



# Moral Damages Left in Limbo

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*In this article, the author highlights the marginal role of moral damages in international investment law. He emphasizes that the role of these damages is vaguely defined, which prevents arbitral tribunals from awarding them in most cases. The first part of the article defines the concept of moral damages and examines its status in public international law. This is followed by a jurisprudential analysis that reveals unsettled issues and controversial aspects surrounding this type of damages. The author concludes that borrowing concepts from other fields of international law, such as the approach taken by human rights tribunals, can clarify the status of moral damages in international investment law.*

*Dans cet article, l'auteur souligne la place marginale réservée aux dommages moraux en droit international de l'investissement. En effet, leur définition incertaine empêche les tribunaux d'arbitrage de les accorder dans le dispositif de leurs sentences. Par conséquent, la première partie du texte aborde généralement la notion de dommage moral, tout en examinant son statut dans les sources du droit international public. Par la suite, une analyse de la jurisprudence révèle ses zones grises persistantes. En conclusion, il est suggéré que l'emprunt d'autres éléments appartenant à la sphère du droit international public, à l'image des tribunaux spécialisés en droits de l'homme, peut mener à une plus grande précision dans l'identification du statut des dommages moraux*

## I. INTRODUCTION

The purpose of foreign investment is to generate wealth through the transfer of tangible or intangible assets from one country into another.<sup>1</sup> As such, investment arbitration primarily deals with economic claims, such as unlawful expropriation. That being said, protection and reparation are not limited to economic interests if the claimant can prove additional damages, such as moral damages.<sup>2</sup> The award of moral damages, which are in some way “human damages”, in the economically oriented field of investment arbitration can raise some contradiction and be problematic<sup>3</sup>. While the issue has gained increasing interest in the past few years, investment arbitrators remain prudent and reluctant to grant compensation for moral damage.

This paper will seek to understand why moral damages have been confined to such a marginal role in international investment law. In doing so, I will start by defining the concept of moral damages and examining its status in public international law (Section II). Through a review of the relevant case law, I will then turn our attention to the way investment arbitration tribunals have tackled the issue (Section III). This jurisprudential analysis will lead me to identify some unsettled issues and to analyze the most controversial aspects surrounding moral damages (Section IV). It will then be concluded that an interesting avenue for the future of moral damages in investment arbitration may be to learn and borrow some ideas and concepts from other fields of international law (Section V).

## II. MORAL DAMAGES IN PUBLIC INTERNATIONAL LAW

### A. Moral Damages in Private Law

The possibility to award moral damages is recognized in nearly every national legal system of either civil or common law.<sup>4</sup> For instance, the Supreme Court of Canada stated that “according to the general civil law rule, any prejudice, whether moral or material, even if it is difficult to assess, is compensable if proven”.<sup>5</sup> The approach is sensibly the same at Canadian common law.<sup>6</sup> While circumstances in which moral damages may be awarded may vary from one system to another, “it is settled amongst legal systems that at least in some instances non-pecuniary loss may be recoverable”.<sup>7</sup>

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1 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 2nd ed (New York: Cambridge University Press, 2004) at 7.

2 Andrea K Bjorklund, “Causation, Morality and Quantum” (2009) 32:2 *Suffolk Transnation'l L Rev* 435 at 436.

3 Panel Discussion, “Should Moral Damages Be Compensable in Investment Arbitration” in Ian A Laird & Todd J Weiler, eds, *Investment Treaty Arbitration and International Law* vol 3 (Huntington, NY: JurisNet, 2010) 233 at 242.

4 Wade M Coriell & Silvia M Marchili, “Unexceptional Circumstances: Moral Damages in International Investment Law” in Ian A Laird & Todd J Weiler, eds, *Investment Treaty Arbitration and International Law* vol 3 (Huntington, NY: JurisNet, 2010) 213 at 214.

5 *Augustus v Gosset*, [1996] 3 RCS 268 at para 27, 1996 CanLII 173 (SCC).

6 See Stephen M Waddams, *The Law of Damages* (Toronto: Canada Law Book Limited, 1983) at para 448.

7 Ingeborg Schwenzer & Pascal Hachem, “Moral Damages in International Investment Arbitration” in Stefan Kröll et al, eds, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution - Liber Amicorum Eric Bergsten* (Alphen aan den Rijn, Netherlands: Kluwer, 2011) 411 at 417.

## B. The Genesis of Moral Damages in Public International Law

Considering this global sympathy towards moral damages, it should come as no surprise that international law also allows for the compensation of moral damages. One of the earliest illustrations is the *Lusitania* case,<sup>8</sup> which involved the sinking of a British passenger ship by Germany during the First World War. More than 1000 people, including 128 U.S. nationals, were killed. The United States-Germany Mixed Claims Commission agreed to compensate the United States and the families of the victims. The Commission held that “an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation”<sup>9</sup> was compensable. It also famously stated that such injuries “are very real, and the mere fact that they are difficult to measure or estimate ... affords no reason why the injured person should not be compensated”.<sup>10</sup> The fundamental precept that underlies the Commission’s statement comes from the famous *Case concerning the factory at Chorzow*, in which the Permanent Court of International Justice affirmed the fundamental principle of full reparation: “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”.<sup>11</sup> The only way full reparation can truly be achieved is thus by recognizing and compensating moral damages.

In sum, the notion of moral damage is well rooted in the tradition of public international law. One commentator refers to the compensation of moral damages as “abundant and long-standing” in international law.<sup>12</sup> In contrast, “the awarding of moral damages in investment arbitration has been slow to gain traction”,<sup>13</sup> as will be discussed in Section III.B.

## C. Definition, Function and Types of Moral Damages

The fundamental principles laid forth in the *Lusitania* and *Chorzow* cases were codified in the *ILC Articles on State Responsibility*. The text of Article 31 explicitly refers to the duty to compensate moral damage:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.<sup>14</sup>

<sup>8</sup> UN, *Reports of International Arbitral Awards*, vol 7 (New York: United Nations, 2006) at 32-44, online: United Nations <[http://legal.un.org/riaa/cases/vol\\_VII/32-44.pdf](http://legal.un.org/riaa/cases/vol_VII/32-44.pdf)> [*UN Reports*].

<sup>9</sup> *UN Reports*, *supra* note 8 at 40.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Factory At Chorzów (Germany v Poland)* (1928), PCIJ (Ser A) No 17 at para 124.

<sup>12</sup> Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008) at 307.

<sup>13</sup> Jarrod Wong, “The Misapprehension of Moral Damages in Investor-State Arbitration” in Arthur W Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (Leiden, Netherlands: Martinus Nijhoff, 2013) 67 at 67.

<sup>14</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UNGAOR, 53rd Sess, Supp No 10, UN Doc A/56/10 (2001) at 91, online: United Nations <[http://legal.un.org/ilc/texts/9\\_6.htm](http://legal.un.org/ilc/texts/9_6.htm)> [*ILC Articles*].

Moral damages thus have an uncontroversial status in public international law. Their function is to provide monetary compensation for intangible but nevertheless real and actual injuries.<sup>15</sup>

In international law, the term “moral damage” is admittedly quite vague,<sup>16</sup> as it is understood to encompass any harm that is non-material or non-financial.<sup>17</sup> Three broad types of moral damage may however be distinguished. The first is damage to the personality rights of individuals, which is “perhaps the most common and obvious form of moral damage”.<sup>18</sup> This category seems to be what is described by *ILC Articles* to be moral damages. In fact, the commentaries to the *ILC Articles* describe moral damages as including “such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s home or private life”.<sup>19</sup> In theory, corporations, as legal persons, cannot suffer such damages<sup>20</sup> (see Section IV.A). Second, moral damage may also adversely affect the reputation or credit of an individual or corporation. As Borzu Sabahi points out, reputational damage “seems to have a dual character, as it may have clear monetary consequences and hence in some cases be considered as material”.<sup>21</sup> As such, the moral dimensions of the reputational damage will have to be clearly delineated from the other economic dimensions to avoid double compensation (see Section IV.D). The third category of moral damage is “legal damages”, which arise from the *ipso facto* violation of an international obligation.<sup>22</sup>

### III. AN OVERVIEW OF MORAL DAMAGES IN INVESTMENT ARBITRATION

While the concept of moral damage has been recognized in public international law for over a century, it has only recently risen as a subject of interest in international investment law.

#### A. Moral Damages in a State of Limbo

Neither international investment law instruments nor arbitral rules directly address the question of moral damages.<sup>23</sup> This does not mean that moral damages are not compensable in

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15 Bernd Ehle & Martin Dawidowicz, “Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation” in Jorge A Huerta-Goldman, Antoine Romanetti & Franz X Stirnimann, eds, *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2013) 293 at 294 [Ehle & Dawidowicz].

16 Patrick Dumberry, “Compensation for Moral Damages in Investor-State Arbitration Disputes” (2007) 27:3 J Intl Arb 247 at 248 [Dumberry, “Compensation”].

17 Borzu Sabahi, “Moral Damages in International Investment Law: Some Preliminary Thoughts in the Aftermath of *Desert Line v Yemen*” in Jacques Werner & Arif Hyder Ali, eds, *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* (London: Cameron May, 2009) 253 at 255 [Sabahi].

18 Ehle & Dawidowicz, *supra* note 15 at 293.

19 *ILC Articles*, *supra* note 14 at 92.

20 Sabahi, *supra* note 17 at 255.

21 *Ibid.*

22 *Ibid* at 256.

23 Lars Markert & Elisa Freiburg, “Moral Damages in International Investment Disputes – On the Search for a

investment arbitration. To the contrary, many tribunals “have overwhelmingly affirmed their power to award moral damages”.<sup>24</sup> For example, a tribunal stated that nothing in the ICSID Convention “prevents an arbitral tribunal from granting moral damages”.<sup>25</sup> Patrick Dumberry adds that he is “unaware of any BIT [bilateral investment treaty] that expressly prohibits arbitral tribunals from awarding compensation for moral damages”.<sup>26</sup> While that may be true, this legislative silence leaves arbitrators with the colossal task of developing the fundamental rules and principles that should guide the award of moral damages. This task is rendered even more difficult by the fact that the jurisprudential history and support of moral damages in investment arbitration are thin. To this date, there has only been one clearly successful ICSID claim for moral damages;<sup>27</sup> that being said, no arbitral tribunal has ever refused to award moral damages as a matter of principle.<sup>28</sup> This jurisprudential hesitancy, combined with the theoretical recognition of moral damages, leaves the issue of moral damages in a state of limbo, as the subsequent review of the case law will show.

## B. Moral Damages in Investor-State Disputes – A Review of the Case Law

As mentioned above, the investment arbitration case law on the issue of moral damages is quite limited. This young jurisprudential history can however be separated into four noteworthy periods or events: the early cases, *Desert Line v Yemen*, the aftermath of *Desert Line*, and the modern restatement.

### i. The Early Cases

The first time an ICSID tribunal granted reparation for moral damages was in the case of *Benvenuti & Bonfant v Congo*,<sup>29</sup> in 1980. Benvenuti, an Italian company, entered into an agreement with the Congolese government to launch a joint venture to produce bottled mineral water. After Congo nationalized the joint venture, expropriating by doing so Benvenuti’s stake, and allegedly threatened to arrest an Italian manager, Benvenuti left the country and commenced ICSID proceedings against Congo. In addition to compensation for the expropriation of the value of their interest in the joint venture, Benvenuti also claimed compensation for moral prejudice, namely loss of business opportunities in Italy, loss of credit with its suppliers and banks, and loss of its managerial and technical staff as a result of their forced and hasty departure from Congo.<sup>30</sup> The tribunal described these allegations as “mere assertions unaccompanied by concrete evidence,

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Legal Basis and Guiding Principles” (2013) 14:1 J World Investment & Trade at 17-18 [Markert & Freiburg].

24 Conway Blake, “Moral Damages in Investment Arbitration: A Role for Human Rights?” (2012) 3:2 J Intl Dispute Settlement 1 at 4.

25 *Cementownia “Nowa Huta” SA v Turkey*, Award (17 September 2009) at para 169, International Centre for Settlement of Investment Disputes (ICSID), Case No ARB(AF)/06/2 (Arbitrators: Pierre Tercier, Honourable Marc Lalonde, J Christopher Thomas), online: Investment Treaty Arbitration <<http://www.italaw.com/cases/228>> [*Cementownia*].

26 Dumberry, “Compensation”, *supra* note 16 at 274.

27 *Desert Line Projects LLC v Yemen*, Award (6 February 2008) ICSID, Case No ARB/05/17, (Pierre Tercier, Jan Paulsson, Ahmed S El-Kosheri), online: Investment Treaty Arbitration <<http://www.italaw.com/cases/documents/357>> [*Desert Line*].

28 Dumberry, “Compensation”, *supra* note 16 at 253.

29 *SARL Benvenuti & Bonfant v People’s Republic of the Congo*, Award (8 August 1980), ICSID, Case No ARB/77/2, 1 ICSID Rep 330 (1993) [*SARL Benvenuti*].

30 *Ibid* at para 4.95.

or even the beginning of evidence”.<sup>31</sup> Quite surprisingly, it nevertheless accorded CFA 5 million (roughly equivalent to €8,000) because the activities of the claimants had certainly been disturbed by Congo’s measures.<sup>32</sup>

Despite this arguably historic award of moral damages, *Benvenuti* is of limited value for two main reasons. First, the tribunal did not even elaborate on what were those “measures” that disturbed the company’s activity and therefore justified the compensation. As such, it is unclear whether the tribunal did award compensation for moral damages at all. The small amount of compensation granted does not appear to relate to intangible losses that would ordinarily give rise to moral damages, such as stress, anxiety, and mental suffering,<sup>33</sup> but was rather awarded because the events had “disturbed the activity of the company”. What was compensated was not really actual damage suffered, but rather the practical consequences for the company.<sup>34</sup> Second, as pointed out above, the tribunal explicitly stated that there was no evidence of any moral damage. One can only wonder why the tribunal nevertheless granted moral damages, especially since it failed to provide any authority or analysis on the quantification of the compensation. According to Dumberry, the fact that the tribunal had the power to rule *ex aequo et bono* is the only reason why moral damages were accorded.<sup>35</sup> For all the foregoing reasons, “*Benvenuti* provides limited guidance for constructing a sound theory of moral damages”.<sup>36</sup>

Considering the many flaws of the *Benvenuti* case, it is not surprising that it did not start a new trend in favour of more generous awards of moral damages, as the early 2000s cases of *Bogdanov v Moldova*<sup>37</sup> and *Tecmed v Mexico*<sup>38</sup> illustrate. In the first case, the tribunal settled the issue in one sentence, mentioning that the claimant “failed to produce any factual evidence for moral damages”.<sup>39</sup> The *Tecmed* decision is more interesting. It involved a Spanish company that sought compensation from Mexico for cancelling the previously authorized construction of a waste disposal landfill. The tribunal awarded compensation for indirect expropriation and the violation of fair and equitable treatment, but denied the request for moral damages for lack of evidence that Mexico’s actions “have also affected the Claimant’s reputation and therefore caused the loss of business opportunities”.<sup>40</sup> Although no moral damages were accorded, the tribunal nevertheless acknowledged the possibility that moral damages could be used to compensate reputational damage to legal persons. As it was the also the case in *Bogdanov*, the case also shows

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31 *SARL Benvenuti*, *supra* note 29 at para 4.96.

32 *Ibid.*

33 Wong, *supra* note 13 at 76.

34 Dumberry, “Compensation”, *supra* note 16 at 255.

35 *Ibid.*

36 Wong, *supra* note 13 at 76.

37 *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova*, Award (22 September 2005) Arbitration Institute of the Stockholm Chamber of Commerce Case No 93/2004 (Arbitrator: Giuditta Cordero Moss), online: Investment Treaty Arbitration <<http://www.italaw.com/cases/168>> [*Bogdanov*].

38 *Técnicas Medioambientales TECMED, SA v The United Mexican States*, Award (29 May 2003), ICSID, Case No ARB (AF)/00/2, online: Investment Treaty Arbitration <<http://italaw.com/cases/documents/1088>> [*Tecmed*].

39 *Bogdanov*, *supra* note 37 at 19.

40 *Tecmed*, *supra* note 38 at para 198.

the necessity that the allegations of moral damage be supported by sufficient evidence.<sup>41</sup>

As Jarrod Wong puts it, it was “not quite the auspicious start for moral damages that one might have hoped for”.<sup>42</sup> Awards of moral damages were rare, if not inexistent, and no investment tribunal had even bothered to elaborate on the nature of moral damages or the conditions of attribution. *Desert Line v Yemen*,<sup>43</sup> a case arbitrated in 2008, is a modest but nevertheless important development on the issue.

ii) *Desert Line v Yemen*

*Desert Line* is by far the most discussed and analyzed investment case on moral damages, and therefore a more detailed account of the facts is warranted.<sup>44</sup> The claimant was an Omani company who had contracted with the Yemeni government to build long stretches of road in Yemen. In January 2004, the company requested payment as most of the contracts had been completed. The Yemeni government did not respond to the requests and the company remained unpaid. In March of the same year, 15 armed men of a Yemeni subcontractor who also had not been paid stormed into one working site, demanding payment of outstanding invoices and threatening the company’s personnel by opening fire with automatic weapons. When the company reiterated to the government its request for payment and asked for protection, the government simply responded to complete the works and to not worry. The company then decided to interrupt the outstanding works, and in response the Yemeni army sieged one working site, preventing the evacuation of the company’s equipment and personnel. In June, the company and the government went to arbitration and the Yemeni arbitral tribunal rendered an award of USD 100 million in favour of the company. Soon after, three workers were arrested and detained for three days after an altercation broke out between the company’s personnel and the Yemeni army. Instead of paying the award, the government urged the company to accept a USD 20 million settlement. Meanwhile, the company complained that some of its employees were subject to harassment, threat and theft by the armed forces. The company accepted the settlement agreement, but soon after commenced ICSID arbitration under the Oman-Yemen BIT. The company claimed the rescission of the settlement and the reinstatement of the arbitral award that was originally granted. The tribunal observed that the settlement agreement was not “the result of an authentic, fair and equitable negotiation”<sup>45</sup> and, as such, ordered Yemen to pay the amount due under the Yemeni arbitral award.

More importantly to the topic of interest of this paper, the company also sought USD 104 million as moral damages for loss of credit and reputation as well as for the stress and anxiety suffered by its personnel as a result of the threats, intimidation, violence, arrests and detentions perpetrated by the government.<sup>46</sup> Relying on the *Lusitania* case, the tribunal started by confirming that moral damages are *prima facie* recoverable in investment law, but then added that such is

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41 Markert & Freiburg, *supra* note 23 at 19.

42 Wong, *supra* note 13 at 76.

43 *Desert Line*, *supra* note 27.

44 *Ibid* at paras 3-49 (See for the factual background).

45 *Desert Line*, *supra* note 27 at para 179.

46 *Ibid* at para 286.

the case only in exceptional circumstances.<sup>47</sup> The tribunal also affirmed that a legal person is entitled to receive moral damages in specific circumstances.<sup>48</sup> On the facts, the tribunal found that the claimant's personnel were subject to physical duress and that the government's violation of the BIT "was malicious and ... therefore constitutive of a fault-based liability".<sup>49</sup> The tribunal nevertheless considered that the amount sought was exaggerated and awarded a reduced and "symbolic" amount of USD 1 million for moral damages.<sup>50</sup>

It should be noted that the tribunal's analysis on the question of moral damages is merely two paragraphs long. One can only find it ironic that the major breakthrough on the issue in investment law comes from such a swift discussion. The decision raises important questions and can be criticized on a lot of grounds, which will be examined further in Section IV. Suffice it to say, for now, that *Desert Line* is an important development as it reminded the investment arbitration community of the possibility of seeking compensation for moral damages, which had been neglected in investment arbitration until then.<sup>51</sup> The cases that followed, however, tempered the optimism of the advocates of moral damages.

### iii. The Aftermath of *Desert Line*

Only three months after the *Desert Line* decision, another ICSIC tribunal was faced with a claim for moral damages. The case of *Pey Casado v Chile*<sup>52</sup> involved Victor Pey Casado, the Spanish majority owner of the most important Chilean newspaper. After the newspaper was shut down by the Pinochet regime, Pey Casado commenced arbitral proceedings. The arbitral tribunal held that Chile breached the BIT's fair and equitable treatment provisions and therefore awarded Pey Casado USD 10 million in compensation.<sup>53</sup> Pey Casado also sought moral damages, alleging that he was mistreated by the Chilean military authorities and then forced to leave Chile. The tribunal rejected the claim for moral damages on the basis that the claimant had not presented sufficient evidence and that the compensation already awarded "*constitue en soi une satisfaction morale substantielle et suffisante*".<sup>54</sup> As I will analyze further in Section IV.B and as Jarrod Wong puts it, "this last statement reflects a flawed understanding of moral damages".<sup>55</sup> Furthermore, the tribunal doesn't even refer to the *ILC Articles* or to the *Desert Line* ruling. *Pey Casado* is thus a disappointing ruling, as it appears to be a step back from *Desert Line*.

The next case of interest is *Funnekotter v Zimbabwe*,<sup>56</sup> in which Dutch owners of commercial farms in Zimbabwe initiated ICSID arbitration against the government of Zimbabwe, alleging

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<sup>47</sup> *Desert Line*, *supra* note 27 at para 289.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* at 290.

<sup>50</sup> *Ibid.*

<sup>51</sup> Sabahi, *supra* note 17 at 264.

<sup>52</sup> *Victor Pey Casado and President Allende Foundation v Republic of Chile* Award (8 May 2008), ICSID, Case No ARB/98/2, online: Investment Treaty Arbitration <<http://www.italaw.com/cases/829>> [*Pey Casado*].

<sup>53</sup> *Ibid* at paras 647, 717.

<sup>54</sup> *Pey Casado*, *supra* note 52 at para 704.

<sup>55</sup> Wong, *supra* note 13 at 80.

<sup>56</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (2009), ICSIC Case No ARB/05/6, online : <<http://www.italaw.com/cases/467>> [*Bernardus Henricus Funnekotter*].

the expropriation of their lands without compensation. The tribunal found for the claimants on that issue. The tribunal also compensated the claimants “for the disturbances resulting from the taking over of their farms and for the necessity for them to start a new life often in another country”.<sup>57</sup> The tribunal then went on to reject the claimants’ request for moral damages because such damages were “already compensated by the allocation of a disturbances indemnity”.<sup>58</sup> Wong believes “this holding misunderstands the nature of moral damages”.<sup>59</sup> Indeed, the disturbance indemnity seems to compensate for economic losses caused by the need to relocate rather than for intangible injuries.<sup>60</sup> Perhaps the claimants did not emphasize greatly enough the intangible consequences of the expropriation (stress, anxiety, etc.), but the tribunal’s equation of moral damages with economic disturbances is odd. This confusion may be because, as in *Pey Casado*, it appears the tribunal did not consider *Desert Line*.

*Pey Casado* and *Funnekotter* were disappointing not so much for their holding, but more for their weak analysis and expeditious discussion on the claim for moral damages. Oddly enough, the next case, *Biwater v Tanzania*,<sup>61</sup> is more interesting and relevant to the question even though the claimants did not formally seek moral damages. Biwater Gauff, a UK-based company, was selected by the Republic of Tanzania to manage and operate a project seeking to modernize and improve Dar es Salaam’s water delivery and sewage services. The first two years of the project were rocky, to say the least.<sup>62</sup> The relationship of the parties deteriorated quickly and mediation failed.<sup>63</sup> Tanzania then seized the company’s assets, occupied its facilities, and deported three of its executives. In arbitration, the tribunal concluded that these actions were “unreasonable and arbitrary, unjustified by any public purpose”.<sup>64</sup> The majority of the tribunal however held that no compensation could be awarded because, the project being of “no economic value”,<sup>65</sup> the claimant did not actually suffer any monetary loss as a result of the Republic’s violations of the BIT.<sup>66</sup> For his part, the dissenting arbitrator, Gary Born, would have awarded moral damages to the investor. In his opinion, Tanzania deliberately violated the fundamental international rights and protections of the claimant, thereby causing moral damages to the claimants that demand “a remedy beyond merely declaring it a violation of the relevant BIT”.<sup>67</sup>

This split decision exemplifies the confusion that was prevailing over moral damages

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<sup>57</sup> *Bernardus Henricus Funnekotter*, *supra* note 56 at para 138.

<sup>58</sup> *Ibid* at para 140.

<sup>59</sup> Wong, *supra* note 13 at 84.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Award (24 July 2008) ICSID, Case No ARB/05/22, online: Investment Treaty Arbitration <<http://www.italaw.com/cases/157>> [*Biwater Gauff Award*].

<sup>62</sup> *Ibid* at para 147 (a description of the problems encountered).

<sup>63</sup> Bjorklund, *supra* note 2 at 439.

<sup>64</sup> *Biwater Gauff Award*, *supra* note 61 at para 503.

<sup>65</sup> *Ibid* at para 792.

<sup>66</sup> *Ibid* at para 807.

<sup>67</sup> *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, Concurring and Dissenting Opinion*, Opinion (18 July 2008) at para 33, ICSID, Case No ARB/05/22, online: Investment Treaty Arbitration <[http://www.italaw.com/sites/default/files/case-documents/ita0093\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0093_0.pdf)>.

at the time.<sup>68</sup> For the dissenting arbitrator, the moral injury was the violation of the BIT; for the majority, there could not be any moral damages awarded without proof of a quantifiable injury resulting from the violation.<sup>69</sup> While the majority's approach is more in line with the *ILC Articles* that depict the injury and the wrongful act as two separate elements,<sup>70</sup> its reasoning on moral damages is evasive and unsatisfactory. Indeed, the majority merely declared that moral damages were "inappropriate" given "the circumstances of this case, and in particular [Biwater's] own conduct".<sup>71</sup> It is unclear what those circumstances were and where does the investor's contributory behaviour fit in the analysis. Andrea Bjorklund believes that "the tribunal might have been hospitable to a claim for moral damages had there been a claim and accompanying proof".<sup>72</sup> Wong is more skeptical; for him, "the majority appeared to have focused only on the economic consequences of the expropriation itself".<sup>73</sup> In any event, he argues that moral damages may well be warranted, but not for the reasons put forth by Born.<sup>74</sup> Indeed, even the majority found that some of the claimant's executives were illegally arrested, detained for an entire day and then immediately deported.<sup>75</sup> After all, Tanzania's conduct is not so far removed from Yemen's conduct in *Desert Line*. Unfortunately, "neither the majority decision nor Mr. Born's opinion focused on whether there was undue physical force involved or whether these actions inflicted moral injuries on the personnel or the corporation".<sup>76</sup> However, perhaps some of the blame should rest on the claimant who did not specifically bring a claim for moral damages, which I find quite surprising in the post *Desert Line* era.

The common thread running through these last three cases is that *Desert Line* did not yield to more frequent awards of moral damages, nor did it spark the interest of arbitrators to deepen their analysis on the topic.

#### iv. The Modern Restatement

The ICSID case of *Lemire v Ukraine*<sup>77</sup> is the most recent and detailed account of the state of the international investment case law on moral damages. This claim involved an American investor in the Ukrainian radio broadcasting industry. When the government decided to open up new radio frequencies, it granted between 38 and 56 additional frequencies to local investors but only one to the claimant, in a small rural village, despite more than 200 applications.<sup>78</sup> The claimant sought USD 3 million as compensation for, in the words of the claimant, "intense moral injuries, tantamount to bodily injury".<sup>79</sup> Specifically, he alleged that he suffered "constant

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68 Wong, *supra* note 13 at 82.

69 Bjorklund, *supra* note 2 at 444.

70 *Ibid* at 440-41.

71 *Biwater Gauff Award*, *supra* note 61 at para 808.

72 Bjorklund, *supra* note 2 at 445.

73 Wong, *supra* note 13 at 83.

74 *Ibid* at 82.

75 *Biwater Gauff Award*, *supra* note 61 at para 223.

76 Wong, *supra* note 13 at 83.

77 *Joseph Charles Lemire v Ukraine*, Award (28 March 2011), ICSID, Case No ARB/06/18, online: Investment Treaty Arbitration <<http://www.italaw.com/cases/documents/616>> [*Lemire*].

78 *Ibid* at para 59.

79 *Ibid* at para 313.

indignity, frustration, stress, shock, affront, humiliation, shame, degradation” and that his image was “eroded” as a result of the government’s recurrent BIT breaches.<sup>80</sup>

The tribunal began by reaffirming the position of the tribunal *Desert Line* that “moral damages may be awarded, but only under exceptional circumstances”.<sup>81</sup> The tribunal however went further and elaborated on what these exceptional cases may be:

- the State’s actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
- the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
- both cause and effect are grave or substantial.<sup>82</sup>

Applying the test to the facts of the case, the tribunal did not award moral damages to Mr. Lemire. First, the tribunal noted that the irregular tender process, although a BIT violation, did not involve physical duress or intimidation. Certainly referring to the *Desert Line* award, the tribunal declared that “the injury suffered cannot be compared to that caused by armed threats, by the witnessing of deaths or by other similar situations in which Tribunals in the past have awarded moral damages”.<sup>83</sup> It was also not convinced that Mr. Lemire sustained extraordinary stress and anxiety, especially since he was a “seasoned entrepreneur”.<sup>84</sup> In sum, two of the three requirements were not met, namely the presence of physical duress or analogous conduct and the gravity of the State’s conduct.<sup>85</sup>

Without a doubt, *Lemire v Ukraine* represents the most thoughtful and far-reaching analysis of the nature and circumstances of attribution of moral damages in international investment law. The test laid down by the tribunal can be summarized as such: moral damages may be awarded only in the exceptional cases where the host state has subjected the investor to grave physical duress or its equivalent and caused the investor to experience moral suffering or loss of reputation or credit.<sup>86</sup> But despite this apparently straightforward and intelligible proposition, several of its parts and underpinnings can be contested on various grounds, as the next section will attempt to demonstrate.

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80 *Lemire, supra* note 77 at para 315 (citing “Claimant’s Memorial on Remaining Issues”, 16 April 2010 at para 81 [footnotes omitted]).

81 *Ibid* at para 326.

82 *Lemire, supra* note 77 at para 333.

83 *Ibid* at para 339.

84 *Ibid* at para 337.

85 Wong, *supra* note 13 at 89.

86 *Ibid* at 88.

## IV. SOME DIFFICULTIES AND UNSETTLED ISSUES

The arbitral decisions examined above have left unanswered a number of fundamental questions. First, what is the basis for awarding moral damages to a corporation when the prejudice is suffered by its employees (Section IV.A)? Second, how can we determine in a given case if moral damages should be remedied by satisfaction or monetary compensation (Section IV.B)? Third, are fault and egregious conduct really pre-conditions for the recovery of moral damages (Section IV.C)? Finally, how and upon which essential principles should the quantum of compensation be assessed (Section IV.D)?

### A. Moral Damages to a Corporation and Its Employees

We naturally associate moral damages with mental suffering such as stress or anxiety and, as such, see it more as a concept relating to natural persons. It is common sense that corporations cannot suffer mental distress.<sup>87</sup> In *Desert Line*, however, the tribunal explicitly recognized that prejudice to a corporation's credit, reputation, and prestige is a form of moral damage that is compensable in international investment law.<sup>88</sup> Dumberry notes that the standing of corporations to bring a claim for moral damages "is not really controversial", as "the possibility for corporations to claim compensation for moral damages is recognized in many municipal legal orders".<sup>89</sup> After all, considering that most of the claims are brought by corporate investors,<sup>90</sup> the recognition and compensation of moral damages in international investment law would not mean much had it not been the case.

As clear as it is that legal persons cannot suffer personal harm and mental distress, a much thornier issue is whether a corporation may seek compensation for moral damage to the personality rights of its employees. If *Desert Line* is any indication, it seems we must answer this question in the affirmative.<sup>91</sup> The tribunal in that case does make a clear distinction between the various heads of damages,<sup>92</sup> but there is no doubt that a predominant part of the lump sum for moral damages was awarded for the harassment and detention of the claimant's executives, and for the duress and stress caused upon them.<sup>93</sup> Sabahi rightly points out that "the rules on standing should prevent awarding compensation for damage to the executives' personality rights".<sup>94</sup> Representatives of the investor are typically not included in most BITs' definition of "investor" and therefore fall outside of their scope and protection.<sup>95</sup> In *Desert Line*, moral damages were awarded to the corporation, which was the claimant. However, Yemen's mistreatment of *Desert Line*'s executives did not cause any direct moral damage to the corporation.<sup>96</sup> This does not mean

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87 Stephen Jagusch & Thomas Sebastian, "Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?" (2013) 29:1 Arb Intl 45 at 56.

88 *Desert Line*, *supra* note 27 at para 286.

89 Dumberry, "Compensation", *supra* note 16 at 266-67.

90 Ripinsky & Williams, *supra* note 12 at 311.

91 Sabahi, *supra* note 17 at 258.

92 See *Desert Line*, *supra* note 27 at paras 289-90.

93 Sabahi, *supra* note 17 at 258.

94 *Ibid* at 259.

95 Schwenzer & Hachem, *supra* note 7 at 423.

96 Dumberry, "Compensation", *supra* note 16 at 267.

that mental injuries suffered by employees can never lead to an award of damages in favour of the corporation, but that will only be the case if these injuries also affect the investment itself.<sup>97</sup> For example, the mental distress inflicted on employees may result in business interruptions or additional expenses to the corporation. These losses would be recoverable by the company, with no need to refer to the concept of moral damages, because it is asserting its own economic rights under the investment treaty.<sup>98</sup> As a matter of law, the tribunal's award of moral damages to the corporation at least partly for the harm sustained by its representatives is therefore hard to justify.

Given the above comments, on what basis can a company be awarded moral damages for the suffering of its employees? Absent of any legal reasoning on the matter, the only way to justify the *Desert Line* award is on equitable grounds. According to a strict application of the legal rules and principles, the only solution for the company's injured employees was to claim their own moral damages in separate individual proceedings.<sup>99</sup> Lars Markert and Elisa Freiburg explain what the obvious problem with this proposition is: "this would mean that employees have to seek compensation through the host state's national courts which – particularly when it comes to awarding moral damages against their national state – might not always have the required dimension of judicial independence".<sup>100</sup> With this in mind, the *Desert Line* tribunal probably did not find it reasonable to tell the company that its injured executives have no other choice but to seek redress in Yemeni courts.

Such an empathetic approach is sensible and relevant, but leaves us unsatisfied, as it does not erase all its legal shortcomings. Commentators have attempted to identify concepts and doctrines that could serve as proper legal bases for the compensation of the moral injuries of the company's employees. Sabahi submits that the doctrine of State espousal, a philosophical fiction according to which an injury to an individual is tantamount to an injury to his home State, could be used.<sup>101</sup> By analogy, the "corporate espousal" doctrine would equate damage to an employee of a corporation with damage to the corporation itself.<sup>102</sup> This solution would not be so far-fetched insofar as there exists a similar working mechanism in customary international law. Indeed, the doctrine of diplomatic protection allows a State to take action in favour of its alien citizens if the host state violates the minimum standard of treatment.<sup>103</sup> The use of this doctrine could explain the *Desert Line* award because there is no doubt that the tribunal in that case assumed that the injury to the employees of the company was an injury to the company itself.<sup>104</sup> I agree with Jarrod Wong that such solution "remains doctrinally problematic since it essentially glosses over the distinct personalities of the corporation and its individual employees".<sup>105</sup> Instead, Wong proposes to look to the subrogation principles. He explains that the corporation could be subrogated to the

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97 Schwenzer & Hachem, *supra* note 7 at 422.

98 Jagusch & Sebastian, *supra* note 87 at 57.

99 Dumbery, "Compensation", *supra* note 16 at 267.

100 Markert & Freiburg, *supra* note 23 at 35.

101 Sabahi, *supra* note 17 at 259.

102 *Ibid.*

103 Markert & Freiburg, *supra* note 23 at 35.

104 Sabahi, *supra* note 17 at 259.

105 Wong, *supra* note 13 at 98.

employee's claim against the host state and, as such, be entitled to claim moral damages on their behalf<sup>106</sup>. However, if we accept this proposition and that the corporate investor is successful in claiming moral damages on behalf of its employees, it must imply that the corporation will hand the indemnity over to its injured employees. It is unclear whether this happened in *Desert Line*.<sup>107</sup>

In sum, after *Desert Line*, it seems to be possible for corporate investors to successfully claim moral damages for the suffering of its employees.<sup>108</sup> As no recognized concept or rule of international law can serve as a satisfying foundation for this proposition, it can only be the result of a flexible application of investment law's rules on standing. This flexibility is first necessary for reasons of fundamental justice and equity, as discussed above. Another reason is that the compensation of the moral injuries of employees may well be, after *Lemire v Ukraine*, the only way corporations can receive moral damages at all. The test elaborated by the tribunal in *Lemire v Ukraine* (see Section III.B.iv) hardens the *Desert Line* decision on the issue of moral damages to corporations. One of the test's three conditions is that "the State's actions imply physical threat, illegal detention or other analogous situations".<sup>109</sup> John Laird rightly observes that this condition "makes moral damage almost inherently a concept related to natural persons ... as physical threat or detention seem impossible to perform against a legal person".<sup>110</sup> As such, awards of moral damages for injuries suffered by the employees of corporations may be the only way to preserve, and give relevance to, the widely accepted standing of corporations to claim moral damages.

That being said, it is worthwhile to take a look at Markert and Freiburg's insightful comments on the issue. The authors propose that the award of moral damages to corporations for harm to their employees should be conditional to two important requirements. First, the affected employees and the host state's breaches must be relevant for the company's investment operations in the host state.<sup>111</sup> After all, we are in the field of investment arbitration, and this condition is essential to ensure "that there is a sufficient nexus between the company's employees and the company's investment itself".<sup>112</sup> The condition would not have been a problem in *Desert Line*, as executive level employees easily qualify. Perhaps we should reformulate the general proposition and specify that the company may seek moral damages for harm done to its executives, managers and other key personnel, rather than for harm done to any of its employees. The second condition is that "the claimant company should at least demonstrate in a *prima facie* manner that it would constitute an undue hardship or to be futile for its employees to vindicate their own rights in the host state".<sup>113</sup> As mentioned, the compensation for injuries suffered by the employees rests for the large part on foundations and principles of equity. As such, it is important that it is not assumed, but rather proven, that the employees cannot reasonably bring their own action. Only when such

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106 Wong, *supra* note 13 at 98.

107 *Ibid.*

108 Markert & Freiburg, *supra* note 23 at 36.

109 *Lemire*, *supra* note 77 at para 333.

110 John R Laird, "Moral Damages and the Punitive Question in ICSID Arbitration" (2011) 26:2 ICSID Rev 171 at 181.

111 Markert & Freiburg, *supra* note 23 at 36.

112 *Ibid.*

113 *Ibid.*

unfeasibility is proven can we say that local remedies are “exhausted”,<sup>114</sup> to borrow the words from the diplomatic protection doctrine.

A balance must be struck between a strict application of international law principles, which would most likely leave harms done to employees unrepaired, and an approach so flexible that it is lacking any legal basis and that it is distorting the very nature and purpose of investment law. In my view, the solution of Markert and Freiburg brings us closer to this vital balance.

## B. The Forms of Reparation

I now turn to the issue of the reparation of moral prejudice. Article 34 of the *ILC Articles* states that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”. Three different methods of reparation thus exist. Restitution, which consists in re-establishing “the situation which existed before the wrongful act was committed”,<sup>115</sup> is certainly not appropriate to repair moral or personal injury.<sup>116</sup> As such, we are left to decide whether satisfaction or monetary compensation is the proper remedy for moral damages. The answer depends if the moral damages are sustained (i) by the State or (ii) by the investor.

### i. Moral Damages Sustained by States

In cases where States suffer intangible injuries, the traditional remedy under customary international law is not financial compensation, but satisfaction.<sup>117</sup> The *commentaries to the ILC Articles* confirm that satisfaction “is the remedy for those injuries, not financially assessable, which amount to an affront to the State”.<sup>118</sup> Depending on the circumstances, reparation by satisfaction may take the form of an acknowledgement of the breach, an expression of regret, or a formal apology.<sup>119</sup> The “Turkey cases” confirm that, not surprisingly, the international investment case law is in line with customary international law on that issue.

The first case is *Europe Cement v Turkey*,<sup>120</sup> Turkey terminated the concession agreements granted to two Turkish electricity companies. Europe Cement, a Polish corporation that claimed to own shares of the two Turkish companies, initiated arbitration proceedings against Turkey under the *Energy Charter Treaty*.<sup>121</sup> The tribunal declined jurisdiction over the dispute because Europe Cement was not able to prove its ownership of the shares.<sup>122</sup> Turkey sought monetary compensation for moral damages to its reputation and international standing as a result of this

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114 Markert & Freiburg, *supra* note 23 at 36.

115 *ILC Articles*, *supra* note 14 at 96.

116 Christine D Gray, *Judicial Remedies in International Law* (Oxford, UK: Clarendon Press, 1987) at 15.

117 Jennifer Cabrera, “Moral Damages in Investment Arbitration and Public International Law” in Ian A Laird & Todd J Weiler, eds, *Investment Treaty Arbitration and International Law* (Huntington, New York: 2010) 197 at 203.

118 *ILC Articles*, *supra* note 14 at 106.

119 *Ibid*, art 37.

120 *Europe Cement Investment & Trade SA v Republic of Turkey*, Award (13 August 2009), ICSID, Case No ARB(AF)/07/2, online: Investment Treaty Arbitration <<http://www.italaw.com/cases/documents/422>> [*Europe Cement*].

121 Dumberry, “Compensation”, *supra* note 16 at 264.

122 *Europe Cement*, *supra* note 120 at para 170.

“jurisdictionally baseless claim asserted in bad faith and for an improper purpose”.<sup>123</sup> The tribunal refused to award moral damages because it did “not consider that exceptional circumstances such as physical duress [were] present in this case to justify moral damages”.<sup>124</sup> In any event, the tribunal concluded that “the reasoning and conclusions set out in this Award, including an award of costs”,<sup>125</sup> provide a sufficient form of satisfaction for any potential reputational damage Turkey may have suffered.<sup>126</sup>

The second case, *Cementownia v Turkey*,<sup>127</sup> also involved a Polish company, which commenced arbitration proceedings against Turkey under the exact same circumstances and allegations as in the *Europe Cement* case.<sup>128</sup> The tribunal again declined jurisdiction and found that the claim was “manifestly ill-founded”<sup>129</sup> and consisted an abuse of process.<sup>130</sup> In addition to the award on costs, the tribunal made a comment that seemed to indicate that satisfaction by way of a declaration of wrongfulness was the proper form of reparation. The tribunal stated, “In any case, since the Arbitral Tribunal has already accepted the Respondent’s request with respect to the fraudulent claim declaration, the Respondent’s objective [to obtain some reparation for moral damages] is already achieved”.<sup>131</sup>

For Dumberry, the “Turkey cases” confirm that, “as a matter of principle, satisfaction is the proper remediation for moral damages suffered by a State”.<sup>132</sup> The fact that costs were awarded against the claimant in both cases should not be confused with monetary compensation for the claimed moral damages.<sup>133</sup> An allocation of costs is a procedural measure generally recognized in international arbitration law that can be used to sanction a party committing an abuse of process or some other misconduct during the arbitration proceedings.<sup>134</sup> In other words, the tribunals’ awards on costs do not make monetary compensation a suitable remedy for moral damages suffered by a State.<sup>135</sup> To date, no investment tribunal has awarded monetary compensation to a respondent State for moral damages.<sup>136</sup>

Satisfaction therefore appears to be the proper form of reparation of moral damages to States. Some commentators have asked whether arbitral tribunals should really treat investors

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123 *Europe Cement*, *supra* note 120 at para 128.

124 *Ibid* at para 181.

125 *Ibid*.

126 *Ibid*.

127 *Cementownia*, *supra* note 25.

128 Dumberry, “Compensation”, *supra* note 16 at 265.

129 *Cementownia*, *supra* note 25 at para 157.

130 *Ibid* at para 159.

131 *Ibid* at para 171.

132 Patrick Dumberry, “Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes” (2012) 3:1 J Intl Dispute Settlement 205 at 233 [Dumberry, “Satisfaction”].

133 Markert & Freiburg, *supra* note 23 at 32.

134 Dumberry, “Compensation”, *supra* note 16 at 268.

135 *Ibid*.

136 Dumberry, “Satisfaction”, *supra* note 132 at 229.

and States on unequal footings, allowing monetary compensation only to the former.<sup>137</sup> For example, Matthew Parish and his colleagues suggest that “under certain limited and exceptional circumstances ... there may be good reasons why a respondent state may be entitled to an award of moral damages *in addition to* a declaratory judgment and attorney fees and costs”.<sup>138</sup> Parish *et al.* point out that when an investor commences and ultimately loses an ICSID arbitration against a state, “the state may have a credible argument that its investment reputation has been unfairly tarnished”.<sup>139</sup> Considering that years usually go by between the commencement of arbitration and the final award, investors may in the meantime refrain to invest in that country and moral damages should be awarded to recover such losses.<sup>140</sup>

Parish and his colleagues make interesting points. It is also worth noting that Special Rapporteur James Crawford has likewise argued in favour of monetary compensation for both individuals and states.<sup>141</sup> However, the idea to award monetary compensation for moral damages sustained by States does not hold water and is problematic from substantive, jurisdictional, and theoretical standpoints. First of all, the argument lacks empirical basis. Parish *et al.* identify two studies that come to diametrically opposed conclusions with respect to the impact that pending arbitration filings against a State may have on investment inflows in that State.<sup>142</sup> Despite this empirical uncertainty, the authors go on to conclude that it is nevertheless “prima facie plausible” that filings against a State may tarnish its investment reputation. In the absence of clear and converging data to suggest otherwise, I am leaning toward the opposite conclusion. Dumberry points out that 81 different States acted as respondents in investment cases, including no less than 17 developed countries.<sup>143</sup> “Being a respondent in investment case is simply part of the deal”, and there is no concrete evidence that the reputation of these 81 countries has been tarnished<sup>144</sup>. Parish and his co-authors suggest that monetary awards of moral damages to respondent states should be reserved for “certain limited and particularly egregious cases ... where a claim is vexatious or has been brought fraudulently or in bad faith”.<sup>145</sup> However, ICSID amended its Arbitration Rules such as to give arbitrators the possibility of dismissing at an early stage any claim that is manifestly without legal merit.<sup>146</sup> Arbitrators are therefore already well equipped to prevent respondent States from being prejudiced by vexatious claims. In any event, the real damage sustained by a respondent State subject to a vexatious claim is no so much a loss of reputation, but rather the considerable amount of time and resources needed to defend the claim, and this damage can be easily remedied by the allocation of costs discussed above and without the need to award any additional moral damages.<sup>147</sup>

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137 Market & Freiburg, *supra* note 23 at 33.

138 Matthew T Parish, Annalise K Newlson & Charles B Rosenberg, “Awarding Moral Damages to Respondent States in Investment Arbitration” (2011) 29:1 BJIL 225 at 236 [emphasis in original].

139 *Ibid* at 236.

140 *Ibid* at 237-38.

141 Markert & Freiburg, *supra* note 23 at 6.

142 Parish, *supra* note 138 at 237-38.

143 Dumberry, “Satisfaction”, *supra* note 132 at 238.

144 *Ibid* at 239

145 Parish, *supra* note 138 at 238.

146 Dumberry, “Satisfaction”, *supra* note 132 at 241.

147 *Ibid* at 242.

Another obvious shortcoming with the proposition of Parish and his colleagues, which they themselves recognize,<sup>148</sup> is of jurisdictional nature. Under the vast majority of BITs, respondent States do not have the standing to submit any counterclaim for moral damages. The prevailing view is that “investment arbitration aims primarily, if not solely, at protecting investors’ rights”.<sup>149</sup> As such, most BITs are asymmetrical and imbalanced insofar as investors are accorded substantive rights, without being the subjects of obligations, while States only have obligations.<sup>150</sup> This asymmetry makes it impossible for a State to submit any counterclaim for moral damages because it does not possess rights under the BIT that the investor could have breached. This is precisely the conclusion that the tribunal reached in *Spyridon Roussalis v Romania*.<sup>151</sup> Some BITs however contain broadly worded dispute resolution clauses that would in principle give States the required standing to bring a claim forward. That being said, since host States cannot establish a substantive cause of action on the basis of a treaty, they would have to rely upon their contract with the investor.<sup>152</sup> Another hurdle to overcome is that the State’s counterclaim for moral damages would be “arising directly out of the subject-matter of the dispute”.<sup>153</sup> In sum, these jurisdictional barriers are burdensome and “may well prevent states from claiming moral damages altogether”.<sup>154</sup>

In sum, as it stands now, reparation by satisfaction is the norm for moral damages to States: monetary compensation, without a procedural mechanism such as an award of costs in cases of abuse of process, seems very unlikely.<sup>155</sup> In any event, the question may be merely theoretical. Indeed, very rare will be the cases in which the host State would have suffered real and proven moral damage and in which the tribunal constituted under the BIT would have jurisdiction over the claim.<sup>156</sup> In the unlikely event that such a case nonetheless arises and in the equally unlikely event that existing procedural mechanisms, such as the allocation of costs against the investor and the early dismissal of a vexatious claim, prove inefficient, the most appropriate way to repair moral damages sustained by States should remain satisfaction, either in the form of a declaration of wrongfulness or of formal apologies.

## ii. Moral Damages Sustained by Investors

Monetary compensation is the only appropriate remedy for moral damages affecting an individual or a corporation. Any other proposition would clearly go against the spirit of the *ILC Articles*. The Commentaries acknowledge that satisfaction “is not a standard form of reparation,

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148 Parish, *supra* note 138 at 241-42.

149 Gustavo Laborde, “The Case for Host State Claims in Investment Arbitration” (2010) 1:1 J Intl Dispute Settlement 97 at 99.

150 Dumberry, “Satisfaction”, *supra* note 132 at 235.

151 *Spyridon Roussalis v Romania*, Award (7 December 2011) at para 871, ICSID, Case No ARB/06/1, online: Investment Treaty Arbitration <<http://www.italaw.com/cases/927>>.

152 Laborde, *supra* note 149 at 113-14.

153 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 art 46 (entered into force 14 October 1966).

154 Markert & Freiburg, *supra* note 23 at 33.

155 *Ibid* at 34.

156 Dumberry, “Satisfaction”, *supra* note 132 at 236.

in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation”.<sup>157</sup> In particular, “[m]aterial and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation”.<sup>158</sup> It may be worth noting that nothing would prevent a tribunal, however, from awarding some form of satisfaction on top of the monetary compensation covering moral damages.<sup>159</sup>

The method of reparation for individual investors is thus not a matter of controversy. The case law reviewed in Section III.B is consistent with this general proposition, subject however to two strange *obiter dictum* by tribunals. In *Pey Casado*, the tribunal declared that the award of USD 10 million against the respondent State, and in particular, the declaration that the claimant was the victim of a denial of justice, was in itself substantial and sufficient moral satisfaction.<sup>160</sup> Similarly, in *Lemire v Ukraine*, the tribunal mentioned in passing that “the acknowledgment in the First Decision that Ukraine has indeed breached the BIT, and the present award of substantial compensation, are elements of redress which may significantly repair Mr Lemire’s loss of reputation”.<sup>161</sup> However, in both *Pey Casado* and *Lemire*, the tribunals had already concluded that the claimants had suffered no moral damages whatsoever and the statements were therefore purely *obiter dictum*.<sup>162</sup> As such, those remarks should not have the effect of challenging the general position that satisfaction is an unsuitable form of reparation for moral damages to an individual investor.<sup>163</sup>

In sum, although some authors are advocating for the possibility to award monetary compensation for States and that some tribunals have somewhat blurred the line by suggesting that satisfaction could properly repair moral damages to individual investors, the general rule is still that “compensation is for moral damages suffered by individuals and corporations, while satisfaction is reserved for those suffered by states”.<sup>164</sup>

### C. Fault and the Presence of Exceptional Circumstances

In *Desert Line*, the tribunal stated that a party may ask for compensation for moral damages, but only in exceptional circumstances.<sup>165</sup> This position was then echoed in *Europe Cement*.<sup>166</sup> Finally, in *Lemire*, the tribunal reiterated that moral damages are reserved for exceptional cases in which both the respondent’s actions and the prejudice are “grave and substantial”.<sup>167</sup> The obvious question then becomes: what can qualify as exceptional circumstances and cases? The question is never directly answered, but it seems that it is the presence of a gross and intentional fault

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<sup>157</sup> *ILC Articles*, *supra* note 14 at 105.

<sup>158</sup> *ILC Articles*, *supra* note 14 at 106.

<sup>159</sup> Dumberry, “Satisfaction”, *supra* note 132 at 228.

<sup>160</sup> *Pey Casado*, *supra* note 52 at paras 704, 717.

<sup>161</sup> *Lemire*, *supra* note 77 at para 339.

<sup>162</sup> Dumberry, “Satisfaction”, *supra* note 132 at 225.

<sup>163</sup> Wong, *supra* note 13 at 73.

<sup>164</sup> Dumberry, “Compensation”, *supra* note 16 at 267.

<sup>165</sup> *Desert Line*, *supra* note 27 at para 289.

<sup>166</sup> *Europe Cement*, *supra* note 120 at para 181.

<sup>167</sup> *Lemire*, *supra* note 77 at para 333.

that makes a given situation “exceptional”. In *Desert Line*, the tribunal found that the claimant’s conduct “was malicious and . . . therefore constitutive of a fault-based liability”,<sup>168</sup> thus suggesting that the presence of a fault or of malicious conduct is, or at least was in that case, essential for a successful moral damages claim. In *Lemire*, by requiring, as part of the first condition of the three-step test, that the “ill-treatment contravenes the norms according to which civilized nations are expected to act”,<sup>169</sup> the tribunal is basically looking for fault, since fault can roughly be defined as one’s failure to abide by the rules and standards which lie upon him.<sup>170</sup> In another case, *Siag v Egypt*, the tribunal sums up the jurisprudential position when it states that awards of moral damages should be limited to “extreme cases of egregious behavior”.<sup>171</sup>

The question that arises from this jurisprudential stance is whether moral damages can be awarded in situations that are not “exceptional”; that is to say, if the State’s breach of treaty does not amount to malicious or egregious conduct?<sup>172</sup> Much of the answer depends on whether we fundamentally conceive moral damages as purely compensatory or as incorporating some form of punishment. As will be discussed, the right conception, legally speaking, may well be the former, but the cases of *Desert Line*, *Lemire* and *Siag* suggest that tribunals may have blended in some aspects of the second conception as well.

#### i. The First Conception: Moral Damages as Compensatory in Nature

Under the first conception, moral damages play a compensatory role and are thus just like any other type of damages. The difference lies in what is being compensated; ordinary awards of damages compensate for economic loss, while moral damages compensate for mental distress.<sup>173</sup> The compensatory conception is clearly the predominant approach in international law, as illustrated by the adoption of the concept of objective responsibility by the *ILC Articles*. Indeed, “it is only the act of a State that matters, independently of any intention”.<sup>174</sup> It is also generally recognized among tribunals deciding investor-state disputes that a state’s intentions are not relevant when evaluating allegations of BIT breaches.<sup>175</sup> As such, it is hard to understand the tribunals’ insistence on fault, egregious behaviour, and exceptional circumstances. As pointed out by Bernd Ehle and Martin Dawidowicz, “[t]here is no clear basis under international law for the proposition that moral damages are limited to exceptional circumstances where both cause and effect must be grave and substantial”,<sup>176</sup> nor is there a “*lex specialis* to suggest this in foreign investment law”.<sup>177</sup> If moral damages are really meant to compensate for non-pecuniary

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168 *Desert Line*, *supra* note 27 at para 290 [emphasis added].

169 *Lemire*, *supra* note 77 at para 333.

170 See e.g. art 1457 CCQ.

171 *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, Award (1 June 2009) at para 545, ICSID, Case No ARB/05/15, online: Investment Treaty Arbitration <<http://www.italaw.com/cases/1022>> [*Siag*].

172 Jagusch & Sebastian, *supra* note 87 at 51.

173 *Ibid* at 54.

174 *ILC Articles*, *supra* note 14 at 36.

175 Dumberry, “Compensation”, *supra* note 16 at 271.

176 Ehle & Dawidowicz, *supra* note 15 at 307.

177 *Ibid*.

injuries, the manner in which the injury occurred should not be determinative<sup>178</sup> and, as such, “the introduction of any fault requirement to the law of moral damages would be at odds with the general position at international law”.<sup>179</sup> To wit, repugnant behavior on the part of the State should not mean that moral damages will automatically be awarded; conversely, the absence of repugnant behavior should not *prima facie* bar the recovery of moral damages.

That is not to say that fault should be completely out of the picture. To borrow the terms of Wade Coriell and Silvia Marchili, a distinction should be drawn between the concept of moral damages and the context in which moral damages are most often awarded.<sup>180</sup> Dumberry probably explained this distinction the best:

The presence of *culpa* will undoubtedly have an impact on a tribunal’s decision to award any compensation for moral damages in the first place. In other words, a tribunal will certainly be more likely to award compensation for moral damages when a state commits particularly reprehensible deliberate actions. This is, of course, not to say that the element of fault is necessary for a tribunal to award compensation for moral damages, since clearly it is not.<sup>181</sup>

In short, fault cannot be used to decide whether compensation should be awarded in the first place, but it can become an important factor at the stage of determining the appropriate quantum of damages once the tribunal has already decided to grant moral damages. Sabahi sees fault as playing the role of a gatekeeper that allows the arbitrators to become more generous in their award of moral damages.<sup>182</sup> But then again, the incremental amount of damages that is being awarded because of the conduct of the State cannot be purely compensatory.<sup>183</sup>

Considering all of the above, it is hard to conclude that tribunals deciding investor-state disputes have totally and unreservedly endorsed the compensatory conception of moral damages. Some commentators give the *Desert Line* tribunal the benefit of the doubt and believe that the reference to “exceptional circumstances” simply illustrates “the rarity and uniqueness of such claims”.<sup>184</sup> As mentioned, my understanding is rather that the “exceptional circumstances” language and the fault requirement must be read together. In any event, the tribunals in *Desert Line*, *Siag* and *Lemire* should have made it clear that the fact that moral damages are usually awarded in the presence of egregious behavior does not make egregious behavior a *sine qua non* condition for an award of moral damages. By not emphasizing this point, they show that they may have a slightly different conception of moral damages.

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178 Jagusch & Sebastian, *supra* note 87 at 55. See also Dumberry, “Compensation”, *supra* note 16 at 271 (Dumberry expresses a similar opinion).

179 Blake, *supra* note 24 at 28.

180 Coriell & Marchili, *supra* note 4 at 219-20.

181 Dumberry, “Compensation”, *supra* note 16 at 271.

182 Sabahi, *supra* note 17 at 260.

183 Jagusch & Sebastian, *supra* note 87 at 59-60.

184 Dumberry, “Compensation”, *supra* note 16 at 269. See also Blake, *supra* note 24 at 24.

## ii. The Second Conception: Moral Damages as Punitive in Nature

Another way to conceive moral damages is as a means not to compensate the victim but to punish the party in breach.<sup>185</sup> Such a conception would bring moral damages closer to punitive damages than to compensatory damages. Despite the fact that punitive damages are very controversial in international law, this conception is nevertheless apparent in many international investment decisions.

Punitive or exemplary damages are sums awarded on top of any compensatory damages, usually in order to punish and deter especially wilful or malicious conduct on the part of the defendant.<sup>186</sup> The availability of punitive damages varies among countries: common law countries generally allow the award of punitive damages, while civil law countries tend to be more refractory.<sup>187</sup> Private law draws a clear distinction between moral damages, which are awarded to compensate for non-pecuniary loss, and punitive damages, which aim to deter the recurrence of similar conduct in the future.<sup>188</sup> This line is somewhat blurred in investment arbitration case law. As discussed in the previous section, the tribunals in *Desert Line*, *Siag* and *Lemire* put fault and malice at the forefront of the discussion about whether or not to award moral damages. Relying on fault this heavily “raises a red flag”<sup>189</sup> because it turns the focus of the analysis on the conduct of the respondent rather than on the injury of the claimant. Such focus is more akin to the logic and approach of punitive damages than of compensatory damages. On its face, the *Desert Line* award of moral damages may seem compensatory because the claimant (or to be accurate, its executives) really did suffer a moral injury. However, I agree with Jagusch and Sebastian that the tribunal in that case really “wanted to sanction behaviour, which it thought was reprehensible”.<sup>190</sup> The compensation was not only intended to remediate damage but also to send a clear message to the respondent state.<sup>191</sup> Simply put, as soon as the award of moral damages depends on the presence of fault or egregious behaviour and is said to have a deterrence function, moral damages undeniably begin to take some punitive color.

There are several problems with the incursion of punitive elements in the concept of moral damages. The first and obvious one is that punitive damages are proscribed in international law. This prohibition is explicit in the *commentaries to the ILC Articles*: compensation “is not concerned to punish the responsible State, nor does compensation have an expressive of exemplary character”.<sup>192</sup> Even if the vast majority of international tribunals tend to respect this prohibition and therefore refuse to award punitive damages,<sup>193</sup> some BITs go even further and explicitly

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185 Jagusch & Sebastian, *supra* note 87 at 54.

186 John Y Gotanda, “The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration” (2009) 10:4 J World Investment & Trade 553 at 554 [Gotanda].

187 *Ibid* at 554-55.

188 Schwenzer & Hachem, *supra* note 7 at 428.

189 Gotanda, *supra* note 186 at 557.

190 Jagusch & Sebastian, *supra* note 87 at 58.

191 Dumberry, “Compensation”, *supra* note 16 at 275.

192 *ILC Articles*, *supra* note 14 at 99.

193 Gotanda, *supra* note 186 at 556.

rule out the possibility to award punitive damages.<sup>194</sup> The second problem is that the punitive conception brings a great deal of unpredictability in investment arbitration. Investment treaties give no guidance on the circumstances or conditions of punitive awards, which is not surprising at all “[g]iven the widespread presumption that punitive damages are not available in international law”.<sup>195</sup> As a result, investment tribunals find themselves in uncharted waters, and it is therefore up to them to establish a firm foundation to support their “punitive” award of moral damages.<sup>196</sup> They regrettably failed to do so. For example, in *Lemire*, the tribunal refers to the “norms according to which civilized nations are expected to act”<sup>197</sup> and gives no indication as to the content of these so-called norms. Had it opted for the compensatory approach, the tribunal would not have had to introduce this vague condition that now introduces a lot of unpredictability into the analysis. For Stephen Jagusch and Thomas Sebastian, the danger is “that tribunals awarding moral damages (as punishment) might find themselves applying subjective and idiosyncratic notions of what constitutes the conduct or circumstances believed sufficient to justify granting them”. This random adjudication and lack of predictability are worrisome to the extent that it can undermine the confidence and trust parties put into the arbitration process.<sup>198</sup>

The aforementioned comments do not suggest that investment tribunals consider moral damages to be virtually the same thing as punitive damages. In fact, a more accurate conclusion would be that tribunals have treated moral damages in a way that combines the compensatory and the punitive conceptions. For example, the *Lemire* test is compensatory in that the claimant must show that it suffered some kind of mental injury; “it is also punitive in that the claimant must not just show a breach of treaty, but that the breach was accompanied by egregious conduct”.<sup>199</sup> No doubt that the treatment of moral damages in international investment law is “hovering on the edge of punishing States”, to borrow Laird’s words.<sup>200</sup> For some, this hybrid conception is clearly contrary to the nature and function of moral damages, “which should be subject to the same rules that govern all compensatory damage claims – no more and no less”.<sup>201</sup> While a fully compensatory conception may be wishful and more consistent with international law principles, it is more probable that tribunals, faced with particularly reprehensible conduct on the part of the State, “will keep camouflaging punitive damages under an award of moral damages, since punitive damages are clearly prohibited under public international law”.<sup>202</sup>

To summarize and to come back to the initial question of this section, investment arbitration tribunals, led by *Desert Line* and *Lemire*, clearly consider fault and malice as prerequisites for an award of moral damages. Until a tribunal reverses this trend and affirms the compensatory

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194 See e.g. US, Department of State and United States Trade Representative, *2012 US Model Bilateral Investment Treaty*, (2012) art 34(3).

195 Jagusch & Sebastian, *supra* note 87 at 60.

196 *Ibid.*

197 *Lemire*, *supra* note 77 at para 333.

198 Gotanda, *supra* note 186 at 553.

199 Jagusch & Sebastian, *supra* note 87 at 61.

200 Laird, *supra* note 110 at 173.

201 Coriell and Marchili, *supra* note 4 at 213.

202 Jagusch & Sebastian, *supra* note 87 at 59.

conception, the chances of success of a claim for moral damages in the absence of particularly egregious behaviour on the part of the host state are slim to none.

#### D. The Quantum of Moral Damages

Another issue that has yet to be clarified by investment arbitration tribunals concerns the amount of compensation for moral damages. In principle, moral damages, being compensatory in nature, do not differ from pecuniary damages and are therefore governed by the rule of full reparation of the *Chorzow* case (see Section II.B). The amount of compensation should be no more and no less than what is necessary to “wipe out” all of the moral injuries resulting from the illegal act. The difficulty with moral injuries is that, by definition and unlike economic losses, they cannot be objectively and accurately assessed.<sup>203</sup> This should in no way affect the *prima facie* possibility of awarding moral damages; indeed, the *Lusitania* tribunal made it clear that “the mere fact that [moral damages] are difficult to measure or estimate ... affords no reason why the injured person should not be compensated”.<sup>204</sup> Moreover, one should not forget that any determination of damages, regardless of the type of loss, could be troublesome considering the many variables and uncertainties arbitrators have to deal with.<sup>205</sup>

That being said, the intangible nature of moral damages and the lack of guidance in the case law will unavoidably make the quantification of moral damages “an arbitrary and haphazard exercise”.<sup>206</sup> Commentators observe that arbitrators have “a great deal of flexibility”,<sup>207</sup> if not an “absolute discretion”,<sup>208</sup> to determine what amount is necessary to compensate the investor for the moral damage suffered. *Desert Line* is a striking example of this arbitrary and discretionary determination of the quantum of moral damages. We have no idea how the tribunal came to the conclusion that USD 1 million was the right amount to compensate for the moral damages suffered. All we know from the tribunal’s explanations is that the amount of USD 104 million requested by the claimant was exaggerated and that the award of USD 1 million is “more than symbolic yet modest in proportion to the vastness of the project”.<sup>209</sup> The claimant’s request of USD 104 million was based on the *Fabiani* case, in which the moral damages awarded amounted to one-third of the principal claim.<sup>210</sup> Both the claimant’s request and the tribunal’s final award quantify the amount of moral damages in relation with the principal claim, which doesn’t make sense under the purely compensatory conception of moral damages.<sup>211</sup>

Another practice that runs afoul of the compensatory logic is the consideration of fault

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203 Ripinsky & Williams, *supra* note 12 at 307.

204 *Lusitania*, *supra* note 6 at 40.

205 See Alex Lo, “Determining Damages in ICSID Arbitration: A Problem of Uncertainty” (2013) 6:1 Contemporary Asia Arbitration Journal 75.

206 Wong, *supra* note 13 at 92.

207 Dumberry, “Compensation”, *supra* note 16 at 272.

208 Ripinsky & Williams, *supra* note 12 at 312.

209 *Desert Line*, *supra* note 27 at para 290.

210 *Ibid* at para 286. See also the comments of Hamid Gharavi, lead counsel for the investor in the *Desert Line* case, in Panel Discussion, *supra* note 3 at 246.

211 Wong, *supra* note 13 at 94-95.

and *culpa* in the quantification of the compensation to be awarded, as explained in Section IV.C. Fault and malicious conduct on the part of the respondent state should not matter if moral damages' function is truly and only to compensate, but it is generally accepted that "the amount of compensation should be proportionate to the seriousness of the offence committed by a state and its degree of responsibility".<sup>212</sup> This is because moral damages will usually be quantified on the basis of an equitable assessment<sup>213</sup> that allows the tribunals to take into account a variety of facts and circumstances, and to increase the amount of moral damages awarded in the presence of aggravating factors or especially reprehensible conduct.<sup>214</sup> As a result of the equitable approach and the wide discretion that such approach confers to arbitral tribunals, the quantification of moral damages "will never constitute an exact science".<sup>215</sup>

Finally, when exercising their discretion with regards to the quantum of damages, tribunals should be aware of the risk of double counting. Double counting occurs when moral damages are awarded to compensate for harms that have already been compensated with material damages.<sup>216</sup> The risk of double counting is particularly acute in cases of reputational damage because there can be an overlap between the pecuniary and non-pecuniary aspects of the injury. On one hand, reputation undeniably has an economic value, and an injury to the investor's reputation can cause pecuniary damage such as loss of goodwill and profits.<sup>217</sup> Such damage should be covered by the award of pecuniary damages and, as such, does not require an additional award of moral damages. On the other hand, the damage to the investor's reputation can cause moral damage to the investor's honour.<sup>218</sup> If the investor is a natural person, he or she may also suffer from stress or anxiety as a result of the damage to his or her reputation.<sup>219</sup> In such cases, an award of moral damages on top of material damages is perfectly warranted. Loss of reputation can therefore cause pecuniary or moral damage. Tribunals must be very prudent in identifying precisely the type of damage a given award is meant to compensate. Failure to do so can lead to double recovery, as we saw, but it can also lead to a failure to recognize an injury that warrants moral damages.<sup>220</sup> It appears as though the majority arbitrators in *Biwater Gauff* fell into the trap when they refused to award moral damages to the claimant on the basis that it could not have sustained any injury since its investments had no economic value.<sup>221</sup> The fact that the claimant's investments were worthless should not have influenced the outcome on the distinct question of moral damages. It is thus essential that arbitrators precisely indicate what injury a given sum of damages aims to compensate. As Wong explains, such rigour and precision will "protect against the risk of duplicating compensatory damages and of overlooking extant moral damages".<sup>222</sup>

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212 Dumberry, "Compensation", *supra* note 16 at 273.

213 Markert & Freiburg, *supra* note 23 at 40.

214 Blake, *supra* note 24 at 32.

215 Markert & Freiburg, *supra* note 23 at 42.

216 Sabahi, *supra* note 17 at 256.

217 Schwenzer & Hachem, *supra* note 7 at 425.

218 Markert & Freiburg, *supra* note 23 at 37.

219 Schwenzer & Hachem, *supra* note 7 at 426.

220 Wong, *supra* note 13 at 91.

221 *Biwater Gauff Award*, *supra* note 61 at para 792.

222 Wong, *supra* note 13 at 91.

## V. CONCLUDING REMARKS

Many tribunals have affirmed the theoretical availability of moral damages in investment arbitration, perhaps most famously in *Desert Line* and *Lemire*. Yet, as the review of the case law showed, most claimants seeking moral damages come out empty-handed. Maybe more concerning than the paucity of awards is the evasive way in which most tribunals dealt with the question. As Coriell points out, tribunals have not been robust in their explanation of the concept of moral damages and their analysis tends to be very fact-specific.<sup>223</sup> It is true that the tribunal in *Lemire* elaborated a three-part test that certainly represents the best guidance for present and future arbitrators. However, a generalized reliance on the *Lemire* test may well conflate moral damages with punitive damages, considering the emphasis put on egregious behaviour and exceptional circumstances. Jagusch and Sebastian believe that if the punitive (and compensatory) conception of moral damages really becomes predominant, “moral damages are unlikely to become a pervasive and uncontroversial feature of the investment arbitration landscape”.<sup>224</sup> In my view, such stagnation would be disappointing, considering that full reparation is often impossible without an award of moral damages.

The notion of moral damages in international investment arbitration is undeniably seeking for guiding principles. In elaborating and affirming these principles, some commentators argue that future tribunals should broaden their perspective and look at what other tribunals are doing. According to Conway Blake, guidance and inspiration can come from the international human rights jurisprudence, which he praises as “one of the fullest elucidations of moral damages”.<sup>225</sup> Scholars and practitioners have historically been reluctant to the idea of importing notions from international human rights law. Jan Paulsson, for example, has doubts about “the perfect correspondence between instruments devised from quite different purposes”.<sup>226</sup> Blake nevertheless believes that the considerable experience of international human rights tribunals in awarding moral damages, the structural parallels between human rights law and investment law as well as the need for a greater coherence and unity in international law militate for a “jurisprudential cross-fertilization”.<sup>227</sup> This cross-fertilization should not be perceived as radically breaking away from the traditional practice and theory of investment law. Indeed, investment arbitration tribunals have often relied on human rights jurisprudence to determine the contents of certain substantive rules. James D Fry cites as examples the definition of regulatory expropriation, the need to exhaust local remedies, the assessment of damages, and the allocation costs.<sup>228</sup>

Specifically, a look at international human rights principles and case law exposes many of

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223 See Coriell’s intervention in Panel Discussion, *supra* note 3 at 237.

224 Jagusch & Sebastian, *supra* note 87 at 62.

225 Blake, *supra* note 24 at 18.

226 Jan Paulsson, “Indirect expropriation: is the right to regulate at risk?” (Making the Most of International Investment Agreements Symposium delivered at OECD Headquarters, 12 December 2005), (2006) 3:2 Transnational Dispute Management 1.

227 Blake, *supra* note 24 at 19.

228 See generally James D Fry, “International Human Rights Law in Investment Arbitration” (2007) 18:1 Duke J Comparative & Intl L 77 at 83-96.

the flaws and questionable aspects of decisions like *Desert Line* and *Lemire*. For example, there is no fault requirement in human rights law and not one decision in which a human rights tribunal rejected a claim for moral damages for lack of fault.<sup>229</sup> Besides, human rights tribunals use the notion of proximate cause or remoteness to establish liability and to restrain the scope of damages within reasonable limits.<sup>230</sup> The notion of remoteness can be a suitable replacement for the concept of egregious and grave conduct, which does not exist in international human rights law.<sup>231</sup> The availability of moral damages in *Lemire* should therefore “not have turned on whether the injury was grave or substantial, but rather on a less stringent test, namely whether a ‘sufficient causal link which is not too remote’ could be established”.<sup>232</sup> Remoteness can also help elucidate the question of moral damages awarded to a company for injuries suffered by its executives. Indeed, tribunals could look at the proximity between the employees and the company’s operation in order to assess the harm suffered by the company.<sup>233</sup>

A full-out intrusion of international human rights principles into investment law is not likely and may not be warranted. After all, investment law is a stand-alone field with its own logic and ways of adjudicating disputes. Moreover, investors must be careful not to frame their claim for moral damages using human rights terminology in order to avoid jurisdictional problems.<sup>234</sup> However, given the paucity of decisions providing sound analysis on the issue of moral damages, some peeking into international human rights law may prove to be an effective way to give moral damages a much-needed theoretical foundation and make investment law more consistent with general principles of international law on this issue.

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229 Blake, *supra* note 24 at 30.

230 *Ibid* at 16, 34.

231 *Ibid* at 17.

232 Ehle & Dawidowicz, *supra* note 15 at 307.

233 Blake, *supra* note 24 at 36.

234 *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability (27 October 1989), Ad hoc UNCITRAL, 95 ILR 184 at 211.