Non-Pecuniary Remedies in ICSID Arbitration

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ICSID tribunals have almost always granted relief in the form of pecuniary damages. Is this due to a limitation contained in the ICSID Convention? Is it due to a limitation inherent in litigation against sovereign states? Can ICSID tribunals issue injunctions and order specific performance, or are they restricted to granting monetary awards?

I. THE ICSID CONVENTION AND ITS DRAFTING HISTORY

The ICSID Convention does not provide for the substance of an award. It states only that the award shall deal with every question submitted to the tribunal.[1] However, the obligation to enforce an award under Article 54 only covers pecuniary obligations:

> Article 54(1)
> 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.

It would be wrong to conclude from this provision that an ICSID tribunal may not order non-pecuniary relief such as an injunction or an order of specific performance. The *travaux préparatoires* would not support such a restrictive interpretation. The deliberations during the drafting of the Convention show clearly that the restriction in Article 54 to pecuniary obligations was based on doubts concerning the feasibility of an enforcement of non-pecuniary obligations and not on a desire to prohibit tribunals from imposing such obligations.[2]

The drafts of the Convention did not contain the restriction to pecuniary obligations.[3] This caused concern about the feasibility of enforcing non-pecuniary obligations arising from awards.[4] The Chairman, Mr Broches, suggested that

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1 Article 48(3).

2 *See History of the Convention*, vol. I (1970), pp. 246, 248, vol. II (1968), pp. 344, 346, 347, 425, 990, 903, 991, 1019, 1026, 1029.

3 *History*, vol. I, pp. 246, 248.

4 *History*, vol. II, pp. 344, 346, 347, 425.

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enforcement be restricted to the award's pecuniary obligations.[5] He emphasized that tribunals could well order a party to perform or to refrain from certain acts but all that could be enforced would be the obligation to pay damages if the party did not comply with the order.[6] In the course of further discussion, Mr Broches pointed out that the *res judicata* effect of the entire award and the obligation of parties under Article 53 to carry out the award would not be affected by the restriction of the award's enforceability to its pecuniary obligations.[7]

Therefore, the Convention's drafting history indicates that an ICSID tribunal has the power not only to award monetary damages but also to order a party to perform a specific act or to desist from a particular course of action.

II. NON-ICSID LITIGATION AGAINST STATES

The power of a court or tribunal to provide non-pecuniary relief against a state is supported by international judicial practice.

(a) The International Court of Justice

The International Court of Justice (ICJ) has ordered relief in the form of judgments for specific performance rather than monetary damages in numerous cases.[8] This practice is usually founded on the judgment of the Permanent Court of International Justice in the *Factory at Chorzów* case, where the Court said:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[9]

The following examples illustrate the practice of the ICJ on this point.

In the *Temple* case,[10] the ICJ found that the disputed temple was situated in the territory of Cambodia. It held 'that Thailand is under an obligation to withdraw any military or police forces' from the Temple. The ICJ also held 'that Thailand is under an obligation to restore to Cambodia any objects' that it may have removed from the Temple.[11]

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[5] *ibid.* p. 990.

[6] *ibid.* pp. 903, 991.

[7] *ibid.* p. 1019; *see also* pp. 1026, 1029. For a more detailed analysis of the *travaux préparatoires* on this point *see* A. Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' in (1987) 2 *ICSID Rev.* 287 at 303, 315, 316, 328–329.

[8] For more comprehensive treatment see I. Brownlie, 'Remedies in the International Court of Justice' in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings* (Cambridge, 1996), pp. 557, 562; C. Gray, *Judicial Remedies in International Law* (Oxford, 1987), pp. 64–68, 95–96.

[9] *Factory at Chorzów,* Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.

[10] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand)* [1962] ICJ Rep. 5.

[11] *ibid.* p. 37.

In the *Teheran Hostages* case,[12] the ICJ found that the occupation of the US Embassy was unlawful. It held that Iran 'must immediately take all steps to redress the situation' and, in particular, 'must immediately terminate the unlawful detention' of the persons concerned. In addition, Iran 'must ensure that all the said persons have the necessary means of leaving Iranian territory' and 'must immediately place in the hands of the protecting power the premises, property, archives and documents of the United States Embassy'.[13]

In the *Nicaragua* case,[14] the ICJ found that the United States was in breach of its obligations under international law. It held that 'the United States of America is under a duty immediately to cease and refrain from all such acts as may constitute breaches of the foregoing legal obligations'.[15]

In the *Arrest Warrant* case,[16] the ICJ found that Belgium had violated international law by allowing a Belgian judge to issue an arrest warrant against the Foreign Minister of the Congo. It held 'that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated'.[17]

In the *La Grand*[18] and *Avena*[19] cases, the ICJ found that the United States had violated Article 36 paragraph 1(b) of the Vienna Convention on Consular Relations by not informing foreign detainees of their rights under the Convention and by not notifying the appropriate consular posts of the detentions. It held that 'the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences'.[20]

These examples clearly demonstrate the ICJ's power to order specific performance against states. In fact, in cases before the ICJ, awards of monetary damages would be unusual while orders of specific performance or mere findings of illegality would be the normal type of relief.

(b) *Non-ICSID Arbitration*

Non-ICSID international arbitration practice also offers instances in which tribunals have ordered specific performance against states.[21]

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12 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* [1980] ICJ Rep. 1.

13 *ibid.* pp. 44–45.

14 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)* [1986] ICJ Rep. 14.

15 *ibid.* p. 149.

16 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* [2002] ICJ Rep. 33.

17 *See* final paragraph of the judgment's *dispositif.*

18 *La Grand Case (Germany* v. *United States)* [2001] ICJ Rep. 513.

19 *Case Concerning Avena and other Mexican Nationals (Mexico* v. *United States)*, 31 March 2004, http://212.153.43.18/icjwww/idocket/imus/imusframe.htm.

20 *See* subpara. (9) of the judgment's *dispositif* in the *Avena* case. The ICJ considered but rejected Mexico's request for an order to cease the wrongful acts seeing that a continuing violation had not been established (at paras 144–148). The ICJ also rejected Mexico's submission that the United States was obliged to annul the convictions and sentences by way of *restitutio in integrum* (at para. 152).

21 See also Gray, *supra* n. 8 at pp. 12–17, 193–200.

In the *Martini* case,[22] the Venezuelan Federal Court of Cassation had cancelled Martini's concession contract for alleged non-performance and had ordered Martini to pay damages. Italy, exercising diplomatic protection, brought the case before an international tribunal. The tribunal found that there was manifest injustice in the Venezuelan court's decision and that 'the Venezuelan Government is bound to recognize, as a right of reparation, the annulment of the obligations of payment imposed upon the Martini company' by the court's decision.[23]

The *Trail Smelter* case[24] concerned liability for toxic fumes released by a smelting factory in British Columbia across the border into Washington State. The tribunal found not only that Canada was liable for the damage inflicted upon US territory but also that 'the Trail Smelter shall refrain from causing damage in the State of Washington in the future' to the extent set forth in a control regime established by the Tribunal.[25]

In the *Case Concerning the Rainbow Warrior Affair*,[26] the tribunal found that France was in violation of its obligations under an agreement between the two states by prematurely repatriating its two agents who had sunk by means of explosives a vessel in Auckland Harbour. New Zealand sought an order for the return of the two agents to the remote island at which they were to be kept for three years. The tribunal addressed the question of its power to order the agents' return in the following terms:

> The question which arises is whether an order for the cessation or discontinuance of the wrongful omission may be issued in the present circumstances.
>
> The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.[27]

In the particular circumstances of the case, the tribunal declined to issue the order to return the agents since the international obligation to keep them on the remote island had expired with the passage of the three-year period.[28]

This last case is particularly instructive for the question of a tribunal's inherent power to order specific performance. The tribunal found that there was no need for such a power to be expressly conferred upon it. Rather, the power to order the cessation of the illegal behaviour was inherent in the powers of a competent tribunal.

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22 *Arbitral Award in the Martini Case (Italy* v. *Venezuela)*, 3 May 1930, (1931) 25 AJIL 554.
23 *ibid.* p. 585.
24 *Trail Smelter Case (United States* v. *Canada)*, Award, 16 April 1938 and 11 March 1941, 3 RIAA 1905.
25 *ibid.* p. 1934.
26 *Case Concerning the Rainbow Warrior Affair (New Zealand* v. *France)*, Award, 30 April 1990, 20 RIAA 217.
27 *ibid.* p. 270.
28 *ibid.* p. 271.

All the above cases concerned litigation between states. Is the power of a court or tribunal to order specific performance a peculiarity of inter-state litigation? It does not seem so. Mixed arbitration practice also contains instances in which tribunals have granted orders for specific performance or injunctions.

The most prominent example is *Texaco (TOPCO)* v. *Libyan Arab Republic.*[29] The tribunal found that Libya by its nationalization measures had acted in violation of the Deeds of Concession between the claimants and the state. A review of judicial practice and of scholarly authorities led the tribunal to hold that the primary remedy would be *restitutio in integrum.*[30] The fact that in the majority of cases restitution was impossible or impracticable and that pecuniary compensation was much more frequent did not alter this fact.[31] '[A]ny possible award of damages should necessarily be subsidiary to the principal remedy of performance itself.'[32] Therefore, the tribunal decided that 'the Libyan Government, the defendant, is legally bound to perform these contracts and to give them full effect'.[33]

III. ICSID ARBITRATION

The fact that ICSID tribunals have granted pecuniary relief rather than ordered specific performance is not based on any fundamental restriction on their power to do so. Rather, investors almost always seem to frame their claims in terms of monetary damages.[34]

Antoine Goetz v. *Burundi*[35] constitutes an exception. The claimants, Belgian nationals, owned a company incorporated in Burundi which had been granted a certificate of free zone. The free zone regime conferred tax and customs exemptions. When Burundi withdrew the certificate the investors instituted ICSID arbitration. The claimants requested the annulment of the decision withdrawing the free zone certificate and, as a subsidiary claim, that Burundi be ordered to pay damages.[36]

The tribunal, aware of parallel settlement negotiations between the parties, first rendered an interim decision on liability.[37] It found that the withdrawal of the certificate of free zone constituted a measure tantamount to an expropriation in the sense of the Belgium–Burundi investment treaty. It gave Burundi a choice

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29 *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, 53 ILR 389.

30 *ibid.* pp. 497–504.

31 *ibid.* pp. 505–507.

32 *ibid.* p. 508.

33 *ibid.* p. 511.

34 In *Tecmed* v. *Mexico*, a case decided under the ICSID Additional Facility, the claimant primarily sought monetary damages. It requested restitution in kind only secondarily at the same time, considering it 'absolutely impossible'. Taking into account that the claimant primarily sought monetary damages, the tribunal did not consider the admissibility or inadmissibility of restitution in kind. *See Tecnicas Medioambientales Tecmed S.A.* v. *United Mexican States*, Award, 29 May 2003, (2004) 43 ILM 133, 182 at para. 183.

35 *Antoine Goetz et consorts* v. *République du Burundi*, Award, 10 February 1999, (2000) 15 *ICSID Rev.* 457.

36 *ibid.* p. 485.

37 Decision of 2 September 1998, (2000) 15 *ICSID Rev.* 459.

of giving an effective and adequate indemnity or of revoking the decision that had withdrawn the certificate. The tribunal said:

> it falls to the Republic of Burundi, in order to establish the conformity with international law of the disputed decision to withdraw the certificate, to give an adequate and effective indemnity to the claimants as envisaged in Article 4 of the Belgium-Burundi investment treaty, unless it prefers to return the benefit of the free zone regime to them. The choice lies within the sovereign discretion of the Burundian government. If one of these two measures is not taken within a reasonable period, the Republic of Burundi will have committed an act contrary to international law the consequences of which it would be left to the Tribunal to ascertain.[38]

A few months later, the parties reached a settlement, which the tribunal embodied into its award.[39] Under the terms of the settlement, Burundi was not only to reimburse the taxes and customs duties that had been imposed illegally upon the investor, but also to create a new free zone regime.[40]

The authority of *Goetz* for the present issue is limited by two peculiarities of the case. First, neither of the two alternatives suggested by the tribunal in its interim decision on liability was a remedy for an illegal act. Rather, the tribunal offered Burundi two ways to avoid responsibility in the first place. The indemnity proposed by the tribunal was not damages for an illegal expropriation but compensation to render the expropriation lawful.

Secondly, the creation of the new free zones regime, although prescribed in the award, was based on an agreement of the parties. Therefore, it is doubtful whether it can be cited as an example for a tribunal awarding non-pecuniary relief.

The power of an ICSID tribunal to order specific performance was squarely addressed in the decision on jurisdiction in *Enron* v. *Argentina*.[41] The case concerns stamp taxes assessed but not yet collected by several provinces of Argentina. The claimants considered these taxes tantamount to an expropriation. They requested that the taxes be declared unlawful and that they be annulled and their collection permanently enjoined.[42]

Argentina, in its objections to jurisdiction, argued that the tribunal did not have the power to order injunctive relief. Under Argentina's theory, the tribunal could only make a finding that there was an illegal expropriation and award compensation, if appropriate. In particular, Argentina argued that an ICSID

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38 *ibid.* p. 516.

39 Under Rule 43(2) of the ICSID Arbitration Rules the tribunal may embody an agreed settlement into its award if so requested by the parties. *See also Tanzania Electric Supply Company Ltd* v. *Independent Power Tanzania Ltd*, Award, 12 July 2001 (www.worldbank.org/icsid/cases/tanesco-full.pdf), in which the investor rather than the host state or its agency was the respondent. The tribunal held that the contract between the parties remained valid and effective and that the parties were to comply with their obligations thereunder. An agreement submitted by the parties, detailing the terms for the performance of the contract, was embodied into the award in accordance with Arbitration Rule 43(2).

40 *Goetz, supra* n. 35 at pp. 456, 518 *et seq.*

41 *Enron Corp. and Ponderosa Assets, LP* v. *Argentine Republic*, Decision on Jurisdiction, 14 January 2004 (www.asil.org/ilib/Enron.pdf).

42 *ibid.* para. 77.

tribunal cannot impede an expropriation that falls within the ambit of state sovereignty. In Argentina's view, the tribunal could only establish whether there had been an illegal expropriation and determine the corresponding compensation.[43] The claimants, on the other hand, argued that an ICSID award can deal with pecuniary and non-pecuniary determinations, including specific performance and an injunction.[44]

The tribunal found that it had the power to order specific performance:

> An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available.[45]

After referring to the *Rainbow Warrior* award, to the award in *Goetz* v. *Burundi* and to a scholarly opinion,[46] the tribunal said:

> The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts. Jurisdiction is therefore also affirmed on this ground. What kind of measures might or might not be justified, whether the acts complained of meet the standards set out in the *Rainbow Warrior*, and how the issue of implementation that the parties have also discussed would be handled, if appropriate, are all matters that belong to the merits.[47]

IV. CONCLUSION

The power of an ICSID tribunal clearly extends to ordering specific performance. This conclusion follows from the *travaux préparatoires* to the ICSID Convention as well as from international judicial practice. The ability to order specific performance is a power that is inherent in a tribunal's jurisdiction. There is no merit to the argument that an ICSID tribunal would thereby impede a state in the exercise of its sovereign rights. An obligation imposed by an award that is expressed not in monetary terms but in terms of an obligation to perform a particular act or to refrain from a certain course of action is equally binding and gives rise to the effect of *res judicata.*

At the same time it is clear that the parties may restrict the tribunal's power to ordering certain forms of relief.[48] States may prefer having to pay damages rather than being enjoined to withdraw measures that have been found illegal. For

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[43] *ibid.* para. 76.

[44] *ibid.* para. 77. The author provided a legal opinion on behalf of the claimant.

[45] *ibid.* para. 79.

[46] C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, 2001), p. 1126.

[47] *Enron, supra* n. 41, Decision on Jurisdiction, at para. 81.

[48] Recent US treaties restrict the power of tribunals deciding investor-state disputes, including ICSID tribunals, to awarding only monetary damages and restitution of property in which case the award shall provide that the respondent may pay monetary damages in lieu of restitution. *See* the respective Arts 10.25 in the Free Trade Agreements with Chile and Singapore, both in force 1 January 2004 (www.tcc.mac.doc.gov/pdf/singaporeFTA/text_final.pdf). *See also* to the same effect Art. 34 of the Draft Updated United States Model BIT of 5 February 2004(www.state.gov/e/eb/rls/prsrl/28923.htm).

instance, Article 1135 of the NAFTA[49] provides that a tribunal may award only monetary damages or the restitution of property, in which case the state concerned may elect to pay monetary damages in lieu of restitution. Similarly, Article 26(8) of the Energy Charter Treaty provides that an award concerning a measure of a subnational government or authority shall provide that the state may pay monetary damages in lieu of any other remedy granted. These special provisions only underscore the basic capacity of an ICSID tribunal to order non-pecuniary remedies.

There is a wide range of possibilities for non-pecuniary obligations that awards might impose. In addition to the restitution of seized property, the return of a licence or the non-collection of unreasonable taxes, the possibilities include the granting of a permission to transfer currency and the discontinuance of harassment of the investor's personnel.

Possible obligations imposed upon the investor rather than the host state might include the employment of local personnel or the reinstatement of wrongfully discharged personnel. Other examples might include compliance with legally imposed performance requirements such as for the use of local components.

The fact that in the cases so far published, ICSID tribunals have nearly always framed the obligations imposed by their awards in pecuniary terms is not due to a belief that they lack the power to proceed otherwise. Rather, the cases involved situations in which the investment relationship had broken down and the claimants have preferred to frame their demands in monetary terms.

It is entirely possible that future cases will involve disputes arising from ongoing relationships in which awards providing for specific performance or injunctions are appropriate. Tribunals imposing such non-pecuniary obligations should keep the impossibility of enforcing them in mind. Such awards should provide for a pecuniary alternative in case of non-performance, such as liquidated damages, penalties or another obligation to pay a certain amount of money.[50]

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49 ICSID arbitration is currently unavailable under the NAFTA since neither Canada nor Mexico has ratified the ICSID Convention. The ICSID Additional Facility is available in NAFTA arbitration involving either a US investor or an investment in the United States.

50 *See also* A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' in (1972-II) 136 *Recueil des Cours* 331, at 400.