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**Awarding Damages or Demanding Performance? A Performance-Oriented Approach
for International Investment Law**

Geraldo Vidigal^{*}
European University Institute

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^{*} Jean Monnet Postdoctoral Fellow, European University Institute, Florence. This paper was produced as part of the project 'Dispute Settlement in Trade: Training in Law and Economics' (DISSETTLE), a Marie Curie Initial Training Network (ITN) funded under the EU's Seventh Framework Programme, Grant Agreement No FP7-PEOPLE-2010-ITN_264633 (www.dissettle.org) and presented at the 2014 PEPA/SIEL Conference in São Paulo, Brazil.

Abstract: This paper examines two different approaches to judicial protection of entitlements in international economic law. One of them, ‘performance-oriented’, is applied by WTO adjudicators. Performance-oriented remedies focus on inducing wrongdoers to resume compliance with the underlying substantive rules. The other, ‘reparation-oriented’, is applied overwhelmingly in international investment law. Reparation-oriented remedies aim at offsetting the injury caused to private parties by the wrongful conduct. This paper discusses the utility of performance-oriented remedies within WTO law, and assesses the possibilities for otherwise reparation-oriented investment tribunals to have recourse to these remedies. It examines a number of decisions that, it is argued, favor performance over pecuniary compensation. From the viewpoint of the state found in breach, compensation then appears as a threatened sanction for non-compliance with the performance obligations determined.

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1 Introduction

This paper examines two different approaches to judicial protection of entitlements in international economic law. One of them, ‘performance-oriented’, is that applied by adjudicators at the World Trade Organization (WTO). Performance-oriented remedies focus on inducing the wrongdoer to resume compliance with the underlying substantive rules. The other, ‘reparation-oriented’, is applied overwhelmingly in international investment law. Reparation-oriented remedies aim at offsetting the injury caused to private parties by the wrongful conduct. In international investment law, the main instruments employed for this purpose are awards for the payment of financial compensation.

It has often been argued that the WTO should adopt retrospective remedies, and panels and the Appellate Body should be empowered to order wrongdoers to pay compensation for breach.¹ This paper examines the opposite question: the possibilities for otherwise reparation-oriented investment tribunals to have recourse to performance-oriented remedies. This does not mean abandoning financial compensation, but recognizing that the ultimate purpose of investment law, as stated in the preamble to the 2012 US Model Bilateral Investment Treaty, is to ‘promote greater economic cooperation’, and to ‘maximize effective utilization of economic resources and improve living standards’, by establishing ‘a stable framework for investment’.

The paper proceeds in three sections. Section 2 discusses the traditional investment law remedy of financial compensation and the alternative of remedies aimed at compliance, arguing that, despite the attention received by the ‘last resort’ of authorized retaliation, WTO remedies induce compliance by intervening within a process of persuasion more than by effectively leading to economic sanctions. Section 3 examines the use, in international investment law, of remedies and techniques aimed at inducing compliance rather than awarding damages. Section 4 Concludes.

¹ WTO Trade Negotiations Committee, Proposal of the African Group, ‘Negotiations on the Dispute Settlement Understanding’, 9 Sept. 2002 (TN/DS/W/15), 3; PAUWELYN, 2000, p. 346; BRONCKERS; VAN DEN BROEK, 2005; BREWSTER, 2011; BRONCKERS; BAETENS, 2013.

2 Performance-Oriented and Reparation-Oriented Remedies

Following almost half a century of debate, the International Law Commission (ILC) has codified the consequences of breaches of international law in its Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). In ARSIWA, consequences for breach are divided into two broad branches, termed in the official Commentary the ‘core legal consequences’ of responsibility.² The first branch covers the duty of cessation, that is, the obligation to put an end to unlawful conduct, if it is continuing. Cessation, provided for in ARSIWA Article 30(a), is the ‘first requirement’ for a state to discharge its responsibility following a breach.³ This duty may be coupled, ‘if the circumstances so require’, with an obligation to offer assurances and guarantees of non-repetition.⁴ As the official Commentary to ARSIWA notes, the duty of cessation is ‘future-looking’;⁵ it is the *prospective* portion of the consequences arising out of unlawful conduct. The *retrospective* portion of consequences is provided for in ARSIWA Article 31, which requires the responsible state to ‘make full reparation for the injury caused by the internationally wrongful act’. Reparation may take three different forms: *restitutio in integrum*, with the restoration of the situation prior to the breach; financial compensation, covering any financially assessable damage that restitution cannot redress; and satisfaction, a category that encompasses a variety of symbolic measures whose unifying factor is the public recognition of the breach as such.

(a) Reparation-oriented remedies in investment law

The remedy of reparation, and in particular that of pecuniary compensation, has always been prevalent in international investment law. This may be attributed to two main reasons, both related to the type of violation international investment law traditionally aims at redressing, namely, expropriation of the property of foreigners by the states where investments are hosted. First, international investment law recognizes this sovereignty – a host state’s ‘fundamental right to choose and implement its own political, economic and social systems’.⁶ It therefore does not aim to affect the political, economic and social choices

² ILC, 2001, p. 87.

³ Ibid., p. 89.

⁴ ARSIWA, Article 30.

⁵ ILC, 2001, p. 90.

⁶ **Military and Paramilitary Activities in and Against Nicaragua (Merits)**, ICJ Reports 1986, p. 14, 131; **BP v Libya** (1973) 53 ILR 297, 353.

of host states, but merely to ensure that foreign investors get prompt, adequate, and effective compensation for this expropriation.

Second, international investment law acknowledges that, even if possible in theory, reversing governmental expropriations may be extremely difficult in practice. Expropriations may be politically motivated, aimed precisely at extracting certain industries from the control of foreigners. Even when this is not the case, the process leading to the expropriation often generates serious friction between the investors and governmental agents. A government forced to return control over the investment to the foreign investor could hamper (through regulation, administrative measures or simple coercion) the enjoyment by the investor of its investment.

For these two reasons, international investment law has traditionally focused on pecuniary compensation, awarding investors damages and setting governments free to pursue their own policies. For arbitrators, this generally means delivering a single award (a) determining whether a breach of the investment treaty has occurred; and (b) establishing an amount of compensation to be paid by the wrongdoing state to the investor.

(a) Performance-oriented remedies in WTO law

The starting point of WTO law is very different. It evolved from the General Agreement on Tariffs and Trade (GATT), a treaty that aimed, as its preamble makes clear, at the ‘substantial reduction of tariffs and other barriers to trade and ... the elimination of discriminatory treatment in international trade’. While the agreement provided for a number of escape clauses, the GATT’s long-term objective was effectively to change the conduct of states parties, with the gradual reciprocal lowering of trade barriers and the elimination of discriminatory practices. Additionally, GATT panels were not tribunals but had a more conciliatory function: GATT dispute settlement aimed at inducing an arrangement between the parties rather than at providing one of them with reparation. While panels and the Appellate Body are clearly judicial bodies, the process of WTO dispute settlement is still heavily influenced by this approach.

Under the WTO Dispute Settlement Understanding (DSU), adjudication proceeds in two phases. The first phase is that of ‘original’ adjudication. Panels and the Appellate Body determine the proper interpretation of WTO rules and find whether a defendant is in violation of these rules. In the affirmative, the offender is enjoined to resume performance. While in principle this must be done promptly, in practice WTO Members always have a reasonable period of time to implement rulings, generally of around 15 months. Only if non-performance

persists after this period do WTO rules allow injured Members to react to the unlawful conduct.

The second phase, known as the implementation phase, is known for the possibility that the injured party (in this case, a WTO Member) may adopt measures of retaliation ('suspension of concessions and other obligations') against the offender. Retaliation measures may only be taken in case the violation persists, and only at a level equivalent to that of the injury ('nullification or impairment') produced by the breach. For this reason, two further procedures must generally be followed before retaliation is authorized.

The first procedure is a compliance panel under DSU Article 21.5, responsible for solving any 'disagreement as to the existence or consistency with a [WTO] agreement of measures taken to comply' with the original rulings. Once the issue of (non-)compliance is settled, the injured Member may request an authorization for retaliation, specifying the level that it believes is equivalent to the injury produced by the breach. However, the offender may object (and always has objected) to the level of retaliation chosen, as well as to the choice of concessions and obligations made by the injured party. In this case, DSU Article 22.6 allows it to request an arbitration to determine the permissible type and level of retaliation. Only after these procedures does the WTO finally authorize retaliation.

(b) WTO remedies and compliance

While the WTO is sometimes celebrated for its 'teeth', the adjudication and implementation phases may take a few years to complete. The process seems almost designed to create procedural obstacles for the authorization for retaliation, delaying the moment at which members may finally retaliate. Compliance proceedings have been labelled 'a cost-free opportunity to delay compliance for several months',⁷ a 'delaying tactic employed by Members',⁸ or 'a de facto escape clause for the duration of the legal proceedings, which allows states to violate WTO law without providing any way for injured states to respond by suspending trade concessions'.⁹

The numbers, however, tell quite a positive story of compliance. Compared to the 159 adopted reports at the original stage, the DSB adopted 27 panel reports on compliance, of which 19 after review by the Appellate Body.¹⁰ Authorizations for retaliation were issued

⁷ HORLICK, 2002, p. 637.

⁸ BABU, 2012, p. 214.

⁹ BREWSTER, 2011, p. 104.

¹⁰ Of these, 104 had been appealed, leading to adopted Appellate Body reports as well. WTO Appellate Body, **Annual Report for 2013** (WTO, March 2014), 52.

only in nine disputes, always after arbitrators had determined its permissible level and kind.¹¹ Since both the compliance panel and the authorization for retaliation may be requested freely by the complainant, leading automatically to the a panel report or an authorization, the fact that over 80% of panel reports never gave way to subsequent stages of adjudication (although there is in principle no temporal limit for this to occur) is significant. While it does not mean that compliance was achieved, it means that the injured party has reached some sort of understanding with the offender on the matter. Only 6% of disputes adjudicated upon ever reach the retaliation stage. In many cases, authorized retaliation is never implemented.

The conclusion to be drawn is that, in spite of its apparent potential to ‘rebalance the scales’, allowing the injured party to withdraw concessions from an offender, WTO retaliation is only very rarely implemented by WTO Members. This is largely because it does not provide them with any concrete reparation for injury. Retaliating Members are not made ‘better off’ by retaliation; they are only interested in applying it to the extent it may function as yet another instrument to press for performance. Retaliation thus fulfils an essential function as a measure of last resort, available to the organization in case the wrongdoer does not comply with the initial ruling. With a number of advantages, compensation can be used to the same effect.

(c) Adopting a performance-oriented approach in investment arbitration

The goal of employing a more performance-oriented logic in investment arbitration does not require the abandonment or weakening of investors’ right to monetary compensation for legal breaches. The essence of the performance-oriented approach is in considering this remedy as a *ultima ratio* – the last option at the disposal of the tribunal to deal with a recalcitrant state – rather than the sole weapon in its arsenal. The first response of tribunals may instead be to demand from states found in breach performance, with the resumption of the investment relationship on lawful grounds.

The performance-oriented approach presents a number of advantages and few disadvantages. It gives the host state an opportunity to perform its obligations knowing precisely what these are, and conscious of the liability that it may incur if it does not comply. Perhaps more so than in WTO adjudication, the prospect of having to pay a large price for the breach may empower sectors of government that prefer compliance over those that favor

¹¹ *EC – Bananas*, *EC – Hormones*, *Brazil – Aircraft*, *US – FSC*, *Canada – Aircraft II*, *US – 1916 Act*, *US – Byrd Amendment*, *US – Gambling*, and *US – Cotton*. In *EC – Bananas* and *EC – Hormones* two complainants were authorised to retaliate; in *US – Byrd Amendment*, eight were. In *US – Cotton*, levels of retaliation for prohibited subsidies and for actionable subsidies are determined in two separate decisions.

insisting on the breach, and possibly sway public opinion in this direction. From the viewpoint of investors, performance-oriented remedies provide them with an instrument to obtain a negotiated settlement; a genuine agreement may be more profitable than an award for damages. The latter may be difficult to enforce, and even voluntary payment is likely to leave the host state ill-disposed towards the investor in the future. From the broader viewpoint of the objectives of investment law, allowing time for agreements ensures that investment law is given a chance to exercise its ultimate purpose: ensuring respect for the rights of investors and contributing to the economic development of the host country.

The performance-oriented approach does not require a modification of the remedies employed in international investment law, but merely a strategic use by the tribunal of these remedies. Rather than delivering a single decision at the end of the procedure, the tribunal may issue preliminary decisions that, without determining the outcome of the case, clarify issues of law and of legal interpretation. Even in its final award, the tribunal may propose solutions different from the mere payment of damages. A relevant practice in fact exists on this matter.

3 Performance-Oriented remedies in international investment law

Investment tribunals have generally adopted performance-oriented remedies of two kinds. The first kind involves a decision prior to the final award, anticipating the possible results of the dispute and providing parties with the opportunity of complying with substantive rules rather than incurring responsibility. The second type of performance-oriented remedy takes place when the final award itself allows host states a choice between performance (often framed as *restitutio in integrum*) and the payment of damages.

(a) Performance-oriented partial decisions

Under UNCITRAL Rules, arbitral tribunals are explicitly empowered to ‘make separate awards on different issues at different times’, and parties engage to ‘carry out all awards without delay’.¹² This freedom has allowed a practice of partial awards of various kinds,¹³ and has been important in leading to negotiated settlements. In *Saluka v Czech*

¹² UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), Article 34.

¹³ See e.g. **Sergei Paushok et al. v the Government of Mongolia**, UNCITRAL arbitration, Award on Jurisdiction and Liability, 28 April 2011.

Republic, the Arbitral Tribunal issued a partial award in which it found that, even if the Czech Republic's actions did not amount to unlawful expropriation, they breached the standard of fair and equitable treatment.¹⁴ While the parties had been negotiating a settlement, only after this decision were they able to agree – first, by determining a cap on the amount of damages the Tribunal was allowed to award, and subsequently, with the payment by the Czech Republic of an indemnity.¹⁵

Contrasting with the liberty afforded to Tribunals under UNCITRAL Rules, the ICSID Convention explicitly provides that an arbitral award 'shall deal with every question submitted to the Tribunal'. However, ICSID Tribunals have long adopted a practice of issuing 'decisions on jurisdiction' prior to issuing the final award. More recently, some Tribunals have also issued 'decisions on liability'.¹⁶

ICSID Arbitral Tribunals in *SGS v Philippines* and *BIVAC v Paraguay* have used decisions on jurisdiction to indicate the likely outcome of their decisions on the merits. This was permitted by the specific character of the underlying disputes, concerning the non-performance by the host states of contracts signed with the claimants.

In *SGS v Philippines*, the ICSID Tribunal held that the failure of the Philippines to abide by its contract obligations would constitute a breach of the obligation of fair and equitable treatment, allowing SGS to submit a claim under the investment treaty. However, SGS could still obtain the reparation it claimed through judicial proceedings before local courts; a breach of treaty would only be characterized if these courts failed to provide SGS with the appropriate redress for the violation of contract. For this reason, the Tribunal found, SGS's claim was 'within jurisdiction but inadmissible'¹⁷ – it had been filed prematurely.

Rather than dismissing the claim, the Arbitral Tribunal decided to stay proceedings pending 'determination of the amount payable, either by agreement between the parties or by the Philippine courts'.¹⁸ The Tribunal thus essentially granted the Philippines an opportunity to comply with its treaty obligations, including through a court decision ensuring respect for the contract. In this case, there would be no breach of the Philippines' treaty obligations and

¹⁴ **Saluka Investments BV v Czech Republic**, Partial Award, IIC 210 (2006), 17th March 2006, Permanent Court of Arbitration [PCA], paras 265, 281.

¹⁵ GEORGIEV, 2008, p. 188.

¹⁶ **LG&E v Argentina**, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para. 267(e); **Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentina**, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para. 273; **Total S.A. v Argentina**, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para. 485(a), (d); **Burlington Resources Inc v Ecuador**, ICSID Case No ARB/08/5, Decision on Liability, 14 December 2012, 546(C)(1), (D)(1).

¹⁷ **SGS v Philippines, Decision on Jurisdiction**, ICSID Case No ARB/02/6, para. 171.

¹⁸ *Ibid.*, para. 175.

no international claim would arise. Rather than concluding from this that the case should be terminated, however, the Tribunal instituted a genuine mechanism for compliance control, establishing for the parties a duty to report to the Tribunal on compliance every six months.¹⁹ *BIVAC v Paraguay* also involved the claim that the non-performance of a contract constituted a breach of the standard of fair and equitable treatment. The ICSID Arbitral Tribunal held that, because the Courts of Asunción had exclusive jurisdiction over the contract, the treaty claim would not be admissible if, through proceedings before the domestic courts, BIVAC were able to vindicate its rights.²⁰ Like in *SGS v Philippines*, the Tribunal then stayed its proceedings and provided BIVAC with three months to pursue a claim before the local courts. Adopting a ‘supervisory function’, the Tribunal ‘directed’ the parties to ‘report to the Tribunal, separately or jointly, on the status of those proceedings at intervals of six months’.²¹ Interestingly, the Tribunal went even further than that of *SGS v Philippines* in establishing a number of conditions, to be followed both by the Paraguayan government and by its courts, in order to ‘deal[] fairly with the claims’ of BIVAC.²² In so doing, it indicated clearly the conditions under which performance could be achieved, avoiding the incidence of responsibility.

(b) Performance-oriented final decisions

Most international investment arbitrators conclude their awards by granting reparation in the form of damages. Under general international law, however, monetary compensation is a substitute for the preferred remedy of restitution. As famously defined in *Chorzów Factory*, ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed’.²³

The practical difficulties with restitution, and the infringement it represents on state sovereignty, have often been invoked – including in *Chorzów Factory* – to justify reparation by equivalent.²⁴ A few tribunals, however, have devised mechanisms for offering states the

¹⁹ Ibid., para. 176 (‘The parties are directed to report briefly to the Tribunal, either jointly or separately, at six-month intervals commencing 1 July 2004, on the steps being taken for the resolution of the present claim’).

²⁰ **BIVAC v Paraguay, Further Decision on Objections to Jurisdiction**, 9 October 2012, Case No. ARB/07/9, para. 282.

²¹ Ibid., para. 284.

²² Ibid., para. 285.

²³ **Factory at Chorzów (Merits)** (1928) PCIJ Ser A No. 17, p. 47.

²⁴ Ibid., p. 48. **Forests of Central Rhodope (Merits)** 3 RIAA (1933) 1405, 1432; **BP v Libya** (n 6); **Libyan American Oil Company (LIAMCO) v Libya** (1977) 62 ILR 140, 199.

opportunity of providing restitution and avoiding the incidence of reparation. The first of these was *Texaco v Libya*. Referring to *Chorzów Factory*, the Tribunal found 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.²⁵

The Tribunal went on to declare that Libya had breached its obligations and was ‘legally bound to perform’ the contracts signed with the claimant. It gave Libya five months to report on ‘measures taken ... with a view to complying with and implementing’²⁶ the award, reserving the possibility of compensation for further proceedings.

A similar solution, without the added burden of further proceedings, was arrived at by the ICSID Arbitral Tribunal in *Arif v Moldova*. The Tribunal considered restitution to be ‘more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host State’,²⁷ but found that it ‘[could] not supervise any restitutionary remedy’.²⁸ As a result, the Tribunal determined an amount of compensation, but offered the parties ninety days to enter into agreement concerning a form of restitution.²⁹ In case the claimant were not satisfied, it could then demand compensation.

(c) *Two-part judgments: Goetz v Burundi*

In *Goetz v Burundi*, the Arbitral Tribunal held that Burundi’s conduct (the withdrawal from a company of a number of certificates allowing for special ‘free zone’ treatment) constituted a ‘measure with similar effect’ to expropriation.³⁰ Instead of proceeding to find a breach and order restitution or compensation, the tribunal found that, at the time of its decision on jurisdiction, ‘the question of the international legality of the Decision of the 29 May 1995 remain[ed] open’.³¹ It then concluded that Burundi could avoid the unlawfulness of its actions entirely by offering restitution of the certificates or paying an equivalent indemnity, offering it four months to do so.³²

²⁵ **Texaco Overseas Petroleum Co v Government of the Libyan Arab Republic** (1979) 53 ILR 389, 507-508.

²⁶ *Ibid.*, 511.

²⁷ **Arif v Moldova**, Award, 8 April 2013, ICSID Case No ARB/11/23, para 570.

²⁸ *Ibid.*, para 571.

²⁹ *Ibid.*, para 572.

³⁰ **Goetz and Others v Burundi**, Award (First Part), 2 September 1998, ICSID Case No ARB/95/3, para. 130.

³¹ *Ibid.*, para. 131.

³² *Ibid.*, at 137.

The judgment was initially successful in inducing the parties to agree on a path towards compliance. Three months after it was issued, the parties reached an agreement whereby Burundi would reimburse the claimants' company for taxes collected unlawfully due to the company's status of a free zone company. The agreement also established a convention for the operation of the company, to be 'ratified' by ICSID. Disputes regarding compliance with the agreement and convention, both incorporated into the judgment, were submitted to the jurisdiction of ICSID Arbitral Tribunals.³³

Two years later, the claimants initiated a new dispute before ICSID, claiming that Burundi had not respected some provisions of the agreement and convention. The new procedure was riddled with difficulties and it took a decade for the newly composed ICSID Arbitral Tribunal to issue a final decision. The new Tribunal rejected the claimants' contention that Burundi's post-1999 measures constituted a new indirect expropriation, but awarded the claimants indemnities, with interest, for the original indirect expropriation and for a number of wrongful acts for which it found Burundi responsible.³⁴

4 Conclusion

The ability of arbitrators to order pecuniary compensation that can be enforced in a number of jurisdictions is certainly one of the major strengths of international investment law. However, awarding damages to investors is not the sole option available to tribunals.

In this regard, due consideration must be given to the swift administration of justice; performance-oriented remedies should not be used as a means to unduly extend the duration of the proceedings. However, in many cases Tribunals may be able to positively influence the prospects of agreement, both by the choice of remedies and by the means of delivering them. Especially when there is a realistic prospect that lawful relations between investor and host state may be restored, tribunals may find that alternatives exist that more adequately fulfil the objective of promoting economic cooperation and providing investors with a stable framework.

³³ **Goetz and Others v Burundi**, Award (Second Part), 29 January 1999, ICSID Case No ARB/95/3, para. 4 (Art. 13).

³⁴ **Goetz and Others v Burundi**, Award, ICSID Case No. ARB/01/2, 21 June 2012, para. 243.

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