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03/2023

Moral Damages in Investment Arbitration

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**EUROPA-
INSTITUT**
SAARLAND UNIVERSITY



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ISSN: 2752-2512 (online)

Chair of Public Law, Public International Law, European Law and International Economic Law
and Jean Monnet Chair of EU Constitutional Framework for International Dispute Settlement
and Rule of Law

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Publications in the Series should be cited as:

AUTHOR, TITLE, JEAN MONNET PAPER NO./YEAR [URL]

Abstract

Whereas it is widely accepted in international investment law that moral damages exist and shall be repaired, a uniform approach to claims for moral damages is absent up to the present moment.

There are certain difficulties connected with claims for moral damages and significant disagreement regarding the proper treatment, preconditions for an award, the appropriate form of reparation and the quantification of moral damages. The purpose of this paper is to thoroughly delineate the concept of moral damages, the approach to claims for moral damages and the problematic side of moral damages. The paper also acquaints the reader with the relevant and most prominent cases in investment arbitration practice involving claims for moral damages and observes legal provisions and sources relevant to the topic.

Key words

Moral damages – physical and mental violence – reputational harm – investment arbitration – “exceptional circumstances” requirement – burden and standard of proof – reparation – satisfaction – compensation – quantification of moral damages

Biography of the author

Anita Grigoryan is an LL.M. candidate at Europa-Institut, Saarland University, specializing in International Dispute Resolution, International Investment Law, as well as in International Human Rights Protection. She successfully participated in the FDI International Arbitration Moot in 2022 on behalf of the Saarland University/Europa-Institut team. A claim for moral damages was included in the 2022's FDI Moot problem and has initiated the author's further interest to comprehensively examine moral damages in investment arbitration.

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Moral Damages in Investment Arbitration

Anita Grigoryan*

A. Introduction

In contrast to material damages, moral damages are not part of every international investment dispute and are, therefore, not widespread. This could be understood as one of the reasons creating an absence of a uniform approach to moral damages in investment arbitration. Although the existence of moral damages, and the reparation for moral damages, have been widely accepted under international investment law,¹ there are several difficulties that claims for moral damages bring with them including a major dispute concerning the proper treatment of moral damages, the appropriate form of reparation and the quantification of moral damages.

The following paper with the title “Moral Damages in Investment Arbitration” aims at comprehensively illustrating the concept of moral damages, the approach to claims for moral damages adopted by relevant arbitral tribunals and the problematic side of moral damages. The paper also introduces the most important cases in international investment arbitration practice.

The paper is divided into four chapters. The first chapter refers to the definition of the concept of moral damages and their differentiation from material and punitive damages. In the framework of the second chapter, the historical development of the concept of moral damages is briefly introduced from the perspective of public international law and international investment law. By referring to the preconditions to award moral damages the third chapter illustrates the “exceptional circumstances” or gravity requirement and the less widespread requirement of respondent’s “malicious” and “fault based” conduct. The fourth chapter introducing the problematic aspects of moral damages that arbitral tribunals face is divided into three subchapters. Relevant themes that will be presented throughout the subchapters include the proof of moral damages, *ratione personae* over moral damages claims and reparation for a moral damage. Finally, in the conclusion the content of prior chapters will be finalized and the approach to moral damages in investment arbitration will briefly be readdressed.

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¹ *Dumberry; Cusson*, JDIA 2014/1(2), p. 35; *Blake*, Journal of International Dispute Settlement 2012/3(2), p. 374; ICSID, Case No. ARB/05/17, *Desert Line Projects LLC v. Yemen*, Award, para. 289; ICSID, Case No. ARB/07/6, *Señor Tzga Yap Shum v. The Republic of Peru*, Award, paras. 281, 282; ICSID, Case No. ARB/06/18, *Joseph Charles Lemire v. Ukraine*, Award, para. 333; ICSID, Case No. ARB/10/15, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award, para. 909; ICSID, Case No. ARB(AF)/06/2, *Cementownia “Nowa Huta” S.A. v. Turkey*, Award, para. 169; UNCITRAL, *Zhongshan Fucheng Industrial Investment v. Nigeria*, Final Award, para. 136; UNCITRAL, *Oxus Gold v. Uzbekistan*, Final Award, para. 895.

B. The Concept of Moral Damages

It is widely acknowledged that the concept of moral damages is indefinite.² The definition of a moral damage as “a damage that is not material” is considered to be uncomplicated.³ In the Commentary on Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) the International Law Commission (ILC) has stipulated that “[it] is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life”.⁴

Another, more broad-based, definition authored by Stephan Wittich has the following content:

“First, it includes personal injury that does not produce loss of income or generate financial expenses. Secondly, it comprises the various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life. A third category would embrace what could be called non-material damage of a ‘pathological’ character, such as mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock. Finally, non-material damage would also cover minor consequences of a wrongful act, e.g., the affront associated with the mere fact of a breach or, as it is sometimes called, ‘legal injury.’”⁵

Injury to the credit and reputation of a legal entity has been appended to the list of moral damages by international investment tribunals.⁶ In addition, Antoine Champagne generally enunciates that the function of the moral damages is the provision of monetary compensation for, despite their not tangible nature, real and actual injuries.⁷

The aforementioned definitions clearly indicate that moral damages encompass all types of physical and mental violence and reputational harms.⁸ They do not relate to financial loss or victim’s assets, but rather are not material. At this point it is decisive to briefly reference the distinction between moral and material damages. The dissimilarity between moral and material damages is emphasized in Art. 31 (2) ARSIWA by stating that an injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State. The ILC defines a material damage as “damage to property or other interests of the State and its nationals which is assessable in financial terms”.⁹ In other words, material damages are of pecuniary nature and are financial or economic losses. Therefore, material damages can objectively be expressed in monetary terms, whereas moral damages cannot be objectively quantified.¹⁰

² *Dumberry*, in: Beharry (ed.), p. 144; *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 419; *Moyano*, *Journal of International Dispute Settlement* 2015/6(3), p. 488; *Jagusch; Sebastian*, *Arbitration International* 2013/29(1), p. 45; *Champagne*, *McGill Journal of Dispute Resolution* 2015/1:2, p. 19.

³ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 419.

⁴ *ILC*, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, A/56/10, Art. 31, para. 5, p. 92.

⁵ *Wittich*, *FYBIL* 2004/XV, pp. 329–330.

⁶ *Dumberry*, in: Beharry (ed.), p. 144; *Markert; Freiburg*, *JWIT* 2013/14(1), p. 3.

⁷ *Champagne*, *McGill Journal of Dispute Resolution* 2015/1:2, p. 19.

⁸ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 420.

⁹ *ILC*, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, A/56/10, Art. 31, para. 5, p. 92.

¹⁰ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 419.

Furthermore, it is decisive to distinguish moral damages from punitive damages explicitly prohibited in some Bilateral Investment Treaties (BIT).¹¹ Damages are considered punitive, when the respondent is obliged to pay an extra amount of money in addition to actual damages based on public aim to punish it and to intercept it from future violations and breaches.¹² Moral damages, in contrast, are awarded to compensate non-material losses¹³ resulting from an internationally wrongful act i.e. breach of a treaty.¹⁴ Accordingly, in case a moral damage would not have an actual basis and the casual link between the internationally wrongful act and the moral damage could not be established, an award of moral damages may be perceived as punitive.¹⁵ It is noteworthy that the concept of punitive damages is not recognized under International law.¹⁶ Since under public international law the sovereign cannot be punished, arbitral tribunals do not have jurisdiction to award punitive damages.¹⁷

C. Historical Overview

The history of moral damages in international disputes does not originate from international investment law, but public international law. The *Lusitania* case decided by the United States-Germany Mixed Claims Commission in 1923 was one of the initial cases before an international dispute resolution body concerning moral damages. The case refers to the sinking of British Cunard liner *Lusitania* by a German submarine during the World War I, causing the death of 1,198 persons.¹⁸ When addressing the claim of moral damages, the Commission has stipulated

“[t]hat one injured is, under the rules of international law, entitled to be compensated for 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, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them nonetheless real and affords no reason why the injured person should not be compensated therefore as compensatory damages, but not as a penalty”.¹⁹

The significance of this decision lies firstly in the fact that it is one of the first cases where an international dispute resolution body has recognized that a moral damage shall be repaired, and that this reparation should correspond to the inflicted damage.²⁰ Secondly, pursuant to Robert Stendel, moral damages have become customary international law on the basis of the *Lusitania*.²¹ On the other hand, according to Lars Markert and Elisa Freiburg, the *Lusitania* Claims

¹¹ Art. 20(5) China - Mexico BIT (2008); Article 34(3) United States of America - Uruguay BIT (2005); Article 34(4) Canada - Moldova BIT (2018).

¹² *Weber*, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 440.

¹³ Schwenzer; Hachem, in: Kröll/Mistelis/Viscasillas/Rogers (eds.), p. 428.

¹⁴ *Jagusch; Sebastian*, Arbitration International 2013/29(1), p. 55.

¹⁵ *Weber*, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 440.

¹⁶ *Jagusch; Sebastian*, Arbitration International 2013/29(1), p. 58; *Weber*, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 440; *Dumberry*, in: Beharry (ed.), p. 158; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, Chapter III, para. 5, p. 111.

¹⁷ *Weber*, The Law & Practice of International Courts and Tribunals, 2020/19(3), p. 440.

¹⁸ *Traummüller*, MPEPIL, 2011, para. 1.

¹⁹ US-Germany Mixed Commission, *Lusitania Cases*, Decision (1 November 1923), para. 40.

²⁰ *Weber*, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 421; *Moyano*, Journal of International Dispute Settlement 2015/6(3), p. 487.

²¹ *Stendel*, ZaöRV/HJIL 2021/81, p. 946.

Commission's reliance on the domestic laws of different jurisdictions demonstrates the character of moral damages as a general principle of law within the meaning of Art. 38(1)(c) ICJ Statute.²² Thirdly, the phrase “one injured” incorporates both judicial and natural persons by giving them a legal right to claim reparation for moral damages.²³ However, despite its seminal role, *Lusitania* has faced criticism for not clarifying the method of quantification of moral damages and for not addressing the available remedies under international law.²⁴

Subsequently, in the *Chorzów* case, the Permanent Court of International Justice (PCIJ) held that “[t]he essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”.²⁵

Hereby, the PCIJ adjudicated on the standard of compensation for damages caused by internationally wrongful acts under customary international law. The significance of this decision lies in the fact that the PCIJ affirmed that a reparation needs to be awarded without distinguishing between moral and material damages.²⁶

When considering modern developments, ARSIWA adopted by the ILC in 2001, is noteworthy by reflecting customary international law,²⁷ despite its legally non-binding character. Dogan Gultutar argues that ARSIWA endorsed the *Chorzów* judgement, and the principle stipulated therein by making the *Chorzów* judgement the cornerstone of Article 31 ARSIWA.²⁸ Article 31 (1) ARSIWA stipulates that a responsible State is obliged to fully repair any damage caused by an internationally wrongful act. Pursuant to Article 31 (2) ARSIWA “[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State”. In other words, the ILC not only recognizes the existence of moral damages but also obliges the states to fully repair those damages. Nevertheless, Article 31 remains silent about the form of the reparation.²⁹

In 2012, in the framework of *Diallo*, the International Court of Justice (ICJ) referred to moral damages. Here, the Republic of Guinea initiated legal proceedings against the Democratic Republic of the Congo (DRC) claiming that Guinean citizen Mr. Ahmadou Sadio Diallo’s international rights were violated by the DRC.³⁰ In contrast to *Lusitania*, the availability of moral damages in

²² Markert; Freiburg, JWIT 2013/14(1), pp. 9-10.

²³ Weber, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 421.

²⁴ Ibid.

²⁵ PCIJ, *The Factory at Chorzów (Germany v. Poland)*, (Claim for Indemnity) (The Merits), 1928 (ser. A) No. 17 (Sept. 13), para. 125.

²⁶ Weber, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 422.

²⁷ Rynjaert, Utrecht Journal of International and European Law 2021/36(2), p. 171.

²⁸ Gultutar. p. 2.

²⁹ Weber, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 423.

³⁰ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, Reports 2007, pp. 585-586, para. 1.

international law was unquestioned.³¹ By confirming the *Chorzów* principle, in *Diallo* a moral damage was defined by the ICJ in a way that it “covers harm other than material injury which is suffered by an injured entity or individual”.³² The ICJ has further established that “[n]on-material injury to a person which is cognizable under international law may take various forms”.³³ Referring to the evidence for moral damages, the ICJ noted that a moral injury can be established even without specific evidence.³⁴ Moreover, the court established that certain circumstances of the case can aggravate claims for moral damages, and that equitable considerations can be taken into account when calculating compensation for non-material harm.³⁵

Transitioning to international investment law concerning the treatment of moral damages, it can firstly be noted that in international investment arbitration the application and implementation of Article 31 ARSIWA has been challenging for arbitral tribunals.³⁶ Nevertheless, some significant cases such as *Desert Line v. Yemen*, *Lemire v. Ukraine* and *von Pezold v. Zimbabwe* have built the investment arbitral practice concerning moral damages. The aforementioned cases will be introduced in detail during the further course of the paper.

D. Preconditions to award moral damages

The available arbitral practice indicates that the award of moral damages is subject to preconditions. Accordingly, moral damages are granted only in exceptional circumstances that require a certain degree of gravity and defendant’s malicious behaviour. This chapter introduces the preconditions to award moral damages, addresses the criticism related to them and the reasoning behind that criticism.

I. Exceptional circumstances or gravity requirement

In investment arbitration, several arbitral tribunals have implemented the “exceptional circumstances” requirement as a precondition for an award of moral damages.

The requirement of “exceptional circumstances” was first introduced by the tribunal in *Desert Line v. Yemen*, which arbitrated a claim arising out of disagreements under road construction contracts and the works undertaken by Desert Line. The claim for moral damages arose out of Desert Line’s executives’ stress and anxiety of being harassed, threatened, and detained by the Respondent (forces? authorities?) and armed tribes; Desert Line’s loss of credit and reputation and the intimidation of Desert Line’s executives’ in relation to the contracts.³⁷ In addressing the claim for moral damages, the tribunal noted that “[e]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional

³¹ *Moyano*, Journal of International Dispute Settlement 2015/6(3), p. 487.

³² ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, Reports 2012, p. 333, para. 18.

³³ *Ibid.*

³⁴ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, Reports 2012, p. 333, para. 21; *Schmalenbach*, MPEPIL, 2019, para. 22; *Moyano*, Journal of International Dispute Settlement 2015/6(3), p. 487.

³⁵ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, Reports 2012, p. 333, paras. 23, 24; *Moyano*, Journal of International Dispute Settlement 2015/6(3), p. 487.

³⁶ *Weber*, The Law & Practice of International Courts and Tribunals 2020/19(3), pp. 417, 424.

³⁷ ICSID, Case No. ARB/05/17, *Desert Line Projects LLC v. Yemen*, Award), para. 286.

circumstances, ask for compensation for moral damages.”³⁸ The tribunal awarded moral damages after establishing that the damage suffered by Desert Line was substantial; it impacted the physical health of the investment’s executives and the investor’s credit and reputation.³⁹

The subsequent *Lemire v. Ukraine* case reaffirmed that moral damages are solely available under exceptional circumstances,⁴⁰ when a US investor (being the major shareholder of a Ukrainian music radio station) sued Ukraine for a violation of the US-Ukraine IIA’s fair and equitable treatment clause. The significance of this decision stems from the attempt of the tribunal to define the concept of exceptional circumstances in the following way:

“[...] as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that

- 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.”⁴¹

Formulated differently, according to this tribunal, moral damages are solely available under exceptional circumstances “such as when State’s conduct is considered grave (involving physical threat, illegal detention, or other analogous situations) and results in a person’s substantial deterioration of health, stress, anxiety, and other types of mental suffering.”⁴²

This test was applied as the claimant sought compensation of USD 3,000,000 for moral damages caused by alleged harassing measures attributable to Ukraine’s broadcasting authorities, for declining applications for new radio frequencies.⁴³ The tribunal observed that “excessive or disproportionate efforts which an applicant may have incurred when requesting administrative licenses, by their nature, are most unlikely to give rise to moral damages, since the injury does not meet any of the three standards required for the existence of moral damages”.⁴⁴ The tribunal has noted that the efforts to obtain new radio frequencies have not generated “extraordinary stress or anxiety” that the claimant may have suffered.⁴⁵ Regarding the claimant’s claim for compensation for the disrespect and humiliation resulted from authorities’ constant rejection of his applications, the tribunal accepted the possibility of repeatedly occurring rejections to cause a “a loss of reputation”.⁴⁶ However, it further stipulated that is not enough by emphasizing “the main question is to determine whether the injury inflicted is substantial”.⁴⁷ The reasoning behind the tribunal’s rejection of the claim for moral damages has been the absence of gravity: Although the tribunal accepted that the claimant suffered an unlawful treatment by the Ukrainian media regulator, it

³⁸ Ibid, para. 289.

³⁹ Ibid, para. 290.

⁴⁰ ICSID, Case No. ARB/06/18, *Joseph Charles Lemire v. Ukraine*, Award, para. 326.

⁴¹ Ibid, para. 333.

⁴² *Dumberry*, in: Beharry (ed.), p. 153.

⁴³ ICSID, Case No. ARB/06/18, *Joseph Charles Lemire v. Ukraine*, Award, para. 310.

⁴⁴ Ibid, para. 336.

⁴⁵ Ibid, para. 337.

⁴⁶ Ibid, para. 338.

⁴⁷ Ibid, para 338.

stated 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”.⁴⁸ The *Lemire* tribunal has thereby established in arbitral practice a proposed threshold, such as a high severity threshold. This would restrict the award of moral damages to “exceptional circumstances” when the “cause” is grave, and the “effect” is substantial.⁴⁹ Antoine Champagne considered the *Lemire v. Ukraine* as the most thorough and comprehensive examination of the concept and requirements of moral damages in international investment law.⁵⁰

Nevertheless, the reasoning behind the *Lemire* award and proposed high severity threshold have not remained uncriticized because of the tiny number of instances on which it was based.⁵¹ In *Arif v. Moldova*, which referred to alleged Government interference in the investor's duty-free business resulting in the exclusive exploitation of stores, moral damages were claimed for the pain, stress, shock, anguish, humiliation and shame suffered and the fact that the investor had to leave Moldova for safety reasons.⁵² Both claimant and respondent have referred to the *Lemire* award.⁵³ This Tribunal did not consider the finding in *Lemire v. Ukraine* as a definition of exceptional circumstances, but rather “a summary of the issues in these cases, but it should not be taken as a cumulative list of criteria that must be demonstrated for an award of moral damages”.⁵⁴ The tribunal has further reaffirmed that the element of exceptionality must be acknowledged and respected, noting:

“A breach of a contract or any wrongful act can lead to a sentiment of frustration and affront with the victim. A pecuniary premium for compensation for such sentiment, in addition to the compensation of economic damages, would have an enormous impact on the system of contractual and tortious relations. It would systematically create financial advantages for the victim which go beyond the traditional concept of compensation. The fundamental balance of the allocation of risks would be distorted. It would have similar effects if permitted in investment arbitration. The Tribunal is therefore aligning itself to the majority of arbitral decisions and holds that compensation for moral damages can only be awarded in exceptional cases, when both the conduct of the violator and the prejudice of the victim are grave and substantial”.⁵⁵

As a result, the *Arif v. Moldova* tribunal ultimately approved the *Lemire*'s three-stage “exceptional circumstances” standard.⁵⁶ By applying the standard to the circumstances of the case, the tribunal concluded that although conduct of the Moldovan authorities created stress and anxiety suffered by the claimant, the conduct did not reach the minimum degree of gravity and intensity which would qualify for exceptional circumstances.⁵⁷ Therefore, it can be concluded that the difference between the *Lemire* and *Arif* awards is quite slight.

⁴⁸ Ibid, para. 339.

⁴⁹ *Dumberry*, in: Beharry (ed.), p. 154; *Stendel*, ZaöRV/HJIL 2021/81, p. 955.

⁵⁰ *Champagne*, McGill Journal of Dispute Resolution 2015/1:2, p. 26.

⁵¹ *Stendel*, ZaöRV/HJIL 2021/81, p. 955.

⁵² ICSID, Case No. ARB/11/23, *Mr. Franck Charles Arif v. Republic of Moldova*, Award, para. 562.

⁵³ Ibid, para. 587.

⁵⁴ Ibid, para. 590.

⁵⁵ Ibid, para. 592.

⁵⁶ *Dumberry*, in: Beharry (ed.), p. 156.

⁵⁷ ICSID, Case No. ARB/11/23, *Mr. Franck Charles Arif v. Republic of Moldova*, Award, para. 612.

In *von Pezold v. Zimbabwe*, where the tribunal has found a breach of the expropriation (of land and property possessed by the claimants), fair and equitable treatment, and other provisions in the relevant BITs, the “extraordinary circumstances” requirement was satisfied. In that dispute the claim for moral damages was based on “invasions” of farms, which were predominantly white owned, by “Settlers / War Veterans”.⁵⁸ According to the tribunal, while the invasions were disorganized and “inchoate” in the beginning, as “they continued and expanded across Zimbabwe logistical support and supplies appear to have been provided by organs of the Zimbabwean Government to the “Settlers/War Veterans”.⁵⁹ In his witness statement, Mr. Heinrich von Pezold, one of the claimants, stated that he “along with [his] staff, were humiliated, threatened with death and assaulted, had firearms put to [their] heads, and were kidnapped. [...] Beyond the actual terror of experiencing an Invasion first-hand, during the invasions there was a general sense of terror within the farming community; [they] knew that farmers and farm workers had been killed during Invasions by War Veterans, and that there were a number of instances of rape and threats of rape on the farms by War Veterans. [...]”⁶⁰ The tribunal found that Heinrich’s treatment justifies an award of moral damages based on the principles established by the *Lemire* tribunal and granted USD 1,000,000 for moral damages, considering it to be “appropriate especially given the number of years that Heinrich was exposed to these stresses”.⁶¹ Addressing the moral damages claims raised by the remaining claimants, the tribunal held that since they did not reside in Zimbabwe, the fact that they had “fears for Heinrich and their staff” was not enough to entitle them to compensation for moral damages.⁶²

Accordingly, it can be stated that there is an expanding consensus in investment arbitration practice that moral damages should be compensated if the requirement of “exceptional circumstances” is fulfilled. In the Aftermath of *Desert Line v. Yemen*, several arbitral tribunals have implemented the requirement and dismissed claims for moral damages when the requirement was not fulfilled⁶³. Hence, the current arbitral practice is equating exceptional circumstances with a gravity threshold: both the internationally wrongful act that violates the relevant BIT or a contract and the consequences of that act must be either grave or substantial.⁶⁴

Notwithstanding, it is noteworthy that the approach adopted by the aforementioned tribunals has been criticized by scholars based on the assumption that the “exceptional circumstances” threshold is not in conformity with established principles of international law concerning reparations”.⁶⁵ While under international law a State is obliged to provide full reparation for all damages, whether

⁵⁸ ICSID, Case No. ARB/10/15, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award, paras. 110, 112.

⁵⁹ Ibid.

⁶⁰ Ibid, para. 898.

⁶¹ Ibid, paras. 920-921.

⁶² Ibid, para. 922.

⁶³ ICSID, Case No. ARB/11/23, *Mr. Franck Charles Arif v. Republic of Moldova*, Award, para. 615; ICSID, Case No. ARB/07/6, *Señor Tz'a Yap Shum v. The Republic of Peru*, Award, paras. 281, 284; ICSID, Case No. ARB/10/4, *Antoine Laboud and Leila Laboud v. DR Congo*, Award, para. 622; ICSID, Case No. ARB/11/25, *OI European Group B.V. v. Venezuela*, Award, para. 917; ICC, Case No. 22236/ZF/AYZ, *Etrak Insaat v. Libya*, Final Award, paras. 430–433; UNCITRAL, *Oxus Gold v. Uzbekistan*, Final Award, paras. 895, 905.

⁶⁴ *Stendel*, ZaöRV/HJIL 2021/81, p. 956.

⁶⁵ *Jagusch; Sebastian*, Arbitration International 2013/29(1), pp. 55, 61–62; *Dumberry*, in: Beharry (ed.), p. 157; *Dumberry; Cusson*, JDIA 2014/1(2), p. 54; *Sabahi*, TDM 2012/9(1), p. 260; *Moyano*, Journal of International Dispute Settlement 2015/6(3), p. 501; *Blake*, Journal of International Dispute Settlement 2012/3(2), pp. 378, 394–395; *Dumberry*, Journal of International Arbitration 2010/27(3), p. 270.

material or moral, it is incomprehensible and controversial that a certain type of damage ought to be handled differently.⁶⁶ Since compensation for moral damages serves the same purpose as other compensatory damages, namely to eradicate all consequences of the breach, there is no reason why it should not be governed by the same standards as other compensatory damages.⁶⁷ Patrick Dumberry and Sébastien Cusson additionally argue that the application of the “exceptional circumstances” requirement, and the high gravity threshold, wrongfully interpret the basic principles of international law and the compensatory nature of moral damages, which may hinder the provision to claimants of full reparation for a real injury actually suffered.⁶⁸ The scholars propose that the proof of grave or “egregious” acts should not be a requirement to award compensation for moral damages.⁶⁹

II. Respondent’s “malicious” and “fault based” conduct

When addressing claims for moral damages, some tribunals have taken into account the malicious and fault-based conduct of the respondent as a further precondition to award moral damages.⁷⁰ In *Desert Line v. Yemen*, the tribunal held that the claimant’s malicious conduct was constitutive of fault-based liability, 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”.⁷¹ According to the interpretation of *Desert Line v. Yemen* by Patrick Dumberry, Yemen’s fault was considered by the tribunal when determining its international responsibility.⁷²

The tribunal in *Hesham Al Warraq v. Indonesia* established that “[...] moral damages are generally awarded only if illegal action was motivated or maliciously induced”.⁷³ Similarly, *Inmaris v. Ukraine* referred to the malicious character of the respondent’s actions when addressing the claim for moral damages and established that the actions were not of malicious character or driven by motives beyond the perceived need.⁷⁴

The requirement of “malicious” and “fault based” conduct has also not avoided criticism. According to Patrick Dumberry and Sébastien Cusson, the concept of “objective” responsibility of a State introduced by the ILC makes fault, malice or any other intent an unnecessary precondition for awarding compensation.⁷⁵ In contrast, scholars argue that a state’s fault or

⁶⁶ Dumberry, in: Beharry (ed.), p. 157.

⁶⁷ Dumberry; Cusson, JDIA 2014/1(2), p. 55; Dumberry, in: Beharry (ed.), p. 157.

⁶⁸ Dumberry; Cusson, JDIA 2014/1(2), p. 73.

⁶⁹ Ibid., p. 74.

⁷⁰ Riottot; Müller, Moral Damages, available at: [https://jusmundi.com/en/document/wiki/en-moral-damages#:~:text=Defi.\(22/11/2022\)](https://jusmundi.com/en/document/wiki/en-moral-damages#:~:text=Defi.(22/11/2022)); UNCITRAL, *Hesham T. M. Al Warraq v. Indonesia*, Final Award, para. 653; ICSID Case No. ARB/08/8, *Inmaris Perestroika and Others v. Ukraine*, Excerpts of Award, para. 428; ICSID, Case No. ARB/05/17, *Desert Line Projects LLC v. Yemen*, Award, ¶290.

⁷¹ ICSID, Case No. ARB/05/17, *Desert Line Projects LLC v. Yemen*, Award, para. 290; *Champagne*, MJDR / RRDM 2015, p. 35.

⁷² Dumberry, Why and How Arbitral Tribunals Award Compensation For Moral Damages?, available at: <http://arbitrationblog.kluwerarbitration.com/2010/05/03/why-and-how-arbitral-tribunals-award-compensation-for-moral-damages/> (22/11/2022).

⁷³ UNCITRAL, *Hesham T. M. Al Warraq v. Indonesia*, Final Award, para. 653.

⁷⁴ ICSID Case No. ARB/08/8, *Inmaris Perestroika and Others v. Ukraine*, Excerpts of Award, para. 428.

⁷⁵ Dumberry; Cusson, JDIA 2014, pp. 33, 74.

malicious intent should be considered by tribunals when quantifying the amount of compensation as a remedy for moral damages.⁷⁶

E. Problematic side of Moral Damages that Arbitral Tribunals face

Claims for moral damages may bring certain difficulties and challenges for arbitral tribunals. This chapter aims at illustrating the problematic side of moral damages, such as the proof of moral damages, *ratione personae* over moral damages claims and reparation for moral damages. These aspects are considered problematic since there is no uniform and final approach adopted by arbitral tribunals. Consequently, they are both disputed and controversial.

I. Proof of Moral Damages

The establishment of requiring adequate evidence to prove the truthfulness of a claim for moral damages, in order to justify the award and establish a causal relationship between an alleged internationally wrongful act and a moral damage, may be difficult for tribunals that arbitrate claims for moral damages. This difficulty is connected with the nature of moral damages: in contrast to material damages moral damages are difficult to prove.⁷⁷

It is a core principle of law that the decisions of tribunals and other judicial bodies must be informed and based on evidence.⁷⁸ In order to prove the truthfulness of their arguments, the parties of a dispute must submit evidence to the tribunal, simultaneously allowing the tribunal to determine the truth in the framework of that dispute.⁷⁹

Generally, the burden of proof, i.e. the proving the liability of the other party to the dispute, lies with the party asserting moral damages, the claimant.⁸⁰ As stipulated in *Rompetrol Group N.V. v. Romania* “[a] claimant before an international tribunal must establish the facts on which it bases its case or else it will lose the arbitration.”⁸¹ This approach was subsequently reaffirmed by *Arif v. Moldova* tribunal, which held that the claimant is required to convincingly demonstrate how the respondent’s alleged commitment not to impose arbitrary or unreasonable measures was violated by the alleged acts and omissions.⁸² Finally, *von Pezold v. Zimbabwe* tribunal has comprehensively explained the rule of burden of proof in the following way:

“[t]he general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections. Conversely, the claimants must prove any facts asserted in response to the Respondent’s objections and bear the overall burden of establishing that jurisdiction exist.”⁸³

⁷⁶ *Dumbery*, in: Beharry (ed.), p. 158; *Dumbery; Cusson*, JDIA 2014, p. 33, 74; *Ripinsky; Williams*, p. 312; *Moyano*, Journal of International Dispute Settlement 2015/6(3), p. 503; *Markert*; Freiburg, JWIT 2013/14(1), p. 32, 41; *Sabahi*, TDM 2012/9(1), p. 260.

⁷⁷ *Weber*, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 438.

⁷⁸ *Ibid.*

⁷⁹ *Weber*, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 438; Catelli; Brueggemann, in: Kläsener/Magál/Neuhaus (eds.), p. 88; *Pietrowski*; Arbitration International 2006/22(3), p. 373.

⁸⁰ *Gultutar*, p. 158.

⁸¹ ICSID, Case No. ARB/06/3, *The Rompetrol Group N.V. v. Romania*, Award, para. 179.

⁸² ICSID, Case No. ARB/11/23, Mr. Franck Charles Arif v. Republic of Moldova, Award, para. 500; *Gultutar*, p. 158.

⁸³ ICSID, Case No. ARB/10/15, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award, para. 174.

The tribunal further stated that the existence of a rebuttable presumption is the main exception to the above rule.⁸⁴

Regarding the standard of proof for moral damages, it can be stated that arbitral practice and approaches adopted by different international dispute resolution bodies are not uniform. Accordingly, under international law, there is no universal rule regarding the standard of proof for moral damages. While the ICJ held in *Diallo* that a moral injury can be established even without specific evidence⁸⁵, arbitral tribunals such as *Rompetrol Group N.V. v. Romania, Caratube and Hourani v. Kazakhstan*, *Tecmed v. Mexico*, *Bank Melli Iran and Bank Saderat Iran v Bahrain* have dismissed claims for moral damages based on the lack of factual evidence.⁸⁶ For instance, in *Rompetrol Group N.V. v. Romania*, in which the claimant argued that “moral damages cover non-pecuniary injury for which monetary value cannot be mathematically assessed and ... must be determined by the tribunal with a certain amount of discretion.”⁸⁷ the tribunal stated that “to a purely discretionary award of moral solace would be to subvert the burden of proof and the rules of evidence, and that the Tribunal is not prepared to do.”⁸⁸

Additionally, *Rompetrol Group N.V. v. Romania* considered that in domestic law, the widespread “balance of probabilities” rule was the “normal rule” to apply to the generality of the factual issues presented to it,⁸⁹ under which a court will be satisfied that an event occurred if it believes that the event’s occurrence is more likely to have happened than not based on the evidence presented. This approach was affirmed by *von Pezold v. Zimbabwe*, stating that generally the “balance of probabilities” is the standard of proof on which a claim in international arbitration must be proven.⁹⁰

Moreover, although the *Lemire* tribunal attempted to implement a reality-test, with the aim to overcome the difficulty concerning the standard of proof of moral damages, the approach of the tribunal stating that “[i]f it can be proven, that in the normal course of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists and that the first is the proximate cause of the other”⁹¹ lacked explanation concerning the composition of such proof.⁹²

Another element of the standard of proof, the causal relationship, is considered a “crucial point” in investment arbitration and, as Simon Weber observes, “[...] causation sits at the crossing point between liability and reparation.”⁹³ The wording of Article 31 ARSIWA demonstrates the

⁸⁴ Ibid, para. 175.

⁸⁵ ICJ, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, Reports 2012, p. 333, para. 21.

⁸⁶ ICSID, Case No. ARB/06/3, *The Rompetrol Group N.V. v. Romania*, Award, para. 289; ICSID, Case No. ARB/13/13, *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan*, Award of the Tribunal, paras. 1200-1203; ICSID, Case No. ARB(AF)/00/2, *Técnicas Medioambientales Tecmed, SA v. United Mexican States*, Award, para. 198; PCA, Case No. 2017-25, *Bank Melli Iran and Bank Saderat Iran v Bahrain*, Award, paras. 794-795.

⁸⁷ ICSID, Case No. ARB/06/3, *The Rompetrol Group N.V. v. Romania*, Award, para. 289.

⁸⁸ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 438.

⁸⁹ ICSID, Case No. ARB/06/3, *The Rompetrol Group N.V. v. Romania*, Award, para. 183; *Gultutar*, p. 160.

⁹⁰ ICSID, Case No. ARB/10/15, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award, para. 177; *Gultutar*, p. 161.

⁹¹ ICSID, Case No. ARB/06/18, *Joseph Charles Lemire v. Ukraine*, Award, para. 169.

⁹² *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 438.

⁹³ Ibid.

decisiveness of causation between the injury and the internationally wrongful act. Therefore, it is essential to convincingly illustrate the causal link between the inflicted moral damage and a certain violation of the relevant agreement or treaty.⁹⁴

It is, however, also worth noting that it is not uncomplicated for the tribunals to establish causation in claims for moral damages, and there is no uniform approach of determining the causation.⁹⁵

While referring to the causal link, the *Lemire* tribunal stated:

“The third element of causality is the so-called causal link, the chain which leads from cause to effect. The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause [...] to the final effect [...]; while the negative aspect permits the offender to break the chain by showing that the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like force majeure)”⁹⁶

The *Lemire* tribunal further observed that the mere fact the State could have predicted the damage creates already a presumption of causality, and the fact that a state voluntarily or maliciously violates its obligations constitutes sufficient proof of a causality.⁹⁷

In contrast, tribunals such as *Tecmed v. Mexico*, *Hassan v. Romania* and *Victor Pey Casado v. Chile* have declined claims for moral damages based on the lack of causality, considering that the claimant was not able to prove the damage had been caused by a breach of obligations.⁹⁸ In *Bivater v. Tanzania*, the claim for moral damages was declined as the tribunal concluded the claimed damage was attributable to factors other than the wrongful act.⁹⁹

Therefore, it may firstly be observed that, as commonly acknowledged in international law and reaffirmed by several international dispute resolution bodies, the burden of proof lies with the party alleging moral damages. Secondly, concerning the elements of standard of proof, such as evidence and causality, it can be stated that “the chain of causality between an internationally wrongful act and the damage incurred must be sufficiently proximate and clearly established by relevant evidence.”¹⁰⁰ Thirdly, a party claiming moral damages must be aware that evidence that the moral damage is directly caused by actions attributable to the State must exist.¹⁰¹

⁹⁴ Ibid, p. 439.

⁹⁵ Ibid.

⁹⁶ ICSID, Case No. ARB/06/18, *Joseph Charles Lemire v. Ukraine*, Award, para. 163.

⁹⁷ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020, 19(3), p. 439.

⁹⁸ ICSID, Case No. ARB/(AF)/00/2, *Técnicas Medioambientales Tecmed SA v. United Mexican States*, Award, para. 198; ICSID, Case No ARB/10/13, *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, Award, para. 516; ICSID, Case No. ARB/98/2, *Victor Pey Casado & President Allende Foundation v. Republic of Chile*, Award, para. 689.

⁹⁹ ICSID, Case No ARB/05/22, *Bivater Gauff (Tanzania) LTD v United Republic of Tanzania*, Award, para. 805.

¹⁰⁰ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020, 19(3), p. 440.

¹⁰¹ *Moyano*, *Journal of International Dispute Settlement* 2015, 6(3), p. 505.

II. *Ratione personae* over Moral Damages Claims

Ratione personae over claims for moral damages refers to the question of whose moral damages can be claimed, and who is permitted to raise a claim for moral damages. Whereas it is established that moral damages can be claimed by investors that are both natural and legal persons,¹⁰² it is still disputed whether they can be claimed by corporations' officers and states. This subchapter refers to the more problematic *ratione personae* aspects.

1. Moral Damages suffered by Corporations' officers

Awarding reparation for moral damages suffered by the officers of a corporation is considered as one of the unsolved problems that an arbitral tribunal may face. It was stipulated in *Gabčíkovo-Nagymaros* that the injured State has the right to compensation from the State committing an internationally wrongful act for the damage it has caused.¹⁰³ What is questionable is whether this principle would apply to investors that claim moral damages suffered by one or more of its officers.

Although natural persons and corporations do not have the status of a subject of public international law, they can obtain restricted status of a subject of international law by taking legal action against a State under the relevant BIT.¹⁰⁴ In the framework of a BIT, the investor would have the right to claim damages in case of a breached obligation or violation of their rights; “[a]pplying the *Gabčíkovo-Nagymaros* principle more abstractly, the wrongdoer has the obligation to repair the damage it has caused.”¹⁰⁵ Accordingly, since international law is applicable in investment arbitration, principles of international law including ARSIWA and relevant judgements would be applicable for claims for moral damages suffered by corporation's officers.¹⁰⁶

Besides, (considering that moral damages may include a variety of internationally wrongful acts) depending on the type of moral damages, they could be claimed to be suffered by the officers of the corporation. For instance, the corporation (often the investment vehicle) is not able to suffer from emotional distress or psychological violence.¹⁰⁷ Hence, it can only be the officers of the corporation (or the investors) who suffer from such types of damages.¹⁰⁸ In contrast, the corporation as a legal person may suffer from damage to its reputation, as affirmed by the *Desert Line* tribunal.¹⁰⁹

The *Desert Line* award implies that compensation for moral damages can be granted to a corporation in order to remediate the moral injury suffered by natural persons i.e. the corporations' officers.¹¹⁰ The tribunal also held Yemen liable for the injury suffered by Desert Line's executives.¹¹¹ Additionally, the *von Pezold v. Zimbabwe* tribunal found that “[...] it is appropriate that staff members of a company have recourse to competent, fair tribunals that can reflect the consequences of their

¹⁰² Riottot; Müller, Moral Damages, available at: [https://jusmundi.com/en/document/wiki/en-moral-damages#:~:text=Defi.\(22/11/2022\)](https://jusmundi.com/en/document/wiki/en-moral-damages#:~:text=Defi.(22/11/2022)).

¹⁰³ ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, Reports 1997, para. 152.

¹⁰⁴ Weber, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 436.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, p. 437.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Dumberry, in: Beharry (ed.), p. 151.

¹¹¹ ICSID, Case No. ARB/05/17, *Desert Line Projects LLC v. Yemen*, Award, para. 290.

poor treatment in an award of moral damages in favour of their employer. In some sense, this serves not only the function of repairing intangible harm, but also of condemning the actions of the offending State.”¹¹²

2. Moral damages as counterclaims

Another unsolved issue is the approach to moral damages claimed by states as counterclaims. Cases such as *Lundin v. Tunisia*, *Europe Cement v. Turkey*, *Cementownia v. Turkey* are examples in which a state has raised a claim of moral damages. While in all three cases the claims for moral damages were rejected,¹¹³ in *Europe Cement v. Turkey* the tribunal stated that just acknowledging that Turkey had suffered reputational loss constituted a restitution in form of satisfaction.¹¹⁴ The tribunal in *Cementownia v. Turkey* required the investor to pay an unusual amount of money when determining costs.¹¹⁵ Both awards, and the reasoning behind them, were subject to criticism.¹¹⁶

Although it is recognized by arbitral tribunals that moral damages may be claimed by a State on the basis of counterclaims,¹¹⁷ it is not common that states claim compensation for moral damages.¹¹⁸ Moreover, claims by states are rarely successful and international dispute resolution bodies tend to refuse such claims.¹¹⁹ Not a single state has received compensation as reparation for direct moral damage.¹²⁰ Therefore, whether states are entitled to compensation for moral injury remains subject of debate.¹²¹

III. Reparation for Moral Damages

Under international law, there is an obligation of the responsible State to make full reparation for the injury, including both material and moral damages, caused by an internationally wrongful act.¹²² Reparation is guided by two fundamental principles: firstly, an internationally wrongful act triggers a reparation obligation; and secondly, reparation must, as far as possible, eliminate the repercussions caused by the international wrongful act.¹²³ In *Chorzów*, regarded as the most significant case in this context, the PCIJ has observed that the obligation of reparation is not just a principle of international law, but even a general conception of law.¹²⁴ In addition, the PCIJ further stated that the obligation to make full reparation includes the elimination of all the consequences

¹¹² ICSID, Case No. ARB/10/15, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award, para. 916.

¹¹³ ICSID, Case No. ARB/12/30, *Lundin Tunisia B. V. v. Republic of Tunisia*, Excerpts of Award, paras. 379, 380; ICSID Case No. ARB(AF)/07/2, *Europe Cement Investment & Trade S.A v. Republic of Turkey*, Award, para. 181; ICSID, Case No. ARB(AF)/06/2, *Cementownia “Nova Huta” S.A. v. Turkey*, Award, paras. 171, 172.

¹¹⁴ ICSID, Case No. ARB(AF)/07/2, *Europe Cement Investment & Trade S.A v. Republic of Turkey*, Award, para. 181.

¹¹⁵ ICSID, Case No. ARB(AF)/06/2, *Cementownia “Nova Huta” S.A. v. Turkey*, Award, paras. 171, 172.

¹¹⁶ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 442.

¹¹⁷ *Riottot; Müller*, *Moral Damages*, available at: [https://jusmundi.com/en/document/wiki/en-moral-damages#:~:text=Defi.\(22/11/2022\)](https://jusmundi.com/en/document/wiki/en-moral-damages#:~:text=Defi.(22/11/2022)).

¹¹⁸ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 443.

¹¹⁹ *Ibid.*

¹²⁰ *Wittich*, *MPEPIL*, 2008, para. 31; *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 443.

¹²¹ *Riottot; Müller*, *Moral Damages*, available at: [https://jusmundi.com/en/document/wiki/en-moral-damages#:~:text=Defi.\(22/11/2022\)](https://jusmundi.com/en/document/wiki/en-moral-damages#:~:text=Defi.(22/11/2022)).

¹²² Article 31 ARSIWA.

¹²³ *Shelton*, *MPEPIL*, 2015, para. 2.

¹²⁴ PCIJ, *The Factory at Chorzów (Germany v. Poland)*, (Claim for Indemnity) (The Merits), 1928 (ser. A) No. 17 (Sept. 13), para. 73.

of the wrongful act and re-establishing the situation which would likely have existed if that wrongful act had not occurred.¹²⁵

There are different forms of reparation. If an arbitral tribunal upholds a claim for moral damages, appropriate reparation for a breach of obligation must also be determined by the tribunal.¹²⁶ Pursuant to Article 34 ARSIWA, the forms of full reparation for the injury caused by the internationally wrongful act are restitution, compensation and satisfaction, either separately or in combination, in accordance with the provisions of Chapter II ARSIWA. Simon Weber defines each form of reparation as follows: “[w]hereas restitution means re-establishment of the situation which existed before the breach, compensation consists of an award of money to the victim. Finally, satisfaction can consist of an acknowledgement of the breach or a formal apology.”¹²⁷

In its Commentary on ARSIWA, the ILC observes that since the notion of “injury” and the necessary causal relationship between the wrong and the injury are defined in the statement of the general obligation to make full reparation in Article 31, Article 34 must refer to “full reparation for the injury caused”.¹²⁸ Further, by referencing the decision in *Chorzów*, the ILC states:

“In the Factory at Chorzów case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation. In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances.”¹²⁹

Additionally, the ILC established that, depending on the nature and scope of the damage that has been inflicted, it may be necessary to provide some or all forms of reparation in order to fully eliminate the effects of the unlawful act.¹³⁰

This is consistent with the ICJ’s ruling in the *Avena* case, in which the ICJ reaffirmed that since the question must be considered from the perspective of what is the “reparation in an adequate form” that corresponds to the injury, it is obvious that what qualifies as “reparation in an adequate form” differs depending on the specific circumstances of each case, as well as the precise nature and extent of the injury.¹³¹

In order to identify the most appropriate form of reparation for moral damages it is essential to clearly define the objective of each form.

1. Restitution

The first form of reparation, restitution, is contained within Article 35 ARSIWA. This requires re-establishing the situation that existed prior to the commission of the wrong, except if the restitution is materially impossible or it does not involve a burden out of all proportion to the benefit derived from restitution instead of compensation. In *Aminoil*, in which a decree issued by the Kuwaiti

¹²⁵ PCIJ, *The Factory at Chorzów (Germany v. Poland)*, (Claim for Indemnity) (The Merits), 1928 (ser. A) No. 17 (Sept. 13), para. 125.

¹²⁶ Weber, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 425.

¹²⁷ Ibid.

¹²⁸ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, A/56/10, Art. 34, para. 1, p. 95.

¹²⁹ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, A/56/10, Art. 34, para. 2, p. 95.

¹³⁰ Ibid.

¹³¹ ICJ, *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, Reports 2004, para. 119.

government rendered a concession held by the investor void, the parties concurred that re-establishment of the initial situation was not possible, considering the non-tangible nature of the inflicted damage.¹³² Consequently, restitution is not considered to be an available remedy for reparation of moral damages.¹³³

2. Compensation

Compensation, the second form of reparation, covers any financially assessable damage insofar as it is established, according to Article 36 (2) ARSIWA. Article 36 (1) ARSIWA stipulates that the State responsible for an internationally wrongful act is obliged to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. It is noteworthy, that the concept of “damage” is defined in accordance with Art. 31 (2) ARSIWA and therefore includes moral damages.

As already discussed, in *Gabčíkovo-Nagymaros*, it was stated by the ICJ that it is a firmly established rule of international law that an injured state has the right to acquire compensation from the State committing an internationally wrongful act, which has caused a damage.¹³⁴ The *Gabčíkovo-Nagymaros* decision is in accordance with the *Lusitania* approach, stipulating that a state, which is responsible for the commission of an internationally wrongful act, is obliged to compensate any monetarily evaluable damage suffered by its victim.¹³⁵ In *Gabčíkovo-Nagymaros*, the ICJ was not asked to quantify the damages, rather to indicate on what basis they should be paid.¹³⁶ Nevertheless, the reparation of moral damages in the form of compensation entails the quantification of the non-pecuniary damage that must objectively specify a certain amount of money, that the party responsible for the moral damages shall compensate.

The *Desert Line*, *Benvenuti* and *von Pezold* tribunals granted compensation for moral damages and, contemporaneously, have sought to quantify the moral damage. However, despite granting compensation, all tribunals failed to explain the method used to objectively quantify the compensation for moral damages. As discussed above, the reparation of moral damages should correspond to the inflicted damage. Yet, in contrast to material damages, moral damages are not *per se* materially or financially quantifiable. For that reason, the objective quantification of moral damages is complicated and rarely possible.

The objective quantification of moral damages was sought by the *Desert Line* tribunal as it had to quantify the compensation of moral damages that it would award based on “objective criteria”.¹³⁷ The claimant in *Desert Line* claimed the amount of OR 40,000,000 for moral damages, including loss of reputation.¹³⁸ Even though the tribunal qualified moral damages suffered by the claimant as “substantial”, it considered the claimed amount of compensation to be “exaggerated”.¹³⁹ Instead, the tribunal granted an amount of USD 1,000,000 as compensation, considering it to be “more

¹³² Government of Kuwait v. American Independent Oil Company (Aminoil), (1984), International Law Reports, 66, p. 533.

¹³³ Weber, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 426; *Champagne*, MJDR / RRDM 2015, p. 30; *Moyano*, Journal of International Dispute Settlement 2015, 6(3), p. 490.

¹³⁴ ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, Reports 1997, para. 152.

¹³⁵ Weber, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 427.

¹³⁶ ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, Reports 1997, para. 152.

¹³⁷ Weber, The Law & Practice of International Courts and Tribunals 2020/19(3), p. 427.

¹³⁸ ICSID, Case No. ARB/05/17, *Desert Line Projects LLC v. Yemen*, Award, para. 286.

¹³⁹ *Ibid*, para. 290.

than symbolic yet modest in proportion to the vastness of the project”.¹⁴⁰ Nonetheless, as already indicated above, the reasoning of the tribunal is considered unsatisfactory in failing to specify how it calculated the amount of the compensation.¹⁴¹

In *Benvenuti & Bonfant v. Congo*, the claimant alleged that 40% of its shares in a joint venture had been expropriated by People’s Republic of the Congo and claimed CFA 250,000,000 for moral damages that resulted from loss of opportunities and credit, its own organisation at management level and of its own technical staff after forcefully leaving Congo.¹⁴² Although the tribunal observed that the claimant did not provide enough evidence to establish the truth of their claims, it was considered equitable to award the claimant CFA 5,000,000 based on *ex aequo et bono* grounds.¹⁴³ It is noteworthy that the tribunal awarded compensation, not for the effective reparation of moral damages, but rather as compensation for the consequences of the measures to which claimant has been subject, which have disturbed the activities of claimant.¹⁴⁴ Correspondingly, the significance of this award restricted.¹⁴⁵

In *von Pezold v. Zimbabwe*, the tribunal recognized the difficult nature of the quantification of moral damages and considered it should strive for some degree of consistency with other ICSID decisions.¹⁴⁶ As already introduced, compensation of USD 1,000,000 has been granted by the tribunal, considering the amount of appropriate by taking into account the number of years that Heinrich von Pezold was subjected to stress.¹⁴⁷

While the ILC established that “[m]aterial and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation”, it fails to illustrate how the compensation for moral damages could be quantified.¹⁴⁸

The Iran-United States Claims Tribunal observed in *Amoco v. Iran* that “[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.”¹⁴⁹ Hence, by awarding compensation for a claim on moral damages, tribunals veer into speculation.¹⁵⁰ Moreover, in Simon Weber’s terms, the absence of concrete means of objective quantification of moral damages means any sum of money awarded as compensation is arbitrary.¹⁵¹

¹⁴⁰ Ibid.

¹⁴¹ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 428; *Champagne*, *McGill Journal of Dispute Resolution* 2015/1:2, p.39; *Moyano*, *Journal of International Dispute Settlement* 2015, 6(3), p. 508.

¹⁴² ICSID, Case No. ARB/77/2, *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, Award, para. 4.95.

¹⁴³ Ibid, para. 4.96.

¹⁴⁴ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020, 19(3), p. 444.

¹⁴⁵ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020, 19(3), p. 444; *Dumberry*, *Journal of International Arbitration* 2010/27(3), p. 255; *Jagusch; Sebastian*, *Arbitration International* 2013/29(1), p. 50.

¹⁴⁶ ICSID, Case No. ARB/10/15, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Award, para. 921.

¹⁴⁷ Ibid.

¹⁴⁸ *ILC*, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, A/56/10, Art. 37, para. 3, p. 106; *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 428.

¹⁴⁹ Iran-United States Claims Tribunal, *Amoco International Finance Corp. v. Islamic Republic of Iran*, Partial Award (Award No. 310-56-3), para. 238.

¹⁵⁰ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 429.

¹⁵¹ Ibid.

Accordingly, it can be reaffirmed that although compensation is an available form to repair moral damages, considering the non-pecuniary nature of moral damages they cannot objectively be quantified. Further, there is no common understanding or calculation mechanism existing in international investment law or in arbitral practice yet, which could quantify the amount of compensation for moral damages.

3. Satisfaction

The third form of reparation, satisfaction, may, according to Article 37 (2) ARSIWA, consist in an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality. Nevertheless, it shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.¹⁵² A declaration by a judicial body referring to the wrongful act that was committed by a state and “pecuniary satisfaction” in form of a “symbolic” amount of money are different forms of satisfaction.¹⁵³ The ILC stipulates that satisfaction in form of monetary payments is to be distinguished from compensation: while compensation follows the purpose to offset the damage caused by the wrongful act, satisfaction is connected with non-material injury. This could be monetary; however it is assessable only in an highly approximate and notional way.¹⁵⁴ Satisfaction through declaratory relief has been accepted by the ILC in case of intangible damages.¹⁵⁵

The State, which is responsible for the commitment of an internationally wrongful act is, according to Article 37 (1) ARSIWA, obliged to provide satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. This shows the exceptional character of satisfaction by emphasizing that satisfaction will be obligatory in case restitution or compensation do not constitute full reparation.¹⁵⁶

In the *Rainbow Warrior* case, it was stated that “[t]here is a long-established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.”¹⁵⁷ This indicates that satisfaction is considered to be an acceptable form of reparation for moral damages.¹⁵⁸

Patrick Dumberry distinguishes between moral damages suffered by individuals and corporations, and moral damages suffered by the states. According to Dumberry, “a mere declaration by a tribunal recognizing the wrongfulness of acts committed by the host state is clearly an insufficient and inappropriate remedy to cover actual moral damages suffered by an investor.”¹⁵⁹ The argumentation standing behind this approach is the above introduced argument of the ILC stipulating that the moral damages are “financially assessable”. This makes a distinction between

¹⁵² Article 37(3) ARSIWA

¹⁵³ *Dumberry*, in: Beharry (ed.), p. 161.

¹⁵⁴ *ILC*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, Art. 36, para. 4, p. 99.

¹⁵⁵ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 434.

¹⁵⁶ *ILC*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, Art. 37, para. 1, p. 105.

¹⁵⁷ France-New Zealand Arbitration Tribunal, *Rainbow Warrior (New Zealand/France)*, U.N.R.I.A.A. XX, para. 122.

¹⁵⁸ *Weber*, *The Law & Practice of International Courts and Tribunals* 2020/19(3), p. 435.

¹⁵⁹ *Dumberry*, in: Beharry (ed.), p. 161.

(easily) quantifiable and not quantifiable moral damages, asserting that the second type of moral damages could acceptably be repaired through satisfaction.¹⁶⁰

The approach concerning the repairment of moral damages through satisfaction is different when the party claiming moral damages is a state. Some internationally wrongful acts e.g. injury to reputation, have the potential to directly affect or harm a state's honour, dignity, or prestige.¹⁶¹ Satisfaction is considered by arbitral tribunals, the ICJ and under customary international law as the appropriate form of reparation for the financially not assessable injuries that affect directly a state.¹⁶²

Until now no investment tribunal has awarded compensation to a state as a respondent. However the *Europe Cement v. Turkey* and *Cementownia v. Turkey* cases, which were briefly introduced above, have referenced the issue: both tribunals denied jurisdiction over two different Energy Charter Treaty issues brought by two Polish firms, due to their inability to show their ownership of shares in the same two Turkish entities that were parties to purportedly terminated concession agreements with Turkey.¹⁶³ In *Europe Cement*, Turkey claimed USD 1,000,000 as compensation for the moral damages that resulted from “jurisdictionally baseless claim asserted in bad faith and for an improper purpose” that has generated “intangible but no less real loss”.¹⁶⁴ The reasoning behind the tribunal’s decision to not award any compensation for moral damages was based on the lack of exceptional circumstances, such as physical duress. Accordingly, it held that moral damages were not justified.¹⁶⁵ In *Cementownia*, Turkey’s argument relied on arbitral practice of awarding satisfaction to a state that suffered an intangible injury, such as injury to its reputation or prestige.¹⁶⁶ Turkey’s claim for pecuniary satisfaction to remedy its moral damage was dismissed by the tribunal,¹⁶⁷ whereas, as mentioned above, the investor was still ordered to pay an unusual amount of money in costs. The *Cementownia* and *Europe Cement* tribunals’ reasoning supports the notion that satisfaction, in the form of a tribunal’s declaration recognizing there has been a wrongful act, is the appropriate remedy for any moral harm suffered by a respondent state.¹⁶⁸ However, it should be noted that breaches of international law by investors that have a direct effect on states do not occur very often, in contrast to breaches of international law in the framework of State-to-State interaction.¹⁶⁹ Recent arbitral practice indicates that states generally request an apology from the state responsible for the wrongful act, or ask the tribunal to declare the wrongfulness of the that act.¹⁷⁰

4. Summary

Finally, it could be stated that under current arbitral practice, there is particular uncertainty concerning the most appropriate form of reparation for moral damages. As explained, restitution is not considered as an available and appropriate remedy for moral damages. Although some

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² *Champagne*, McGill Journal of Dispute Resolution 2015/1:2, p. 30; *Dumberry*, in: Beharry (ed.), p. 161.

¹⁶³ *Dumberry*, in: Beharry (ed.), p. 163.

¹⁶⁴ ICSID, Case No. ARB(AF)/07/2, *Europe Cement Investment & Trade S.A v. Republic of Turkey*, Award, para. 128.

¹⁶⁵ Ibid., para. 181.

¹⁶⁶ ICSID, Case No. ARB(AF)/06/2, *Cementownia “Nova Huta” S.A. v. Republic of Turkey*, Award, para. 165.

¹⁶⁷ Ibid., para 171.

¹⁶⁸ *Dumberry*, in: Beharry (ed.), p. 165.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

tribunals have repaired moral damages through compensation, bearing in mind their non-pecuniary nature, the objective quantification of moral damages remains difficult and problematic, if not in certain cases impossible. This problem has raised the question whether subjectively quantified and speculative compensation would be an appropriate form of reparation for moral damages. Referring to satisfaction, it can be stated that different types of satisfaction are perceived differently. Monetary satisfaction, for instance, is also controversial, because, like compensation, it could hardly be objectively quantified. Moreover, by awarding satisfaction for the claims of moral damages, it is important whether the party that suffered moral damages is a state or an investor. Hence, in the absence of a uniform approach by international dispute resolution bodies, it is reasonable to state that an appropriate form of reparation for moral damages should be determined considering the circumstances of each case, based on the specific aspects of the case.

F. Conclusion

The purpose of this paper was, as described previously, to provide a comprehensive illustration of the approach to moral damages adopted by international investment tribunals, by explaining the concept of moral damages and introducing their problematic aspects. In the first chapter, different versions of the definition of moral damages were introduced, namely moral damages from material damages and moral damages from punitive damages. The analysis of the historical development of moral damages has contributed to the better understanding of their concept. In the third chapter the requirements of “exceptional circumstances” and of respondent’s “malicious” and “fault based” conduct have been introduced by referring to the relevant arbitral practice and introducing the corresponding criticism. Subsequently, the fourth chapter illustrated the problematic side of moral damages. In the first subchapter it was stated that the causal relationship between an internationally wrongful act and the damage incurred must be sufficiently proximate and based on evidence. It has been stipulated in the second subchapter that moral damages suffered by corporations’ officers may be repaired and that moral damages claimed as counterclaims by states are still subject to debate. Finally, the third subchapter affirmed that whereas moral damages cannot be repaired through restitution, the appropriateness of compensation and satisfaction as forms of reparation of moral damages is disputed and should be based on the specific circumstances of each case. The issue of challenging quantification of moral damages has also been introduced in the framework of that subchapter.

To conclude, it can be reaffirmed that there is not a firm and uniform approach adopted by international investment tribunals concerning the award of moral damages in international investment arbitration. The differences between the approaches of diverse arbitral tribunals on a certain issue, or a certain element of the claim, have also been illustrated. Those different approaches and disputes may relate to the fact that moral damages are not part of every international investment dispute and are rather new in investment arbitration. Nevertheless, it can be clearly affirmed that it remains undisputed that moral damages exist. Hence, should an international dispute resolution body find that moral damages have been inflicted, they should be repaired in an appropriate form and configuration, based on the circumstances of the relevant case.

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