FOUNDATIONS OF SPECIFIC PERFORMANCE IN INVESTOR-STATE DISPUTE SETTLEMENTS: IS IT POSSIBLE AND DESIRABLE?

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INTRODUCTION

In most cases the parties meet their obligations in accordance with the contract or treaty. Nevertheless, it happens that one party fails to meet his obligations. In the context of contract law, for instance, a seller might fail to deliver the goods; delay in delivering the goods; or deliver non-conforming goods. In the context of investment law, a state might fail to live up to its treaty obligations to not discriminate against a foreign investor. Or, it might fail to honor its contractual obligations under an investment contract. In all these cases one party breaches its obligations by not following its obligations under the contract or the treaty.

To tackle the consequences of such a breach, contract law has remedies in place to protect an aggrieved party. In a general classification, these remedies may be divided into three categories:

specific,[1] substitutionary,[2] and termination.[3] Specific performance refers to demanding "actual performance of the defaulting party's undertaking."[4] Further, substitutionary relief is concerned with "compensation for not having received the promised performance."[5] In a simple word, termination means putting an end to the life of a contract.

The goal behind all these remedies is to put the aggrieved party in as good a position as he would have been had the contract been fully performed.[6] However, the approaches taken to provide effective remedies and accomplish the goal just mentioned vary from one legal system to the next. Civil law regimes such as France, Germany, Netherland, and Iran prefer specific reliefs over the compensatory measures.[7] On the other hand, in common law systems such as the United States and England, compensatory measures come first.[8] In some other countries, remedies have a discretionary nature.[9] That is to say, an aggrieved party has a broad discretion to choose from the available remedies.

In the context of international investment disputes, however, despite the fact that the principle of *pacta sunt servanda* (Latin for "agreements must be kept") has widely been recognized, courts and arbitral tribunals normally award monetary compensation and rarely grant specific performance. The main reasons put forward against the availability of specific performance have to do with its interference with a state's

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1. In the literature, specific performance is recognized also as a primary or preventive relief. Ewan McKendrick & Iain Maxwell, *Specific Performance in International Arbitration*, 1 CHINESE J. COMP. L. 195, 196 (2013), http://cjcl.oxfordjournals.org/content/1/2/195.full.pdf+html.

2. Pecuniary, compensatory, and secondary remedies are interchangeable with substitutionary remedies. JANET ANNE O'SULLIVAN & JONATHAN HILLIARD, THE LAW OF CONTRACT 436 (5th ed. 2012).

3. G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 3 (1998).

4. *Id.* at 1.

5. *Id.*

6. LIU CHENGWEI, REMEDIES FOR NON-PERFORMANCE: PERSPECTIVES FROM CISG, UNIDROIT PRINCIPLES & PECL 33 (2003); Alan Schwartz, *The Case for Specific Performance*. 89 YALE L.J. 271, 271 (1979).

7. PRINCIPLES OF EUROPEAN CONTRACT LAW (PARTS I & II) 363 nn.1-4 (Ole Lando & Hugh Beale eds., 2000) [hereinafter Lando & Beale]; *see* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED STATES CONVENTION 296-98 (3d ed. 2009); Ebrahim Shoarian & Farshad Rahimi, International Sales Law from the Perspective of Doctrine and Case Law 378 (Shahre-e-Danesh Institute of Law, Tehran 2015) (translation is in Persian).

8. *See id.*

9. *See, e.g.*, International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, ch. 7 (1994); U.N. Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, arts. 45 & 61 (1981); STEFAN VOGENAUER & JAN KLEINHEISTERKAMP, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 728 (2009); SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 694 (Ingeborg Schwenzer ed., 3d. ed. 2010) [hereinafter SCHLECHTRIEM & SCHWENZER].

sovereignty,[10] difficulty in its enforcement,[11] and the fact that investors in the vast majority of cases frame their claims in terms of monetary compensation. The main thesis of this Article is that courts and arbitral tribunals should be able to grant specific performance in international investment disputes for five main reasons.

Firstly, granting specific performance does not conflict with a state's sovereignty since the right and power of a state to enter into a contract or undertake obligations in the treaty is an obvious attribute of sovereignty.[12]

Secondly, as modern law of contract demonstrates, an immediate effect of the principle of *pacta sunt servanda* is the other party's right to opt for performance.

Thirdly, there are situations where neither granting specific performance nor awarding damages independently could make whole all of the losses arising from a breach of a contract; rather, a combination of specific performance and monetary relief (and sometimes a shift from one remedy to another remedy) could fully compensate the aggrieved party.

Fourthly, in the context of both commercial and investment contracts, there are situations in which only specific performance might make whole all losses arising from a breach of an obligation. For instance, in the context of "debt-for-nature swap"[13] investment, monetary compensation will be an inadequate remedy since "debt-for-nature swaps are non-pecuniary: the NGO [non-governmental organization] invests in the host country's environment, with no expectation of financial return."[14] The non-pecuniary nature of debt-for-nature swaps investment makes

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10. Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, *in* INTERNATIONAL INVESTMENT LAW & COMPARATIVE PUBLIC LAW 747 (Stephan W. Schill ed., 2010); LG&E Energy Corp et al. Argentine Republic, ICSID Case No. ARB 02/1, Award, ¶¶ 84-87 (July 25, 2007).

11. *See* M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 280 (2000).

12. Lowell C. Wadmond, *The Sanctity of Contract Between a Sovereign and a Foreign National*, 1957 A.B.A. SEC. MINERAL & NAT. RES. L. PROC. 179 (1957); *see generally* Libyan Am. Oil Co. v. Gov't of the Libyan Arab Republic, Apr. 12, 1977, 20 I.L.M. 1 (1981); BP Exploration Co. (Libya), Ltd. v. Gov't of the Libyan Arab Republic, 53 I.L.R. 297 (1979); Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Gov't of the Libyan Arab Republic, Jan. 19, 1977, 17 I.L.M. 1 (1978). Analysis of these cases can be seen in Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1583-93 (2009).

13. Debt-for-nature swap investments involves "an exchange or cancellation of a foreign country's debt in return for the debtor country's commitment to use a given amount of local currency funds to protect national parks, establish environmental education programs or train people in natural resource conservation or management." Rosanne Model, *Debt-for-Nature Swaps: Environmental Investments Using Taxpayer Funds Without Adequate Remedies for Expropriation*, 45 U. MIAMI L. REV. 1195, 1197 (1991).

14. *Id.* at 1198.

compensation an inadequate remedy in the event of host country expropriation.[15] This kind of investment aims at preventing or diminishing "destructive effects of the economy and poor agricultural management" on the environment.[16] In order to impede these negative measures, "the NGO obtains a commitment from the debtor-country government to protect an endangered habitat or to train people in natural resources conservation and sustainable development."[17] If the host state fails to meet its commitments, it is clear that monetary compensation will not be the appropriate remedy since the only motivation for debt-for-nature swaps is to get the host state to engage in activities that guarantee the protection of environment or to prevent it to take any action that has a destructive effect on the environment.

Fifthly, the problem inherent in the enforcement of specific performance in investment disputes is a procedural dilemma and should not have any effect on the existence of a substantive right to require performance; enforcement is another issue that requires its own solutions.[18] To put it differently, the claim that enforcement of specific performance in investment disputes is tough is absolutely plausible and convincing, since "a judgment ordering the debtor to perform is not of much use to the creditor unless the legal system provides the means to make it effective."[19] The solution should not, however, be simply rejecting specific performance in international investment disputes. If there is no theoretical problem to award specific performance in Investor-State Dispute Settlements (ISDS) and there are situations in which it is inevitable or desirable to grant specific performance, one needs to come up with solutions to address the enforcement problem rather than attacking it for being an unenforceable remedy.[20]

It is clear that this Article cannot address all of the reasons mentioned to support the availability of specific performance in ISDS, nor can it thoroughly address the relationship of the principle of *pacta sunt servanda* with other general principles. The Article will mainly deal with the principle of *pacta sunt servanda* and doctrines of "change of remedy" and "accumulation of remedies" to support the theoretical foundations of specific performance and its inevitability and desirability in ISDS.

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15. *Id* at 1199-1200.

16. *Id.* at 1196.

17. *Id.* at 1197.

18. *See* Michael E. Schneider, *Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice*, *in* PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION: ASA SPECIAL SERIES NO. 305 (Michael E. Schneider & Joachim Knoll eds., JurisNet 2011) [hereinafter PERFORMANCE AS A REMEDY]; David Ramos Munoz, *The Power of Arbitrators to Make Pro Futuro Orders*, *in id.* at 117.

19. KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 473 (3d ed. 1998).

20. *See* Schneider, *in* PERFORMANCE AS A REMEDY, *supra* note 18, at 5.

However, this Article does not submit that specific performance should be available in all circumstances. There are, of course, situations where granting specific performance is not possible, efficient, or desirable. For instance, "restitution will be materially impossible in situations such as where the subject-matter of the dispute has been destroyed, has irremediably deteriorated (for example when a confiscated ship has been sunk), has perished or where it has passed into the hands of a bona fide third party."[21] In any event, however, the principle of *pacta sunt servanda* ought to be a starting point for the analysis of available remedies to an aggrieved party.

This Article proceeds as follows. After this introduction, Part I is about remedies in general. Here, the Article gives a brief overview of remedies in contract law and then turns to address forms of reparation in international law. It also examines the state of investment law with regard to the remedy of specific performance in the light of treaties and case law. In the Part dealing with case law, the main focus will be on the cases that have addressed specific performance. Part I also discusses the remedy of specific performance under the Principles of International Commercial Contracts (PICC) and how it is relevant for settling investor-state dispute settlement. It thus concludes with providing a definition of specific performance and different types of it.

Part II starts with addressing the principle of *pacta sunt servanda* under the PICC. It argues that under the PICC an aggrieved party's right to choose specific performance is a general principle that is the direct effect of breach of the principle of *pacta sunt servanda*. It then examines the state of the principle of *pacta sunt servanda* in international investment law. It establishes that the principle of *pacta sunt servanda* lies at the heart of international law as well as international investment law and maintains that it should be taken seriously especially where the host state acts arbitrarily and in bad faith. It holds that an investor's right to choose specific performance is not only the investor's natural right but also shall promote stability and predictability in international investment law and more importantly is compatible with the nature of long-term contracts. Furthermore, it comes to the conclusion that the use of specific performance in ISDS is not against states' sovereignty since the right and power to enter into a contract or a treaty is an obvious attribute of state's sovereignty.

Part III is concerned with identifying circumstances under which an order for specific performance in ISDS might prove to be indispensible and desirable. It first examines these situations in the light of literature and makes it clear that there are certainly situations where an order for

21. CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 571 (2008). For a real life example of this principle, see Alpha Projektholding GMBH v. Ukraine, ICSID Case No. ARB 07/16, Award ¶ 436 (Nov. 8, 2010).

specific performance in ISDS shall be inevitable and desirable such as where the host state is unable to pay the damages or it shows willingness to live up to its obligations specifically and there is high chance of the continuation of friendly relationship between the investor and the host state. It proposes two mechanisms namely the doctrines of "change of remedy" and "accumulation of remedies" to accomplish the goal of full compensation in ISDS through the remedy of specific performance. It addresses the two mentioned doctrines under the PICC and international investment law and concludes that international investment law might be more open to these doctrines, particularly to the mechanism of change of remedy.

I. REMEDIES IN GENERAL

A. *Remedies for Breach of an Obligation in Contract Law*

A breach of an obligation could take place in all legal systems and in all types of contracts. A party to a contract or a treaty might fail to meet its obligations arising from the contract, either investment or commercial contract, or the treaty. A state might fail to treat a foreign investor in a "fair and equitable" manner. A seller may not live up to its promises on time.

To tackle the consequences of such a breach, contract law has devices to deal with this problem. The meaning of non-performance and the scope of remedies granted based on the definition of non-performance might vary from one legal regime to the next, however, generally speaking, the main remedies available include claims for damages, the right to claim performance—recovery of money due or specific performance of non-monetary obligations—and the right to terminate the contract.[22] There are also some incidental remedies such as suspension of performance that might be resorted before invoking main remedies.[23]

The goal behind all these remedies is to put the aggrieved party in as good a position as he would have been had the contract been fully performed ("full compensation").[24] However, the approaches taken to provide effective remedies and accomplish the goal vary from one legal system to the next. Civil law regimes such as France, Germany, Netherland, and Iran, prefer specific relief over the compensatory

22. TREITEL, *supra* note 3, at 1-2; JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 108 (3d. ed. 2008); VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, at 728.

23. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, at 728.

24. CHENGWEI, *supra* note 6, at 33; Schwartz, *supra* note 6, at 271.

measures.[25] On the other hand, in common law systems such as the United States and England, compensatory measures come first.[26] In others, remedies have a discretionary nature.[27] That is to say, an aggrieved party has a broad discretion to choose from the available remedies.

In the context of contract law, because of a wide range of available remedies, the purpose of full compensation is usually served. However, in the context of investment law, the normal remedy is pecuniary damages and courts and arbitral tribunals rarely grant specific performance. This may give rise to inefficiencies since there are certainly situations where pecuniary damages will not rectify an aggrieved party's losses in investment disputes.[28] The soundness of a legal regime depends in large part on the one hand devising appropriate remedies or mechanisms to encounter any breach of an obligation and on other hand strong devices for the enforcement of the available remedies.[29] Therefore, in order to enhance the soundness of the investment law regime, one needs to increase the availability of specific performance as another remedy available for the aggrieved party.

B. *Forms of Reparation in International Law*

In accordance with the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), restitution, compensation, and satisfaction are the three main forms of reparation that are devised to address the legal consequences of an internationally wrongful act.[30] We will mainly focus on restitution because it has long been established, at least in theory, as the primary remedy in international law. There is no consensus, however, among scholars whether specific performance falls within the types of reparation in the ILC Articles. In the following paragraphs, we will argue that specific performance might be associated with the duty of *restitutio in integrum*. Before that, we will briefly define compensation and satisfaction in the ILC Articles.

According to Article 36 of the ILC Articles, compensation as a

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25. Shoarian & Rahimi, *supra* note 7, at 372-79; HONNOLD, *supra* note 7, at 296-98.

26. *See id.*

27. *See supra* text accompanying note 9.

28. *See* Model, *supra* note 13, at 1198.

29. ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW 115-16 (2009); Daniel Friedman, *Rights and Remedies*, *in Comparative Remedies for Breach of Contract* 3-4 (Nili Cohen & Ewan McKendrick eds., 2005).

30. Article 34 of ILC Articles reads "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." *Official Records of the General Assembly*, Fifty-sixth session, Supplement no. 10 (A56/10, Ch. V, art. 34 (2001) [hereinafter ILC Articles and Commentaries].

remedy "shall cover any financially assessable damage including loss of profits insofar as it is established."[31] Under Article 31 recoverable damages include both material and moral damages.[32] Moral damage is, however, recoverable in the form of satisfaction.[33]

Article 37(2) of the ILC Articles defines satisfaction as "an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality."[34] According to the commentary it is intended to rectify those kinds of losses that are not assessable in financial terms and amount to an affront to the State.[35]

When it comes to the remedy of restitution as the main focus of this section, Article 36 of the ILC Articles defines it as reestablishing "the situation which existed before the wrongful act was committed." The remedy of restitution amounts to, at least in theory, a primary remedy in international law.[36] The primacy of restitution was established by the Permanent Court of International Justice (PCIJ), in its famous holding in the case concerning the Factory at Chorzow and then codified in the ILC Articles specially Article 34 which puts restitution first in the list of means of reparation. One can infer the primacy of restitution from Article 36(1) of the ILC Articles as well which provides "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.*"

In *Chorzow*, the court explained:

> 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

31. *Id.* art. 36.

32. *Id.* art. 31.

33. *See id.* art. 36, cmt. 1 (explaining that "the qualification 'financially assessable' is intended to exclude compensation for what is sometimes referred to as 'moral damage' to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37").

34. *Id.* art. 37(2).

35. *Id.* art. 37, cmt. 3.

36. *See* Steffen Hindelang, *Restitution and Compensation- Reconstructing the Relationship in Investment Treaty Law*, *in* INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 161 (Rainer Hoffman & Christopher J. Tams eds., 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525065; *see* BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 61 (2011) (noting that "restitution has been recognized as the primary remedy in international law, because it has the potential to eliminate, legally and materially, the consequences of an unlawful act").

> 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 determine the amount of compensation due for an act contrary to international law.[37]

This award implies that "restitution is the normal form of reparation and indemnity could only take its place if restitution in kind is not possible."[38] This award also contains the general principle of full reparation that Article 31 of the ILC Articles has codified as the responsible State being under the "obligation to make full reparation for the injury caused by the internationally wrongful act."[39] Scholars have argued that restitution is the very first and primary remedy that can "wipe out" all consequences of a breach by the responsible state and this is why the *Chorzow* case and the ILC articles consider restitution as the primary remedy.[40]

Restitution might be divided into two categories: material and juridical restitution.[41] The former referring to the injury that takes the form of material damage. Therefore an order to perform in kind would include, for instance, the state's duty to restitute confiscated property, release a detained individual, or restitute an arrested ship.[42] The latter consisting of cases where "implementation of restitution involves the modification of a legal situation either within the legal system of the author state or on the international plane."[43] Accordingly, it might require, among other things, annulling certain national laws or court decisions or even an international treaty.[44] In both cases, however, restitution in kind is not a pure reestablishment of the status quo ante, but, rather, under the mandate of the principle of full reparation, compensation may supplement restitution in kind.[45] By way of illustration, "a mere restoration of an expropriated property to the aggrieved party may not fully repair the aggrieved party's economic losses" such as diminution in

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37. Cour Permanente De Justice Internationale [The Permanent Court of International Justice], July 26, 1927, File E.C., Docket XI, Judgment No. 8, *available at* http://www.icj-cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf.

38. MOHAMMED BEDJAOUI, INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 369 (1991).

39. Hindelang, *supra* note 36, at 2.

40. *Id.* at 3; SABAHI, *supra* note 36, at 61.

41. Hindelang, *supra* note 36, at 4.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.*

the value of the property and moral damages.[46] In these situations, therefore, monetary compensation will supplement restitution.

There is controversy among scholars as to whether specific performance falls within the types of reparation in the *Chorzow* case and the ILC Articles.

Some have argued that restitution as a form of reparation in the ILC Articles is distinct from specific performance.[47] Having noted that restitution has even been treated as synonymous to specific performance, Christine D. Gray argues that "*restitutio in integrum* demands the re-establishment of the situation which would in all probability have existed if the illegal act had not been committed. That is, it does not expressly involve an order for specific performance, and it goes further than specific performance in that it may involve the rectification of harm already caused by the illegal act."[48] This argument is not without flaw since specific performance is not usually granted alone, rather it is accompanied with damages that is intended to rectify those part of losses that specific performance cannot remediate in itself (accumulation of specific performance with damages). Professor Zachary Douglas also puts forward that "restitution should not be confused with specific performance, the latter being confined to the enforcement of contractual obligations."[49] He does not further develop his statement. However, it follows from this statement that restitution encompasses the enforcement of both contractual and non-contractual obligations. In any event, it seems that the better view has been pronounced by Sabahi where he points out that specific performance may be associated with the duty of *restitutio in integrum*. According to him, such a categorization also derives from Commentary 5 to the Article 35 of the ILC Articles where it provides "the term restitution in article 35 has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act."[50] Moreover, "investors in arbitral decisions on some occasions have sought specific performance of the state party's obligations . . . associating this remedy with restitution."[51] Therefore, in our view, restitution is a broad concept that encompasses specific performance as well.

46. SABAHI, *supra* note 36, at 62.
47. CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 13 (1990).
48. *Id.* at 12-13.
49. ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 100 (2009).
50. SABAHI, *supra* note 36, at 82.
51. *Id.*

C. *Specific Performance in International Investment Law*

1. Treaties

In general, investment treaties, either bilateral or multilateral, do not specify "the content of international responsibility including the forms of reparation."[52] The North American Free Trade Agreement (NAFTA) and the recent model Bilateral Investment Treaties (BITs) of the United States[53] and Canada[54] are some notorious examples that limit the types of available remedies to damages and restitution of property. For instance, Article 1135(1) of NAFTA limits the availability of remedies to damages and restitution of property. It sets out:

> where a Tribunal makes a final award against a Party, 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 disputing Party may pay monetary damages and any applicable interest in lieu of restitution.[55]

It thus excludes the availability of juridical restitution that may require, among others, modification of regulations and annulment of courts' judgments. Further, 1135(b) implies that the availability of restitution of property is also very limited since in accordance with Article 1135(b), the award should give the opportunity to a disputing Party to pay damages in lieu of monetary compensation.

As a result, the current state of the law with regard to the availability of specific performance is that it either does not specify the forms of reparation or limits the scope of non-pecuniary remedies.

2. Case Law

This Part will examine the state of specific performance in the light of case law pertaining to ISDS. It will only concentrate on cases that have particularly addressed the remedy of specific performance in one way or another. It thus will not look at cases that have addressed other forms of

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52. *See* Martin Endicott, *Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 520 (Philippe Kahn & Thomas W. Wälde eds., 2007) (noting that "it is rare for bilateral investment treaties or investor-state concession contracts to specify the types of remedies that may be ordered by an arbitral tribunal").

53. *See* U.S. Model Bilateral Investment Treaty art. 34 (2012).

54. DUGAN ET AL., *supra* note 21, at 570.

55. North American Free Trade Agreement, art. 1135(1), Dec. 8, 11, 14, & 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289.

non-pecuniary remedies such as provisional measures and declaratory reliefs.[56]

The *TOPCO* award was the first in investor-state arbitration in which the tribunal ordered restitution and specific performance against a sovereign state.[57] The dispute arose out of 12 oil concession agreements concluded between the Asiatic Oil Company and Texaco Overseas Petroleum Company—the two companies brought their claims jointly (*TOPCO*)—with Libya when the government of Libya issued decrees nationalizing all of the rights, interests, and property of *TOPCO* on September 1, 1973.[58]

As a result of this nationalization, *TOPCO* submitted the dispute to arbitration in accordance with the arbitration clause in each of the concession agreements and asked the tribunal to grant specific performance of contracts. Having found that the Libyan Government's acts were illegal and unlawful, the sole arbitrator held that the agreements were binding on the parties and that the "Libyan Government was legally bound to perform the concession agreements and give them full force and effect."[59] Furthermore, in 1995, a dispute arose between Mr. Antoine Goetz and five other Belgian investors who owned a company named AFFIMET and Burundi when the latter withdrew "certificate of free zone," which was granted to AFFIMET and entitled it to certain tax and custom exemptions.[60] As a result of the withdrawal of the certificate, claimants brought a claim under the Belgium-Luxembourg Economic Union-Burundi BIT and alleged, inter alia, that the withdrawal of the certificate constituted an expropriation.[61]

In 1999, having found that the withdrawal of the certificate was indeed an indirect expropriation, the tribunal took an innovative two-stage approach toward the remedy of specific performance.[62] Instead of an immediate awarding of compensation or restitution, it gave Burundi an opportunity either to live up to its international law obligations by reissuing the certificate or compensating the claimants for failure to do so.[63] This encouraged Burundi to voluntarily comply with its international law obligation through the reissuance of the certificate.[64]

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56. Two examples of such cases include Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction (Aug. 25, 2006), and Telefonica S.A. v. Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (May 25, 2006).

57. Endicott, *supra* note 52, at 524.

58. *Id.* at 525.

59. *Id.*

60. SABAHI, *supra* note 36, at 77.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

Enron v. Argentina is another case in which the tribunal confirmed its authority to grant non-pecuniary remedies in accordance with the rules of the International Centre for Settlement of Investment Disputes Convention (ICSID Convention). The dispute arose between the parties where some Argentinean provinces imposed certain tax assessments with respect to a gas transportation company in which the claimants participated through investments in various corporate arrangements (the alleged expropriation). The claimants had requested the tribunal to declare the assessed taxes as an expropriation of investment "in breach of the treaty and unlawful, and that they be annulled and their collection permanently enjoined."[65] The Argentine Republic objected to the tribunal's authority to order injunctive relief as requested by the claimants.

In response to the Argentine Republic's objection, the tribunal made the following arguments.

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 Claimants have convincingly invoked the authority of the Rainbow Warrior, where it was held:

> The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.[66]

Based on this, the tribunal came to the conclusion that:

The same holds true under the ICSID Convention, "and in addition to declaratory powers, [the tribunal] has the power to order measures involving performance or injunction of certain acts." [67] "Jurisdiction is therefore also affirmed on this ground. What kind of measures might or might not be justified, whether the acts complained of meet the standards set out in the Rainbow Warrior, and how the issue of implementation that the parties have also discussed would be handled, if appropriate, are all

65. R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES 1261 (2005).

66. PIERRE TERCIER, PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION 202 (2012).

67. ARTHUR W. ROVINE, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 177 (2007).

matters that belong to the merits."[68]

Nevertheless, taking into account the fact that Enron withdrew the claim in question, the tribunal never actually had to rule on the issue.[69]

In *Nykomb v. Latvia*, the tribunal also addressed the availability of restitution and specific performance in ISDS.[70] The case concerned a claim for payment of a so-called double tariff for the supply of electricity that arose under the Latvian Entrepreneurial Law and was enshrined in the contract between the Latvian state electricity company, Latvenergo, and the Nykomb's subsidiary, Windau.[71] The tribunal held "even if damage or losses to an investment may be inflicted indirectly through loss creating actions toward a subsidiary in the country of a Contracting State, restitution must primarily be seen as an appropriate remedy in a situation where a contracting state has instituted actions directly against the investor."[72] However, the tribunal found compensation to be an appropriate remedy in the circumstances since it lacked the legal capacity to order specific performance because "damage was inflicted indirectly through loss creating actions toward a subsidiary in the contrary of a Contracting State" while the shareholding company had initiated the arbitration.[73] With regard to future payments, however, the tribunal held that "the Republic of Latvia is ordered to ensure the payment of the double tariff to Windau for electric power delivered from Windau's cogeneration plant at Bauska in accordance with Contract for the period from the date of this award until 16 September 2007,"[74] which is clearly an order for specific performance.[75]

As a result, in situations where the relevant obligations of a host state remain in force, specific performance seems more appropriate compared to monetary compensation[76] as provided in Article 29 of the ILC Articles.[77]

Micula v. Romania also acknowledges the arbitrator's power to order for non-pecuniary remedies including specific performance. On August

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68. Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 81 (Jan. 14, 2014).

69. CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 209-16 (2007).

70. Nykomb Synergetics Tech. Holding AB v. Latvia, Arbitration Inst. of the Stockholm Chamber of Commerce, Award of 16.12.2003.

71. Gisele Stephens-Chu, *Is it Always All About the Money? The Appropriateness of Non-Pecuniary Remedies in Investment Treaty Arbitration*, 30 ARB. INT'L 661, 677 (2014) [hereinafter Gisele].

72. SABAHI, *supra* note 36, at 84.

73. *Nykomb Synergetics Tech. Holding AB*, Award of Dec. 16, 2003, at 44.

74. *Id.* § 7.1(b).

75. Gisele, *supra* note 71, at 678.

76. *Id.* at 679.

77. Article 29 of the ILC Articles sets forth "The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached." Int'l Law Comm'n, G.A. Res 56/83 (Dec. 12, 2001).

2, 2005, Micula along with four other claimants (hereafter, the claimants) brought an action against Romania in accordance with the Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments requesting restitution of the legal framework governing their investment.[78] Romania argued that the claim for restitution of the legal regime is inadmissible[79] for four main reasons: Firstly, "it would be absurd and unjust for Romania to reinstate an old regulatory regime that would likely breach the EC Treaty."[80] Secondly, "Romania has not undertaken any obligation to take or maintain a specific regulatory regime."[81] Thirdly, "restitution sought would not flow directly from the causes of action."[82] Finally, "no form of restitution can be awarded (whether by way of order or declaration) when that would impinge on the state's regulatory sovereignty."[83] The claimants argued that the claim for restitution is admissible and decision and discussions on remedies should be made on the merit phase.[84] At the jurisdictional phase and in stark contrast with Romania's arguments, the tribunal argued as follows:

> 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. Similarly, and contrary to Respondent's argument, the fact that such a remedy might not be enforceable pursuant to Article 54 of the ICSID Convention should not preclude a tribunal from ordering it. Remedies and enforcement are two distinct concepts.[85]

In addition, the Tribunal finds no limitation to its powers to order restitution in the BIT, the instrument on which the consent of the parties is based. While Article 4 of the BIT dealing with expropriation only mentions compensation, it does not rule out restitution. Moreover, the rest

78. Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 7 (Sept. 24, 2008), http://www.jstor.org/stable/25691337?seq=1#page_scan_tab_contents.

79. *Id.* ¶ 159.

80. *Id.* ¶ 160.

81. *Id.* ¶161.

82. *Id.* ¶ 162.

83. *Id.* ¶ 163.

84. *Id.* ¶¶ 51-52.

85. *Id.* ¶ 166.

of the BIT provisions do not preclude a tribunal from ordering restitution, if and when appropriate, for a violation of other substantive provisions. Article 7 of the BIT contains no further limitations to the Tribunal's powers in that respect.[86]

The Tribunal therefore does have the powers to order restitution, both under the ICSID Convention and the BIT, and thus cannot uphold Respondent's objection as an objection to jurisdiction and admissibility. Ultimately, whether restitution is an appropriate remedy, and whether restitution or compensation should be ordered, are questions properly addressed at the merits phase of the proceedings. It is premature to discuss this issue at this juncture. It requires, in any event, a showing by Claimants that Respondent violated the BIT.[87]

On December 11, 2013, the tribunal rendered its final award on the merits. At the merit phase, in spite of the fact that the claimants abandoned their request for restitution[88] they applied for interim measures and post-award injunctive relief.[89] The purpose of interim measures was to prevent Romania from collecting taxes from the claimants until the tribunal renders the final award. The tribunal accepted such a request which precluded Romania from collecting taxes from the claimants up until the issuance of the final award. The reason behind post-award injunctive relief was a reaction to Romania's application to revoke provisional measures and ensure the claimants that Romania "is enjoined from any further tax collection measures of any kind in respect of the Claimants and the EFDC until such a time as the damages awarded by the Tribunal have been paid in full, and include a pecuniary alternative in case of non-performance."[90]

With regard to the claimants' request for post-award injunctive relief, although the tribunal, in the first place, did find itself competent to award such remedy, it refused to grant it mainly because the claimants' request for such remedy was not made timely and expressly. The tribunal, by making reference to its decision on jurisdiction and admissibility and recognizing its competency to grant non-pecuniary remedies, held: "Non-pecuniary relief may take many forms, such as restitution or specific performance. It may also take the form of definitive (*i.e.*, not provisional) injunctive relief, if the Tribunal finds that such relief is necessary to ensure that the breach will be redressed."[91]

The tribunal continued and opined:

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86. *Id.* ¶ 167.
87. *Id.* ¶ 168.
88. Micula v. Romania, ICSID Case No. ARB/05/20, Final Award, ¶ 881 (Dec. 11, 2013).
89. *Id.* ¶ 1308.
90. *Id.* ¶ 263(b).
91. *Id.* ¶ 1311.

> The Tribunal concludes that it has the power to grant injunctive relief in a final award. This relief, however, must be definitive (i.e., not provisional, not meant to "preserve the respective rights of either party" until final resolution of the dispute, which is the objective of provisional measures pursuant to Article 47 of the ICSID Convention). The Tribunal prefers the term "definitive" to "permanent", as the relief granted may be temporary (i.e., granted only until a certain date or until a certain condition is met). However, as the Tribunal will become *functus officio* upon the rendering of the Award (subject to a party filing a claim for rectification, supplementary decision, interpretation or revision of the Award pursuant to Articles 49, 50 or 51 of the ICSID Convention), the injunctive relief granted cannot be later reconsidered or lifted by the Tribunal, as would be the case with provisional relief: such definitive injunctive relief would have res judicata effect.[92]

Nevertheless, the tribunal did not grant post-award injunctive relief in the favor of the claimants mainly on the grounds that the request had not been made expressly and timely.

The tribunal in *ATA v. Jordan* granted the claimant a juridical restitution.[93] The dispute arose when a state-controlled company applied to the Jordanian Court of Appeal to set aside an arbitral award that has been rendered in favor of ATA.[94] When the Jordanian Court of Appeal annulled the arbitral award, ATA brought an action before the ICSID tribunal alleging the unlawful expropriation of its claims to money and rights to legitimate performance under the Contract and the Final Award, as well as the failure to accord fair and equitable treatment to its investment, inter alia by way of serious and repeated denials of justice by the Jordanian courts.[95] The tribunal held "the single remedy which can implement the Chorzow standard is a restoration of the Claimant's right to arbitration."[96] It ordered that that "the ongoing Jordanian court proceedings in relation to the Dike No. 19 dispute be immediately and unconditionally terminated, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute."[97]

In *Al-Bahloul v. Tajikistan*, which was held under the rules of the Energy Charter Treaty, the tribunal not only held that it has the power to order specific performance, but also regarded specific performance an

92. *Id.* ¶ 1313.
93. ATA Constr., Indus. & Trading Co. v. Jordan, ICSID Case No. ARB/08/2, Award, ¶ 121 (May 18, 2010).
94. *Id.* ¶ 1.
95. *Id.* ¶ 37.
96. *Id.* ¶ 131.
97. *Id.* ¶¶ 132-33.

appropriate remedy in situations where a breach has a continuing character.[98] The tribunal also ruled that the possible problems of enforcement do not per se make specific performance an impermissible remedy.[99] In the case at hand, however, the tribunal found specific performance materially impossible due to the following reason:

> Nine years have elapsed since Claimant has left Tajikistan. During that period Claimant has had no activities in the country, nor has it been shown that Claimant engaged in exploration and development activities in the oil and gas sector elsewhere. Claimant has had no working relationship with Tajikistan and indeed has had difficulty even obtaining visas to visit the country.[100]

"During the past nine year period . . . third parties have become active in the four geographic areas where Claimant had been promised exclusive licenses. There is also no evidence that their rights were obtained through bad faith conduct on their parts."[101]

A similar approach was taken by the *Bitwater Gauff v. Tanzania* tribunal. In that case, the tribunal held that, "[In cases where expropriation] take[s] place by reason of a substantial interference with rights, even if no economic loss is caused thereby, or can be calculated, non-pecuniary remedies (e.g. injunctive, declaratory or restitutionary relief) may still be appropriate."[102]

Finally, *Arif v. Republic of Moldova*[103] is among the most significant and interesting cases that has ever been decided with regard to the availability of non-pecuniary remedies in ISDS. Unlike many other cases in which host states have challenged the tribunal's competency to grant non-pecuniary remedies for reasons such as incompatibility of non-pecuniary remedies with states' sovereignty, in this case, it was the Republic of Moldova which insisted on restitution in lieu of damages award.[104] Further, the circumstances of the case show that the claimant

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98. Al Bahloul v. Tajikistan, Case No. V(064/2008), Final Award, ¶¶ 47-48 (June 8, 2010).
99. *Id.* ¶ 50.
100. *Id.* ¶ 54.
101. *Id.* ¶ 56.
102. Biwater Gauff v. Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 781 (July 24, 2008).
103. Arif v. Moldova, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013).
104. Moldova in its counter memorial argued "restitution is the primary form of reparation for an internationally wrongful act. Although claimant does not seek restitution, respondent reserves the right to request that restitution be the relief ordered, if any, to the extent it is possible and lawful under the circumstances and in light of the particular obligation the tribunal may determine that respondent has breached." *Id.* ¶ 269. According to the respondent, it "should have the opportunity to provide restitution as an alternative to damages, as this remedy would restore claimant to the position he would have been in without any violation of the BIT, and also avoids the uncertainties of the calculation of damages, including the possibility of risk free windfall

also was not against restitution. In fact, it seems that the main reason behind the claimant's preference for damages was that he was not confident that the respondent would comply with its obligation specifically;[105] the tribunal expressly mentioned that restitution as a remedy is in accordance with the nature of investment treaties and contracts. According to the tribunal "the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution. On the other hand, 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."[106] Finally, the award gave the opportunity to the claimant to choose from restitution and compensation.[107]

The dispute between the parties arose when the Republic of Moldova delayed or prevented the opening of several duty free stores granted to Mr. Arif (the claimant), and breached an exclusivity undertaking thereby to ensure fair and equitable treatment to Claimant's investment in some of the duty free stores.[108] Consequently, the claimant brought an action against the respondent for the breach of fair and equitable treatment in accordance with the BIT concluded between France and the Republic of Moldova.[109] Although the Tribunal did not accept all of the claimant's claims, it confirmed the respondent's failure to meet its treaty obligations with regard to the duty free store at Chisinau Airport.[110]

Regarding to the requested remedy and in order to reconcile the interests of the claimant and respondent as well as objectives of bilateral investment treaties, the tribunal held:

> The Tribunal considers restitution to be the preferable remedy, but as in the present case Respondent has not been able to confirm that

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profits." *Id.* ¶ 569.

105. In relation to the airport store, claimant stated that "restitution would require respondent to allow and to enable claimant to open and operate his duty free store at Chisinau International Airport without undue interruption. This would require all relevant licenses and authorizations to be (re)issued by Respondent and its organs to Le Bridge, as well as a new lease agreement, at identical or essentially similar terms as the former Airport Lease agreement, leasing out the exact same premises at the Airport to Le Bridge for the same duration (and preferential renewal rights), which would start to run at the date of the actual opening of the Airport store." *Id.* ¶ 566. The claimant continued and pointed out that "in his view, the reality is that respondent is unwilling or unable to extend a firm offer for restitution, backed by adequate guarantees and so insisted on reparation in the form of damages." *Id.* ¶ 567.

106. *Id.* ¶ 570.

107. *Id.* ¶ 633.

108. *Id.* ¶ 1.

109. Agreement between the Government of the Republic of France and the Government of the Republic of Moldova on the Reciprocal Promotion and Protection of Investments dated September 8, 1997. *Id.* ¶ 190.

110. *Id.* ¶ 633.

> 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 to preserve the investment, while also preserving Claimant's right to damages if a satisfactory restitutionary solution cannot be found.[111]

The tribunal went on and opined:

> Accordingly, the Tribunal decides that, within 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.[112]

D. *Specific Performance Under the PICC*

The PICC is an "elaboration of restatement of general principles of contract law."[113] It was first published in 1994,[114] with a second and third edition published respectively in 2004[115] and 2010.[116] It provides a unified set of "rules of law" that are suitable for international commercial

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111. *Id.* ¶ 571.

112. *Id.* ¶ 572.

113. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, at 1.

114. For the 1994 version of the PICC, *see* International Institute for the Unification of Private Law, *Principles of International Commercial Contracts*, UNIDROIT (1994), http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994.

115. For the 2004 version of the PICC, see International Institute for the Unification of Private Law, *Principles of International Commercial Contracts*, UNIDROIT (2004), http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2004.

116. For the 2010 version of the PICC, see International Institute for the Unification of Private Law, *Principles of International Commercial Contracts*, UNIDROIT (2010), http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010 [hereinafter PICC 2010].

contracts. Nonetheless, dissimilar to traditional ways of harmonization that usually take the form of binding bilateral and multilateral treaties or conventions, the PICC is an academic work of comparative law[117] with a non-binding nature.[118] Accordingly, it, as a general principle, comes into play only where the parties expressly opt for it as an applicable law in their contract. The Preamble of the PICC, however, gives a full picture of the role and function of the PICC. According to the Preamble:

> These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.[119]

The PICC deals with non-performance and remedies arising out of it in chapter 7.[120] It provides three main remedies for an aggrieved party confronting non-performance: specific performance, termination, and damages. The PICC does not, however, establish a hierarchy among the available remedies.[121] That is, an aggrieved party may resort to any remedy he pleases, unless the conditions for the asserted remedy are not satisfied.[122]

Section 2 of chapter 7 of the PICC deals with conditions under which an aggrieved party might require specific performance of an obligation.[123] The PICC, however, distinguishes between requiring specific performance of monetary and non-monetary obligations.[124] With the effect that in the former case, requiring specific performance of an obligation is always possible,[125] but in the latter case, the PICC recognizes the primacy of specific performance as a principle and then

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117. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, at 26.

118. *Id.* at 5.

119. Int'l Inst. for the Unification of Private Law, *UNIDROIT Principles of Int'l Commercial Contracts*, at 1 (2010) [hereinafter Int'l Inst. for the Unification of Private Law].

120. The structure of chapter 7 is such that in section 1 it addresses non-performance in general. Section 2 is concerned with the right to specific performance. Section 3 addresses the right to terminate the contract. Finally section 4 discusses the right to claim damages. *Id.* at 223-24.

121. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, at 728.

122. *Id.*

123. Int'l Inst. for the Unification of Private Law, *supra* note 119, at 224.

124. *Id.*

125. *Id.*

lays down exceptions to it.[126]

The PICC recognizes the right to demand specific performance as a primary remedy.[127] Nonetheless, to reconcile the different approaches taken by civil law and common law systems, Article 7.2.2 of the PICC through paragraphs (a) to (e) comes up with some significant exceptions to specific performance of non-monetary obligations.[128] The exceptions apply, for instance, where "performance is impossible in law or in fact"; or "performance or, where relevant, enforcement is unreasonably burdensome or expensive."[129]

In both cases of requiring performance of monetary and non-monetary obligations, however, the parties have a broad discretion to exclude or limit the provisions on non-performance and the available remedies.[130] Therefore, the parties might exclude the possibility of requiring specific performance in the contract or they may attach additional requirements to a request for performance.[131] However, other provisions of the PICC might impose restrictions on the parties' ability to exclude or limit liability or available remedies.[132] For instance, Article 7.1.6 of the PICC sets out, "a clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract."[133]

Under the PICC "specific performance is not a discretionary remedy, i.e. a court must order performance, unless one of the exceptions laid down in this Article applies."[134] That is, an aggrieved party is entitled both to demand specific performance from the other party and to require its enforcement by a court.[135]

E. *The Relevance of PICC to ISDS*

The PICC is an "elaboration of restatement of general principles of contract law."[136] Therefore, a comparative study of this instrument as a basis for analysis of specific performance in the context of ISDS might

126. *Id.* at 240 (noting that "following the basic approach of CISG (Article 46) this Article adopts the principle of specific performance, subject to certain qualifications").

127. *Id.*

128. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, art. 7.2.2.

129. Int'l Inst. for the Unification of Private Law, *supra* note 119, at 423.

130. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, at 731.

131. *Id.*

132. *Id.*

133. *Id.* art. 7.1.6.

134. Int'l Inst. for the Unification of Private Law, *supra* note 119, art. 7.2.2. cmt. 2.

135. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9; Int'l Int. for the Unification of Private Law, *supra* note 119, art. 7.2.1, cmt. 2.

136. *See* PICC 2010, *supra* note 116, at xxii.

seem bizarre. As a result, it is indispensible to specify the relevance of the PICC in ISDS.

In order to determine the role and relevance of the PICC in ISDS, it is first necessary to identify sources of law applicable to investment disputes. Generally speaking, rules of international law, investment treaties, "rules of law" chosen by the parties, and the domestic law of host state are four primary sources of law applicable to ISDS; depending on the nature of the claim, that is, whether it is contractual or based on a treaty, these sources may be applied individually or jointly.[137] For instance, in the absence of an explicit choice of law and in circumstances where an investor brings a claim in accordance with the standards of protection in the investment treaty, case law regards it as an implicit choice of international law.[138] In addition, depending on the applicable arbitration rules, in the absence of choice of law by the parties, the tribunal may be required to apply the national law of the host state or another national law that may be determined as being applicable by the conflict rules of the host State's law. The international law, however, shall be used to fill the gaps in the national law or correct the national law to the extent that application of national law would lead to a violation of public international law obligations of the state.[139]

In accordance with the well-established principle of party autonomy, most arbitration rules allow the parties to choose applicable law to their contract and to this effect, arbitration rules use a wide language of "rules of law."[140] It is now beyond doubt that the PICC falls within the scope of "rules of law" that the parties may choose as applicable law to their dispute.[141]

In situations where the applicable law to the investment dispute is the national law of the host state, the PICC also may play a corroborative or corrective role of the national law. The Preamble of the PICC, as we addressed above, allow such a function for the PICC.

Moreover, in circumstances where the applicable law is international law, Article 38(1)(c) of the statute of the International Court of Justice (ICJ statute) provides the authority for the use of the PICC in settling disputes arising from breach of a treaty obligation since general principles of law are one of the sources of international law that a judge may apply

137. DUGAN ET AL., *supra* note 21, at 201.

138. Giuditta Cordero-Moss & Daniel Behn, *The Relevance of the UNIDROIT Principles in Investment Arbitration*, 19 UNIFORM L. REV. 570, 575 (2014) [hereinafter Moss & Behn].

139. *Id.* at 576.

140. *See* International Centre for Settlement of Investment Disputes, art. 42(1), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; UNCITRAL Arbitration Rules, art. 35(1), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf; ICC Arbitration Rules, art. 21(1), http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/.

141. Moss & Behn, *supra* note 138, at 575.

in settling disputes between states. Taking into account the fact that the PICC is a restatement of general principles of contract law, it may find a way into treaty arbitration as well.

Some might, however, argue that not all of the PICC provisions, such as those provisions regarding "change of remedy" and "accumulation of remedies," amount to general principles of law in accordance with Article 31(3)(c) of the ICJ Statute so that one cannot make use of all of the provisions of the PICC as representing the general principles of law recognized by civilized nations. Thomas W. Wälde reacts to such a claim in the best way; he argues "international law is defined in Article 38 of the ICJ Statute for ICJ inter-State adjudication. But this provision reflects the bygone area of international law as a law exclusively between Nation-States. That is no longer appropriate for the modern global economy where market States and non-State actors participate as law-creating and law enforcing players. "One should therefore not exclude the possibility that instruments of international law, such as treaties and other instruments for harmonizing international commercial law (e.g. UNIDROIT Principles on Contract Law), can also help to inform the interpretation of investment treaty terms."[142] He continues and points out:

> While "*lex mercatoria"* as an expression of international business custom is far from the vision of public international lawyers, the wide reference to "international law" in Article 31(3)(c) and the tripartite nature of investment arbitration including a non-State element does not preclude taking account of non-traditional sources of international law.[143]

It has also been argued that:

> the practice of states as expressed in arbitration treaties determining the sources of law to be applied by international judges shows that, rules of international law stipulated by custom and treaty regarded as incomplete and insufficient. There exists a customary law to the effect that general principles of law, justice and equity should, in addition and apart from custom and treaties, be treated as binding upon international tribunals.[144]

Last but not least, the PICC has recently gained significant attention

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142. Thomas W. Wälde, *Interpreting Investment Treaties: Experiences and Examples*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 775 (Christina Binder et al. eds., 2009).

143. *Id.*

144. HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION 298-99 (1970).

in literature[145] and jurisprudence; arbitral tribunals and parties to the dispute increasingly and steadily rely on the PICC to settle investor-state disputes either for breaches that arise from a mere contractual relationship or breaches that stem from treaty obligations[146] such as a breach of fair and equitable treatment standard.[147] In fact, the tribunals have used the PICC as a "rules of law" chosen by the parties,[148] as a source of international law[149] where they represent general principles of law,[150] as corroboration of international law,[151] and as corroboration of national law.[152] From substantive perspective, the tribunals have used the PICC for the purpose of, among others, interpretation of contract,[153] determining the amount of payable damages,[154] entitlement of the

145. *See generally* Michael Joachim Bonell, *International Investment Contracts and General Contract Law: A Place for the UNIDROIT Principles of International Commercial Contracts?*, 17 UNIFORM L. REV. 141, 159 (2012); Piero Bernardini, *UNIDROIT Principles and International Investment Arbitration*, 19 UNIFORM L. REV. 561 (2014); Andrea Marco Steingruber, El Paso v. Argentine Republic*: UNIDROIT Principles of International Commercial Contracts as a Reflection of 'General Principles of Law Recognized by Civilized Nations' in the Context of an Investment Treaty Claim*, 18 UNIFORM L. REV. 509 (2013); Moss & Behn, *supra* note 138; August Reinisch, *The Relevance of the UNIDROIT Principles of International Commercial Contracts in International Investment Arbitration*, 19 UNIFORM L. REV. 609 (2014).

146. Steingruber, *supra* note 145, at 529.

147. Bernardini, *supra* note 145, at 561.

148. *See* Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 111 (Jan. 14, 2010); Moss & Behn, *supra* note 138, at 581.

149. Petrobart, Ltd. v. Kyrgyz Republic, SCC Case No. 126/2003, Arbitral Award (Mar. 29, 2005), at 88.

150. Micula v. Romania, ICSID Case No. ARB/05/20, Final Award, ¶ 881 (Dec. 11, 2013).

151. The use of the PICC as a corroboration of international law refers to situations where arbitral tribunals use the PICC not as an independent proof of general principles of law, rather they use it as corroborating evidence alongside other sources of law. Moss & Behn, *supra* note 138, at 588; *see also* Eureko v. Poland, Ad Hoc UNCITRAL Arbitration, Partial Award (Aug. 19, 2005), ¶¶ 176-178; Gemplus & Talsud v. Mexico, ICSID Case No. ARB(AF)/04/3, Award (June 16, 2010). In order to support and corroborate this principle, the tribunal cited article 7.4.3(1) of the PICC which requires a "reasonable degree of certainty" for establishing compensation for harm including future harm; some tribunals have taken a step forward and held that "the PICC is neither a treaty, nor compilation of usages, nor standard terms of contract. It is in fact a manifestation of transnational law." *Lemire*, ICSID Case No. ARB/06/18, ¶ 109. In this sense, some tribunals have used the PICC as corroboration of general principles of law that "figure prominently among" sources of international law. Ralf Michaels, *The UNIDROIT Principles as Global Background Law*, 19 UNIFORM L. REV. 643, 653 (2014).

152. The use of the PICC as a corroboration of national law is where the arbitral tribunal find domestic law as an applicable law to settle the dispute and uses the PICC to supplement and interpret the domestic law. Moss & Behn, *supra* note 138, at 596. For the list of cases that has used the PICC as corroboration of national law, see African Holding Co. of Am., Inc. v. La République démocratique du Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité (July 29, 2008); Mohamed Abdulmohsen Al-Kharafi v. Libya, Final Arbitral Award, 368-72 (Mar. 22, 2013).

153. Michaels, *supra* note 151, at 661.

154. *Al-Kharafi*, Final Arbitral Award, at 370-72.

aggrieved party to interest,[155] and recoverability of lost profit.[156]

One of the general principles that the PICC expressly underlies has to do with the general principle of specific performance. This principle is closely connected with the principle of *pacta sunt servanda* and an aggrieved party's immediate right to specific performance is the consequence of the binding nature of obligations under the PICC.

The principle of *pacta sunt servanda* already exists in international law. However, the effect of breach of the principle is not clear in international law as it is in contract law. Therefore, the paper argues that the PICC could make a significant contribution in order to make it clear.

Furthermore, one can also infer the doctrines of "change of remedy" and "accumulation of remedies" from the ILC Articles as a codification of international customary law. The role of the PICC in this study shall be a contribution to the completeness of international law with respect to the effect of breach of the principle of *pacta sunt servanda* and the necessity for accumulation and change of remedy in international investment law.

It might be argued that the doctrines of "change of remedy" and "accumulation of remedies" followed from the ILC Articles and completed with the PICC may not be applied to the investment treaties that restrict the forms of reparation to monetary compensation. In response, the paper puts forward that it is not the mere review of the law and case law rather it is intended to be a forward-looking study. In fact, the paper specified the state of the law in previous section and shall argue that based on some policy considerations as discussed in Part II and necessities as explored in Part III, full-on prohibitions of the remedy of specific performance should not be written into the texts of future investment treaties nor read into the texts of the many existing treaties that are silent with regard to the types of available remedies.

F. *Concept of Specific Performance*

Given that various legal systems treat specific performance differently both in terms of terminology used and the content of the remedy, it is difficult and unrealistic to come up with one single definition to encompass all features of specific performance in different legal systems.[157] "Nevertheless, specific performance is, broadly speaking, a mechanism through which a party may require the other party to meet its

155. *Petrobart*, SCC Case No. 126/2003, at 88.

156. *Gemplus*, ICSID Case No. ARB(AF)04/3, at 13-88.

157. Nayiri Boghossian, *A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods*, *in* PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 30 (1999-2000).

obligations under the contract or [treaty]."[158] In fact, it is a "process whereby the creditor obtains as nearly as possible the actual subject-matter of his bargain."[159]

This definition, especially the phrase "as nearly as possible," fits the context of this Article; because where a non-performing party is compelled to meet his original obligations under the contract or treaty, an aggrieved party does not usually get what the parties actually contracted for since there is naturally a delay between the time in which the obligor was supposed to perform the contract and the time he actually executes the contract. Therefore, in order to give full effect to the remedy of specific performance and respect for the principle of *pacta sunt servanda*, the aggrieved party, besides specific performance, must be able to claim damages for losses that specific performance has not remediated.

G. *Types of Specific Performance*

This Part will address the types and examples of specific performance in contract and investment law.

Generally speaking, the form of specific performance will depend on the nature of undertaken obligation. In one classification, one can divide obligations into two categories of positive and negative obligations. Positive obligations refer to situations where the obligor undertakes to accomplish "certain physical or legal state of affairs."[160] Negative obligations relate to situations in which a promisor obligates himself to refrain from doing something.[161] Accordingly, an order for specific performance could be negative or positive in nature.[162]

Had the obligor failed to meet his positive obligation; an order for specific performance would require the obligor to achieve that state of affairs. In contract law, take the example of a sales contract in which the seller undertakes to deliver the goods in a specific period of time, if he fails to deliver the goods at all, a buyer may require the delivery of the goods. In the context of investment law, if a state undertakes to treat a foreign investor in a fair and equitable manner and fails to do so, an order for specific performance would mean requiring the state to treat the investor in a fair and equitable manner, for instance, by not increasing the amount of payable taxes. Specific performance in this context is a "remed[y] that purport[s] to constrain the manner in which a government may exercise its powers."[163] If the state is compelled to bring tax

158. CHENGWEI, *supra* note 6, at 14.
159. TREITEL, *supra* note 3, at 43.
160. *Id.*; HUGH BEALE, REMEDIES FOR BREACH OF CONTRACT 125 (1980).
161. *Id.*
162. 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS 156 (3d ed. 2004).
163. JONATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS 60 (2014).

regulation in compliance with the terms of an investment agreement or the contract, specific performance will preclude incurring future losses to the investor (prospective effect). However, before the state amends its tax regulation, the investor might incur losses for increases resulting from change of tax regulation. Therefore, the state must compensate those losses in accordance with the principle of full compensation (retrospective effect).

Moreover, an order for specific performance of negative obligations shall mean stopping the obligor from doing something he was supposed not to do, or preventing him from doing those things in the future.[164] For instance, if under a technology transfer agreement, a buyer undertakes to not disclose trade secretes relating to the sold goods, he will breach his obligation when he discloses secret information. Therefore, an order for specific performance would mean stopping the buyer from continuing to disclose. In the context of investment law, an order for specific performance of negative obligation could be preventing a state from discriminating against the foreign investor in breach of treaty obligation. Specific performance in this context is also a "remed[y] that purport[s] to constrain the manner in which a government may exercise its powers."[165]

Based on the nature of an assumed obligation, specific performance in investment law, by and large, might include "(i) the annulling of a governmental measure or decision; (ii) injunctions (requiring a party to do or to refrain from doing something); and (iii) declarations of the rights and obligations of the parties, or a declaration that a particular administrative decision was illegal without otherwise stating any consequences."[166]

From another perspective and based on the definition of non-performance, an order for specific performance might take different forms. For instance, the PICC uses a unified concept of non-performance that embraces all forms of non-performance—either total non-performance or defective performance.[167] Total non-performance means that an obligor entirely fails to live up to his obligation such as where the obligor fails to deliver the agreed upon goods. Defective performance involves circumstances in which the obligor fails to meet an obligation exactly in accordance with the terms of the contract; meets only parts of his obligations, for instance, delivers only parts of the goods; or delays in performing his obligations.

As a result, depending on the form of non-performance, an order for

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164. TREITEL, *supra* note 3, at 43; *see* BEALE, *supra* note 160, at 125.

165. BONNITCHA, *supra* note 163, at 60.

166. Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, OECD Working Papers on International Investment (Mar. 2012), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf.

167. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, art. 7.1.1.

specific performance might take different forms. This classification of types of specific performance falls within the general classification.

II. FEASIBILITY AND COMPATIBILITY OF SPECIFIC PERFORMANCE WITH INTERNATIONAL LAW AND INTERNATIONAL INVESTMENT LAW

A. *The Principle of* Pacta Sunt Servanda *Under the PICC*

The PICC recognizes specific performance as a general principle and regard it as a natural consequence of the principle of *pacta sunt servanda*.[168] The binding nature of the contract itself is the result of the principle of party autonomy.[169]

In international trade practice, these principles play a crucial part in an open market economy; because "they ensure that commercial parties are free to decide to whom they will offer their goods or services, and by whom they wish to be supplied, as well as to freely agree on the terms of those transactions. Once such voluntary agreements have been reached, security of the transaction requires them to be enforced. This process of voluntary exchange promotes economic growth through competition and the efficient allocation of resources."[170] Therefore, these principles serve the purpose of stability and certainty in international trade.[171] Accordingly, breach of the principle of *pacta sunt servanda* should be taken seriously. The Official Comment to Article 7.2.2 of the PICC lays out the immediate effect of failing to meet contractual obligations and the principle of *pacta sunt servanda*. It provides "in accordance with the general principle of the binding character of the contract, each party should as a rule be entitled to require performance by the other party not only of monetary, but also of non-monetary obligations, assumed by that party."

The official comment to Article 7.2.2 of the PICC continues and sets forth

> the principle [of specific performance] is particularly important with respect to contracts other than sales contracts. Unlike the obligation to deliver something, contractual obligations to do something or to abstain from doing something can often be performed only by the other contracting party itself. In such cases

168. *See* PICC 2010, *supra* note 116, art. 1.3.

169. *See id.* art. 1.5, cmt. 1.

170. Nicole Kornet, *Evolving General Principles of International Commercial Contracts: The UNIDROIT Principles and Favor Contractus*, Working Paper No. 2011/07, at 3 (Univ. of Maastricht), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756751

171. *Id.* at 14.

> the only way of obtaining performance from a party who is unwilling to perform is by enforcement.[172]

Therefore, under the PICC the most significant foundation of the right to specific performance is the principle of *pacta sunt servanda* and the immediate consequences of its breach is an aggrieved party's right to choose specific performance.[173] The structure of remedies in the PICC and many provisions under it clearly demonstrate the importance of sticking to the principle of *pacta sunt servanda*. For instance, a court's power to direct a non-performing party to pay a penalty if it does not comply with the order for specific performance,[174] a non-performing party's right to cure non-performance[175] and subjecting termination to the fundamentality of breach are among the provisions that show the PICC's tendency toward specific performance.[176]

B. *The Principle of* Pacta Sunt Servanda *in ISDS*

1. The Principle of *Pacta Sunt Servanda* Lies at the Heart of Public International Law

The principle of *pacta sunt servanda* is the most vital general principle of international law as well as international investment law.[177] Article 26 of the Vienna Convention on the Law of Treaties sets forth "every treaty in force is binding upon the parties to it and must be performed by them in good faith." This means that the parties of any treaty including a bilateral or multilateral investment treaty are obligated to perform the assumed obligations under the treaty.[178]

Furthermore, most investment treaties make an explicit reference to the parties' obligations to observe the terms of the treaty and agreements with investors. For instance, the bilateral treaty of 1959 between Germany and Pakistan in Article 7 lays down "either party shall observe any other obligation it may have entered into with regard to investments

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172. *See* PICC 2010, *supra* note 116, art. 7.2.2., cmt. 1.

173. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, at 784.

174. *See* PICC 2010, *supra* note 116, art. 7.2.4(1).

175. *See id.* art. 7.4.1.

176. *See id.* art. 7.3.1.

177. JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 319 (2013); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 62 (2009); GODEFRIDUS J.H. HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 75 (1983).

178. YUSUF CALISKAN, THE DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW: LESSONS FROM THE OECD MAI NEGOTIATIONS AND THEIR APPLICATION TO A POSSIBLE MULTILATERAL AGREEMENT ON INVESTMENT 23 (SJD dissertation 2008); GUIGUO WANG, INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE 559 (2015).

by nationals or companies of the other party."[179]

Also Article 15(2) of the Czech Republic and Singapore BIT 1995 reads "each contracting party shall observe commitments, additional to those specified in this agreement, it has entered into with respect to investment of the investors of the other contracting party. Each contracting party shall not interfere with any commitments, additional to those specified in this Agreement, entered into by nationals or companies with the nationals or companies of the other contracting party as regards their investments."[180] Although the language of such clauses differs from one treaty to the next,[181] its purpose is to reject the idea that "governments can breach contracts at will—it affirms . . . the position that governments have an international duty not to rely on governmental powers to breach contracts concluded with foreign investors."[182]

Nevertheless, when a state breaches its obligations, courts and arbitral tribunals normally award monetary compensation. This Article submits that the principle of *pacta sunt servanda* as a starting point obligates a sovereign state to observe its obligations under an investment contract or a treaty. If it fails to meet its obligations either under the investment contract or the treaty, an immediate effect of the principle of *pacta sunt servanda* would be the investor's right to choose specific performance of its obligations. In this regard, it does not matter whether the state has breached its treaty obligation, contractual promises, or both of them. This position is confirmed by the PICC as an example of modern contract law that can be used as a source of international law, corroboration of international law, as a law chosen by the parties, source of national law, and corroboration of domestic law.[183] This does not, however, mean that specific performance must take precedence over pecuniary damages. Rather, it means that when an aggrieved party opts for specific performance, a court or a tribunal should be able to grant specific

179. Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Pak.-Ger. at 28, Nov. 25, 1959, *available at* http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf.

180. Agreement on the Promotion and Protection of Investments, art. 15(2), Apr. 8, 1995, *available at* http://investment policyhub.unctad.org/Download/TreatyFile/981.

181. *See* Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD Working Papers on International Investment (Mar. 2006), *available at* http://www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf; Patricio Grané & Brian Bombassaro, *Umbrella Clause Decisions: The Class of 2012 and a Remapping of the Jurisprudence*, KLUWER ARBITRATION BLOG, http://kluwerarbitrationblog.com/blog/2013/01/17/umbrella-clause-decisions-the-class-of-2012-and-a-remapping-of-the-jurisprudence/; Elisabeth Meurling & Bart Volders, *Umbrella Clauses in International Investment Litigation*, 2 EUR. PUB. PRIVATE PARTNERSHIP L. REV. 80, 80-90 (2007).

182. Thomas W. Wälde, *The "Umbrella" Clause (or Sanctity of Contract/Pact sunt Servanda Clause) in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INV. & TRADE 30 (2005), *available at* http://www.biicl.org/files/946_thomas_walde_presentation.pdf.

183. *See supra* text accompanying notes 127-29.

performance unless one of the exceptions to the right to require performance is satisfied; for example, where a state confiscates a ship belonging to an investor and then it sank by natural means.[184] The principle of *pacta sunt servanda* should be taken seriously especially where the host state acts arbitrarily and in bad faith.

2. Specific Performance Meets Parties' Expectations

The simplest philosophy behind why specific performance should be available has to do with the fact that this is what the parties contracted for.[185] "The parties to a transaction often take great care in defining their respective rights and obligations, the performance they expect from each other. One must assume that, unless substantial changes occurred, they wish to receive this performance."[186] There should be no difference as to contracts between states and investors. When a state enters into a contract with a foreign investor, it creates the expectation in the foreign investor that it will live up to its obligations under the contract or it will observe obligations imposed by treaty on it; otherwise it is highly unlikely for a foreign investor to enter into a contract with a state. It is reasonable to expect the parties to any contract, be it between two states, between an individual and a state or between two individuals, to meet their obligations as originally agreed by them. Professor Dunn argues that "private individuals making contracts with foreign governments do not ordinarily foresee that the government will in the future resort to its governmental power to defeat its obligations under the contract. If they did, they would make no such contracts at all, since the scope of governmental power is such as to be able to defeat any normal basis of outcome of the contractual relationship."[187] Therefore, this reasonable expectation should be respected. The law of many countries recognizes the binding nature of state contract with individuals.[188] For instance, the decision of the U.S. Supreme Court in the famous case of *Perry v. United States* best illuminates this point. In that case, the court held that "the United States are as much bound by their contracts as are individuals . . . when the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who

184. Hindelang, *supra* note 36, at 3.

185. Eustace Chikere Azukibe, *The Place of Treaties in International Investment*, 19 ANN. SURV. INT'L & COMP. L. 155, 176 (2013) (noting that "the underlying philosophy behind pacta sunt servanda is the idea that it is proper for individuals to be bound by their promises").

186. Schneider, *supra* note 18, at 4.

187. Fredrick Dunn, *The Protection of Nationals, in the Sanctity of Contract Between a Sovereign and a Foreign National*, A.B.A. SEC. MINERAL & NAT. RES. L. PROC. 177, 181 (1957).

188. F.A. Mann, *The Law Governing State Contracts*, 21 BRIT. Y.B. INT'L L. 1, 13-14 (1944).

are parties to such instruments."[189] According to the court "this is recognized in the field of international engagements. Although there may be no judicial procedure by which such contracts may be enforced in the absence of the consent of the sovereign to be sued, the engagement validly made by a sovereign state is not without legal force."[190] The court also continued and held "the binding quality of the promise of the United States is of the essence of the credit pledged. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legality and binding character of its contracts."[191]

If a state recognizes the binding nature of its contracts with its citizens, it could not change its obligations at the international level. Wadmond argues that "customary international law itself provides that contracts between a state and a foreigner are binding upon both parties . . . it is beyond dispute that the national law of any state cannot vary its obligations under international law."[192]

3. Specific Performance Creates Stability and Predictability

As a matter of common sense, investors locate their investments in countries where they find stability, security, and predictability; security of investment therefore makes an integral part of decision-making process to invest abroad. This security "vanishes with the violation of international contracts."[193] The same holds true in regard to other areas of international law. In relation to the WTO, for instance, some have argued that "[the] development of *pacta sunt servanda* into the WTO treaty system seems to have been slow, but represents a significant step towards the enhancement of the security and predictability objectives of the multilateral trading system."[194] Further, the principle of *pacta sunt servanda* "may be seen as manifesting the need perceived by states for an international legal system that can ensure international order and prevent arbitrary behavior and chaos."[195]

In fact, it will not be an exaggeration to say that the entire investor-state relationship is built upon trust and confidence considering that "the investor exposes himself to the host state's legal and factual control over the investment and relies on the host state to meet its promises it made

189. Perry v. United States, 294 U.S. 330, 351-52 (1935).
190. *Id.* at 361 n.3.
191. *Id.* at 353-54.
192. Wadmond, *supra* note 12, at 182-83.
193. *Id.* at 181.
194. Yenkong H. Ngangjoh, Pacta Sunt Servanda *and Complaints in the WTO Dispute Settlement*, 1 MANCHESTER J. INT'L ECON. L. 75, 75 (2004).
195. Igor Ivanovich Lukashuk, *The Principle of* Pacta Sunt Servanda *and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513, 514 (1989).

before investing."[196] If the host state breaches its obligations, this trustful relationship will likely be diminished or destroyed. Therefore, holding the state responsible for meeting its obligations in kind as a result of the principle of *pacta sunt servanda* might restore this diminished or destroyed trust and confidence. Therefore, at least theoretically, the more trust and confidence the host state gains the more investment it will attract.[197] One can argue that trust and confidence cannot be increased unless one attaches huge significance to the principle of *pacta sunt servanda* and the primary effect of the breach of this principle which is an aggrieved party's right to specific performance. Endicott nicely argues that "protecting contractual and treaty rights is widely seen as essential to the encouragement of foreign direct investment and stable and functional economy in general."[198] In his account, "unless investors can be confident that their agreements will be honored, they face considerably greater risks in making their investment and may therefore decide against doing so."[199] It therefore seems that an express provision in an investment contract or a treaty providing that the primary effect of the breach of obligations shall be the other party's right to choose performance will serve the function of assuring the investors of an investment-friendly environment in the host country.

4. Specific Performances Accords with the Nature of Long-Term Agreements

Specific performance as an immediate effect of the principle of *pacta sunt servanda* appears to be an effective remedy for agreements involving a continuing relationship as is the case in all investment contexts; the WTO experience also highlights contracts involving an ongoing relationship as an example of circumstances in which the use of non-pecuniary relief may be most effective.[200] Specific performance may prove to be particularly effective if the circumstances of the dispute indicate that there is a high chance of continuation of a friendly relationship between an investor and a host state.[201] This might be the

196. STEPHAN W. SCHILL, *Umbrella Clauses as Public Law Concepts in Comparative Perspective, in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 322 (Stephan W. Schill ed., 2011).

197. Azubuike, *supra* note 185, at 176 (arguing that "international relations are enhanced when States, in their dealings with each other, have the comfort and assurance that whatever agreement they enter into will be respected by each party. Thus, pacta sunt servanda is trust-constitutive").

198. Endicott, *supra* note 52, at 548.

199. *Id.*

200. Brooks E. Allen, *The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners, in* ASA PERFORMANCE AS A REMEDY 283 (Michael E. Schneider & Joachim Knoll eds., 2011).

201. Elizabeth Whitsitt & Nigel Bankes, *The Evolution of International Investment Law and*

case, for instance, in situations where the host state's actions violating treaty or contractual obligations has been taken unintentionally.[202] Maybe taking into account of this fact Schreuer observes that "it is likely that in the future more cases will arise, involving disputes stemming from ongoing relationships, in which awards providing for specific performance or injunctions will become relevant."[203] Schreuer's prediction came true in 2013 in the case of *Arif*. In this case, the tribunal held that

> the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution. On the other hand, 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.[204]

The interesting aspect of this case lies in the fact that unlike many other cases in which states refuse to perform their obligations in kind, in this case it was the state that insisted on performing its obligations in kind by way of restitution. In fact, the responded asked the tribunal

> were [it] to decide that Moldova bears responsibility for the cancellation of the Airport Lease Agreement, Moldova stands by its request for 60 days to determine if it can provide some form of restitution, for example by arranging signature of a new lease agreement with Le Bridge in conformity with applicable law, in lieu of whatever damages the tribunal might determine.[205]

Furthermore, in some investment sectors such as investment in the international energy industry, it appears that states themselves attach great importance to keeping the relationship intact. Professor Peter Cameron points out that many disputes in the international energy industry are settled before the court or arbitral tribunal renders the final award which reflects the significance of "both commercial realities and the need to preserve a long-term relationship between the investor and

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Its Application to the Energy Center, 51 ALBERTA L. REV. 207, 239 (2013).

202. JARVIN SIGVARD, *Non-Pecuniary Remedies: The Practice of Declaratory Relief and Specific Performance in International Commercial Arbitration*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 167-68 (Arthur W. Rovine ed., 2008).

203. CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY, ¶ 79, at 1138 (2d ed. 2009).

204. Arif v. Moldova, ICSID Case No. ARB/11/23, Award ¶ 570 (Apr. 8, 2013).

205. *Id.* ¶ 568.

the host state."[206] Based on this fact, it might not be unreasonable to make the assumption that whenever host state benefits from the continuation of the relationship, it does not come up with defenses it could have used otherwise. Consequently, it is obviously against the principle of good faith to come up with a sovereignty defense where the host state does not consider the continuation of the relationship beneficial. There should be no doubt that the principle of good faith could prohibit such a behavior by forcing the host state to specifically perform its obligations and thus to stick to the principle of *pacta sunt servanda*.[207]

The case of *Nykomb v. Latvia*[208] best exemplifies the effect of bad faith on the part of the host state. In that case the tribunal held "even if damage or losses to an investment may be inflicted indirectly through loss creating actions toward a subsidiary in the country of a Contracting State, restitution must primarily be seen as an appropriate remedy in a situation where a contracting state has instituted actions directly against the investor."[209] The case implies that where the host state takes actions in bad faith, it could justify the investor's right to specific performance since when states make treaties and thus assume obligations and obtain rights, they must employ their rights in accordance with the purposes and principles of international law and "without prejudice to the legitimate interest and rights of other subjects of that law."[210]

The principle of good faith, as a basis for specific performance of a contract or a treaty, may also come into play in situations where a state expressly deprives itself of a right to nationalize their contracts. George W. Haight argues that according to the principle of *pacta sunt servanda*, states must comply with their contracts in good faith.[211] He goes on and

206. PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY, ¶ 1.126 (2010).

207. The principle of good faith is also well established in international law as well as international investment law. International treaties, case law, and scholarship unanimously acknowledge the paramount importance of the principle of good faith in international law. It is a principle from which other principles such as the principle of *pacta sunt servanda* and other legal rules related to honesty, fairness, and reasonableness have been derived. In international investment law, substantive standards of protection such as "fair and equitable treatment," "full protection and security," "protection of legitimate expectations," "transparency," and "non-discrimination" are also based on the principle of good faith. *See, e.g.*, Munir Maniruzzaman, *The Concept of Good Faith in International Investment Disputes – The Arbitrator's Dilemma*, KLUWER ARBITRATION BLOG, http://kluwerarbitrationblog.com/2012/04/30/the-concept-of-good-faith-in-international-investment-disputes-the-arbitrators-dilemma-2/; Todd J. Grierson & Weiler Ian A Laird, *Standards of Treatment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 272 (Peter Muchlinski et al. eds., 2008); Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, ¶ 154 (May 29, 2003).

208. Nykomb Synergetics Tech. Holding AB v. Latvia, Arbitration Inst. of the Stockholm Chamber of Commerce, Award of Dec. 16, 2003.

209. *Id.* § 5.1.

210. Lukashuk, *supra* note 195, at 514.

211. George W. Haight, *The Internationalization of Development Contracts*, 3 PUB. L.

states "although like other property these contracts can be lawfully nationalized upon the payment of adequate compensation, governments in the exercise of their sovereignty can divest themselves of the right to nationalize their contracts. If despite such divestment the government nevertheless purports to nationalize, the principle of *restitutio integrim* would apply and a tribunal could order specific performance or damages."[212]

5. Specific Performance does not Violate States' Sovereignty

States and arbitral tribunals have argued that specific performance is against a state's sovereignty. However, specific performance does not run counter to the state's sovereignty. In *Occidental v. Ecuador*, where the claimant sought provisional measures in relation to Ecuador's termination of a participation contract for exploration of hydrocarbon reserves, the tribunal held: "[i]t 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 entitlement, specific performance must be deemed legally impossible."[213] The tribunal went on and held that

> [t]he adequate remedy where an internationally illegal act has been committed is compensation deemed to be equivalent with restitution in kind. Such a solution strikes the required balance between the need to protect the foreign investor's rights and the right of the host State to claim control over its natural resources."[214]

Likewise, in *Enron v. Argentina*,[215] Argentina strongly questioned the tribunal's jurisdiction to grant injunctive relief which would have prohibited Argentina from collecting taxes.[216] It particularly argued that "an ICSID tribunal cannot impede an expropriation that falls exclusively within the ambit of State sovereignty; that tribunal could only establish whether there has been an expropriation, its legality or illegality and the corresponding compensation."[217] Nonetheless, States' power and right to enter into treaties and contracts are an obvious attribute of their

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FORUM 69, 78 (1984).

212. *Id.*

213. Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award of Aug. 17, 2007, ¶ 79.

214. *Id.* ¶ 85.

215. Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 81 (Jan. 14, 2014).

216. Aaken, *supra* note 10, at 747.

217. *Enron*, ICSID Case No. ARB/01/3, ¶ 76.

sovereignty. Sovereignty does not exist in a vacuum; "the assumption and exercise of international legal obligations constitutes a realization of that sovereignty. By undertaking such obligations, a state acquires not only duties, but also rights. As a result, its capacity to exercise its sovereignty in international relations is enhanced."[218] In fact, when a state makes a contract with a foreign investor, it makes use of its sovereignty power;[219] and, thus by exercising its power and right to conclude a contract, it also assumes responsibility and liability.[220] One aspect of this liability may be compelling the state to meet its obligation in kind. Also, some have argued that the principle of good faith may impose limitations on States' sovereignty.[221] In addition, to give huge weight to the concept of sovereignty would mean that "a state can always violate its commitments under both treaties and agreements with private individuals, thus making any agreements the state enters into meaningless and non-binding"[222] which is clearly unjust and unreasonable.

Last but not least, the current trend is toward limiting the extreme manifestations of sovereignty, and toward intensifying the rights of individuals against the state.[223] This is currently taking place in some areas of international law specifically the WTO. Anne van Aaken argues that "international courts clearly issue decisions which make revision of laws as well as administrative acts necessary and there it is well accepted, for example in WTO law."[224]

III. INEVITABILITY AND DESIRABILITY OF SPECIFIC PERFORMANCE IN ISDS

Despite the silence of most of investment treaties as to the form of reparation, in practice arbitral tribunals rarely award non-pecuniary remedies including specific performance in ISDS.[225] One may explain

218. Lukashuk, *supra* note 195, at 515.

219. In this regard, PCIJ has declared that "the right of entering into international engagement is an attribute of state sovereignty." Wadmond, *supra* note 12, at 179.

220. *Id.* at 181 (arguing that "with increased government control [over economic activities] comes increased government responsibility; in a democratic state power imports responsibility. The contract is the primary instrument of reconciling freedom with responsibility").

221. Steven Reinhold, *Good Faith in International Law*, BONN RESEARCH PAPERS ON PUBLIC INTERNATIONAL LAW NO 2/2013, 17 (May 23, 2013), http://ssrn.com/abstract=2269746.

222. Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 325 (1999) (arguing that "if the system of international law had not recognized the principle of pacta sunt servanda, then that principle would have become legally meaningless and all agreements reached between States would have been rendered ineffective and non-binding. Thus, the doctrine of pacta sunt servanda fails to offer a satisfactory explanation of the basis of validity of international law").

223. Wadmond, *supra* note 12, at 179.

224. Aaken, *supra* note 10, at 749.

225. MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND

this with the fact that the tribunals consider specific performance as a sovereignty infringing remedy that is incapable of being enforced in any effective way.[226] In line with this group of cases, Sornarajah argues that an order for specific performance against a state by an arbitrator is obviously a futile act as it cannot be enforced in any meaningful way.[227] The other reason for the scarcity of specific performance in ISDS has to do with the fact that investors in the vast majority of cases frame their claims in terms of monetary compensation.[228] There is no empirical research, however, to show why investors do not opt for specific performance. Therefore, the fact that investors do not claim specific performance in ISDS should not lead one to conclude that investors view specific performance as an inappropriate remedy, at least, in all circumstances.

Problems inherent in the enforcement of non-pecuniary remedies may be one of the major determinative factors in regard to investors' preference for monetary compensation.[229] The enforcement problems may include, among others, difficulty in supervising specific performance. This is particularly acute in settling disputes through arbitration since at the time an arbitral tribunal renders its final award its duty comes to an end; difficulties in forcing a foreign national government or federal court to adopt a new regulation or law; and troubles in forcing a private company contracted to work for the government to change its behavior or offer an apology.

Nonetheless, based on the fact that most investment treaties do not set out the forms of reparation, most scholars approve of the tribunals power to award non-pecuniary remedies in ISDS unless an investment treaty expressly exclude it.[230] Focusing on the current literature, the following

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MEDIATION: A PRACTICAL GUIDE 319 (2010) (noting that "although [arbitral tribunals usually] have the power to award specific performance, in practice arbitral tribunals are reluctant to do so, especially where such an award will be difficult to enforce").

226. *See, e.g.*, Occidental v. Ecuador, ¶¶ 78, 84 (Provisional Measures, Aug. 17, 2007), *available at* http://www.italaw.com/ sites/default/files/case-documents/ita0576.pdf; Amco Asia Corp. v. Republic of Indon., ICSID Case No. ARB/81/1, ¶ 202 (Nov. 20, 1984), *available at* http://www.italaw.com/cases/347; CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 341 (2007); BONNITCHA, *supra* note 163, at 60.

227. *See generally* M. SORNARAJA, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT LAW, 280 (3th ed. 2010).

228. Hindelang, *supra* note 36, at 9; Christoph H. Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT'L 325, 329 (2004).

229. Allen, *supra* note 200, at 294 (noting that the "preference for damages often reflects practical considerations, such as the difficulty of obtaining restitution of property that has already been liquidated. Moreover, the filing of investor-state arbitration often signals the end of the relationship between the parties; investors may fear that they can no longer operate in what is perceived to be a hostile environment").

230. DUGAN ET AL., *supra* note 21, at 570; BONNITCHA, *supra* note 163, at 59-60 (noting that "the prevailing view is that tribunals adjudicating investor-state disputes under investment treaties do have the inherent authority to award non-pecuniary remedies"); Whitsitt & Bankes, *supra* note

paragraphs seek to shed some light on the circumstances in which an order for specific performance in ISDS may be inevitable and desirable and proposes two ways namely "change of remedy" and "accumulation of remedies" to accomplish the goal of awarding specific performance in ISDS and giving full effect to the principle of full compensation. Having specified the mentioned circumstances, this Article shall first examine the doctrines of "change of remedy" and "accumulation of remedies" under the PICC in order to shed some light on the doctrines in international investment law. Finally it will address the doctrines in international investment law focusing on the ILC Articles and case law.

A. *Circumstances Making Specific Performance an Inevitable and Desirable Remedy*

Brooks E. Allen in an article entitled "*The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*" strives to transfer the approach of WTO toward remedies to other areas of law including ISDS. He points out that although there are huge differences between the WTO systems on the one hand and commercial and investor-state arbitration on the other, however, the WTO may provide arbitral practitioners with valuable lessons with respect to the appropriateness of non-pecuniary remedies.[231] He identifies circumstances under which non-pecuniary remedies may prove to be appropriate and effective. He also proposes some solutions for the enforcement problem of non-pecuniary remedies.[232] In his view, damages are inadequate remedies because in some circumstance it is impossible to quantify them.[233] He gives the example of a treaty violation by a state in which the state refuses to permit foreign nationals to assume management positions in an investor's company.[234] He concludes that in such a situation, one cannot quantify the sustained damages and thus "the most effective remedy would be an order that required the State to permit

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201, at 237 (noting that "in investment arbitration, reparation made to investors for breaches of IIAs almost always comes in the form of compensation. However, non-pecuniary remedies like restitution (that is, specific performance or an injunction) are part of the spectrum of remedies available to foreign investors"); MCLACHLAN ET AL., *supra* note 226, ¶ 9.112 (pointing out that "to date, the remedy awarded by almost all tribunals has been the payment of monetary compensation. Yet this past practice should not obscure the fact that tribunals have the power to be much more flexible in their choice of remedy."); Latham & Watkins, *Non-Pecuniary Remedies in Investment Arbitration Against Sovereigns*, *in* INTERNATIONAL DISPUTE RESOLUTION PRACTICE 1 (2009), https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationpub2699_1.pdf.

231. Allen, *supra* note 200, at 283.

232. Addressing the solutions for the enforcement of non-pecuniary remedies is beyond the scope of this study.

233. Allen, *supra* note 200, at 299.

234. *Id.*

foreign managers to assume positions in the company."[235] He continues and puts forward that non-pecuniary remedies may also be useful remedies compared to damages award in situations where monetary compensation are grounded in lost profits.[236] He refers to the fact that "the often speculative nature of lost profits claims may render tribunals reluctant to grant them, particularly in the investor-state context if the investment is relatively new or untested."[237] From his point of view "an order to return property, or perform contractual obligations, may not only provide a more effective remedy, but may also pose fewer methodological difficulties than a damages award, and thereby avoid a costly and protracted battle of experts."[238]

Martin Endicott in an article with the title of "*Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards"* examines the availability of non-pecuniary remedies in ISDS in the light of the ILC Articles. He states that the ILC Articles may be a great source of guidance in regard to the availability of non-pecuniary remedies in ISDS; at the same time, he cautions that one must be very careful in applying the ILC Articles to ISDS analogously.[239]

Relying on three hypothetical scenarios, he elegantly illustrates circumstances under which monetary damages may not compensate an investor's losses. We mention one of those scenarios as an example here. He illustrates a situation in which

> a foreign investor, an engineering company, sets up a factory in country A to manufacture electricity generating turbines. The factory is in the process of manufacturing a turbine for an important new client. Some weeks before it is shipped, a revolution takes place in country A. A detachment of troops arrives at the factory gates and their commander reports that the new Government has passed a decree nationalizing certain foreign businesses and confiscating their property which, of course, includes the turbine. Most of the foreign investor's staff are escorted to the airport but the Research and Development (R&D) manager is told that he is not permitted to leave and must continue living at his local residence until further notice. The turbines are unique and, if they are not delivered there is no telling how much damage will be caused to the project in country B and how many

235. *Id.*
236. *Id.* at 300.
237. *Id.*
238. *Id.*
239. Endicott, *supra* note 52, at 517.

present and future clients the investor is likely to lose.[240]

He points out that although it will be possible to quantify the sustained damages in relation to the seizure of the plant, however calculation of the potential damages with regard to the turbines and detained manager will not be possible because of the unique nature of both of them which makes a damages award an inadequate remedy in this situation.[241] Finally, he proposes some standards that arbitrators must take into account in deciding to grant or reject non-pecuniary remedies; they are: proportionality,[242] sanctity of contract, state sovereignty, consistency, sustainable development, inadequacy of compensation, and inadequacy of enforcement capability.[243]

Carole Malinvaud in a paper entitled "*Non-pecuniary Remedies in Investment Treaty and Commercial Arbitration*" addresses the availability of non-pecuniary remedies in both commercial and investor-state arbitration. Focusing on the concept of remedies which is defined as "the means of enforcing the right or preventing or redressing a wrong," she comes to the conclusion that remedies both in commercial and investor-state disputes are not confined to monetary compensation.[244] She also gives examples of situations where monetary compensation will not be an adequate remedy. In her view, this may be the case where "a party suffers moral damage, when the honour or the reputation of the party is at stake."[245] She states that in such situation "money would probably be less satisfactory than a full apology or public acknowledgement of libel."[246] She concludes with the proposition that non-pecuniary remedies may be available in ISDS subject to the satisfaction of two conditions: firstly the conditions provided in ILC Articles are to be met and secondly, states show willingness to abide by the measure ordered.[247]

With respect to the appropriateness of non-pecuniary remedies in ISDS, Surya P Subedi also argues that "it is conceivable that in many cases the foreign investors concerned, especially large multinational enterprises or those taking a longer-term approach to investment in the development of the infrastructure or the exploitation of natural resources

240. *Id.* at 518.

241. *Id.* at 519.

242. Proportionality means that "the nature of remedy should be proportionate to the harm caused by breach. For instance, restitution should not be ordered where it will result in a burden disproportionate to the benefit that is obtained by requiring restitution rather than compensation." *Id.* at 548.

243. *Id.* at 547-50.

244. CAROLE MALINVAUD, *Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration, in* 50 YEARS OF THE NEW YORK CONVENTION, 208 (Albert Jan van den Berg ed., 2009).

245. *Id.* at 209.

246. *Id.*

247. *Id.* at 229.

in the country concerned, would be quite satisfied with a promise of cessation, non-repetition, revocation or modification of the wrongful measures concerned on the part of the host state rather than the payment of monetary damages as such."[248] Above all, it seems that in some circumstances such as "debt-for-nature swap" investment only specific performance of obligations will be an adequate remedy.[249]

These studies unearth some crucial facts. There are certainly situations where non-pecuniary remedies including specific performance will be more appropriate in terms of making whole the losses arising from a breach of an obligation and other implications they may have on the entire society; for instance, where the quantification of damages becomes impossible or the host state simply does not pay damages. Also there are situations where it will be desirable to award specific performance in ISDS, such as where the host state itself insist on specific performance and there is a high chance of continuation of a friendly relationship between an investor and the host state.

The Article has proposed two mechanisms, namely "change of remedy" and "accumulation of remedies" in order to deal with situations where monetary damages turn to be inadequate remedy or granting specific performance will be desirable compared to damages claim.

B. *"Change of Remedy" and "Accumulation of Remedies"*

This Part will address "accumulation of remedies" and "change of remedy" under both the PICC and investment law. The rationale behind both is to fully compensate an aggrieved party. However, accumulation of remedies and change of remedy must not lead to overcompensation. Taking into account the fact that investment treaties and international law do not expressly set out any rule to this effect, this Article will first examine the approach of the PICC in order to give an insight regarding to the issue. Outside of the PICC, we might look into several other sources of law such as the Principle of European Contract Law (PECL), Draft Common Frame of Reference (DCFR) and U.N. Convention on Contracts for the International Sale of Goods (CISG) to confirm and supplement the approach of the PICC. However, they are not the main focus of this Article. Although in some circumstances an order for specific performance might serve the interests of an aggrieved party better than monetary compensations, nonetheless, occasionally specific performance may not make whole all of an aggrieved party's losses arising from breach of a contract since there is usually a delay in the time in which the contract should have been performed and the time it is

248. SURYA P SUBEDI, INTERNATIONAL INVESTMENT LAW RECONCILING POLICY AND PRINCIPLE 218 (2008).

249. *See supra* text accompanying notes 13-17.

actually executed. This leads to the question "should an aggrieved party rely on other remedies besides specific performance?" ("accumulation of remedies"). The assumption of accumulation of remedies may occur in regard to all available remedies. However, this Part will only address accumulation of specific performance with damages claim.

Moreover, an aggrieved party who has already demanded specific performance might later find it an inappropriate remedy. For instance, performance may become impossible due to circumstances which have arisen after the order to perform. This also leads to the question "should an aggrieved party invoke another remedy?"("change of remedy"). The assumption of change of remedy may also take place in regard to all available remedies. However, this Part will only deal with change of remedy in relation to specific performance and damages claim which itself could take two forms: (1) where the aggrieved party decides to change from specific performance to a damages claim and (2) when the aggrieved party decides to change from a damages claim to specific performance.

The accumulation aspect of the principle of full compensation on its face does not reinforce an aggrieved party's right to specific performance since when one speaks of accumulation of specific performance with a damages claim; it means that the aggrieved party has already obtained an order for specific performance. Therefore, what we want to establish, has already been accomplished. Nonetheless, the accumulation of specific performance with a damages claim may play a crucial role in consolidating the aggrieved party's right to specific performance in the sense that it provides a safeguard against those who might argue that specific performance is not an appropriate remedy because it does not fully compensate the aggrieved party. Therefore, by recognizing the possibility of the accumulation of specific performance with damages claim such possible arguments become irrelevant.

Where the change of remedy aspect of the principle of full compensation is concerned, an aggrieved party might decide to shift from specific performance to damages and vice versa. Again, a shift from specific performance to damages does not *prima facie* reinforce the right to specific performance since like the previous case the aggrieved party has already obtained an order for specific performance. However, considering that it makes specific performance a flexible remedy, it overcomes the undesirability of specific performance in situations such as where the enforcement of the contract becomes impossible after the aggrieved party has obtained an order for specific performance. On the other hand, the shift from damages claim to specific performance is highly relevant to establish the theoretical foundation of specific

performance. This might be particularly pertinent in ISDS.[250]

C. *Accumulation of Remedies: Specific Performance and Damages Claims*

As far as the possibility of combining the remedies is concerned, most domestic legal systems neither explicitly reject nor embrace it.[251] There are, of course, some legal systems that expressly reject[252] or accept[253] the possibility of accumulation of remedies. At the international and regional level, however, almost all advanced instruments such as the PICC, the CISG, the PECL,[254] and the DCFR[255] allow accumulation of remedies as far as they are compatible with each other. An immediate reason accounting for an aggrieved party's right to combine the available remedies has to do with the fact that, in some circumstances, an order for specific performance may not make whole all of an aggrieved party's losses arising from breach of a contract.

Although the CISG does not set forth a specific provision for the purpose of accumulation of remedies, nevertheless, as many scholars have noted, various provisions of the CISG, especially Articles 45(2) and 61(2), confirm the possibility of combining remedies under the CISG.[256]

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250. *See* below "change of remedy" in international investment law.

251. E.g., the Iranian civil code neither explicitly sets out any rule regarding accumulation of remedies nor rejects it. Scholarship, however, has filled this gap and recognized the possibility of combining remedies under the Iranian law. *See, e.g.*, Shoarian & Rahimi, *supra* note 7, at 735; HOSSEIN SAFAEI ET AL., INTERNATIONAL SALES LAW 157 (4th ed., Publ'n of Univ. of Tehran, 2013) (translation is in Persian).

252. The Civil Code of Germany (BGB) presumably rejects the possibility of combining remedies since the BGB 325 and 326 "give the aggrieved party the choice between damages and 'termination,' and thus it is often said that the aggrieved party cannot both 'terminate' and claim damages for non-performance." Lando & Beale, *supra* note 7, at 363; COMMENTARY ON THE INTERNATIONAL SALES OF LAW THE 1980 VIENNA SALES CONVENTION 231 (C.M. Bianca & M.J. Bonell eds., Giuffre 1987) (noting that "some national laws, such as the English, German and Hungarian Ones, do not allow combining the remedy of avoidance of a contract with an action for damages").

253. E.g., article 6:277 of the Dutch Civil Code expressly provides that a creditor who has terminated a synallagmatic contract may ask for damages under the contract. Study Group on a European Civil Code, *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* at 802 n.1 (Christian von Bar et al. eds., 2008), *available at* http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf; Article 159(1) of Libyan Civil Code sets forth "bilateral contracts . . . . if one of the parties does not perform his obligation, the other party may demand the performance of the contract or its rescission." Mahdi Zahraa & Aburima Abdullah Chith, *Specific Performance in the Light of the CISG, the UNIDROIT Principles and Libyan Law*, 7 UNIF. L. REV. 751, 766 n.110 (2002).

254. Principles of European Contract Law art. 8.102 (2002), *available at* http://www.transnational.deusto.es/emttl/documentos/Principles%20of%20European%20Contract%20Law.pdf.

255. Study Group on a European Civil Code, *Draft Common Frame of Reference*, at 238, *available at* http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

256. SCHLECHTRIEM & SCHWENZER, *supra* note 9, at 699 ¶ 25 (noting that "Article 45 (2)

Article 45(2) reads "the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies."[257] Similarly, Article 61(2) provides "the seller is not deprived of any right he may have to claim damages by exercising his right to other remedies."[258]

Like the CISG, the PICC does not set out a specific provision on this matter. However, one can infer an aggrieved party's right to accumulate remedies from different provisions scattered over the PICC. Article 7.1.4(3), (4), and (5) on the right to cure, Article 7.1.5(2) on the additional period for performance, Article 7.3.5 on termination, and Article 7.4.1 on damages are highly relevant for this purpose.[259] For example, Article 7.1.4(5) reads "notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by cure." Furthermore, Article 7.3.5 (2) sets forth "termination does not preclude a claim for damages for non-performance."[260] The official comment to Article 7.1.1 of the PICC also acknowledges this conclusion. It states "the assumption underlying the Principles is that all remedies which are not logically inconsistent may be cumulated."[261] It, however, fails to specify which remedies are logically consistent and which are not.[262]

The approach of the PECL and the DCFR is more clear and organized compared to the approach of the CISG and PICC because they explicitly set out a provision with regard to accumulation of remedies. For example, Article 8:102 of the PECL provides "remedies which are not incompatible may be cumulated. In particular, a party is not deprived of its right to damages by exercising its right to any other remedy."[263] The DCFR in Article III.–3:102 employs exactly the same language as the PECL.

Accumulation of remedies is not unlimited, though. The general rule is that an aggrieved party cannot accumulate incompatible or inconsistent

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provides that the buyer has the right to combine a claim for damage with the remedies available to him under Article 45(1)(a) and 46 to 52"); Jarno Vanto, *Remedy of Reduction of Price: Remarks on the Manner in Which the Principles of European Contract Law may be Used to Interpret or Supplement Article 50 of the CISG*, *in* AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM LAW 413 n.8 (John Felemegas ed., 2007); HONNOLD, *supra* note 7, at 406.

257. CISG art. 45(2), *available at* https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

258. *Id.* art. 61(2).

259. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, ¶ 4, at 729.

260. UNIDROIT Principles 2010 art. 7.3.5(2).

261. Official Comment art. 7.1.1, UNIDROIT Principles 2010, *available at* http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.

262. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, ¶ 2, at 809.

263. *See* Lando & Beale, *supra* note 7, at 362.

remedies.[264] In determining what remedies are inconsistent, one needs to explore the relationship between different remedies. For instance, an aggrieved party cannot claim its right to specific performance and at the same time terminate the contract.[265]

However, specific performance and damages claims are, as a general principle, compatible remedies. Therefore, a claim for specific performance is consistent with damages for delay or other consequential damages on the grounds of delay in performance.[266] It seems that the only restriction stems from the principle of full compensation. One aspect of this principle is that an aggrieved party must not be overcompensated.[267] Consequently, where the aggrieved party gets the very performance contracted for, he should not also be compensated for the value of the defaulting party's promise.[268] In fact, "an action for performance is incompatible with a claim for full damages, that is, damages that replace the performance."[269]

D. *Change of Remedy*

Change of remedy is another means to achieve the goal of full compensation. It has generally to do with the question whether an aggrieved party may shift from first invoked remedy to another remedy. If an aggrieved party, for instance, has first demanded specific performance, may he shift to damages claim later and vice versa? Or, if an aggrieved party has first demanded specific performance, may he change his mind later and resort to termination? Answering these questions, first and foremost, require determining the applicable law to the dispute. At national level, most legal regimes do not expressly provide any rules in regard to change of remedy.[270] The same holds true in relation to most regional and international instruments such as the CISG,[271]

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264. *See, e.g.*, first sentence of Article 8:102 of the PECL which provides "remedies which are not incompatible may be cumulated." *Id.* at 362.

265. *Id.* at 363.

266. HONNOLD, *supra* note 7, at 406; VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, at 729.

267. SCHLECHTRIEM & SCHWENZER, *supra* note 9, at 699 (noting that "the scope of claim for damages differs depending upon the remedy to which it is linked. The general principle is that cumulative damages cannot be permitted to lead to overcompensation of the buyer").

268. *Id.*

269. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, ¶ 7, at 729.

270. Indian law "generally allows for free shifting between different remedies until a court has passed a judgment ordering performance of the contract"; LARS MEYER, NON-PERFORMANCE AND REMEDIES UNDER INTERNATIONAL CONTRACT LAW PRINCIPLES AND INDIAN CONTRACT LAW: A COMPARATIVE SURVEY OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, THE PRINCIPLES OF EUROPEAN CONTRACT LAW, AND INDIAN STATUTORY CONTRACT LAW 134 (2010).

271. Despite the fact that the CISG does not expressly set out rules for change of remedy, however this can be inferred from other provisions of the CISG. Articles 47 and 63 of the CISG

PECL,[272] and DCFR.[273] The PICC is the only international instrument that explicitly sets out rules regarding change of remedy.

Article 7.2.5(1) of the PICC reads "an aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy." Article 7.2.5(2) also provides "where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy." The Article seemingly has limited the possibility of change of remedy to situations where an aggrieved party has first demanded specific performance. However, as literature confirms, it is also applicable to situations where an aggrieved party has first invoked other remedies such as termination and damages claims and then shifted to specific performance.[274] This Part, nonetheless, will only address the relationship between specific performance and damages claims in two different situations. First, when an aggrieved party has already demanded damages claims and then shifted to specific performance and second where an aggrieved party has already relied upon specific performance and later changes his mind in favor of a damages claim.

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which respectively give a right to a buyer and a seller to fix an additional time for a defaulting party to perform his obligations are especially relevant. Article 47(1), for instance, after establishing such a right, in article 47(2) sets down "unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance." This paragraph provides that during the additional time period, which enables a defaulting party to meet his obligation, the buyer would not be able to resort any other remedy including termination and damages claims. In fact, granting an additional time excludes the remedies referred to in Article 45(1) of the CISG. SCHLECHTRIEM & SCHWENZER, *supra* note 9, ¶ 14, at 730. However, once the additional time expires, the buyer will be able to invoke other remedies subject to the satisfaction of their requirements. For instance, if the seller does not meet his obligations to repair the goods during the additional period, the buyer will be able to terminate the contract if the delivery of non-conforming goods amounts to a fundamental breach in the meaning of article 25 of the CISG. Under certain circumstances, such as where a defaulting party declares that he will not perform within the fixed additional period or where a seller commits further breach during the additional period that justify an immediate avoidance of the contract, an aggrieved party will be able to resort other remedies even before the expiration of the additional time. *Id.* ¶ 15, at 730-31.

272. In spite of the fact that Article 8:102 of the PICC does not expressly set out possibility for change of remedy, however official comment C states that "Article 8:102 does not preclude an aggrieved party which has elected one remedy from shifting to another later, even though the later remedy is incompatible with the first elected." Lando & Beale, *supra* note 7, at 363.

273. Official comment C to Article III.–3:102 of the DCFR by using the same language as the PECL provides "however, a creditor who has chosen one remedy is not precluded from shifting to another later, even though the later remedy is incompatible with the first elected." Study Group on a European Civil Code, *supra* note 253, at 802.

274. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, ¶ 2, at 809.

1. Change from Specific Performance to Damages Claim

A shift from specific performance to damages claim might be useful in some situations. The performance of the contract might become ineffective because of its dependency on the cooperation by the other party.[275] Furthermore, the performance of the contract might become impossible after an aggrieved party obtains an order for specific performance.[276] Additionally, an aggrieved party may simply change his mind in favor of other remedies like damages claims and termination.[277] If, for instance, an aggrieved party who has already obtained an order for specific performance comes to know that a defaulting party is unwilling or unable to perform, he might effectively shift from specific performance to damages claims. A shift from specific performance to damages claim *per se* does not reinforce the existence of specific performance; however given that it makes specific performance a flexible remedy it should be taken for granted.

2. Change from Damages Claim to Specific Performance

In contrast to the previous assumption, a shift from damages claims to specific performance seems unlikely in practice. However, it might be the case in situations where calculation of damages proves to be very difficult or impossible[278] as it is usually the case with regard to long term contracts. Furthermore, an aggrieved party who has already claimed damages might shift to specific performance coming to know that he will face serious problems finding substitute performance. The shift from damages to specific performance will be particularly relevant in ISDS.[279]

An aggrieved party's right to change his remedy, however, is not absolute. The principles of good faith and fair dealing might impose limitations on the aggrieved party's right to change remedy if it disturbs the interests of the non-performing party.[280] This might be the case "if the

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275. *Id.* ¶ 1, at 809.

276. *Id.*

277. *Id.*

278. SIGVARD, *supra* note 202, at 167 (arguing that "specific performance is ordinarily granted where the remedy in the form of money damages is inappropriate because it is either inadequate or impractical. Several elements may be taken into account to find a satisfactory substitute to monetary compensation: the difficulty of proving damages and the difficulty of collecting damages").

279. *See* below "change of remedy" in international investment law.

280. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, ¶ 3, at 810; SCHLECHTRIEM & SCHWENZER, *supra* note 9, ¶ 15, at 695.

> [I]n exceptional cases, a change from an initially asserted right to require performance to another remedy can be a misuse of rights. This would apply, for

non-performing party relied upon the exercise of a particular remedy."[281] For example, if an aggrieved party has already demanded specific performance and then decides to shift to damages claims, the principle of good faith and fair dealing will prohibit him from doing so, if, for instance, "the non-performing party has already invested a great deal of effort and/or incurred expenses in preparing its performance."[282] Furthermore, if an aggrieved party fixes an additional time for a non-performing party to perform his obligations, the aggrieved party cannot invoke other remedies during that period.[283]

E. *"Change of Remedy" and "Accumulation of Remedies" in International Investment Law*

Neither international law in general nor international investment law in particular make an explicit reference to the doctrines of "change of remedy" and "accumulation of remedies." Nonetheless, one can infer the same principles in international law as well as international investment law relying on the principle of full compensation, which is the underlying reason accounting for the doctrines of "change of remedy" and "accumulation of remedies," and the principle of good faith. It is clear that this Part cannot address all aspects of the principle of full compensation. Rather our main purpose is to establish whether the principle of full compensation exists in international investment law or not. The ILC Articles may also provide constructive guidance on accumulation of remedies and change of remedy in ISDS. In order to address the issue, it is, first and foremost, necessary to deal with the relevance of the ILC Articles to ISDS and the principle of full compensation in international investment law.

Therefore, this Part will first address the relevance of the ILC Articles to ISDS and then turn to deal with the principle of full compensation in international investment law. Subsequently, it will examine the accumulation of remedies and change of remedy in the light of the ILC Articles, the principle of full compensation, and the principle of good faith. This Part will address the issue of accumulation of remedies and change of remedy only with regard to the relationship of specific

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> instance, in case of a fundamental breach of contract if the buyer initially insists on delivery and then changes to a remedy on short notice, although the seller has already effected the delivery in the meantime. If delivery is made before the buyer declares the avoidance of the contract, the right of the buyer to avoidance of the contract is excluded pursuant to Article 7(1) (good faith).

Id.

281. VOGENAUER & KLEINHEISTERKAMP, *supra* note 9, ¶ 3, at 809.
282. *Id.* ¶ 5, at 810.
283. *Id.*

performance and damages claim.

1. The Relevance of the ILC Articles for the Purpose of Extraction of the Doctrines of "Change of Remedy" and "Accumulation of Remedies"

The ILC Articles, as their name indicate, deal with responsibility of states for international wrongful acts and are thus not formally applicable to investor-state dispute settlement.

As far as it is concerned, the applicability of the ILC Articles to ISDS, Articles 33(2) and 55 of the ILC Articles, however, shed some light on the issue. In accordance with Article 33(2), the general principles of state responsibility are "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." This means that "primary rules creating obligations to non-state actors can have their own set of obligations, among others, on the form of reparation."[284] Article 55 of the ILC Articles also sets forth "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."

Consequently, where a particular investment treaty, for instance, contains specific rules regarding the available remedies, the ILC Articles cannot be used to ISDS. For example, as NAFTA in Article 1135 prioritize compensatory relief and limits the scope of restitution, one cannot use the ILC Articles, which favors restitution, in order to interpret rules of remedies in NAFTA since specific rules take precedence over general rules of the ILC Articles.[285]

Taking account of the fact that the ILC Articles are not formally applicable to ISDS, there is thus no consensus among scholars as to the applicability of the ILC Articles to ISDS.[286] The better view has been pointed out by Endicott. He argues that although the ILC Articles are not formally applicable to ISDS, however there is no better source of guidance for the law of remedies in international law than the ILC Articles.[287] In his view, if the investor-state tribunals disregarded the application of the ILC Articles analogously to ISDS they "would be ignoring a valuable tool to promote clarity in international law of remedies."[288]

Furthermore, this Article is not just about examining which

284. Hindelang, *supra* note 36, at 8.
285. *Id.* at 9.
286. *See* Cour Permanente De Justice Internationale, *supra* note 37.
287. Endicott, *supra* note 52, at 531.
288. *Id.*; *see also* Gisele, *supra* note 71, at 667.

investment treaty allows the availability of specific performance so one can make use of the ILC Articles in order to fill gaps in the investment treaty or which treaty does not approve of the availability of specific performance, therefore one cannot employ the ILC Articles as a gap-filler. On the other hand, this Article will argue that based on some policy considerations and practical necessities, specific performance must be available to an aggrieved party in ISDS regardless of what the current situation is. Consequently, for the purpose of this study it does not matter whether an investment treaty allows or disallows specific performance and subsequently whether the ILC Articles can be used to fill the gaps in a specific investment treaty. For the purpose of this study, the ILC Articles serve the function of shedding some light on the possibility of accumulation of remedies and change of remedy in international law that can be or more accurately should be transported into ISDS in some circumstances. In addition, Articles 33(2) and 55 of the ILC Articles imply that where an investment treaty as an example of instruments creating primary obligations such as fair and equitable treatment do not provide specific rules with regard to the form of reparation, the ILC Articles can be applied to fill the existing gaps in the treaty.

2. The Principle of Full Compensation in International Investment Law

The principle of full compensation lies at the heart of international law.[289] The PCIJ restated this principle in the *Chorzow* case as "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."[290] The ILC Articles have codified this principle in Article 31(1). It reads "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." Likewise, Article 36(2) states "The compensation shall cover any financially assessable damage including loss of profits insofar as it is established." The function of the principle of full compensation is to put an aggrieved party or injured state in as good a position as it would have been had the contract been fully performed or the wrongful act had not been committed.[291]

When it comes to ISDS, one must differentiate between compensation for a (legal) expropriation or termination and damages for an illegal act

289. SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 112 (2008) (noting that "full compensation has been firmly established, at least in relation to cases involving wrongful conduct of respondent, as a principle in international law").

290. *See* Cour Permanente De Justice Internationale, *supra* note 37.

291. RIPINSKY & WILLIAMS, *supra* note 289, at 108 (noting that "the general principle of full compensation is the same regardless of whether a loss has been suffered as a result of a breach of contract or breach of international law").

or termination. Regarding the former, BITs and multilateral investment treaties diverge as to the standard of compensation. There are, by and large, two primary approaches. According to one approach, compensation to foreign investor should be "just and appropriate." In accordance with this approach, the amount of compensation is lower than full compensation.

Another approach, that the vast majority of investment treaties, either bilateral or multilateral treaties follow, require compensation to foreign investors be "prompt, adequate, and effective."[292] It is controversial whether this language implies full compensation or not. In accordance with one view, this does not give rise to the conclusion that the compensation must make whole loses arising from expropriation.[293] On the other hand, some have put forward that compensation should be regarded as "full" compensation and the term "full" itself means "prompt, adequate and effective."[294] This conclusion seems to be correct since in all legal systems, the principle of full compensation has been recognized as a principle that intends to put the aggrieved party in as good a position as he would have been had the contract been fully performed and states cannot change this with regard to their obligations in the international arena. Therefore, in the context of ISDS the principle of full compensation or full reparation shall put "the aggrieved party in the hypothetical position or the situation that it would have assumed in the absence of the unlawful act."[295]

Where the standard of compensation in cases of illegal acts such as unlawful expropriation or breach of an investment contract by the host state is concerned, it seems that there is no controversy with regard to the applicability of the standard of full compensation in calculating the damages to be awarded to the investor.[296]

3. Accumulation of Remedies in International Investment Law

Having determined the relevance of the ILC Articles to ISDS and proving the existence of the principle of full compensation in ISDS, now we turn our focus to examining accumulation and change of remedies in ISDS. The ILC Articles will be the principal source of guidance in this

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292. RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 97 (1995).

293. IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT 21 (2009).

294. MCLACHLAN ET AL., *supra* note 226, at 316-19; SUBEDI, *supra* note 248, at 80-81 (noting that "it has been argued that such compensation should be regarded as 'full' compensation and the term 'full' itself means 'prompt, adequate and effective.' Indeed, a vast majority of BITs, RTAs and FTAs require 'prompt, adequate and effective' compensation against all forms of expropriation").

295. SABAHI, *supra* note 36, at 61-62.

296. MARBOE, *supra* note 293, ¶¶ 2.72, 2.77, at 29.

regard.

The ILC Articles do not expressly speak of the principle of accumulation of remedies. Nevertheless, some of the provisions of the ILC Articles shed some light on the issue. Article 34 (Forms of Reparation) sets down "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 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation."[297] Among particular cases where only the combination of remedies may serve the purpose of full reparation is when a tribunal grants restitution to an injured party. Article 36(1) confirms this by setting out that "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."[298] The phrase "as such damage is not made good by restitution"[299] clarifies that in some circumstances restitution in itself cannot make whole all of losses arising from a wrongful act.

The same holds true in the context of ISDS. Thus, for example, "a mere restoration of an expropriated property to the aggrieved party may not fully repair the aggrieved party's economic losses. Such losses may, for example, be in the form of diminution in value of the property, business interruption, as well as moral damages. In such situations, the aggrieved party is entitled to recover compensation for all such losses, in addition to restitution."[300]

4. Change of Remedy in International Investment Law

When it comes to the principle of change of remedy, one must first of all be aware of the fact that, as the study of the PICC showed, a shift from one remedy to another presupposes that an aggrieved party has an option to choose from the available remedies. The same rule seems to hold true in international law as well as international investment law. Article 43(2)(b) of the ILC Articles sets forth that an injured state invoking the responsibility of another state may specify "what form reparation should take in accordance with the provisions of part two." The official comment states "in general, an injured state is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the Factory at *Chorzow* case, or as Finland eventually chose to do in its settlement of the passage

297. ILC Articles and Commentaries, *supra* note 30, at 95 cmt 2.
298. *Id.* art. 36(1).
299. *Id.*
300. SABAHI, *supra* note 36, at 63.

through the *Great Belt* case.[301] Nonetheless, the ILC Articles do not expressly lay down the possibility of change of remedy. However, one may infer the possibility of change of remedy from Articles 35 and 36 of the ILC Articles. Article 35 makes restitution the primary remedy provided that restitution (a) "is not materially impossible" or (b) "does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation." Article 36(1) reads "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." The final phrase of Article 36(1) ("insofar as such damage is not made good by restitution") clarifies the relationship between restitution and compensation.

According to the official commentary, if restitution is unavailable or inadequate, compensation may take its place or supplement it respectively.[302] In the words of the commentary, one of the reasons that may make restitution unavailable is where in accordance with Article 35(a) it is not materially possible.[303] The appearance of the article indicates that a court or an arbitral tribunal shall take this into account at the time of rendering the award. If it finds that the restitution is materially impossible it will not award it, thus compensation will take its place in accordance with Article 36. Nevertheless, the tribunal may find restitution materially possible at the time of the award and grant it for the injured state, however, it subsequently becomes materially impossible. This leads the question what would happen to the losses of the injured party. It seems that Article 36 is resilient enough to allow the injured party to shift from specific performance, which the tribunal already had granted to him, to a damages claim. The same should also hold true with regard to a shift from a damages claim to specific performance which might be particularly relevant in the context of ISDS.

One may also infer the possibility of a change of remedy from *Arif*. The tribunal's award reflects consideration of some important policy concerns. Firstly, the claimant requested damages, but the circumstances of the case indicated that he was not totally against restitution; as the circumstances of the case imply, his main concern was the likely inability or unwillingness of the respondent to comply with its obligation specifically.[304] Secondly, "the starting point of respondent's position [was] that the primary form of reparation for internationally wrongful acts is restitution. Respondent requested that, in the event of the tribunal finding liability, the possibility of restitution should be investigated as an

301. ILC Articles and Commentaries, *supra* note 30, at 120 cmt 6.
302. *Id.* at 99 cmt 3.
303. *Id.*
304. Arif v. Moldova, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013), ¶ 567.

alternative to any damages that the Tribunal may award."[305] In the respondent's view, restitution "would restore the claimant to the position he would have been in without any violation of the BIT, and also avoids the uncertainties of the calculation of damages, including the possibility of risk free windfall profits."[306] Thirdly, the tribunal held 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." However, taking into account the fact that the respondent had not been able to confirm that restitution is possible, and the tribunal declared that it cannot supervise any restitutionary remedy; it rendered the final award as follows:

> Within a period of no more than sixty days from the date of this Award Respondent shall make proposals to Claimant for the restitution of the investment in the airport store, including proposals as to appropriate guarantees for the legality of a new lease agreement;[307]
>
> Claimant may elect to accept or reject the restitution offered by Respondent at any time within a period of ninety days from the date of this Award;[308]
>
> If Claimant elects to accept restitution, Respondent shall pay to Claimant by way of damages for its breaches of the BIT in relation to the airport store the sum of MDL 6,565,429;[309]
>
> If Claimant elects to reject restitution, or if for any reason Respondent fails to make proposals to Claimant within the sixty days referred to in (d) above, then Respondent shall pay damages of MDL 35,136,294.[310]

In spite of the fact that there is no available information pertaining to whether the respondent proposed an appropriate way of restitution and whether the claimant selected damages or restitution, the award leads one to come to the conclusion that in situations where a host state is willing to live up to its obligations specifically and the circumstance of the case ensure the claimant that the host state will be able to meet its obligation in kind, one must prefer restitution over monetary compensation. This

305. *Id.* ¶ 564.
306. *Id.* ¶ 569.
307. *Id.* ¶ 633.
308. *Id.*
309. *Id.*
310. *Id.*

will likely "wipe out" all consequences of a breach by the host state and would restore claimant to the position he would have been in without any violation of the BIT. Furthermore, in situations where a host state itself is willing to perform its obligations in kind, there does not seem to be any enforcement problem based on sovereignty. Accordingly, the arguments of those who attack specific performance because of difficulty in its enforcement become automatically irrelevant. The interesting point with regard to the award is the way the tribunal has framed the remedy which guides us to deduct the possibility of change of remedy.

The award first obligates the respondent to make proposals to the claimant for the restitution of the investment in the airport store within a period of no more than sixty days from the date of the award. It then authorizes the claimant to accept or reject the proposed form of restitution at any time within a period of ninety days from the date of the award. One may make different assumptions based on these two parts of the award: (a) the respondent makes the proposed way of restitution before the expiration of the sixty-day period. The claimant rejects it before the expiration of the ninety-day period since it does not assure him that the respondent will be able to make the restitution; (b) the respondent makes the proposed way of restitution shortly before or at the final day of deadline. The claimant rejects the proposed way of restitution and opts for damages claim; (c) the respondent fails to make the proposed way of restitution within the allowed time period. In such a situation, the award provides that it shall pay damages of MDL 35,136,294; (d) the respondent proposes an appropriate way of restitution and the claimant decides to accept it. Unfortunately, the award does not expressly state whether the decision of the claimant within the allowed time to reject or accept the proposed way of restitution is conclusive or changeable. The appearance of the ward as well as inability of the tribunal to supervise the restitution indicates that the decision to reject or accept the restitution is definitive. Therefore, if the respondent makes the proposal on the thirtieth of the deadline and the claimant rejects it right away; the claimant shall not have an opportunity to change his mind subsequently even if the respondent proposes a way that totally assures the claimant of the restitution. However, if one reads the award from a functional perspective, one may come to the conclusion that the claimant should be able to change his mind at least during the permissible period of time which might be particularly useful in the assumptions "a" and "d." Take the assumption of "d" as an example in which the respondent proposes an appropriate way of restitution and the claimant decides to accept it. However, the respondent later declares that it is unwilling to make the promised restitution. Should the claimant be left without remedy? The answer is that the principle of good faith and full compensation shall obligate the respondent to pay damages and thus the claimant should be able to shift

from specific performance to a damages claim. Likewise, if according to assumption (a) the main reason for the rejection of restitution was the lack of solid guarantee on the part of the respondent, why one cannot accept the possibility of change of remedy if the respondent subsequently provides a secure guarantee in accordance with the requirements satisfactory to the claimant. These claims are made regardless of the fact that there would be some practical hindrance given that at the time the claimant decides to shift from the first resorted remedy to another remedy, the tribunal would have not been in place. However, these are procedural dilemmas that need to be handled in accordance with the substantive law necessities.

There are also situations where a shift from damages to specific performance may become necessary. This might take place in various stages of the proceeding. For example, as studies demonstrate, there are certainly situations where the calculation of damages may prove to be very difficult or impossible such as where compensation is grounded in lost profits. Furthermore, as some scholars have pointed out the amount of damages payable in favor of investors in investor-state dispute settlement has begun "to become notorious resulting in big money award against relatively poor nations."[311] This might lead to the inability of poor countries to pay damages. It is clear that in such situations investors should not be left without a remedy. The principle of full compensation and the principle of good faith should give the opportunity to an aggrieved investor to shift from the first resorted remedy, in our assumption damages, to specific performance and vice versa. Schwebel argues "if a state, as is sometimes the case, lacks the capacity to pay the damages it would be obliged to pay were monetary compensation required, it may be said that good faith requires the contract to be performed specifically."[312] This inability to pay damages or impossibility to calculate recoverable damages may become manifest during the proceeding or after the tribunal renders its award. In either case the investor must be able to change his remedy.

As we addressed under the PICC and other relevant international and regional instruments, the accumulation and change of remedy aspect of the principle of full compensation does not, on its face, strengthen an

311. MCLACHLAN ET AL., *supra* note 226, at 341 (arguing that "as investment arbitration begins to become notorious for their potential to result in big money award against relatively poor nations, it may be time to rethink this position. They goes further and point out tribunals should be willing to consider preliminary orders to lift discriminatory treatments or to seek other administrative remedies that can provide full satisfaction to investors before moving to award compensation"); Aaken, *supra* note 10, at 749 (arguing that "the amount of damages awarded in some cases can be equally sovereignty infringing").

312. Stephen M. Schwebel, *Speculations on Specific Performance of a Contract Between a State and a Foreign National*, *in* STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW 422 (1994).

aggrieved party's right to specific performance since in these cases the aggrieved party has already obtained an order for specific performance. However, taking into account the fact that it makes specific performance a flexible remedy capable of making whole the losses arising from a breach of an obligation, it could be seen a solid foundation for the existence of specific performance in ISDS. On the other hand, the need for a shift from a damages claim to specific performance seems to be particularly useful in ISDS and provides a sound theoretical foundation for the existence of specific performance in the context of ISDS.

CONCLUSION

Arbitral tribunals rarely grant specific performance in ISDS. The apparent infringement a state's sovereignty, the difficulty of enforcement of non-pecuniary remedies, and the fact that investors almost always frame their claims in terms of monetary damages are among the most significant reasons that explain the scarcity of specific performance in ISDS.

The main thesis of this Article is to argue that arbitral tribunals should be able to grant specific performance if requested by an aggrieved party. We tried to substantiate our claim relying on the principle of *pacta sunt servanda* and doctrines of "accumulation of remedies" and "change of remedy" as two crucial aspects of the principle of full compensation. These foundations proved that the arguments put forwarded against non-pecuniary remedies in ISDS are ill founded and incomplete since there are certainly situations in which specific performance might prove to be inevitable and desirable. Also, as the examination of the PICC showed, the primary effect of the principle of the *pacta sunt servanda* is an aggrieved party's right to choose specific performance. We established that the principle of *pacta sunt servanda* lies also at the heart of international public law as well as international investment law and therefore it should be taken as seriously as it is taken in the context of contract law. The investigation of the principle of *pacta sunt servanda* also clarified that non-pecuniary remedies are not incompatible with states' sovereignty since sovereignty does not exists in vacuum and the right and power to enter into contracts and make treaties is an obvious attribute of sovereignty. Specific performance as a primary effect of the principle of *pacta sunt servada* is in accordance with parties' expectations. It also creates predictability and stability which in turn may give rise to the attraction of more investment. The paper illuminated that specific performance is in accord with the nature of long-term contracts and investment treaties. We showed that in some sector, states themselves attach huge significance to this factor.

Having identified circumstances under which specific performance may be necessary and desirable, we proposed to mechanisms namely doctrines of "change of remedy" and "accumulation of remedies" to accomplish the goal of full compensation through the remedy of specific performance.

We pointed out that accumulation aspect of the principle of full compensation, on its face, does not provide a sound foundation for the existence of non-pecuniary remedies in ISDS since it presumes that the aggrieved party has already obtained an order for specific performance. However, considering that it makes specific performance a flexible remedy capable of making whole all of the losses arising from a breach of an obligation, it could be perceived as a solid foundation for the existence of specific performance in ISDS.

When it comes to change of remedy aspect of the principle of full compensation, we provided illustrations of the circumstances under which it would be desirable and sometime indispensable to allow an aggrieved party to shift from damages claim to specific performance and vice versa. For instance, as the case of *Arif* showed where there is high chance of continuation of a friendly relationship between an investor and a host state itself is keen to meet its obligations specifically and the circumstances of the case also shows that the claimant is also interested in specific performance, it would certainly be desirable to opt for specific performance than damages claim. This would have many implications: it will highly likely wipe out all consequences of a wrongful act by the host state; it will, to a great extent, guarantee a friendly continuation of the relationship between the investor and the host state which in turn will bring more development into the host state and thus creates a balance between the interests of the investor and the host state. It is clear that these circumstances may arise in different phases of the proceeding (*e.g.*, after the claimant has framed his request for remedy in terms of monetary compensations and even when the tribunal has rendered his final award in favor of damages claim). In either case, the aggrieved party should be able to change his remedy from damages claim to specific performance. There are, of course, procedural problems inherent in change of remedy. For example, when the aggrieved party decides to change his remedy in favor of specific performance, the arbitral tribunal may not be in place. However, the procedural problems cannot undermine the existence and desirability of substantive rights. The procedurals problems ought to be handled in accordance with the substantive law necessities.

Moreover, the change of remedy aspect of the principle of full compensation revealed that in some circumstances an aggrieved party should be able to shift from damages claim to specific performance. This may be particularly relevant in ISDS since e.g., a host state may not be able to pay the amount of awarded damages or because of the long-term

nature of investment it becomes impossible to quantify damages. The principle of full compensation and the principle of good faith are crucial grounds that may justify such a shift from damages claim to specific performance and ILC Articles provide legal authority for change of remedy in international law as well as international investment law. As a result, the arbitral tribunals must take non-pecuniary remedies including specific performance very seriously in ISDS since the soundness of a legal regime depends in large part on the one hand devising appropriate remedies or mechanisms to encounter any breach of an obligation and on other hand strong devises for the enforcement of the available remedies. Therefore, in order to enhance the soundness of investment law regime, the paper proposes that full-on prohibitions of the remedy of specific performance should not be written into the texts of future investment treaties nor read into the texts of the many existing treaties that are silent with regard to the types of available remedies.