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ALTERNATIVE REMEDIES IN INVESTMENT ARBITRATION*

Christoph Schreuer

We tend to take it for granted that the objective of international arbitration is to obtain the payment of compensation. This is certainly true, but it may be questioned whether it is the whole truth. Is the outcome of a successful pursuit of international arbitration always a pecuniary remedy in the form of damages or compensation, or are there other potential rewards?

I. THREE TYPES OF REMEDIES

In international law, the *casus classicus* concerning remedies for damage arising from an illegal act is the Judgment of the Permanent Court of International Justice in the *Chorzów* case. In that case, the PCIJ 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 reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to

* This article is an adapted version of a keynote address given at the Fourth Annual Damages in International Arbitration Conference in Vienna on 2 October 2015.

determine the amount of compensation due for an act contrary to international law.¹

Under this statement, restitution in kind is the primary remedy. Payment of compensation is to take its place if restitution is not possible.

The International Law Commission's Articles on State Responsibility² ('ILC Articles') foresee three forms of reparation: restitution, compensation and satisfaction.³ Article 34, listing the forms of reparation, states:

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 34 points out that the three forms of reparation are not mutually exclusive but may have to be applied in combination. The Commentary to the ILC Articles elaborates this point:

[F]ull reparation may only be achieved in particular cases by the combination of different forms of reparation. ... Wiping out all the consequences of

¹ *Factory at Chorzów*, Indemnity, Merits, 13 September 1928, P.C.I.J., Series A-No. 17, p. 47.

² See *Annual Report of the International Law Commission on Its Fifty-third Session*, A/56/10, ch. IV. Resolution 56/83 adopted by the UN General Assembly on 12 December 2001, by which the General Assembly took note of the *ILC Articles* and recommended them to the attention of Governments. See also *Crawford, J., The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

³ Strictly speaking, Chapter II of Part Two of the ILC Articles dealing with reparation for injury does not apply beyond purely inter-state disputes. See Article 33(2): "This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State." In *Quiborax v. Bolivia*, Award, 16 September 2015, at para. 555, the Tribunal said on this point: "That said, the ILC Articles restate customary international law and its rules on reparation have served as guidance to many tribunals in investor-State disputes. In this Tribunal's view, the remedies outlined by the ILC Articles may apply in investor-state arbitration depending on the nature of the remedy and of the injury which it is meant to repair."

the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.⁴

The order in which Article 34 lists the three forms of reparation is significant. Restitution is to be the primary remedy. Compensation is due insofar as restitution does not make good the damage. Satisfaction is subsidiary to restitution and compensation: the obligation to give satisfaction exists insofar as restitution or compensation do not provide a remedy. Therefore, there is a clear hierarchy among the three remedies. This is clear from the more detailed description of the three forms of reparation in the ILC Articles:

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37. Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act

⁴ Commentary on ILC Article 34, para. (2).

insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

The three forms of reparation, as described in the ILC Articles, take account of the principle of proportionality. Restitution is due only if it does not involve a disproportionate burden. If it does, compensation is to take its place. Compensation is to cover only financially assessable damage actually incurred. Satisfaction shall not be out of proportion to the injury.

In the practice of investment tribunals, compensation is so dominant that it often eclipses other remedies. So much so that their availability in investment arbitration is sometimes cast into doubt. Respondent States have at times contested the admissibility of non-pecuniary remedies in investment arbitration. But their availability seems to be beyond doubt in principle.⁵

The Tribunal in *Micula v. Romania* was particularly clear on this point. In the Decision on Jurisdiction and Admissibility it said:

Under the ICSID Convention, a tribunal has the power to order pecuniary or nonpecuniary remedies, including restitution, i.e., re-establishing the situation

⁵ S. Wittich, Investment Arbitration: Remedies, in: M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds.), *International Investment Law* (2015) 1391; G. Stephens-Chu, Is It Always All about the Money? The Appropriateness of Non-Pecuniary Remedies in Investment Treaty Arbitration, 30 *Arbitration International* (2014) 661; P. Dumberry, Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States, in: *Investor-State Arbitration Disputes*, *Journal of International Dispute Settlement* (2012) 1; M.E. Schneider, J. Knoll (eds.), *Performance as a Remedy: Non-Monetary Relief in International Arbitration*, ASA Special Series No. 30 (2011); S. Hindelang, Restitution and Compensation – Reconstructing the Relationship in Investment Treaty Law, in: R. Hofmann, C. Tams (eds.), *International Investment Law and General International Law* (2011) 161; U. Kriebaum, Restitution in International Investment Law, in: *loc. cit.* p. 201; C. Schreuer, Non-Pecuniary Remedies in ICSID Arbitration, 20 *Arbitration International* (2004) 325.

which existed before a wrongful act was committed.⁶ As Respondent itself admits, restitution is, in theory, a remedy that is available under the ICSID Convention (...). That admission essentially disposes of the objection as an objection to jurisdiction and admissibility. The fact that restitution is a rarely ordered remedy is not relevant at this stage of the proceedings.⁷

Arguments against the permissibility of non-pecuniary remedies sometimes seek to rely on Article 54 of the ICSID Convention. That provision foresees enforcement only for pecuniary obligations.⁸ However, the availability of a specific mechanism for the enforcement of pecuniary obligations does not support an argument against the availability of non-pecuniary relief. The Convention's *travaux* clearly indicate that tribunals can order a party to perform or to refrain from certain acts. The restriction in Article 54 to pecuniary obligations was the result of doubts concerning the feasibility of an enforcement of non-pecuniary obligations and not of a desire to prohibit tribunals from imposing such obligations.⁹ The Chairman, Mr. Broches, 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.¹⁰ Mr. Broches also pointed out that the *res judicata* effect of the entire award and the obligation of parties under Article 53 to

⁶ The Tribunal relied on Article 35 of the ILC Articles.

⁷ *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 166.

⁸ Article 54(1) of the ICSID Convention provides in relevant part: "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."

⁹ See History of the Convention, Vol. I, pp. 246, 248, Vol. II, pp. 344, 346, 347, 425, 990, 903, 991, 1019, 1026, 1029.

¹⁰ At pp. 903, 991.

carry out the award would not be affected by the restriction of the award's enforceability to its pecuniary obligations.¹¹

In *Micula v. Romania*, the Tribunal's answer to the argument against non-pecuniary remedies, based on Article 54(1) was clear:

The Tribunal is aware that, although Article 54(1) of the ICSID Convention provides that a state shall recognize an award as binding, it then proceeds to limit a state's obligation to enforce an award to the pecuniary obligations imposed by that award. However, this should not be interpreted as limiting ICSID tribunals to awarding pecuniary relief. As the Tribunal already stated, awarding remedies and enforcement are two distinct concepts. Moreover, the *travaux préparatoires* of the ICSID Convention confirm 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." Indeed, the fact that Article 54 found it necessary to specify that only pecuniary obligations could be enforced confirms that a tribunal has the power to order non-pecuniary relief.¹²

Most treaties providing for consent to arbitration do not address the issue of available remedies. An exception is the BIT between Austria and Bosnia Herzegovina of 2 October 2000. It carefully lists the forms of relief that a tribunal may grant through an Award:

¹¹ At 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, 2 ICSID Review—Foreign Investment Law Journal (1987) 287 at 303, 315, 316, 328/9.

¹² *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, Award, 11 December 2013, para. 1310. Footnotes omitted.

- (1) Arbitration awards, which may include an award of interest, shall be final and binding upon the parties to the dispute and may provide the following forms of relief:
 - (a) a declaration that the Contracting Party has failed to comply with its obligations under this Agreement;
 - (b) pecuniary compensation, which shall include interest from the time the loss or damage has occurred until time of payment;
 - (c) restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and
 - (d) with the Agreement of the parties to the dispute, any other form of relief.

What is interesting about this provision is not only that it lists all three types remedies but also their order. A declaratory remedy ('satisfaction' in the ILC's terminology) comes first. Pecuniary compensation is second. Restitution comes third. This is a reversal of the order in the ILC Articles, which envisage restitution as the primary remedy, followed by pecuniary compensation and satisfaction. Moreover, under the Austria - Bosnia Herzegovina BIT, the respondent State may opt out of restitution where it is 'not practicable' by choosing to pay pecuniary compensation.

II. RESTITUTION

Restitution is not a precise term. In its simplest form, it means the reestablishment of the status *quo ante*, i.e. the situation that existed before the internationally wrongful act. However, in a wider sense, restitution may also cover various forms of specific performance. Restitution most closely conforms to the general principle of reparation because it should wipe out, as far as possible, the consequences of the wrongful act.

As the ILC's Commentary to Article 35 points out, restitution may take the form of (1) material restoration, (2) a reversal of some juridical act, or (3) some combination of them. This may involve the amendment or revocation of legislation enacted in

violation of international law or the rescission of an administrative or judicial measure unlawfully adopted in respect to a foreign investor or its property.¹³

There is a wide range of possibilities for non-pecuniary obligations that awards might impose. With respect to the foreign investor, they include the employment of local personnel or the reinstatement of wrongfully discharged personnel.¹⁴ Another example might be compliance with performance requirements like the use of local components. Possible obligations imposed upon the host State would include the restitution of seized property, the return of an investment license that has been withdrawn, the granting of permission to transfer currency, the discontinuance of harassment of the investor's personnel, or the desistance from imposing unreasonable taxes.¹⁵

A. Limitations

Although the ILC Articles list restitution as the primary remedy, the ILC recognised that it is subject to serious practical limitation. Article 35 of the ILC Articles lists two such limitations to the remedy of restitution:

- a) It is available only if it is not materially impossible, and
- b) It is available only if it does not involve a disproportionate burden compared to compensation.

The ILC's Commentary points out that "restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these."¹⁶ The position of third parties may have to be taken into account to answer the question of material impossibility:

¹³ Commentary on ILC Article 35, para. (5).

¹⁴ See the Statement by the US Department of State in connection with the enactment of implementing legislation to the ICSID Convention, 5 ILM 820, 824 (1966).

¹⁵ C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention A Commentary* (2009) Article 54, para. 75.

¹⁶ Commentary on ILC Article 35, para. (8).

But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.¹⁷

In some cases, investment tribunals held that restitution was indeed materially impossible. *Al-Bahloul v. Tajikistan* arose from the host State's failure to issue necessary licenses for hydrocarbons explorations. The Tribunal found that specific performance was a permissible remedy in international law. However, nine years had elapsed since the investor had left the country and other investors had since become active in the areas in question. Therefore, specific performance through the issuance of new licenses was no longer an option. Under these circumstances, the Tribunal concluded that it was materially impossible to implement a remedy of specific performance.¹⁸

Petrobart v. Kyrgyz Republic concerned a contract for the delivery of gas condensate. After the contract's termination, Petrobart claimed damages. The Respondent stated that specific performance was the primary remedy and that the Republic could be ordered to accept delivery and pay for it. Petrobart agreed that specific performance was a primary remedy, in principle, but argued that for a variety of reasons this was no longer possible in the particular case. The most important reason why it would have been impossible to resume delivery was because Petrobart was no longer engaged in Kyrgyzstan. The Tribunal agreed that under these circumstances specific performance was materially impossible. It said:

The Arbitral Tribunal notes Petrobart's explanation that the company no longer has any activity in the Kyrgyz Republic and that its supply contract with Uzneftegazdobicha is no longer in operation. In such circumstances, the Arbitral Tribunal considers that specific performance is no longer a practical option

¹⁷ Commentary on ILC Article 35, para. (10).

¹⁸ *Al-Bahloul v. Tajikistan*, Final Award, 8 June 2010, paras. 47-63.

and finds that also in regard to lost profits monetary compensation would be the only appropriate remedy in this case.¹⁹

Alpha v. Ukraine concerned Agreements on Joint Investment Activities (JAAs) for the restoration and operation of a hotel. After the suspension of payments, the Claimant instituted ICSID proceedings in which it contended that it was entitled to the restoration of the *status quo ante*. The Tribunal found that the passage of time had made restitution materially impossible. It said:

At this stage, more than six years after the cessation of payments, it is the view of the Tribunal that it is not possible to restore the *status quo ante*. Compensation is, therefore, the appropriate remedy. ... The Tribunal notes, however, that the compensation it will award is intended to substitute for the restoration of the *status quo ante*, that is, it is intended to put Claimant in the situation as if the JAAs had been properly performed. Therefore, once Claimant is awarded compensation, it will have no right to specific performance.²⁰

A frequently advanced argument is that a State cannot or should not be compelled to reverse action that it has taken in its official capacity. Some tribunals have accepted this reasoning and have found that the respondent State's sovereignty made an order of restitution or specific performance impossible.²¹ Already in *British Petroleum v. Libya*, the Tribunal said:

[W]hen by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalisation of the enterprise and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of

¹⁹ *Petrobart v. Kyrgyzstan*, Award, 29 March 2005, p. 78.

²⁰ *Alpha v. Ukraine*, Award, 8 Nov. 2010, para. 436.

²¹ See *LIAMCO v. Libya*, Award, 12 April 1977, 20 International Legal Materials (1981) 1 at 63-64.

the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages.²²

In *LG&E v. Argentina*, the Tribunal had found in its Decision on Liability that, upon termination of the State of necessity, Argentina should have either re-established the tariff scheme offered to LG&E or compensated the Claimants.²³ Argentina declined to restore its tariff obligations. The Tribunal refused to order Argentina to restore the gas tariff that it had unlawfully abrogated because doing so would be an undue interference with its sovereignty. The Tribunal said:

[T]he Tribunal cannot go beyond its fiat in the Decision on Liability. The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty. Consequently, the Tribunal arrives at the same conclusion: the need to order and quantify compensation.²⁴

In *Occidental v. Ecuador*, the claimants requested provisional measures enjoining Ecuador from occupying their facilities and from preventing the investors' continuation of their activities. The Tribunal rejected restitution, relying on both limitations in Article 35 of the ILC Articles. First, it found that specific performance was impossible. In a variation on the wording of Article 35, which uses the term "materially impossible", the Tribunal found restitution "legally impossible":

It is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's

²² *British Petroleum v. Libya*, Award, 10 October 1973, 53 International Law Reports 297, 354.

²³ *LG&E v. Argentina*, Decision on Liability, 3 October 2006, para. 265.

²⁴ *LG&E v. Argentina*, Award, 25 July 2007, para. 87.

entitlement, specific performance must be deemed legally impossible.²⁵

Second, the Tribunal also found that *restitutio in integrum* would be a disproportionate interference:

To impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by the State, would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation.²⁶

Despite these categorical statements, the rejection of specific performance in cases involving States as respondents is by no means universal. As demonstrated below, in certain cases tribunals have ordered States to make restitution or to act in a particular way.

B. Choice of Remedies

One possibility to resolve the dilemma between restitution and compensation is to give the parties, or one of the parties, a choice. Article 43 of the ILC Articles states that the injured party may specify what form reparation should take. In investment cases, it is usually not the injured party or claimant but the respondent State that is given the choice how to discharge its obligations.

Article 1135(1) of the NAFTA provides that a tribunal may award monetary compensation and restitution either separately or in combination. If the Tribunal awards restitution of property, "the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution."

²⁵ *Occidental v. Ecuador*, Decision on Provisional Measures, 17 Aug 2007, para. 79. The Tribunal distinguished *Texaco v. Libya* and relied on *LIAMCO v. Libya* and *BP v. Libya*.

²⁶ At para. 84.

The US Model BIT of 2012 contains a similar provision on the choice of remedies by the respondent State. Its Article 34 provides in relevant part:

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:
 - (a) monetary damages and any applicable interest; and
 - (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

The Energy Charter Treaty (ECT) contains a similar provision with respect to remedies for measures of sub-national entities. Article 26(8) provides in relevant part:

An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted.

Even without specific treaty authorizations, some tribunals have offered respondent states a choice of means to make reparation.

In *Antoine Goetz v. Burundi*,²⁷ the claimants had held a free zone certificate conferring tax and customs exemptions. After Burundi had withdrawn the certificate, the investors instituted ICSID arbitration requesting the cancellation of the certificate's withdrawal and, subsidiarily, the payment of damages.

The Tribunal found that the withdrawal of the certificate constituted a measure tantamount to an expropriation. It gave Burundi a choice between paying an effective and adequate indemnity and returning the benefits of the free zone regime. The Tribunal said:

²⁷ *Antoine Goetz et consorts c. République du Burundi*, Award, 10 February 1999.

... il incombe à la République du Burundi, en vue d'établir la licéité internationale de la décision litigieuse de retrait de l'agrément, d'accorder aux requérants l'indemnité adéquate et effective prévue à l'article 4 de la Convention belgo-burundaise de protection des investissements, à moins qu'elle ne préfère leur restituer le bénéfice du régime de la zone franche. Le choix relève de la décision souveraine du Gouvernement burundais. Faute de prendre dans un délai raisonnable aucune de ces deux mesures, la République du Burundi commettrait un acte internationalement illicite dont il appartiendrait au Tribunal de tirer les conséquences appropriées.²⁸

[... 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.]²⁹

The parties reached a settlement, which the Tribunal embodied into its Award.³⁰ Under the terms of the settlement, Burundi undertook not only to reimburse the taxes and customs duties that it had imposed illegally upon the investor but also to create a new free zone regime.³¹

²⁸ At para. 133.

²⁹ The translation is from 6 ICSID Reports 44.

³⁰ 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.

³¹ See 15 ICSID Review – FILJ (2000) 518 *et seq.*

Strictly speaking, neither of the two alternatives suggested by the Tribunal was a remedy for an illegal act. The restitution and the indemnity proposed by the Tribunal were not remedies for an illegal expropriation but, instead, steps to forestall the illegality of the expropriation.

*Arif v. Moldova*³² related to the delayed or prevented opening of duty free stores and to the breach of an exclusivity undertaking. The initiative for the offer of a choice of remedies came from the respondent. Moldova argued that it should have the opportunity to provide restitution as an alternative to paying damages. This would not only restore the claimant to the position he would have been in without the violation but would also avoid the uncertainties of the calculation of damages.³³ The Tribunal noted that the general position in international law is that the injured State may elect its preferred form of reparation. It also said that restitution was more consistent with the objectives of bilateral investment treaties because it preserves the investment and the relationship between investor and host State.³⁴ The Tribunal offered the parties an alternative between restitution and compensation:

The Tribunal considers restitution to be the preferable remedy, but as in the present case Respondent has not been able to confirm that restitution is possible, and the Tribunal cannot supervise any restitutionary remedy, the best course is to order restitution and compensation as alternatives, with the remedy of compensation suspended for a period of ninety days. This provides Respondent with the opportunity, in light of the findings of this award, to formulate and propose to Claimant the exact mechanism of restitution. If restitution is not possible, or the terms of restitution proposed by Respondent are not satisfactory to Claimant then the damages awarded will satisfy the violation of Claimant's right to fair and equitable treatment. This solution provides a final opportunity

³² *Mr. Franck Charles Arif v. Republic of Moldova*, Award, 8 April 2013.

³³ At para. 569.

³⁴ At para. 570.

to preserve the investment, while also preserving Claimant's right to damages if a satisfactory restitutionary solution cannot be found.³⁵

Therefore, the Tribunal gave the respondent an opportunity to make an offer of restitution. If the offer turned out to be unacceptable for the Claimant, it had the option to elect the compensation quantified in the Award.³⁶

C. *Payment as Specific Performance*

In some cases, the tribunals ordered specific performance, but the performance related to the payment of money. These orders of restitution or specific performance concerned the non-collection of taxes illegally assessed, the return of money illegally collected, or the payment of money improperly withheld.

*Enron v. Argentina*³⁷ concerned stamp taxes assessed but not yet collected. The Claimants requested that the Tribunal declare the taxes unlawful and permanently enjoin their collection.³⁸ 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 tribunal lacks the power to impede an expropriation that falls within the ambit of State sovereignty.³⁹ 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.⁴⁰ The Tribunal found that it had the power to order specific performance:

³⁵ At para. 571.

³⁶ At para. 572.

³⁷ *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, Decision on Jurisdiction, 14 January 2004.

³⁸ At para. 77.

³⁹ At para. 76.

⁴⁰ At para. 77.

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. ... 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.⁴¹

In *Semos v. Mali*, the state had collected stamp duty in violation of prior undertakings. The Award ordered Mali to reimburse the stamp duty unduly collected.⁴²

In *Nycomb v. Latvia*, the claimant had been promised a double tariff for electric power delivered in connection with its investment in an electricity generating installation. The Tribunal ordered the respondent State to ensure the payment at the double tariff for the remainder of the contractual period. The Tribunal said:

[T]he Tribunal considers it to be a continuing obligation upon the Republic to ensure the payment at the double tariff for electric power delivered under the Contract for the rest of the eight year period, and therefore gives an order for the Republic to fulfil its obligation under the Treaty to protect the Claimant's investment.⁴³

In these cases, the tribunals' orders were clearly distinct from damages awards. They were directed at the non-collection, restitution, and payment of money by way of specific performance. In economic terms, the orders for restitution of money and specific performance to pay money resemble compensation. But they were

⁴¹ At paras. 79, 81. In its Award of 22 May 2007 the Tribunal awarded monetary compensation.

⁴² *Société d'Exploitation des Mines d'Or de Sadiola SA ("Semos") v. Republic of Mali*, Award, 25 February 2003, 10 ICSID Reports 114.

⁴³ *Nycomb Synergetics Technology Holding AB v. The Republic of Latvia*, Arbitral Award, 16 December 2003, sec. 5.2 b), p. 41.

directed at re-establishing the situation as it existed before the State's interference rather than at the payment of damages.

D. Non-Pecuniary Forms of Restitution

In another group of cases, orders of restitution or specific performance have taken forms other than the payment of money.

The best-known case in this category is *TOPCO v. Libya*,⁴⁴ by now a historic Award. In that case, the Tribunal found that Libya's nationalisation measures were in violation of Deeds of Concession between the Claimants and the State. On the basis of judicial practice and of scholarly authorities, the Tribunal held that the primary remedy would be *restitutio in integrum*.⁴⁵ It found that even though in the majority of cases restitution was impossible or impracticable and that pecuniary compensation was much more frequent did not alter this fact:

Any possible award of damages should necessarily be subsidiary to the principal remedy of performance itself.⁴⁶

Therefore, the Tribunal decided:

[T]he Libyan Government, the defendant, is legally bound to perform these contracts and to give them full effect.⁴⁷

In *ATA v. Jordan*,⁴⁸ legislation had extinguished Claimant's contractual right to arbitration. Instead, the respondent State had started domestic court proceedings. The Tribunal adopted a statement that said:

⁴⁴ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, 53 ILR 389.

⁴⁵ At pp. 497-504.

⁴⁶ At p. 508.

⁴⁷ At p. 511.

⁴⁸ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, Award, 18 May 2010.

There is no doubt that 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*.⁴⁹

The appropriate remedy was the restoration of the Claimant's right to arbitration:

In the instant case, in the view of the Tribunal, the single remedy which can implement the *Chorzow* standard is a restoration of the Claimant's right to arbitration. In this regard, the Tribunal notes that the Respondent has already indicated its willingness to accept such an order⁵⁰

The Tribunal ordered that the ongoing Jordanian court proceedings be terminated and held that the Claimant was entitled to proceed to arbitration in accordance with the original arbitration agreement.⁵¹

In its Decision on Interpretation, the *ATA* Tribunal added the following explanation:

The situation to be re-established was the *status quo ante*, specifically, the arbitral clause. The only way of effecting that was by negating, as a matter of international law, the mandatory extinguishment of the Arbitration Agreement. ... This necessarily resulted in the restoration of the Arbitration Agreement *in toto*.⁵²

⁴⁹ At para. 130. The statement is from C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (2009) Article 54, para. 80.

⁵⁰ At para. 131.

⁵¹ At para. 132.

⁵² *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, Decision on Interpretation, 7 March 2011, para. 40.

These examples demonstrate that, in appropriate circumstances, restitution or specific performance can be a useful remedy in investment arbitration. In some cases, it may help to maintain the investment and help to avoid a complete break between the investor and the host State.

III. SATISFACTION

Of the three forms of relief, (restitution, compensation and satisfaction), satisfaction in the form of declaratory relief gets the least attention. It is the Cinderella among the types of reparation. Perhaps this is not surprising in view of the strongly commercial character of international arbitration. Satisfaction is primarily a psychological concept. However, its legal dimension should not be underestimated.

Under the ILC Articles, satisfaction is subsidiary. In accordance with Article 37, it comes into play insofar as the injury cannot be made good by restitution or compensation. Therefore, satisfaction is the remedy of choice for injuries that are not financially assessable, i.e. non-material injury.

Satisfaction can take many forms such as an apology or public admission of fault. An important form of satisfaction is a judicial pronouncement. The Commentary to Article 37 of the ILC Articles states:

One of the most common modalities of satisfaction in the case of moral or non-material injury to the State is a declaration of wrongfulness of the act by a competent court or tribunal.⁵³

The significance of satisfaction as a remedy differs widely in different forms of international adjudication. In proceedings before the International Court of Justice, satisfaction in the form of declaratory relief is the standard form of reparation. In the practice of the International Court of Justice instances of monetary compensation are very rare.

⁵³ Commentary on ILC Article 37, para. (6).

Before human rights courts, such as the European Court of Human Rights, the situation is different. A declaration of wrongfulness by the Court is the dominant form of relief, but the Court may, where appropriate, grant financial compensation if domestic law does not allow complete reparation. Rather confusingly, in the terminology of the European Convention on Human Rights, this financial compensation is called 'just satisfaction'.⁵⁴ In fact, the term is doubly confusing. In the Convention's terminology 'satisfaction' means payment of damages. In addition, 'just' does not mean 'only' but 'fair'.

A judicial declaration may be just preliminary to a decision on restitution or compensation. However, in some situations, it is a remedy in its own right. The ILC has described this dual role of declarations of wrongfulness in the following terms:

[W]hile the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought.⁵⁵

A. Availability of Satisfaction in Investment Arbitration

At times, the availability of satisfaction as an independent form of reparation in investment arbitration has been a matter of dispute. States have sometimes argued that, as a matter of

⁵⁴ Article 41 of the European Convention on Human Rights: "**Just satisfaction.** If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

⁵⁵ Commentary on ILC Article 37, para. (6).

principle, satisfaction is available only to States and not to foreign investors.⁵⁶

In *Quiborax v. Bolivia*,⁵⁷ the Claimant had asked the Tribunal to issue a declaratory judgment under Article 37 of the ILC Articles to the effect that Bolivia's conduct during the arbitration proceedings constituted an internationally wrongful act.⁵⁸ Bolivia contended that a declaratory judgment, i.e. satisfaction under Article 37 of the ILC Articles, is not one of the remedies available to investors in investor-State disputes.⁵⁹

The *Quiborax* Tribunal found that "some types of satisfaction are not a remedy available to investors in investor-State arbitrations."⁶⁰ In particular, "the type of satisfaction which is meant to redress harm caused to the dignity, honor and prestige of a State, is not applicable in investor-State disputes."⁶¹ This did not mean that all forms of satisfaction are unavailable in investor-State disputes. The Tribunal said:

The fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate. Moreover, this is also a power inherent to the Tribunal's mandate to resolve the dispute. ... As the ILC commentary explains and the ICJ/PCIJ case law demonstrates, such a declaration can or

⁵⁶ See *CMS Gas Transmission Comp. v. Argentina*, Award, 12 May 2005, at para. 399: "As this is not a case of reparation due to an injured State, satisfaction can be ruled out at the outset."

⁵⁷ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Award, 16 September 2015.

⁵⁸ At paras. 535, 552-553.

⁵⁹ At paras. 550-551.

⁶⁰ At paras. 554-558.

⁶¹ At para. 559.

cannot be a form of satisfaction, depending on the circumstances.⁶²

A different argument, sometimes put forward by respondent States, is that an investment tribunal cannot proceed without evidence of material injury. In a number of cases, respondents have argued that evidence of material damage is a requirement for jurisdiction or admissibility. This would imply that, a tribunal may only proceed if there is financially assessable damage that may lead to pecuniary compensation. This would marginalize declaratory relief. Tribunals have rejected this argument.

In *Total v. Argentina*,⁶³ Argentina argued that the dispute did not exist because Total had suffered no damage. The Tribunal had no doubt that a declaratory judgment concerning the alleged breaches by Argentina was permissible. It said:

As to the relief sought, there is no doubt as to the admissibility of the claim for relief that the Claimant has sought against and from Argentina, notably a declaratory judgment that Argentina has committed various breaches of the BIT provisions and an order that Argentina compensate Total for the damages stemming therefrom.⁶⁴

The Tribunal found that any uncertainty concerning the amount of the damages did not represent a bar to jurisdiction and was to be decided in the merits phase.⁶⁵ The Tribunal added the following observation:

Finally the Tribunal observes that the Claimant has requested a declaratory judgment that Argentina has breached the BIT. In this respect the issue of the damages is immaterial. As a consequence, the

⁶² At para. 560. The Tribunal quoted from the Commentary on ILC Article 37, para. (6).

⁶³ *Total S.A. v. Argentina*, Decision on Jurisdiction, 25 August 2006. For a decision dealing with the same issues in almost identical terms see: *Telefónica S.A. v. Argentina*, Dec on Jurisd. 25 May 2006, paras. 57, 115.

⁶⁴ At para. 56.

⁶⁵ At para. 88.

objection by Argentina based on the alleged lack of damages must be rejected.⁶⁶

It follows that if the claimant requests a declaration that the host State has breached the BIT, the issue of damages is immaterial for purposes of jurisdiction. Therefore, declaratory relief is possible in investment arbitration in principle.

It follows from this practice that satisfaction in the form of declaratory relief is available in appropriate circumstances. Practice points to several situations where satisfaction as an independent remedy is appropriate.

B. Absence of Quantifiable Damage

In some cases, tribunals have found that there had been a violation of the investors' rights but that there was no resulting damage. Consequently, the awards in these cases contain findings of breach but no awards of damages.

Biwater Gauff v. Tanzania, concerned a water concession that the host State had terminated prematurely. The Tribunal found that the respondent had violated several of the standards of protection in the applicable BIT. However, none of these violations had caused the loss and damage for which Biwater Gauff (BGT) had claimed compensation. The Tribunal concluded that under these circumstances a declaration of illegality was the only appropriate remedy. The Tribunal said:

Given that none of the Republic's violations of the BIT caused the loss and damage for which BGT now claims compensation, it follows that each of BGT's claims for damages must be dismissed, and that the

⁶⁶ At, para. 89. The Tribunal added the following footnote: "A basic issue in the present dispute is whether Argentina has committed an internationally wrongful act, that is whether it has breached the international obligations contained in the BIT by conduct attributable to it. As held by the I.L.C. these two conditions are sufficient to establish such a wrongful act giving rise to international responsibility. Having caused damage is not an additional requirement, except if the content of the primary obligation breached has an object or implies an obligation not to cause damages, see I.L.C., *Draft Articles on State Responsibility* cit., Commentary to Art. 2, para. 9."

only appropriate remedies for the Republic's conduct can be declaratory in nature.⁶⁷

Nordzucker v. Poland concerned a sale of companies in the Polish sugar industry, which did not materialize. The Tribunal declared that Poland had violated the BIT between Germany and Poland by failing to finalize the sales procedure within a reasonable time and by uselessly protracting it.⁶⁸ In a subsequent decision, the Tribunal declined to award damages because Nordzucker had not proven that Poland's lack of transparency had caused the damage it claimed.⁶⁹

Al-Bahloul v. Tajikistan, concerned hydrocarbon exploration agreements between the claimant and Tajikistan. In a Partial Award, the Tribunal found that the respondent had breached its obligation under Article 10(1) of the Energy Charter Treaty as a result of its failure to issue licenses.⁷⁰ In its Final Award, the Tribunal declined an award of damages for lack of reliable evidence that the claimant had suffered damage. The Tribunal said:

The Tribunal thus has to conclude that it has no substantiated basis upon which to make an assessment of damages, despite the Respondent's established liability and on-going breach of the BIT.

Since Claimant has not proved that he has suffered damages on account of Respondent's breach of the BIT, his claims for compensation are necessarily denied.⁷¹

In these cases, the tribunals found that the host States had breached their obligations, but when they reached the *quantum*

⁶⁷ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, 24 July 2008, para. 807.

⁶⁸ *Nordzucker v. Poland*, 2d Partial Award, 28 January 2009, dispositif.

⁶⁹ *Nordzucker v. Poland*, 3d Partial Award, 23 November 2009, para. 60.

⁷⁰ *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, Partial Award on Jurisdiction and Liability, 2 September 2009.

⁷¹ *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, Final Award, 8 June 2010, paras. 98, 99.

stage, they found that they were unable to identify any quantifiable damage. Therefore, the finding of liability was the only available remedy.

C. Moral Damage

In other cases, parties claimed compensation for non-material injury, usually referred to as moral damages. This was the case, for instance, where the respondent States had successfully argued that the claims put forward against them had not merely been unmeritorious but also abusive.

In *Europe Cement v. Turkey*,⁷² the respondent asked for monetary compensation for the moral damage it had suffered in the face of a claim that involved forged documents.⁷³ The Tribunal declined to make a monetary award, finding that its Award provided a form of satisfaction. The Tribunal said:

The Tribunal believes that any potential reputational damage suffered by the Respondent will be remedied by the reasons and conclusions set out in this Award, including an award of costs, which as set out below is significant. This provides a form of "satisfaction" for the Respondent. In the circumstances, therefore, the Tribunal decides not to make a monetary award of compensation to the Respondent.⁷⁴

In a wider sense, all cases in which tribunals rejected claims because of the investors' illegal actions afford a form of satisfaction to respondent States.⁷⁵

Investors have also made claims for moral damages but have succeeded only under exceptional circumstances.⁷⁶ Therefore, as

⁷² *Europe Cement v. Turkey*, Award, 13 August 2009. See also *Cementownia Nowa Huta' v. Turkey*, Award, 17 September 2009, paras. 159, 163, 169, 170, 171.

⁷³ At paras. 146-148, 177

⁷⁴ At para. 181.

⁷⁵ For detailed discussion see *C. Knahr*, Investments "in accordance with host state law," 4 TDM No. 5; *U. Kriebaum*, Illegal Investments, Austrian Arbitration Yearbook 307 (2010).

⁷⁶ *Desert Line Projects LLC v. The Republic of Yemen*, Award, 6 February 2008.

a general proposition, an investor that successfully seeks relief for non-material injury, will have to be content with satisfaction in the form of a declaration by the tribunal.

Pey Casado v. Chile concerned the occupation of the premises and seizure of equipment of a newspaper by Chile's military regime in 1973. The Claimant had demanded moral damages in connection with its claim for denial of justice. The Tribunal rejected the claim and found that its Award containing a recognition of the Claimants' rights and of a denial of justice constituted a substantial and sufficient 'moral satisfaction'. The Tribunal said:

Une explication complémentaire se justifie en ce qui concerne la demande relative au dommage moral. Outre le fait que les demanderesses n'ont pas apporté de preuves permettant l'évaluation d'un tel préjudice le Tribunal arbitral estime que le prononcé de la présente sentence, notamment par sa reconnaissance des droits des demanderesses et du déni de justice dont elles furent victimes, constitue en soi une satisfaction morale substantielle et suffisante.⁷⁷

Declaratory relief may act not merely as a substitute for damages in the absence of the required proof of material loss. It may also operate as an additional remedy even where the tribunal does award pecuniary relief.

Lemire v. Ukraine, concerned irregularities in the allocation of radio frequencies. The Tribunal found that the host State had acted in breach of the applicable BIT⁷⁸ and awarded damages accordingly.⁷⁹ In addition, the claimant requested moral damages for having suffered indignity, frustration, stress, shock, affront, humiliation, shame, and degradation as well as loss of reputation.⁸⁰

⁷⁷ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, Award, 8 May 2008, para. 704.

⁷⁸ *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010.

⁷⁹ *Joseph Charles Lemire v. Ukraine*, Award, 28 March 2011, paras. 243-309.

⁸⁰ At para. 315.

The Tribunal found that it would only award moral damages under exceptional circumstances, which were not present in the case before it. The Tribunal's recognition of the breach constituted a sufficient remedy. It said:

The Arbitral Tribunal has pondered the circumstances of the case and decides that the gravity required under the standard is not present. ... And the acknowledgement in the First Decision that Ukraine has indeed breached the BIT, and the present award of substantial compensation, are elements of redress which may significantly repair Mr. Lemire's loss of reputation.⁸¹

D. Satisfaction as an Independent Remedy

Satisfaction or declaratory relief has nearly always lingered in the shadow of financial compensation. The submissions by claimants usually contain a request for a determination of a breach as a separate item. But these requests for a declaration of breach are typically perceived as steps preliminary to demands for pecuniary compensation. Findings by tribunals that a violation of investor rights has occurred are seen as no more than a logical precondition for an award of damages.

The function of declaratory relief is easily overlooked by a preoccupation with pecuniary reparation. A finding that there has been some illegality does not merely pave the way towards a decision on damages. The fact that a determination of liability is typically followed by an award of damages does not mean that the finding of illegality is necessarily accessory to the award of damages and has no independent existence. Rather, a tribunal's finding of a breach may amount to a remedy in its own right.

A rare case in which a tribunal discussed the independent function of satisfaction as an autonomous remedy was *Rompetrol v. Romania*. The case arose from the privatisation and sale of shares in a formerly State-owned company. The Claimant had framed its request for relief in terms of a request for a determination of breach followed by an award of damages. The

⁸¹ At para. 339.

Tribunal found that a breach had occurred but that the claimant had not met its burden of proving that it suffered economic loss and rejected the claim for damages. The Tribunal found that the claim to declaratory relief had a separate existence independently of the question of damages. The Tribunal said:

The Tribunal notes that the Claimant framed its requests for relief from the outset (starting from the Request for Arbitration itself) in terms of a request for a determination of breach followed by an award of damages; by the time of the Post-Hearing submissions this had become refined into a statement that TRG 'seeks damages in compensation for' Romania's measures, of which the declaration of breach was the first 'specific' step. This modification might give the impression that the determination of breach was conceived of as the necessary stepping-stone to the award of damages, not as a substantive claim in its own right. Nevertheless, in the Tribunal's view, the correct assessment of the submissions of the Parties is that the claim to declaratory relief retained an independent existence of its own irrespective of the question of consequential loss or damage.⁸²

In *Achmea (Eureko) v. Slovakia* the Tribunal found that Slovakia had breached its obligations under the Netherlands-Slovakia BIT and proceeded to calculate compensation. After the part of the Award dealing with the calculation of damages, there is a short section entitled 'other relief'. In that section, the tribunal declares that the Slovak Republic had breached certain obligations under the BIT. It declined to order future compliance but pointed out that the BIT remained in force. The Tribunal said:

The Tribunal declares that the Slovak Republic breached its obligations under Article 3(1) and Article 4 of the BIT by adopting the ban on profits, and later by adopting also the ban on transfers. The Tribunal declines to make an order as requested by Claimant concerning future compliance with the

⁸² *The Rompetrol Group N.V. v. Romania*, Award, 6 May 2013, para. 294.

Treaty by Respondent. It is not for the Tribunal to grant relief on the basis of speculations about the future conduct of the Parties. Nonetheless, the Tribunal notes that the Treaty remains in force.⁸³

This case is interesting in several respects. The separate presentation of the Tribunal's finding of breach after the quantum section creates the impression that the Tribunal regarded the declaration of breach as a distinct remedy. In addition, the Tribunal pointed to the host State's ongoing obligation under the BIT but declined to order specific performance.

E. Conclusions on Satisfaction

A declaration of wrongfulness by a court or tribunal may act as a form of reparation in its own right, that is, independently of and in addition to damages. The same is true of a finding that the host State has acted lawfully. In both situations, the winning party will draw satisfaction not merely in a legal sense but also in a personal, emotional sense. For an aggrieved investor, an official confirmation that the host state has indeed acted in an impermissible manner may well be as important as, or more important, than financial indemnity. Conversely, a host state will feel gratified by a tribunal's finding that its legal system is in conformity with international standards and that its organs have acted in accordance with its international obligations.

This psychological or emotional factor can be quite important to a decision on whether to proceed with litigation. An investor may resort to arbitration despite the fact that compliance with or enforcement of an award of money is uncertain. What matters is not just the difference on the balance sheet but also the vindication of one's position in a judicial process.

Therefore, damages are clearly important. In fact, they may be the most important motive in arbitration. Nevertheless, investment arbitration is not always just about the money.

⁸³ *Achmea B.V. v. The Slovak Republic*, Final Award, 7 December 2012, para. 335. Footnote omitted.

