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Restitution as Remedy in Disputes Between Investor and State

ARTICLE

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ABSTRACT

Restitutionary remedies in international law have been based on the notions of unjust enrichment. There has, however, been a certain amount of scepticism in importing remedies based on restitutive principles into international investment law. This is mainly due to the difficulty in enforcing an award of restitution-in-kind against the sovereign State players in the domain of international investment law. With this backdrop, in the article I look into and analyse the development of restitutionary remedies in international law and their import into investor-State disputes. In addition, I lay out the different ways in which restitution has been codified in investment treaties and other multinational legal instruments and the restrictive nature of the implementation of restitution as a remedy in investor-State disputes. In the subsequent parts of the article I have made an effort to illustrate the extent of the effectiveness of restitution in cases of expropriation and to look at the remedy through the lens of a host State. I conclude the article by delineating certain policy and structural modifications that are likely to render restitution a more acceptable remedy in international investment law.

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1. INTRODUCTION

The remedy of restitution entails a form of reparation that aims at restoring the *status quo ante* i.e., the position as it existed previously. Restitution has long been envisaged as the primary remedy in public international law. A relief of restitution has been generally sought where a State or a party has unjustly enriched itself, thereby depriving the claimant of its rightful property. The development of restitutionary remedies in international law has been broadly based on the claims of unjust enrichment,[1] where a certain event enriched one party to the detriment of another without any legal justification.[2] Scepticism about importing a generalized notion of unjust enrichment into international law has, however, arisen due to a lack of uniformity in legitimizing various connotations of the concept as a cause of action across municipal law. The perception that reliance on unjust enrichment is an attempt to avoid due compensation and to disguise a lack of evidence[3] undermines the potential of restitutionary remedies.

In this article, I draw upon the notions of restitution and unjust enrichment which can be functionally imported into international investment law. It is submitted that the remedy can be founded upon both a claim of unjust enrichment and a wrong.[4] In the former instance, there has to be an injustice involved in the retention of value by a subtraction of benefit from the claimant.[5] The latter is a derivative kind of restitution whereby the wrongful act has to be proved by reference to the rules on wrongs.[6] This distinction can be drawn in international investment law to bring remedies for both permitted and unlawful expropriation under the umbrella of restitution.

Even after codifying restitution as a primary remedy for internationally wrongful acts by States,[7] there has been a lack of conviction in applying the principle to the arena of international investment law. This is primarily due to two reasons. First, with the minimization of diplomatic intervention in investment disputes, investors (private entities) can directly invoke international responsibility of host States. This presents a dichotomy between private and public international law and makes the law of inter-State relations largely inapplicable.[8] The second reason is the gap between theory and practice that renders restitution-in-kind an ineffective remedy impugning State sovereignty.[9] It is pertinent to note that in the International Law Commission's Articles on State Responsibility (ASR), restitution is a secondary obligation which gets triggered by the commission of a wrongful act by a State.[10] This holds true for the predominantly commercial relationships between an investor and a State as well,[11] but this does not resolve the debate relating to the interaction of restitution with other legal subjects. Private law scholars, in a commercial context, have been divided between regarding restitution as an autonomous branch of the law of obligations and considering it as a principle running through existing subjects like tort, contract and property law.[12]

1 CH Schreuer, 'Unjustified Enrichment in International Law' (1974) 22 *American Journal of International Law*, no. 2, 284–285.

2 O Hailes, 'Unjust enrichment in investor-State arbitration: A principled limit on compensation for future income from fossil fuels' (2022) 32 *Review of European, Comparative & International Environmental Law*, no. 2, 5.

3 C Manga Fombad, 'The principle of unjust enrichment in international law' (1997) 30 *Comparative and International Journal of South Africa,* no. 2, 120, 122.

4 P Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 *UW Austl L Rev,* no. 1, 49.

5 S Moriarty, 'An Introduction to the Law of Restitution. By Peter Birks. [Oxford: Clarendon Press. 1985. xxxiv, 447 and (Bibliography and Index) 7 pp. Hardback £40·00 net.]' (1986) 45 *Cambridge Law Journal*, no.1, 129.

6 ibid.

7 UN Doc 56/83 (2001), Art. 35.

8 B Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (2011), 63.

9 C Gray, 'The Choice between Restitution and Compensation' (1999) 10 *EJIL*, no. 2, 416.

10 UN Doc 56/83, supra note 7.

11 See generally for international law, B Juratowich & J Shaerf, 'Unjust Enrichment as a Primary Rule of International Law' in M Andenas et al. (eds), *General Principles and the Coherence of International Law* (2019), pp. 227, 229–231.

12 B Dickson, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54(1) *Cambridge Law Journal*, no. 1, 109–110.

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Restitution-in-kind or 'payment of a sum corresponding to the value which a restitution in kind would bear'[13] has, thus, been placed against compensatory remedies based on a claimant's loss. This gets manifested as compensation being stipulated as an enforceable remedy for claims arising out of investment disputes in bilateral investment treaties (BITs) and international investment agreements (IIAs). This is generally in addition to providing for restitution, impliedly or expressly, as an alternate remedy.

The inherent asymmetry in design of IIAs,[14] does not sufficiently protect the interests of developing host States. Regarding States as the most powerful actors in international law ignores the prevailing reality of 'transactional inequality';[15] with multi-national investors being capable of easily exerting their financial power over developing and under-developed States. Example of this can be found in the assumption of jurisdiction by English courts over disputes arising out of industrial activities carried out by subsidiaries of English-domiciled corporations in former English colonies.[16] In these cases typically there is no final judicial sanction against the damage caused by the corporations as the cases are settled at an intermediate stage.

Against this background, I set out to examine the status of restitution as a remedy in BITs and IIAs. Thereafter, I focus on how restitution and causes of action giving rise to it can be taken into account in claims of expropriation. It is pertinent to flag up that the term 'compensation' will be used, hereinafter, to include both loss-based and gain-based damages. Following on from afore-mentioned, I will elaborate on the chances of an overlap in restitutionary and loss-based remedies in investment disputes and the issues that arise out of it. Finally, I identify the ramifications of the remedy from the perspective of States. I will conclude that certain developments need to be made in the investment environment generally and in the investor-State dispute settlement mechanism, particularly to bring in more clarity about the possible situations that can be remedied through restitution.

2. RESTITUTION AS INCORPORATED IN BITS AND IIAS

The International Court of Justice (ICJ)'s *obiter dictum* in *Chorzow* is helpful in understanding restitution as adopted in BITs and IIAs. This is because *Chorzow* involved claims for indemnification against the Polish Government for causing damage to factories of German companies[17]: a scenario economically analogical to claims of expropriation. The claim for restitution-in-kind was abandoned.[18] In its discussion, the ICJ observed that compensation could be limited to the value of the undertaking only when there was a right to expropriate.[19] Otherwise, for reparation, the award of compensation ought to comprise 'payment of a sum corresponding to the value which a restitution in kind would bear' along with 'damages for loss…which would not be covered by restitution in kind or payment in place of it…".[20]

Thus, where the State is carrying out a permitted activity, it is the unjust enrichment accruing to the State that is to be quantified as damages to be awarded to the claimant-investor. This reflects a gain-based approach. When the act is, however, illegal, consideration for compensation must include both gain to the State and loss to the claimant. The approach to damages developed in *Chorzow* can be traced back to private law principles. The ultimate aim for damages in breach of contract (represented here by breach of obligations under the IIA) is to place the claimant in a position as if the contract had been performed.[21] The ICJ speaks in the same tone too in recognizing that Germany should not be placed 'in a situation

13 *Factory at Chorzów, Germany v Poland* (Merits) (1928) PCIJ Series A No 17, 47.

14 T Allee & C Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) 66 *World Politics*, no. 1, 61–62.

15 P Birks, 'The English Recognition of Unjust Enrichment' (1991) *LMCLQ*, 473, 506.

16 See generally *Okpabi v Royal Dutch Shell Plc and Anr.* [2021] UKSC 3, *Vedanta Resources Plc v Lungowe* [2019] UKSC 20.

17 *Factory at Chorzów, Germany v Poland* (Merits), supra note 13, 5.

18 *Factory at Chorzów, Germany v Poland* (Claim for Indemnity) (Jurisdiction) (1927) PCIJ Series A No 9, 17.

19 *Factory at Chorzów, Germany v Poland* (Merits), supra note 13.

20 ibid; *ADC Affiliate Ltd. v The Republic of Hungary* [2006] ICSID Case No. ARB/03/16, pp. 487–494 for continuing relevance of *Chorzow* principles.

21 VP Goldberg, *Rethinking the law of contract damages* (2019), 2.

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more unfavourable than [it] would have been if Poland had respected the said Convention'.[22] In this manner, the duality between private law and public international law that characterizes investor-State relationships can be reconciled, as far as restitutionary damages are concerned.

IIAs incorporate the remedy of restitution in several ways. Commonly observable codifications stipulate that, while making an award in an investor-State dispute, the tribunal may grant restitution of property. However, this ought to be alternatively be quantified as monetary damages in lieu of restitution.[23] It is often provided that the host State must not discriminate between the foreign investor and its own or third-State investors while granting restitution, indemnification or compensation in response to the crisis.[24] Certain treaties, such as the UK-Tanzania BIT,[25] go one step further to mandatorily secure full reparation for investors through restitution, compensation or both where the investment is requisitioned or destroyed by unnecessary actions of the host State's forces. Subtler ways of preventing unjust enrichment of the host State are also common. For example, the definition of 'investment' under Article 14.1 of the US-Mexico-Canada Agreement (UMCA) protects the expectation interest of the investor by including 'expectation of gain or profit' in it. It follows as a natural corollary that, should any dispute arise, such expectation ought to be fulfilled through damages. The International Energy Charter validates the right to repatriate profits;[26] thus imposing a counter-obligation to restore profits whenever such enrichment occurs.

The policy decision of not mandatorily obligating a host State to carry out restitution-in-kind is justified on several grounds. A situation may arise where the remedy cannot be enforced due to material impossibility or disproportionate burden.[27] In *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*,[28] the tribunal gave due regard to the disproportionate burden on the respondent that would result from an award to reinstate the pre-breach royal decree and held that the legal and regulatory autonomy of the host State would be materially affected. Subsequently, pecuniary compensation was granted instead of juridical restitution. On the other side of the spectrum lies the award of *Cairn v Republic of India*[29] where the claimant was granted restitution by an order to the respondent to withdraw the impugned tax assessment order (Demand). Although this seems *prima facie* uncomplicated, its repercussions spill over into the domain of sovereign powers that restrict restitution-in-kind. The Government of India has now given effect to the Taxation Laws (Amendment) Act 2021 with the aim of settling the disputes by refunding the tax imposed retrospectively on Cairn and other entities. However, if the State and its Union legislature had been reluctant to pass the 2021 Act, the Constitutional Courts of India would have been likely to have been placed in a difficult position since, unless the legislation pursuant to which the Demand was made was not held to be unconstitutional, enforcement of the *Cairn* award would have been tantamount to discrimination against the fundamental right to equal protection of law enshrined in the Constitution of India.

It is noteworthy that the arbitration rules adhered to by the tribunal affect the outcome. Had *Cairn* been following the International Centre for Settlement of Investment Disputes Convention (ICSID Convention) instead of United Nations Commission on International Trade Law (UNCITRAL) rules, the tribunal may have been driven to award damages in lieu of restitution, since only the pecuniary obligations imposed by the award would be enforceable.[30] As the tribunal becomes *functus officio* it becomes impossible for it to supervise

22 *Factory at Chorzów, Germany v Poland* (Merits), supra note 13.

23 See for examples, 2019 Agreement Between the United States of America, United Mexican States and Canada, Art. 14.D.13; 2013 Agreement Between the Government of Canada and Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, Art. 33(2); 2000 Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments, Art. 9.7.

24 See the examples cited supra note 13.

25 1994 United Republic of Tanzania – United Kingdom Bilateral Investment Treaty, Art. 4(2).

26 International Energy Charter, Article 4.

27 UN Doc 56/83, supra note 7, Art. 35(b); Sabahi, supra note 8, 86–90.

28 *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* [2019] Case No. ARB/14/1, para. 563.

29 PCA Case No. 2016-7 (21 December 2020) para. 1877.

30 1966 Convention on Settlement of Disputes between Nations and Nationals of Other Nations, Treaty Series of the United Nations Volume 575, Registration No. 8359, Art. 54(1).

any restitutionary remedy.[31] Thus, the tribunal may refuse to grant restitution-in-kind or may award it alternatively with compensation,[32] with a condition of the latter becoming enforceable upon failure of restitution. The impact of juridical restitution on parties not privy to the arbitration proceedings is also an argument against restitution since such an award would severely impede State sovereignty.[33]

The issues plaguing restitution-in-kind make it unclear as to whether restitution constitutes a customary principle in international investment law. The first blow comes from the ASR itself, where restitution is limited by material impossibility and disproportionate burden. Further, as Professor Christine Gray has observed, permitting derogations for special legal regimes (e.g., treaties) downplays the status of the remedy.[34] The constraints on establishing State practice and *opinio juris*[35] arise out of the disparities in the level of commitments secured through treaties. For instance, unlike the examples above in the third paragraph of this Section, the Comprehensive and Economic Trade Agreement between the European Union and Canada explicitly limits the scope of monetary damages in investment disputes to the loss suffered by the investor.[36] The tribunal in *BP Exploration Co. (Libya) Ltd. v Government of the Libyan Arab Republic*[37] had also endorsed the view that the lack of consistency in authorizing restitutive remedies in treaties arrived at through the consent of parties is indicative of lack of uniform state practice.

At this stage, certain points ought to be noted. The work of Professor Christine Gray[38] and the judicial authority[39] cited in the preceding paragraph were dealing with restitution-in-kind. As has been already set out, damages in *lieu* of restitution are often accepted as a permissible remedy along with loss-based damages in IIAs. It is, however, highly unlikely that restitution, for theoretical purposes, would be divided on the basis of its mode of enforcement because that would create a new set of secondary obligations. Against this backdrop, it is difficult to determine the status of the remedy. In practice, although awards like that in *Alpha v Ukraine*[40] take into consideration heads of damages such as historical losses, foregone revenue and terminal value of investment to grant compensation that is intended to substitute for the restoration of the *status quo ante* for violation of a treaty obligation, a reluctance amongst claimants looms large regarding framing their claim to seek restitutionary damages.

Formulating a restitutionary claim in terms of unjust enrichment is also subjected to criticism. The decision in *Lena Goldfields*, where an *ad hoc* arbitral tribunal granted damages for unjust enrichment to an investor and dissolved the underlying concession agreement, is condemned for bringing in nothing but confusion[41] and hence dismissed as not being authoritative.[42] This is despite the clarification that the same money value would have resulted from compensating either for contractual breach or unjust enrichment. Since *Lena Goldfields*, restitution has expanded in English law (on which the decision was based) to be based on contractual breaches as well as unjust enrichment.[43] Hence, the above-mentioned criticisms do not seem to hold good in light of subsequent legal developments. *Occidental Petroleum Corporation v*

31 *Mr. Franck Charles Arif v Republic of Moldova* [2013] ICSID Case No. ARB/11/23, para. 571.

32 ibid.

33 *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, supra note 28.

34 Gray, supra note 9, 420.

35 For detailed discussion on customary rule in international investment law, see P Dumberry, *Formation and Identification of Customary International Law in International Investment Law* (2016), Chapters 3,4.

36 2016 Comprehensive and Economic Trade Agreement between European Union and Canada, Art. 8.39(3).

37 *BP Exploration Co. (Libya) Ltd. v Government of the Libyan Arab Republic* Award (Merits) (10 October 1973) para. 158.

38 Gray, supra note 9, 420.

39 Award (Merits), supra note 37, para. 158.

40 *Alpha Projektholding GmbH v Ukraine* [2010] ICSID Case No. ARB/07/16, para. 436.

41 Schreuer, supra note 1, 288–289.

42 C. Binder & C. Schreurer, 'Unjust Enrichment', in Max Planck *Encyclopedia of Public International Law* (2017), para. 33.

43 Birks, supra note 15.

The Republic of Ecuador[44] and *ADC Affiliate Ltd. v The Republic of Hungary*[45] are often cited to establish that unjust enrichment lacks validation from international tribunals as a method of damages quantification.[46] In *Occidental*, the claimant-investor was granted reimbursement of value added tax (VAT) under certain regulations. The reimbursement mechanism was, however, discontinued by the State for the companies in the oil sector, requiring entities such as the claimant-investor to return the refunded amount. The claimant-investor brought forward claims of treaty violations. While upholding a violation of fair and equitable standards, the tribunal rejected the State's contention that compensation would unjustly enrich the claimant-investor because such compensation extinguished the right of a third party to proceed against the respondent.[47] *ADC*, on the other hand, presented an atypical case where the claimant included alternative methods for calculating compensation based on restitution and unjust enrichment.[48] The tribunal confirmed the approach based on restitution with emphasis on *restitutio in integrum* and rejected the approach based on unjust enrichment partly because of Article 4 of the involved BIT limiting compensation to the market value of expropriated investments.[49] Thus, while *ADC* presents an interesting snippet of interaction between unjust enrichment and restitution, neither of these cases diminishes the potential held by both of the concepts in investment disputes.

The relegation of material and juridical restitution to a less preferred remedy has been mostly driven by the argument of State sovereignty, but this argument has also been challenged. To constitute full reparation, restitutionary and compensatory damages often lead to exorbitant amounts that prove to be a heavy burden on the economy of the State.[50] This will be dealt with in detail in Section V of this article. A State's role as a sovereign territory also includes fulfilling its international obligations. The IIAs, as instruments of bilateral or multilateral engagements, codify those obligations. As such, while sovereignty can limit restitution for permitted activities, it remains unresolved why such an argument must absolve a State of its liabilities when in breach of international obligations.[51] In view of this, in Section III, I will look into the scope of granting restitution for expropriation claims and how the sovereign powers of a host State interact with it.

3. RESTITUTION AS A REMEDY IN CLAIMS OF EXPROPRIATION

It is not a new principle of international law that a State has the right to expropriate alien property as a manifestation of its territorial sovereignty.[52] The advent of investor-State relationships make it necessary for the State to provide an investor with a stable social, legal, political and financial environment. This calls for a threshold of security against expropriation of the investor's assets. From the existing body of case studies, it is evident that acts of expropriation can be classified along several lines and not all of those can be remedied through restitution.

The foremost distinction can be drawn on the basis of legality. Where an expropriation is lawful, the procedural and substantive requirements under relevant treaty and customary international law having been followed,[53] no question of restitution-in-kind (i.e., restoration of the situation prior to the expropriation) arises. The State merely exercises a power vested in it. This is not to say that any restitutionary principle is completely ignored. Many BITs like the United States of America-Uruguay BIT stipulate payment of prompt, adequate and effective

44 *Occidental Petroleum Corporation v The Republic of Ecuador* [2012] ICSID Case No. ARB/06/11.

45 *ADC Affiliate Ltd. v The Republic of Hungary* [2006] ICSID Case No. ARB/03/16.

46 Binder & Schreuer, supra note 42.

47 *Occidental Petroleum Corporation v The Republic of Ecuador*, supra note 44, paras. 654–655.

48 *ADC Affiliate Ltd. v The Republic of Hungary*, supra note 45, para. 243.

49 ibid., paras. 500, 514.

50 T Ishikawa, 'Restitution as a "Second Chance" in Investor State Relations: Restitution and Monetary Damages as Sequential Options' (2016) 3 *McGill Journal of Dispute Resolution*, 163.

51 ibid.

52 R Dolzer & C Schreuer, *Principles of International Investment Law* (2012), 98.

53 D Khachvani, 'Compensation for unlawful expropriation: Targeting the Illegality' (2017) 32 *ICSID Review*, no. 2, 386.

compensation as one of the requisites for expropriation.[54] This has to be equivalent to the fair market value of expropriated investment just before expropriation,[55] where the economic value of the investment for the investor is lost. To put it another way, if the State is not obligated to pay the fair market value, that would lead to the unjust enrichment of the State since it would acquire rights of such value free of cost. In following the treaty standard, the State disgorges the unjust enrichment accrued by means of expropriation.

It is easier to effect material restitution in disputes involving monetary sums. Although not in the context of expropriation, *Maffezini v The Kingdom of Spain*[56] is an example in point. Here, the tribunal found that a State-company was carrying out public functions in the course of a loan transaction that was transferred out of the investor's accounts without his authority/consent. The State was in violation of its obligations to protect the investment and to provide fair and equitable treatment.[57] Subsequently, the tribunal directed the State to compensate the investor with 30 million Spanish pesetas that had been wrongfully transferred plus additional interest.[58]

Where expropriation is unlawful, either due to illegitimate taking[59] or total absence of compensation,[60] restitution becomes a more probable remedy at least in principle. Under these circumstances, tribunals widely rely on the *Chorzow* standard of reparation, which includes restitution. A classic illustration of this is the *Texaco v Libya*[61] arbitration. This case was set against the factual backdrop of nationalization of properties, rights and assets held by the claimant under the deeds of concession,[62] whereby the government of Libya was to ensure the enjoyment of the rights by the claimant.[63] The tribunal decided the question whether the Libyan government should be held to *restitutio in integrum* in the affirmative and thus found against the government. Restitution was reinstated as the primary remedy with damages being given a derivative character.[64] If not materially impossible, restitution is aimed at re-establishing the situation that existed before the wrongful act had taken place and if the State had performed its obligations.[65] The remedy is considered equivalent to the common law remedy of specific performance in the context of expropriation of contractual rights.[66]

The *Texaco* award can be contrasted with the *BP v Libya*[67] award where the sole arbitrator had favoured compensation and considered restitution as an exception.[68] It was observed in *BP v Libya* that *restitutio in integrum* should be considered where damages are not adequate i.e., where the State is insolvent or incapable of discharging its proper obligations.[69] This inevitably takes us back to the discussion about the status of the remedy in international investment law, which remains somewhat inconclusive. Primacy of restitution in ASR tends to re-affirm the *Texaco* view as it distinctly codifies a persuasive source of international law. An alleged lack of authority of the *Chorzow* dictum was a minor obstruction that had been refuted by the *Texaco* tribunal.

54 Article 6.1.a.

55 Article 6.2.

56 *Emilio Agustin Maffezini v The Kingdom of Spain* ICSID Case No. ARB/97/7 (13 November 2000).

57 ibid., para. 83.

58 ibid., paras. 95–96.

59 Khachvani, supra note 53, 395–397.

60 CL Lim et al, *International investment law and arbitration: commentary, awards and other materials* (2018), Chapter 13. <https://ereader.cambridge.org/wr/viewer.html?skipLastRead=true#book/9bef61a7-1faa-4532-9b3d-5cb76f56d7ee/doc22> accessed 10 October 2023.

61 *Texaco Overseas Oil Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* (Arbitration Tribunal) (1977) 53 ILR, 389.

62 ibid., 390.

63 ibid., 389.

64 ibid., 502–503.

65 ibid.

66 ibid., 505.

67 *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* (Arbitration Tribunal) (1973) 53 ILR 297.

68 J Categreil, 'The Audacity of the Texaco/CALASIATIC Award: Rene Jean Dupuy and the Internationalization of Foreign Investment Law' (2011) 22 *EJIL*, no. 2, 451.

69 *BP Exploration Company (Libya) Limited*, supra note 67, para. 198.

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Claimants have also been keen to seek compensation based on the restitutionary approach. In *ADC v Hungary*, the investor's assets were expropriated through legislation that purported to transfer the operations and management of activities carried out by the investor to a State entity. This rendered all agreements between the investor and State impossible to be performed.[70] Unlike most unlawful expropriation cases, there had been a substantial appreciation in asset value after the date of expropriation as the airport terminals in question continued receiving increasing yearly footfall. The tribunal found that the State had failed to meet each criterion of a lawful expropriation, namely, public interest, due process of law, non-discrimination and just compensation.[71] Once the illegitimacy of the State's wrongful act was established, it was the *Chorzow* standard of restitution that was to be applied in deciding compensation.

The claimants claimed alternatively amounts arrived at through the restitution approach and the unjust enrichment approach, which resulted in a difference of around USD 20,000,000.[72] Along with consequential damages, they claimed the greater of either market value of the expropriated investment at the time of expropriation or the sum of that at the time of the award and the value of the income which the claimant would have earned between the date of expropriation and award. The tribunal rejected the unjust enrichment[73] component of the value which the claimant would have earned until the date of the award. The *Chorzow* standard led the tribunal to award the value of investment on the date of award since it was higher than that on the date of expropriation. The argument has been made that even though the *ADC* tribunal rejected the unjust enrichment approach, in effect through restitution it was the unjust enrichment that was remedied.[74] It is submitted that this argument is correct. Once the heads of damages sought by the claimants' are separately considered, it becomes clear that the tribunal granted one head of unjust enrichment while rejecting another. There is thus no reason to view unjust enrichment and restitution as distinct remedies.

The argument that there is always an unjust enrichment that has to be remedied does not hold good in cases of regulatory expropriations, particularly relating to environmental or public health concerns. When such expropriation in the public interest is non-discriminatory, the same restrictions are imposed upon domestic as upon foreign entities operating in the concerned domain in the host State. As such, regulatory expropriations are similar to indirect expropriations where the economic value of the investment is lost and the investor is rendered unable to manage, use or control the investment in a meaningful way. The State is not left with much to enjoy from the expropriated rights. Here two competing interests come into play. The State has regulatory power as a sovereign to regulate the environmental/health standards for the welfare of the nation. The investor and any other entity have to abide by such rules by virtue of being subject to the legal system of the country. However, if such law amounts to expropriation, it violates the international law obligations of the State under the treaty. Consequently, it cannot be justified on the ground that the regulatory 'risk' was voluntarily taken up by the investor when it had decided to make the investment.

Whether juridical restitution would be granted in such cases depends on the approach of the individual tribunal. In *Methanex v USA*,[75] the North American Free Trade Agreement (NAFTA) stipulated that a host State should not waive its domestic health, safety and environmental standards just to encourage investment by the other party.[76] The parties agreed that which regulatory measures are compensable and which are not would depend on the purpose sought to be achieved by the measure.[77] The claim itself was dismissed at the stage of jurisdiction, although the tribunal went on to decide it on the merits as if the tribunal were to have had jurisdiction. *Methanex's* argument that the regulations were a sham purporting to promote

70 *ADC Affiliate Ltd. v. The Republic of Hungary*, supra note 45, para. 186.

71 ibid., paras. 429–444.

72 ibid., para. 243.

73 ibid., para. 499.

74 A Vohryzek, 'Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims under ICSID' (2009) 31 *Int'l & Comp. L. Rev.*, no. 3, 535–536.

75 (2005) 44 ILM 1345.

76 1994 North American Free Trade Agreement (Canada-Mexico-United States), Art. 1114(2).

77 M Paparinskis, 'Regulatory expropriation and sustainable development' in MW Gehring et al. (eds.), *Sustainable development in international investment law* (2011).

the domestic ethanol industry and harm foreign methanol producers was rejected.[78] The tribunal found, after studying the evidence, that the government of California had responded reasonably to the potentially serious environmental damage that was caused by methyl tertiary-butyl ether contamination.[79] Thus, under these circumstances no question of juridical restitution arose.

In practice, a claimant may not seek juridical restitution and instead claim only for damages against a State. In *Siemens v Argentina*, amongst other claims, the tribunal found that the decree terminating the contract between the parties was an independent act of unlawful expropriation.[80] Other legislative actions that preceded the decree were also part of the gradual process that culminated in the expropriation of the contract.[81] Accordingly, under head 4 of the reliefs, the claimant was granted the value of the investment, consequential damages and bills unpaid by the Government.[82] While the issue of juridical restitution itself was not brought up, the elements of the award demonstrated elements of unjust enrichment by the State that had arisen out of its wrongful acts.

An element of commonality found in both *Methanex* and *Siemens* is the question regarding the existence of a public purpose. Where the police powers of the State are exercised to legislate on an issue meeting the definition of public purpose after reasonable consideration of stakeholders' positions, such action is likely to be found non-expropriatory. In other circumstances, the State's obligations under the treaty to protect an investment get put on a pedestal.

It is worth noting that not all IIAs grant authority to tribunals to award juridical restitution. Article 1135 of the erstwhile NAFTA is an example of this. Only two kinds of remedies are permitted: monetary damages and restitution of property. In agreements where there is no restriction in this regard, under proper circumstances the tribunal may award juridical restitution. Thus, in *ATA v Jordan*, the dispute arose when a court of appeal in Jordan annulled an arbitration award and extinguished the arbitration agreement between the investor and a host State party.[83] Reparation/restitution here would have included restoring the claimant's right to take any dispute to arbitration.[84] The tribunal found this annulment and extinguishment a breach of the State's obligations under the Turkey-Jordan BIT and ordered the ongoing proceedings to be terminated.[85]

Besides each tribunal's responsibility to decide whether the relief of juridical restitution must be granted on merits, a common objection to the remedy has been the concern of interference with State sovereignty. From the preceding range of discussed cases, it appears that sovereignty cannot be a defence to an unlawful regulatory expropriation carried out with the sole intent of disrupting the investor's economic activities.

Digressing slightly from the discussion in this Section, cases illustrate that there can be other ways of obtaining *status quo* that are generally aimed at by seeking a remedy of restitution wherever possible. First, the threat of impending investor-State arbitration has sometimes been found to have a deterrent effect on bringing about any regulatory change. For example, when Philip Morris had initiated investor-State arbitration against Australia for introducing regulations for plain packaging of tobacco products, New Zealand deferred introducing regulations on similar lines.[86] This also embodies the major political influences that multi-national corporations can exert through the investor-State dispute settlement mechanism indirectly even if their direct deliberations, if any, with host State governments fail. Secondly, at the interim stage of arbitration, the claimant may seek a provisional measure to 'freeze' the

78 Methanex, supra note 75, part IV-E, para. 20.

79 ibid.

80 *Siemens A.G. v The Argentine Republic* [2007] ICSID Case No. ARB/02/8, para. 271.

81 ibid.

82 ibid., para. 403.

83 *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* [2010] ICSID Case No. ARB/08/2, paras. 29–37.

84 ibid., para. 131.

85 ibid., para. 132.

86 KJ Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?' (2017) 71 *International Organization*, no. 3, 560–561.

status quo and prevent any change to the assets/rights of the investor.[87] However, to grant this provisional measure, the tribunal has to be satisfied, amongst other conditions, that the alleged harm cannot be repaired by monetary damages. In the context of expropriation, this condition can be met only after the investor shows that it has a reasonable prospect of success on the merits and that the balance of probabilities is in favour of the claimant of the relief.[88]

Restitution can therefore be envisaged as a remedy only where the expropriation occurs unlawfully. With regard to compensation, it is seen that standards prescribed in customary international law adopt restitutionary principles as well and r give them priority. In view of this, in Section IV I proceed to discuss the interaction between the form and substance of monetary damages and whether it produces a desirable result for the parties.

4. INTERACTION BETWEEN FORM AND SUBSTANCE OF REMEDIES

Sections II and III of this article demonstrate the position held by restitutionary remedies, both in theory and practice, in international investment law. Where the host State metes out unlawful treatment to the investor, be it through expropriation, violation of a fair and equitable treatment clause etc., the *Chorzow* standard of reparation comes into play[89] and grants primacy to restitution. What has come to be termed 'compensation' in investment arbitration is often a cumulation of damages that are aimed to place the investor in the *status quo ante*. In the course of this, the losses incurred by the investor are also compensated. Under ideal market conditions, the loss of the claimant ought to be commensurate with the gain of the respondent. Since this is not the case in most instances, there is a general concern in the law of obligations that this may lead to the claimant being overcompensated or enjoying the 'windfall'.[90]

In the sphere of domestic private law, Professor Doug Rendleman has rejected this trend of conceptualizing a 'windfall' because restitution and several other categories of damages have been developed to meet different, non-compensatory policy aims.[91] As such, there is no mischief of 'over-compensating' or 'double recovery' by the claimant if it is allowed to recover multiple heads of damages that have different aims. When this legal position is drawn into the domain of investment law, it sometimes leads to the concern of over-burdening developing host States with compensation awarded by investment arbitration tribunals. This issue will be addressed in Section V.

What remains to be examined is if, theoretically, the standard of reparation followed to this day leads to an 'excessive cumulation'[92] of remedies. In academic scholarship, 'excessive remedial cumulation' is regarded as a mischief that warrants election amongst multiple available remedies for a cause of action.[93] This argument has taken place in the context of English law. In customary international law, the literature about remedies has almost always swung between restitution and compensation without much classification of the latter remedy. Moral damages have been recognized for internationally wrongful acts but not as such in investment law.[94] Further, the possibility that the host-State 'buys the right to breach'[95] sounds analogical to

87 Example: *Navodaya Trading GMCC v Gabonese Republic* PCA Case No. 2018-23. The claim, however, failed in this case.

88 D Charlotin, 'Uncovered: Kaufman-Kohler chaired tribunal confirms that OIC Agreement contains consent to arbitration, but ultimately dismisses mining claims on the merits' (17 February 2021) <https://www-iareporter-com.libproxy.ucl.ac.uk/articles/uncovered-kaufmann-kohler-chaired-tribunal-confirms-that-oic-agreement-contains-consent-to-arbitration-but-ultimately-dismisses-mining-claims-on-the-merits/> accessed 10 October 2023.

89 Dolzer & Schreuer, supra note 52, 100–101.

90 For general observation, see D Rendleman, 'Measurement of Restitution: Coordinating Restitution with Compensatory Damages with Punitive Damages' (2011) 68 *Washington and Lee Law Review*, no. 3, 976. In an investment law context, see Vohryzek, supra note 74, 536.

91 Rendleman, supra note 90, 976.

92 S Watterson, 'Alternative and Cumulative Remedies: What is the Difference' (2003) 11 *RLR* 7.

93 ibid.

94 See generally S Weber, 'Demystifying Moral Damages in International Investment Arbitration' (2020) 19 *Law and Practice of International Courts and Tribunals*, no. 3, 417–450.

95 Ishikawa, supra note 50, 166.

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the categorization of negotiated damages[96] that has now been considered compensatory in English law.

It is a better approach not to view remedies as inherently inconsistent with each other. Instead, as Watterson proposes, it is advisable to analyse if, in awarding one remedy, the aim of any of the other available remedies is also fulfilled.[97] If so, the claimant must not be awarded any relief for the other remedy, lest the respondent is burdened multiple times in meeting a singular aim. The *Chorzow obiter dicta* essentially encapsulates this proposition. Payment of a sum that corresponds to the value of restitution is available only when restitution in kind is not possible.[98] Also, damages for loss can be awarded only where such damages are not covered by restitution.[99] Thus, restitution in kind, payment *in lieu* thereof and loss-based damages are all available at the same time. However, if the wrongful act or cause of action is remedied through any of the three ways, it extinguishes any further right to the remaining remedies. This is the position with respect to ASR where a right of election of remedy has been considered implicit.[100]

In determining the fulfilment of any remedial aim, it often becomes pertinent to examine the form and substance of the legal principle. This is what Lord Andrew Burrows has called the distinction between outward appearance and inner reality.[101] As discussed in Section II, *Lena Goldfields* perfectly illustrates a situation where unjust enrichment of the respondent was in reality the loss incurred by the claimant. Hence, either traditional compensation for loss or restitution for unjust enrichment resulted in the same outcome. With the varying connotations given to unjust enrichment across municipal law, it has not always been a simple endeavour to grant restitution for that enrichment. For example, in the development of common law, unjust enrichment only came to be recognized as a separate cause of action about three decades ago. Before this, it was hidden behind a fiction of implied contract between the parties.[102] According to this fiction, restitution was to be granted to the plaintiff/claimant because there was an implied contract that any unjust enrichment would be made good. Thus, the idea of 'quasi-contract' was introduced. The confusion then arose as to whether restitution and unjust enrichment could be treated as an independent branch of the law of obligations.

In international investment law these confusions can be done away with to a large extent because of the *sui generis* regime of treaty law. The treaty codifies most of the obligations such as the minimum standard of treatment and consequences that would follow if these obligations are breached. The treaty obligations coupled with principles of customary international law lay out the arena of obligations. While unjust enrichment is not explicitly addressed in treaties, many obligations stipulated therein can be alternatively explained through terms of such enrichment. Restitution assumes a well-recognized position, as already discussed, in both treaty language and customary law. There thus seems to be no need to import any fiction into investment law in this regard since restitution and unjust enrichment have both been free-standing, recognized concepts.

Interaction of the obligations as stated in the previous paragraph can be found in *SOMILO v Mali*.[103] The State had imposed tax and penalties after an 'adjustment' of the fiscal dues paid by the investor earlier. This violated the tax stabilisation clause in the establishment agreement between the parties. This stabilisation clause represents mutual obligations specific to the parties that were to be followed. Once a breach of the obligation by the State was established, the amount that the investor had already paid to the State as penalties etc., represented the loss that the investor would not have sustained but for the breach. It also denotes the unjust

96 *Morris-Garner v One-Step (Support) Ltd* [2019] AC 649.

97 Watterson, supra note 92, 19–20.

98 *Factory at Chorzów, Germany v Poland* (Merits), supra note 13.

99 ibid.

100 J Crawford, *State Responsibility: The General Part* (2013), 508–510.

101 A Burrows, 'Form and Substance: Fictions and Judicial Power' in A Robertson & J Goudkamp (eds.), *Form and Substance in the Law of Obligations* (2019), 17, 19.

102 ibid., 29.

103 D Charlotin, 'In heretofore-confidential award in Société des Mines de Loulo S.A. (SOMILO) v. Mali, tribunal found breach of contractual tax stabilisation clause' (13 November 2019) <https://www-iareporter-com.libproxy.ucl.ac.uk/articles/revealed-in-confidential-award-in-societe-des-mines-de-loulo-s-a-somilo-v-mali-tribunal-found-breach-of-contractual-tax-stabilisation-clause/> accessed 10 October 2023.

enrichment of the State at the expense of the investor. Thus, when the tribunal directed the State to compensate the investor for the collected penalties and the tax on profits, this could be explained both in terms of restitution and traditional, loss-based compensation.

With regard to non-pecuniary damages, the tribunal in *SOMILO v MALI* also granted a declaration preventing the State from collecting the tax on the profits component from the investor-firm's foreign suppliers. This kind of injunctive relief in effect reinstates the position before the breach and can indeed be said to be a form of restitution. *Alpha v Ukraine*,[104] also demonstrates that a compensatory award can be intended to substitute for the restoration of the *status quo ante*.

In practice, besides the concern of material impossibility, claimants may prefer compensation (monetary damages) due to depreciation in the value of assets. Where the value of rights/assets of the investor has substantially fallen after the host State's failure to meet treaty standards, the economic activity of the investor becomes non-profitable against the economic and political backdrop. Hence, without further efforts to increase the investment's value, it serves the claimant well to detach itself from the investment after obtaining due compensation.

The interplay between form and substance of remedies in international investment law does not create much impediment in practice before tribunals. Nevertheless, it ought to be recognized in academic pursuits to reinforce the primacy of restitution, in order to justify remedies through restitutionary principles.

5. THE REMEDY FROM PERSPECTIVE OF A HOST STATE

Having been initially adopted in general international law and thereafter extended to investment law, restitution as a remedy meets the aims of the regime established by IIAs. Stipulation of the remedy along with substantive obligations ensures a high standard of investment protection and incentivizes investors.[105] As one may observe, the considerations in the previous Sections of this article, as well as in the majority of the literature on the subject, have been investor-centric. This ignores the standing of the host States with respect to the remedy.

In my view, for host States, especially developing host States, restitution assumes a two-fold importance. First, when granted against the host State it may often lead to exorbitant amounts of compensation that leaves a burden on the State exchequer. Juridical restitution brings about a 'regulatory chill'.[106] Secondly, an unbalanced focus on the investor's interests in this domain often renders the State remediless before its own courts, where ideally the investor must carry out certain restitutive functions. Both of these issues encompass wide-ranging arguments. However, owing to the restricted scope of this article, I explore each issue only in the context of specific examples.

Attending to the first issue, the nature of investor-State arbitration awards begs the question about both developing a rule of substance and about procedure. There is no substantial rule of limiting State responsibility because of the 'crippling' nature of compensation, despite some deliberations about it before the final ASR were adopted.[107] The general limiting factors of causation and remoteness are brought into this area as in the law of obligations.[108] As Paparinskis has noted, reliance can be placed on domestic legal systems that comprise a rule against attaching certain categories of property in enforcement proceedings.[109] However, this analogy is easier said than applied. The legislative intention behind most of these domestic law provisions is not to deprive the liable respondent of the basic means of sustenance or of some

104 *Alpha Projektholding GmbH v Ukraine*, supra note 40.

105 T Laudal Berge, 'Dispute by Design? Legalization, Backlash and Drafting of Investment Agreements' (2020) 64 *International Studies Quarterly*, no. 4, 921.

106 ibid., 922.

107 M Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83 *MLR*, no. 5, 1254–1256.

108 D Shelton, 'Remedies and Reparation' in M. Langford et al. (eds.), *Global Justice, State Duties – The Extraterritorial Scope of Economic Social and Cultural Rights in International Law* (2012), 385–386.

109 Paparinskis, supra note 107, 1269.

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property that has been vested with a special status. While this intention remains intact even if imported into investment law, it is rather difficult to arrive at a consensus of what comprises the basic means of sustenance for a welfare State. A relative determination seems possible but is unlikely to find support globally.

Pakistan was burdened with an arbitral award that amounted to almost one-fiftieth of its gross domestic product,[110] in *Tethyan Copper Company Pty Ltd. v Islamic Republic of Pakistan,*[111] as the tribunal held that the claimant should be compensated not only for the amount it had invested but also for the increment in value that resulted from the decrease in risks affecting future cash flows to be obtained from the project.[112] The award was followed by a plethora of proceedings. There was a conditional stay on enforcement, partial lifting of the stay following Pakistan's failure to meet the conditions within the stipulated time[113] and parallel annulment as well as revision proceedings initiated by the State.[114] As the investor initiated enforcement proceedings in the British Virgin Islands and Washington DC in respect of the State's overseas assets, the State had said in Washington that 'the country's economy and political stability faces potential devastation without the stay'.[115]

Failing immediate compliance, this nature of enforcing an award against the State's assets situated overseas also threatens the State. In another instance, before Cairn initiated proceedings against Air India's assets for enforcing the December 2020 award against India,[116] the State had asked the State-run banks to withdraw funds from their foreign currency funds for fear of Cairn suing to seize/freeze these accounts.[117] In other cases, enforcement against a public sector undertaking and the looming danger of an aircraft being seized upon landing on foreign soil may be strategically used by the investor to compel the State to settle the dispute. The issues arising out of enormous compensation amounts can thus be connected back to the higher bargaining power that investors often enjoy over a State and that hold the potential of being exploited.

Turning to the second issue, the investor-State dispute settlement mechanism usually does not provide any recourse for the State's grievances. Under certain situations, the State may have the *locus* to file counter-claims in an ongoing arbitration instituted by the investor.[118] Therefore, the State/State-parties have to rely upon the domestic judicial system to resolve and enforce their rights. This arrangement does not work out effectively for countries whose judicial system may fail on several accounts such as lack of transparency, prolonged litigation periods etc. In recent years, this has led to a trend of trans-national litigation by nationals of the host State, against the subsidiary investor entity incorporated in that State and its parent entity; in a developed country that happens to be the domicile of the parent company.

From the two most publicized cases of this nature litigated in England, namely *Vedanta Resources Plc v Lungowe*[119] and *Okpabi v Royal Dutch Shell,*[120] it is noteworthy that these arise out of environmental damage caused by the subsidiary's activities in the host State.

110 A Ben Mansour, 'Domestic Procedures for the Payment of Damages by States in Investment Arbitration' *Investment Treaty News*, 20 June 2020, <https://www.iisd.org/itn/en/2020/06/20/domestic-procedures-for-the-payment-of-damages-by-states-in-investment-arbitration-affef-ben-mansour/> accessed 15 October 2023.

111 *Tethyan Copper Company Pty Ltd. v Islamic Republic of Pakistan* [2019] ICSID Case No. ARB/12/1.

112 ibid., para. 1741.

113 Vladislav Djanic, 'Stay of $6 billion award is partially lifted as Pakistan fails to meet conditions laid out by ICSID annulment committee' (10 November 2020) <https://www-iareporter-com.libproxy.ucl.ac.uk/articles/stay-of-6-billion-award-is-partially-lifted-as-pakistan-fails-to-meet-conditions-laid-out-by-icsid-annulment-committee/> accessed 10 October 2023.

114 Lisa Bohmer, 'Pakistan applies for revision of $6 Billion mining award' (17 March 2021) <https://www-iareporter-com.libproxy.ucl.ac.uk/articles/pakistan-applies-for-revision-of-6-billion-mining-award/> accessed 10 October 2023.

115 <https://www.law360.com/articles/1333300/pakistan-says-enforcing-6b-award-would-batter-its-economy> accessed 15 October 2023.

116 *Cairn v. India* 2020, supra note 29.

117 <https://www.reuters.com/business/finance/cairn-energy-sues-air-india-enforce-12-bln-arbitration-award-court-filing-2021-05-15/> accessed 15 October 2023.

118 JK Sharpe & M Jacob, 'Counterclaims and State Claims' in CL Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (2018), 357–358.

119 [2019] UKSC 20.

120 [2021] UKSC 3.

In the example of *Vedanta*, there was toxic discharge polluting the watercourse used by the claimants/applicants for drinking, livestock and agriculture in Zambia.[121] These cases are typically litigated only up to the initial stage of establishing the English courts' jurisdiction. Once the English judiciary assumes jurisdiction, the respondents settle the issues with the claimants through payment of compensation.

Given the readiness of English courts to judicially innovate, two elements that the court seeks to be determined at the jurisdiction stage are whether there is a real issue to be tried against the respondent and if there is a real risk of substantial justice in the foreign jurisdiction.[122] For the second element, it is essential to see if there are mechanisms in the foreign State to fund such group claims, *locus standi* to bring the claims and the capability to handle them.[123] If not, jurisdiction is established through 'foreign direct liability' of the parent in respect of the subsidiary's activities.

What is relevant in the specific context of this article is the flipside of these types of litigation. Since they do not proceed beyond the jurisdiction stage, the actual environmental damage is not remedied. To put it in other words, the business corporation need not suffer any consequences, even after the proceedings, for not restoring or remedying the environmental condition to the *status quo ante*. This in turn may also incentivize the host State not to strengthen its environmental and health standards for fear of losing investments, leading to what is referred to as the 'race to the bottom'.[124] Hypothetically, even if the litigation were to be decided on its merits, it is highly doubtful that the English courts could have assumed jurisdiction to grant injunctive relief in relation to natural resources over which another State exercises its sovereignty.[125] This trend of litigation runs the risk of interfering in a foreign State's sovereign domain. Furthermore, while it is expected that, in the face of such legal repercussions in England, the company will improve and implement internal policies, there is no judicial sanction for cases of failure.

These issues can be resolved through one of two ways. First, by strengthening the domestic legal system of the host State so that all parties may have effective access to justice. Secondly, since the first solution is an imperative of the State machinery, in the face of weak judicial infrastructure the State instrumentality ought to be given access to initiate investor-State dispute settlements ('ISDS') as well. IIA language integrating investment protection with public policy concerns related to environment, health and human rights may be becoming more common,[126] but the inequality in the bargaining power of a developing State often prevents it from enforcing high standards.[127] In these circumstances, adapting treaty language to grant the State/State-parties access to ISDS would create a threat-free environment for the developing States to develop their own legal standard without the potential consequence of losing investments. In addition, this would also ensure that investors are mindful of their obligations within the domestic legal framework and are aware of the restitutive functions they ought to carry out for causing any environmental/human rights violations.

6. CONCLUSION

The appropriateness of restitution as a remedy in disputes between investors and States touches upon broader concerns than a merely codified obligation under an IIA. As part of a tiered dispute resolution mechanism, failing a favourable outcome from a domestic judicial system, an investor may approach the treaty-stipulated arbitral tribunal under the form of

121 *Vedanta v Lungowe*, supra note 119, para. 1.

122 ibid., para. 22.

123 ibid., para. 89.

124 U Grusic, 'International Environmental Litigation in EU courts: A Regulatory Perspective' (2016) 35 *Yearbook of European Law*, no. 1, 187–188.

125 E Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14 *Utrecht Law Review*, no. 2, 20.

126 K Gordon & J Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) 2011/1 *OECD Working Papers on International Investment*, 3.

127 Grusic, supra note 124, 190.

a violation of treaty obligation by the State.[128] This gives rise to the possibility of a conflict of decisions. Further, the internationalization of private rights poses a complex situation for domestic courts[129] in nations where the national constitution places certain fundamental/basic rights on a higher pedestal than the State's compliance with international obligations.[130]

The main thesis of this article is to demonstrate that, despite any perceived inconvenience and scepticism, the status of restitutionary remedies can be revisited to bring out viable options for stakeholders in an investor-State dispute. In an ideal situation, such remedies allow an aggrieved investor to continue reaping profits from its investment. If any State-party is the claimant against an investor, enabling restitution (whether in the form of monetary damages or otherwise) is seemingly more beneficial to the State. It has been discussed that where restitution-in-kind is impossible in practice, tribunals have also considered compensation methods based on restitution and unjust enrichment. Further, it has also been shown using examples of arguments, reasoning, and decisions of investment treaty tribunals, that varied approaches may be adopted to generate more acceptance for restitution as a possible remedy while at the same time avoiding an excessive cumulation of remedies or overcompensation.

Thus, I suggest a reorientation of the domestic policy narrative and a structural modification of the international investment disputes resolution mechanism so as to reinforce the position of restitutionary remedies, especially from the State's viewpoint. The first step ought to be to strengthen national long-term policy commitments regarding the State's welfare concerns such as health, safety and environment. Stability in the domestic legal environment is actively sought by investors. Additionally, this also sends out the message to potential investors that they would be held accountable to high standards of restitutive measures for any failure to meet the host State's national policies. The second step would be for States to welcome incorporation, in BITs and IIAs, of clauses that enable a host State to set high standards of public welfare. This can also be achieved through an inclusive definition of 'public purpose' in the instrument.[131] This specific codification is likely to expand the ambit of lawful expropriation while ensuring that adequate compensation is still paid as a matter of primary obligation. As a third step in this direction, the IIAs may permit the State to bring up grievances, either on behalf of itself or on behalf of any national/s. In adopting this procedure, the instrument must also have to stipulate the establishment of a domestic authority that will act as an instrumentality of the State to which nationals may submit their claims. This clause can be drafted in broad terms to enable corporations, industries and communities to bring forward claims through the domestic instrumentality. This will have two advantages. First, no national would have to bear the financial and logistical burden of directly approaching the tribunal and this, in turn, would prevent any possible exploitation of the claimant's *locus*. Secondly, codification in an international treaty would obligate the State to comply with the treaty's terms. These should, however, never be to the exclusion of the jurisdiction of national courts.

These formal measures are likely to go a considerable way to ensuring that restitutive remedies are placed on a significantly high pedestal and that international investment law obligations are met by the State as well. The principle of *pacta sunt servanda* would bind the States and, through them, the investors would be bound to adhere to the treaty obligations and would be in line with the expectations of the stakeholders. This will hopefully also do away with the reluctance shown towards restitution and bring about the corrective justice[132] desired by the parties.

128 An example of this can be found in *Chevron v Ecuador* PCA Case No. 2009-23, where the tribunal suspended the sentence of the national court that had directed Chevron to pay USD 19 billion to an indigenous community for causing environmental damage for decades.

129 A Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (2009), 270.

130 An illustration of this can be found in the Constitution of India wherein fostering respect for international law and treaty obligations (Article 51(c)) does not enjoy the same status as fundamental rights of the people (Part III).

131 C Baltag et al., 'Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?' [2023] 38 *ICSID Review*, no. 2, 414, 416.

132 J Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 *Law and Philosophy*, no. 1, 9.

COMPETING INTERESTS

The author has no competing interests to declare.

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