



Centro di
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I quaderni europei

Serie Energia



L'AZIONE DELL'UNIONE NEL SETTORE DELL'ENERGIA

Anna De Luca

Aprile 2015
n. 4

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Non-Pecuniary Remedies Under the Energy Charter Treaty

Università di Catania - *Online Working Paper* 2015/n. 4

URL: http://www.cde.unict.it/quadernieuropei/energia/4_2015.pdf

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Università degli Studi di Catania in collaborazione con il Centro di documentazione europea - *Online Working Paper*/ISSN 1973-7696

Periodico mensile registrato al Tribunale di Catania il 22 ottobre 2013 con il numero 15

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Abstract

L'articolo analizza la disciplina specifica relativa ai rimedi (*remedies*) prevista dalla Carta europea dell'Energia rispetto al diritto internazionale generale, alla luce dei *travaux préparatoires*. I tribunali arbitrali istituiti in base all'art. 26 della Carta possono ordinare a favore degli investitori sia risarcimenti in forma monetaria che rimedi di carattere non monetario (quale l'esecuzione in forma specifica). La sentenza arbitrale deve espressamente lasciare alla Parte contraente convenuta la possibilità di optare per il risarcimento dei danni al posto di rimedi di carattere non monetario solo nell'ipotesi di misure, illegittime in base alla Carta, di enti o autorità *sub*-nazionali. Operando quale *lex specialis*, la disposizione dell'art. 26(8) della Carta costituisce una deroga alla limitazione, derivante dal principio internazionale di sovranità statale, al potere dei tribunali arbitrali di ordinare rimedi di carattere non monetario in controversie tra privati investitori e Stati ospiti.

The paper explores the specific regime on remedies set up by the Energy Charter Treaty (ECT) in comparison with general international law, taking into account the *travaux préparatoires*. Both pecuniary (i.e., economic compensation) and non-pecuniary (i.e., orders for specific performance) remedies are available to arbitral tribunals instituted under Article 26 of the ECT. The award has to expressly provide for the Contracting Party to opt to pay monetary damages in lieu of non-pecuniary remedies just in cases of Treaty breaches related to acts of *sub*-national governments or authorities. By operating as *lex specialis*, the provision of Article 26(8) of the ECT derogates the inherent limitation over the authority of arbitral tribunals to award non-pecuniary remedies (especially orders for specific performance) in private investor-State disputes deriving from the principle of State sovereignty.

Keywords

Carta europea dell'Energia - arbitrato sugli investimenti – indennizzo - Articolo 26(8) Carta europea dell'Energia - *lex specialis* - rimedi di carattere non monetario in controversie in materia di energia tra investitori stranieri e Parti contraenti convenute.

Energy Charter Treaty - investment arbitration - State sovereignty – compensation - Article 26(8) ECT - *lex specialis* - non-pecuniary remedies in energy disputes between foreign investors and respondent Contracting Parties.

NON-PECUNIARY REMEDIES UNDER THE ENERGY CHARTER TREATY

by Anna De Luca*

Summary: 1. Are non-pecuniary remedies available to arbitral tribunals under the ECT? - 2. State sovereignty and the limitation over arbitral tribunals' authority to award non-pecuniary remedies. - 3. Article 26(8) ECT as a *lex specialis* provision and the preparatory work of the ECT. - 4. The conventional obligation upon the Contracting Parties to implement ECT awards under Article 26(8), last sentence, of the ECT. - 5. Discussion of specific performance by ECT arbitral tribunals. - 6. Final Remarks

1. Are non-pecuniary remedies available to arbitral tribunals under the ECT?

Yes. Both pecuniary and non-pecuniary remedies are available to arbitral tribunals instituted under Article 26 of the Energy Charter Treaty (ECT), though with some limitation contained in Article 26(8), second sentence, of the ECT.

After having provided that «[t]he award of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute», Article 26(8) of the ECT goes on to state that an ECT award ... «concerning a measure of a *sub*-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted».

Therefore, while an arbitral tribunal under the ECT can grant non-pecuniary remedies, the award has to expressly provide for the Contracting Party to opt to pay monetary damages in lieu of non-pecuniary remedies only in cases of treaty breaches related to acts of *sub*-national governments or authorities. The exception related to unlawful measures of *sub*-national governments or authorities of Contracting Parties was introduced into the text of the treaty as a compromise solution with Canada.

As it is outlined below in Section D, during the negotiations Canada insisted upon a provision excluding, in principle, non-pecuniary remedies. The aforementioned exception was intended to address, a matter of compromise, at least some of the concerns raised by Canada, i.e. its constitutional concerns as to the lack of authority of Canada's Federal Government to compel state governments and *sub*-national authorities to withdraw their legislative measures when found in breach of the ECT.

By only limiting the power of tribunals to award non-pecuniary remedies in the case of unlawful measures of *sub*-national governments or authorities of Contracting States, the provision vests, as a rule, arbitral tribunals instituted under the ECT with the authority to grant both pecuniary remedies (i.e., compensation) and non-pecuniary remedies (i.e., orders for specific performance) in all other cases¹.

By operating as *lex specialis*, the provision of Article 26(8) of the ECT derogates the inherent limitation over the authority of arbitral tribunals to award non-pecuniary remedies (especially orders for specific performance) in private investor-State disputes deriving from the principle of State sovereignty, as it is outlined in Section B.

2. State sovereignty and the limitation over arbitral tribunals' authority to award non-pecuniary remedies

The inherent limitation over arbitral tribunals' authority to award non-pecuniary remedies, as well as the limitations on enforcement of non-pecuniary obligations in an arbitral award against a foreign State, is nothing other than one of the legal implications of the multi-faceted general principle of State

* The present article has been published as Energy Charter Secretariat Occasional Paper in 2015 (http://www.encharter.org/fileadmin/user_upload/Knowledge_Centre/Occasional_Papers/Non-Pecuniary_Remedies_under_the_ECT.pdf).

The author wishes to thank Alejandro Carballo Leyda and Matteo Barra of the Energy Charter Secretariat for their helpful comments and suggestions during the preparation of this work. Furthermore, the author is grateful to the Energy Charter Secretariat for the support during the research period spent as a fellow in Brussels.

¹ See *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Final Award, June 8, 2010, para 49.

sovereignty². This is, of course, unless the wrongdoing State agrees to an arbitral order for specific performance, or voluntarily complies with the non-pecuniary obligations under the award.

While investment agreements generally presuppose and implicitly acknowledge State sovereignty, the ECT explicitly acknowledges the relevance of the principle and recognizes State sovereignty and sovereign rights over energy resources in its Article 18.

State sovereignty as a fundamental principle of international law, limiting the power of arbitral tribunals to order specific performance or restitution against States in investment disputes with foreign investors, is not a new factor in international arbitration, but rather well established.

In the *pre*-BIT arbitration era, the international law principle of State sovereignty, as well as that of “permanent sovereignty” over wealth and natural resources, has been almost consistently regarded by case law as preventing arbitral tribunals from ordering restitution or specific performance (for instance, the revocation of a law or an act of general application, or even a specific act addressed to an individual foreign investor), with monetary damages being the only remedy compatible with the said legal principle³.

As it was held in 1981 in the *LLAMCO v. Libya* case, which concerned a foreign investment in the exploration and exploitation of hydrocarbons under a concession, *restitutio in integrum* (full restitution) cannot be among the remedies available to investment arbitrators in the absence of the wrongdoing host State’s acceptance since:

«... it is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of a State ... Further, restitution presupposes the cancellation of the nationalization measure at issue, and such cancellation violates the sovereignty of the nationalizing state»⁴.

This is also the case where the concession or investment contract contains a so-called “stabilization clause” or “freezing clause”, namely a clause under which a host State explicitly promises the investor not to nationalize or expropriate, and to not modify the domestic legal framework applicable to the contract⁵.

Absent specific treaty provisions (explicitly or implicitly) limiting or replacing the general and customary concept of State sovereignty and its legal implications (as well as customary provisions on foreign investment protection)⁶, customary law will be applicable in both a residual and supplementary manner in investment disputes under investment treaties⁷.

² State immunities are also specific manifestations of the principle of State sovereignty. See, for instance, J. E. VIÑUALES, *Customary Law in Investment Regulation*, in *IYBIL*, 2013, pp. 24-25; J. E. VIÑUALES, *Sovereignty in Foreign Investment Law*, in Z. DOUGLAS, J. PAUWELYN, J. E. VIÑUALES (eds.), *The Foundations of International Investment Law*, Oxford, 2014, p. 317 ff.; and with specific reference to immunities J. FINKE, *Sovereign Immunity: Rule, Comity or Something Else?*, in *EJLE*, 2011, p. 853 ff.

³ The *Texaco* case is one of the very few cases in which a Respondent State has been ordered to make restitution within the framework of the protection of a foreign investment under a State contract in the energy sector (*Texaco-Calasiatic v. Libya*, Award, 29 January 1977, JDI, pp. 350-389). For this reason, the award has been often referred to by the supporters of the “inherent” power of arbitral tribunals to order specific performance or restitution against States in investment disputes with foreign investors. See, for instance, C. SCHREUER, *Non-pecuniary Remedies in ICSID Arbitration*, *Arb. Int.*, 2004, p. 328. The precedent has, however, limited value as legal authority, since it is not consistent with both previous and successive case-law. See, for instance, I. BROWNLIE, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162 *RCADI* (1979-1), p. 309, observing that ... «the previous jurisprudence of international tribunals has given little support to the view adopted in the *Texaco* Awards». Conf. C. GRAY, *The choice between Restitution and Compensation*, in *EJIL*, 1999, pp. 417-418. As to previous and successive case-law *infra* n. 5.

⁴ *LLAMCO v. Libya* (1981), 20 *ILM*, p. 125.

⁵ See also *BP v. Libya* (1979), 53 *ILR*, p. 353 also observing that *restitutio in integrum* is dependent upon the will of the wrongdoing State, rather than the will of the home State of the foreign investor, in State-to State international disputes arising from the exercise of diplomatic protection; *AGIP Spa. v. Congo*, ICSID Award, 30 November 1979, paras 86-88; and *Amoco International Corporation v. Islamic Republic of Iran, National Iranian Oil Company*, Partial Award, July 1987, 1988, para 178, observing that: «... in no system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good. Rather private parties who contract with the Government are only entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights. No justification exists for a different treatment of foreign private interests ...».

⁶ States’ right (and power) to regulate is a basic attribute of their sovereignty under international law.

⁷ On the relationship between customary law and treaty law in Investment law see, *inter alia*, J. E. VIÑUALES, *Customary Law in Investment Regulation*, in *IYBIL*, 2013, p. 23 ff., p. 26 also referring to Article 31(3)(c) of the Vienna Convention on the Law of Treaties; J. KURTZ, *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, in *ICSID Review*, 2010, pp. 206-208 referring to Article 55 ILC’s Articles on State Responsibility.

While restating the principle of State sovereignty in Article 18, the ECT does not fail, however, to reduce its scope of application *vis-à-vis* the substantive obligations on investment protection of Part III, as well as the investment arbitration under Article 26 (paragraph 8 included)⁸.

As stated in Declaration V of the 1994 Final Act of the European Energy Charter Conference, «... Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty». Besides Declaration V, a Chairman's statement also recalls the declaration of the representatives of several negotiating Parties that the treaty shall be applied and interpreted in compliance with generally recognized rules and principles as reflected in Articles 26-38 of the Vienna Convention on the Law of Treaties, with the following specific declaration:

«In particular in the context of Article 18(2) they recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose»⁹.

State sovereignty, which includes the concept of “permanent sovereignty over natural wealth and resources”, as a specific manifestation covering relations of host states with private persons (and especially foreigners)¹⁰ is a customary (and general) law principle encompassing the right of States to regulate in the general interest. This right in turn includes the right to expropriate and nationalize¹¹, as well as the right to regulate the economic activities and conduct of foreign individuals within national territory by adopting less impairing measures than expropriations and nationalizations.

As is well known, the exercise of such sovereign rights (the right to expropriate, nationalize, and to enact regulatory measures included), rather than being prevented by the operation of international law provisions on foreign investors' protection, is subject to the respect of certain conditions such as the well established customary law condition of non-discrimination on grounds of race or religion, and appropriate compensation¹².

As observed by Professor Higgins (former President of the ICJ) with reference to the concept of indirect expropriation:

«... governments may indeed need to be able to act *qua* governments and in the public interest. *That fact will prevent specific performance (including restitution) from being granted against them.* But that is not to liberate them from the obligation to compensate those with whom it has entered into specific arrangements.

That is the reasonable place to strike the balance between the expectations of foreign investors and the *bona fide* needs of governments to act in the public interest. [emphasis added]¹³.

The fundamental principle of State sovereignty underpins the compensatory approach followed by customary international law on foreign investor protection, since compensation is a remedy less intrusive into State sovereignty from a legal point of view¹⁴.

By taking the principle of State sovereignty for granted, BITs and investment agreements also follow, as a rule, a compensatory approach. The relevance of State sovereignty, and the need to respect it within host State-foreign investor relations is at the basis of the liability model followed by both customary and treaty law on foreign investors' protection. The compensatory approach is spelled out in

⁸ For an account of the negotiating history of Article 18, see MENA Chambers, *Series of Notes on the Energy Charter Treaty, A Bird's eye view of article 18 of the Energy Charter Treaty*, available at http://www.menachambers.com/expertise/energy-charter-treaty/MCET_ECT_Note-4_11032014.pdf.

⁹ See Chairman's Statement at Adoption Session on 17 December 1994, reproduced in Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents*, 2004, p. 158.

¹⁰ See, *inter alia*, A. A. FATOUROS, *An International Legal Framework for Energy*, (2007) 332 RCADI 355, p. 388 ff.; I. BROWNIE, *supra* n. 3, pp. 261-262, with reference to UNGA Resolution 1803 (XVII) of 14 December 1962 on “Permanent Sovereignty Over Natural Resources” as declaratory of pre-existing standards, and pp. 308-310.

¹¹ See, for instance, N. SCHRIJVER *Permanent Sovereignty over Natural Resources Versus the Common Heritage of Mankind: complementary or contradictory principles of international economic law?*, in DE WAART, PETERS AND DENTERS, *International Law and Development*, 1988, p. 90 and p. 91 also observing at that time that «... there will be hardly any international lawyer now who would deny legal value to the principle of PSNR [namely Permanent Sovereignty over Natural Resources]».

¹² See I. BROWNIE, *supra* n. 3, p. 269; and UN General Assembly Resolution 1803 (XVII) of 14 December 1962 on “Permanent Sovereignty Over Natural Resources”, paras 3-4.

¹³ See, R. HIGGINS *Taking of property by the State: Recent developments in international law*, 176 RCADI (1982-III), pp. 338-339.

¹⁴ Nevertheless, monetary damages might be more burdensome for Respondent States than specific performance, if one adopts an economic perspective. This is the case where the Respondent State's measures at stake before arbitral tribunals are measures of general application negatively impacting an open-ended class of investors protected under investment agreements.

treaty provisions on expropriation, and is implicit in respect of the fair and equitable treatment (FET) standard, and the other substantive standards generally contained in investment agreements¹⁵.

The above principle makes the awarding of non-pecuniary remedies (such as orders for specific performance) by international tribunals in investor-State arbitration subject to the agreement of the wrongdoing State,¹⁶ unless the treaty itself explicitly allows otherwise.

Investment arbitral tribunals do not have any inherent power to order specific performance or restitution by host States in favour of individual foreign investors¹⁷, since what is inherent in positive public international law is State sovereignty and the right of States to regulate (which includes the right to expropriate and nationalize)¹⁸.

BIT case-law also confirms that the possibility of awarding specific performance and/or restitution is subject to host State's sovereign discretion, in line with the principle of State sovereignty. Besides the *Goetz* case,¹⁹ two more recent cases illustrate the point.

In *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*²⁰ the extinguishment of an arbitration agreement included in a construction contract between an investor and a public entity of Jordan, due to the retroactive application of a successive arbitration law, was considered a breach of the Turkey-Jordan BIT.²¹ As a consequence, the Tribunal first observed that the appropriate remedy to the case was an order for restoration of the Claimant's right to arbitration; secondly, it noted that the Respondent already indicated during the proceedings its willingness to accept such an order²².

In *Mr. Franck Charles Arif v. Republic of Moldova* the Tribunal primarily awarded the claimant restitution (the case involved the investment in a duty free store at Chisinau Airport), giving the Respondent sixty days from the date of the award to make restitution proposals to the Claimant.

Nevertheless, the Tribunal alternatively awarded the Claimant monetary damages in lieu of restitution in the cases of Respondent's default or Claimant's rejection of restitution proposals made by the Respondent²³.

The *Arif* case, which at first glance might appear to support the primacy of restitution in investor-State disputes, actually points to the opposite conclusion and confirms that the general rule applies. As clearly stated by the Tribunal, Moldova not only indicated its willingness to accept restitution as the most appropriate remedy, but it insisted thereon with the aim of avoiding «the uncertainties of the calculation of damages, including the possibility of risk free windfall profits». On the contrary, the Claimant was insisting on monetary damages²⁴. Moreover the issue whether or not «restitution can be considered in circumstances where Claimant insists on damages» is positively answered by the Tribunal, although when referring to the Commentaries to Article 43 ILC's Articles it «... notes that the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution»²⁵.

¹⁵ A. VAN AAKEN, *Primary and Secondary Remedies in International Investment Law and National State Liability: a Functional and Comparative View*, in S. W. SCHILL, *International Investment Law and Comparative Public Law*, 2010, p. 722; p. 752-753 referring to investment treaty provisions (FET obligation included) as liability rules; J. BONNITCHA, *Substantive Protection under Investment Treaties: A legal and Economic Analysis*, CUP, p. 59-62, and with reference to the FET standard at p. 60.

¹⁶ In this respect, see *Antoine Goetz et consorts v. République du Burundi* (ICSID Case No. ARB/95/3), Award, 10 February 1999, ICSID Review, 2000, p. 459.

¹⁷ With reference to the remedies international tribunals may order in general, see A. NOLLAEMPER, *National Courts and the international rule of law*, 2012, p. 199 observing that «[w]hile international courts can pronounce that legal restitution is due, they do not themselves effectuate such restitution. There are few judgments that point in other directions».

¹⁸ See, *inter alia*, R. CHOWDHURY, *Permanent Sovereignty over natural resources: Substratum of the Seoul Declaration*, in DE WAART, PETERS AND DENTERS, *International Law and Development*, 1988, p. 73, observing that: «[t]he right to nationalize is inherent in the sovereignty of every State».

¹⁹ *Antoine Goetz et consorts v. République du Burundi* (ICSID Case No. ARB/95/3), Award, 10 February 1999, (2000) 15 ICSID Review 459.

²⁰ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2), Award, 18 May 2010.

²¹ *Ibid.*, paras 121, 128.

²² *Ibid.*, para 131.

²³ *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013, para 633.

²⁴ *Ibid.*, paras 568-569.

²⁵ *Ibid.*, para 570. However, Part Three of the ILC's Articles (Article 43 included) is not intended to be applied to dispute between investors and host States since it concerns the invocation of responsibility by States against other States. In the words of the ILC «[t]he articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 [of Article 33] makes this clear». (see ILC's Commentaries to the Articles, Article 33, para 4, p. 95).

As opposed to what is occasionally stated by investment tribunals²⁶, the ILC's Articles on State Responsibility do not (and cannot) support the primacy of restitution in International Investment Law.

Neither do the Articles support the inherent authority of arbitral tribunals to award non-pecuniary remedies against host States in investment disputes with foreign investors, eventually resulting from the primacy of restitution.

To use the words of the ILC, Part Two of the Articles (which includes Articles 28-39) «... does not apply to obligations of reparation to the extent that arise towards or are invoked by a person or entity other than as State»²⁷.

When an investment protection treaty is silent on the available remedies, which is the case in the great majority of investment agreements in force²⁸, the principle of State sovereignty, and its specific manifestations in respect to foreign investor-host State relations, apply as background elements that (should) guide the application and interpretation of investment agreements²⁹.

Additionally, the few other treaties on investment protection containing specific provisions on remedies (different from the ECT) confirm, indeed, the inherent limitation on investment tribunals' power to award specific performance against States under international law on foreign investment protection deriving from State sovereignty.

This is the case with Article 1135 of the NAFTA. The mentioned provision limits arbitral tribunals' power to order restitution or specific performance against the NAFTA Parties, by making it clear at paragraph 1 that, when they award restitution of property, «the award shall provide that *the disputing Party may pay monetary damages and any applicable interest in lieu of restitution*».[emphasis added]³⁰.

3. Article 26(8) ECT as a *lex specialis* provision and the preparatory work of the ECT

The preparatory work and the negotiating history of Article 26(8) of the ECT³¹, as supplementary means of interpretation codified in Article 32 of the Vienna Convention on the Law of Treaties of

²⁶ 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, 24 September 2008, para 166-168 referring, among others, to Article 35 ILC's Articles (footnote 28), and Award, 11 December 2013, para 1309-1312 restating the same position but this time observing that the ILC Articles expressly recognize a tribunal's power to grant non-pecuniary relief just in the State-to-State sphere (footnote 293); and *Enron Corporation and Poderosa Assets, L.P. v. Argentina* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2004, paras 79-81.

²⁷ ILC's Commentaries to the Articles, Article 28, para 3, pp. 87-88. In this respect, see also J. CRAWFORD, *Investment Arbitration and the ILC Articles on State Responsibility*, ICSID Review, (2010), p. 127 ff., p. 130; and Z. DOUGLAS, *Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID*, in CRAWFORD, PELLET AND OLLESON, *The Law of International Responsibility*, 2010, p. 820, and pp. 829-830. Many renowned arbitrators and legal scholars have addressed criticisms to the (mis)use by some investment arbitral tribunals of the ILC's Articles. Apart from CRAWFORD, *supra*, p. 128-130, and KURTZ, *supra* n. 7, p. 216-217 see also D.D. CARON, *The ILC Articles on State Responsibility: the Paradoxical Relationship Between Form and Authority*, UC Berkeley School of Law Public Law and Legal Theory Research Paper No. 97 2002, available at SSRN: <http://ssrn.com/abstract=339540> or <http://dx.doi.org/10.2139/ssrn.339540>. In 2008, the *Continental* case (*Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, footnote no. 238) observed and criticized the trend in investment case-law towards the treatment of ILC's Articles as they were treaty provisions (instead of particularly authoritative works of both codification and progressive development of international law). In this respect the Tribunal recalled that: «... the ILC articles should not be considered *per se* as a source of international law. The UNGA, in taking note of the Articles presented to it by the ILC, «commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate actions» (Resolution 56/83 of December 12, 2001, the annex to which contains the text of the ILC articles)». Furthermore, as it is well known, the ILC is entrusted with the codification and progressive development of international law under Article 15 of its Statute (as to the aforementioned double task of the ILC see the (still) relevant observations made in 1955 by H. LAUTERPACHT, *Codification and Development of International Law in AJIL*, 1955, Vol. 49, pp. 16-43). The double task of the ILC explains why neither the Articles can be treated as treaty provisions nor they can be read without an in-depth study of the Commentaries thereto, and positive international law.

²⁸ See J. POHL, K. MASHIGO, A. NOHEN, *Dispute Settlement Provisions in International Investment Agreements, A large Sample Survey*, OECD Working Papers on International Investment, 2012/02, pp. 32-33.

²⁹ See also Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

³⁰ Article 1135.1. NAFTA provides that «[w]here a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;
(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules».

See also Article 34.1 of the US BIT model of 2012; and Article 44.1 Canada BIT model of 2004; Article IX.14 Colombia BIT model of 2007.

³¹ The *travaux préparatoires* of the ECT can be consulted at the offices of the Energy Charter Secretariat upon prior appointment.

1969, confirm the nature of Article 26(8) of the ECT as a *lex specialis* provision, derogating from the general customary limitation on the authority of investment tribunals to award non-pecuniary remedies against States.

Analysis of the negotiations amongst the national delegations drafting of Article 26(8) of the ECT indicates the clear intention of the Parties to go further what is provided for in general and treaty international law on investment protection, with reference to the remedies available to investors.

The *lex specialis* nature of the provision of Article 26(8) of the ECT results from two elements, which emerge from the analysis of the preparatory work. These elements show that the treaty drafters were aware of the special character of the provision of Article 26(8) of the ECT, and its legal implications.

The first element consists of the fact that a proposal on remedies modelled on Article 1135.1 NAFTA (which was under negotiation during the same period in which the negotiation on the ECT took place), was submitted by Canada for discussion as of November 1992 but rejected by the other negotiating parties.

Canada's proposal, similar to Article 1135.1 NAFTA, read as follows:

«An arbitral tribunal established pursuant to this Article may award, separately or in combination, only monetary damages and restitution of property. Any award or restitution shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules. A tribunal may not order the payment of punitive damages»³².

The NAFTA-modelled proposal on remedies was insisted upon by Canada, without success, during all negotiations related to Article 26 of the ECT³³. Canada's proposal met the opposition of the US, as well as the EU and its Member States.

Furthermore, following a US proposal, in April 1993 the drafters reached an agreement on a quite differently worded treaty-making option. The agreed text of Article 30(9) - now Article 26(8) of the ECT - provided that:

«The award of arbitration, which may include an award of interest, shall be final and binding on the parties to the dispute. Each Contracting Party shall carry out without any such award and *shall make provision for the effective enforcement* in its Domain of such awards». [emphasis added]³⁴.

During the work on the Second Draft Version of the ECT, Canada re-launched its proposal extending the limitation over tribunals' authority to make orders for specific performance against Contracting Parties in respect of provisional measures. The proposal of Canada was modelled on an identically worded provision of the NAFTA (Article 1134), and read as follows:

«A tribunal may award, or recommend, an *interim* measure of protection to preserve the rights of a disputing party, or to ensure that a tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order, or recommend, attachment of assets or *order, or recommend, that a measure alleged to constitute a breach of an obligation in Part III of this Agreement be enjoined*» [emphasis added]³⁵.

This proposal also found no support from other delegations. Following the Working Group II Chairman's suggestion to invite experts to find a solution to the problems raised by Canada, Canada declared itself to be ready to reconsider its proposal on provisional measures.

During the Plenary Meeting of 25-28 May 1993, the delegations agreed on the need to at least address Canada's constitutional concerns as to the lack of authority of Canada's Federal Government to compel state governments and *sub-national* authorities to withdraw their legislative measures when found in breach of the ECT³⁶. A newly drafted paragraph appeared in the Third Draft Version of the treaty³⁷.

³² See BA 37-20/93, Annex I, 1 March 1993.

³³ See negotiating docs BA 38-31/93, 2 April 1993; CONF 56, 35/93, 1 May 1993 (Draft Energy Charter Treaty-Second Version), footnote 30.20.

³⁴ BA 38- 31/93, 2 April 1993.

³⁵ CONF 56, 35/93, 1 May 1993 Draft Energy Charter Treaty, Second Version, footnote 30.18.

³⁶ CONF 60, 46/93, 1 June 1993, Draft Energy Charter Treaty, Third Version.

³⁷ Room document 14 (plenary session, 28 June - 2 July).

The new text, which is substantially identical to the final text of Article 26(8) of the ECT, was worded as follows:

«The award of arbitration, which may include an award of interest, shall be final and binding on the parties to the dispute. *An award of arbitration concerning a measure of a Sub-Federal Government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted.* Each Contracting Party shall carry put without any such award and shall make provision for the effective enforcement in its Domain of such awards» [emphasis added]³⁸.

Notwithstanding the efforts of the other national delegations, the compromise text did not satisfy Canada. The negotiation round ended with Canada observing that the text probably met some of its constitutional concerns, but addressed them only in relation to final awards and not in relation to interim awards³⁹.

During the Plenary Meeting of 28 June-2 July 1993, the drafters continued discussion on the compromise text of Article 26(8) of the ECT. While the *Sub-Group* Chairman kept emphasizing the nature of the new text of paragraph 8 as a compromise resulting from an effort by other negotiators to address at least Canada's constitutional concerns, Canada maintained its position. Furthermore, Canada addressed to the other national delegations the following rhetorical question: ... «whether other delegations are prepared to accept that tribunals (notably those acting under ICSID Additional Facility and UNCITRAL rules) may make any *interim* order on any matter raised in arbitration. Specifically, is each country prepared to accept that a tribunal may make an *interim* order against it requiring that its laws (or other measures) not be applied pending the delivery of the Tribunal's final order?»⁴⁰.

Notwithstanding Canada's observations and the aforementioned rhetorical question to the other drafters, the compromise text limiting the power of tribunals to award non-pecuniary remedies just in the case of unlawful measures of *sub-national* governments or authorities of Contracting States remained unchanged in the Fifth Draft Version of the ECT⁴¹.

During the Plenary Meeting of 14 December-17 December 1993, the drafters continued discussion on the compromise text of Article 26(8) of the ECT. The discussion confirmed the broad agreement among national delegations on a drafting of Article 26(8) in line with the compromise text. The drafters finalized the negotiation over the provision by including the compromise text, which substantially reflects the current text with modest changes⁴², in the Sixth and Seventh Draft Versions of the Energy Charter Treaty⁴³.

Notwithstanding the repeated attempts of Canada, the other drafters of the ECT refused any treaty-making options restating the general law limitation over arbitral tribunals' power to award non-pecuniary remedies against States, such as Article 1135.1 NAFTA.

The second element, confirming the fact that the drafters were well aware of the special character of the provision of Article 26(8) of the ECT and its implications on the remedies available to ECT tribunals, emerges from analysis of the preparatory work of drafting the umbrella clause. As it is well known, a broadly-worded umbrella clause covering any obligations each Contracting Party «... has entered into with an Investor or an Investment of an Investor of any other Contracting Party» was finally included in the text of the ECT (Article 10(1), last sentence)⁴⁴.

Different treaty-making options aimed at protecting investors' rights arising from investment contracts and authorisations were discussed at length by the negotiators. Two concurrent treaty making options (one proposed by the US and the other by the EU) were the object of a debate among the national delegations starting from May 1993.

In October 1993 the Chairman of the Conference asked for the advice of the Legal *Sub-Group* (LSG) on the concurrent proposals of umbrella clauses by the US and EU, and their legal implications⁴⁵.

³⁸ CONF 60, 46/93, 1 June 1993, Draft Energy Charter Treaty, Third Version; and Room document 14 (plenary session, 28 June - 2 July).

³⁹ Room document 14 (plenary session, 28 June - 2 July).

⁴⁰ CONF 64, 55/93, 7 July 1993, Draft Energy Charter Treaty, Fourth Version.

⁴¹ CONF 72, 64/93, 11 October 1993.

⁴² More specifically “*Sub-federal*” is replaced with “*Sub-national*.”

⁴³ Draft Energy Charter Treaty, Sixth Version; and Draft Energy Charter Treaty, Seventh Version, 17 March 1993.

⁴⁴ On the drafting and interpretation of the umbrella clauses see A. DE LUCA, *Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT, The Journal of World Investment & Trade*, 2014, pp. 510-521, and references therein.

⁴⁵ CONF 56, Second Draft Version of the ECT, 11 October 1993.

Without engaging in an in-depth analysis of the legal implications of the two alternative proposals of umbrella clauses discussed in the Opinion of the LSG⁴⁶, some observations of the LSG should be mentioned here since they are directly relevant in respect to the topic of the remedies available to ECT tribunals. This is especially so considering that the current text of Article 26(8) of the ECT was already finalized at the time of the release of the LSG's Opinion.

The LSG's Opinion starts with the observation that the two proposals of umbrella clauses discussed would render a breach of contract as internationally unlawful. After having referred to the effect of the internationalisation of State contracts on the remedies available to arbitral tribunals, the LSG observes that «[r]estitution in kind rather than the payment of damages has traditionally been limited to...».

By citing the book authored by Mr. Paasivirta (Finnish member of the LSG) on the subject-matter, the Opinion observes that:

«Arbitral practice ... indicates a certain degree of reluctance ... to consider restitution as the primary remedy in the domain of foreign investment agreements. Instead it has become the regular pattern to award pecuniary compensation, not only in cases of lawful expropriation, but also for unlawful ones»⁴⁷.

Having clarified the above, the LSG refers to the remedy of restitution in kind within the ECT, and specifies that:

«[o]f course, such an award already is possible under the Charter Treaty as it now stands, if the events complained of constitute a breach of an obligations created in Part III... the raising of non-treaty obligations to treaty level obligations might affect substantially the remedies available for a breach of those obligations ...»⁴⁸.

The discussion on the impact of the protection of contractual rights of investors through an umbrella clause on the remedies under the treaty shows, once again, that the drafters wilfully and thoughtfully took the decision to overcome the general law limitation on non-pecuniary remedies, and their implementation in domestic legal systems of the Parties.

4. The conventional obligation upon the Contracting Parties to implement ECT awards under Article 26(8), last sentence, of the ECT

The last sentence of Article 26(8) of the ECT confirms the intention of the drafters of the ECT to go beyond the general limitation on international tribunals' authority to order States to make specific performance and restitution in favour of foreign investors.

The treaty's derogation from the afore-mentioned limitation is coherently accompanied with a specific provision concerning the implementation of awards rendered pursuant to the ECT, going beyond the mere provision that «[e]ach Party shall provide for the enforcement of an award in its territory»⁴⁹.

Article 26(8) of the ECT ends with a specific provision requiring that «[e]ach Contracting Party shall carry out without delay any such award and *shall make provision for the effective enforcement* in its Area of awards» [emphasis added]⁵⁰.

⁴⁶ LSG, Draft Opinion: Access to Charter Treaty Dispute Resolution for Issues Arising Under Other Contracting Party Obligations, 15 November 1993.

⁴⁷ Ibid., p. 6 referring to E. PAASIVIRTA, *Participation of States in International Contracts*, 1990, p. 238.

⁴⁸ Ibid., p. 6, observing that the alternative treaty making option to leave unchanged the nature of investors' rights under an investment agreement or authorization, but open to investors the opportunity to go to investment arbitration under the treaty would have allowed contractual provisions in State contracts «to be subject to binding arbitration (and potential monetary or non-monetary award remedies) pursuant to Article 30 [now article 26]».

⁴⁹ As it is established, for instance, in Article 1136.4 of the NAFTA and Article 34.7 of the US BIT model. Both the NAFTA and US BIT model restate the general international law limitation on tribunals' power to award non-pecuniary remedies, at Article 1135.1 NAFTA and Article 34.1 US BIT model, respectively.

⁵⁰ The term "enforcement" in Article 26(8) of the ECT refers to the conventional obligation of Contracting Parties, and especially the Contracting Party to the dispute, to implement the awards rendered pursuant to the ECT, rather than to the execution of such awards. The execution of ECT awards is a matter regulated by reference by the ICSID Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards pursuant to Article 26(4) and (5) ECT. The distinction between enforcement and execution has been made in respect to awards rendered pursuant to the ICSID Convention: in *Kardassopoulos & Fuchs v. Georgia* (ICSID Case No. ARB/05/18 and ARB/07/15), the *ad-hoc* Committee in its Decision on the Stay of the Enforcement of the Award (18 November 2010), paragraph 30 observes that «[t]he simplified and automatic enforcement system of Article 54(1) of the ICSID

Such a provision secures the effective implementation of ECT awards, especially when specific performance is awarded, since it imposes upon the Contracting Parties not only an obligation to enforce pecuniary obligations under an award (as Article 54(1) ICSID Convention establishes) but also an obligation to make “specific provision” to the purpose in relation to any award (independently of whether the remedy granted is pecuniary or non-pecuniary)⁵¹.

The said conventional obligation implies that a wrongdoing Party can be required by an ECT arbitral tribunal to repeal (or change) a legislative act or an act of general application (as well as measures specifically addressed to individual investors), when found in breach of the treaty, by adopting or enacting *ad-hoc* appropriate and adequate provisions⁵².

The special nature of the provision of Article 26(8), last sentence, of the ECT and the Contracting Parties' obligation «to make provision for the effective enforcement of awards» enshrined therein also emerges when the wording of said provision is evaluated against other, differently worded treaty provisions related to the implementation of obligations provided for in public international law awards that conclude disputes over investments between foreign investors and host states.

In this respect, the provision of Article 54(1) of the ICSID Convention is worthy of special mention since an identically-worded provision was repeatedly proposed by Japan during the negotiation on Article 26(8) of the ECT⁵³, but rejected as a treaty-making option by the other delegations.

While stating that an ICSID award has binding force for the Contracting Parties equivalent to domestic *res judicata* (i.e., «... as if it [the ICSID award] were a final judgment of a court in that State»), Article 54(1) of the ICSID Convention goes on to limit the obligation of the Parties to implement ICSID awards to the enforcement of the pecuniary obligations imposed thereby⁵⁴.

As it has been authoritatively observed, «... enforcement under Article 54 is limited to the pecuniary obligations imposed by the award. In other words, [under the ICSID Convention] enforcement does not extend to negative or positive injunctions ...», contrary to (and differently from) what is explicitly established by the ECT⁵⁵.

The proposal to replace Article 26(8), last sentence, of the ECT with a provision limiting Contracting Parties' enforcement obligations to the pecuniary obligations imposed by the award, in

Convention should not be conflated with the measures of execution that follow the order granted by the court or authority designated in accordance with Article 54(2) for enforcement of the award and which are referred to in Article 54(3) providing that «[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought».

⁵¹ See also the Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, last sentence, where it is stated that «Any arbitral award against the European Communities will be implemented by the Communities' institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty».

⁵² In this respect, and in relation to the EU, see 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, Official Journal L 069, 09/03/1998 pp. 1-116, Preamble, para 17, where it is observed that «... the Energy Charter Treaty could affect legislative acts based on Article 235 of the Treaty establishing the European Community ...». The above statement is in line with the settled case-law of the Court of Justice of the EU on the legal effects of international agreements of the EU within the European legal system. According to such settled case-law the provisions of international agreements, signed by the EU and subsequently approved, «... form an integral part of the Community legal order (see, *inter alia*, Case C-344/04 *LATA and ELFAA* [2006] ECR I-403, para 36, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, para 82)». (Case C-431/05 *Merck Genéricos* [2007] ECR I-7001, para 31), and are binding upon the institutions of the EU. As a consequence, the validity of European acts (legislative acts included) «... may be affected by reason of the fact that they are contrary to a rule of international law» (Case C-162/96 *A. Racke GmbH & Co. and Hauptzollamt Mainz* [1998] ECR I-3688, para 27).

⁵³ LSG, Report on questions to Article 30 (now Article 26) from Japan, 2 May 1994, p. 3.

⁵⁴ Article 54(1) of the ICSID Convention provides that: «[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State». The distinction between enforcement (directly regulated by Article 54(1) ICSID Convention) and execution (governed by domestic law in accordance with Article 55 ICSID Convention) is made by Broches, the father of the ICSID Convention. See A. BROCHES, *Awards rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, ICSID Review, 1987, p. 302 and p. 318 where he observes that enforceability is governed and decreed by the Convention and its implementation by execution is governed by domestic law. See also I. UCHKUNOVA, O. TERMIKOV, *Enforcement of Awards Under the ICSID Convention-What Solutions to the Problem of State Immunity?*, ICSID Review, 2014, p. 193 also referring to I. KARDASSOPOULOS, *Decision of the ad-hoc Committee on the Stay of the Enforcement of the Award* (18 November 2010), para 30. *Contra* SCHREUER AND OTHERS, *The ICSID Convention: A Commentary*, CUP 2009, p. 1135.

⁵⁵ In this respect see A. BROCHES, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 RdC 331, p. 400) stating also that: «It may assumed, however, that awards will whenever possible impose pecuniary obligations ... in the case of non-compliance with obligations of specific performance». This means that orders for restitution or specific performance against States have to be framed in monetary terms in line with the principle of State sovereignty, as indeed investment case-law shows. See, for instance, *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para 444.

conformity with Article 54(1) ICSID Convention, was maintained by Japan until the end of the negotiations but was never endorsed by the other delegations.

Since the ECT explicitly vests, as a rule, arbitral tribunals with the power to award specific performance against a Contracting State to an investment dispute with a foreign investor, in derogation of the principle of State sovereignty, the Contracting Party's obligation to enforce an award rendered pursuant to the ECT is not limited to the pecuniary obligations imposed thereby (as it is generally provided in the ICSID Convention).

The obligation to implement ECT awards extends to negative or positive injunctions. For instance, an arbitral tribunal instituted under the ECT might order a Respondent State to repeal or modify a legislative measure as primary remedy, except in the case of *sub*-national governments' (or authorities') measures.

As a consequence, under Article 26(8), last sentence, of the ECT, the wrongdoing Party has the obligation to take such provision (legislative provisions included) as may be necessary for making the enforcement of such an award (irrespective of whether it is an ICSID or non-ICSID award) effective.⁵⁶

5. Discussion of specific performance by ECT arbitral tribunals

There are at least two cases under the ECT in which specific performance has been discussed. These are *Mohamad Ammar Al-Babloul vs. Republic of Tajikistan* and *Nykomb Synergetics Technology Holding AB vs. Latvia*.

The *Al-babloul* case regards four agreements for exploration and eventually exploitation of hydrocarbons, signed in 2000, by the claimant and a public authority of the Respondent in relation to four different areas. The failure by the Respondent to issue the licences for exploration in favour of the Claimant in breach of the agreements was at the heart of the case.

The Tribunal found the failure of the host State to issue the licences necessary to carry out the exploration activities as provided for in the agreements to be in breach of the umbrella clause of Article 10(1), last sentence⁵⁷. Among the requests for relief of the Claimant was ordering the Respondent to issue the necessary licenses.

While not excluding in principle the possibility of making orders for specific performance against the Respondent, the Tribunal denied specific performance in favour of the Claimant. Among the factors leading the Tribunal to such an outcome were mainly i) an incorrect interpretation of Article 26(8) of the ECT, and ii) a misplaced reliance on the ILC's Articles on State Responsibility⁵⁸.

As to point i), after having aptly observed that Article 26(8) of the ECT implicitly recognizes the power of a tribunal to grant a non-pecuniary remedy, the Tribunal goes on to state that «the ECT provision does not purport to compel the Contracting Party to implement such non-monetary relief, since it requires the award to provide in such case for the option of damages in lieu thereof»⁵⁹.

This interpretation by the Tribunal, which runs contrary to the plain text of the provision, is mistaken and largely unexplained. It is sufficient to say here that Contracting Parties may opt to pay damages in lieu of non-pecuniary remedies only in the case of unlawful *sub*-national government measures; secondly, the provision of Article 26(8) of the ECT, last sentence, imposes upon the Contracting Party to the dispute an obligation to make provision for the effective enforcement of awards⁶⁰, and therefore compels Contracting Parties to implement non-monetary relief.

⁵⁶ The international obligation imposed upon the Contracting Parties by Article 26(8), last sentence, of the ECT is different from and autonomous in respect to the other conventional obligations on awards enforcement with which it partially overlaps (such as for instance Article 54(1) ICSID Convention). See also the Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, last sentence, *supra* n. 51.

⁵⁷ See *Mohammad Ammar Al-Babloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, paras 263-268; Final Award, June 8, 2010, para 10.

⁵⁸ There is also the fact that the Respondent never appeared before the Tribunal.

⁵⁹ *Mohammad Ammar Al-Babloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Final Award, June 8, 2010, para 49.

⁶⁰ See Section F above.

As to point ii), the decision of the Tribunal to deny the order for specific performance requested by the Claimant is also based on the “material impossibility” of restitution in accordance to what is established by Article 35(a) and (b) (para. 52) ILC’s Articles on State Responsibility⁶¹.

First of all, as already said above, the reliance by the Tribunal on Articles 28-39 of the ILC Articles is misplaced since (in the words of the International Law Commission itself) they are not applicable in respect to international obligations of reparation upon States towards (or invoked by) persons or entities other than States.

Secondly, according to the International Law Commission «the term “restitution” in Article 35 has a broad meaning ...», and includes “legal restitution” (e.g., the revocation, annulment or amendment of a legislative provision)⁶². Similarly, the concept of “material impossibility” of granting restitution referred to by Article 35(a) ILC Articles is also such a broad concept as to encompass the impossibility of implementing legal restitution. This is made clear by the International Law Commission in its Commentaries through the reference to the *Forests of Central Rodbopia* case⁶³. After having acknowledged that the case «supports a broad understanding of the impossibility of granting restitution», the Commission observes that the case, however, «concerned questions of property rights within the legal system of the Respondent State»⁶⁴. Since Article 35 of the ILC Articles is not applicable to obligations of reparation of States towards (or invoked by) individuals (foreign investors included), the Commission suggests that the position may be different where rights and obligations amongst States arise directly at the international level. This is a further element making the reliance by the *Al-Baboulou* Tribunal to the broad concept of “material impossibility” in Article 35 of the ILC's Articles unsound.

In the presence of the *lex specialis* provision of Article 26(8) of the ECT, the application by the Tribunal of such a broad concept as the «impossibility of granting restitution», alongside the reliance on Article 35 of the ILC's Articles, is hardly understandable⁶⁵. This is all the more so considering that after having denied the Claimant's request for restitution, the Tribunal also rejected the Claimant's request for monetary damages as being “overly speculative”⁶⁶. As a result, the Tribunal left the Claimant with no remedy at all, «despite the Respondent's established liability and on-going breach of the BIT», as it is observed by the Tribunal itself⁶⁷.

In the case *Nykomb Synergetics Technology Holding AB v. Latvia*, a Swedish investor on behalf of a local company complained about the violation by Latvia of a contract to build and operate a cogeneration plant with a State-owned company operating in the electricity sector.

The dispute before the Tribunal was substantially a “price dispute” under the contract. Among the various breaches alleged by the Claimant was the right to receive a double tariff from the State-owned company for the electricity purchased for the remaining eight years as provided for in the contract. In this respect, the Tribunal made an order for specific performance against Latvia.

Even if it is not entirely clear, the Tribunal mainly found that a breach of the umbrella clause of Article 10(1) of the ECT occurred through a breach of the contract. As a consequence, the investor apparently was awarded the damages arising from the contract’s breaches.

Notwithstanding that, the Tribunal refers to Article 34-35 of ILC’s Articles as restating customary principles relevant and applicable to the assessment of damages and losses found to be caused by violations of Article 10 of the ECT⁶⁸. The reference to the ILC’s Articles also remains unexplained.

The basis of the Tribunal’s order for specific performance in favour of the investor is briefly described as follows:

«As specifically regards the asserted losses on delivery of electric power to Latvenergo for the remainder of the eight year period, the Tribunal considers this potential loss to be too uncertain and speculative to form the basis for an award of monetary compensation. But the Tribunal considers it to be a continuing obligation upon the Republic to ensure the payment at the double tariff for electric

⁶¹ *Mohammad Ammar Al-Babloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Final Award, June 8, 2010, para 52.

⁶² ILC’s Commentaries to the Articles, Article 35, para 9, p. 98.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ The Tribunal followed none of the suggestions on a correct use of the Articles given by Caron, *supra* n. 27, p. 26.

⁶⁶ *Mohammad Ammar Al-Babloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Final Award, June 8, 2010, para 97.

⁶⁷ *Ibid.*, para 98.

⁶⁸ P. 38.

power delivered under the Contract for the rest of the eight year period, and therefore gives an order for the Republic to fulfill its obligation under the Treaty to protect the Claimant's investment»⁶⁹.

Moreover, in its final holdings the Tribunal directly granted to the Swedish investor the pecuniary remedy for monetary damages arising under the contract between the local company and the State-owned company, but ordered Latvia to ensure the payment of the double tariff to the local company in accordance with the contract.

6. Final Remarks

Article 26(8) of the ECT is a *lex specialis* provision since it rules out, in principle, the inherent limitation of international arbitral tribunals in awarding non-pecuniary remedies in foreign individual-to-State investment disputes.

By vesting ECT tribunals with the authority to award both pecuniary and non-pecuniary remedies, the provision leaves the determination of the appropriate remedy in each case to the discretion of the competent arbitral tribunal.

The choice of the remedy to be awarded in each case is a matter within the discretionary appreciation of the tribunal, with a caveat. The scope of the discretionary authority of ECT tribunals to award a non-pecuniary remedy is dependent upon the content and nature of the substantive provisions that the Respondent State is found to have violated.

The liberty of ECT tribunals to decide among pecuniary and non-pecuniary remedies is limited in the case of a breach of Article 13 of the ECT, which protects investors from expropriation, in conformity with the principle of State sovereignty. As it results from the wording of Article 13, the ECT does not limit the Contracting Parties' right to nationalize or expropriate, but does subject the exercise of that right to the conditions set out in Article 13(1) of the ECT. In this respect the traditional rule applies: the awarding by the Tribunal of restitution to the claimant investor is subject to the sovereign will of the Respondent⁷⁰.

The latitude given by the ECT to arbitral tribunals with regard to remedies is broader in respect to breaches of the ECT provisions other than those on expropriation. ECT-based tribunals can decide *ex officio* to award a non-pecuniary remedy in respect of all other breaches (breaches of the umbrella clause included), provided that due process is respected, and the opportunity to discuss the issue is given to the parties to the dispute⁷¹. In such cases the discretionary authority of ECT arbitral tribunals is coherent and consistent, not only with the objectives of the ECT but also with the catch-all commitment of the Contracting Parties «to encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area» and the connected with «commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment» (Article 10(1), first and second sentences of the ECT)⁷².

The wide discretion of ECT arbitral tribunals to select a preferable remedy on the basis of the nature and peculiar circumstances of the breach of the ECT found in each specific case can operate in favour of Respondent States, since claimant investors generally frame their claims in monetary terms. As opposed to the calculation of damages in cases of expropriation, the calculation of monetary damages arising from breaches of the other *standards* might be too uncertain to be considered as a reasonable basis for State liability⁷³. For instance, in many cases of a breach of the Fair and Equitable

⁶⁹ *Nykomb Synergetics Technology Holding AB v. Latvia*, SCC Case No. 118/2001, Arbitral Award, December 16, 2003, p. 41.

⁷⁰ That is irrespective of whether expropriations or nationalizations are qualified as direct or indirect, since under the ECT indirect expropriations or nationalizations are equated to direct expropriations or nationalizations.

⁷¹ The parties shall have the opportunity to be heard, but the decision of a Respondent State to not take part in the proceedings cannot limit the Tribunals' power over remedies under the treaty. Neither can the decision of the Respondent shift the burden of proving that legal restitution is not impossible to the Claimants.

⁷² Not to speak about the duty of an ECT arbitral tribunal to award at least an appropriate non-pecuniary remedy to the claimant in case that a breach of umbrella clause, which protects rights arising from obligations specifically entered into by the host State with the said investor or its investment, is found but the monetary damages suffered are considered as not compensable since they are either not capable of being estimated with sufficient certainty, or too speculative.

⁷³ *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Final Award, June 8, 2010, paras 95-99.

Treatment *standard* (or umbrella clause), the Claimant still operates in the host State during the arbitration proceedings and generally will continue to operate therein for a certain period after the issuance of the award. While the calculation of past damages might appear to be a reliable operation, the opposite is true for the calculation of future damages. As outlined in section E, similar observations were made in the *Nykomb* case.

If this is the case, the insistence by the Respondent State upon restitution instead of monetary damages might be a defensive strategy to block claims for future damages, the quantification of which the Respondent considers too uncertain and speculative. That was the strategy of Moldova in the *Arif* case (non-ECT case mentioned in section B).

In that case, the solution applied by the Tribunal was to award restitution as a primary remedy, giving the Respondent a time limit to agree on a restitution solution with the claimant, and monetary damages as a subsidiary remedy in case of the Respondent's default. The passages of the award where the Tribunal justified its holdings are worth mentioning:

«The Tribunal considers restitution to be the preferable remedy, but as in the present case Respondent has not been able to confirm that restitution is possible, and the Tribunal cannot supervise any restitutionary remedy, the best course is to order restitution and compensation as alternatives, with the remedy of compensation suspended for a period of ninety days. This provides Respondent with the opportunity, in light of the findings of this award, to formulate and propose to Claimant the exact mechanism of restitution. If restitution is not possible, or the terms of restitution proposed by Respondent are not satisfactory to Claimant then the damages awarded will satisfy the violation of Claimant's right to fair and equitable treatment. This solution provides a final opportunity to preserve the investment, while also preserving Claimant's right to damages if a satisfactory restitutionary solution cannot be found⁷⁴.

In this respect, it is necessary to point out here that ECT arbitral tribunals have a wider authority to order non-pecuniary remedies than arbitral tribunals instituted under BITs (such as in the *Arif* case), since under Article 26(8), last sentence, of the ECT the wrongdoing Party has the obligation to take such provisions as may be necessary for making the enforcement of ECT awards effective, and this obligation extends to the negative or positive injunctions that an ECT tribunal may deem appropriate in the case⁷⁵.

Although compensation is the primary remedy in positive international law on foreign investors' protection (and restitution is a secondary remedy dependent upon the sovereign agreement of the wrongdoing State), the availability of non-pecuniary remedies to ECT arbitral tribunals was freely agreed upon by the Contracting Parties of the ECT probably due to the fact that investments in the energy sector are generally long term, and have large sunk costs.

Nevertheless, it should also be emphasized here that specific performance is generally the primary remedy at the national level in disputes between private individuals and public authorities⁷⁶. Judicial review over public authorities' decisions is provided for in many legal systems. For instance, all EU Member States' legal systems, as well as the European legal system, provide for judicial review over public authorities' decisions⁷⁷.

Domestic public authorities' decisions, having a negative impact on private economic interests or property rights, can be challenged by the individual concerned before domestic judges. When a public authority's decision is judged by the competent domestic judge as unlawful under domestic law (since, for instance, it has been issued by an incompetent authority), or considered to be clashing with the domestic rule of law, it is set aside.

Therefore, when a Contracting Party's measure specifically addressing a foreign economic operator in the energy sector is at stake, specific performance against that Party might be ordered by

⁷⁴ *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013, para 571.

⁷⁵ As it is outlined in section D.

⁷⁶ VAN AAKEN, *supra* n. 15 (and references therein).

⁷⁷ With reference to the remedies under EU law, and the concept of legitimate expectations in EU law, see, *inter alia*, A. ALBORS-LLORENS, *Remedies Against the EU Institutions After Lisbon*, in *CLJ*, 2012, pp. 507–536 (and references therein); and S. M. STEFÁNSSON, *Legitimate Expectations in EC/EEA Law*, in M. MONTI, N. VON UND ZU LIECHTENSTEIN, B. VERSTERDORF (Eds.), *Economic Law and Justice in Times of Globalization*, 2007, p. 627 ff.

either an ECT arbitral tribunal or a competent domestic judge, with the consequence that the practical outcome could be the same.

In this respect, a further element must be stressed here. While the same measure might be subject to the judicial review of either the international arbitral tribunal or the competent domestic judge with the aim to maintain the rule of law, the standards of review applicable on the international and domestic levels are different. While the national judge applies the domestic rule of law, the international judge or arbitrator applies (or should apply) the international rule of law with the result that a measure, judged as arbitrary in application of the domestic rule of law, may be in compliance with the international rule of law. The *ELSI* case well illustrates the point. In considering an Italian measure (i.e., a requisition), already found by the Italian judges as arbitrary under the domestic rule of law, as not arbitrary under international law, the Court observed that:

«[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the International Court of Justice (ICJ) in the *Asylum* case when it spoke of “arbitrary action” being “substituted for the rule of law” It is a wilful disregard of due process of law, an act that shocks, or at least surprises, a sense of juridical propriety»⁷⁸.

Moreover, as it has been stressed by the ICJ itself, what is unlawful in the municipal law because of its “arbitrariness” under the domestic rule of law, «... may be wholly innocent of violation of a treaty provision», as it indeed occurred in the *ELSI* case⁷⁹.

Furthermore, specific performance, which is considered to be a more intrusive remedy into State sovereignty than monetary damages from a legal viewpoint, might be less burdensome for Respondent States if one adopts an economic perspective. This is the case when the Respondent State’s measures at stake before arbitral tribunals are measures of general application, negatively impacting an open-ended class of investors protected under the treaty. Not to speak about the fact that restitution in such a case might stop investors' claims for future damages, which appear to be too speculative.

⁷⁸ *Elettronica Sicula S.P.A. (ELSI)*, Judgment, ICJ Rep 1989, para 128, p. 76.

⁷⁹ *Ibid.*, para 73, p. 51.