compelling in the area of foreign investment, where disputes are normally settled through arbitration and there is no appeal

³ If the parties to the treaty have adopted an authoritative interpretation, it might be superfluous and inefficient to undertake a thoroughly textual analysis of the relevant provision. It is also possible, although rather exceptional, as pointed out by I Sinclair, above Ch 1, n 10, p 130, that ‘the object and purpose of the treaty is so overwhelmingly apparent that it must necessarily and from the very outset exercise a determining influence upon the search for the contextual “ordinary meaning”’. As pointed out by V Lowe, above Ch 1, n 52, p 74, ‘most courts ... do not draw fine distinctions as to the sequence and purpose for which interpretative aids are applied’.

⁴ In *AWG Group Ltd v Argentina*, UNCITRAL, Jurisdiction, 3 August 2006, para 54, the Tribunal reiterated that ‘the text of the treaty is presumed to be the authentic expression of the parties’ intentions. The starting place for any exercise in interpretation is therefore the treaty text itself’. In *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, above Ch 1, n 10, Judgment, para 41, the Court confirmed that ‘[i]nterpretation must be based above all upon the text of the treaty’. See also *Arbitral Award of 31 July 1989, ICJ Reports 1990*, para 48. The ILC, in turn, pointed out that ‘the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties’, (1966-II) 18 *Yearbook of the International Law Commission* 221. In *US—Shrimp*, above Ch 3, n 114, para 114, the Appellate Body observed that ‘[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted’. In *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, para 181, it further noted that ‘[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used’.

⁵ For an example of use of legal dictionaries, see *Aguas del Tunari*, above Ch 1, n 53, Jurisdiction, para 232.

⁶ See below, Ch 9, section I.

⁷ P Reuter, *Introduction of the Law of the Treaties*, 2nd English edn (London: Kegan Paul, 1995) para 142. Quoted with approval by J Paulsson, individual opinion, *Hrvatska Elektroprivreda d.d. v Slovenia*, above Ch 1, n 4, para 48.

mechanism. The importance of the text of the treaty has been stressed by numerous investment tribunals. In *Methanex v United States*, in particular, the Tribunal, relying on the work of the ILC,⁸ 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.’⁹ In a similar vein, in *Wintershall v Argentina*, the Tribunal pointed out that ‘[t]he carefully-worded formulation of Article 31 [of the VCLT] is based on the view that the text must be presumed to be the authentic expression of the intention of the parties.’¹⁰

According to *Rompetrol v Romania*,

[t]he question ... is not what the Parties to this bilateral treaty might (or might not) conceivably have intended, but what they actually did, and the evidence for that is the terms of the treaty they concluded. That, so far as the Tribunal can see, is what the Vienna Convention requires.¹¹

Several tribunals have emphasised the predominance or primacy of textual interpretation of a treaty provision and stuck to the ordinary meaning of its terms, even when the outcome could have been surprising. In this regard, it is worth recalling that the ICJ has held that a grammatical (textual) interpretation leading to a ‘result which is legally somewhat surprising’ must be accepted only if there are compelling and decisive grammatical arguments.¹²

In *Planet Mining Pty Plc v Indonesia*, for instance, the Tribunal interpreted Article XI(3) of the BIT between Australia and Indonesia as allowing foreign investors to resort to arbitration under UNCITRAL rules only when they cannot resort to ICSID because either or both parties do not accept the jurisdiction of

⁸ (1966-II) 18 *Yearbook of the International Law Commission* 223.

⁹ *Methanex v United States*, above Ch 1, n 55, Award, Part II, Chapter B, para 22. Similarly, in *Saluka v Czech Republic*, Partial Award, above Ch 3, n 1, para 241, the Tribunal stressed that ‘the predominant factor which must guide the Tribunal’s exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal’s jurisdiction’. In *ADF Group Inc v United States*, ICSID ARB (AF)/00/1, Award, 9 January 2003, para 47, the Tribunal held that ‘the rules of interpretation found in customary international law ... enjoin us to focus first on the actual language of the provision being construed’. In *Sociedad General de Aguas de Barcelona SA v Argentina*, ICSID ARB/03/17, Jurisdiction, 16 May 2006, para 54, ‘The starting place for any exercise in interpretation is therefore the treaty text itself’.

¹⁰ *Wintershall v Argentina*, above Ch 3, n 19, Award, para 78. In para 88, the same Tribunal emphasised that ‘[i]n the circumstances, the Tribunal holds that, there is no room for any presumed intention of the Contracting Parties to a bilateral treaty, as an independent basis of interpretation; because this opens up the possibility of an interpreter (often, with the best of intentions) altering the text of the treaty in order to make it conform better with what he (or she) considers to be the treaty’s “true purpose”’. See also the resolution adopted by the Institut de droit international (1952-I) 44 *Annuaire de l’Institut de droit international* 199.

¹¹ *The Rompetrol Group NV v Romania*, ICSID ARB/06/3, Jurisdiction and Admissibility, 18 April 2008, paras 107 and 109.

¹² *Aegean Sea Continental Shelf*, Judgment, ICJ Reports 1978 p 3, 22.

ICSID tribunals.¹³ The Tribunal conceded that interpreting Article XI(3) in the sense that acceptance of ICSID jurisdiction by both parties to the BIT precludes arbitration under UNCITRAL rules is ‘undoubtedly a surprising and unsatisfactory result’. It nonetheless firmly held that this is ‘the result that derives from the text of the Treaty and the Tribunal cannot change the text, especially not in the absence of *travaux* that would shed a different light on the words’.¹⁴

The strong reliance on the text of the treaty, however, does not amount to a profession of faith.¹⁵ Textual interpretation is the departing and normally most crucial element of the process of interpretation. Yet, the literal interpretation needs to be double checked against the context in which the treaty terms have been used and against the object(s) and purpose(s) of the treaty and the relevant provision(s). The interpreter must then take into account any of the elements listed in Article 31(3) VCLT, if applicable.

Besides, it cannot be excluded that the literal interpretation must be discharged due to an error committed during the drafting of the treaty.¹⁶ Equally important, it is possible that other elements or means the interpreter must or may consider under the VCLT rules on interpretation compel a departure from literal interpretation. The departure from the literal meaning must be based on well-founded reasons, not merely on speculation or unverified assumptions. In this respect, it has been stressed that

[a]bsent specific circumstances to the contrary, this Tribunal sees no reason to deviate from the ‘ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’, which is the primary rule of interpretation under Article 31 of the Vienna Convention on the Law of Treaties.¹⁷

A scrupulous reading of the text of any given treaty provision might allow the interpreter to reach a straightforward interpretation. In *Continental Casualty Company v Argentina*, for instance, the annulment Committee, dealing with a preliminary objection made by the investor, had to determine whether, in case of

¹³ Article XI(3) reads in part: ‘If both Parties are not at the same (*sic*) time the dispute arises party to the [ICSID] Convention, the dispute may be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within a three month period from written notification of the claim, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of UNCITRAL as then in force’.

¹⁴ *Planet Mining Pty Ltd v Indonesia*, ICSID ARB/12/14 and 12/40, Jurisdiction, 24 February 2014, para 169.

¹⁵ Although dated well before the conclusion of the VCLT, the following finding by the ICJ in *Anglo-Iranian Oil Co Case (Jurisdiction)*, Judgment, *ICJ Reports 1952* p 93, 104 is still valid today: ‘the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court’.

¹⁶ See Ch 6, section IV.

¹⁷ *Jan de Nul NV and Dredging International NV v Egypt*, ICSID ARB/04/13, Award, 6 November 2008, para 139.

rectification in accordance with Article 49(2) ICSID, the deadline to file a request for annulment has to be calculated from the date the award was rendered or that in which it was rectified. In the words of the Committee,

[f]or purposes of Article 31(1) of the Vienna Convention, the Committee considers that the plain meaning of Article 49(2) of the ICSID Convention is abundantly clear: where a rectification decision is given under Article 49(2) of the ICSID Convention, the period of time provided for under Article 52(2) of the ICSID Convention runs from the date of the rectification decision, rather than from the date of the original award. The Committee considers that there is nothing in the context or objects and purposes of the ICSID Convention that would require this provision to be understood as having a completely different meaning to what it plainly says.¹⁸

Owing to the unequivocal meaning of the text, the Tribunal understandably limited itself to double checking whether any contextual or teleological considerations could point in a different direction. In other words, it tested whether—using the ICJ expression referred to above¹⁹—the interpretation based on the ordinary meaning of the terms employed in the relevant provision ‘made sense’ in their context and in the light and purpose of the treaty. Absent any of the elements indicated in Article 31(3) and (4) VCLT, the outcome of the interpretative process can be considered as final.

In other cases, the relevant treaty provisions were considered as sufficiently clear to allow the interpreter to establish the ordinary meaning of their terms. In *Saba Fakes v Turkey*, for instance, the Tribunal rejected the argument put forward by the Respondent that Article 25(2)(a) of the ICSID Convention and Article 1(a)(i) of the Netherlands–Turkey BIT require the nationality of the claimant to be effective. It found that neither provision confines the jurisdiction *ratione personae* of the Tribunal to disputes involving claimant holding effective nationality of the home State.

As pointed out by the Tribunal, Article 25(2)(a) of the ICSID Convention bars jurisdiction only in the case where the claimant holds the nationality of the Respondent State and avoids any reference to the effectiveness of an investor’s

¹⁸ *Continental v Argentina*, above Ch 3, n 89, Preliminary Objection to Application for Annulment, 23 October 2009, paras 25 and 26. Art 49(2) reads: ‘The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Art 51 and paragraph (2) of Art 52 shall run from the date on which the decision was rendered.’ In the same case, Award, 5 September 2008, para 164, the Tribunal interpreted Art XI of the BIT between United States and Argentina concerning the measures the host State could adopt on grounds of necessity. It found that ‘[t]he ordinary meaning of the language used, together with the object and purpose of the provision (as here highlighted and interpreted under Art 31 of the VCLT) clearly indicates that either party would not be in breach of its BIT obligations if any measure has been properly taken because it was necessary, as far as relevant here, either “for the maintenance of the public order” or for “the protection of essential security interests” of the party adopting such measures.’

¹⁹ Above, text accompanying n 1.

nationality. The text of Article 25(2)(a) being unambiguous in this respect, the Tribunal rightly refused to import into it extraneous conditions. It concluded:

The language of Article 25(2)(a) of the ICSID Convention is clear and does not require any further clarification. Pursuant to the generally accepted rules of treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties, the Tribunal is precluded from elaborating any interpretation that would run counter to this clear language, in particular any interpretation that would result in establishing additional limitations to the Centre's jurisdiction where no such limitations were provided by the Contracting Parties.²⁰

The *Tokios Tokelès v Ukraine* decision is another good example of literal interpretation, although it is controversial in other regards. The claimant was a company legally established under the laws of Lithuania, although 99 percent of the outstanding shares were held by nationals of Ukraine. In rejecting a challenge to jurisdiction, the Tribunal applied literally Article 1(2)(b) of the BIT between Ukraine and Lithuania, according to which 'any *entity established* in the territory of the Republic of Lithuania in conformity with its laws and regulations' qualifies as a Lithuanian investor. It held that

the ordinary meaning of 'entity' is '[a] thing that has a real existence'. The meaning of 'establish' is to '[s]et up on a permanent or secure basis; bring into being, found (a ... business)'. Thus, according to the ordinary meaning of the terms of the Treaty, the Claimant is an 'investor' of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an 'investor' of Lithuania.²¹

The Tribunal found that this interpretation was supported by object and purpose of both Article 1(2)(c) and the treaty as a whole. This interpretation of Article 1(2) of the BIT is irreproachable. As conceded by the dissenting arbitrator, the contracting parties to an investment treaty can freely agree on the definition of investor *for the purpose of the treaty*, on the criteria for the nationality of investors, and on the latitude of their consent to international arbitration.²²

In spite of the unanimous agreement on the importance and predominance of the ordinary meaning of the terms used in a treaty, however, literal interpretation often remains an exercise fraught with difficulties. The interpreter is often confronted with treaty provisions whose terms are ambiguous or may bear

²⁰ *Saba Fakes v Turkey*, ICSID ARB/07/20, Award, 14 July 2010, para 76. The Tribunal's view is reminiscent of D Anzilotti's dissenting opinion attached to *Interpretation of the Convention of 1919 concerning Employment of Women during Night*, Series A/B No 50, p 383, maintaining that when a provision 'according to the natural meaning of its terms, were really perfectly clear it would be hardly admissible to endeavour to find an interpretation other than that which flows from the natural meaning of its terms'.

²¹ *Tokios v Ukraine*, above Ch 1, n 15, Jurisdiction, para 28 (italics as in the original, footnotes omitted). See also *Rompetrol v Romania*, Jurisdiction, above n 11, para 101.

²² Majority decision, para 39 and dissenting opinion para 12.

different meanings. The reasons for this may be diverse and include the incapacity or unwillingness of the parties to agree on unequivocal terms or to clarify the meaning of the terms used through a more elaborated text, footnotes or additional articles.

The decision on jurisdiction in *Aguas del Tuner v Bolivia* provides a first useful example of the difficulties related to literal interpretation. The Tribunal had to interpret, in the context of a complex corporate structure,²³ Article 1(b)(iii) of the BIT between the Netherlands and Bolivia, which includes in the definition of investor ‘legal persons controlled directly or indirectly by nationals of that contracting Party’. In the second objection to the Tribunal’s jurisdiction, the respondent argued that the claimant was not a Bolivian entity controlled by a Dutch company and consequently could not enjoy the protection of the BIT between the Netherlands and Bolivia. It emphasised the use of the past participle ‘controlled’ instead of the adjective ‘control’ to argue that in order to qualify as investor for the purpose of Article 1(b)(iii), the entity needs to exercise actual or effective control or, in other words, to have ‘the power, without the permission of others, to control their own corporate destinies and, accordingly, that of the claimant’.²⁴ This means that only the ultimate controller—in this case *Bechtel* (United States)—would fall within the scope of Article 1(b)(iii) due to the actual and effective control it exercises over the claimant, either directly or through another entity or other entities. According to the respondent,

[t]he word used in the Treaty, ‘controlled’, is a participle i.e., a verb used in adjective form. To say that an object is ‘controlled’ is different from saying that an object is capable of being controlled; an object that is ‘controlled’ is actually controlled. ‘Controlled’ is not a complex or unusual word. To apply the word in this case means that AdT must have been controlled, i.e. commanded, regulated, restrained, or directed, by a Dutch company or companies.²⁵

The claimant, on the other hand, interpreted the phrase ‘controlled directly or indirectly’ as requiring only the legal potential to control the concerned entity. Such an interpretation permits not only the ultimate controller, but also—if appropriate—the intermediate entities under the control of the ultimate controller to qualify as an investor for the purpose of Article 1(b)(iii). According to this line of reasoning, since *Aguas del Tunari* was controlled indirectly by two Dutch intermediate entities, the investment was protected under the BIT between the Netherlands and Bolivia.

The Tribunal first conceded that the use of ‘controlled’ rather than ‘control’ militates in favour of the respondent’s interpretation. After consulting several dictionaries, including legal ones, however, it concluded that the word ‘controlled’

²³ A chart of the ownership structure is reproduced in para 318 of the decision.

²⁴ *Aguas del Tunari*, above Ch 1, n 53, Jurisdiction, para 209 and fn 181.

²⁵ As reproduced in para 228 of the award.

is ambiguous and—like the word ‘control’—is not determinative.²⁶ It then focused on the phrase ‘directly or indirectly’, which in its term modifies—although ‘qualifies’ may have been more accurate—the word ‘controlled’. For the Tribunal,

[t]his phrase clearly indicates that one entity may control another entity in one of two ways. An entity that is *directly controlled* implies that there is no intermediary between the two entities, while an entity that is *indirectly controlled* implies that there is one or more intermediary entities between the two.²⁷

Since the BIT ‘does not limit the scope of the eligible claimants to only the ‘ultimate controller’, the Tribunal admitted the possibility of simultaneous existence of a direct controller and one or more indirect controllers. The Tribunal then dealt with what it defined as the ‘second prong’ of the respondent’s argument, namely that the control exercised over the claimant was to be effective. For this purpose, it considered several non-textual elements, including the object and purpose of the treaty and the context in which the phrase ‘controlled directly or indirectly’ has been used.

From the standpoint of literal interpretation, two observations are in order. The meaning of ‘directly or indirectly’ relates to *how* such control is exercised. Both parties and the Tribunal agreed that control for the purpose of Article 1(b)(iii) can be exercised with or without any intermediate company. The expression ‘directly or indirectly’ neither implies nor excludes the possibility of multiple controllers. The crux of the matter remains the interpretation of the term ‘controlled’, or *which kind* of such control must be exercised. The text of the treaty does not allow the interpreter to reach any undisputable interpretation. It may nonetheless be argued that demanding effective control would amount to importing into Article 1(b)(iii) a requirement the parties have not contemplated. The conclusion held by the Tribunal that the Article 1(b)(iii) requires only legal control—as opposed to actual control—can be accepted as a plausible provisional interpretation that needs to be further tested against the remaining elements of Article 31 and possibly Article 32 VCLT.²⁸

In other cases, arbitral tribunals have not fully examined and exploited the potential of literal interpretation, and even disregarded what was arguably the clear ordinary meaning of the terms of a treaty. The following two examples are quite illustrative.

The *Yukos v Russian Federation* case provides an example of underdeveloped or superficial literal analysis. Dealing with the ordinary meaning of the terms used in Article 45(1), the Tribunal pointed out that the phrase ‘to the extent that’ *often*

²⁶ paras 233 and 234.

²⁷ para 236. In the preceding paragraphs, the Tribunal presented an *a contrario* argument (see below text accompanying n 256) and rejected the possibility of attributing to the word ‘controlled’ a special meaning for the purpose of Art 31(4) VCLT.

²⁸ See also below, text accompanying n 256 and Ch 7 text accompanying n 60.

means 'only insofar as what then follows is the case'.²⁹ Instead of carefully examining the meaning of 'to the extent that', however, it almost instantly moved to the adjective (or rather the predeterminer) 'such', which follows 'to the extent that' and precedes 'provisional application' in Article 45(1).

For the Tribunal 'such' clearly refers to 'this Treaty'.³⁰ To support its conclusion, the Tribunal embarked on a rather unusual exercise. It replaced the words 'this treaty' and 'such provisional application' by 'this entire treaty' and 'the provisional application of the entire treaty' and, alternatively, 'some parts of this treaty' and 'the provisional application of some parts of the treaty'. It found that the first option was *obviously* to be preferred and that partial provisional application of the treaty would be possible only if the contracting parties had explicitly accepted it.³¹

After holding the all-or-nothing nature of provisional application under Article 45(1), it found that 'by signing the ECT, the Russian Federation agreed that the Treaty as a whole would be applied provisionally pending its entry into force unless *the principle* of provisional application itself was inconsistent 'with its constitution, laws or regulations'.³² For the Tribunal this was not the case.

The Tribunal interpretation is not persuasive. There is no doubt that the ordinary meaning of the expression 'to the extent' is 'only insofar as what then follows is the case', as conceded by the Tribunal, or 'within the limits'. In other words, 'to the extent that' refers to the 'scope' or the 'width' of provisional application under Article 45(1). This already solid literal argument is enhanced *a contrario* by the panoply of alternative words or expressions the contracting parties could have used had they intended to introduce an all-or-nothing proposition. These alternatives, which could have been formulated in positive or negative form, include 'unless', 'if', 'where', 'except where', and 'provided that'.

Yet, the Tribunal hastily disposed of the phrase 'to the extent that' and read too much on the predeterminer 'such'. Although it is self-evident that 'such application' refers to 'the application of this Treaty', two interpretations remain plausible, as admitted by the Tribunal: (a) provisional application of the entire Treaty, or (b) provisional application of either the entire Treaty or part of it, depending of the existence of any inconsistency with domestic law. The conclusion reached by the Tribunal that the former interpretation accords better with the ordinary meaning of 'this Treaty' seems unpersuasive.

The powerful literal argument supporting the interpretation of the expression 'to the extent' in the sense of admitting the possibility of partial provisional application of the ECT can be set aside only for compelling reasons.³³ Moreover, the Tribunal's choice to isolate the phrase 'such provisional application' from the rest

²⁹ Above Ch 4, n 89, para 303.

³⁰ paras 304–08.

³¹ para 311.

³² para 301.

³³ See the clear position of the ICJ on this point, below n 285.

of the sentence and to consider it separately from the phrase ‘to the extent’ which immediately precedes is questionable.

By finding that the question is one of *principle*, furthermore, the Tribunal deprives the word ‘such’ of any practical significance. By discussing whether *the principle* of provisional application *per se* was inconsistent with the signatory’s domestic law, the Tribunal disconnects the limitation clause from the ECT and poses the question in general terms, that is in relation to any international treaties that may apply provisionally to the Russian Federation. Here the Tribunal seems to contradict itself when, after equating ‘such provisional application’ to ‘provisional application of *this* treaty’, discusses the compatibility of provisional application with the generality of treaties. Finally, the meaning of Article 45(1) would not change if the word ‘such’ is deleted. One could even argue that the word ‘such’ makes sense only if read in conjunction with the phrase ‘to the extent’, thus leading to the conclusion opposite to the one reached by the Tribunal.

The second example related to the award in *Bayindir v Pakistan*. The Tribunal had to interpret the BIT between Turkey and Pakistan in force at the time. The treaty did not contain any express obligation concerning FET, but in its preamble the parties had agreed that ‘FET of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources’. The treaty included an MFN treatment clause in Article II, which was applicable at the exclusion of agreements relating to customs unions, regional economic organisation or similar international agreements, and of agreement relating wholly or mainly to taxation. The Tribunal found that

[i]t is true that the reference to FET in the preamble together with the absence of a FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty. The Tribunal is, however, not persuaded that this suggestion rules out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty. The fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary. Indeed, even though it does not establish an operative obligation, the preamble is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty’s object and purpose pursuant to Article 31(1) of the VCLT ... The ordinary meaning of the words used in Article II(2) together with the limitations provided in Article II(4) show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries. This reading is supported by the preamble’s insistence on FET. It is further supported by the decision of the tribunal in *MTD v Chile* regarding the application of MFN to import an FET obligation ... the *ejusdem generis* principle that is sometimes viewed as a bar to the operation of the MFN clause with respect to procedural rights does not come into play here and the words of the Treaty are clear.³⁴

³⁴ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, ICSID ARB/03/29, Award, 27 August 2009, paras 155–56. Similar considerations apply to *L.E.S.I. SpA et ASTALDI SpA v Algeria*, ICSID ARB/05/3, Award, 12 November 2008. Even less convincing is the decision in *Al Warraq v Indonesia*, above Ch 1, n 43. In this case the Tribunal incorporated the FET via the MFN clause even if the preamble contained no mention to the FET.

The decision is not convincing. The preamble of the treaty is hortatory and reading it as imposing any substantive obligations such as FET treatment obligation upon the parties would be at odds with the VCLT rules on interpretation. As admitted in the decision on jurisdiction, '[d]espite the use of the verb "agree", it is doubtful that, in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT'.³⁵ Yet, the text of the preamble is straightforward in the sense that the parties merely shared the view that FET is *desirable* to enhance the protection enjoyed by the respective investors. The ordinary meaning of the verb 'to desire' being unambiguous,³⁶ the text of the preamble clearly militates against not only any substantive obligation related to FET, but also any legal obligation to negotiate its inclusion in the treaty.

The Tribunal conflates the question of the interpretation of the preamble with the interpretation and application of the MFN clause. The Tribunal first held that the preamble 'does not establish any operative obligation' where the adjective 'operative' presumably means 'substantive'. In spite of this conclusion, the Tribunal described the text as 'of little assistance' and downgraded the interpretation of the preamble (not imposing upon the parties any substantive obligations) to a 'suggestion'.³⁷ It then postulated that such suggestion was not necessarily an obstacle to the importation into the treaty of FET treatment via the MFN clause. Quite the contrary, for the Tribunal, the importance attached to FET by the parties in the preamble militates in favour of the functioning of the MFN clause with regard to FET obligations. In a rather radical change of perspective, the Tribunal moved to the interpretation of the MFN clause in respect of which the preamble was considered as relevant as context and as expression of the object and purpose of the treaty. The Tribunal found that the MFN clause of the treaty between Pakistan and Turkey (Article II(2)) functioned with regard to all substantive standards accorded to investors of third countries—apart from those included in treaties covered in Article II(4). From this, the Tribunal deduced that FET fell within the scope of the MFN clause.³⁸

As a result, the Tribunal turned upside down the clear meaning of the preamble and eventually interpreted it as imposing upon the parties a substantive obligation to treat the respective investors fairly and equitably,³⁹ an obligation the parties had hardly contemplated to include in the treaty, although they may have contemplated

³⁵ Rendered on 14 November 2005, para 230.

³⁶ In *Arbitral Award of 31 July 1989*, Judgment, *ICJ Reports 1991*, p 53, para 56, the Court made a crucial distinction between the desire expressed by the Parties in the Arbitration Agreement to reach a settlement of the dispute and their actual acceptance of the jurisdiction of the Arbitral Tribunal.

³⁷ para 155.

³⁸ The reference contained in para 158 referring to *MTD v Chile*, above Ch 3, n 41, Award, para 104 finally, is misplaced as the BIT upon which the investor based its claim in that decision contained an FET clause and the Tribunal was concerned with procedural rights.

³⁹ This is without prejudice to the question of the customary nature of FET obligations.

its importance.⁴⁰ The Tribunal failed to draw the logical consequences of such an interpretation. The purely hortatory nature of the text of the preamble—as demonstrated by the use of the adjective ‘desirable’—reveals the intention of the party not to include in the treaty any substantial obligation on FET.⁴¹ Instead, the Tribunal ignored its own finding that the preamble did not establish any ‘operative’ or substantive obligation and used the preamble in the exact opposite sense for the purpose of interpreting the MFN clause, an exercise which prevented the accurate application of the *ejusdem generis* rule.

Since no FET clause is included in the treaty, the MFN clause cannot be invoked to import into the treaty an FET clause contained in other treaties concluded by the respondent. The ILC has clearly explained that according to the *ejusdem generis* rule ‘a clause conferring MFN *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’.⁴² Since the BIT between Turkey and Pakistan did not confer any right related to FET, no FET rights could be incorporated in the treaty through the MFN clause.

II. Textual Interpretation not a Mechanical Exercise

The paramount importance of textual interpretation, however, should not be reduced to a mechanical search of the meaning of the terms used in the treaty or to ‘a sort of lexicographical literalism’.⁴³ Interpretation is rarely amenable to grammatical or lexical postulates. Instead, the interpreter has to work on the basis of presumptions and demonstrate a good deal of flexibility.

The basic presumption is that if the same term is used across a treaty or in different treaties, the parties to the treaties intended to attach to it the same meaning.⁴⁴ Conversely, it is certainly possible, or even likely, that the use of different terms reveals the intention of the parties to attach to them different meanings. As pointed out by a tribunal, ‘terms must be interpreted literally and given practical effect, which excludes redundancy. As the parties to the Treaty referred both to

⁴⁰ According to the ILC, ‘[t]he 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’ (1978-II) 30 *Yearbook of the International Law Commission* Part 2, para 11, p 30 (footnote omitted).

⁴¹ See above, section I.

⁴² (1978-II) 30 *Yearbook of the International Law Commission*, Part 2, p 31 (emphasis added).

⁴³ *Giovanni Alemanni and Others v Argentina*, ICSID ARB/07/8, Jurisdiction and Admissibility, 17 November 2014, para 270.

⁴⁴ See *Romak v Uzbekistan*, below, text accompanying n 191.

“divergence” and “dispute”, it must be assumed that they were not giving the same meaning to these two distinct terms.⁴⁵ It held:

Although the terms ‘divergence’ and ‘dispute’ both require the existence of a disagreement between the parties on specific points and their respective knowledge of such disagreement, there is an important distinction to make between them as they do not imply the same degree of animosity. Indeed, in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner. On the other hand, in case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. Consequently, different views of parties in respect of certain facts and situations become a ‘divergence’ when they are mutually aware of their disagreement. It crystallises as a ‘dispute’ as soon as one of the parties decides to have it solved, whether or not by a third party.⁴⁶

Nonetheless, the interpreter must be cautious in accepting that the use of two different words or expressions in the same provision or treaty necessarily implies different meanings. It should not be taken for granted that the use of the same word or expression postulates the same meaning throughout a treaty or in different treaties. In *Plama v Bulgaria*, the Tribunal found that

the difference between the terms ‘treatment ... accorded to investments’, as appearing in Article 3(1) of the Bulgaria–Cyprus BIT, and ‘treatment ... accorded to investors’, as appearing in other BITs, is to be noted. The Tribunal does not attach a particular significance to the use of the different terms, in particular not since Article 3(1) contains the words ‘investments by investors’.⁴⁷

Whether different terms are to be considered as equivalent has sometimes proved rather arduous. In *Churchill Plc v Indonesia*, for instance, the Tribunal discussed whether the verb ‘to assent’ used in Article(1) of the BIT between Indonesia and the United Kingdom could be treated as synonymous of ‘to consent’. The Tribunal first found that neither the arguments submitted by the parties nor a review of dictionary definitions allowed a clear difference between the two verbs to be established. It nonetheless concluded that

[b]oth ‘consent’ and ‘assent’ are manifestations indicating a willingness to engage in certain conduct or an agreement with a proposed opinion. It is true that ‘consent’ is a term of foundational importance in the area of international dispute settlement. In the ICSID framework, disputing parties are required to ‘consent in writing’ to ICSID arbitration. Accordingly, one might venture to say that, *prima facie* at least, assent may not suffice to create the jurisdiction of an ICSID tribunal.⁴⁸

The interpreter must always be vigilant on the different meanings that can be attached to the very same word depending on the specific circumstances of its

⁴⁵ *Helnan International Hotels A/S v Egypt*, ICSID ARB/05/19, Award, 7 June 2008, para 52.

⁴⁶ *ibid.*

⁴⁷ *Plama v Bulgaria*, above Ch 3, n 52, Jurisdiction, para 190 (footnote omitted).

⁴⁸ para 165.

use.⁴⁹ The same word may assume different meaning in different provisions of the same treaty or in different treaties. The use of the modal ‘shall’ provides a useful example.

In some cases, the modal ‘shall’ obviously indicates the existence of legally binding obligations. This is the case, for instance, of standard FET full security and expropriation provisions, which may read, respectively, as follows: ‘Investment of nationals or companies of each Contracting Party shall at all times be accorded FET and shall enjoy full protection and security in the territory of the other Contracting Party’,⁵⁰ and ‘Investment of nationals or companies of each Contracting Party shall not be nationalised, expropriated or subject to measures having equivalent effect ... except for ...’⁵¹

The modal ‘shall’ may proscribe any given conduct not only to the parties to the treaty but also to arbitral tribunals, as in the case of Article 42(1) of the ICSID Convention, which reads:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Another interesting example is the obligation incumbent upon investment tribunals to respect authentic interpretations agreed by the parties to the treaty. The relevant provision may read, for instance, as follows: ‘A decision of the Joint Committee declaring its interpretation of a provision of this Agreement ... shall be binding on a tribunal established under this Section, and any award must be consistent with that decision.’⁵²

In other cases, the interpretation of ‘shall’ has been problematic. In *Wintershall v Argentina*, for instance, the Tribunal dealt with a jurisdictional objection based on Article 10 of the BIT between Argentina and Germany and held:

The use of the word ‘shall’ in Article 10(2) (‘[i]f any dispute in terms of the paragraph 1 above could not be settled within the term of six months ... it shall be submitted to the Courts of competent jurisdiction of the Contracting Party in whose territory the investment was made’)—is itself indicative of an ‘obligation’—not simply a choice or option. The word ‘shall’ in treaty terminology means that what is provided for is *legally binding*.⁵³

⁴⁹ In *Japan—Alcoholic Beverages*, above Ch 1, n 11, p 21, the WTO Appellate Body held that ‘[t]he concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.’

⁵⁰ Art 2(2) UK Model BIT (2005).

⁵¹ *ibid*, Art 5(1).

⁵² Art 15.21 of the FTA between the United States and Singapore, below Ch 7, n 6.

⁵³ *Wintershall v Argentina*, above Ch 3, n 19, Award, para 119. See the text of Art 10 of the BIT between Argentina and Germany below, section III.

In interpreting Article X of the BIT between Argentina and Spain, which on this point is essentially identical to Article 10 of the BIT between Argentina and Germany, another Tribunal reached a different conclusion in spite of the use of the modal 'shall'. It found that

Article X(2) does not set a mandatory obligation. When stating that 'the dispute ... shall ... be submitted to the competent tribunals' of the Host State, it seems to require that once a dispute had been raised, and the time period for negotiating a settlement had elapsed, the dispute must be brought to court at the initiative of either party. But such an understanding goes too far. What these words mean is enlightened by the provisions of Article X(3). Indeed, based on letter *a*), recourse to local courts is a requirement for access to international arbitration. But it is not more. The party raising the dispute can also decide not to go before domestic courts and to run the risk that later access to international arbitration might be denied.⁵⁴

The second interpretation is clearly to be preferred. The use of 'shall' in the second paragraph of both provisions may convey the impression of a self-standing legal obligation, but cannot be interpreted in the sense of requiring the parties to start litigating before domestic tribunals. In this case, the modal 'shall' has a permissive nature. The reason for this is a logical one. It is self-evident that the parties *may* if they so wish resort to domestic tribunals once the requirement concerning the friendly settlement of the dispute has been met.⁵⁵ Such a decision remains at the discretion of the parties and depends on a number of factors related, *inter alia*, to the evaluation of the litigation risks, costs and benefits, the relationship between the parties to the dispute, and, as far as the investor is concerned, the possible impact of litigation on the business. It is therefore up to the parties to bring the case before a domestic court at the expiry of the six-month period, to allow further negotiation and eventually opt for litigation at a later date, or not to seek any judicial remedy at all.

In some cases, the literal interpretation of the meaning of a provision based on 'shall' has been inconclusive. The decisions on jurisdiction in two parallel cases confirm the versatility of the modal 'shall'. In *Churchill Plc v Indonesia*, the Tribunal interpreted Article 7 of the BIT between Indonesia and the United Kingdom, according to which the parties 'shall assent' to any request on the part of such national or company to submit for conciliation or arbitration to ICSID. In *Planet Mining v Indonesia*, the Tribunal interpreted Article XI of the BIT between Indonesia and Australia under which each Party 'shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor'.

⁵⁴ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID ARB/07/26, Jurisdiction, 19 December 2012, para 108.

⁵⁵ In this sense, see *PSEG Global, Inc, The North American Coal Corporation, and Konya İnşin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID ARB/02/5, Award, 19 January 2007, para 161.

In both cases, the Tribunal pointed out the double function of ‘shall’, which can either indicate that the parties have consented to submit to international arbitration their dispute with their respective investors, or be understood as implying some future action leading to the expression of such consent (or assent). The Tribunal admitted that the literal analysis of the relevant provisions did not reach any definitive conclusion as to the meaning to be attached to the word ‘shall’. In its words:

As to the word ‘shall’, it can either imply an obligation (suggesting that the Respondent’s submission to ICSID is mandatory) or refer to a future action (suggesting the contrary). Be this as it may, even if ‘shall’ expresses an obligation of the State to give its consent, the sanction for a failure to do so would not be to supply the missing consent or to deem that constructive consent exists. Hence, whatever the meaning of ‘shall’, it does not advance the analysis.⁵⁶

The interpreter has then to turn to the other elements of the VCLT rules on interpretation in order to determine the meaning of ‘shall’ and the provision to be interpreted.⁵⁷

III. Focus of Textual Interpretation

As has been seen in the previous sections, it is generally accepted that, as a matter of principle, the textual analysis of the terms used in the treaty is the natural departing point of the interpretative process. This view calls nonetheless for an important qualification. Before undertaking the textual analysis, a preliminary operation is indispensable, as the interpreter has to set the focus of the interpretative effort.

The basic unit for the purpose of interpretation is normally—but not necessarily—each single provision of the treaty, although in the case of complex provisions, the interpreter may zoom on some of its paragraphs or sentences as appropriate. Each provision is presumed to be the result of logical decisions and choices made by the contracting parties. The negotiations leading to the adoption of the text of a treaty include the organisation, design and co-ordination of the various treaty provisions with a view to enhancing clarity, coherence and ultimately legal predictability. Each provision can be seen as the final outcome of a drafting

⁵⁶ *Planet Mining v Indonesia*, above n 14, para 163. In the same sense, see *Churchill Mining Plc v Indonesia*, ICSID ARB/12/14 and 12/40, Jurisdiction, 24 February 2014, para 162. In the second decision, the Tribunal held that ‘[i]t is common ground, and rightly so, that the word “shall” implies an obligation. This would suggest that the submission to ICSID on the part of the Respondent is mandatory ... On the other hand, “shall” can also be understood as implying a future action. In this sense, the use of the word “shall” does not necessarily imply automaticity in the achievement of the contemplated result.’

⁵⁷ See, in particular, Ch 5, text accompanying n 12 ff and n 25, and Ch 10, text accompanying n. 63 ff.

process which often requires contracting parties to make choices between different options and to restructure the treaty provisions through merging, splitting, insertion or deletion. The materials generated during the process may be relevant for the purpose of Article 32 VCLT and will be dealt with in Chapter 10. For the time being, suffice it to stress that normally each treaty provision is meant to constitute a logical constituent element of the treaty. Indeed, Article 31 VCLT itself is a fine example of the unity of a treaty provision, as clearly indicated in its title. In principle, therefore, the interpreter is expected to focus on a treaty provision and to consider the terms or phrases used in it, keeping in mind its lexical and logical construction.

It is unlikely—although it cannot be categorically ruled out—that the relationship existing between two (or more) provisions obliges the interpreter to interpret them jointly. The question arose with regard to Articles 53 and 54 of the ICSID Convention.⁵⁸ Argentina argued in several cases that the obligation incumbent upon a party to an ICSID dispute under Article 53 of the ICSID Convention to abide and comply with an award is subject to the recourse by the other party to the mechanism established under Article 54 of the ICSID Convention for the recognition and enforcement of award within the jurisdiction of ICSID members.

The argument was convincingly rejected in *Enron v Argentina*.⁵⁹ The Tribunal held that

nothing in the language of these provisions suggests that these two obligations are related, and in particular, that there is nothing in the language to suggest that the obligation in the second sentence of Article 53(1) must be read as being subject to an award creditor invoking enforcement mechanisms established pursuant to the obligation in the first sentence of Article 54(1).⁶⁰

Quite the contrary, the argument continues, the two obligations imposed in the two provisions are clearly distinct and addressed to different subjects. Under Article 53(1), the parties to the dispute must abide and comply with the award. Under Article 54(1), every member of ICSID—the host State included—must recognise and enforce the award within its territory. The Tribunal then emphasised that

Article 54(1) does not state that a party to an award must use the enforcement machinery established pursuant to this provision as a condition of the award being complied with. Nor does it state that a Contracting State or a constituent subdivision or agency that is

⁵⁸ The relevant part of Art 53(1) reads: ‘The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.’ The relevant part of Art 53(1) reads: ‘Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.’

⁵⁹ *Enron Corporation and Ponderosa Assets, LP v Argentina*, ICSID ARB/01/3, Continued Stay of Enforcement of the Award, 7 October 2008. See also *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, ICSID ARB/97/3, Continued Stay of Enforcement of the Award, 4 November 2008, paras 34–36.

⁶⁰ *Enron v Argentina*, above n 59, para 61.

an award debtor is entitled to decline to comply with the terms of the award until the enforcement machinery that exists under that Contracting State's own national law is used by the award creditor.

The already solid literal interpretation of the two provisions upheld by the Tribunal was also supported by a contextual argument based on the fact that Article 27 of the ICSID Convention permits the home State to exercise diplomatic protection when the host State fails to abide and comply with the award. For the Tribunal this indicates that the obligation under Article 53(1) is independent and that failure to comply with it removes the prohibition to exercise diplomatic protection, regardless of any attempts to have the award recognised and enforced under Article 54 of the ICSID Convention. The Tribunal's interpretation, which was further buttressed by an *a contrario* argument and teleological considerations, is definitely persuasive.⁶¹

It is also possible that the interpreter focuses the literal interpretation on a part of a treaty provision and then zooms out in order to consider contextual elements. In *Ping v Belgium*, for instance, the Tribunal had to interpret the BIT concluded between China and the Belgium–Luxembourg Economic Union in 2005, which entered into force in 2009 and replaced the BIT concluded in 1984, which entered into force in 1986.⁶² One of the key questions dealt with by the Tribunal was whether disputes that were notified under the 1986 BIT, but not yet subject to arbitral or judicial proceedings, could fall within the scope of the arbitral clause of the 2009 BIT, which is much broader than that contained in the prior BIT. The Tribunal first held that the crucial provision was Article 8(1) of the 2009 BIT.⁶³ It then proceeded with the literal interpretation of Article 8(1) and found that its plain meaning is clear. For the Tribunal, the expression 'when a legal dispute arises' limits the scope of application of Article 8(1) to disputes arising after the entry into force of the BIT.

The provisional conclusion based on the literal interpretation was double checked against the context of Article 8(1) and more precisely Article 10(2) and Article 10 as a whole. Article 10 (titled 'transition') provides that the 2009 BIT substitutes and replaces the 1986 BIT, but does not offer any indication on whether a dispute notified but not subject to arbitral or judicial proceedings under the latter treaty could be adjudicated under the former treaty. For the Tribunal, therefore, Article 10 has no impact on the literal interpretation of Article 8(1).

According to Article 10(2), the 2009 BIT applies to investments made before or after its entry into force, but not disputes or claims concerning investments which were already under judicial or arbitral process before its entry into force.

⁶¹ See SA Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention', in C Binder et al (eds), above Ch 1, n 29, p 322.

⁶² *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v Belgium*, ICSID Case No ARB/12/29, Award, 30 April 2015.

⁶³ *ibid.*, 212. The Tribunal held that 'there can be no doubt, that the essential question is one of interpretation of Article 8(1)'.

These disputes and claims continue to be settled in accordance with the 1984 BIT. Article 10(2) is simply silent on the fate of disputes notified but not subject to arbitral or judicial proceedings under the 1986 BIT. Thus, the Tribunal convincingly dismissed that Article 10(2) provides significant contextual elements for the purpose of interpreting Article 8(1) and possibly inducing it to adjust the textual interpretation.

Setting the focus of the interpretation process is particularly important when the provision to be interpreted contains a chapeau, establishes a sequence of procedural steps, includes cross-references, or has a complex structure requiring a clarification of the relationship between the different parts of the provision.

Treaty provisions containing a chapeau, as is normally the case of those defining foreign investments in BITs, offer an interesting example. In *Romak v Uzbekistan*, for instance, the Tribunal had to interpret Art 1(2) of the BIT between Uzbekistan and Switzerland, which is composed of a chapeau according to which the term investment includes every kind of asset and a non-exhaustive list of categories of investments. It convincingly rejected a mechanical interpretation that would include within the scope of Article 1(2) any claim to money regardless of its nature or origin. Yet, it argued that interpreting the categories included in Article 1(2) letters (a)–(e) in disconnection from the intrinsic meaning of the term ‘investment’ used in the chapeau of Article 1(2) would produce a result manifestly absurd or unreasonable.⁶⁴ Less clear is the observation made by the Tribunal that the outcome of a mechanical application would be ‘contrary to Article 32(b) of the Vienna Convention’. The question is not the alleged inconsistency with Article 32(b)—which allows the interpreter to resort to subsidiary means of interpretation if interpretation under Article 31 leads to a result which is manifestly absurd or unreasonable—but rather the interpretation of the term ‘investment’ in accordance with Article 31.

In *Ambiente v Argentina*, on the other hand, the majority of the Tribunal paid lip service to the importance of the chapeau, but essentially ignored it for all practical purposes. The dissenting arbitrator strongly disagreed and argued that in order to benefit from the protection of the BIT between Argentina and Italy an investment must necessarily satisfy the definition of investment contained in the chapeau of Article 1.⁶⁵

The chapeau was considered by the Tribunal in *Romak v Uzbekistan* and by the dissenting arbitrator in *Ambiente v Argentina* as context or ‘immediate context’, which has been defined as including ‘the grammatical construction of the provision or phrase within which a word is located’⁶⁶ and may be important ‘to confirm an ordinary meaning if a single contender emerges or to assist in identifying the ordinary meaning if two or more possibilities come forward.’⁶⁷ This

⁶⁴ *Romak SA v Uzbekistan*, UNCITRAL Case No AA280, Award, 26 November 2009, para 184.

⁶⁵ S Torres Bernàrdez, dissenting opinion in *Ambiente v Argentina*, above Ch 1, n 15, esp paras 279–81.

⁶⁶ R Gardiner, above Ch 1, n 10, p 199.

⁶⁷ *ibid.*

position is certainly plausible, but seems to be based on an unduly strict chronological sequence in which contextual considerations necessarily follow the textual analysis.

Yet, the so-called immediate context may well come into play at the very beginning of the interpretative process when the interpreter set the focus of its interpretative exercise. This confirms that the various elements included in Article 31 VCLT, far from being sealed compartments, mutually interact with each other and that the sequence sketched in that provision is flexible and functional.

The chapeau is part and parcel of the literal analysis aimed at establishing the ordinary meaning of ‘investment’ for the purpose of the treaty. As will be seen later, the term is a generic one, but one bearing its own meaning nonetheless.⁶⁸ As such, it must be taken into due account by the interpreter while searching for the ordinary meaning of investment under the definition of investment of the BIT. The unity of the provision and the consequent need to take into account from the outset its chapeau is demonstrated by the fact that if the putative investment is not expressly included in the categories listed in the non-comprehensive list, the chapeau remains the only textual element available to the interpreter. Or, putting it differently, the chapeau in this case simply cannot be the context of something that is not there.

Treaty provisions involving a sequence of steps equally require a clear focus for their correct interpretation. This is typically the case of the dispute settlement provisions such as those included in several BITs concluded by Argentina prior to 1994.⁶⁹ In its simplest form, these provisions provide, *inter alia*, that, in the absence of an agreement between the parties, a dispute can be submitted to international arbitration only after litigating before domestic tribunals for 18 months.⁷⁰ They have been the object of diverging interpretations and sharp divisions amongst and within arbitral tribunals.⁷¹ Consider, for instance, Article 10 of the BIT between Argentina and the Germany, which reads:

- (1) Any dispute arising between either of the Contracting Parties and the national or company of the other Contracting Party in connection with the investments under the terms of this Agreement shall, if possible, be amicably settled by the parties to the dispute.
- (2) If any dispute in the terms of paragraph 1 above could not be settled within the term of six months, counted as from the date on which any of the Parties had brought it forth, at the request of any of the parties, it shall be submitted to the courts of competent jurisdiction of the Contracting Party in whose territory the investment was made.

⁶⁸ See Section V.

⁶⁹ See the list in *Daimler v Argentina*, above Ch 1, n 15, Award, Appendix 1, p 123.

⁷⁰ Art 8(3) BIT between Argentina and Italy.

⁷¹ Compare, for instance, *Impregilo SpA v Argentina*, ICSID ARB/07/17, Award, 21 June 2011 and *ICS v Argentina*, above Ch 3, n 130, Jurisdiction.

- (3) The dispute may be submitted to an international arbitral tribunal in any of the following events:
- (a) At the request of any of the parties in dispute, if no decision on the merits of the case had been reached following eighteen months from the date when the judicial proceeding provided for in paragraph 2 of this Article was initiated, or if the decision had been reached and the dispute between the parties still continued.
 - (b) When both parties in dispute had so agreed.

The first phase of the dispute settlement mechanism is negotiation. Under Article 10(1), the dispute shall, if possible, be amicably settled by the parties. The use of 'shall' arguably indicates a self-standing legal obligation to attempt a friendly settlement of the dispute, but not to reach any agreement as confirmed by the qualifier 'if possible' or 'as far as possible'. This would be a typical obligation of means—rather than result—that both parties have to comply with in good faith.⁷² Complying with the legal obligation to seek a friendly settlement of the dispute, at any rate, is imposed in Article 10(2) for the purpose of submitting the dispute to the competent domestic courts or tribunals. Such an obligation must be complied with in order to move to the second phase, namely litigation or arbitration. It is the use of 'if' at the beginning of paragraph 2—rather than the use of 'shall' in paragraph 1—that unequivocally makes the access to domestic tribunals conditional upon the satisfaction of the requirement related to the friendly settlement of the dispute.⁷³ Needless to say, under paragraph 2 the investor has the right—but certainly not the obligation—to submit the dispute to domestic courts.

The most problematic paragraph remains Article 10(3). As indicated by the modal 'may', the Article 10(3) offers to the parties—which means the foreign investor—the possibility to settle the dispute through international arbitration. It is up to the foreign investor to decide the most appropriate strategy to settle the dispute. One option, entirely at the discretion of the investor, is resorting to international arbitration. But there is no legal obligation in this sense and the investor may decide to continue litigating before domestic tribunals, attempt to resume negotiations, or abandon any attempt to settle the dispute.

The analysis of the text of these provisions leads therefore to a comfortable conclusion with regard to the '18 months requirement': a dispute can be submitted to international arbitration only in presence of one of the circumstances defined in Article 10(3), namely no decision on the merits of the case had been reached within eighteen months, nor has a decision been reached since, but dispute between the parties still continues. Only then does the dispute fall within the scope of the (conditional) consent of the host State to international arbitration. In this regard, the parties to the dispute are free to submit the dispute to domestic

⁷² *Ambiente v Argentina*, above Ch 1, n 15, Admissibility and Jurisdiction, para 581, relying on *Railway Traffic between Lithuania and Poland, Advisory Opinion, 15 October 1931, PCIJ Series A/B, No 42, 116.*

⁷³ *Ambiente v Argentina*, above Ch 1, n 15, Admissibility and Jurisdiction, para 590.

tribunals and therefore comply with the legal requirements prescribed in these clauses, but have to do so in order to resort to international arbitration.⁷⁴ The co-existence of a right to litigate before domestic courts, established under domestic law and not affected by the treaty, and a legal requirement, imposed by a treaty in the sense of conditioning access to international arbitration to the exercise of such a right, seems unproblematic.⁷⁵

Clauses like Article 10 of the BIT between Argentina and Germany are not exhaustion of domestic remedies clauses as they do not require the applicant to obtain a final decision from the domestic tribunals. Rather, they require certain actions to be taken by the putative applicant both in the negotiation and the domestic litigation phases to upgrade the dispute, respectively to domestic litigation and international arbitration. For the purpose of the literal interpretation of these clauses, the view could be safely shared that ‘regardless of the classification of the objection as a plea to jurisdiction or to admissibility, the result of the non-fulfilment of the requirements should have been the same, the dismissal of the case’.⁷⁶ In other words, the applicant must comply with the requirements related to domestic litigation before submitting the dispute to international arbitration.⁷⁷

But this is certainly not the end of the exercise, especially considering that these clauses have been described as ‘nonsensical’ and the requirement they contain ‘curious’.⁷⁸ Even assuming that—as seems to be the case—there are compelling and decisive grammatical arguments, the result obtained on the basis of the analysis of the text of these clauses is a provisional one, which must be double checked against the other elements of the interpretative process.⁷⁹ For the time being,

⁷⁴ See S Torres Bernàrdez, dissenting opinion in *Ambiente v Argentina*, above Ch 1, n 15, para 419.

⁷⁵ *Contra*, apparently, *Hochtief AG v Argentina*, ICSID ARB/07/31, Jurisdiction, 24 October 2011 paras 52 and 53.

⁷⁶ G Abi Saab, dissenting opinion in *Abaclat v Argentina*, above Ch 1, n 15, para 25. In *Urbaer v Argentina*, above n 54, Jurisdiction, para 113, the Tribunal seems to have downplayed the importance of this qualification.

⁷⁷ In *Ambiente v Argentina*, above Ch 1, n 15, Admissibility and Jurisdiction, para 589, the Tribunal found without hesitation that ‘to have recourse to domestic courts, the Tribunal is of the opinion that the clear wording of Art 8 paras 2 and 3 of the Argentina–Italy BIT permits of no other conclusion than that the provision sets forth a binding precondition for access to international arbitration’. In *Urbaer v Argentina*, above n 54, Jurisdiction, para 130, the Tribunal held that ‘the clear wording of the relevant provisions of Article X and the equally lucid suggestion as to its purpose that Respondent has advanced (to which Claimants did not object per se), lead to the conclusion that resort to domestic courts is a precondition to be met before resorting to international’. See also *Impregilo v Argentina*, Award, above n 70, para 90. In *BP Group Plc v Argentina*, UNCITRAL (1976), Final Award, 24 December 2007, para 146, the Tribunal held without any reference to or analysis under VCLT Art 31, that ‘as a matter of treaty law investors acting under the Argentina–UK BIT must litigate in the host State’s court for 18 months before they can bring their claims to arbitration’.

⁷⁸ *Plama v Bulgaria*, above Ch 3, n 52, Jurisdiction, para 224.

⁷⁹ As pointed out by S Torres Bernàrdez, ‘Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties’, in G Hafner et al (eds), *Liber Amicorum Professor Seidl-Hehenveldern* (The Hague: Kluwer, 1998) 721, 728, treaty interpretation ‘is a legal operation which should combine the various permitted elements and means of interpretation as they may be present in the case, while keeping open the interpretation until the very conclusion of the interpretative process’.

however, suffice it to note the importance of the need to interpret provisions that contain a sequence of steps—such as Article 10 of the BIT between Argentina and Germany—as a whole and duly take into account the functional links between its different paragraphs.

The interpreter may also be called upon to start the interpretative process with a preliminary operation aimed at establishing the relationship between the various parts of any given provision with a view to focusing on the relevant part or parts, as illustrated in the decision on jurisdiction in *Garanti Koza v Turkmenistan* with regard to the interpretation of Article 8(1) and (2) of the BIT between the United Kingdom and Turkmenistan, which it is convenient to reproduce here:

- (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.
- (2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
 - (a) the International Centre for the Settlement of Investment Disputes; or
 - (b) the Court of Arbitration of the International Chamber of Commerce; or
 - (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the UNCITRAL.

if after a period of four months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the UNCITRAL as then in force. The parties to the dispute may agree in writing to modify these Rules.

The majority decided to deal with the interpretation of the two paragraphs separately. According to the Tribunal, Article 8(1) deals with the contracting parties' consent to participate in international arbitration and the conditions attached to that consent, whereas Article 8(2) specifies the arbitration systems that may be used if the conditions of Article 8(1) are met. For the Tribunal, Article 8(1) appears 'to establish unequivocally Turkmenistan's consent to submit disputes with UK investors to international arbitration'. This is due essentially to the mandatory character of the modal 'shall'.

The Tribunal nonetheless conceded that Article 8(1) does not provide consent to ICSID. Relying on *Biwater v Tanzania*, it held:

The ordinary meaning of Article 8 is thus that Turkmenistan consented in Article 8(1) to submit disputes with a UK investor arising under the UK–Turkmenistan BIT to international arbitration. However, unless Turkmenistan reaches an agreement with such

an investor to submit a particular dispute to either ICSID or ICC arbitration, Article 8(2) restricts the investor to submitting the dispute to UNCITRAL arbitration.

The route followed by the majority to reach such an interpretation has been sharply criticised in a dissenting opinion, which on this point emphasises the inseparable character of Article 8(1) and (2) since ‘elementary rules of treaty interpretation invite to interpret Article 8 *as a whole* and not as composed of segmented and fragmented provisions’, where the verb ‘to invite’ is to be read as equivalent to ‘to direct’.⁸⁰ Accordingly,

Article 8(1) contains, subject to the condition of four months of negotiations, consent in principle to international arbitration, and such consent in principle must still be read in light of the further specific conditions governing consent to arbitration by virtue of Article 8(2).

On the basis of the ordinary meaning of Article 8(2) and in particular of the phrase ‘may agree to refer the dispute’, the arbitrator concluded that it is Article 8(2) that governs consent to arbitration. It is through the agreement concluded under Article 8(2) that the parties to the dispute express their consent to arbitration before one of the three institutions listed in that provision. In the absence of such an agreement, the investor may still resort to—and exclusively to—arbitration under UNCITRAL.

The dissenting arbitrator’s interpretation is clearly to be preferred. Article 8(1) is not a self-standing provision providing for consent to arbitration. Its *ratio legis* is merely to fix the precondition for international arbitration.⁸¹ It contains no standing offer by the contracting parties simply because the putative arbitral tribunal is not indicated.⁸² The expression of consent must be established in Article 8(2) which prospected two alternatives: either the parties to the dispute reach an agreement on the referral to one of the three tribunals listed, or the investor can rely on the default option, namely a tribunal established under UNCITRAL rules.

The relationship between different paragraphs within the same treaty provision containing cross-references to each other was also important in *Planet Mining v Indonesia*. The Tribunal had to determine whether in Article XI of the

⁸⁰ L Boisson de Chazournes, dissenting opinion in *Garanti Koza LLP v Turkmenistan*, ICSID ARB/11/20, Jurisdiction, 3 July 2013, paras 14 and 16. In para 19 she has convincingly argued that Arts 8(1) and 8(2) are two sides of the same coin. The coin—Art 8—encompasses the provisions governing consent to international arbitration under the UK–Turkmenistan BIT. One side of the coin—Art 8(1)—shows the general precondition(s) under which a foreign investor can initiate international arbitration against the host state; the other side—Art 8(2)—fixes the strict conditions under which the foreign investor can pursue one specific venue of international arbitration (eg ICSID arbitration) rather than another (eg UNCITRAL arbitration).

⁸¹ *ibid*, para 18.

⁸² Interestingly, the majority accepted that Art 8(1) does not provide any information about *what kind* of international arbitration the contracting parties have consented to, and therefore considered it indispensable to look at Art 8(2).

BIT between Australia and Indonesia the parties have expressed their consent to ICSID arbitration.⁸³ The relevant parts of Article XI read as follows:

2. In the event that such a dispute cannot be settled through consultations and negotiations, the investor in question may submit the dispute for settlement:
 - a. ...;
 - b. To the International Centre for the Settlement of Investment Disputes ('the Centre')
- ...
4. Where a dispute is referred to the Centre pursuant to sub-paragraph 2(b):
 - a. Where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor; or
 - b. If the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the investor affected shall have the right to choose.

The Tribunal first noted the parties' disagreement on the 'articulation' of paragraphs (2) and (4).⁸⁴ It found without hesitation that under Article XI(2), the investors of each party are entitled to institute ICSID arbitral proceedings and that 'the right to initiative rests with the foreign investor and there is no limitation placed on this right in this paragraph'.⁸⁵ It noted, however, that 'the difficulty in this case arises from the context of paragraph 2 and specifically from paragraph 4'. Since under Article XI(4) the host State shall consent in writing within 45 days, the Tribunal found that consent to arbitration 'cannot be located in the Treaty itself and ... a separate act is needed'.⁸⁶ After conceding that the modal 'shall' can either suggest an obligation or refer to a future action, it held that even assuming that the parties have an obligation to express such consent, the failure to do so means that consent is still lacking.⁸⁷ For the Tribunal, the written form required under Article XI(4) as well as the fact that according to ICSID Arbitration Rule 2(1) the party requesting arbitration must indicate the date of consent militate in favour of the above interpretation.

The Tribunal concluded that the ordinary meaning of Article XI(2) and Article XI(4) taken individually is clear, but their interaction 'creates some uncertainty', although it provisionally expressed its preference for interpreting Article XI as not containing the parties' consent to ICSID proceedings. For the Tribunal, holding otherwise would have reduced Article XI(4)(a) to a mere administrative formality. The Tribunal then turned to what it defined as 'the context of Article XI(2) and (4)' and focused on the disjunctive 'or' that separates the two

⁸³ *Planet Mining v Indonesia*, above n 14, Jurisdiction, para 159.

⁸⁴ para 157.

⁸⁵ para 159.

⁸⁶ para 161.

⁸⁷ para 163.

sub-paragraphs of Article XI(4). It held that the disjunctive is not significant. It then continued as follows:

Planet argues that the disjunctive ‘or’ shows that if Indonesia fails to provide its consent in writing within the allocated time, then under sub-paragraph (b) the investor has the right to choose between conciliation and arbitration. A review of Australian BITs containing similar dispute settlement clauses shows that Australia always used the term ‘and’ between these two provisions and that the BIT with Indonesia is the only one where the word ‘or’ appears. Hence, the Tribunal believes that the inclusion of ‘or’ is the result of an infelicitous drafting rather than a deliberate choice entailing specific consequences. In any event, Planet’s argument fails since sub-paragraphs (a) and (b) deal with entirely distinct matters.⁸⁸

The Tribunal finally dismissed the contextual arguments put forward by the applicant with regard to Article XI(3) and Article XI(4), dealing respectively with UNCITRAL arbitration and diplomatic protection. It equally dismissed teleological arguments as the object and purpose of the treaty are neutral and of little assistance for the purpose of interpreting Article XI. It finally held that the interpretation of the ordinary meaning of Article XI(2) and (4) in the light of *this* context leads to the conclusion that Article XI does not contain the parties’ advance consent to ICSID proceedings.

The path followed by the Tribunal seems tortuous and not entirely convincing. It is not clear why the Tribunal first considered Article XI(4) as context of Article XI(2) and then the disjunctive ‘or’—which is located in Article XI(4)—as context of Article XI(2) and (4). It is also difficult to understand how the Tribunal found the ordinary meaning of Article XI(4) clear and only a few paragraphs later described the inclusion of ‘or’ as ‘the result of infelicitous drafting’ and disregarded it on the basis of treaty practice of Australia.⁸⁹ Finally, it is not evident how the contextual considerations developed by the Tribunal provided the definitive argument in support of the interpretation of Article XI.

It is argued that the combined reading of Article XI(2) and (4) could lead to an alternative and perhaps more convincing interpretation of Article XI. The interpreter dealing with paragraphs containing cross-references should carefully set the focus of the interpretative process, especially if the relevant paragraphs are complex or contain infelicitous drafting. In the case of Article XI of the BIT between Australia and Indonesia, the interpreter should have first analysed together the text of paragraphs (2) and (4). As pointed out by the Tribunal, the meaning of Article XI(2) is clear. Under Article XI(2) the investor has the right to submit the dispute *inter alia* to the Centre for settlement either by conciliation or arbitration (sub-paragraph (b)). The definition of the procedure to settle disputes before the Centre continues in Article XI(4). The structure of paragraph 4 is not an example

⁸⁸ para 168.

⁸⁹ On subsequent practice, see below Ch 7 section V.

of clear drafting due to the double use of 'where'. Since under Article XI(2) only the investor can submit a dispute to the Centre, the first eleven words of sub-paragraph (b)—'where that action is taken by an investor of one Party'—are redundant and can be safely removed. The operation is entirely anodyne and serves exclusively to simplify the text, which imposes upon the host State the obligation to consent in writing to the investor's request within 45 days of receiving such a request. Since Article XI(4) refers to both means for the settlement of investment disputes administered by the Centre—namely arbitration and conciliation—it logically follows that the investor must specify in its request the preferred mechanism. Without such indication, it would be impossible for the host State to express its consent.

The host State is expected—if not indeed obliged as suggested by the modal 'shall'—to express its consent with such a mechanism in accordance with Article XI(4)(a). It is through the acceptance by the host State of the means preferred by the investor that the agreement referred to in Article XI(4) may come into existence. Since there is no guarantee that the host State effectively complies with the obligation to give its consent, Article XI(4)(b) provides for a default procedure by granting the investor the right to choose one of the two means offered by the Centre. Such a right makes sense only if the Centre can effectively administer either of the two means in spite of the failure by the host State to consent under Article XI(4)(a).

The disjunctive 'or' is not an obstacle to this interpretation. Indeed, the meaning of Article XI would not be different were the sub-paragraphs of Article XI(4) linked with the conjunction 'and', or separated by a full stop. From this perspective, the if-clause contained in Article XI(4)(b) introduces an alternative route to confer the Centre the competence to settle the dispute either by conciliation or arbitration, at the choice of the investor.

The fact that under ICSID Arbitration Rule 2(1) consent must exist on the day of the filing of a request for arbitration is not an obstacle for the above interpretation. Nothing would prevent the parties to an investment treaty from agreeing that the investor send a request for either arbitration or conciliation to the host State, that the host State has 45 days to consent in writing to the specific mechanism, failure to do which the choice is made by the investor, and that then the request is formally filed at the Centre. The text of Article XI(4)(a) points in this direction as it refers to the request the host State receives 'from the investor'. This seems compatible with the object and purpose of the treaty as well as the ICSID Convention and Arbitration Rules.

The decision on jurisdiction in *Yukos v Russian Federation* offers another interesting example of the importance for the purpose of interpretation of considering preliminarily the relationship between different parts of a provision. The respondent invoked Article 45 of the ECT to challenge the Tribunal jurisdiction. Article 45 governs the provisional application of the ECT. It is a lengthy and complex provision composed of seven paragraphs totalling more than 500 words. The Tribunal started its analysis with an inquiry on the relationship between the

first two paragraphs of Article 45. Under the first paragraph, by signing the treaty each party agrees to apply it provisionally to the extent that such provisional application is not inconsistent with its constitution, laws or regulations. Under Article 45(2)(a), any signatory may, when signing, make a declaration that it is not able to accept provisional application.

The first question addressed by the Tribunal was precisely whether a declaration under Article 45(2) is indispensable in order to invoke the limitation clause of Article 45(2). Determining whether a declaration under Article 45(2) is necessary to invoke the limitation clause under Article 45(1) is certainly an appropriate departing point to deal with the provisional application of the ECT under Article 45(1). Depending on the answer to this question, the Tribunal will focus the interpretative process on Article 45(1) or, alternatively, on Article 45(1) and (2).

The Tribunal convincingly found that ‘nothing in the language of Article 45 suggests that the Limitation Clause in Article 45(1) is dependent on the mandatory making of a declaration under Article 45(2).’⁹⁰ The finding is based essentially on two main literal arguments. First, the ordinary meaning of the modal ‘may’—instead of ‘shall’—used in Article 45(2)(a) reveals the permissive nature of Article 45(2) in clear contrast with the mandatory nature of Article 45(1). Second, the word ‘notwithstanding’ which opens Article 45(2)(a) discloses the self-executing—or better self-standing—character of Article 45(1).

IV. Vague or Imprecise Provisions (FET and MFN)

International investment treaties often contain provisions that are intentionally or accidentally drafted in vague terms. As a result, the interpreter can hardly rely or can rely only to a limited extent on literal interpretation. This is typically the case of the FET standard—arguably the most important standard in investment law⁹¹—and MFN provisions.

The overwhelming majority of investment treaties contain an FET clause.⁹² The text of the clauses almost typically refers to ‘fair and equitable treatment’ although the expressions ‘equitable treatment’⁹³ or ‘equitable and reasonable

⁹⁰ *Yukos Universal Ltd (UK–Isle of Man) v Russian Federation*, PCA Case AA 227; *Hulley Enterprises Ltd v Russian Federation*, PCA Case No AA 226; *Veteran Petroleum Ltd v Russian Federation*, PCA Case No AA 228, Jurisdiction and Admissibility, para 262. See T Gazzini, Provisional Application of the Energy Charter Treaty: The *Yukos* Case (2015) 30 *ICSID Review* 14.

⁹¹ C Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’ (2005) 6 *Journal of World Investment & Trade* 33.

⁹² For a systematic classification and a significant numbers of examples of FET clauses, see I Tudor, above Ch 3, n 39, Appendix III, p 246 ff.

⁹³ See, eg, the BITs between China and the Philippines, Art 3.1 and between China and Pakistan, Art 3.1.