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Compensation for Moral Damages in Investor-State Arbitration Disputes

Patrick Dumberry★

This article examines the issue of monetary compensation awarded by arbitral tribunals for moral damages suffered by foreign investors in the context of investor–state arbitration. It examines the nature and the function of moral damages in international investment law as well as several controversial issues, including the proper form of reparation to remediate moral damages suffered by a state, whether proof of malicious intent is a necessary condition for a tribunal to award compensation and whether compensation should be limited to cases involving "egregious" or grave treaty violations. The article argues that particularly condemnable governmental actions toward foreign investors will have a bearing on the actual quantification of the amount of compensation to be awarded for moral damages. The goal is not only to remediate the actual damage suffered but also to send a "clear message" to the host state.

"La réparation morale contient un élément de châtiment"

Hersch Lauterpacht[1]

I. Introduction

Moral damage is an elusive concept. As explained in 1923 by the *Lusitania* tribunal, even if moral damages are "difficult to measure or estimate by money standards" it nevertheless remains that they are "very real" and must therefore be compensated.[2] In the past, numerous international tribunals and commissions have awarded compensation for moral damages suffered by foreign nationals. The present article set outs to analyze the role of moral damages in the specific context of investor–state arbitration. It will examine *when*, and most importantly, *why* arbitral tribunals established under investment treaties have awarded monetary compensation for moral damages suffered by foreign investors as a result of treaty breaches committed by the host state of the investment.

Until very recently, the issue of moral damages had arisen in only a handful of investor–state disputes. However, in 2008 and 2009 alone, no less than five arbitration awards discussed the issue. In one such case, *Desert Line Projects LLC v. Yemen*,[3] the arbitral tribunal awarded an amount of U.S.$1 million in compensation to the claimant. The tribunal held that Yemen should provide compensation to a corporation for its officers' *psychological*

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[1] Hersch Lauterpacht, *Règles générales du droit de la paix*, 62 Rec. des Cours 355 (1937-IV).

[2] Opinion in the Lusitania Cases, United States–Germany Mixed Claims Commission, 1923, VII U.N.R.I.A.A. 32.

[3] Desert Line Projects L.L.C. v. Yemen, ICSID Case No. ARB/05/17, Award, Feb. 6, 2008.

suffering (in this case, the "stress and anxiety of being harassed, threatened and detained")[4] directly resulting from *physical actions*, i.e. physical duress and other related measures of coercion, interference or intimidation conducted by army/police forces.[5] The tribunal also recognized that an injury to a corporation's credit, reputation and prestige is a form of moral damages that can be compensated by an award.[6] The tribunal's award marks the very first time compensation has been awarded for moral damages in the context of an investment treaty. This decision also contains the most comprehensive analysis to date on the question of moral damages in international investment law.

In view of these interesting and far-reaching new developments, the author proposes to revisit the question of moral damages in international law based on the work of the International Law Commission (ILC). The main focus of this article is to offer a *tour d'horizon* of all past and recent investor–state arbitration cases where the question of moral damages arose and to critically assess how tribunals have responded. I will also offer some preliminary conclusions on the nature and the function of moral damages in international investment law. In this third section, several controversial issues arising in the context of moral damages claims will be examined: Can a corporation claim compensation for its own moral damages as well as for the damages suffered by its officers or employees? What is the proper form of reparation to remediate moral damages suffered by a state? Is proof of fault or malicious intent a necessary condition for a tribunal to award monetary compensation for moral damages? Should compensation be limited only to cases involving "egregious" or grave treaty violations? Finally, if it is generally recognized that moral damages are not "punitive" in nature, what is then a tribunal's true objective when awarding compensation for such damages?

II. Moral Damages Under International Law

A. What is a "moral" damage suffered by an individual?

The concept of "moral" damage is admittedly vague and uncertain. In its most general and broadest sense, it simply means the opposite of "material" damages, i.e. damages that entail a financial or an economic loss. In its Commentaries to its Draft Articles on State Responsibility, the ILC provides the following illustration of the type of moral damages affecting an individual that can be compensated: "non-material damage 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."[7] A more comprehensive definition of moral damages was developed by Wittich:

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[4] *Id.*, paras. 179, 286.
[5] *Id.*, para. 290.
[6] *Id.*, para. 286.
[7] *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session, November 2001*, Report of the ILC on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 ((A/56/10), Ch. IV.E.2) ("ILC Commentaries") at 252. *See also* art. 28 of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Apr. 15, 1961, by reporters L.B. Sohn & R. Baxter, 55 A.J.I.L. 548 (1961):

> 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."[8]

To this list should be added one specific type of moral damages: injury to the credit and reputation of a legal entity, i.e. a corporation. International human rights tribunals have also defined the concept of moral damages.[9]

The distinction between material and moral damages is certainly blurred in some circumstances. As explained by Wittich, there are many instances where "non-material damage to the individual is the inevitable consequence of, and inseparably linked to, physical damage."[10] For example, this is the case of some forms of physical maltreatment, personal injury or bodily harm, which may entail an economic loss that is financially assessable and should, therefore, be deemed as a "material" damage. However, the same physical injury may also lead to other forms of emotional harm, which must be assessed as moral damage. Conversely, some "mental" injury (such as, for instance, humiliation or defamation) may not only be purely moral and may, indeed, cause pecuniary losses (e.g., medical expenses).

B. Recognition of moral damages in international law

Moral damage is not a new concept in international law; it has long been recognized by international tribunals. One famous illustration is the *Lusitania* case adjudicated by the United States–Germany Mixed Claims Commission in 1923. This case involved the sinking of the British liner *Lusitania* by a German submarine during the First World War, killing 1,198 people, including 128 U.S. nationals.[11] On the issue of compensation for moral damages, Umpire Parker made the following observation:

> That 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

"Damages for bodily or mental harm, for mistreatment during detention, or for deprivation of liberty shall include compensation for past and prospective: (a) harm to the body or mind; (b) pain, suffering and emotional distress."

[8] Stephan Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 15 Finnish Y.B. Int'l L. 329 (2004) (he uses the term "non-material" instead of "moral" damages).

[9] Street Children (Villagrán Morales et al.) v. Guatemala, Inter-American Court of Human Rights, Judgment, May 26, 2001, Series C No. 77, para. 84: "This non-pecuniary damage may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other sufferings that cannot be assessed in financial terms."

[10] Wittich, *supra* note 8, at 330.

[11] *Lusitania*, *supra* note 2, at 32.

> 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 therefor as compensatory damages, but not as a penalty.[12]

The well-known basic principle of reparation in international law is set out at Article 31 of the ILC's Articles on State Responsibility. It provides that a state must make full reparation for any "injury" caused to another state by an internationally wrongful act.[13] The same provision also states that the concept of "injury" includes "any damage, *whether material or moral*, caused by the internationally wrongful act of a State."[14] The work of the ILC therefore clearly recognizes the concept of moral damages. The official commentary to the ILC Articles further explains that:

> As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. *But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation*.[15]

A state must therefore provide full reparation for all damages, including "moral" damages. The question is what form of reparation.

C. What is the proper form of reparation to remediate moral damages?

Article 34 of the ILC Articles indicates that there are three different methods of reparation: restitution, compensation and satisfaction. The general rule under Article 35 is that a "State responsible for an internationally wrongful act is under an obligation to make restitution," i.e. "to re-establish the situation which existed before the wrongful act was committed" (when this is "not materially impossible"). Under the ILC Articles, compensation is the appropriate reparation measure whenever restitution *in integrum* is not possible.[16] The only limitation to compensation as the appropriate measure of reparation is that the damage be "financially assessable." According to the ILC, "material and *moral damage* resulting from an internationally wrongful act will *normally* be financially assessable and hence covered by the remedy of compensation."[17]

The ILC Articles include a third type of reparation: "satisfaction." Under Article 37(1) of the Articles, "[t]he State responsible for an internationally wrongful act is under an

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[12] *Id*. at 40.

[13] *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, UN Doc. A/CN.4/L.602/Rev.1.ILC (July 26, 2001) [hereinafter "ILC Articles on State Responsibility"], art. 31.

[14] *Id*. art. 31(2) (emphasis added).

[15] ILC Commentaries, *supra* note 7, at 226 (emphasis added).

[16] ILC art. 36 reads as follows: "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

[17] ILC Commentaries, *supra* note 7, at 264 (emphasis added).

obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation."[18] The ILC Commentaries suggest that as a form of reparation for injury, the use of satisfaction is exceptional: "[i]t is only in those cases where those two forms [i.e. restitution and compensation] have not provided full reparation the satisfaction may be required."[19]

The question of which form of reparation the remedy for moral damages will take depends essentially on whether the damage affects the state *directly* or through one of *its nationals*.[20] It is generally recognized that restitution is not the appropriate remedy for moral damages.[21]

Satisfaction is *normally* the proper remedy for moral damages suffered by a state.[22] Thus, the ILC explains that satisfaction is the appropriate remedy for "those injuries, not financially assessable, which amount to an affront to the State."[23] One may think, for instance, of insults to state symbols, such as the national flag, or to violation of territorial integrity, the premises of embassies and consulates, attacks on ships and aircrafts, attacks on heads of state or diplomatic and consular representatives, etc.[24] There are very few cases where moral damage to a *state itself* (as opposed to one of its nationals) have been remedied by monetary compensation and not by satisfaction.[25] One well-known example of where an injury suffered directly by a state itself was remedied by both satisfaction and monetary compensation is the *Rainbow Warrior* arbitration between France and New Zealand.[26]

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[18] ILC art. 37(2) and (3) read as follows: "2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality; 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."

[19] ILC Commentaries, *supra* note 7, at 263.

[20] Gaetano Arangio-Ruiz, Special Rapporteur, *Second Report on State Responsibility*, A/CN.4/425, *in* II(4) Y.B. ILC 1 (1989) ("*Second Report on State Responsibility*") at para. 8: "moral damage to the injured State and moral damage to the injured State's nationals or agents receive different treatment from the point of view of international law." This essential distinction is also recognized in doctrine: C. Dominicé, *De la réparation constructive du préjudice immatériel souffert par un État*, *in* C. Dominicé, L'ordre juridique international entre tradition et innovation, Recueil d'études 355 (P.U.F., Paris, 1997); Christine Gray, Judicial Remedies in International Law 41 (1987); Wittich, *supra* note 8, at 327–29; Sergey Ripinsky & Kevin Williams, Damages in International Investment Law 308 (2008).

[21] Gray, *supra* note 20, at 15.

[22] *See* Affaire du Manouba (France v. Italy), 1913, XI U.N.R.I.A.A. 463; Affaire du Carthage (France v. Italy), 1913, XI U.N.R.I.A.A. 449; Corfu Channel, Merits (United Kingdom v. Albania), 1949 I.C.J. 35; Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France, 2008 I.C.J. para. 204 (June 4, 2008); Arrest Warrant of Apr. 11, 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. 3, paras. 11, 75 (Feb. 14, 2002). Other cases are discussed in *Second Report on State Responsibility*, *supra* note 20, at 33 et seq.; Wittich, *supra* note 8, at 321–68.

[23] ILC Commentaries, *supra* note 7, at 264. It further explains that "the qualification 'financially assessable' is intended to exclude compensation for what is sometimes referred to as *moral damage to a State*, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37." (*Id.* at 244, emphasis added).

[24] *Id.* at 264–65.

[25] One such case is S.S. I'm Alone (Canada v. United States), III U.N.R.IA.A. 1618.

[26] Case Concerning the Differences Between New Zealand and France Arising from the Rainbow Warrior Affair, Ruling of July 6, 1986 by the Secretary-General of the United Nations, XIX U.N.R.I.A.A.199; Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on July 9, 1986 Between the Two States and which Related to the Problems Arising from the Rainbow Warrior Affair (New Zealand v. France), Award, Apr. 30, 1990, XX U.N.R.I.A.A. 217.

The work of the ILC on State Responsibility makes it clear that compensation is the appropriate remedy for moral damages affecting an individual: "compensable personal injury encompasses not only associated material losses," but also includes "non-material damage suffered by the individual."[27] Thus, and contrary to the view held by some scholars,[28] compensation can be the proper remedy for moral damage to the extent that such damage is "financially assessable." The ILC considers that moral damages suffered by an individual are "financially assessable": "No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the *Lusitania* case."[29]

In the past, several international tribunals, such as the Tribunal for the Law of the Sea,[30] as well as various human rights bodies[31] have awarded compensation to individuals for moral damages.[32] One recent example is the United Nations Compensation Commission (UNCC).[33] A second is the Ethiopia–Eritrea Claims Commission.[34] One well-known example is the above-mentioned *Lusitania* case.[35] Other examples of cases decided by mixed claims commissions include *Chevreau*,[36] *Di Caro*,[37] *Heirs of Jean Maninat* case,[38] *Gage*,[39] and *Letelier and Moffitt*.[40]

III. Moral Damages in Investor–State Arbitration Disputes

Investors have claimed compensation for moral damages in several disputes. Such claims have been submitted for moral damages suffered by both natural persons and legal

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[27] ILC Commentaries, *supra* note 7, at 252.

[28] *See, e.g.*, Abby Cohen Smutny, *Some Observations on the Principles Relating to Compensation in the Investment Treaty Context*, 22(1) ICSID Rev. 6 (2007), for whom moral damages can only be remedied by "satisfaction" insofar as compensation deals only with "financially assessable damage." She argues that "compensation is not a remedy for 'moral' damage" (at 6). The author also states (at 7): "The principle that compensation is only owed in respect of financially assessable damage refers both to the fact that *compensation is not meant to remedy "moral" injury*, and to the fact that compensation is owed only in respect of injuries that are quantifiable with some degree of certainty, i.e. the scope of the injury (and thus the obligation to compensate) cannot be too speculative." (emphasis added)

[29] ILC Commentaries, *supra* note 7, at 252.

[30] *See, e.g.*, The M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea, Judgment, July 1, 1999, where the tribunal included damages for injury to the crew of a ship, their unlawful arrest, detention and other forms of ill-treatment.

[31] *See* D. Shelton, Remedies in International Human Rights Law (Oxford University Press, 1999). *See* Velásquez Rodríguez (Compensatory Damages), Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989), in 95 I.L.R. 233, 315–16 (1990) at para. 38; Godínez Cruz (Compensatory Damages), Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989).

[32] In doctrine, *see* Wittich, *supra* note 8, at 321–68.

[33] U.N.C.C. Governing Council Decision No. 3 on Personal Injury and Mental Pain and Anguish, S/AC.26/1991/3 (Oct. 23, 1991) provides, inter alia, that "compensation will be provided for non-pecuniary injuries resulting from … mental pain and anguish."

[34] Agreement on Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, June 18, 2000, 2138 U.N.T.S. 86; Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Dec. 12, 2000, 2138 U.N.T.S. 94.

[35] *Lusitania, supra* note 2.

[36] Chevreau (France v. United Kingdom), 1931, II U.N.R.I.A.A. 1113.

[37] Di Caro, Italy–Venezuela Mixed Claims Commission, 1903, X U.N.R.I.A.A. 597.

[38] Heirs of Jean Maninat, France–Venezuela Mixed Claims Commission, 1905, X U.N.R.I.A.A. 55.

[39] Gage, United States–Venezuela Mixed Claims Commission, 1903, IX U.N.R.I.A.A. 226.

[40] Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt, Decision, Jan. 11, 1992, XXV U.N.R.I.A.A. 1; 88 I.L.R. 727 (1992).

entities. More recently, respondent states have also submitted counterclaims requesting compensation for moral damages alleging having suffered an injury to their reputation as a result of "fraudulent" arbitral proceedings commenced by foreign investors.[41] The "mapping" of these various cases can be summarized as follows:

- No arbitration case was found where the arbitral tribunal expressly refused, as a matter of principle, to award compensation to an investor for moral damages.
- In one case, however, the tribunal decided not to address the allegation raised by the claimant.[42]
- One tribunal dismissed a claim for moral damages because of its late filing,[43] while two others rejected claims because they lacked jurisdiction over the disputes.[44]
- The *Biloune* tribunal (discussed below) held that it lacked jurisdiction over a claim of "human rights" violations due to the restrictive language of the arbitration clause contained in a state contract under which the tribunal was constituted.
- One tribunal held, without any further analysis, that the treaty under which the arbitration proceedings were commenced did not provide any basis for allowing moral damages counterclaims by a state.[45] The same conclusion was also reached by the *Cementownia* tribunal (discussed below).
- In six cases, tribunals dismissed moral damages claims based on lack of evidence. In two of them, they did so without discussing the issue.[46] Three other tribunals (*Pey Casado*, *Bywater* and *Europe Cement*, all discussed below) ultimately rejected the claims based on lack of evidence, but nevertheless made some interesting

[41] Limited Liability Co. AMTO v. Ukraine, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 080/2005, Award, Mar. 26, 2008; Europe Cement Investment & Trade S.A. v. Turkey, ICSID Case No. ARB(AF)/07/2, Award, Aug. 13, 2009; Cementownia "Nowa Huta" S.A. v. Turkey, ICSID Case No. ARB(AF)/06/2, Award, Sept. 17, 2009.

[42] Helnan Int'l Hotels A.S. v. Egypt, ICSID Case No. ARB/05/19, Award, June 7, 2008, in which the claimant claimed compensation in the amount of €10 million for moral damages to its reputation.

[43] Bernardus Henricus Funnekotter et al. v. Zimbabwe, ICSID Case No. ARB/05/06, Award, Apr. 22, 2009. Claimants submitted for the first time at the hearing a claim for moral damages seeking €100,000 each in compensation. The tribunal held that the claim was inadmissible because of its late filing (*id*. paras. 139–40).

[44] Zhinvali Development Ltd. v. Georgia, ICSID Case No. ARBF/00/1, Award, Jan. 24, 2003, paras. 278–79, 280, 282. Claimant alleged having suffered moral damages as a result of defamatory comments by Georgia that caused harm to its reputation. The majority of the tribunal held that it lacked jurisdiction over the dispute since it did not qualify as an investment under Georgian law (the law under which the proceedings were instituted). *See also* Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003, para. 17.6. The tribunal held that the claimant's cause of action based on art. 56 of the Ukrainian Constitution for "moral damages inflicted by unlawful decisions" was beyond the scope of its jurisdiction which was limited to BIT breaches.

[45] *Limited Liability Co. AMTO, supra* note 41. Ukraine submitted a counterclaim claiming, inter alia, compensation for "non-material injury" to its reputation in the amount of €25,000 as a result of allegations raised by the investor in the proceedings. The tribunal dismissed a counterclaim of this nature on the ground that the respondent had "not presented any basis in this applicable law [i.e., the Energy Charter Treaty and 'the applicable rules and principles of international law'] for a claim of non-material injury to reputation based on the allegations made before an Arbitral Tribunal" (para. 118).

[46] Técnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, para. 198, where the claimant alleged that Mexico's conduct damaged its reputation and caused the loss of business opportunities. Iurii Bogdanov, Agurdino-Invest Ltd. & Agurdino-Chimia J.S.C. v. Moldova, S.C.C., Award, Sept. 22, 2005, at para. 5.2, where the tribunal mentioned the claimants' request for compensation for "moral damage" (without providing more details as to the nature of such damages), but dismissed it for lack of evidence.

observations on the role of moral damages in international law. Lastly, the *Benvenuti* tribunal (discussed below) concluded that the claim was unsupported by any evidence, but nevertheless awarded a small amount of money based on *ex aequo et bono* grounds.

– In only one case (*Desert Line Projects*, also discussed below) did a tribunal award compensation for moral damages.

In this section, we will examine the cases that offer the most in-depth analysis of moral damages. This will allow us in the following section to draw some preliminary conclusions based on these cases.

A. *Benvenuti and Bonfant v. Congo*

In 1973, an agreement was entered into between the Government of the People's Republic of Congo (sometimes known as Congo-Brazzaville) and Benvenuti and Bonfant S.r.l., an Italian corporation, for the establishment of a company (Plasco Co., a joint venture 60% owned by the government) to manufacture plastic bottles.[47] In 1977, the Italian company commenced ICSID proceedings against Congo alleging that it had expropriated its 40% interest in the joint venture. The tribunal concurred and awarded compensation to the investor in the amount of CFA113.4 million, compensating them both for the value of their interest in the venture and for lost profits. In addition, the investor also claimed some CFA250 million for "moral damages" related to loss of business opportunities in Italy, loss of credit with suppliers and banks, and loss of managerial and technical personnel, following their forced departure from the investor's operations in Congo.

The tribunal held that the investor had presented insufficient proof to support these specific allegations, which the tribunal described as "mere assertions unaccompanied by concrete evidence, or even the beginning of evidence."[48] However, the tribunal nevertheless decided to award compensation of less than €8,000 for moral damages on the basis that:

> [I]n view of the measures to which Claimant has been subject and the suit that was the consequence thereof, which have certainly disturbed the activities of Claimant, the Tribunal deems it *equitable* to award it the amount of CFA5,000,000 for moral damage.[49]

The tribunal did not explicitly indicate what those "measures" were. It is most likely a reference to the occupation of the investor's premises by the Congolese military, and the

[47] S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, Aug. 8, 1980, English translations of French original in 21 I.L.M. 740 (1982) (with correction: 21 I.L.M. 1478 (1982)); 8 Y.B. Com. Arb. 144 (1983); 1 ICSID Rep. 330 (1993).

[48] 8 Y.B. Com. Arb. 150 (1983).

[49] *Id*. (emphasis added). According to Ripinsky & Williams, *supra* note 20, at 310, the amount of CFA5 million would correspond today to less than €7,600.

institution of criminal proceedings against Mr. Bonfant, an officer of the company, which led the Italian diplomatic authorities to advise him to leave the country.[50] In any event, it is submitted that this award is of limited value in the context of investor–state disputes for two reasons.

First, the true nature of the award is rather unclear. The tribunal did *not* award compensation for the "moral damages" suffered by the company or one of its officers, Mr. Bonfant. In other words, compensation was not aimed at remediating Mr. Bonfant's "mental" suffering (in all likelihood stress and anxiety) resulting from his forced departure from Congo. The small amount of compensation was apparently awarded only because these events had "disturbed the activities" of the company. Thus, the goal of compensation was not to remediate the *actual damage* suffered (stress and anxiety), but to address the *practical consequences* arising from such damage, most notably the fact that Mr. Bonfant's departure led to some practical difficulties for the company.

Secondly, it is worthwhile to reiterate that the tribunal concluded that there was no evidence of any moral damage. The parties had agreed that the tribunal had the power to decide the dispute *ex aequo et bono* (pursuant to Article 42(3) of the ICSID Convention) and in its decision the tribunal expressly stated that the amount of damage was determined *solely on this basis.* Clearly the outcome of this case would have been different had it not been decided *ex aequo et bono*.

B. *Biloune v. Ghana*

Although this case does not deal directly with a claim for moral damages, but instead with related allegations of human rights abuses, the author nevertheless considers its findings to be of some relevance in the context of this article. The case of *Biloune v. Ghana* involved Mr. Antoine Biloune, a Syrian national, and a Ghanaian corporation, Marine Drive Complex Ltd. (MDCL, in which Mr. Biloune was the principal shareholder).[51] In 1985, MDCL and Ghana Tourist Development Company (GTDC) concluded a lease agreement under which MDCL was to renovate and manage a restaurant. Later, their business relationship was changed to a joint venture.[52] After the completion of a feasibility study, the scope of the project was expanded to the construction of an extensive 4-star hotel resort complex. In 1986, MDCL applied to the Ghana Investment Centre (GIC) to obtain certain benefits for the new project, which were available to joint ventures between foreign and Ghanaian partners under the Ghana Investments Code of 1985. The investment was approved by the GIC and an agreement was signed the same year.

In 1987, the Accra City Council (ACC) issued a "stop work" notice for lack of a building permit. According to the claimants, they obtained from ACC assurances that

[50] *S.A.R.L. Benvenuti & Bonfant*, 8 Y.B. Com. Arb. at 147.

[51] Antoine Biloune (Syria) & Marine Drive Complex Ltd. (Ghana) v. Ghana Investment Centre & Government of Ghana, ad hoc arbitration under the UNCITRAL Arbitration Rules, Award on Jurisdiction and Liability, Oct. 27, 1989, unpublished, extracts in Y.B. Com. Arb. 11 (1994).

[52] GTDC owned 51% of the shares, while MDCL owned 49%. MDCL was designated as manager of the joint venture.

approval for construction would be forthcoming and were instructed to proceed with construction without the permit. Soon after, ACC ordered the demolition of the project and announced (in a local newspaper) that persons involved in the project had to report to the National Investigations Committee (NIC). Mr. Biloune (as well as other MDCL officers) did so and were ordered to fill out an "assets declaration form" within fourteen days (Mr. Biloune requested and obtained a number of extensions of the deadline). Several months later, he was arrested and held in custody for thirteen days without charges ever being filed. A deportation notice was issued which stated that Mr. Biloune's presence in Ghana was "not conductive to the public good" and that he had to leave the country the very same day. A few days later Mr. Biloune was deported from Ghana to Togo.

The claimants commenced arbitration proceedings under the arbitration clause contained in the agreement alleging that GIC and the Government of Ghana interfered with their investment in MDCL and that their assets had been expropriated. It should be noted that Mr. Biloune did not specifically claim monetary compensation for moral damages consequent to his arrest and deportation, but did claim compensation for "denial of justice" and "violation of human rights." The tribunal summarized the claimants' argument as follows:

> The claimants assert that the Government's allegedly arbitrary detention and expulsion of Mr. Biloune and violation of his property and contractual rights constitute an actionable human rights violation for which compensation may be required in a commercial arbitration pursuant to [the parties' agreement]. They assert that the tribunal should consider this portion of the claim because this is the only forum in which redress for these alleged injuries may be sought.[53]

The tribunal observed that, in general, the host state must accord a minimum standard of treatment to foreign investors, which includes "fundamental human rights" obligations:

> Long-established customary international law requires that a State accord foreign nationals within its territory a standard of treatment no less than that prescribed by international law. Moreover, contemporary international law recognizes that all individuals, regardless of nationality, are entitled to fundamental human rights (which, in the view of the Tribunal, include property as well as personal rights), which no government may violate.[54]

However, in its decision the tribunal determined that it had no jurisdiction over Mr. Biloune's claim for violation of human rights based on the restrictive language contained in the arbitration clause:[55]

> Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights. This Tribunal's competence is

[53] Y.B. COM. ARB. 15 (1994).
[54] *Id.* at 15.
[55] The arbitration clause read as follows: "Where any dispute arises between the foreign investor and the Government *in respect of the enterprise*, all efforts shall be made through mutual discussions to reach an amicable settlement. Any dispute between the foreign investor and the Government in respect of an approved enterprise which is not amicably settled through mutual discussions may be submitted to arbitration; in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law." (emphasis added)

> limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes 'in respect of' the foreign investment. Thus, other matters—however compelling the claim or wrongful the alleged act—are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr. Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.[56]

Even though the tribunal chose not to address the violations of human rights as an independent cause of action, it nevertheless considered them relevant to determine whether or not the claimants' assets in MDCL had been expropriated. On this issue, the tribunal concluded that:

> The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr. Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune's interest in MDCL, unless the respondents can establish by persuasive evidence sufficient for these events.[57]

The tribunal concluded that Ghana "by its actions and omissions culminating with Mr. Biloune's deportation, constructively expropriated MDCL's assets, and Mr. Biloune's interest therein" and that the claimants were therefore entitled to compensation.[58]

In this case, the tribunal's determination that it lacked jurisdiction over the investor's human rights claim was based expressly on the narrow scope of the arbitration agreement. The law applicable to the contract was Ghanaian law with no reference to international law. It is submitted that the outcome of this case would have been quite different had it been brought under a modern investment treaty, with international law as the applicable law for the tribunal. Arguably, the conjunction of the arrest, the detention and the deportation of Mr. Biloune would have been considered in breach of the fair and equitable treatment and full security and protection clauses typically contained in such treaties.

C. *Desert Line Projects L.L.C. v. Yemen*

The case of *Desert Line Projects L.L.C. v. Yemen* involved a company from Oman which began building roads in Yemen in 1997.[59] In 2004, the company complained to

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[56] Y.B. Com. Arb. 15 (1994).

[57] *Id.* at 19–20. The tribunal also held that the government "ha[d] not succeeded in establishing that there were reasons for the NIC investigation and the arrest and deportation of Mr. Biloune that were not connected to the MDCL project." (*Id.*, para. 28.)

[58] The tribunal awarded compensation to the claimant in a subsequent award on damages and costs of June 30, 1990.

[59] *Desert Line Projects*, *supra* note 3.

the government that no payment had been made in respect of several completed contracts.[60] In March 2004, works were interrupted at some of the construction sites by the subcontractor (who had not been paid) when "15 armed individuals, demand[ed] payment of outstanding invoices and threatene[d] the company's personnel."[61] Days later, a member of the local council and "individuals of his tribe confronted" the company's personnel, "demanding to traverse the working site and opening fire with automatic weapons."[62] The manager of the company also received a phone call urging him to leave the country as his life was in danger. The company brought an action before a Yemeni court for payment of the outstanding amount under the contracts. In response to a letter by the company, the President of Yemen gave assurances that it would be paid. Soon after, the company complained about the "evacuation of [its] equipment by armed forces dispatched by the Minister of the Interior."[63]

In June 2004, the company and the government executed an arbitration agreement to submit the dispute to two Yemeni arbitrators. Six weeks later the arbitral tribunal rendered an award in favor of the company in the amount of some U.S.$108 million. Soon after the award was rendered, an altercation at one of the company's construction sites between its personnel and the Yemeni army resulted in the arrest and detention (for three days) of three of the company's executives. Yemen did not comply with the award and applied to its own courts to have the decision annulled.

In October 2004, Yemen offered to pay the company U.S.$20 million as a final settlement of the dispute. The company protested against the terms proposed under the settlement insofar as the amount was much lower than what had been previously determined by the arbitral tribunal. In the meantime, the company complained to the authorities about "harassment, threat and theft" committed by armed groups and requested protection from the government.[64] In a December 2004 letter, the President of Yemen refused to pay the amount under the arbitral award and instead "urged" the company "to accept the reduced sum offered to him, by the Ministry of Public Works."[65] Soon after, the company signed the settlement agreement and Yemen paid the amount specified in the agreement. A few months later, the company indicated its rescission of the settlement agreement and commenced ICSID arbitration under the Oman–Yemen bilateral investment treaty (BIT). It claimed the amount outstanding under the arbitral award as well as damages "in an amount to be determined for loss of business opportunities, loss of reputation and other losses sustained by the claimant as a result of the Respondent's breaches."[66]

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[60] In its award, the tribunal held that it had jurisdiction over the dispute even though the claimant had not obtained an "investment certificate" as required under the Yemen–Oman BIT. The tribunal found that the project had been solicited and approved by the Yemeni President himself.

[61] *Desert Line Projects*, *supra* note 3, Award, para. 19.

[62] *Id.*, para. 20.

[63] *Id.*, para. 26.

[64] *Id.*, para. 38.

[65] *Id.*, para. 170.

[66] *Id.*, para. 50.

The claimant specifically requested compensation for moral damages in the amount of U.S.$104 million.[67]

In its award of February 2008, the tribunal described the aforementioned letter by the President of Yemen as an "executive intervention with the legal process of the most errant kind"[68] and added that "international tribunals [have] refused to give effect to transactions where governments have created intolerable pressure to conclude transactions."[69] The tribunal also added that in this case the "iniquity [was] patent since the Claimant was presumptively entitled to the amount of the Yemeni arbitral award and every dinar cancelled by the Settlement Agreement was an injustice."[70] The tribunal then observed that a settlement usually entails that each party waives its rights and claims arising out of a dispute. However, when the settlement agreement was signed there was no dispute left to be resolved since the issue had already been decided by the arbitral tribunal in its binding award. Under the circumstances, the tribunal held that the settlement was not the result of fair and equitable negotiations between the parties and fell "well short of the minimum standard of international law":

> The settlement agreement according to which the prevailing party in an arbitral proceeding renounces half of its rights without due consideration can only be valid if it is the result of an authentic, fair and equitable negotiation. In the case at hand, the rejection of the outcome of a mechanism for the resolution of the claims rendered in a local arbitration by two arbitrators selected by the parties, and assisted in their deliberations by a local Yemeni magistrate; coupled with the subjection of the Claimant's employees, family members, and equipment to arrest and armed interference, as well as the subsequent peremptory "advice" that it was "in [his] interest" to accept that the amount awarded be amputated by half, falls well short of minimum standards of international law and cannot be the result of an authentic, fair and equitable negotiation.[71]

The tribunal concluded that the claimant had "no realistic choice but to enter into the settlement."[72] The claimant was thus induced to be patient by relying on several promises of payment, including some by senior officials and by the President of Yemen himself. The claimant had invested a considerable amount of money to execute the contracts and was "almost bankrupt" when it entered into the settlement.[73] The tribunal concluded that Yemen had exerted undue coercion upon the claimant. Thus, the settlement "was imposed onto the Claimant under physical and financial duress" and was "not the result of fair and sincere negotiation among the parties."[74] According to the tribunal, the conduct of the respondent was in violation of the obligation to provide "fair and equitable

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[67] *Id.*, para. 58. OR40 million was worth some U.S.$104,248,111 at the time of the filing of claimant's memorial (June 26, 2006), *available at* <www.oanda.com>.

[68] *Id.*, para. 171.

[69] *Id.*, para. 172.

[70] *Id.*, para. 174.

[71] *Id.*, para. 179.

[72] *Id.*, para. 181.

[73] *Id.*, paras. 182–84.

[74] *Id.*, para. 186. On the concept of duress, the tribunal indicated (para. 151) that "the fact that a party is objectively under financial pressure does not necessarily mean that any agreement reached with such party is vulnerable to invalidation for duress. … A contractual excuse of duress requires some element of abuse by the other contracting party." The tribunal also noted that "a party may fail to make payments expected by another party without necessarily exposing itself to a claim of duress" (para. 152).

treatment" under the BIT. The tribunal also found that the settlement agreement contravened the respondent's obligations under the BIT, and that the agreement was not entitled to international effect.[75] As a result of its findings, the tribunal reinstated the previous arbitral award for the purposes of determining Yemen's liability under the BIT.[76] It ordered Yemen to pay the claimant the amount due under the Yemeni arbitral award (i.e. U.S.$24 million).[77]

Addressing the specific claim for moral damages, the tribunal summarized the claimant's contention as follows: "[t]he Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes; the Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant's executives have been intimidated by the Respondent in relation to the contracts."[78] The respondent claimed that the claimant failed to establish that these acts were related to the contract and were attributable to Yemen.

The tribunal first noted that the respondent had "not questioned the possibility for the Claimant to obtain moral damages in the context of ICSID procedure."[79] The tribunal acknowledged that BITs "primarily aim at protecting property and economic values," but added that "they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages."[80] According to the tribunal, "it is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages."[81] The tribunal noted that "it knows that it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award."[82] In its decision, the tribunal quoted the aforementioned *Lusitania* case to show that non-material damages may be "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."[83] The tribunal also stated that it was "generally recognised that a legal person (as opposed to a natural person) may be awarded moral damages, including loss of reputation, in specific circumstances only."[84] The tribunal concluded that Yemen's actions were in violation of the BIT:

> The Arbitral Tribunal finds that the violation of the BIT by the Respondent, in particular the physical duress exerted on the executives of the Claimant, was malicious and therefore constitutive of a fault-based liability. Therefore the Respondent shall be liable to reparation for the injury

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[75] *Id.*, paras. 193–94.

[76] The tribunal nevertheless observed that the arbitral proceedings leading to the Yemeni award had been "more than unusual" (para. 168) and that the award "by reference to international practice" was "perplexing" (para. 169). The award is discussed in detail at paras. 196–205. The tribunal concluded that the award definitively resolved all disputes between the parties and that it was "final and binding, has a res judicata effect and is therefore legally enforceable" (para. 204).

[77] Less the amount already paid by the government before the award as well as the amount already paid pursuant to the settlement agreement.

[78] *Desert Line Projects*, *supra* note 3, Award, para. 286.

[79] *Id.*, para. 289.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

> suffered by the Claimant, whether it be bodily, moral or material in nature. The Arbitral Tribunal agrees with the Claimant that its prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation.[85]

The tribunal held that Yemen was liable to make reparation for "moral damages, including loss of reputation" in the sum of U.S.$1 million (without interest).[86] It added that this amount for moral damages was "indeed more than symbolic yet modest in proportion to the vastness of the project."[87]

D. *Pey Casado v. Chile*

This case involved Mr. Victor Pey Casado, who owned shares in a local newspaper in Chile which were confiscated by the military junta led by General Pinochet in 1973.[88] After the event, he fled to his native Spain and only returned to Chile in the late 1980s following the arrival of a new government promising to remedy the losses he had sustained. However, Mr. Pey Casado was unable to secure any remedies in Chilean courts and commenced arbitral proceedings in 1997 under the Chile–Spain BIT claiming U.S.$396.8 million.[89]

The tribunal did not assess the legality of the actions which took place at the time of the *coup d'etat* (and soon after) because the BIT had not yet entered into force. The tribunal held that it had jurisdiction under the BIT only for acts which took place after 1994. The tribunal concluded that Chile breached the fair and equitable treatment provision contained in the Spain–Chile BIT.[90] In particular, the tribunal found that the failure of the Chilean courts to render a decision on a complaint filed by Mr. Pey Casado for some seven years (from 1995 to 2002) constituted a denial of justice.[91] The tribunal awarded the claimants U.S.$10 million.[92]

In its pleadings, the claimants requested the tribunal to render an award in compensation for moral damages inflicted on Mr. Pey Casado.[93] In the course of the award, the tribunal made some interesting observations on the personal situation of Mr. Pey Casado in the context of its analysis of the contentious issue of whether or not the actions of Chile after the *coup* had resulted in him losing his Chilean nationality. The tribunal noted

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[85] *Id.*, para. 290.
[86] *Id.*, para. 291.
[87] *Id.*, para. 290. The amount claimed by the claimant (U.S.$104 million) was deemed "exaggerated."
[88] Victor Pey Casado & President Allende Foundation v. Chile, ICSID Case No. ARB/98/2, Award, May 8, 2008.
[89] The Salvador Allende Foundation, to which Mr. Pey Casado had donated 90% of his shares, was also a party to the dispute.
[90] *Victor Pey Casado*, *supra* note 88, Award, para. 665.
[91] *Id.*, para. 659. The tribunal also indicated that in providing compensation to individuals who were not the owners of the confiscated goods, and in refusing payment to Mr. Pey Casado, Chile had "manifestly committed a denial of justice and refused to treat the claimants justly and fairly." (*Id.*, para. 674.)
[92] Soon after the award was rendered, Chile filed an application for revision. In its award of Nov. 18, 2009, the same tribunal rejected the request for revision. In July 2009, Chile filed annulment proceedings.
[93] Victor Pey Casado, *supra* note 88, Award, para. 27.

the "arbitrary and shocking behavior" of the Chilean military authorities with respect to Mr. Pey Casado after the *coup*:[94]

> M. Pey Casado, à l'instar de nombreux autres citoyens considérés comme ennemis du nouveau régime issu du coup d'Etat militaire, ou rebelles, et publiquement dénoncés comme tels par ledit régime, a été contraint de chercher asile à l'étranger pour protéger sa vie et sa liberté. Il semble même que, compte tenu de sa situation personnelle et patrimoniale éminente, de son influence et de ses liens avec le Président Allende, *M. Pey Casado ait été particulièrement menacé et visé par les voies de fait et mesures de la dictature militaire*.[95]

The tribunal refused to award any "moral damages" to Mr. Pey Casado on the ground that the claimants failed to present sufficient proof to enable the evaluation of such damages.[96] The tribunal also made an important remark in the form of an obiter dictum, stating that the arbitral award against Chile (awarding compensation in an amount of U.S.$10 million), and in particular the tribunal's conclusion that Mr. Pey Casado was the victim of a denial of justice, constitutes in itself "substantial and sufficient moral satisfaction" for the claimants.[97] In other words, the tribunal would have awarded no compensation for moral damages because it considered that its finding of a breach of the BIT was in itself a proper remedy.

The tribunal's *obiter dictum* on "satisfaction" is interesting in many regards. As mentioned earlier, "satisfaction" is generally recognized as the proper form of reparation for moral damages committed against the honor and reputation of a state. Thus, satisfaction is never used by tribunals in the context of moral damages suffered by an *individual*. Clearly, in this case the tribunal did not hold that satisfaction was the proper remedy when an investor suffers from moral damages. The tribunal did not have to do so since it reached the conclusion that the claimants had suffered no such damages. The question of whether or not an arbitral tribunal can remedy moral damage suffered by an investor with a declaration of satisfaction instead of monetary compensation remains unanswered.

E. *Biwater Gauff v. Tanzania*

Another recent case where reference is made to the concept of moral damages is the ICSID case of *Biwater Gauff (Tanzania) Ltd. v. Tanzania*.[98] This case involved a U.K.-based company appointed to manage and operate (through a locally incorporated company, City Water) a project to upgrade and improve the delivery of water and sewage services in and around the capital of Dar es Salaam. City Water and the Dar es Salaam Water and Sewerage Authority (DAWASA) entered into several contracts for the implementation of

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[94] *Id.*, para. 269.
[95] *Id.*, para. 266 (emphasis added).
[96] *Id.*, para. 689.
[97] *Id.*, para. 704: "A complementary explication is necessary concerning the claim for modal damages. Apart from the fact the claimants did not bring forward any evidence allowing to quantify such alleges damages, the arbitral tribunal believes that this award, including its recognition of the claimants' rights and the fact that they were victims of a denial of justice, constitute in itself a substantial and sufficient moral satisfaction." (emphasis added)
[98] Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award, July 24, 2008.

the project. Shortly after, both parties began experiencing difficulties in executing their respective contractual obligations and in May 2005 DAWASA terminated these contracts. Around the same time, Tanzanian government officials took a series of actions, which would ultimately be deemed by the tribunal to be in breach of the United Kingdom-Tanzania BIT. One such measure was the seizure of City Water's assets and operations by representatives of DAWASA, the occupation of its facilities and the deportation of three key company executives. The tribunal described these actions executed with the assistance of police forces as "well beyond the ambit of normal contractual behavior."[99] It concluded that these abusive, unreasonable and arbitrary actions "unjustified by any public purpose"[100] were in breach of several BIT provisions, including the obligation to provide full protection and security to foreign investors.

The majority of the tribunal held that the actions of the Tanzanian government had breached four provisions of the BIT (including expropriation and fair and equitable treatment). However, it concluded that the poorly prepared and executed project was in fact worthless ("of no economic value")[101] at the time the treaty had been breached by Tanzania. Because "none of [Tanzania's] violations of the BIT caused the loss and damage for which [the investor] now claims compensation," the majority of the tribunal dismissed the claim for damages.[102]

In a dissenting opinion, arbitrator Gary Born maintained that even though the investor "did not demonstrate a quantifiable monetary loss, it did demonstrate an unacceptable breach of fundamental international rights and protections."[103] He referred to the ILC's Articles on State Responsibility on the issue of reparation and concluded that "the fact that [an] injury does not entail monetary damage in no way implies that there was no injury, on the contrary, an injury can very readily exist even without monetary damage."[104] According to Mr. Born, there is no doubt that Tanzania's expropriation actions caused the investor an injury "regardless whether that injury had a quantifiable monetary value."[105] He therefore contended that further remedy was owed to the investor beyond a mere declaration of breach of treaty. In his dissent Mr. Born stated that, "when a State deliberately conducts itself in a manner it knows at the time to be wrongful, disregarding the basic legal rights and protections of private parties, it is at best anomalous for a tribunal to grant no affirmative relief."[106] Thus, the government's conduct "caused moral damages" to the investor.[107] He concluded that "to require a measure of tangible reparations for violation of internationally-protected rights" whether denominated as moral damages (which he noted had been done by "some tribunals," but had not been

[99] *Id.*, para. 503.
[100] *Id.*, paras. 503, 709.
[101] *Id.*, para. 792.
[102] *Id.*, para. 807.
[103] Concurring and Dissenting Opinion of Gary Born, July 18, 2008, para. 33.
[104] *Id.*, para. 26.
[105] *Id.*, para. 27.
[106] *Id.*, para. 32.
[107] *Id.*, para. 33.

sought by the investor in its pleadings) or by way of a costs award or otherwise "better advances the objectives of BITs and the ICSID Convention."[108]

The majority of the tribunal disagreed with Mr. Born and stated that it would have been "inappropriate" to award any such moral damages in the circumstances of the case and in light of the investor's conduct.[109] The majority also noted that the claimant made no such claim.

F. *Europe Cement v. Turkey*

Europe Cement, a Polish company, commenced arbitration proceedings against Turkey under the Energy Charter Treaty alleging Turkey's termination of concession agreements granted to two Turkish electricity corporations (Çukurova Elektrik A.S. (CEAS) and Kepez Elektrik Türk A.S. ("Kepez")) of which Europe Cement purported to be a shareholder.[110] The tribunal declined jurisdiction over the dispute based on the claimant's inability to prove its ownership of shares in the corporations.[111] Furthermore, the tribunal stated that the claim was in fact "based on the false assertion of ownership of an investment" and constituted an "abuse of process" by the claimant.[112] Turkey requested the tribunal make a declaration that the claim was "manifestly ill-founded and ha[d] been asserted using inauthentic documents."[113] The tribunal refused to make such declaration on the ground that it had no jurisdiction to hear the dispute.[114]

Turkey also sought an award of monetary compensation for moral damages it allegedly suffered to its "reputation and international standing"[115] as a result of the "jurisdictionally baseless claim asserted in bad faith and for an improper purpose"[116] which caused it "intangible but no less real loss."[117] For Turkey, citing the *Desert Line Projects* award, an amount of U.S.$ 1 million for moral damages "would be providing a form of satisfaction, even if the award were never to be paid."[118]

The tribunal first noted that "conduct that involves fraud and an abuse of process deserves condemnation,"[119] but added that it was a "difficult question" to determine whether such actions "warrant[ed] an award of damages."[120] According to the tribunal, the examination of this question "would entail an analysis of [its] jurisdiction to hear the claim, which comes close to an ancillary claim under Article 47 of the Arbitration (Additional

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[108] *Id.*, para. 32.
[109] *Biwater Gauff*, *supra* note 98, Award, para. 808.
[110] *Europe Cement*, *supra* note 41.
[111] *Id.*, para. 163.
[112] *Id.*, para. 175.
[113] *Id.*, para. 176. The tribunal also noted that the respondent had "abandoned the use of the term 'manifestly ill-founded' without suggesting alternative language in which the declaration might be couched."
[114] *Id.*, para. 177.
[115] *Id.*
[116] *Id.*
[117] *Id.*, para. 128.
[118] *Id.*, para. 135.
[119] *Id.*, para. 180.
[120] *Id.*, para. 181.

Facility) Rules."[121] This comment suggests that the tribunal seriously doubted having jurisdiction over the dispute under the Treaty. In any event, the tribunal held that such an inquiry was not necessary since "it [did] not consider that exceptional circumstances such as physical duress are present in this case to justify moral damages."[122] The tribunal therefore rejected the claim based on lack of evidence.

In any event, the tribunal found that any "potential reputational damage" suffered by Turkey would be "remedied by the reasoning and conclusions set out in this Award, including an award of costs."[123] Thus, such an award "provides a form of 'satisfaction' for the Respondent."[124] The tribunal ordered that the claimant pay the respondent its full costs for the proceedings (some U.S.$3.9 million) as well as half the arbitration costs (U.S.$129,000). According to the tribunal, such an award of full costs in favor of the respondent "will go some way towards compensating [it] for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims."[125]

G. *Cementownia v. Turkey*

Cementownia "Nowa Huta" S.A. ("Cementownia") was a Polish company which commenced arbitration proceedings against Turkey under the Energy Charter Treaty under the exact same circumstances and allegations of breach as in the aforementioned *Europe Cement* case.[126] The tribunal declined jurisdiction over the dispute based on lack of evidence that Cementownia ever owned shares in the two Turkish corporations (CEAS and Kepez). The tribunal added that the claim was "a mere artifice" to "fabricate international jurisdiction where none should exist"[127] and that the claimant had "intentionally and in bad faith abused the arbitration" by "purport[ing] to be an investor" which constituted "an abuse of process"[128] and a "fraudulent" claim.[129]

The tribunal granted Turkey's request for a "declaration" that the claimant filed a fraudulent claim, but refused to award compensation for moral damages. In its analysis, the tribunal noted that "there is nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an arbitral tribunal from granting moral damages."[130] However, the tribunal distinguished the present claim from the *Desert Line Projects* award where the "arbitral tribunal decided, on the basis of the obligations contained in the Bilateral Investment Treaty (BIT) between Yemen and Oman, in particular the obligation of security, that exceptional circumstances, such as physical duress suffered by the investor,

[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*, para. 185.
[126] *Cementownia*, *supra* note 41.
[127] *Id.*, para. 117.
[128] *Id.*, para. 159.
[129] *Id.*
[130] *Id.*, para. 169.

justified the compensation."[131] In the present case, Turkey requested compensation for moral damages "based merely on a general principle, i.e., abuse of process" and not on a BIT provision.[132] According to the tribunal, "it is doubtful that such a general principle may constitute a sufficient legal basis for granting compensation for moral damages."[133] The tribunal therefore dismissed Turkey's request for compensation based on the fact that the Energy Charter Treaty did not provide any legal basis for awarding compensation for moral damages suffered by a state party.

In its decision, the tribunal noted that although "a symbolic compensation for moral damages" could indicate the tribunal's condemnation for the claimant's abuse of process, in the present case, it was more appropriate "to sanction the Claimant with respect to the allocation of costs" (in the amount of close to U.S.$5 million).[134] Finally, the tribunal made a statement that seems to indicate that the declaration was the proper form of reparation for the Turkish government: "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 is already achieved."[135]

IV. Nature and Function of Moral Damages in International Investment Law

It goes without saying that the question of compensation for moral damages is necessarily fact driven and will always depend on the specific circumstances of a case. It is thus quite hazardous to try to draw any generalizations from the very small sample of cases examined in the previous section. This section will examine several controversial issues arising in the context of moral damages claims. It will also aim to tentatively put forward some preliminary conclusions on the nature and the function of moral damages in international investment law.

A. A corporation can claim moral damages for itself as well as for its officers

In its award, the *Desert Line Projects* tribunal noted that the corporation had "suffered a significant injury to its credit and reputation and lost its prestige."[136] The tribunal explicitly recognized that an injury to a corporation's credit, reputation and prestige is a form of moral damage that can be compensated in an award.[137] Such a finding is not really controversial.[138]

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[131] *Id.*

[132] *Id.*, para. 170.

[133] *Id.* The tribunal added that such compensation "goes clearly beyond the general sanction of awarding the total costs on the responsible Party."

[134] *Id.*, para. 171. The tribunal noted (*id.*, para. 158) that "in case of an abuse of rights, ICSID tribunals can award costs against parties as a sanction against what they see as dilatory or otherwise improper conduct in the proceedings."

[135] *Id.*, para. 171.

[136] *Desert Line Projects, supra* note 3, para. 286.

[137] *Id.*

[138] Wade M. Coriell & Silvia M. Marchili, Unexceptional Circumstances: Moral Damages in International Investment Law, paper presented at the Third Annual Investment Treaty Arbitration Conference: A Debate and Discussion, Interpretation in Investment Arbitration, Apr. 30, 2009, at 9. *See also* the separate opinion of Amb. Jacovides in *Zhinvali, supra* note 44, para. 31.

The possibility for corporations to claim compensation for moral damages is recognized in many municipal legal orders. In fact, it is not uncommon for corporations to claim such moral damages in investor–state arbitration proceedings.[139]

One noteworthy element of the *Desert Line Projects* award is the fact that monetary compensation was also awarded to the corporation to remediate the injury suffered by *physical persons*,[140] based on the tribunal's observation that the corporation's "executives suffered the stress and anxiety of being harassed, threatened and detained."[141] As a matter of law, there is no doubt that the tribunal should have clearly distinguished both types of damages. This is because the host state's mistreatment of a company's officers does not cause any *direct* damage to this legal entity. In fact, the moral injury is suffered only by those physical persons and not by the company.

Following this logic, the company's executives should have claimed their *own* moral damages in separate proceedings. However, such an approach would have been problematic since it would put the tribunal's jurisdiction over the dispute into question. Thus, it is unlikely that the company's executive claim would have been considered as an "investment" under the BIT. As a result, the corporate executives would have had no recourse to arbitration under the treaty to obtain redress for the harm they had suffered. Surely, these facts were taken into consideration by the tribunal when it decided to award compensation to the corporation even though part of the injury was in fact sustained by its officers.[142] This sensible approach is likely to be followed by other tribunals in the future.

B. Compensation is for moral damages suffered by individuals and corporations, while satisfaction is reserved for those suffered by states

The awards examined confirm the principle set out in the work of the ILC on State Responsibility that monetary compensation is the appropriate remedy for moral damages affecting *an individual or a corporation*.[143] However, a rather controversial *obiter* was written by the *Pey Casado* tribunal, to the effect that monetary compensation for *material* damage awarded to a foreign investor for treaty breach and a declaration of liability could also be considered as sufficient "satisfaction" for an individual in the context of a moral damages claim.

Tribunals have held that they do not have jurisdiction under typical investment treaties over counterclaims raised by states claiming monetary compensation for moral injury suffered as a result of fraudulent arbitral proceedings commenced by foreign investors.

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[139] *See Benvenuti & Bonfant*, *supra* note 47; *Tecmed*, *supra* note 46, *Zhinvali, supra* note 44.

[140] This is discussed in Ripinsky & Williams, *supra* note 20, at 311; Coriell & Marchili, *supra* note 138, at 10–12.

[141] *Desert Line Projects, supra* note 3, para. 286.

[142] Ripinsky & Williams, *supra* note 20, at 310. Another explanation for the tribunal's conclusion is also possible. It may be that while acknowledging that the injury affected these persons specifically, the tribunal nevertheless concluded that such injury also had an impact on the performance of the company and, therefore, caused it some form of damages. *See* Ripinsky & Williams, *id.* at 311; Coriell & Marchili, *supra* note 138 at 12.

[143] ILC Commentaries, *supra* note 7, at 252.

This is because these investment treaties essentially provide foreign investors with unprecedented substantive and procedural legal protection when they invest abroad. These instruments do not provide any legal protection for the host state against the actions of investors.

In any event, as in the previously mentioned work of the ILC on State Responsibility,[144] arbitral tribunals contend that the proper remedy for moral damages suffered by a state is satisfaction, not monetary compensation. Thus, the *Cementownia* tribunal held that Turkey's claim for moral damages would be remediated by "satisfaction" in the form of a "declaration" that the claimant's proceedings were fraudulent. Similarly, the *Europe Cement* tribunal also held that the award's recognition that the claim was fraudulent would provide Turkey a form of satisfaction for any reputational damage it suffered.[145]

It is also important to point out that in both cases the tribunals decided that any such reputational damage could also be remediated by an award of costs in favor of the respondent state.[146] In our view, this is simply because in both instances the alleged moral damages suffered by the state resulted from misconduct which took place *during the arbitration proceedings*. As explained by the tribunals, one form of sanction that can be used by a tribunal to deal with abuse of process committed by one party (the investor or the host state) during the arbitration proceedings is the allocation of costs on the party in bad faith.[147] In other words, the tribunals' *obiter* on costs does not support the view that monetary compensation is the proper remedy for moral damages suffered by a state.

Turkey's position on the proper remedy is also worthy of discussion. In *Europe Cement*, Turkey argued that a monetary award (in an amount of U.S.$1 million) would be the proper form of reparation for the moral damages it suffered. However, Turkey also added that under the circumstances, such an award would most likely take the form of "satisfaction" since the award would probably never be paid by the investor.[148] In other words, for Turkey the true nature of its requested monetary award was, in fact, a mere declaration amounting to a satisfaction remedy. Interestingly, Turkey's position contrasts with the stance it adopted in the *Cementownia* case. In the latter, it first argued that "tribunals applying international law may award to a State *the remedy of satisfaction* where it has suffered an intangible injury, such as injury to its reputation or prestige," but then added that "in investment treaty cases, *compensation* has been awarded where the injury was inflicted *maliciously*."[149] Turkey's argument seems to be that in some circumstances monetary compensation (and not satisfaction) should be the proper remedy for moral damages suffered by a state.

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[144] ILC Commentaries, *supra* note 7, at 264.

[145] *Europe Cement*, *supra* note 41, para. 135: "The Tribunal believes that any potential reputational damage suffered by the Respondent will be remedied by the reasoning and conclusions set out in this Award, including an award of costs, which as set out below is significant."

[146] *Europe Cement*, *supra* note 41, para. 181; *Cementownia*, *supra* note 41, paras. 157–58, 171.

[147] *Cementownia, supra* note 41, para. 165; *Europe Cement*, *supra* note 41, paras. 182–86.

[148] *Europe Cement*, *supra* note 41, para. 135.

[149] *Cementownia, supra* note 41, para. 165 (emphasis added).

C. Proof of grave or "egregious" acts is not a requirement to award compensation for moral damages

In its award, the *Europe Cement* tribunal referred to the "exceptional circumstances such as physical duress" which could justify awarding compensation for moral damages.[150] This statement is somewhat puzzling. Does the tribunal simply mean that claims of physical duress are rare in investor–state disputes? The statement is even more troubling if it suggests the existence of a higher threshold for finding a breach of international law in the context of moral damages claims. This seems to be the position adopted by the *Siag v. Egypt* tribunal stating that awarding compensation for moral damages should only be reserved for "extreme cases of egregious behavior."[151]

In our view, it is undesirable that only "egregious" state behavior should result in awarding compensation for moral damages. One may envisage situations where state actions will not necessarily reach such a high threshold of unacceptable conduct, but will nonetheless cause mental suffering to an individual in the form of humiliation, shame, loss of social position, etc. To paraphrase the *Lusitania* tribunal, such damages are no less "very real" and should be compensated.[152]

No trace of such a high threshold is found in the *Desert Line Projects* award (although reference is made to malicious acts and fault-based liability, a point further discussed below). It is true that the *Desert Line Projects* tribunal did mention the "exceptional circumstances" under which compensation for moral damages can be claimed under investment treaties.[153] According to some scholars, by using such language the tribunal "enforce[d] a higher standard in the context of a moral damages claim as compared to claims for other types of compensatory damage."[154] In our view, the tribunal's reference to "exceptional circumstances" does not relate to any higher threshold for moral damages claims. This is simply a reference to the rarity and uniqueness of such claims given the particular nature of investment treaties. Thus, these treaties regulate the treatment of foreign investors and their investments in the host state.[155] "Investment" is an economic concept. Disputes commenced under BITs concern *economic* damages suffered by foreign investors. Moral injuries, on the other hand, are non-material and are more commonly dealt with in the sphere of human rights disputes.[156] Because of the specific nature of investment treaties, claims for moral damages will remain relatively rare.

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[150] *Europe Cement*, *supra* note 41, para. 181.

[151] Waguih Elie George Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Award, June 1, 2009. The tribunal came to the conclusion that Egypt had breached the Italy–Egypt BIT, but rejected the claimants' request for punitive damages. In an obiter dictum, the tribunal mentioned that "it appears that the recovery of punitive *or moral damages* is reserved for extreme cases of egregious behaviour" (para. 545, emphasis added). This is truly *obiter* since the case did not involve any claim for moral damages.

[152] *Lusitania, supra* note 2, at 32.

[153] *Desert Line Projects, supra* note 3, para. 289.

[154] Coriell & Marchili, *supra* note138 at 12.

[155] ICSID Convention, art. 25. *See* Ripinsky & Williams, *supra* note 20, at 310, 311; Coriell & Marchili, *supra* note 138 at 8–9.

[156] This is discussed in Coriell & Marchili, *supra* note 138, at 3–5.

In any event, in the author's view, there is no requirement on claimants to prove the existence of "egregious" acts or any other grave or "exceptional circumstances."[157] Such higher level of seriousness is not a precondition for awarding compensation for moral damages. As justly stated by some scholars, "it is important to recognise the distinction between the concept of moral damages—which is compensatory in nature and should, like other forms of compensatory damages, require no proof of grave or exceptional liability—and the context in which moral damages are most often awarded."[158] In other words, it is true that compensation for moral damages has been awarded in the past in some truly "exceptional circumstances" often involving "egregious" acts. This is, indeed, the case in the specific context of human rights courts. The *Desert Line Projects* case also involved some very serious violations of the basic minimum standard of treatment that must be accorded to foreign investors. However, in our view, we should not conclude from these observations that such grave circumstances *must* necessarily be present for a tribunal to award compensation for moral damages.

D. Fault or malicious intent is not a necessary condition to award compensation for moral damages

In Gary Born's dissenting opinion in the *Biwater Gauff* case, he stated that the fact that a state "*deliberately* conducts itself in a manner it knows at the time to be wrongful, disregarding the basic legal rights and protections of private parties" caused "moral damages" to the investor.[159] Similarly, in the *Desert Line Projects* case, the tribunal referred to one specific breach of the BIT as "the physical duress exerted on the executives of the Claimant" which "was *malicious* and therefore constitutive of a *fault-based liability*."[160] It has been suggested in doctrine that the *Desert Line Projects* award's reference to "fault-based liability" and "malicious" acts means that the tribunal considered Yemen's fault when finding its international responsibility.[161] This also seems to be the position defended by Turkey in the *Cementownia* case where it argued that "in investment treaty cases, compensation has been awarded where the injury was inflicted *maliciously*."[162] These statements raise the question whether or not a state's fault or malice is in fact a *necessary condition* for an award of compensation for moral damage.

The work of the ILC on State Responsibility has adopted the concept of the "objective" responsibility of a state. It no longer makes use of the concept of *culpa*: "it is

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[157] *Id.* at 3–4.

[158] *Id.* at 5. *Contra*, Jennifer Cabresa, Moral Damages in Investment Arbitration and Public International Law, paper presented at the Third Annual Investment Treaty Arbitration Conference: A Debate and Discussion, Interpretation in Investment Arbitration, Apr. 30, 2009, at 13, for whom "extreme bad faith" could "eventually come to be the critical element for an award of moral damages in investment arbitration."

[159] *Biwater Gauff, supra* note 98, para. 33 (emphasis added).

[160] *Desert Line Projects, supra* note 3, para. 290 (emphasis added).

[161] Meriam Alrashid, *Moral Damages: A Critique of Desert Line*, 3(2) Global Arb. Rev. 39 (2008).

[162] *Cementownia, supra* note 41, para. 165 (emphasis added).

only the act of a State that matters, independently of any intention."[163] It is also generally recognized in doctrine that the element of fault is not a necessary condition to determine the liability of a state under contemporary international law.[164] Arbitral tribunals deciding investor–state disputes have recognized that a state's intention is not relevant when assessing allegations of BIT breaches.[165]

Therefore, fault, malice or any other intent is clearly *not* a necessary precondition for a tribunal to award compensation for moral damages.[166] The *Desert Line Projects* dictum is misplaced.[167] That does not mean, however, that intent has been totally evacuated from the field of state responsibility.[168]

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. Summarily, although Yemen's fault was not necessary for the *Desert Line Projects* tribunal's decision to award compensation for moral damages, it remains that its finding of "malicious" intent must have had an impact on its decision.

In our view, *culpa* is still relevant with respect to the *consequences* of responsibility.

E. Fault or malicious intent is relevant for the quantification of damages

It should be reiterated at this juncture that the basic principle of state responsibility is that a state must make *full reparation* for any *injury* (whether material or moral) caused to another state. The goal is to wipe out all the consequences of a wrongful act, and not go beyond that. A tribunal should therefore award an amount of compensation that is exactly equivalent to the actual moral damage suffered and should not award a single dollar in compensation over and above that. In its practical application, this mantra is not always applied *à la lettre*. Thus, in Whiteman's 1940s' classic three-volume textbook on damages in international law, she notes that "the excess in the amount of damages awarded" in some decisions was "over the actual loss or injury."[169] In her view, this was

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[163] ILC Commentaries, *supra* note 7, at 73. *See also* James Crawford, Special Rapporteur, *First Report on State Responsibility* (add. no. 4), U.N. Doc. A/CN.4/490/Add. 4 (May 26, 1998) at para. 122.

[164] Ian Brownlie, State Responsibility Pt I, 39 (1983) ("the practice of States and the jurisprudence of arbitral tribunals and the ICJ have followed the theory of objective responsibility as a general principle (which may be modified or excluded in certain cases)"); Nguyen Quoc Dinh, Patrick Daillier, & Alain Pellet, Droit international public 742 (6th ed. 1999); Pierre-Marie Dupuy, Droit international public 437 (4th ed. 1998).

[165] CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 280 ("The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard"). *See also* Occidental Exploration & Prod. Co. v. Ecuador, LCIA Case No. UN3467, Final Award, July 1, 2004, para. 186.

[166] Coriell & Marchili, *supra* note 138 at 6–8.

[167] *Id.* at 12–13.

[168] A. Gattini, *La notion de faute à la lumière du projet de convention de la Commission du Droit International sur la responsabilité internationale*, 3 E.J.I.L. 253 (1992).

[169] Marjorie Whiteman, I Damages in International Law 628 (1937).

because the "persons making the award are influenced by the seriousness of the part taken by the respondent state in the incident out of which the claim arose."[170]

Since, as a matter of principle, a tribunal should not award compensation beyond the actual damages suffered, the most important consideration becomes the question of *quantification*. The concept of moral damage is by definition vague and may be subject to different interpretations. The same statement can also be made about quantification. Under the exact same circumstances, a certain type of moral damage that is considered by one tribunal to be worth U.S.$10,000 in compensation could very well be deemed worth U.S.$100,000 by another. In this context, the fairness and reasonableness of compensation truly lies in the perception of the arbitrator. There are only a select few instances where a tribunal, such as the UNCC, is bound by strict guidelines determining in advance the amount of compensation to be awarded for certain specific types of moral damages.[171] Similarly, there are some forms of "mental" injury that are quite easily calculable such as, for instance, those resulting in medical expenses actually incurred.[172]

In all other cases where no guidelines exist, a tribunal will necessarily have a great deal of flexibility to determine what amount should adequately compensate an investor for the moral damage he/she has suffered. In fact, "arbitrators seem to enjoy almost an absolute discretion in the matter of determining the amount of moral damages."[173] For example, little is known about how the *Desert Line Projects* tribunal came to the conclusion that U.S.$ 1 million was the proper amount to remediate the moral damages suffered by the investor. In fact, the tribunal (quoting the *Lusitania* case) openly acknowledged that such damages were "difficult to measure or estimate by money standards."[174] The tribunal only went so far as to say that the amount claimed (U.S.$104 million) was "exaggerated" and that actual amount awarded was "more than symbolic yet modest in proportion to the vastness of the project."[175]

Since arbitral tribunals have a vast discretion when quantifying the amount that they consider appropriate to remediate actual damage suffered, it is legitimate to ask how they should exercise such discretion. This is where *culpa* actually matters. State's fault or malicious intent will be taken into account by tribunals when they actually quantify the amount of compensation to be awarded to remediate moral damages. This has long been recognized in doctrine. For Ago, "the problem of the various gradations and nuances of fault in

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[170] *Id*.

[171] U.N.C.C. Governing Council Decision No. 3 on Personal Injury and Mental Pain and Anguish, S/AC.26/1991/3 (Oct. 23, 1991) defining the concepts of "serious personal injury" and "mental pain and anguish." U.N.C.C. Governing Council Decision No. 8 on Determination of Ceilings for Compensation for Mental Pain and Anguish, S/AC.26/1992/8 (Jan. 27, 1992), providing for "ceiling amounts for compensation" for several types of mental pain and anguish, including, inter alia, a U.S.$15,000 ceiling per claimant (and U.S.$30,000 per family) for "a spouse, child or parent of the individual [who] suffered death"; a U.S.$15,000 ceiling for individuals who suffered "dismemberment, permanent significant disfigurement, or permanent loss of use or permanent limitation of use of a body organ, member, function or system"; a U.S.$5,000 ceiling for individuals who "suffered sexual assault or aggravated assault or torture"; a U.S.$1,500 ceiling for individuals who have been "taken hostage or illegally detained for more than three days, or for a shorter period in circumstances indicating an imminent threat to life, etc."

[172] Cabresa, *supra* note 158, at 4–6.

[173] Ripinsky & Williams, *supra* note 20, at 312.

[174] *Desert Line Projects, supra* note 3, para. 290.

[175] *Id*.

internationally wrongful acts seems to be of importance chiefly in regard to another question, on which it undoubtedly has a notable impact, namely, the nature and the extent of the reparation to be made by the State responsible."[176] Similarly, as explained by ILC Special Rapporteur Arangio-Ruiz:

> While aware that the Commission has rightly or wrongly chosen not to mention fault among the conditions of international responsibility, [I] find … it difficult to believe that fault in any degree could not be deemed to be—*de lege lata* or *ferenda*—of some relevance in the determination of the *consequences* of an internationally wrongful act.[177]
>
> [I]it seems both logical and rational, as recognized by a number of authorities, that the presence or absence of fault, and, if there is fault, the degree of wilful intent or negligence, play some role in the *determination of the degree of responsibility and therefore of the forms and degrees of the reparation due*.[178]

Thus, the amount of compensation should be proportionate to the seriousness of the offence committed by a state and its degree of responsibility. A tribunal may award a greater amount of compensation for moral damages in a situation where the conduct of the state is especially malicious or shocking. Simple common sense would dictate such a solution. This is, indeed, the position adopted by some scholars for whom "the maliciousness of the respondent's conduct could well be regarded as an aggravating circumstance increasing the amount of damages due."[179] This is in fact not a novel idea. For instance, as it was expressed in explicit terms by Bluntschli more than a hundred years ago:

> The nature and the extent of the compensation, satisfaction or punishment are determined in accordance with the nature and the seriousness of the offence. The greater the crime, the more important the consequences. There is some proportion between the penalty and the guilt.[180]

One recent illustration of this approach is the case of *Letelier and Moffitt* (not involving any investment issues). In this dispute, the ad hoc Commission established by the United States and Chile awarded more than U.S.$1 million in compensation for moral damages to three individuals and their heirs.[181] The Commission noted that "in considering the

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[176] *See, e.g.*, R. Ago, *La colpa nell'illecito internazionale*, *in* III SCRITTI GIURIDICI IN ONORE DI SANTI ROMANO (1940); *reprinted in* R. AGO, I SCRITTI SULLA RESPONSABILITA INTERNAZIONALE DEGLI STATI 302 (1978) (referred to in *Second Report on State Responsibility*, *supra* note 20, para. 182).

[177] *Second Report on State Responsibility*, *supra* note 20, para. 145 (emphasis added).

[178] *Id.*, para. 180 (emphasis added).

[179] RIPINSKY & WILLIAMS, *supra* note 20, at 312. H. JØRGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 201 (2001), examined older arbitration cases and concluded that "the award of damages often corresponded to the seriousness of the original offence."

[180] J.C. BLUNTSCHLI, DAS MODERNE VOLKERRECHT DER CIVILISIRTEN SLATEN ALS RECHTSBUCH DARGESTELLT 268, art. 469 (3d ed. 1878) (referred to in *Second Report on State Responsibility*, *supra* note 20, para. 109). For R. JENNINGS & A. WATTS, I OPPENHEIM'S INTERNATIONAL LAW 532 (9th ed. 1992), "In the assessment of damages a great difference would be likely to be made between acts of reparation for international wrongs deliberately and maliciously committed, and for those which arise merely from culpable negligence." According to JØRGENSEN, *supra* note 179, at 191, older arbitration cases "provide some evidence that there are various degrees of state delinquency which are possibly to be taken into account in arriving at a sum of damages."

[181] *Letelier and Moffit*, *supra* note 40. Mr. Orlando Letelier, a Chilian national living in exile in Washington, was an opponent of the Pinochet regime which took power in Chile in a *coup d'etat* in 1973. He was assassinated in 1976 in Washington, D.C. by Chilean secret police agents in a car bomb along with his assistant, Mrs. Ronni Moffitt (a U.S. national). Mrs. Moffitt's husband, Mr. Michael Moffitt (also a U.S. national), was injured in the car bomb, but survived. The United States sought compensation from Chile on behalf of both the Letelier and Moffitt families because it considered Chile to be responsible under international law for the deaths of Mr. Letelier and Mrs. Moffitt and the personal injuries to Mr. Moffitt. In 1990, after a regime change in Chile, the United States and Chile entered

compensation for moral damages" it had "taken into account the significant steps undertaken by the Chilean Government and Congress to remedy human rights problems as well as the efforts undertaken towards financial reparation at the domestic level for families of victims."[182] In his own "separate concurrent Opinion" Professor Orrego Vicuña indicated that Chile "ha[d] given important steps to satisfy the moral dimension of the human rights situations with which it has had to deal" and that "[t]his positive attitude ha[d] certainly a bearing on the determination of compensation for moral damages."[183]

This case is an illustration of an instance where a tribunal considered factors other than the mere quantitative aspect of a person's moral suffering when calculating the quantum of compensation to be awarded. Thus, the Commission took into account the "positive attitude" of the local authorities and consequently, seems to have awarded less monetary compensation than it would have otherwise awarded, absent these "significant steps" and "efforts" undertaken by Chile. Arguably, tribunals should not only take into account the "positive" attitude of states regarding foreign investors but also, quite logically, any other "negative" factors. Any particularly condemnable governmental actions toward a foreign investor could have a bearing on the quantification of the actual amount of compensation to be awarded for moral damages.

V. Conclusion: Why do Tribunals Award Compensation to Remediate Moral damages?

The obligation of states to make reparation for moral damages is well established in international law. A series of recent arbitral awards in the context of disputes between foreign investors and states show that, in general, tribunals have jurisdiction to award compensation for moral damages suffered by individuals and corporations. As clearly stated by the *Cementownia* tribunal, nothing in the ICSID Convention "prevents an arbitral tribunal from granting moral damages."[184] In fact, the author is unaware of any BIT that expressly prohibits arbitral tribunals from awarding compensation for moral damages.

The question of *why* tribunals award compensation to remediate moral damages is not a simple one. The ultimate goal is, of course, to wipe out all the negative consequences of a wrongful act and to remediate the actual damage suffered. However, in our view, when faced with state conduct that is especially malicious or shocking, a tribunal awarding a greater amount of compensation for moral damages than it would have otherwise had done is also doing something of a slightly different nature. In this case, a tribunal is expressing its strong concerns about a state's unacceptable treatment of foreign investors,

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into a *compromis* under which they agreed "that the amount of the *ex gratia* payment [to be paid by Chile] should be equal to that which would be due if liability were established" and that "the amount of the compensation to be paid shall be the sole question to be determined by the Commission" (*id.* at 4). The Commission awarded U.S.$160,000 in moral damages to Mr. Letelier's wife, U.S.$80,000 to each of the couple's four children, U.S.$300,000 to the parents of Mrs. Moffitt and U.S.$250,000 to Mr. Moffit himself.

[182] *Id.* at 10.

[183] *Id.* at 16.

[184] *Cementownia*, *supra* note 41, para. 169.

a concern which can be expressed in monetary terms. In such a case, the amount of compensation is not only intended to remediate damage but also to send a clear message to the host state. This is the position of Jimerez de Arechaga for whom "[i]n some cases, under the guise of compensation, a mild form of sanction has been imposed to induce the delinquent government to improve its administration of justice."[185]

There are several earlier examples of international law cases where arbitral tribunals have awarded monetary compensation in circumstances akin to moral damages with the clear intent of condemning unacceptable state conducts. One such example is the *Moke* case decided in 1871, where a certain "arbitrary, illegal and unequal" practice by Mexico was "strongly condemned" by the United States–Mexico Mixed Claims Commission.[186]

However, the use of monetary compensation by a tribunal to send a "clear message" to the host state must be distinguished from the notion of punitive damages. Punitive damages are commonly referred to as the "payment of damages in addition to actual (compensatory) damages when the defendant acted with recklessness, malice, deceit, or other reprehensible conduct (e.g., violence, oppression, fraud)."[187] Since "punitive damages are intended to punish the defendant and thereby to deter blameworthy conduct,"[188] the concept is not recognized under international law.[189] As explained by the ILC Commentaries on State Responsibility, "the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act … It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character."[190] Several commissions or arbitral tribunals have reiterated this principle in the

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[185] E. Jimenez de Arechaga, *International Responsibility*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW 571 (M. Sorensen ed., 1968) (referring to the following cases: *Janes*, 1926, IV U.N.R.I.A.A. 89; *Putnam*, 1927, IV U.N.R.I.A.A. 151; *Massey*, 1927, IV U.N.R.I.A.A. 155; *Kennedy*, 1927, IV U.N.R.I.A.A. 194).

[186] Moses Moke v. Mexico (Docket No. 342), United States–Mexico Claims Commission, Opinion of Aug. 16, 1871 *in* J.B. MOORE, IV HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS 4311 (1898). This case involved Mr. Moke, a U.S. national, who had been subjected by the Mexican authorities to a day's imprisonment to "force" him to "loan" U.S.$1,300. The Commission set up under the Convention of July 4, 1868 between these two countries awarded compensation to condemn the use of force against private parties in order to induce them to grant loans. The Commission stated: "The forced loans were illegal; the imprisonment was only for one day, and resulted in no actual damage to claimant or his property; but *we wish to condemn the practice of forcing loans* by the military, and think an award of $500 for 24 hours' imprisonment will be sufficient … we cannot too strongly *condemn this arbitrary, illegal, and unequal way* of supplying the wants of the military. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them." (emphasis added)

[187] S. Wittich, *Punitive Damages*, *in* HANDBOOK ON INTERNATIONAL RESPONSIBILITY/MANUEL DE LA RESPONSABILITÉ INTERNATIONALE 1 (James Crawford & Alain Pellet eds., 2010), *available at* <http://ukcatalogue.oup.com/product/9780199296972.do?keyword=+INTERNATIONAL+RESPONSIBILITY&sortby=bestMatches>.

[188] *Id*.

[189] ILC Commentaries, *supra* note 7, at 279: "the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms." *See*, in doctrine: Dominicé, *supra* note 20, at 361; E. Jimerez de Arechaga, *International Law in the Past Third of a Century*, REC. DES COURS 149, 287 (1978-I) ("Punitive or exemplary damages, inspired by disapproval of the unlawful act and as a measure of deterrence of reform of the offender, are incompatible with the basic idea underlying the duty of reparation. Imposition of such damages goes beyond the jurisdiction conferred on the ICJ by its statute and that normally attributed to arbitral tribunals, which are not invested 'with a repressive power' "); Coriell & Marchili, *supra* note 138, at 2. *Contra*: R. JENNINGS & A. WATTS, I OPPENHEIM'S INTERNATIONAL LAW 533 (9th ed. 1992). For more recent analysis of the question, *see* N. Jørgensen, *A Reappraisal of Punitive Damages in International Law*, 68 B.Y.I.L. 247 (1997); S. Wittich, *Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility*, 3 AUSTRIAN REV. INT'L & EUROPEAN L. 101 (1998).

[190] ILC Commentaries, *supra* note 7, at 246.

past.[191] Investor–state arbitral tribunals have also refused to award punitive damages.[192] In fact, some recent BITs prevent arbitral tribunals from ordering a disputing party to pay punitive damages.[193]

In the author's view, a tribunal expressing strong concerns about state actions through an award of compensation to remediate moral damages must be distinguished from punitive damages. On the one hand, a state is not having imposed on it an *extra* amount of compensation in addition to the actual damages suffered. The amount of compensation awarded is in fact equivalent to the actual damage. On the other hand, the goal of awarding compensation still remains to remediate the actual damage suffered; it is clearly not awarded to punish the host state.

It may be that the concept of "aggravated" damages would in fact be a better term to describe this situation. Aggravated damages have been described by one scholars as "damages on an increased scale awarded to the injured party over and above the actual economic, financial or other material loss, where the wrong done was aggravated by reprehensible conduct on the part of the wrongdoing party."[194] This is certainly an area where future scholarship and doctrinal reflection is necessary.

[191] Responsabilité de l'Allemagne dans les colonies portugaise du sud de l'Afrique (Portugal v. Germany), Award, June 30, 1930, II U.N.R.I.A.A. 1077; *Lusitania*, *supra* note 2, at 38–44; *Letelier and Moffit*, *supra* note 40, at 15 (separate opinion by Vicuña). These cases and others are discussed in Wittich, *supra* note 189, at 131 et seq.

[192] S.D. Myers, Inc. v. Canada, Partial Award on Liability, Nov. 13, 2000, fn. 53 ("The Tribunal does not suggest that punitive damages may be awarded, as these are expressly prohibited by NAFTA"); S.D. Myers Inc. v. Canada, Partial Award on Damages, Oct. 21, 2002, para. 6 ("It is not open to the Tribunal to award any kind of punitive relief"); CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 404; Siag v. Egypt, *supra* note 151, paras. 544–45.

[193] *See, e.g.*, NAFTA, art. 1135(3); Canada Model BIT, art. 44(3); Canada–Peru BIT, art. 44(3); United States Model BIT, art. 34(3); United States–Uruguay BIT, art. 34(3). The same clause is also found in several BITs entered into by Mexico (*e.g.*, with Austria, Czech Republic, Greece, Australia, South Korea, Iceland, Portugal, Sweden Switzerland, Netherlands, France, Germany).

[194] Wittich, *supra* note 187, at 1.

Guide to Authors

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