



Restitution as a 'Second Chance' for Investor-State Relations: Restitution and Monetary Damages as Sequential Options

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La disponibilité et l'opportunité des recours non pécuniaires dans le cadre de l'arbitrage investisseur-État suscite de nombreuses controverses, au centre desquelles se trouve la question de l'atteinte à la souveraineté par le mécanisme de la restitution. Cet article vise à démontrer qu'il existe des situations où la restitution doit être considérée comme un remède préférable pour l'État hôte plutôt qu'une menace à sa souveraineté. La restitution offre à l'État la possibilité de rétablir et de maintenir des relations d'investissement à long terme avec l'investisseur concerné. Plus important encore, la restitution permet à l'État de démontrer son engagement continu envers l'accord international sur l'investissement (AII) en se conformant une sentence arbitrale ordonnant une restitution. En revanche, même dans de telles situations, des restrictions pratiques, c'est-à-dire le principe nec ultra petita et l'inexécution des recours non pécuniaires, pourraient de facto prévenir les tribunaux d'ordonner la restitution. Pour résoudre ce problème, cet article propose une approche « à deux options » selon laquelle les tribunaux arbitraux ordonnent la restitution en tant que première option, et la compensation en tant que deuxième option lorsque la première échoue. Cet article avance que cette approche constitue un moyen efficace de donner une « seconde chance » à l'État hôte de démontrer son engagement au maintien d'un environnement d'investissement stable et durable en conformité avec l'AII, tout en gardant la compensation comme filet de sécurité pour les investisseurs contre le risque de non-exécution de la restitution. L'article conclut en proposant l'inclusion de cette approche dans les AII futurs afin de mettre en pratique cette approche.

The availability and appropriateness of non-pecuniary remedies in investor-state arbitration has been a matter of controversy, at the centre of which is the concern over the infringement of sovereignty by restitution. This article aims to demonstrate that there are situations where restitution should be regarded as a preferable remedy for the host state, rather than as a threat to its sovereignty, for it gives the state the opportunity to re-establish and maintain long-term investment relations with the relevant investor and, more importantly, to demonstrate its continuing commitment to the international investment and arbitration agreement (IIA) by complying with the restitution order. On the other hand, even in such situations, practical restrictions on ordering restitution, that is, the nec ultra petita principle and non-enforceability of non-pecuniary remedies, could effectively prevent the tribunals from ordering restitution. As a way to address this issue, this article proposes a 'two-options' approach, under which arbitral tribunals order restitution as the first option, and compensation as the second option, enabled when the first option fails. It argues that this approach is an effective way to give a 'second chance' for the host state to demonstrate its continued commitment towards a long term and stable investment environment in conformity with the IIA, while providing compensation as a safety net for the investors against the risk of non-enforceability of restitution. It concludes by proposing the inclusion of this approach in future IIAs as a way to put this approach into practice.

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I. INTRODUCTION

50 years after the adoption of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), investor-state arbitration finds itself in an ambivalent situation. On the one hand, it has become one of the most active dispute settlement forums in the sphere of international law. If we measure the success of a dispute settlement forum by the number of cases it receives, it would indeed be regarded as highly successful. According to the United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2015, the total number of known investment arbitration cases is 608.¹ As of the end of 2015, the International Centre for the Settlement of Investment Disputes (ICSID) “had registered 549 cases under the ICSID Convention and Additional Facility Rules.”² On the other hand, in recent years it has increasingly faced criticism. The negotiations of the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) have exacerbated the concerns over investor-state arbitration.³ At the centre of the criticisms of investor-state arbitration is the concern that it reduces the sovereign power of states to regulate for public purposes. For example, the report on consultation on investment protection in the TTIP negotiations published in January 2015 by the European Commission provides that:

In these submissions, the ISDS mechanism is perceived as a threat to democracy and public finance or to public policies. ... Many among the collective submissions express specific concerns about governments being sued by corporations for high amounts of money which in their view create a “chilling effect” on the right to regulate.⁴

Against this backdrop, the European Commission has proposed an Investment Court System,⁵ which is included in the proposed text of the TTIP as well as the texts of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement.⁶

At the remedy phase of investment arbitration, this concern manifests itself in the context

1 United Nations Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance*, UNCTAD, 2015, UN Doc UNCTAD/WIR/2015, (2015) at xi.

2 International Centre for Settlement of Investment Disputes, *The ICSID Caseload – Statistics, Issue 2016-1* (2016) at 7, online.

3 See e.g. European Economic and Social Committee, *Opinion: Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries*, [2015] REX/411 at paras 1.7, 1.21, online: <www.eesc.europa.eu/?i=portal.en.rex-opinions.35922>; see also EC, Commission, *Report: Online public consultations on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, (Brussels: EC, 2015) [EC Consultations Report]; EC, Commission, *Concept Paper: Investment in TTIP and beyond – the path for reform*, (Brussels: EC, 2015), online: <trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>; Judith Resnik, “Battle rages over key Obama trade policy”, Open Letter, *The Washington Post* (30 April 2015), online: https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf.

4 EC Consultations Report, *supra* note 3 at 14.

5 EC, Press Release, “EU finalizes proposal for investment protection and Court System for TTIP” (12 November 2015), online: European Commission Press Release Database <europa.eu/rapid/search.htm>.

6 See Catharine Titi, “The European Union’s Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead” (2016) *Transnat’l Disp Mgmt J*, online: <<https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1619>>.

of the availability and appropriateness of non-pecuniary remedies.⁷ Some argue that restitution, in particular juridical restitution, in investor-state arbitration results in undue interference with the sovereignty of the host state. Concerns over the infringement of sovereignty by juridical restitution have led to the express exclusion of juridical restitution from the scope of remedies imposed by arbitral tribunals found in some International Investment Agreements (IIAs) such as Article 1135 of the North American Free Trade Agreement (NAFTA).⁸ On the other hand, for the majority of IIAs that do not specify the types of remedies that may be ordered by an arbitral tribunal, the availability of non-pecuniary remedies in investor-state arbitration has been a matter of controversy.⁹

Against this background, this article revisits the question of availability and appropriateness of restitution in the context of investor-state arbitration. It first examines the discussion over the (analogous) applicability of the principles on remedies adopted by the Articles on State Responsibility for Internationally Wrongful Acts (ASR) to the investor-state arbitration context. It argues that, while the considerations of state sovereignty as well as the *sui generis* character of the investor-state regime may make it inappropriate to transplant the ASR principles into investor-state arbitration, these considerations may not preclude restitution from the power of tribunals to award any remedy which is necessary to discharge its own adjudicative function. It also argues that it is entirely possible for states to determine the scope of the power of tribunals to order non-pecuniary remedies in an IIA. In this respect, Article 26(8) of the Energy Charter Treaty (ECT) is suggestive because it (in contrast with Article 1135 of the NAFTA) implicitly includes juridical restitution as a type of remedy available under the ECT.¹⁰ This article proceeds to argue that there are situations where restitution is actually beneficial to the host state, for it gives the state the opportunity to re-establish and maintain long-term investment relations with the relevant investor and, more importantly, to demonstrate its continuing commitment to the IIA by complying with the restitution order. It then examines the situations where awarding restitution may actually have these benefits. On the other hand, even in such situations, practical restrictions on ordering restitution, that is, the *nec ultra petita* principle and non-enforceability of non-pecuniary remedies, could effectively prevent the tribunals from ordering restitution. Based on these considerations, this article proposes a 'two-options' approach, under which arbitral tribunals order restitution as the first option, and compensation as the second option, enabled when the first option fails. It argues that this approach is an effective way to give a 'second chance' for the host state to demonstrate its continued commitment towards a long term and stable investment environment in conformity with the IIA, while providing compensation as a safety net for the investors against the risk of non-enforceability of restitution. It concludes by proposing the inclusion of this approach

7 Anne van Aaken, "Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View" in Stephan W. Schill, ed, *International Investment Law and Comparative Public Law* (New York: Oxford University Press, 2010) 721 at 747.

8 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA] at art 1135. See also Martin Endicott, "Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards" in Philippe Kahn & Thomas Wälde, eds, *New Aspects of International Investment Law / Les aspects nouveaux du droit des investissements internationaux* (Leiden: Martinus Nijhoff Publishers, 2007) 517 at 548.

9 *Ibid* at 520.

10 *The Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95 at art 26(8) (entered into force 16 April 1998).

in future IIAs as a way to put this approach into practice. As a background for the analysis, the following section clarifies the notion of restitution in international law.

II. THE CONCEPT OF JURIDICAL RESTITUTION IN INTERNATIONAL LAW

Restitution in international law is a form of reparation which results from state responsibility.¹¹ Historically, restitution was understood in two different ways. The first reading defines it as re-establishing the situation that existed prior to the occurrence of the wrongful act. The other reading defines it as establishing the situation that would exist, or would have existed, if the wrongful act had not been committed. The latter definition is broader than the former in that it presents “an ‘integrated’ concept of restitution in kind within which the restitutive and compensatory elements are fused.”¹² Article 35 of the ASR adopts the former – narrower – definition, which has “the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed.”¹³ Defined thus, restitution may not always provide full reparation because it only restores the *status quo ante*, and therefore may “of course have to be completed by compensation in order to ensure full reparation for the damage caused”.¹⁴

Restitution may take two types of form. Material restitution takes the form of, for example, the restitution of confiscated property and the release of a detained individual. Juridical restitution requires specific legislative or executive acts by the relevant state to restore the legal situation that existed before the commission of the wrongful act.¹⁵ The Commentary to ASR explains this form of restitution as follows:

The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, the

11 Stephen Wittich, “Investment Arbitration: Remedies” in Marc Bungenberg et al, eds, *International Investment Law* (Baden-Baden: Nomos Verlagsgesellschaft, 2015) 1391 at 1392 [Wittich, “Remedies”].

12 Gaetano Arangio-Ruiz, “Preliminary Report on State Responsibility” (UN Doc A/CN.4/216 & Corr.1 & 2 and Add.1 & Corr.1) in *Yearbook of the International Law Commission* 1988, vol 2, part 1 (New York: UN, 1988) 6 at para 67 [Arangio-Ruiz].

13 United Nations International Law Commission, *Report of the International Law Commission*, ILC, UNGA, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at 238 [ILC Report].

14 *Ibid.* See also Christine Gray et al, “The Different Forms of Reparation: Restitution” in James Crawford, Alain Pellet & Simon Olleson, eds, *The Law of International Responsibility* (New York: Oxford University Press, 2010) 589 at 590 [Gray, “Forms of Reparation”]; Steffen Hindelang, “Restitution and Compensation – Reconstructing the Relationship in Investment Treaty Law” in Rainer Hofmann & Christian J. Tams, eds, *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Baden-Baden: Nomos Verlagsgesellschaft, 2011) 161 at 164–165; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (New York: Oxford University Press, 2011) at 61–62 [Sabahi].

15 Zachary Douglas, Daniel Muller & Drazen Petrovic, “Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID” in Crawford, Pellet & Olleson, eds, *supra* note 14, 815 at 829 [Douglas et al]; Kaj Hobér, “Remedies in Investment Disputes” in Andrea K. Bjorklund et al, eds, *Investment Treaty Law: Current Issues III – Remedies In International Investment Law, Emerging Jurisprudence Of International Investment Law*, (London: British Institute of International and Comparative Law, 2009) 3 at 8; Sabahi, *supra* note 14 at 73.

rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.¹⁶

With regard to this distinction, however, the following statement by Special Rapporteur Arangio-Ruiz in his Preliminary Report on State Responsibility should be noted:

Within any inter-individual community living—as hopefully any national society ought to do—under the rule of law (*Stato di diritto, Rechtsstaat*), it is hardly thinkable that the Government responsible for an internationally wrongful act could accomplish any *restitutio* without something “legal” happening within its system ... In practice, any international restitution in kind will be an essentially juridical *restitutio* within the legal system of the author State, accompanying or preceding material *restitutio*.¹⁷

Therefore, according to him, material and juridical restitution “should be viewed not so much as different remedies but as distinct aspects of one and the same remedy.”¹⁸ Indeed, in an established legal system, any governmental or administrative measures as well as judicial acts that, for example, constitute a taking of property, are to be based on legal grounds. If this is so, ‘undoing’ such measures or acts to achieve material restitution would necessarily entail the modification or annulment of legal situations. The two types of restitution are therefore, in most cases, in continuum, and the distinction between them is relative. In light of these considerations, the validity of the exclusion of ‘juridical restitution’ alone from the scope of remedies by some IIAs such as Article 1135 of the NAFTA may be questioned.

In order to determine the scope of the concept of restitution, the relationship with the following two concepts must be examined: cessation and specific performance. The obligation of cessation, that is, the obligation to cease the wrongful conduct, and restitution in kind are ‘inextricably intertwined’,¹⁹ in the sense that they may be applied to the same facts and the result of the fulfilment of both obligations are indistinguishable in certain situations.²⁰ The nature and role of cessation is, nevertheless, distinguished from that of reparation. Special Rapporteur Arangio-Ruiz explains the distinction as follows: cessation is “a consequence of a wrongful act having a continuing character”²¹ and therefore its target is “the wrongful conduct *per se*”, not to “affect the consequences—legal or factual—of the past wrongful conduct.”²² It follows that, unlike restitution, the obligation of cessation is not subject to limitations relating to proportionality,²³ and it may be required when restitution is no longer possible,²⁴ because:

¹⁶ ILC Report, *supra* note 13 at 240.

¹⁷ Arangio-Ruiz, *supra* note 12 at para 80.

¹⁸ *Ibid* at para 82.

¹⁹ Gray, “Forms of Reparation”, *supra* note 14 at 590.

²⁰ ILC Report, *supra* note 13 at 218.

²¹ Arangio-Ruiz, *supra* note 12 at para 39.

²² *Ibid* at para 40.

²³ *Ibid*.

²⁴ Olivier Corten, “The Obligation of Cessation” in Crawford, Pellet & Olleson, eds, *supra* note 14, 545 at 548 [Corten]; Gray, “Forms of Reparation”, *supra* note 14 at 590.

[W]hile the consequences of past acts cannot always be erased (which is the objective of *restitutio in integrum*), it is always possible to take action in relation to future events (which are the only acts envisaged in the obligation of cessation).²⁵

A closely related issue is the distinction between restitution and specific performance. Specific performance, that is, an order to do or refrain from doing certain conduct, is not explicitly included in Article 35 of the ASR, and different views have been expressed as to how this type of remedy fits within the forms of reparation under the ASR. It is argued: that specific performance may fall within the scope of Article 30, i.e. cessation and non-repetition;²⁶ that it is a type of satisfaction;²⁷ and that requests and orders for specific performance are one form of the request of restitution.²⁸ Yet, as Stephens-Chu aptly points out, restitution and specific performance are distinguished in their purpose and effect, because:

[I]n its narrow sense, restitution involves the restoration of the *status quo ante*, and thus, potentially, the reversal of sovereign acts; whereas specific performance seeks to address continuing and future breaches of obligations which endure.²⁹

On the other hand, it is often difficult to determine whether a wrongful act is completed or continuing, and therefore it is observed that, depending on the circumstances of the individual case, the same act “can be both a form of restitution and cessation of the wrongful act”.³⁰ This observation squarely applies to the distinction between restitution and specific performance.³¹ Perhaps for this reason, investment arbitral tribunals have not always been clear as to this distinction.³² Nevertheless, the distinction between restitution and cessation/specific performance has practical consequences in that, for example, the limitations on restitution are relevant only to the former.

Article 35 of the ASR indicates the primacy of restitution in kind over compensation. It does not, however, necessarily mean that this principle is firmly established in international law. The formal status of the ASR as a text adopted by the International Law Commission (ILC) and approved *ad referendum* by the United Nations General Assembly³³ remains a “subsidiary

²⁵ *Ibid* at 548–549.

²⁶ Gisele Stephens-Chu, “Is it Always All About the Money? The Appropriateness of Non-Pecuniary Remedies in Investment Treaty Arbitration” (2014) 30:4 *Arb Intl* 661 at 665 [Stephens-Chu]; ILC Report, *supra* note 13 at 216.

²⁷ Stephens-Chu, *supra* note 26 at 666; Endicott, *supra* note 8 at 544; Sabahi, *supra* note 14 at 81; Wittich, “Remedies”, *supra* note 11 at 1427.

²⁸ *BP Exploration Co (Libya) Ltd v. Libya*, Award (10 October 1973) 53 *ILR* 297 at 350-51 [*BP v. Libya*]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, Decision on Provisional Measures (17 August 2007) at paras 79–80, ICSID, Case No ARB/06/11 [*Occidental v. Ecuador*].

²⁹ Stephens-Chu, *supra* note 26 at 678–679.

³⁰ Wittich, “Remedies”, *supra* note 11 at 1416.

³¹ *Ibid* at 1427.

³² See e.g. *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, Award (16 December 2003) at 44, SCC [*Nykomb v. Latvia*]. See also Christoph Schreuer, “Alternative Remedies in Investment Arbitration” (2016) 3:1 *J Damages in Int’l Arb* at 1 at 17-18 [Schreuer, “Alternative Remedies”]; Hindelang, *supra* note 14 at 177.

³³ James Crawford, “Articles on Responsibility of States for Internationally Wrongful Acts 2001”, Introductory

means for the determination of rules of law” within the meaning of Article 38 of the Statute of the International Court of Justice (ICJ).³⁴ Likewise, the statement of the Permanent Court of International Justice (PCIJ) in the *Chorzow Factory* case which influenced the ILC for the primacy of restitution in this context³⁵ did not form part of the ratio of that decision, which arguably affects its significance.³⁶

With this background, the next section examines the availability and appropriateness of ordering juridical restitution in investor-state arbitration. Closely related to this issue is the question of the relationship between Part II of the ASR and investor-state arbitration, which is discussed first.

III. AVAILABILITY OF RESTITUTION IN INVESTOR-STATE ARBITRATION

A. Relationship between Part II of the ASR and Investor-state Arbitration

There has been controversy over the question of whether and to what extent Part II of the ASR can be applicable to investor-state arbitration. It should be emphasised first that Part II of the ASR does not directly apply to this context. Although there are cases where investment arbitration tribunals relied on these articles without addressing the issue of their applicability,³⁷ this is clear from Article 33(2) of the ASR which provides that: “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.” Crawford and Olleson, referring also to the Introductory Commentary to Part II, Chapter I³⁸ and the Commentary to Article 28,³⁹ conclude that:

[I]n contrast to Part One, ... Part Two is limited to cases of inter-State responsibility and the exceptional case of responsibility to the international community as a whole. As a consequence, the provisions of Part Two are, on their own terms, not directly applicable to questions of the content of the responsibility which may arise in the context of an investment arbitration as the result of the breach of the substantive obligations contained in an investment protection instrument (whether bilateral or multilateral).⁴⁰

Note, A/RES/56/83 (2001) at 1–2.

34 Endicott, *supra* note 8 at 530; Hindelang, *supra* note 14 at 162.

35 Endicott, *supra* note 8 at 533.

36 Christine Gray, “The Choice between Restitution and Compensation” (1999) 10:2 *European J Intl L* 413 at 416 [Gray, “Restitution and Compensation”]; Endicott, *supra* note 8 at 533.

37 See e.g. *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, Final Award (8 June 2010) at para 42, SCC, Case No V (064/2008) [*Al-Bahloul v. Tajikistan*]; *Nykomb v. Latvia*, *supra* note 32 at 38–9; *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) at para 166 [*Micula v. European Food*]; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, Interim Award (1 December 2008) at para 118, UNCITRAL, PCA Case No 34877. see Ursula Kriebaum, “Restitution in International Investment Law” in Rainer Hofmann & Christian J. Tams, eds, *supra* note 14, 201 at 206; Stephens-Chu, *supra* note 26 at 667. See also Hindelang, *supra* note 14 at 181.

38 ILC Report, *supra* note 13 at Art 33(2).

39 ILC Report, *supra* note 13 at 214.

40 James Crawford & Simon Olleson, “The Application of the Rules of State Responsibility” in Bungenberg et al, eds, *supra* note 11, 411 at 417–18 [Crawford, “Rules of State Responsibility”]. See also, *Wintershall*

The debate over whether the foreign investor, when bringing a claim before an investment tribunal, “is in fact exercising its own right, or a right derived from the right of its home state” does not alter this notion.⁴¹ While it is undoubtedly the investor who brings a claim for the violation of international obligations in investor-state arbitration, under the ASR regime “the obligation to make full reparation may only be invoked by – or possibly for – the ‘injured State’.”⁴²

Of course, the non-applicability of Part II of the ASR to investor-state arbitration does not mean that the former is of little relevance to the latter. An obvious question to follow is whether Part II of the ASR may be applied *analogously* to investor-state arbitration.⁴³ Scholars have expressed different views on this point. Some answer this question in the affirmative, arguing *inter alia* that the ASR “remain the best available source of guidance as to the law of remedies in international law.”⁴⁴ On the other hand, Douglas emphasises the *sui generis* character of the investor-state regime, which creates “mechanisms for non-State actors to invoke the international responsibility of contracting States which transcend the traditional dichotomy between public and private international law.”⁴⁵ He argues that the secondary obligations generated in this regime are different in juridical character from those that arise with respect to the inter-state regime.⁴⁶ He goes on to argue that the investor-state regime should be conceptualized as a “sub-system” of state responsibility and the secondary consequences arising from the violation of this mechanism are not governed by Part II of the ASR.⁴⁷ According to him, therefore, “it cannot be assumed that ICSID tribunals are competent to order the different forms of reparation set out in Chapter II of Part Two [of the ASR].”⁴⁸ The analogous applicability of the ASR to investor-state arbitration thus remains controversial.

Nevertheless, certain rules set out in Part II of the ASR may still be relied upon in investor-state arbitration as the manifestation of general principles of international law.⁴⁹ Wittich argues that the rules concerning restitution and compensation in Part II are clearly characterised as general principles “which are to be found in municipal private law as well and which, in the ILC Articles, are formulated in vague, because general, terms.”⁵⁰

Crawford and Olleson argue that the reliance on Part II of the ASR in investor-state arbitration is “unproblematic”:

[T]he provisions on reparation in general, and compensation in particular, have been referred to frequently by arbitral tribunals in investment

Aktiengesellschaft v. Argentina, Award (8 December 2008) at para 112, ICSID, Case No ARB/04/14; Stephan Wittich, “State Responsibility” in Marc Bungenberg et al, eds, *International Investment Law* (Baden-Baden: Nomos Verlagsgesellschaft, 2015) 23 at 40–1 [Wittich, “State Responsibility”].

41 See Eric De Brabandere, *Investment Treaty Arbitration as Public International Law* (Cambridge: Cambridge University Press, 2014) at 55 [De Brabandere].

42 Brigitte Stern, “The Obligation to Make Reparation” in Crawford, Pellet & Olleson, eds, *supra* note 14, 565 at 567.

43 Endicott, *supra* note 8 at 520.

44 Stephens-Chu, *supra* note 26 at 667. See also Endicott, *supra* note 8 at 531; Hindelang, *supra* note 14 at 195.

45 Douglas et al, *supra* note 14 at 819.

46 *Ibid.*

47 *Ibid* at 819–820.

48 *Ibid* at 820.

49 ILC Report, *supra* note 13 at 247.

50 Wittich, “State Responsibility”, *supra* note 40 at 44.

protection disputes; such reliance is unproblematic, as it is not obvious that the content of the responsibility owed to an investor (or at least those rules relating to the manner in which compensation is to be quantified) differ from those applicable in the context of inter-State responsibility.⁵¹

Even acknowledging the relevance – not the analogous applicability – of Part II of the ASR to investor-state arbitration as a guiding principle, the question of the availability of restitution in investor-state arbitration remains unanswered. This must be examined as a separate question. On this point, the three Libyan oil arbitration cases, *Texaco v. Libya*,⁵² *BP v. Libya*⁵³ and *LIAMCO v. Libya*,⁵⁴ demonstrate the divergence between tribunals on the question of whether restitution is applicable to the cases of internationally wrongful acts against foreign nationals.⁵⁵ In the first case the sole arbitrator endorsed the principle of the primacy of restitution,⁵⁶ yet in the latter two cases the arbitrators refused to award restitution on the ground that an order of restitution which entails revoking nationalization measures would violate Libya's sovereignty.⁵⁷

The principle of state sovereignty has also been invoked to deny the availability of restitution in the context of investment treaty arbitration. For example, in *Amco v. Indonesia*, the tribunal stated that:

[I]t is obvious that this tribunal cannot substitute itself for the Indonesian Government, in order to cancel the revocation and restore the licence; such actions are not even claims, and it is more than doubtful that this kind of restitution in integrum could be ordered against sovereign states.⁵⁸

Against this background, De Luca argues that, when an IIA is silent on the available remedies, it is the principle of state sovereignty that guides the application and interpretation of investment agreements as to the available remedies.⁵⁹

These sovereignty-oriented arguments have not been unchallenged. Angelet argues that deference to state sovereignty as a reason to shy away from restitution is “misconceived as a matter of law” because “[s]tate sovereignty is at the basis of the regime of lawful expropriation but does not – witness the rules of State responsibility – stand in the way of restitution as a means

51 Crawford, “Rules of State Responsibility”, *supra* note 40 at 418.

52 *Texaco Overseas Petroleum Co. v. Libya*, Award on the Merits (17 January 1977), Ad Hoc, 17 ILM 1 (Arbitrator: René-Jean Dupuy) [*Texaco v. Libya*].

53 *BP v. Libya*, *supra* note 28 at 350.

54 *Libyan American Oil Company (LIAMCO) v. Libya*, Award (12 April 1977), Ad Hoc, 20 ILM 1 (Arbitrator: Dr. Sobhi Mahmassani) [*LIAMCO v. Libya*].

55 For a detailed examination and comparison between these cases, see: Christine Gray, *Judicial Remedies in International Law* (New York: Oxford University Press, 1987) at 188.

56 *Texaco v. Libya*, *supra* note 52 at para 111.

57 *BP v. Libya*, *supra* note 28 at 354; *LIAMCO v. Libya*, *supra* note 54 at 120. See also: Sabahi, *supra* note 14 at 81; Christoph Schreuer, “Non-Pecuniary Remedies in ICSID Arbitration” (2004) 20:4 Arb Int 325 at 329 [Schreuer, “Non-Pecuniary Remedies”]; Stephens-Chu, *supra* note 26 at 672.

58 *AMCO Asia Corp. and others v. Republic of Indonesia*, Award (21 November 1984) 24 ILM 1022 at para 202. See also *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, Award (25 July 2007) at para 87, ICSID, Case No ARB/02/1; *Occidental v. Ecuador*, *supra* note 28 at paras 78, 84.

59 Anna De Luca, “Non-Pecuniary Remedies under the Energy Charter Treaty”, (2015) Energy Charter Secretariat 1 at para 27 [De Luca].

of redress for unlawful expropriations.”⁶⁰ This argument appears to be based on the principle that a state may not rely on internal law in order to justify its failure to comply with its obligations.⁶¹ Doubts have been also raised over the contention that pecuniary remedies are less intrusive to state sovereignty than non-pecuniary remedies, given that monetary damages might be more burdensome for states in certain circumstances.⁶²

In addition, there is a strong argument that ordering restitution in investor-state arbitration is derived from a tribunal’s jurisdiction to decide a case.⁶³ That is, the jurisdictional power of the tribunal to award “any remedy that is part of the applicable law” is “necessary for the tribunal to discharge its own adjudicative function as an arbitral tribunal.”⁶⁴ It is also observed that the ICSID, UNCITRAL and other arbitration rules do not impose any limitations on the power of a tribunal to award specific remedies.⁶⁵ The tribunal in *Micula v. Romania* clearly endorses the availability of non-pecuniary remedies in investor-state arbitration:

Under the ICSID Convention, a tribunal has the power to order pecuniary or non-pecuniary remedies, including restitution, i.e., re-establishing the situation which existed before a wrongful act was committed. 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.⁶⁶

These considerations suggest that the availability of non-pecuniary remedies such as material and juridical restitution in investor-state arbitration is, in itself, well established.⁶⁷ On the other hand, in light of the principle of state sovereignty as well as the *sui generis* character of investor-state arbitration examined above, the question of *appropriateness* of awarding restitution remains to be examined.

B. Provisions on Remedies in IIAs as *Leges Specialis*

The controversy over the availability of restitution in investor-state arbitration is laid to rest by the inclusion of a provision on the form of remedies available in investor-state arbitration

60 Nicholas Angelet, “Alleviating the Disruptive Nature of Investment Arbitration: Some Remarks on Restitution and Post-Arbitration ADR” (2014) 11:1 *Transnational Dispute Management* 1 at 5 [Angelet].

61 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 27 (entered into force 27 January 1980); “Report of the Commission to the General Assembly on the work of its fifty-third Session” (UN Doc A/56/10) in *Yearbook of the International Law Commission* 2001, vol 2, part 2 (New York: UN, 2001) at Art 32 (UNDOC.A/CN.4/L.602/Rev.1 [“Report of the Commission”]); Hindelang, *supra* note 14 at 181.

62 Thomas W. Wälde & Borzu Sabahi, “Compensation, Damages, and Valuation in International Investment Law” in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (New York: Oxford University Press, 2008) 1049 at 1060 [Wälde & Sabahi]; Van Aaken, *supra* note 7 at 748.

63 Sabahi, *supra* note 14 at 63.

64 Wittich, “Remedies”, *supra* note 11 at 1398.

65 *Ibid* at 1395.

66 *Micula v. European Food*, *supra* note 37 at para 166. See also *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, Award (14 January 2009) at para 79, ICSID, Case No ARB(AF)/01/03.

67 Schreuer, “Non-Pecuniary Remedies”, *supra* note 57 at 331-32; Ian A. Laird et al, “International Investment Law and Arbitration: 2013 in Review” in Andrea K. Bjorklund, ed, *Yearbook on International Investment Law & Policy* (New York: Oxford University Press, 2015) 69 at 119; Stephens-Chu, *supra* note 26 at 667.

in IIAs. Even assuming that Part II of the ASR analogously applies to investor-state arbitration, such a special provision will prevail over these articles by virtue of Article 55 of the ASR, which provides that:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.⁶⁸

Gray observes that while the exact scope of this provision is not clear, it “clearly includes special ‘self-contained’ regimes such as those of the EU and the WTO where there are institutional procedures and specific treaty rules as to reparation.”⁶⁹ In a similar vein, there would be no doubt that provisions on remedies in IIAs constitute “special rules of international law” within the meaning of Article 55. States are therefore free to exclude, explicitly acknowledge, or even expand, the power of tribunals to order non-pecuniary remedies.⁷⁰

In this regard, Article 26(8) of the ECT merits attention in that it recognises the authority of tribunals to award non-pecuniary remedies, albeit implicitly. The second sentence of Article 26(8) provides that:

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.⁷¹

According to the preparatory work of the ECT, this sentence was introduced into the treaty upon Canada’s proposal in order to address its constitutional concerns as to the impossibility for the federal government to require state governments to withdraw measures under its domestic legal system. This suggests that the possibility of ordering non-pecuniary remedy, that is, the withdrawal of the relevant measures, was clearly recognised in the process of negotiations, and the fact that Canada’s proposal was adopted in the final text implies that the availability of such remedies was accepted by the negotiating states. De Luca, based on thorough research on the preparatory work of the ECT, observes that this provision vests arbitral tribunals established under the ECT with the authority to grant non-pecuniary remedies in all other cases “[b]y only limiting the power of tribunals to award non-pecuniary remedies in the case of unlawful measures of sub-national governments or authorities of Contracting States.”⁷² Kriebaum similarly observes that the ECT “apparently is based on the assumption that specific performances can be ordered in an award”.⁷³ This is contrasted with Article 1135 of NAFTA and similar provisions that are often found in recent IIAs that limit the types of remedies available in investor-state arbitration to pecuniary compensation and restitution in property (see Introduction).

68 ILC Report, *supra* note 13 at art 55.

69 Gray, “Restitution and Compensation”, *supra* note 36 at 418-9; Gray, “Forms of Reparation”, *supra* note 14 at 594; “Report of the Commission”, *supra* note 61 at 30.

70 De Brabandere, *supra* note 41 at 188.

71 *The Energy Charter Treaty*, *supra* note 10 at art 26(8).

72 De Luca, *supra* note 59 at paras 4, 46-53.

73 Kriebaum, *supra* note 37 at 205.

In summary, although the question of appropriateness of awarding juridical restitution has been a matter of controversy in the context of investor-state arbitration, it is always possible for states to solve this issue by providing a specific provision that acknowledges restitution as a form of remedy in the relevant IIA.

C. Case Law

There are a few cases in which investment arbitration tribunals actually ordered non-pecuniary remedies or effectively ordered monetary restitution under the rubric of compensation. A clear example of juridical restitution is found in *ATA v. Jordan*. There, the tribunal found that the extinguishment of the arbitration agreement by Jordan infringed the claimant's right to arbitrate a contractual claim, and therefore violated the Jordan-Turkey BIT. At the remedy phase, the tribunal revived the arbitration agreement by ordering, *inter alia*, "that the ongoing Jordanian court proceedings in relation to [the relevant] dispute be immediately and unconditionally terminated, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute" and "that the Claimant is entitled to proceed to arbitration [in relation to the dispute] in accordance with the terms of the Arbitration Agreement set forth in the Contract of 2 May 1998."⁷⁴ In *Saipem v. Bangladesh*, the tribunal found that the claimant's rights to arbitrate were expropriated by the judgment of the Supreme Court of Bangladesh. As for remedies, the tribunal concluded that "in the present case the amount awarded by the ICC Award constitutes the best evaluation of the compensation due under the Chorzów Factory principle" and awarded the payment of that amount.⁷⁵ It is observed that "[a]lthough characterized as compensation, this effectively was re-instatement of the ICC award at the international level."⁷⁶ Another example where the tribunal awarded juridical restitution is *Arif v. Moldova*, which is examined in detail later in this article. However, these cases remain a rarity in international investment law. The cause of the significant gap between the theoretical availability of restitution and the actual rarity of its occurrence in practice will also be examined.

IV. POSSIBLE BENEFITS OF JURIDICAL RESTITUTION IN INVESTOR-STATE ARBITRATION

A. Object and purpose of IIAs

The previous section demonstrated that awarding juridical restitution would be possible in theory, and that it is always possible for the state to explicitly endorse the power of tribunals to order such remedies in the relevant IIA. This section aims to demonstrate that there are situations where juridical restitution should be regarded as a preferable remedy for the host state, rather than as a threat to its sovereignty.

First, restitution, in certain circumstances, better serves the object and purpose of IIAs.

⁷⁴ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, Award (18 May 2010) at para 133, ICSID, Case No ARB(AF)/08/02.

⁷⁵ *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award (30 June 2009) at para 202 and 216, ICSID, Case No ARB(AF)/05/07.

⁷⁶ Sabahi, *supra* note 14 at 78. See also *Occidental v. Ecuador*, *supra* note 28 at para 15; *Maffezini v. Spain*, Award (25 January 2000) at at 34-35, ICSID, Case No ARB(AF)97/07; *Emilio Agustín Maffezini v. The Kingdom of Spain*, Award (13 November 2000) at para 72-83 and 94, ICSID, Case No ARB(AF)97/07.

The primary objective of IIAs is to enhance economic relations between the contracting states as well as sustainably develop the economy of the contracting states by promoting and protecting foreign investments. The tribunal in *Arif v. Moldova*, explained the link between restitution and the objectives of IIAs as follows:

[R]estitution is more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host State.⁷⁷

Indeed, given that investor-state arbitration is one of the commitments undertaken by the contracting states to achieve these objectives, these objectives should also be reflected at the remedy phase.⁷⁸

Equally important is that in order to achieve these objectives, a contracting state should have a “systemic interest” in demonstrating its willingness to maintain a properly-functioning legal system that forms the basis of a long-term, stable investment environment, as well as being consistent with the IIA.⁷⁹ It may also be argued that this approach is beneficial to investors when they keep relations with the host state, because it gives stable ground and guidance for their future business operations in the territory of the host state. Van Aaken goes further to argue that primary remedies, such as specific performance or injunctions, which “restore the *status quo ante* or create an entitlement”, provide a stronger protection of an entitlement for investors than secondary remedies as pecuniary damages.⁸⁰ Therefore, “an investor might have a strong interest in primary remedies”.⁸¹

In this sense, the objectives of IIAs are better achieved by juridical restitution than allowing the host state to “buy the right to breach” the approach that addresses only “the consequences of past conduct and thus may not adequately deter future violations”.⁸² Hindelang summarises these points as follows:

Turned positively, prioritising restitution would give the host state a second chance to present itself as being committed to establishing and maintaining long term and stable investment relations on the basis of the rule of law. Already by knowing that it might see the foreign investor ‘again’, the host state has an increased interest in constantly working on the relationship.⁸³

Schreuer also acknowledges the usefulness of restitution in certain cases that it “may help to maintain the investment and help to avoid a complete break between the investor and the host State.”⁸⁴

Moreover, as noted, ordering a state party to pay monetary damages can have an even

⁷⁷ *Mr. Franck Charles Arif v. Republic of Moldova*, Award (8 April 2013) at para 570, ICSID, Case No ARB(AF)/11/23 [*Arif v. Moldova*].

⁷⁸ De Brabandere, *supra* note 41 at 69.

⁷⁹ Hindelang, *supra* note 14 at 186.

⁸⁰ Van Aaken, *supra* note 7 at 745.

⁸¹ *Ibid* at 746.

⁸² Stephens-Chu, *supra* note 26 at 679.

⁸³ Hindelang, *supra* note 14 at 198. See also Endicott, *supra* note 8 at 517.

⁸⁴ Schreuer, “Alternative Remedies”, *supra* note 32 at 20.

stronger impact on a state's sovereignty than ordering restitution.⁸⁵ Wittich therefore observes that non-pecuniary remedies may “assist tribunals in counterbalancing the tendency” towards damages awards that are seen as excessive, which “may have detrimental consequences for a dispute settlement system that is based on the consent of State parties.”⁸⁶

B. ‘In certain situations’: limitations on juridical restitution

A natural question that follows from this is under what circumstances juridical restitution can be a preferable remedy. This is closely related to the issue of limitations on restitution. Article 35 of the ASR, which may well be considered as the manifestation of general principles of international law, identifies two such limitations: when restitution is materially impossible; and when restitution involves “a burden out of all proportion to the benefit deriving from restitution instead of compensation.”⁸⁷ As to the former, the mere challenge of implementing the order of restitution in the domestic legal system (including constitutional difficulties) would not form the basis of “material impossibility.”⁸⁸ This argument is made in light of the principle that a state is not entitled to invoke the political or administrative obstacles resulting from its internal law, as justification for failure to provide full reparation (Article 32 of the ASR).⁸⁹ On the other hand, restitution may well be materially impossible where third parties have acquired legitimate interests in the situation created by the wrongful conduct. With this regard, the Commentary to ASR states that:

[W]hether 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.⁹⁰

In *Al-Bahloul v. Tajikistan*, the claimant brought arbitration proceedings under the ECT in relation to the failure of the Tajik authorities to issue the necessary licences for the exploration and development of hydrocarbons, pursuant to various agreements concluded with the authorities. Among the requests for relief of the Claimant was that of ordering the Respondent to issue the necessary licenses. The tribunal acknowledged that specific performance was “a permissible remedy in international law”, but concluded that it was not materially possible to order Tajikistan to issue the licences, as nine years had lapsed since the claimant had left Tajikistan.⁹¹ Furthermore, during this period, “third parties had become active in the areas where [the] Claimant had been promised exclusive licenses.”⁹²

In a similar vein, restitution should be considered materially impossible where it is detrimental to the public interests of the citizens. This is often the case when the measures at issue concern “abstract-general (parliamentary) laws” rather than “individual-concrete measures

85 De Brabandere, *supra* note 41 at 18; Wälde and Sabahi, *supra* note 62 at 1060.

86 Wittich, “Remedies”, *supra* note 11 at 1430. See also Irmgard Marboe, “The System of Reparation and Questions of Terminology” in Bungenberg et al, eds, *supra* note 11, 1031 at 1036; Angelet, *supra* note 60 at 5.

87 ILC Report, *supra* note 13 at 243.

88 *Ibid* at 242.

89 *Ibid*.

90 *Ibid* at 243.

91 *Al-Bahloul v. Tajikistan*, *supra* note 37 para 47.

92 *Ibid* at paras 54–56.

imposed usually through an administrative act".⁹³ For example, where the breach of the relevant IIA provisions is primarily based on the procedural flaws of an otherwise valid measure adopted in the public interest, it would be materially impossible to order juridical restitution that would invalidate the measure.

Petrobart v. Kyrgyz Republic is another example where restitution was materially impossible. This case arose out of the break-down of a contractual relationship for the delivery of gas condensate. In this case, it was the Respondent who claimed that specific performance was the primary remedy, whereas the claimant argued for compensation, finding that in the circumstances of the case, specific performance was no longer possible.⁹⁴ The tribunal agreed with the claimant that, in the situation where the claimant no longer had any activity in the Kyrgyz Republic and where the contract at issue was not in operation, "specific performance is no longer a practical option".⁹⁵

Angelet points out that restitution is also materially impossible when the measure in question is necessary for safeguarding international human rights and the nullification of the measure would "make it impossible for the host State to comply with its other international obligations."⁹⁶

Material impossibility does overlap with the second restriction, i.e., disproportionate burden, and there are "borderline cases ... which do not clearly fall within either category."⁹⁷ On the other hand, as determination on proportionality requires a balancing exercise based on considerations of equity and reasonableness, this second restriction arguably gives greater flexibility to the tribunal in determining whether restitution would be appropriate in a given case.⁹⁸

Apart from these restrictions recognised by the ASR, restitution would be practically meaningless to the affected investor in situations where the investment relationship had effectively broken down and the investor had withdrawn from the host state. This is indeed a typical situation that is brought to investor-state arbitration, and in such a case, ordering damages would be the only viable remedy for the investor.⁹⁹

Conversely, there are situations where such restraining factors do not exist, and the restoration of the legal situation could be a practically meaningful outcome for the investor. *ATA v. Jordan*, in which the tribunal effectively restored the status quo ante with respect to claimant's right to arbitrate a contractual claim, provides a good example of such a situation. Another example would be ordering the re-issuance of revoked licences to the claimant investor who still operates in the host State during the arbitration proceedings, and who is willing to continue its operation for a certain period after the issuance of the award.

To summarize, restitution may be a preferable option depending on the facts of the case,

93 Van Aaken, *supra* note 7 at 724.

94 *Petrobart Limited v. The Kyrgyz Republic*, Award (29 March 2005) at 78, SCC, Case No Arb(AF)/126/2003.

95 *Ibid.*

96 Angelet, *supra* note 60 at 5.

97 Sabahi, *supra* note 14 at 86.

98 Endicott, *supra* note 8 at 541.

99 Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008) at 57 [Ripinsky & Williams]; Stephens-Chu, *supra* note 26 at 662.

the nature of the breach of international obligations, and the interests of the investor. Ultimately, it may better achieve the object and purpose of IIAs to protect and promote foreign investment by providing a stable legal system for long-term investor- state relationships.

V. PRACTICAL RESTRICTIONS ON RESTITUTION IN INVESTOR-STATE ARBITRATION

Despite the availability and desirability (in certain circumstances) of restitution in investor-state arbitration, in practice, investment arbitral tribunals rarely order restitution, even though “[t]he orders declaring the nullity of governmental measures at the international level are numerous”.¹⁰⁰ Cases such as *ATA v. Jordan* and *Saipem v. Bangladesh* in which the tribunals awarded material and juridical restitution remain a rarity in international investment law. This is because there are fundamental practical obstacles to awarding restitution in the context of investor-state arbitration. This section examines two of such restraints: the *nec ultra petita* principle and non-enforceability of non-pecuniary remedies.

A. Nec ultra petita

In investor-state arbitration, investors almost always frame their claims in terms of monetary damages.¹⁰¹ Therefore, it is sometimes argued that the power of a tribunal to order any remedy available under the applicable law is constrained by the rule of *nec ultra petita*. In cases where investors seek only monetary damages, the tribunal is precluded from ordering non-pecuniary remedies.¹⁰² However, the claim that the form of reparation is entirely dependent on the claimant investor’s selection has not been fully supported. In the context of inter-state relationships, while Article 43(2)(b) of the ASR provides that the injured state may specify what form reparation should take in accordance with the provisions of Part II, it does not mean that the choice by the injured state ultimately determines the admissible form of reparation. The commentary to Article 43 provides that: “article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.”¹⁰³ Hindelang observes that:

State practice does not unequivocally embrace that the explicit choice or intentions inferred from unilateral acts adopted by the injured State party throughout the proceedings determine the (only) admissible form of reparation. Except for the situation that the responding State party does not object to an explicit or implicit election amounting to a *solo consensu* agreement between the State parties, the question of whether the reaction of the responding State

100 Sabahi, *supra* note 14 at 74. See also Carole Malinvaud, “Non-pecuniary Remedies in Investment Treaty and Commercial Arbitration” in Albert Jan van den Berg, ed, *ICCA International Arbitration Conference* (Alphen aan den Rijn: Kluwer Law International, 2009) 209 at 225; Ripinsky and Williams, *supra* note 99 at 57–59; Endicott, *supra* note 8 at 537.

101 Schreuer, “Non-Pecuniary Remedies”, *supra* note 57 at 329.

102 Wälde & Sabahi, *supra* note 62 at 1059; Van Aaken, *supra* note 7 at 734; Kriebaum, *supra* note 37 at 205; Ripinsky & Williams, *supra* note 99 at 57-9.

103 ILC Report, *supra* note 13 at 304.

can fully be ignored by the tribunals appears unsettled.¹⁰⁴

Gray likewise argues that “the right of the injured State to choose the form of reparation must be further modified in the light of several complicating factors.”¹⁰⁵ Certainly, in international arbitration, a tribunal’s competence is limited by the common will of the parties. Therefore, if there is an agreement between the parties concerning the choice of a form of reparation, the tribunal may not go beyond what is agreed on by the parties.¹⁰⁶ By contrast, where such an agreement does not exist, Brabandere argues that tribunals are authorised to rule that it “would not be *ultra petita*” to order restitution, even though the claimant requests compensation, if “one of the parties has argued that restitution would be an appropriate remedy”.¹⁰⁷

Indeed, when the respondent state objects to the injured party’s choice of a specific form of reparation, the considerations of sovereignty require the tribunal to pay due regard to the opposition of, or the form of reparation specifically requested by, the respondent state.¹⁰⁸ In such circumstances, if the tribunal orders only one form of reparation, it necessarily means that either party’s request or objection is dismissed *in toto*. The proposed ‘two-options’ approach, by which tribunals award restitution and pecuniary compensation as ‘sequential’ *alternatives*, will address this ‘all-or-nothing’ dilemma, as is explained below.

B. *Non-enforceability*

More critical is the issue of non-enforceability of restitutionary remedies. Article 54(1) of the ICSID Convention obliges contracting states to enforce the pecuniary obligations imposed by an ICSID arbitral award as if it were a final judgment of its national court, but does not provide the obligation to enforce non-pecuniary obligations. While the *travaux préparatoires* of the ICSID Convention clearly suggests that the absence of the reference to non-pecuniary remedies in Article 54(1) does not affect the power of an ICSID tribunal to order such remedies,¹⁰⁹ it does mean that non-pecuniary obligations are not enforceable.¹¹⁰ Also, implementing juridical restitution may “contravene constitutional norms or affect the rights of third parties.”¹¹¹ These factors would undoubtedly limit a party’s interest in claiming non-pecuniary remedies, as well as discourage tribunals from awarding such remedy.¹¹² With regard to the ECT, De Luca argues that the effective implementation of ECT awards of specific performance is secured by virtue of the provision in Article 26(8) that, “[e]ach Contracting Party shall carry out without delay any such award and *shall make provision for the effective enforcement* in its Area of awards.”¹¹³

104 Hindelang, *supra* note 14 at 169.

105 Gray, “Forms of Reparation”, *supra* note 14 at 593.

106 Yann Kerbrat, “Interaction Between the Forms of Reparation” in Crawford, Pellet & Olleson, eds, *supra* note 14, 573 at 577.

107 De Brabandere, *supra* note 41 at 185–86

108 Kerbrat, *supra* note 106 at 577; Angelet, *supra* note 60 at 4.

109 Schreuer, “Alternative Remedies”, *supra* note 32 at 5 (citing History of the Convention, Vol. I, pp. 246, 248, Vol. II, pp. 344, 346, 347, 425, 990, 903, 991, 1019, 1026, 1029.). See also Sabahi, *supra* note 14 at 64; 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) at para 1310, ICSID, Case No ARB(AF)/05/20 [*Micula v. Romania* (Award)].

110 Douglas, *supra* note 14 at 829–830; Endicott, *supra* note 8 at 521.

111 Douglas et al, *supra* note 15 at 829.

112 Malinvaud, *supra* note 100 at 227.

113 De Luca, *supra* note 59 at para 56.

This is because it “imposes upon the Contracting Parties ... also an obligation to make “specific provision” to the purpose in relation to any award (independently of whether the remedy granted is pecuniary or non-pecuniary).”¹¹⁴ However, a critical difference between pecuniary and non-pecuniary remedies, in this context, is that the latter may be provided only by the host state in its jurisdiction. It follows that the implementation of restitutionary remedy depends, after all, on the willingness of the state, and therefore the issue of non-enforceability remains for the ECT awards. Moreover, even if the state has demonstrated a willingness to implement the award, there is no means to guarantee such implementation. This leaves significant uncertainty as to whether the investor may obtain satisfaction. This uncertainty would naturally constitute a bar for the investors to claim restitution rather than compensation. Furthermore, by virtue of the *nec ultra petita* principle, the award of restitution would become even rarer, and “the scarcity of such awards may deter them from claiming such relief.”¹¹⁵ In this way, the non-enforceability issue is closely linked to the *nec ultra petita* principle.

In addition, when the EU institutions find that an investment dispute involves the issue of inconsistency between EU law and investment treaty obligations, there is currently no practical possibility of EU member states’ implementing the award that orders non-pecuniary remedies. This is due to the rigid insistence on the supremacy of EU law by the EU’s institutions. The aggressive interference by the European Commission in the enforcement proceedings of the *Micula v. Romania* award well illustrates this point, although the award itself ordered compensation. The case arose out of Romania’s revocation of certain incentives and benefits provided to foreign investors in disfavoured regions, including the claimants, who engaged in food and beverage production, and invested in one such disfavoured region relying on the incentive mechanism. During the process of accession negotiations between the EU and Romania, the EU invited Romania to end its aid measures that were incompatible with the EU’s state aid rules, or to align with the *acquis*.¹¹⁶ Subsequently, Romania repealed certain incentives, including those granted to the claimants.¹¹⁷ The claimants filed an ICSID arbitration under the Swedish–Romanian BIT, claiming compensation for the losses incurred due to the revocation.¹¹⁸ The tribunal found that Romania had breached the BIT by failing to ensure the FET of the claimants’ investments when it removed the incentives on the ground, *inter alia*, that ‘Romania made a representation that created a legitimate expectation that the EGO 24 incentives would be available substantially in the same form as they were initially offered’.¹¹⁹ Accordingly, the tribunal ordered Romania to pay a total of 250 million USD.¹²⁰ In response to the award, the European Commission took up the position that the payment of the compensation awarded by the arbitral tribunal constituted ‘state aid’ within the meaning of Article 107 (1) of the TFEU. This was incompatible with the internal market, and required Romania not to pay out any incompatible state aid and to recover any such aid that

114 *Ibid* at 57.

115 Stephens-Chu, *supra* note 26 at 662.

116 *Micula v Romania* (Award), *supra* note 109 at para 235.

117 *Ibid* at para 241.

118 *Ibid* at paras 130–249.

119 *Ibid* at para 677.

120 *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 Annulment (26 February 2016) at para 341, ICSID, Case No ARB(AF)/05/20.

had already been paid out.¹²¹ In addition, the Commission concluded that the claimants were jointly responsible for the repayment of the state aid received by either of them.¹²² Based on this position, the Commission assisted Romania in the enforcement proceedings of the award initiated by the claimants in various jurisdictions, and sought to block the enforcement of an ICSID award not only within, but also outside the EU. The examination of the EU's controversial position in these proceedings is outside the scope of this article, but this episode vividly demonstrates the practical non-enforceability of restitution in a situation where EU member states (or the EU) are the respondents, and the EU finds inconsistency between its own law and investment treaty obligations.

Against this background, the following section demonstrates that the 'two-options' approach may be employed as a way to overcome the issue of non-enforceability. It first examines the case of *Arif v. Moldova*, which adopted this approach in investment treaty arbitration. Having argued that this approach does provide a helpful way to achieve the benefits of awarding restitution while addressing the issue of non-enforceability of the restitutionary remedy, it proceeds to examine how to put this approach in practice.

VI. THE 'TWO-OPTIONS' APPROACH

In *Arif v. Moldova*, the claimant investor had won the tender to operate duty free stores at the border with Romania. It also concluded a lease agreement which was authorised by a regulatory authority, and obtained a licence in order to operate a duty-free store at the country's main airport. Subsequently, however, this tender, lease agreement and the licences were invalidated and cancelled by a series of acts by organs of the Moldovan state, including domestic judicial decisions. The tribunal found that the claimant's investment in the airport duty free store has not received fair and equitable treatment in accordance with Article 3 of the France-Moldova BIT.

As for the forms of reparation, it was the respondent state that preferred restitution as the primary form of reparation, whereas the claimant insisted on monetary damages.¹²³

The tribunal first considered the question of "whether restitution can be considered in circumstances where Claimant insists on damages."¹²⁴ The tribunal addressed neither the source of the tribunal's authority to order restitution in such circumstances nor the issue of *nec ultra petita*, but instead stated that "restitution is more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host State", and therefore it "considers restitution to be the preferable remedy".¹²⁵ The tribunal then noted the issue of uncertainty of implementation of restitution by stating that: 'in the present case Respondent has not been able to confirm that restitution is possible, and the Tribunal cannot supervise any restitutionary remedy'.¹²⁶ Accordingly, the tribunal adopted the following solution:

121 EC, Commission Decision 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral Award *Micula v Romania* of 11 December 2013, [2015] OJ, L 232/43 at 69.

122 *Ibid.*

123 *Arif v. Moldova*, *supra* note 77 at para 568–69.

124 *Ibid* at para 569.

125 *Ibid* at paras 570–71.

126 *Ibid* at para 571.

[W]ithin a period of no more than sixty days, Respondent will make a proposal to Claimant for the restitution of the investment in the Airport store, including its proposals as to appropriate guarantees for the legality of a new lease agreement. The Tribunal expects the Parties to negotiate regarding this proposal in good faith, but confirms that Claimant at any time within a period of ninety days from the date of this award may elect to take the compensation as quantified in this Award in lieu of restitution and Respondent is obliged to make the payment accordingly.¹²⁷

This is to award restitution and compensation as sequential alternatives at the option of the claimant, in the sense that if the terms of restitution proposed by the host state within a specified period of time are not satisfactory to the investor, the investor may elect to claim and enforce the pecuniary award.

A similar approach is found, although not in the context of the form of reparation, in *Goetz v. Burundi*. This case concerns the withdrawal by Burundi of a free zone certificate conferring tax and customs exemptions held by the claimant. The claimant instituted an ICSID arbitration, requesting the cancellation of the withdrawal and, as a subsidiary, monetary damages. The tribunal, having found that the withdrawal was tantamount to expropriation, gave Burundi a choice between restitution, i.e. returning the benefits of the free zone regime, and paying an effective and adequate indemnity as a means to avoid liability under the applicable treaty,¹²⁸ the failure of both resulting in international illegality the consequences of which would be left to the Tribunal to ascertain.¹²⁹ Subsequently, the parties reached a settlement agreement in which the government agreed to pay compensation and also reissue the certificate, and the agreement was included in the award.¹³⁰ Certainly, this approach does not concern restitution as a form of reparation but concerns the conditions for avoiding international liability and therefore does not provide a direct support for the ‘two-options’ approach with regard to the forms of reparation.¹³¹ Nevertheless, this case demonstrates the tribunal’s willingness to offer the host state the chance to nullify and change its measures.¹³² Also the settlement agreement reached in this case effectively means a juridical restitution.¹³³

The ‘two-options’ approach is well-received as a means that gives the state “a final opportunity to preserve the investment, while also preserving Claimant’s right to damages if a satisfactory restitutionary solution cannot be found.”¹³⁴ Brabandere argues that the solution adopted by the *Arif v. Moldova* tribunal should be welcomed “for its pragmatism in ordering compensation as an alternative remedy in view of the fact that foreign investment relies very

127 *Ibid* at para 572.

128 *Antoine Goetz et consorts v. République du Burundi*, Award (10 February 1999) at para 132, ICSID, Case No ARB(AF)/95/03.

129 *Ibid* at para 133.

130 *Ibid* at 518.

131 Malinvaud, *supra* note 100 at 223; Schreuer, “Non-Pecuniary Remedies”, *supra* note 57 at 330.

132 J. Gillis Wetter & Stephen M. Schwebel, “Some Little-Known Cases on Concessions” in Humphrey Waldock & R. Y. Jennings, eds, *The British Year Book of International Law 1964* (London: Oxford University Press, 1966) 183 at 216; Gray, “Judicial Remedies”, *supra* note 55 at 193. See also, *Texaco v. Libya*, *supra* note 52 at para 111.

133 Sabahi, *supra* note 14 at 77; Stephens-Chu, *supra* note 26 at 673–74.

134 *Arif v. Moldova*, *supra* note 77 at para 571.

much on a relationship of good faith with the host state.”¹³⁵ Schreuer argues that:

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.¹³⁶

These considerations strongly support the appropriateness of the two-options approach as a way to give a ‘second chance’ for the host state to demonstrate its continued commitment towards long-term and stable investment environment in conformity with the IIA (by implementing restitution) as well as providing a safety net for investors against the risk of non-enforceability of restitution, by requiring the ordering of monetary compensation as an alternative.

A remaining issue is how to put this approach in practice. As for the post-award phase, that is, once the pecuniary and non-pecuniary remedies are actually awarded as alternatives, Angelet persuasively proposes the active use of ‘post-award ADR’ in which the state and the investor make good faith efforts to implement restitution, the failure of which would result in compensation as an alternative means of redress.¹³⁷ This section examines how to encourage tribunals to adopt the two-options approach, which is the precondition for any post-award efforts.

As noted, the *Arif v. Moldova* tribunal did not directly address the issue of whether the tribunal had the power to award restitution when the investor claimed monetary damages, as a result of which subsequent tribunals may be hesitant to follow this tribunal’s approach. However, unless the disputing parties agree to exclude restitutionary remedies, or this type of remedy is excluded in the relevant IIA, the tribunal is not precluded from awarding restitution even where the claimant claimed monetary damages. A clear recognition of this point by tribunals may lead to the endorsement of the *Arif v. Moldova* tribunal’s approach rather than leaving it as an ‘unusual award’.¹³⁸

In addition, a clear and effective way to make the two-options approach a practicable option is to provide an explicit authorization for the tribunals to adopt this approach in the IIA. As examined above, states are free to exclude, or conversely, expand the power of tribunals to order non-pecuniary remedies. If this is so, it would be entirely possible to explicitly acknowledge the power of tribunals to award juridical restitution (which is likely to be supplemented by compensation), on the condition that the tribunal shall also award monetary damages as an alternative which may be enforced if the restitution is not implemented within a specified period of time. The reasonable period of time for implementation would be determined by the tribunal in light of the circumstances of each case. It should also be noted that, in application, the tribunal should specify, as far as possible, the content of juridical restitution in order to avoid future conflicts concerning implementation.

135 De Brabandere, *supra* note 41 at 190.

136 Schreuer, “Non-Pecuniary Remedies”, *supra* note 57 at 332.

137 Angelet, *supra* note 60 at 5-9.

138 Laird et al, *supra* note 67 at 119.

VII. CONCLUSION

This article first demonstrated that, regardless of the non-applicability of the ASR regime on state responsibility to investor-state relationship, juridical restitution would be theoretically available in investor-state arbitration. It also demonstrated that in certain circumstances, juridical restitution is more beneficial for the host state than merely ‘buying itself out’ of international responsibility by paying out compensation, in that it gives a final opportunity to demonstrate its willingness to keep committed to a stable investment environment in conformity with the IIA. It then examined, even in circumstances where awarding juridical restitution would be appropriate, practical obstacles to awarding restitution, in particular its non-enforceability, making it difficult for tribunals to actually award restitution. The two-options approach proposed in the previous section would be an effective way to address the issue of non-enforceability while achieving the benefits of restitution.

States should acknowledge that restitution may, under certain circumstances, better serve the primary objective of IIAs to enhance economic relations between the contracting states as well as (sustainably) develop the economy of the contracting states by promoting and protecting foreign investments. Juridical restitution should be viewed as a second-chance for the host state to demonstrate its continued commitment towards a long-term and stable investment environment in conformity with the IIA, rather than a threat to its sovereign power. The states therefore should acknowledge, rather than minimize, the power of tribunals to award restitutionary remedies. On the other hand, this power should not be exercised at the expense of the interests of investors, that is, it should not make the investors bear the risk of non-enforceability of such remedies. The endorsement of the two-options approach by IIAs proposed by this article is an effective way to better reflect the objective of IIAs in the remedy phase of investor-state arbitration, but without putting undue burden on investors.