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Restitution in Kind in Investment Disputes: The Spectrum of the Libyan Nationalization Cases

Victor STOICA[1]

Abstract: The issue of primary remedies available in international law is still very much open, as international case-law has yet to reach consensus on this matter.

A particular manifestation of this relates to the availability of restitution in kind or specific performance as a remedy of international law in investment disputes. The aim of this article is to analyse restitution in kind as a remedy in investment disputes, particularly looking at the classic Libyan Nationalization Cases.

Key-words: *Remedies, Restitution in Kind, Investment Arbitration*

I. Introduction

The Libyan Nationalization Cases pose an interesting dilemma: the same question of whether a claimant is entitled to restitution in kind against a responding State has been answered differently by the three different *ad-hoc* arbitral tribunals.

Moreover, the three arbitral awards create a spectrum which ranges between a complete denial of the availability of restitution in kind to a complete acceptance. It is for this reason that these arbitral awards are still of great importance for investment disputes, as *"the awards were just as (if not more) important in terms of defining the future direction of investor State*

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relations."[1] The views taken by the arbitrators in these three cases are still cited in instances where claims regarding restitution in kind and specific performance are submitted. Although they have not provided one clear answer to the question at hand, they have helped shape the various approaches to restitution in kind in the context of international investment arbitration.

II. The Libyan Nationalization Cases

The present Section addresses the three Libyan Nationalization Cases, which are the following: *Libyan American Oil Company v. The Government of the Libyan Arab Republic*; *Texaco Overseas Petroleum Company v. the Government of the Libyan Republic*; and, *BP Exploration Company v. the Government of the Libyan Arab Republic*, and the approach taken in each of them relation to restitution in kind in investment law.

As such, the following Subsections shall provide a brief presentation of the facts and an analysis of the findings of the Tribunals in each of the three cases.

II.1. Libyan American Oil Company v. The Government of the Libyan Arab Republic[2]

Brief Presentation of the Facts

The *Libyan American Oil Company v. The Government of the Libyan Arab Republic* case consisted of an *ad hoc* investment arbitration filed in relation to the unlawful nationalization of the Libyan American Oil Company ("LIAMCO") Petroleum Concessions, by the Government of the Libyan Arab Republic ("Libya").

On 12.12.1955 Libya entered into three Petroleum Concessions with LIAMCO relating, *inter alia*, to the extraction of petroleum from certain land areas in Libya over a period of fifty years, renewable for an additional ten years.

On 01.09.1973, and later on 11.02.1974, Libya issued two Nationalization Laws effectively transferring to the State all the properties, privileges,

[1] M. Waibel, *The Backlash Against Investment Arbitration, Perceptions and Reality* (Kluwer Law International 2010), p. 565.

[2] *Libyan American Oil Company v. The Government of the Libyan Arab Republic*, Arbitral Award dated 12.04.1977, available at < https://jusmundi.com/en/document/decision/en-libyan-american-oil-company-v-the-government-of-the-libyan-arab-republic-award-tuesday-12th-april-1977>.

assets, rights, shares, activities and interests of LIAMCO under the respective Petroleum Concessions.

In accordance with Clause 28 of the Concession Agreements, LIAMCO initiated *ad hoc* arbitral proceedings, filing a claim against Libya in respect of the premature repudiation of the Concession Agreements, some thirty-two years before the expiry of the period of the concessions.

The claimant argued that the nationalization of the Petroleum Concessions was illegal from an international law perspective, thus requesting relief in the form of restitution in kind and, in the alternative, the payment of damages, as compensation.

LIAMCO sought declaratory relief, requesting the Arbitral Tribunal to find that Libya's title to the concession rights was invalid. LIAMCO further claimed that *restitutio in integrum* should be reached through restitution in kind, thus requesting: "*the restoration to LIAMCO of its concession rights; and the transfer to LIAMCO of the benefits of the exercise of its concession rights by the National Oil Company of Libya (...)*",[1] characterizing the breach of international law that Libya had committed as unlawful expropriation as a result of the nationalizations.

The Arbitral Tribunal analysed the arguments brought forward by the Parties and considered that restitution in kind was not applicable in this case.

As a first step in its analysis, the Arbitral Tribunal provided a comparison between the principles of Libyan law and the general principles of international law. The starting point consisted of the finding that *"according to these general common principles [i.e.* the principles of municipal law of Libya and the general principles of international law*], obligations are to be performed, principally, in kind, if such performance is possible*".[2]

In other words, the premise of the Tribunal's argumentation was the acknowledgement of the principle that restitution in kind and specific performance are primary remedies in Libyan law and in international law, but that this general rule is not applicable where restitution in kind or specific performance are impossible.

After determining the general rule, the Tribunal turned to the assessment of the threshold of *impossibility* to specifically perform a contract or to provide restitution in kind. Citing V. Friendman, the Tribunal noted that the impossibility of performance is common in international law as:

[1] Ibid., para. 169.
[2] Ibid., para. 264.

> *"it is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States*".[1]

As such, the Tribunal considered that restitution in kind and specific performance constituted the primary remedies in international law, with the exception where these remedies were ordered against a State. Therefore, the impossibility to award restitution in kind was assessed by observing the party against whom this remedy was directed and not the object of the dispute.

The Tribunal thus rejected Claimant's claim for restitution in kind and also rejected the declaratory relief sought, essentially stating that "*they are practically incapable of compulsory execution".*[2] Finally, the Tribunal granted Claimant's claim for monetary indemnification.**Analysis of the Case**

Despite the Arbitral Tribunal's finding in the LIAMCO v. Libya case, a preferable approach would have been, when analyzing *impossibility*, to focus on the objective reasons underlying a decision on what remedies are available, rather than considering the subject against whom such remedy is ordered. In other words, international courts and tribunals should assess whether restitution, in a given circumstance, could be awarded materially, disregarding whether or not one of the parties could be compelled by such an award.

The LIAMCO Tribunal further argued that restitution would presuppose the cancelation of the nationalization measures and that such cancelation would violate the sovereignty of the State.

In other words, the Tribunal considered that both material restitution and judicial restitution were considered to infringe the sovereignty of the State, which for this Tribunal entailed that restitution and specific performance were considered as impossible.

However, in its analysis of the impossibility of restitution, the Arbitral Tribunal failed to focus on the material/judicial possibility of restitution or specific performance. The question of whether restitution was materially or judicially possible was neither asked nor answered explicitly. The Tribunal simply argued that even if, in principle, restitution in kind and specific performance are the primary remedies in international law, the principle of State sovereignty would stop such remedies from being awarded.

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[1] Ibid., para. 268.
[2] Ibid., para. 375.

This statement might be considered as contradictory. Awards and judgments in public international law necessarily entail a State party to the dispute. Affirming that restitution in kind is a primary remedy in international law, but then arguing that it is not applicable against a State, directly goes against the first statement made. The latter conclusion would render the first inapplicable, and would further lead to the argument that restitution in kind is never available in public international law cases considered broadly (and here we include investment arbitration), as by definition a State will always answer as respondent. The case law of international courts and tribunals, and particularly the case law of the International Court of Justice contradicts this outcome, as the International Court of Justice has granted restitution in kind throughout its jurisprudence.

The principle of State sovereignty is indeed one of the fundamental characteristics that define a State. However, if the principle of State sovereignty would have the above-suggested effects in international law, States would be entitled to act and to enact legislation, be it illegal from an international point of view, without the corresponding obligation to repair the injury caused through restitution in kind.

Nevertheless, the Tribunal in LIAMCO found that compensation is an available remedy. However, if matters would be interpreted in the same restrictive manner, as in this particular arbitral case, monetary compensation would amount to the only available remedy under these circumstances.

Certain commentators seem to agree with the outcome of this case and, in their analysis, they consider that the Tribunal's solution amounts to the most sensible oneThe following has been stated in this respect:

> *"la position adoptée sur ce point dans la sentence Liamco nous parait la seule admissible: toute restitutio in integrum des concessionaires dans leurs droits à la suite d'une nationalisation, constituerait une ingérence intolerable dans la souveraineté des Etats."*[1]

In our view, the above-mentioned assessment should not be as strong as suggested. It is true that States have some prerogatives that individuals do not have. However, it would seem rather drastic to consider that the principle of State sovereignty would have the effects that it had in this case with respect to restitution in kind.

[1] B. Stern, '*Trois Arbitrages, Un Meme Problème, Trois Solutions, Les nationalisations petrolieres libyenes devand l'arbitrage international'* (1980) Rev. Arb. p. 39.

The International Court of Justice has granted judicial restitution, as well as material restitution, and, as such, it recognized and applied these remedies. In this sense, State sovereignty does not seem as strong before the International Court of Justice as it seems before investment tribunals.

As such, it would be procedurally inaccurate to consider that when a State faces another State, the powers are divided equally and all remedies can be awarded, while when a State faces an individual the balance of powers switches towards the State. It is surprising precisely because the entire purpose of investment arbitration is to level the playing field between States and individuals or private entities.

Following the reasoning applied by the LIAMCO Tribunal, an individual or private entity would not be able to request restitution in kind in any case when facing a State, simply because such remedy would be off limits on the basis of State sovereignty.

Such a blanket refusal to apply what is considered to be a primary remedy in international law appears rather restrictive, and seems to attribute to State sovereignty an exaggerated array of effects.

State sovereignty has been interpreted in different ways by different authors. Some authors considered in this sense that State sovereignty does not mean that the State can say "I do what I want",[1] and rightly so. In assessing the dangers of allowing States to breach their obligations, without the corresponding obligation of restitution in kind, it has also been observed that "*to allow states to undo their commitments means in practice to forbid them from making undertakings in the future".*[2]

These arguments provide important input with respect to the future of the the interpretation of remedies of international law, if the principle of State sovereignty would be interpreted as allowing a wrongful act to be committed against a private entity without implying an obligation for restitution or specific performance. The trust that investors have in the relationship with the State can only rely upon the ability to make meaningful promises, as Jan Paulsson puts it.[3] And if a State could legally invoke the principle of State sovereignty, in order to argue that restitution in kind or

[1] J. Paulsson, 'The power of States to make Meaningful Promises to Foreigners' J Int. Disp. Settlement (2010), p. 341.

[2] P. Mayer, 'La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat' (1986), J Doit Int'l 5, as cited in J. Paulsson, 'The power of States to make Meaningful Promises to Foreigners' J Int. Disp. Settlement (2010), p. 349.

[3] J. Paulsson, 'The power of States to make Meaningful Promises to Foreigners' J Int. Disp. Settlement (2010), p. 343.

specific performance, although considered primary remedies in international law, are just shapes without substance, the trust of investors might be lost.

States have not explicitly committed through Bilateral Investment Treaties ("BIT") and state contracts or conventions that restitution in kind would be a remedy under international law, and neither is there such a necessity. Article 26 of the Vienna Convention on the Law of Treaties provides that *"every treaty in force is binding upon the parties to it and must be performed by them in good faith"*.

Therefore, it can be argued that the investors have legitimate expectations that States will subject themselves to the remedy of specific performance and restitution in kind, as this would amount to the performance of the treaty in force.

Schreuer confirms this view, and argues as follows, in this sense:

> *"[e]xpectations can be created through the general regulatory framework prevalent in a country. Expectations can also be created through specific transactions or governmental assurances. In some cases the expectations stemmed from the general regulatory framework as well as specific commitments contained in licenses".*[1]

Expectations could also be created through conventions and treaties, and, unless otherwise agreed, investors have the legitimate expectation for specific performance and restitution in kind to be granted and respected. If specific performance and restitution in kind are materially impossible or if granting these remedies would presuppose a burden out of proportion, monetary relief should suffice. While it is true that, generally, investors do not seek restitution in kind or specific performance and focus on compensation, it cannot be considered that the right for specific performance or restitution in kind should not be available.

If all Tribunals would adopt the LIAMCO approach, the claims of investors through which they request restitution in kind or specific performance might never be granted, even when the right to such remedies exists, as such claims would be rejected at the offset as an interference with State sovereignty.

The outcome of this case describes one approach that tribunals had at a time when investment disputes were in an emerging phase. However, the view of the LIAMCO Tribunal should not be considered as the absolute

[1] C. Shreuer and U. Kriebaum, 'At What Time Must Legitimate Expectations Exist' (http://www.univie.ac.at/intlaw/pdf/97_atwhattime.pdf), last visited 10 April 2020, p. 8.

interpretation of the effects of State sovereignty on *restitutio in integrum* achieved through restitution in kind.

Indeed, other Tribunals have embraced different views on this subject, as the following Subsections shall provide.

II.2. Texaco Overseas Petroleum Company v. the Government of the Libyan Republic[1]

Brief Presentation of the Facts

The arbitration in the present case bears a factual matrix similar to that of the first case studied herein, *i.e.* LIAMCO v. Libya. The dispute in this case originated from fourteen Deeds of Concession concluded between the Texaco Overseas Petroleum Company and California Asiatic Oil Company ("the Companies"), on the one hand, and the Government of the Libyan Republic ("Libya"), on the other hand, in the period between 1955 and 1968.

By two Decrees, issued in 1974 and 1975 respectively, Libya essentially nationalized the entirety of all the properties, rights and assets relating to the fourteen Deeds of Concession.

Pursuant to Clause 28 of the Deeds of Concession, the Companies initiated *ad hoc* arbitral proceedings against Libya seeking an award finding, *inter alia,* "*that Libya be held to perform the Deeds of Concession and fulfill their terms*".[2]

The arbitral tribunal in the Texaco Overseas Petroleum Company case stated that *restitutio in integrum* is the applicable principle of international law (the same conclusion that the LIAMCO Tribunal reached) and that this case would be the case where it should apply. The Tribunal concluded that restitution in kind should be awarded.

The structure of the analysis followed by the Arbitral Tribunal in reaching its decision was similar with the structure followed by the Tribunal in the LIAMCO case. However, the conclusion was vastly different.

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[1] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. the Government of the Libyan Arab Republic*, available at <https://www.academia.edu/35005891/Texaco_Overseas_Petroleum_Company_and_California_A>, last visited 10 April 2020.

[2] Ibid., para. 17.

The Tribunal first analyzed the principles of Libyan law with respect to *restitutio in integrum.* The Tribunal concluded that "*by application of the principles of Libyan law, breach of a contract by a party thereto justifies the judgment of restitutio in integrum against that party*".[1] Further, the Tribunal turned to the principles of international law with respect to *restitutio in integrum*. In its analysis, the Tribunal looked to the jurisprudence established by the Permanent Court of International Justice ("**PCIJ**") in the Chorzow Factory case[2] and the Mavrommatis Jerusalem Concessions case,[3] as well as the ICJ's judgment in the Temple of Preah-Vihear Case, among others.[4] Further, the Tribunal made reference to arguments of the legal scholars of the time.

The Arbitral Tribunal's conclusion was that:

> "*for the general reasons mentioned above, this Tribunal must hold that restitutio in integrum is, both under the principles of Libyan law and under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the status quo ante is impossible.*"[5]

Analysis of the Case

The decision reached in the Arbitral Tribunal in this case was subject to criticism.

First, the Tribunal's reliance on scholarly writings was criticized, as it was considered that the number of authors quoted in its award was "too small".[6] By this argument, it would appear that the critics of the award implied that the analysis rendered by the Tribunal was not sufficiently reliable.

Second, other authors stated that the scholarly writings quoted in this case were taken out of context and that they were not "unequivoqual". Therefore, the criticism put forth was that even if arguments were made that restitution represents the object of redress, the scholars in question regarded restitution

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[1] Ibid., para. 96.

[2] *Case Concerning the Factory at Chorzow (Germany vs Poland),* Judgment on the Merits [1928] P.C.I.J., Ser. A, No. 17.

[3] *Mavrommatis Jerusalem Concessions Case* [1925] P.C.I.J., Ser. A, No. 5.

[4] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* Merits, Judgment of 15 June 1962: I.C. J. Reports 1962, p. 6.

[5] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. the Government of the Libyan Arab Republic*, para. 109.

[6] B. Stern, '*Trois Arbitrages, Un Meme Problème, Trois Solutions, Les nationalisations petrolieres libyenes devand l'arbitrage international'* (1980) Rev. Arb. p. 37.

as an "unusual remedy". Finally, it has been pointed out that even if restitution was considered as the primary remedy in international law, in disputes involving territory or water rights a mere offer of money could be regarded as a sufficient settlement.[1]

Despite these criticisms, a distinction must be drawn between legal arguments and opinions. It is the legal argument that should be the basis of an award and not an opinion. While it is true that some of the authors cited by the Texaco Tribunal regarded restitution as an unusual remedy, the general consensus was that it represents a primary remedy in international law.

The Texaco Tribunal's conclusion that restitution in kind represented the applicable remedy for the breach of binding concession agreements reflects the interpretation given by the PCIJ of said principle in the Chorzow Factory Case that:

> "*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear (...)*".[2]

The Arbitral Tribunal noted that restitution in kind or specific performance should be *"discarded when there is absolute impossibility of envisaging specific performance, or when an irreversible situation has been created"*.[3]

However, the Tribunal concluded that this was not the case, since *"the performance of its obligations by the defendant seems to depend on the defendant itself and it should, in all likelihood be possible for the Libyan Government to take the necessary measures to restore the situation"*.[4]

Considering the above arguments put forth by the Texaco Tribunal, it becomes evident that it undertook a legal analysis that the LIAMCO Tribunal failed to pursue: the analysis of the material impossibility or the judicial impossibility of restitution in kind or specific performance.

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[1] M. Sornarajah, *The Pursuit of Nationalized Property*, (Martinus Nijhoff Publishers 1986) p. 145.

[2] *Case Concerning the Factory at Chorzow (Germany vs Poland),* Judgment on the Merits 1928, PCIJ, p. 47.

[3] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. the Government of the Libyan Arab Republic*, para. 112.

[4] Ibid.

The Texaco Tribunal considered that the inapplicability of restitution in kind could only be caused by "*an absolute impossibility, beyond its control, that eliminated the possibility of restoring things to the previous state"*[1] by the Respondent.

In other words, the Arbitral Tribunal in the Texaco case put forth a definition of impossibility of restitution in kind, that, unlike the LIAMCO Tribunal, took into account the concrete factual circumstances of the particular case in order to determine whether restitution was impossible, rather than simply considering the party against whom restitution was ordered.

In this respect, not only does the interpretation given in the Texaco award resemble the practice of the PCIJ, but it also illustrates the actual structure of the text of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts of 2001 ("ILC Articles on State Responsibility").

Indeed, Art. 35 (b) of the ILC Articles on State Responsibility establishes that restitution is an obligation of the State, to the extent that restitution is not *materially* impossible.

The award in the Texaco case is one of the most cited awards when restitution in kind and specific performance are the contemplated remedies by arbitral tribunals. Moreover, in the context of that time, this award was rather a statement award arguing that restitution is an available remedy under international law and should be awarded when it is possible.

II.3. BP Exploration Company v. the Government of the Libyan Arab Republic[2]

Brief Presentation of the Facts

The facts of the BP Exploration Company ("BP**"**) v. the Government of the Libyan Arab Republic ("Libya") case bear similarities with the cases discussed above.

In December 1957, Mr. Nelson Bunker Hunt, a citizen of the United States of America, was granted a Deed of Concession, *i.e.* Concession 65, which granted the exclusive right for 50 years to search for and extract petroleum within a designated area, and to take away and dispose of the same.

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[1] Ibid.

[2] *BP Exploration Company v. the Government of the Libyan Arab Republic*, Award on the Merits of 10.10.1973, available at < https://jusmundi.com/en/document/decision/en-bp-exploration-company-libya-limited-v-government-of-the-libyan-arab-republic-award-wednesday-10th-october-1973 >, last visited on 10 April 2020.

In November 1960, Mr. Hunt assigned an undivided one-half interest and title in Concession 65 to BP Exploration Company (the **"**BP Concession").

In December 1971, Libya passed a law providing that the activities of BP in Oil Concession 65 were nationalized (the "BP Nationalization Law").

As such, BP initiated arbitral proceedings pursuant to Clause 28 of the Concession Agreement, and requested that the Arbitral Tribunal render a declaratory Award, declaring, *inter alia*, that "*[t]he Claimant is entitled to be restored to the full enjoyment of its rights under the Concession Agreement*".[1]

The BP Tribunal proceeded with its legal analysis following the same structure as the LIAMCO and Texaco Tribunals, *i.e.* the Tribunal firstly analyzed the availability of restitution in kind and specific performance under Libyan Law.

BP's case on this point relied on Art. 159 of the Libyan Civil Code, which provided that *"in bilateral contracts (contrats synnallagmatiques) if one of the parties does not perform his obligation the other party may, after serving a formal summons on the debtor, demand the performance of the contract or its rescission, with damages, if due, in either case.*"[2]

The Tribunal's conclusion on this point rested on its consideration that it *"has not been in a position to form an opinion in this respect except on the basis of the argument presented by the Claimant which appears less than exhaustive"*,[3] such that "*no certain conclusions as to the position of Libyan law can be drawn on the material available*".[4]

Despite the conclusion reached by the Tribunals in the LIAMCO and Texaco cases, the BP Tribunal did not consider that the principle of the primacy of restitution is applicable in Libyan law. This conclusion is somewhat surprising, when considering the clear language contained in the above-cited legal text.

On the other hand, the Tribunal did not consider the issue of Libyan law any further as it found that "*(...) nor is it necessary to pursue the research on Libyan law further on account of the conclusions presented below as to public international law, which is a second necessary link in the argument*".[5]

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[1] Ibid., para. 86.
[2] Ibid.
[3] Ibid., para. 121.
[4] Ibid., para. 125.
[5] Ibid.

To put it differently, the BP Tribunal appeared unconvinced by the provisions of Libyan law with regard to the availability of restitution in kind, but in its own words, considered that there was no point in further researching Libyan law for a solution, as it had already drawn its conclusions from an analysis of public international law.

In this vein, the Tribunal turned to the interpretation of the Vienna Convention on the Law of Treaties, on the basis that "*[w]hile the concept of "treaty" used in the Convention is restricted in its scope, certain of the provisions of the Convention have analogous application to international agreements in general which are governed by international law*".[1]

Specifically, the Tribunal observed Art. 26[2] of the Vienna Convention, which enshrines the principle of *pacta sunt servanda,* and reached the conclusion that it does not entail that specific performance or restitution should be granted as remedies.

Moreover, the Tribunal considered that "*[t]he Convention, however, conspicuously lacks any rules on remedies*"[3] and proceeded to look at further provisions within the Vienna Convention, stating that *"a fleeting reference in Article 65 Paragraph 5, to a 'party claiming performance of the treaty or alleging its violation' cannot be construed as a considered incorporation of specific performance as a remedy."*[4]

The Tribunal found that the Convention does not have any particular rules on specific performance and that the primacy of restitution cannot be implied. Therefore, the Tribunal concluded that public international law outside the Convention should be resorted to, in order to determine the availability of restitution in kind/specific performance.

As such, in its analysis of public international law outside the Convention, the Tribunal clarified that:

> *"with regard to the question of the availability of the remedies of specific performance and restitution in integrum in customary international law, it is important to stress that the inquiry below will be restricted to the general field of economic interests and especially long-term contracts of commercial or industrial*

[1] Ibid., para. 126.

[2] Art. 26 of the Vienna Convention on the Law of Treaties: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*."

[3] *BP Exploration Company v. the Government of the Libyan Arab Republic*, para. 129.

[4] Ibid.

character and property and other assets employed in industrial undertakings."[1]

A summary of the opinion of the BP Tribunal on public international law provided by scholarly writings explained that the Arbitral Tribunal:

> *"examined the practice of international tribunals in respect of customary international law distinguishing between cases relating to state territory or other vital interests and cases concerning economic interests. He noted that no tribunal had ever awarded specific performance or restitution in integrum in a case of a second kind. He therefore decided that notwithstanding the famous dictum in the Chorzow Factory case and a number of other pronouncements, damages were the primary remedy in public international law.*"[2]

In consideration of all of the above, the Tribunal stated that it "*is unable to find that there exist principles of the law of Libya common to principles of international law pursuant to which the BP Concession is still in law valid and subsisting and the remedy of restitutio in integrum available to the Claimant*."

Finally, the Tribunal, by a "*rule of reason*"[3], determined that "*when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalization of the enterprise and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages*".[4]

Analysis of the Case

The BP Tribunal essentially found that restitution in kind was not an available remedy for the Claimant in the present proceedings, concluding that monetary compensation was the sole relief which could be granted in the circumstances.

Therefore, this Tribunal's decision is on the opposite pole of the Texaco Tribunal's decision. In the same way that we concluded that the award in

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[1] Ibid., para. 134.

[2] C. Greenwood, 'State contracts in international law, The Libyan Oil Arbitrations' (1982 53 BYBIL) 67.

[3] *BP Exploration Company v. the Government of the Libyan Arab Republic*, para. 200.

[4] Ibid.

Texaco was a statement, the same argument could be made regarding this decision, but in the opposing direction.

The BP Tribunal considered that the principle stating that restitution in kind and specific performance are primary remedies in international law is not applicable.

Some authors support the view that this Tribunal followed and argue as follows in this sense:

> *"the tribunal in BP v. Libya focused on the field of economic interest and particularly on long term commercial and industrial contracts. He said that the relevant issues with regard to remedies in this area could be fundamentally different from those in other areas such as sovereignty over territory. He examined not only the jurisprudence of judicial and arbitral decisions but also state practice in the area of expropriation and concluded that there was no support for the proposition that restitution was the primary remedy in international law available at the option of the injured state in cases of nationalization.*"[1]

On this particular point, we consider that it is not for arbitral tribunals to assess the economic interests of the parties, as this is reserved for the parties themselves. To deny restitution in kind arguing that it is in the best interest of the parties (including the claimant that requested restitution in kind) may even amount to giving a decision *infra petita*.

Moreover, to argue that restitution in kind would not be the primary remedy in international law with this reasoning is tantamount to a wrongful interpretation of the law *ab initio*. The law should be interpreted through legal reasonings, and not economic ones. Once a rule is settled in a legal environment the only possibility to exclude it would be by demonstrating its illegality or inapplicability, and not its usefulness from an economic perspective.

Turning to the Tribunal's assessment of the provisions of the Vienna Convention, the tribunal stated that the principle provided in Art. 26 is the rule of *pacta sunt servanda*. The Tribunal considered that the Convention did not state any rules on the remedies that are available for the aggrieved parties and concluded that this gap should be filled by *"customary international law, and particularly the case law of international tribunals,*

[1] C. Gray, 'The choice between restitution and compensation' 2, EJIL (1999), p. 418.

must answer the question of what remedies are available without the benefit of guidance from the Convention."[1]

The argument that the Convention lacks specific rules on remedies is correct, in principle. However, the principle of *pacta sunt servanda* should be interpreted as meaning that the parties should respect the obligations that they have undertaken and that a party has a right to expect that their counterparty will perform their obligations in the manner in which they have committed themselves. The consequence of this is that, when a party fails to perform accordingly, the natural remedy would be precisely to order the breaching party to perform their obligations, as established through a treaty.

When a party fails to respect its obligations and the aggrieved party does not have recourse to restitution in kind or specific performance, this in itself can amount to a breach of the principle of *pacta sunt servanda*. As long as restitution in kind or specific performance are not materially impossible, a breach of an obligation followed by a remedy other than restitution in kind or specific performance primarily, would constitute a deviation from *pacta sunt servanda*, since the parties agreed specifically on the performance of the contract.

Therefore, the provisions of Art. 26 of the Vienna Convention could, in themselves, be interpreted as establishing that States have an obligation to specifically perform a treaty and that, as such, specific performance and restitution in kind, when possible, should be granted.

It has been stated, and rightfully so, that pursuant to Art. 26 of the Vienna Convention a State has a duty to perform the treaty in good faith: *"in the Gabcikovo-Nagymaros Project Case the ICJ emphasized that good faith performance implies that "it is the purpose of the treaty, and the intentions of the parties in concluding it, which should have prevailed over its literal application".*[2]

In other words, not only do parties have to comply with their obligations in the way that they were stated in the treaty, but they also have to act in good faith, so as not to defeat, but rather to preserve, the object and purpose of the treaty. In other words, *"a party may act in a manner that is inimical to the object and purpose of the treaty even though the act itself is not expressly prohibited by its provisions*".[3]

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[1] *BP Exploration Company v. the Government of the Libyan Arab Republic*, para. 129.

[2] O. Dorr and K. Schmalenbach, *Viena Convention on the Law of Treaties a Commentary* (Springer-Verlag Berlin Heidleberg 2012), p. 445.

[3] Ibid., p. 446.

Finally, the BP Tribunal's reliance on the fact that tribunals had not awarded specific performance or restitution in kind cannot serve as an argument in itself to deny an award on these remedies.

III. Restitution in Kind in ICSID Arbitration

The availability of restitution in kind in investment law is linked with the power of investment tribunals to order such remedy. The possibility to award restitution in kind and specific performance specifically by ICSID tribunals was addressed by Christoph Schreuer, who has, in this issue, responded in the affirmative.[1]

It would seem that ICSID arbitral tribunals generally support the fact that restitution in kind is available in international law as a primary remedy.

For instance, in the case between *Burlington Resources Inc and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador)*, the Tribunal stated that Art. 35 of the ILC Articles on State Responsibility applies in international law and that restitution and specific performance are available, provided that these remedies are not materially impossible or disproportionate. However, the Tribunal made a reservation, pointing out that a view has been expressed that restitution or specific performance would not be applicable in international law where an agreement for natural resources has been terminated or cancelled by a sovereign State.[2] Further analysis on this matter was not developed since this case did not deal with natural resources.

The view that restitution in kind is the primary remedy unless materially impossible is the view provided not only by the ILC Articles, but also by the

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[1] C. Schreuer: *ICSID Convention A Commentary* (Cambridge University Press, 2001), p. 325: *"ICSID Tribunals have almost always granted relief in the form of pecuniary damages. Is this due to a limitation contained in the ICSID Convention? Is it due to a limitation inherent in litigation against States? Can ICSID Tribunals issue injunctions and order specific performance, or are they restricted to granting monetary awards?".*

[2] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, p. 22, para. 70: *"with respect to international law, article 35 of the ILC Articles on State Responsibility provide for restitution which includes specific performance unless it is materially impossible or wholly disproportionate. Whether specific performance is impossible or disproportionate is a question to be dealt at the merits stage. It is true that the view has been expressed that the right to specific performance is not available under international law where a concession agreement for natural resources has been terminated or cancelled by a sovereign State. […] this is not the case."*

Chorzow Factory Case dictum.[1]

Several other Tribunals have regarded this issue in a similar manner. In *CMS Gas Transmission Company v. The Argentine Republic*, the Tribunal stated that:

"restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation".[2]

This argument reinforces the rule that restitution in kind and specific performance should be the primary remedies in international law. States, however, do not support this view and argue against the primacy of restitution in kind in investment disputes. One argument that has been used by respondent States is that restitution in kind has never been awarded in a BIT investment dispute, or that in other disputes relating to investments it has been rarely awarded. This is rather a factual argument and not a legal one. Merely stating that tribunals have not awarded restitution in many cases cannot serve as a legal argument. Whether or not restitution is a remedy of international law is a matter of legal reasoning, and not of popularity.

In this sense, in the European Media Ventures v. The Czech Republic case (at the setting aside stage before the High Court of Justice), Mr. Justice Simon stated that "it is clear that, despite being rare, restitution and declaratory relief are available remedies in international law".[3] In other words, the fact that restitution and declaratory relief are rarely awarded in investment disputes could not serve as an argument to reject a request for such a remedy.

Reinforcing this argument, the Tribunal in the *Occidental Petroleum* case, quoting the Award in *Maffezini*,[4] stated that the fact that other tribunals had not ordered restitution or specific performance *"is not a reason to refuse*

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[1] *Case Concerning the Factory at Chorzow (Germany vs Poland),* Judgment on the Merits [1928] P.C.I.J., Ser. A, No. 17, 47.

[2] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case no. ARB/01/8, Award, 115.

[3] *The Czech Republic v. European Media Ventures SA*, Neutral Citation Number: 2007 EWHC 2851 (Comm), United Kingdom High Court of Justice, Queen's Bench Division, Commercial Court, Decision on Application to Set Aside, p. 14.

[4] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, para. 5: "*The lack of precedent is not necessarily determinative of our competence to order provisional measures*".

such a remedy"[1].

The sole limitations of restitution in kind and specific performance are the ones that the claimant in the *Helnan International Hotels A/S v. The Arab Republic of Egypt* argued, by stating that *"there exist only two limitations to the Tribunal's power to award non-pecuniary compensation. This is so where restitution is impossible and where restitution does involve a disproportionate burden*."[2]

In the *Micula v. Romania* case, the respondent State submitted a separate preliminary objection on the issue of restitution in kind as a remedy in international law. First, the State argued that *"the restitution remedy is unavailable to Claimants as a matter of international law, and Claimants' prayer for relief must be confined to monetary damages*",[3] thus challenging the availability of restitution in international law.

The Government of Romania argued that the claimant must prove a link between the cause of action and "any reparation attendant to it: restitution may be a form of reparation under international law but why should it be appropriate or possible as a remedy in this very case?"[4] Therefore, the respondent State primarily challenged the availability of restitution in kind and, in the alternative, the applicability of restitution in kind.

On this matter, the Tribunal found that "under the ICSID Convention, a tribunal has the power to order pecuniary or non-pecuniary remedies, including restitutio, i.e. re-establishing the situation which existed before a wrongful act was committed"[5] therefore confirming the fact that restitution in kind is available in ICSID investment disputes.

On the other hand, the *Occidental Petroleum* case constitutes an example of a different approach with respect to restitutio in integrum. The claimant relied on the primacy of the remedy of restitution, arguing that "*international law jurisprudence recognizes that, unless restitution is impossible, it is the preferred remedy for internationally wrongful acts by a*

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[1] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on provisional measures, 36.

[2] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case no. ARB/05/19, Award, p. 20.

[3] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, p. 47.

[4] Ibid., p. 48.

[5] Ibid.

State".[1]

Respondent's position on this issue was that: "the 'right' that Claimants seek to preserve by means of their requested provisional measures is non existent. There is no right to specific performance of a natural resources concession agreement that has been terminated or cancelled by a sovereign State; the lawful remedy in the event of wrongful or illegal action by the State is payment of monetary compensation".[2]

The respondent State argued that specific performance or restitution in kind was never ordered by an investment tribunal and that, in its view, the reason for such a lack of awards on restitution was that *"a sovereign State may not be ordered against its will to restore to a private investor an investment or concession that it has terminated or expropriated. In such circumstances, the State can only be required to pay monetary compensation".*[3]

In this case, the Tribunal considered that a right to specific performance or restitution in kind is not presumed and that the party requesting it must prove it. Concluding, the tribunal considered that the claimant did not prove that it had such a right. For this reason, *inter alia,* the Tribunal rejected the relief for restitution in kind/specific performance in this case.[4]

IV. Conclusion

The opinions expressed by the Arbitral Tribunals in the Libyan Nationalization Cases form a spectrum of interpretation of the applicability of restitution in kind and specific performance in investment disputes.

On one end of the spectrum, the Texaco Tribunal acknowledged the primacy of restitution in kind. On the other end of the spectrum, the BP Tribunal stated that the primacy of restitution does not apply in international law. In the middle of the spectrum, the LIAMCO Tribunal determined the primacy of *restitutio in* integrum, but found insurmountable conditions to its application.

The views expressed in the above-mentioned cases, as contradictory as they may seem, proved in any case to be forward looking, since case-law is still divided with respect to the availability of restitution in kind as a primary

[1] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on provisional measures, 14.

[2] Ibid., p. 18.

[3] Ibid.

[4] Ibid. 48-49.

remedy in international law.

ICSID tribunals have also considered different approaches in relation to the availability of restitution in kind, relying on the differing conclusions established in the Libyan Nationalization Cases.

Although there is no unitary application of restitution as a remedy in international law, there is perhaps one more element which must be borne in mind, namely, the practical outcome of a case.

This consideration was best described in scholarly writings in relation to the outcome of the Texaco Case, in the following manner:

"[t]his outcome [the outcome of the award in the Texaco Case] is often cited as a failure of an award for performance. This is correct only in part. In fact, the award made by Professor Dupuy, opened the way to negotiations which led after a relatively short period to a settlement between the parties. In the two other parallel cases the claimants were awarded substantial amounts of money as damages. However, the monetary awards in these other cases travelled the world in attempts for enforcement with little success."[1]

This pragmatical view of the issue has merit. The end result of any arbitration or litigation is the settlement of a dispute and the satisfaction of the party which had been wronged.

Applying this definition to the outcomes of the Libyan Nationalization Cases, it appears that, ironically, practical relief was obtained by the claimant who was granted restitution in kind, due to the fact that this constituted a basis for negotiation, while in the other two cases, the enforcement of the awards in relation to the monetary relief granted proved less effective. Restitution in kind is the naturally occurring remedy when a breach of an obligation occurs, of course, to the extent that this remedy is not impossible or overly burdensome.

In a similar vein, Professor Schreuer characterizes legal disputes as follows:

> *"The dispute will only qualify as legal if legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed. Consequently, it is largely in the hands of the claimant to present the dispute in*

[1] M. E. Schneider, 'Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice', in M E Schneider and J Knoll (eds.), "Performance as a Remedy: Non-Monetary Relief in International Arbitration", ASA Special Series No. 30, (JurisNet 2011), 46.

legal terms."[1]

We submit to the above view insofar as it states that a dispute shall qualify as legal when remedies such as restitution and compensation are available, as it does the justice of placing restitution and compensation on the same procedural legal footing. It implies, and rightly so, that it is in the very nature of a legal dispute that the parties are able to request, and at the same time be granted by international courts and tribunals, *inter alia,* restitution in kind.

A dispute where this remedy would be prohibited *ab initio* would no longer constitute a legal dispute.

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[1] C. Schreuer, *ICSID Convention A Commentary* (Cambridge University Press, 2001) 105.

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