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Moral Damages in Investment Treaty Arbitrations: Where we are and where we can go?

YASH SHIRALKAR[1]

ABSTRACT

This article seeks to highlight the advancements made in investment treaty arbitrations, specifically dealing with claims for non-material or moral injuries. It looks at the development of claims for moral damages under international law through the 20th century and its foray into the field of investment treaty arbitration. It then establishes in what circumstances a tribunal must be predisposed to consider and consequently grant such moral damages. It also tries to highlight some of the issues plaguing this particular field and how more progress can be made.

I. INTRODUCTION

The Investor-State Dispute Settlement cases have proliferated over the past few decades with no signs of stopping and currently there have been almost a thousand cases. This has to its credit, efforts taken on both sides. States, on their end, have executed absurdly high number of Bilateral Investment Treaties ["**BIT**"] to encourage foreign investment. The number of BITs currently stands at 2342 and there are another 319 treaties with investment provisions, such as the Energy Charter Treaty ["**ECT**"] and the North American Free Trade Agreement.[2]

On the other side, guided by monetary compensation – the main objective of a foreign investor as a claimant in an investment treaty dispute – foreign investors have become increasingly aware of their rights under such instruments and have begun to succeed even more in enforcing those rights. It has become an exceedingly lucrative affair and the maximisation of this lucrative feature has become of paramount importance. This has consequently given rise to new heads of claims over the past few years. Among them, one of the most widely talked about is moral damages.

In an attempt to navigate the entire development of moral damages, especially in the realm of investment treaty arbitration, this paper: (in section **II**) summarises the development and modern day position of moral damages; (in section **III**) covers the growth of some of the

[1] Author is a student at Government Law College, Mumbai, India.

[2] Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited Sept. 30, 2020).

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foremost claims for moral damages and how these would come to be later used in modern day investment treaty arbitration; (in section **IV**) showcases the current position of claims for moral damages, as seen in modern day investment treaty arbitration; (in section **V**) considers how States must also be entitled to claim moral damages, albeit as a counterclaim; (in section **VI**) looks at possible scenarios for denial of a claim for moral damages; (in section **VII**) seeks to bring to the fore the contentious issue of quantification of moral damages; (and in section **VII**) concludes with remarks on the present position and possible future of this particular field.

II. WHAT IS MORAL DAMAGES?

The Draft Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission ["**ILC Articles**"] states in Article 36(1) that "[*t*]*he 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.*".[3] The commentaries to the ILC Articles, relying upon the *Lusitania case* (discussed below), provide that the "*fundamental concept of "damages" is...reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.*"[4] It is then emphasized that compensable injuries encompass not only associated material losses – such as loss of earnings and earning capacity, medical expenses and the like – but also non-material losses suffered by the individual (sometimes, although not universally, referred to as "moral damage"). In fact, in the very same case, the Umpire succinctly described moral or non-material damages as follows:[5]

> *one* [*who is*] *injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury*

The Umpire further held that under international law, such injuries are "*very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated…*"[6]

[3] Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001) [hereinafter ILC Articles].
[4] ILC Articles, *supra* note 2, at 99.
[5] Opinion in the Lusitania Cases, UNRIAA, vol. VII (Sales No. 1956. V. 5), 32 (U.S.–Ger. Mixed Claims Comm'n 1923), at 40 [hereinafter Lusitania].
[6] Lusitania, *supra* note 4, at 40.

This view is shared by the International Law Commission who have consistently held that such an injury also includes any damage, regardless of whether it is material or moral.[7] In fact, in modern international case law, be it investment treaty arbitration[8] or otherwise,[9] the International Law Commission's understandings of 'injury' and 'compensation' have been relied upon to bring forth claims for material damage.

The modern day claims for moral damages, specifically within the realm of investment treaty arbitration, have also grown progressively common. A growth in the claims has subsequently led to the jurisprudence on this point becoming increasingly significant. Of the published awards, there have been at least three cases where the claims for moral damages were allowed. In fact, Prof. Patrick Dumberry has mapped out various claims for moral damages in investor–state settlement disputes:[10]

- 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.[11]
- One tribunal dismissed a claim for moral damages on a technical ground because of its late filing of that claim, however this has nevertheless been viewed by some as a grant of moral damages (*Funnekotter*, discussed below).[12]
- In two other cases, the tribunals rejected claims because they lacked jurisdiction over the disputes and consequently did not go into the issue of moral damages altogether.[13]

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[7] ILC Articles, *supra* note 2, Art. 31(2) states: "*Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State*"; *also see*, Chevron Corp. & Texaco Petrol. Co. v. Ecuador, PCA Case No. 2009–23, ¶ 4.93 (Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012) [hereinafter Chevron Third Interim Award].

[8] *See, e.g.*, Desert Line Projects L.L.C. v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, ¶ 227 (Feb. 6, 2008) [hereinafter Desert Line].

[9] *See, e.g.*, Ahmadou Sadio Diallo (Republic of Guinea v. Dem. Rep. Congo), Compensation Judgment, 2012 I.C.J. Rep. 324, ¶¶ 18–25 (June 19) [hereinafter Guinea v. Congo], the court relied on the *Lusitania* case amongst others; *see also*, ¶ 49.

[10] Prof. Patrick Dumberry, *Compensation for Moral Damages in Investor-State Arbitration Disputes*, 27 J. Int'l Arbitration 247, 253 (2010) (A few changes have been made to reflect the cases that have been decided upon since).

[11] Helnan Int'l Hotels A.S. v. The Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award, (June 7, 2008) (In this case, the claimant claimed compensation in the amount of EUR10 million for moral damages to its reputation, but since the dispute was decided in favour of the State, the question of moral damages for the claimant did not arise).

[12] Bernardus Henricus Funnekotter et al. v. Republic of Zimbabwe, ICSID Case No. ARB/05/06, Award, (Apr. 22, 2009) [hereinafter Funnekotter].

[13] Zhinvali Dev. Ltd. v. Georgia, ICSID Case No. ARB/00/1, Award, ¶¶ 278–79, 280, 282 (Jan. 24, 2003) (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

- The *Biloune* tribunal 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.[14]

- The *Limited Liability Co. AMTO* tribunal held, without any further analysis, that the treaty under which the arbitration proceedings were commenced (ECT) did not provide any basis for allowing counterclaims for moral damages by a State. Ukraine, the respondent State had submitted a counterclaim claiming, *inter alia*, compensation for "*non-material injury*" to its reputation in the amount of EUR25,000, as a result of allegations raised by the investor in the proceedings.[15] The tribunal dismissed a counterclaim of this nature on the ground that Ukraine 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 nonmaterial injury to reputation based on the allegations made before an Arbitral Tribunal*".[16] The *Cementownia* tribunal (discussed below) also found that the ECT along with the ICISD Arbitration (Additional Facility) Rules did not sanction the grant of moral damages for a State in its particular case.[17]

- While at least six tribunals dismissing almost entire claims for moral damages based on lack of evidence has been commonplace, in two such cases, they did so without discussing the issue.[18] Three other tribunals (*Pey Casado*,[19] *Biwater*[20] and *Europe*

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, ¶ 17.6 (Sept. 16, 2003) (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).

[14] Antoine Biloune (Syria) & Marine Drive Complex Ltd. (Ghana) v. Ghana Inv. Ctr. & Gov't of Ghana, Y.B. Com. Arb. 11, 15 (1994) (ad hoc arbitration under the UNCITRAL Arbitration Rules, Award on Jurisdiction and Liability, Oct. 27, 1989, originally unpublished) [hereinafter Biloune].

[15] Limited Liability Co. AMTO v. Ukraine, Stockholm Chamber of Commerce Case No. 080/2005, ¶ 116–118 (Award, Mar. 26, 2008) [hereinafter *Limited Liability Co. AMTO*].

[16] *Id.* ¶ 118.

[17] Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award, ¶¶ 169–171 (Sept. 17, 2009) [hereinafter Cementownia].

[18] Técnicas Medioambientales Tecmed S.A. v. Estados Unidos Mexicanos **(**Mexico), ICSID Case No. ARB(AF)/00/2, Award, ¶ 198 (May 29, 2003) (Here 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, Stockholm Chamber of Commerce Case No. 093/2004 (Award, Sept. 22, 2005), ¶ 5.2 (Here 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).

[19] Victor Pey Casado & President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, ¶ 689 (May 8, 2008) [hereinafter Pey Casado].

[20] Biwater Gauff (Tanzania) Ltd. v. The United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 808 (July 24, 2008) [hereinafter Biwater].

Cement[21]) ultimately rejected the claims based on lack of evidence, but nevertheless made some interesting observations on the role of moral damages in international law. Lastly, the *Benvenuti* tribunal concluded that the claim for moral damages was unsupported by any evidence, but nevertheless awarded a small amount of money based on *ex aequo et bono* grounds.[22]

- In at least three cases (*Benvenuti*, *Desert Line*, and *von Pezold*, as discussed below) did a tribunal award compensation for moral damages.

III. THE DEVELOPMENT OF MORAL DAMAGES

Perhaps the most pertinent case, that has indirectly led to a barrage of claims for moral damages, is the *Lusitania case*. It is one that has been documented plentifully, both in international law as well as folklore.

In the early 20th Century several strides were made in the field of international law, due to the Treaty of Versailles. But much earlier, the RMS Lusitania was a British ocean liner that was sunk on 7 May 1915 – in the midst of World War I – by a German U-boat 11 miles off the southern coast of Ireland, killing about 1,200 passengers and crew. Of the 197 American citizens aboard the ship at that time, 69 were saved and 128 lost. This is regarded by many as the act that led to the American declaration of war upon Germany. The liability for the losses sustained by American nationals was assumed by the Government of Germany through its note of 4 February 1916.[23] Through the Treaty of Berlin (or, the Treaty of Peace) between the United States and Germany, Germany accepted responsibility for all loss and damage to which the United States and its nationals had been subjected to as a consequence of the war.[24]

This led to filing of more than 50 cases against Germany in relation to the sinking of RMS Lusitania, all of which were clubbed together. The Umpire therein, laid down a quintessential principle, "*[t]he fundamental concept of "damages" is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.*"[25] The Umpire further held that mental suffering, humiliation, shame, degradation, loss of social position, or injuries to the feelings, his credit, or his reputation, are quite common, and such injuries are

[21] Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award, ¶¶ 177, 181 (Aug. 13, 2009) [hereinafter Europe Cement].
[22] S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, (Aug. 8, 1980), 8 Y.B. Com. Arb. 144 (1983) [hereinafter Benvenuti], at 150.
[23] Lusitania, *supra* note 4, at 33.
[24] *Id.* at 42.
[25] *Id.* at 39.

very real and must be compensated.[26]

These very principles have been accepted as an accurate representation of international law and hold solid ground even today. The Commentaries to the ILC Articles (specifically, commentaries to Art. 36) bring to the fore the very importance of the holdings of the *Lusitania* case.[27] Modern investment treaty cases have also relied upon these cardinal principles.[28]

IV. MORAL DAMAGES IN CONTEMPORARY INVESTMENT TREATY ARBITRATION

The *Desert Line case* is undoubtedly the most popular and landmark case. It is one of the very few cases where moral damages were explicitly granted. The claimant instituted ICSID proceedings under the Oman-Yemen BIT alleging non-payment of monetary dues under several road construction contracts in Yemen. In addition to alleging breach of obligations under the said BIT and international law, the claimant also specifically quantified its claim for moral damages.[29] The claimant argued that its "*executives suffered the stress and anxiety of being harassed, threatened and detained by the respondent as well as by armed tribes*" and that it "*suffered a significant injury to its credit and reputation*".[30] The investor claimed moral damages to the tune of USD103 million. In granting the claim for moral damages, the tribunal held:[31]

> *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 is therefore constitutive of a fault-based liability. Therefore, the Respondent shall be liable to reparation for the injury 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.*

Although the Tribunal did find the extent of the claim to be excessive and proceeded to only grant moral damages of USD1 million. It concluded:[32]

> *Therefore the Arbitral Tribunal grants the Claimant's Claim for moral damages, including loss of reputation, in the amount of USD 1,000,000 without interest. This*

[26] *Id.* at 40.
[27] *See, e.g.*, ILC Articles, *supra* note 2, at 99.
[28] *See e.g.*, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, ¶¶ 329–330 (Mar. 28, 2011) [hereinafter Lemire]; Chevron Third Interim Award, *supra* note 6, ¶ 4.93.
[29] Desert Line, *supra* note 7, ¶ 226.
[30] *Id.* ¶ 286.
[31] *Id.* ¶ 290.
[32] *Id.* ¶ 291.

amount shall be paid within 30 days from the notification of the award.

This definitely ushered in a new era for investment treaty arbitrations. Others attempted to rely on *Desert Line* to bring forth their own claims for moral damages. One of the most important questions that came to be asked after this case, under what circumstances would/should an investment treaty tribunal entertain and grant a claim for moral damages.

In the *Lemire case*, Joseph Charles Lemire, an American investor in Ukraine's radio broadcasting industry, accused the Ukrainian broadcasting authorities of unfairly rejecting a long string of applications for new radio frequencies that would have permitted him to expand his radio business. The arbitrators ultimately found that Ukraine's treatment of Mr. Lemire did not meet the standards of fairness set out in the U.S.-Ukraine BIT, and awarded him USD8.7 million for his financial losses. Mr. Lemire also made a claim for moral damages as he had claimed to have suffered constant indignity, frustration, stress, shock, affront, humiliation, shame, and degradation.[33] His initial claim for moral damages was USD3 million.[34]

The tribunal went on to state that moral damages may be awarded, but only under exceptional circumstances.[35] This view was also shared by both parties, but the parties differed on their understanding of 'exceptional circumstances' and whether they were met in the present case. Thus, the tribunal set out for itself the task of coming to a precise definition of 'exceptional circumstances' and perused through case law for the same.[36] It concluded that moral damages can only be granted under the following 'exceptional circumstances':

1. The State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act.
2. The State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position.
3. Both cause and effect are grave or substantial.

These thresholds of 'exceptional circumstances' or the *Lemire* principles were applied to the facts of the case by the tribunal, and it held that the threshold to grant moral damages was not met. The tribunal concluded that "*moral aspects of his injuries have already been*

[33] Lemire, *supra* note 27, ¶ 315.
[34] *Id.* ¶ 313.
[35] *Id.* ¶ 326.
[36] *Id.* ¶¶ 326–332 (It went through the *Lusitania*, *Desert Line* and *Siag* cases.)

compensated by the awarding of a significant amount of economic compensation, and that the extraordinary tests required for the recognition of separate and additional moral damages have not been met in this case."[37] In its analysis of the actions of the State, one can see that the main reason behind the rejection of the claim for moral damages, was that the tribunal did not find the acts of the State and the consequent injury to be grave or substantial enough to warrant the grant of separate moral damages.[38]

In the author's opinion, the *Lemire* tribunal has comprehensively laid out the threshold for when moral damages must be granted. In doing so it considered other cases such as the *Lusitania* and the *Desert Line* cases. It also considered the *Siag* case,[39] which has a somewhat controversial holding.[40] The *Siag* case dealt with a variety of issues, one of which was moral damages. In addressing the claim for moral damages, the tribunal interpreted *Desert Line* to mean that the recovery of punitive or moral damages is reserved for extreme cases of egregious behaviour.[41] Egypt had seized the claimants' property with five separate decrees and took physical control of the property on two occasions.[42] Each seizure was in time revoked by Court decisions; however, Egypt disregarded such decisions and new seizures followed.[43] The seizures were carried out by force, which included the beating of one of Mr. Siag's employees, who required hospital care, and led to the arrest of Mr. Siag and three of his lawyers.[44]

It is difficult to fathom that the tribunal, despite being wholly conversant and approving of the holding in *Desert Line* – which involved forceful detention of individuals – refused to grant moral damages, when the facts presented before it, not only involved detention but also went further to physical violence to the extent that required hospital care. This has been criticised by others.[45] However, the claimants were still granted USD74.5 million as compensation for the violation of various treaty provisions by Egypt in its expropriation of the claimants' property.[46]

Zimbabwe has been the respondent in two pivotal cases. The *Funnekotter case* is the first of

[37] *Id.* ¶ 344.
[38] *Id.* ¶¶ 338–339.
[39] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, (June 1, 2009) [hereinafter Siag].
[40] Jarrod Wong, *The Misapprehension of Moral Damages in Investor-State Arbitration*, *in* Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 67, 84–85 (Arthur W. Rovine ed., 2012).
[41] Siag, *supra* note 38, ¶ 545.
[42] *Id.* ¶¶ 76–87.
[43] *Id.* ¶ 380.
[44] *Id.* ¶ 48.
[45] Jarrod Wong, *The Misapprehension of Moral Damages in Investor-State Arbitration*, *in* Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 67, 85 (Arthur W. Rovine ed., 2012).
[46] Siag, *supra* note 38, ¶631.

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the two.[47] The Dutch claimants were owners of large commercial farms who initiated ICSID arbitration against Zimbabwe for the expropriation of their land. Claimants alleged that "*they were deprived of their properties sometime between 2001 and 2003 through invasion of their farms by settlers and veterans of the 1980 war for Zimbabwean independence and/or through various orders taken by the Government of Zimbabwe under the Land Acquisition Act of 1992.*"[48] The tribunal determined that Zimbabwe breached its obligations under the BIT, and ordered Zimbabwe to pay EUR8 million plus interest in way of compensation for its seizure of claimants' lands and moveable assets.[49]

Both claimants also sought USD 40,000 each for "disturbances" caused by the expropriation,[50] and this was granted, albeit to a reduced tune of EUR20,000 per claimant.[51] And for the first time at the hearing, the Claimants asked for EUR100,000 for moral damages.[52] The tribunal found that since these new claims for moral damages partially concerned damages already compensated by the allocation of the disturbances indemnity and that since these claims were formulated briefly and only at a very late stage of the proceedings, they were therefore inadmissible.[53]

There is debate on whether this award has unequivocally rejected the claim for moral damages,[54] and in the view of the author there has not been an absolute and outright rejection. Despite the technical rejection of the claim for moral damages, the claim for damages for the 'disturbances' was granted. This amount was not characterised as 'moral damages', but nevertheless appeared to compensate moral harm. This is supported by the fact that when the tribunal dismissed the claimants' prayer for moral damages (in addition to damages for the disturbances), there was no outright rejection of damages for moral injury, as the compensation already awarded for the 'disturbances' had already repaired this moral injury.

The second case is *von Pezold*.[55] In this case, the claimants' estates were expropriated under the Zimbabwe's Land Reform and Resettlement Programme, where the claimants and their staff suffered mistreatment from war veterans in the form of "*death threats, assaults with*

[47] Funnekotter, *supra* note 11.
[48] *Id.* ¶ 90.
[49] *Id.* ¶ 148.
[50] *Id.* ¶ 137.
[51] *Id.* ¶ 138.
[52] *Id.* ¶ 139.
[53] *Id.* ¶ 140.
[54] Ian A. Laird et al., *International Investment Law and Arbitration: 2008/09 in Review*, *in* Yearbook on International Investment Law & Policy 2009-2010 87, 153 (Karl P. Sauvant ed., 2009).
[55] Bernhard Friedrich Arnd Rüdiger von Pezold & others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, (July 28, 2015) [hereinafter von Pezold].

firearms, kidnapping and humiliation" in being dispossessed.[56] The tribunal acknowledged that a State's obligation to provide reparation for an "injury" may include moral damage, in addition to material damage.[57] While relying on the principles laid down in *Desert Line* and *Lemire* to hold that corporations are entitled to moral damages in international law, the tribunal stated:[58]

> *It is appropriate that staff members of a company have recourse to competent, fair tribunals that can reflect the consequences of their poor treatment in an award of moral damages in favour of their employer. In some sense, this serves not only the function of repairing intangible harm, but also of condemning the actions of the offending State.*

In deciding for each individual claimant, the tribunal granted moral damages but cautioned that the sum should only be modest and *in "the context of the overall claim, it is not a significant amount but it appropriately reflects the wrongfulness of the actions.*"[59]

V. CAN STATES CLAIM MORAL DAMAGES?

The accepted view is that States should be able to and can claim moral damages. There are a few cases where States have attempted to do so (discussed here), but no recorded and published case shows a State actually being granted moral damages. From the reasons behind the rejection of such claims, one can conclude that States are also entitled to claim moral damages in right situations.

But why has the question arisen, as to whether States can claim moral damages? It has to do with the ILC Articles.[60] It is the ILC Articles that recognised *Lusitania* and it is modern day investment treaty law that recognise the ILC Articles as the basis for a right to claim moral damages.[61] Art. 31(2) states, "*Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*" It places a unilateral burden upon a State to make good the damage, moral or otherwise, caused by its internationally wrongful act.[62] No internationally recognised document seems to place a corresponding burden on foreign investors. Of course, these draft articles deal with the responsibility of States, and not

[56] *Id.* ¶ 898.
[57] *Id.* ¶ 908.
[58] *Id.* ¶ 916.
[59] *Id.* ¶ 923
[60] ILC Articles, *supra* note 2.
[61] Chevron Third Interim Award, *supra* note 6, ¶ 4.93 ("*a matter of legal principle as regards the claim for moral damages (see Article 31(2) of the ILC Articles on State Responsibility*…)")
[62] *See generally*, Aleksei Drobyshev, *ISDS, Moral Damages, Reputational Harm…To The State – A Comment In The Wake Of Lundin*, Kluwer Arbitration Blog (Jan. 23, 2017), http://arbitrationblog.kluwerarbitration.com/2017/01/13/isds-moral-damages-reputational-harm-to-the -state-a-comment-in-the-wake-of-lundin/

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of natural or legal nationals of such states. But so long as there is no restriction imposed upon the State by the treaty provisions or the arbitration institution's rules, there should be no barrier preventing a State from making a counterclaim for moral damages, and rightly so. As a result, Turkey has attempted to do so in two cases.

The first being *Europe Cement*.[63] Here the Polish claimant commenced ICSID proceedings against Turkey under the ECT alleging wrongful termination of concession agreements granted to two Turkish electricity corporations of which they purported to be a shareholder. The tribunal declined jurisdiction due to the claimant's inability to prove ownership of shares in the corporations and went on to further state that the proceedings constituted an "*abuse of process*" by the claimant.[64] Turkey's request that the tribunal make a declaration that the claim was manifestly ill-founded and had been asserted using inauthentic documents was denied.[65] However, Turkey sought moral damages, as injury was caused to its "*reputation and international standing*".[66] In determining whether Turkey was entitled to receive moral damages, it mulled over jurisdictional issues but did not go into them, as "*exceptional circumstances such as physical duress are present in this case to justify moral damages*" as were present in *Desert Line*.[67] It also believed 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 amounted to just over USD4 million.[68] At no point in this case, was it even debated that a State, by virtue of being a State, would be disentitled from claiming moral damages.

The other case is *Cementownia*.[69] This also involved a Polish claimant, under almost identical facts and treaty provisions. The tribunal also declined jurisdiction over the dispute for the same reasons and added that this was a fraudulent claim. Additionally, the tribunal held that the claim was "*mere artifice employed to manufacture an international dispute out of a purely domestic dispute*"[70] and that the claimant's conduct constituted "*an abuse of process*" and that this was a "*fraudulent*" claim.[71] The tribunal had further noted that "*there is nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an*

[63] Europe Cement, *supra* note 20.
[64] *Id.* ¶ 175.
[65] *Id.* ¶ 176.
[66] *Id.* ¶ 177.
[67] *Id.* ¶ 181.
[68] *Id.* ¶¶ 181–182.
[69] Cementownia, *supra* note 16.
[70] *Id.* ¶ 117.
[71] *Id.* ¶ 159.

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arbitral tribunal from granting moral damages."[72] However, the tribunal refused Turkey's request to award compensation for moral damage[73] as it believed that it would be "*more appropriate to sanction the Claimant with respect to the allocation of costs*"[74] which amounted to about USD5 million.[75] However, Turkey's claim for moral damages was based purely on abuse of process and the Tribunal doubted that "*such a general principle may constitute a sufficient legal basis for granting compensation for moral damages*."[76] Hence the dismissal can also be owed to the lack of any legal basis in the ECT.

As discussed above, the tribunal in *Limited Liability Co. AMTO* also refused to grant the counterclaim for moral damages as Ukraine had failed to establish any basis under the ECT or rules and principles of international law as to why it ought to be granted moral damages.[77]

VI. WHY IS A CLAIM FOR MORAL DAMAGES DENIED?

No tribunal, which has been posed the issue of moral damages, has rejected the existence of the means to such a remedy. It goes without saying that if the thresholds prescribed in the *Lemire* principles are not met, then moral damages ought not to be granted. No case yet has applied them in such a manner, and gone on to prove the failure of meeting the 'exceptional circumstances' (barring *Lemire* itself). Nevertheless, it has been done indirectly, and as mapped out above, the most common reason for the denial of moral damages is the failure in proving moral injury.

However, the leading of specific evidence is not found to be necessary for the recognition of moral injury.[78] But, the lack of concrete and apposite evidence – while not necessarily fatal to a claim for moral damages – can bring about significant reductions in the quantum granted.

In the *Benvenuti case*, an agreement was entered into between the Government of the People's Republic of Congo, and Benvenuti and Bonfant S.r.l., for the establishment of a company (Plasco Co., a joint venture with 60% owned by the government) to produce plastic bottles.[79] In 1977, the investor commenced ICSID proceedings alleging that Congo had expropriated its 40% ownership interest. The tribunal awarded compensation of CFA113.4 million to the investor, compensating them both for the value of their interest in the venture

[72] *Id.* ¶ 169.
[73] *Id.* ¶ 170.
[74] *Id.* ¶ 171.
[75] *Id.* ¶ 178.
[76] *Id.* ¶ 170.
[77] Limited Liability Co. AMTO, *supra* note 14.
[78] Guinea v. Congo, *supra* note 8, ¶ 21 ("*In the view of the Court, non-material injury can be established even without specific evidence.*").
[79] Benvenuti, *supra* note 21, at 144.

and for lost profits. The investor had 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.*"[80] Nevertheless, the Tribunal found that due to "*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.*"[81] This amounts to a considerable reduction to the initial claim made by the investors, one can always argue that the initial amount claimed (CFA250 million) was deeply inflated and a highly improbable amount to secure, considering the compensation granted for the material injury amounted to only CFA113.4 million.

Amongst various reasons for denial of a claim for moral damages, the *Pey Casado Tribunal* believed that "…*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*."[82] It is worth mentioning that, in this case, the primary reason upon which the Tribunal had denied the claim for moral damages was the inability on the part of the claimant to provide sufficient evidence.

The *Europe Cement Tribunal*, after establishing that it lacked jurisdiction, had to deal with Turkey's counterclaim for moral damages. The Tribunal did "*not consider that exceptional circumstances such as physical duress are present in this case to justify moral damages.*"[83] However, the Tribunal nevertheless went on to state 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…This provides a form of "satisfaction" for the Respondent.*"[84] The Tribunal had ordered the claimant to pay the full costs for the proceedings (some USD3.9 million) as well as half the arbitration costs (USD129,000), which it sought necessary to "*discourage others from pursuing such unmeritorious claims.*"[85]

[80] *Id.* at 150.
[81] *Id*.
[82] Pey Casado, *supra* note 18, ¶ 704.
[83] Europe Cement, *supra* note 20, ¶ 181.
[84] *Id.*
[85] *Id*. ¶ 185.

VII. THE PROBLEM OF QUANTIFICATION OF MORAL DAMAGES

As early as the Lusitania case, the Umpire had laid down that it "*is difficult to lay down any rule for measuring [non-material] injury*", and that damages granted for such injury "*are difficult to measure or estimate by money standards*".[86] Needless to say, that such damages must be commensurate to the injury suffered. The umpire drew parallels to the difficulties experienced by judges in tort cases, of clearly defining in their instructions to juries the different factors, which are to be taken into account and readily applied by them in assessing the quantum of damages to be granted, but also exercised caution to not award exemplary or punitive damages.[87] Ultimately due to the restrictions imposed upon it by the Treaty of Berlin, the Umpire proceeded to grant only such damages as, in its opinion, would be necessary to compensate the injured for injuries suffered by them and nothing more (such as exemplary or punitive damages).[88]

Modern investment treaty case law has yet to come to a mechanism for determining the appropriate amount of damages that ought to be granted. The lack of any rules in this regard has allowed tribunals to exercise its powers with flexibility and often times without much justification. While not arbitrary, tribunals have failed to answer how they have often times arrived at a particular figure.

In *Desert Line*, the claimant therein sought to follow the *Fabiani* case.[89] Accordingly, the claimants quantified their claim for moral damages at 1/3rd of the total amount claimed, as granted in the *Fabiani* case of 1902. In the *Fabiani case*, the dispute arose following an arbitral award in favour of Mr. Fabiani rendered in France against two ex-business partners domiciled in Venezuela. When Mr. Fabiani attempted to enforce the award in Venezuela he was faced by arbitrary actions, denial of justice and fraudulent resolutions by the executive power of Venezuela to keep him from recovering his debt. Notably, the government fraudulently assigned railroad contracts and awarded maritime contracts to third parties in order to insulate the assets of Mr. Fabiani's debtor. The sole arbitrator considered Venezuela's hostile attitude towards Mr. Fabiani as an aggravating factor and concluded that the authorities had committed repeated denials of justice against him, and that he was entitled to receive damages for material as well as non-material injury. This was further aggrandised because Mr. Fabiani's inability to recover the amount of compensation of the initial award

[86] Lusitania, *supra* note 4, at 40.
[87] *Id.* at 39.
[88] *Id.* at 43.
[89] Desert Line, *supra* note 7, ¶ 286; Antoine Fabiani case, UNRIAA, vol. X (1905), 83 (Report of French–Venezuelan Mixed Claims Comm'n of 1902) [hereinafter Fabiani].

led ultimately to his bankruptcy.

The Tribunal in *Desert Line* did not analyse the holding of *Fabiani*. Instead the tribunal merely said:[90]

> *Nevertheless, the amount asked by the Claimant is exaggerated and cannot be allocated in its entirety. The Arbitral Tribunal considers that, based on the information at hand and the general principles, an amount of USD 1,000,000 should be granted for moral damages, including loss of reputation.*
>
> *This amount is indeed more than symbolic yet modest in proportion to the vastness of the project*

Without offering much explanation as to how it arrived at such a figure, the Tribunal cut down a claim for moral damages from about USD103 million to USD1 million. In fact, the *von Pezold* case also had similar reductions. In the *von Pezold* case, a total of USD17 million for moral damages was sought – USD5 million for the first claimant (Heinrich) and the border claimants each, as well as USD1 million for 7 of the other claimants[91] – and keeping in mind the decision in *Desert Line*, the tribunal substantially reduced the amount of moral damages granted. Only the claims for the main claimant and the border claimants were considered warranted, however they were both cut down from USD5 million to USD1 million each in order to provide consistency with *Desert Line*.[92] Other than its want for consistency with *Desert Line*, there was no in-depth analysis carried out by the Tribunal as to USD1 million would be the more appropriate amount as opposed to USD5 million.

It is also worth noting that the *Benvenuti* tribunal had made reductions to the claims. Neither did the tribunal in this case specify the reasoning behind its reduction. While the *Lemire* case laid down the principles based upon which moral damages should be granted, as the claim in that case ultimately did not meet the 'exceptional circumstances' threshold, the question of quantification sadly never arose.

Tribunals have seemed to cut down on claims for moral damages. This could be due to various reasons: the claimants' natural tendency to quantify exaggerated amounts; the tribunals' consequent natural tendency to reduce amounts claimed by parties; claimants' difficulties in accurately quantifying and supporting such quantification.

However, in the author's opinion, modern day investment treaty arbitrations, where quantum

[90] Desert Line, *supra* note 7, ¶ 290.
[91] von Pezold, *supra* note 53, ¶ 905.
[92] *Id.* ¶¶ 921–923.

experts are almost ubiquitous, should leave parties no excuse to bring unquantified (or poorly quantified) claims for non-material injury. Of course, it is impossible to be absolutely accurate, but precision must be sought to the extent that it does not leave tribunals the opportunity of claiming an insufficiency in the backing of such claims. Additionally, and perhaps more importantly, tribunals must also take additional effort. Merely cutting down claims to a smaller amount, or – possibly even more dangerous – conforming to the quantum of another case purely for the sake of consistency, will not just prevent the development of this field but paralyse it.

VIII. CONCLUSION

The world of investment treaty arbitration is in its nascent stage and is sure to grow much more. And the concept of moral damages is also here to stay. The concept is still a novel one and requires fine-tuning to a great extent, which shall take time. Very few claims for moral damages have been made, but with it attracting more attention, claimants will be more likely to press tribunals for compensation in this regard. And with an increasing number of claims being made, the number of successful ones will surely rise as well.

Major strides have taken place in the past decade, most notably through *Desert Line* – which seems to have awoken and alerted foreign investors of an additional possible source of revenue. Furthermore, the *Lemire* principles, dealing with the 'exceptional circumstances' under which a tribunal can grant moral damages, must stand the test of time (and other cases) before positively setting themselves in stone. States can also take advantage of these advances.

Quantification of moral damages, though, still remains a relative grey area. More cases will surely seek to clear the uncertainty of quantification and pioneer a fresh approach. Perhaps there can be similar principles laid down, to determine a formula based on entirety of claims – such as the *Fabiani* case – or it could borrow from other fields such as human rights law. Until then, tribunals will seek to grant moral damages in the manner they deem best and hopefully provide reasonings for the same, which may not be the worst thing in the interim.

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