MORAL DAMAGES IN INTERNATIONAL INVESTMENT LAW

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Abstract

This article discusses the notion of moral damages in international investment arbitration. Although there are currently more than 2500 bilateral investment agreements (hereinafter — BIT) in force, none of them regulates moral damages. The analysis focuses on the historical background of moral damages, which shows that international law has not been overly concerned with their assessment within the last hundred years. As such, despite their almost universal acceptance by international courts and tribunals, there is still no guidance for tribunals on how to approach moral damages, making their assessment a topical issue of modern international law. The article highlights the reasons tribunals give for either completely disregarding such claims, or granting merely symbolic sums, such as non-tangible nature of moral damages, lack of any concrete evidence, or an extremely high threshold. The author concludes that international law still lacks a strict and uniform test, when it comes to moral damages, which are bound to face rather broad and subjective decisions rendered by the tribunals. The author further discusses the problem of assessing moral damages, which also lacks established methodology, and often refers to national law of domestic legal systems instead of a unified standard. In some cases, tribunals do not provide any reasoning or legal basis for their assessment. The author concludes that in the absence of a strict test, investment tribunals may turn to human rights instruments to make the assessment of moral damages clearer and more consistent.

Key words

moral damages, compensation, investor-state dispute settlement

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Introduction

The notion of moral has long been a driving force in many international public law cases. Still, it seems to be unusual to reiterate its definition in the context of international investment law. Does international investment law even have a place for moral? The nature of international investment arbitration claims, which involve the disputes between states and investors adversely affected by the state conduct, gives an affirmative answer to this question. Hence, it seems reasonable that investors who have suffered moral damages must be compensated as if they had suffered physical damages. Still, it remains unclear whether the notion of moral damages even fits into the category of compensation in the context of public international law, since moral damages were primarily born out of private law, rather than public.

As was highlighted by G. Arangio-Ruiz, moral losses should be compensated "as an integral part of the principal damage suffered by the injured state".[2] Indeed, his words ring true to this day. As of today, both practical and academic importance of the topic has increased exponentially. The scientific research regarding moral damages shows the growing division between the proponents and opponents of moral damages. This division stems from the very nature of moral damages to the tests deployed by the tribunals. As such, it is natural to suggest that scientific research on moral damages has particular importance for its development, as the recent works tend to overlook the critical significance of such damages and the implications of granting such compensation claims in international law. Hence, the research goal of the present article is to identify the critical problems that turned moral damages into the modern enigma of international investment law, as well as possible solutions for making the assessment of moral damages by arbitral tribunals clearer.

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[2] Second Report on State Responsibility by ILC Special Rapporteur Arangio-Ruiz of 22 June 1989.

Although most authors criticise the rigid approach adopted by the *Lemiere* tribunal,[3] existing academic literature on moral damages remains to be scarce due to the "elusive"[4] nature of this concept. As such, although some even go as far as developing their own definition of moral damages,[5] most authors tend to analyse moral damages by recognizing their alien nature as the first step.[6] Instead, this article suggests looking at the same picture backwards. The author believes that moral damages share the same framework as other forms of reparations. And moral damages, despite their duality, are very real. An extensive analysis of the case law proposed by the author proves this theory.

The article is structured in the following way. In the first section the origins of the concept are presented, including various approaches to its definition, and different types of damages. The second section is devoted to the analysis of different tests applied by international tribunals for the award of moral damages, including such tests as exceptional circumstances and the *Lemiere* test. And finally, the last section is focused on the issue of quantification of moral damages. As will be shown, the quantification of damages remains one of the difficult tasks in the context of compensation in general, yet evaluation of moral damages presents to be even a bigger problem for international tribunals due to the inability to effectively quantify such damages because of their very specific nature. Moreover, the section also looks at the problem of moral damages evaluation in investment law from the perspective of human rights law, and makes the conclusions with regard to the increasing interconnection between the two.

1. The concept origins

Naturally, the obligation to repair moral damages reflects the obligation under customary international law[7] of full reparation and injury as provided in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts[8] (hereinafter — ARSIWA). Under Article 31(2) ARSIWA, "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act", while such "injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

In the landmark *Lusitania* case concerning the sinking of the British ocean liner, RMS Lusitania, by a German submarine during World War I, which resulted in the deaths of 1,198 passengers, the tribunal characterised moral damages as "very real",[9] amounting to "mental suffering, injury to [one's] feelings, humiliation, shame, degradation, loss of social position or injury to [one's] credit or to [one's] reputation, and entailing compensation <…> commensurate to the injury".[10]

The Mixed Claims Commission established that "non-material damage is financially assessable and may be subject of a claim of compensation" as "mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards",[11] hence why "the mere fact that they are difficult to measure or estimate <…> affords no reason why the injured person should not be compensated".[12] Such definitive approach clearly aligns with the customary principle[13] of full reparation later encapsulated in *Chorzów Factory*, which aims to "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[14]

The importance of *Lusitania* is also reflected in the Commission's attempts to assess moral damages through domestic law of Britain, France, Germany, and the U.S. By relying on different national systems

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3 Ehle B., Dawidowicz M. *Moral Damages in Investment Arbitration. Commercial Arbitration and WTO Litigation* in J. Goldman et al. *WTO Litigation, Investment Arbitration, and Commercial Arbitration*. Kluwer Law International. 2013. P. 293, 304, 307, 310; Conway B. *Moral Damages in Investment Arbitration: A Role for Human Rights?* // Journal of International Dispute Settlement. 2012. Vol. 3. № 2. P. 371, 378–379, 394; Lawry-White M. *Are Moral Damages an Exceptional Case?* // International Arbitration Law Review. 2012. Vol. 15. № 6. P. 236, 239.

4 Dumberry P. *Moral damages in Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*. Leiden : Brill Nijhoff, 2018. P. 142; Jagusch S., Sebastian T. *Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing? //* Arbitration International. 2013. Vol. 29. № 1. P. 45.

5 Wittich S. *Non-Material Damage and Monetary Reparation in International Law* // Finnish Yearbook of International Law. 2004. P. 321, 329–330.

6 Dumberry P. *Op.cit*. P. 142.

7 PCIJ. *Factory at Chorzów* (*Germany v. Poland*). Judgement of 13 September 1928 // P.C.I.J. Series A, № 17. 1928. P. 47.

8 International Law Commission. Articles on State Responsibility for Internationally Wrongful Acts // YBILC 2 (Part 2). 2001.

9 Mixed Claims Commission. *Opinion in the Lusitania cases* (*United States v. Germany*). Decision of 1 November 1923. 7 RIAA. P. 40.

10 *Ibid*.

11 *Ibid*. P. 36.

12 *Ibid*. P. 40.

13 UNCITRAL. *BG Group Plc. v. The Republic of Argentina*. Final Award of 24 December 2007. §421–429.

14 PCIJ. *Factory at Chorzów* (*Germany v. Poland*). P. 47. §124.

as guidance, the Commission understood moral damages as a general principle of law, which could also be found in international law.

In the end, *Lusitania* was the first case of its kind where compensation was awarded to the families of victims "for such mental suffering or shock, if any, caused by the violent severing of family ties, as Claimant may actually have sustained by reason of such death".[15] Thus, it not only legitimised understanding of the definition of moral damages in the legal sense, but also paved the way for others to claim damages for their non-material suffering in future cases.

Indeed, moral damages have been often invoked by international tribunals.[16] For instance, in 2010 the International Labor Organization Administrative Tribunal awarded EUR 10 thousand of moral damages to an employee of the International Fund for Agricultural Development due to her suffering after the termination of her employment contract.[17] Likewise, the European Court of Human Rights has on numerous occasions recognized the existence of moral damages,[18] and even turned to the rules of state responsibility to specify their content under the ECHR. For example, in the case *Papamichalopoulous and others v. Greece*, which declared the supremacy of the *restitutio in integrum* principle,[19] the Court stated that "while the Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgement in which the Court has found a breach, <...> if the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it",[20] and further noted that "this discretion as to the manner of execution of a judgement reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed".[21] The Court then proceeded to award 6.3 million drachmas for "non-pecuniary damage arising from the feeling of helplessness and frustration".[22] In a similar fashion, Inter-American Court of Human Rights has also accepted the existence of moral damages.[23]

State practice has also on numerous occasions recognized moral damages.[24] It has been confirmed to be "settled amongst legal systems that at least in some instances non-pecuniary loss may be recoverable".[25] For example, Canadian Supreme Court in *Augustus v. Gosset* affirmed that "according to the general civil law rule, any prejudice, whether moral or material, even if it is difficult to assess, is compensable if proven".[26]

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15 Mixed Claims Commission. *Opinion in the Lusitania cases.* §35.

16 *Madame Chevreau* (*France v. United Kingdom*). 11 RIAA 1113. 1931. P. 1143; IACtHR. *Velasquez Rodriguez*. Judgement of 29 July 1989. §27; ECtHR. *BB v. UK*. Application no. 53760.00. Decision of 10 February 2004. §36; ICJ. *Ahmadou Sadio Diallo* (*Guinea v. Congo*). Judgement of 19 June 2012. §18.

17 ILOAT. *Mrs. A. T. S. G. v. Int'l Fund for Agric. Dev*. Judgement of 3 February 2010. P. 5.

18 ECtHR. *Byrzykowski v. Poland*. Application no. 11562/095. Judgement of 27 June 2006; ECtHR. *Papamichalopoulous v. Greece*. Judgement of 31 October 1995; ECtHR. *Case of Elci and Others v. Turk*. Application no. 23145/93. Judgement of 13 November 2003; ECtHR. *Perks and others v. the U.K.* Application no. 25277/94. Judgement of 12 October 1999; ECtHR. *Cf. Ruiz Torija v. Spain*. Judgement of 9 December 1994. §33; ECtHR. *Boner v. the United Kingdom*. Judgement of 28 October 1994. §46; ECtHR. *Kroon and Others v. the Netherlands*. Judgement of 27 October 1994. §45; ECtHR. *Darby v. Sweden*. Judgement of 23 October 1990. §39–40; ECtHR. *Koendjbiharie v. the Netherlands*. Judgement of 25 October 1990. §34; ECtHR. *McCallum v. the United Kingdom*. Judgement of 30 October 1990. §35.

19 Ichim O. *Just Satisfaction under the European Convention on Human Rights* / *Just Satisfaction under the European Convention on Human Rights* / ed. by O. Ichim. Cambridge : Cambridge University Press. 2014.

20 ECtHR. *Papamichalopoulous v. Greece*... §31, 34, 36.

21 *Ibid*. §34.

22 *Ibid.* §43.

23 IACtHR. *Villagrán-Morales et al. v. Guatemala.* Judgement of 26 May 2001. §88; IACtHR. *Ivcher Bronstein v. Peru*, Judgment of 6 February 2001. §183; IACtHR. *Olmedo Bustos et al. v. Chile*. Judgement of 5 February 2001. §99; IACtHR. *Baena Ricardo et al. v. Panama*. Judgement of 2 February 2001. §206; IACtHR. *Case of the Constitutional Court v. Peru*. Judgement of 31 January 2001. §122; IACtHR. *Blake Case.* Judgement of 22 January 1999. §42.

24 Trenor J. A. *Guide to Damages in International Arbitration* // Global Arbitration Review. 2022. P. 40–41; Ruling of the Plenary Session of the Supreme Court of the Russian Federation of 24 February 2005. §1; Ruling of the Supreme Court of Chile of 26 September 2013. Case no. 375/2013; Egyptian Civil Code, Article 222(1); *Simmons v. Castle*. Judgement of 2013. 1 W.L.R. P. 1239, 1252 in Lunney M., Nolan D. *Tort Law: Text and Materials*. Oxford University Press. 2017. P. 904; Ripinsky S., Williams K. *Damages in International Investment Law*. British Institute of International and Comparative Law. 2015. P. 307.

25 Schwenzer I. & Hachem P. *Moral Damages in International Investment Arbitration* // *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* / ed. by S. Kröll. Liber Amicorum Eric Bergsten. Alphen aan den Rijn, Netherlands : Kluwer. 2011. P. 417.

26 Supreme Court of Canada*. Augustus v. Gosset.* Judgement of 10 March 2003. P. 270.

However, although there are currently more than 2500 BITs in force, none of them include provisions that would regulate moral damages. Yet, they are not alien to investment arbitration.[27] As such, the tribunal in *Cementownia v. Turkey* confirmed that "there is nothing in the ICSID Convention, Arbitration Rules, and Additional Facility which prevents an arbitral tribunal from granting moral damages".[28] At the same time, due to the newness[29] of the concept of moral damages in international investment law, very few tribunals actually grant the claimants requests to award moral damages due to their elusive nature,[30] and a high threshold.[31] Thus, in *OI European Group BV v. Bolivarian Republic of Venezuela*, the tribunal found that behaviour of the respondent did not amount to an additional compensation for moral damages as it did not include physical threats, illegal detention or ill-treatment.[32]

While there is no precise definition of moral damages in international investment law, they have been generally understood as "a damage that is not material".[33] Another example for understanding the substance of moral damages can be provided by the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which considers moral damages as "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".[34]

Hence, material damage is reflected in monetary terms, but moral damages "cannot be objectively quantified",[35] since they primarily involve different notions of moral sufferings that cannot be evaluated in the same way as material harm. Therefore, although moral damages have been gradually recognized in recent years, most investment tribunals have been cautious in granting moral damages claims.[36]

Generally, moral damages can be understood in three dimensions:[37] (i) as damage to personality rights of individuals; (ii) as damage to reputation;[38] and (iii) as legal damage.[39] Naturally, damage to the personality rights of individuals is understood as "perhaps the most common and obvious form of moral damage".[40] Such damage may include "individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life".[41] However, it is still unclear whether a Respondent state involved in investment disputes can also be awarded moral damages. On the one hand, states have often claimed moral damages in their arguments[42] as the "personification of the legal order and honour of the nation enjoys respect for its moral and political personality".[43] On the other hand, it is noteworthy that there is no case law confirming that moral damages have ever been awarded to them. For instance, in *Benvenuti & Bonfant v. People's Republic of the Congo* the government of Congo in its counterclaim requested the same amount of prejudice moral as the Claimant. The government

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27 ICSID. *Pey Casado v. Chile* (I). Case no. ARB/98/2. Decision on Annulment of 8 January 2020. §716; CIRDI. *Lundin Tunisia B.V. v. Republic of Tunisia*. Case no. ARB/12/30. Sentence (extraits) of 22 December 2015. §374; ICSID. *Border Timbers v. Zimbabwe*. Case no. ARB/10/25. Award of 28 July 2015. §905; ICSID. *von Pezold and others v. Zimbabwe*. Case no. ARB/10/15. Award of 28 July 2015. §908; ICSID. *OIEG v. Venezuela*. Case no. ARB/11/25. Award of 10 March 2015. §906; ICSID. *Lemire v. Ukraine* (II). Case no. ARB/06/18. Decision on Jurisdiction and Liability of 14 January 2010. §476; Houtte H., McAsey B. *Future Damages in Investment Arbitration — a Tribunal with a Crystal Ball? / Practising Virtue /* ed. by D.D. Caron, S.W. Schill, A. Smutny, E.E. Triantafilou. Oxford University Press. 2015. P. 2; Marchili S. *Unexceptional Circumstances: Moral Damages in International Investment Law* // Third Annual Investment Treaty Arbitration. 2010. P. 213, 223.

28 ICSID. *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*. Case no. ARB(AF)/06/2. Award of 17 September 2009, §169.

29 ICSID. *Border Timbers v. Zimbabwe*. §906; ICSID. *von Pezold and others v. Zimbabwe*. §909; ICJ. *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*). §18.

30 Dumberry P. *Satisfaction as a Form of Reputation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes* // Journal of International Dispute Settlement. 2012. Vol. 3. № 1. P. 5.

31 *Ibid.*

32 ICSID. *OIEG v. Venezuela OI European Group B.V. v. Bolivarian Republic of Venezuela*. Case no. ARB/11/25. Award of 10 March 2015.

33 ICJ. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)…* §18.

34 Sohn L.B., Baxter B.B. *Draft Convention on the International Responsibility of States for Injuries to Aliens* // American Journal of International Law. 1961. Vol. 55. № 3. P. 548–584.

35 Weber S. *Demystifying Moral Damages in International Investment Arbitration* // The Law and Practice of International Courts and Tribunals. 2020. Vol. 19. P. 417–450.

36 ICSID. *OI European Group BV v. Bolivarian Republic of Venezuela*. Case no. ARB/11/25. Award of 10 March 2015. §910–917; ICSID. *Lemire v. Ukraine.* Decision on Jurisdiction and Liability of 14 January 2010. §333; ICSID. *Desert Line Projects LLC v. Republic of Yemen*. Case no. ARB/05/17. Award of 6 February 2008. §291.

37 Sabahi B. *Compensation and Restitution in Investor–State Arbitration.* Oxford : Oxford University Press. 2011. P. 136–7.

38 UNCITRAL. *Zhongshan Fucheng v. Nigeria*. Final Award of 26 March 2021. §177; ICSID. *Desert Line Projects LLC v. Republic of Yemen*. §290.

39 ICSID. *Desert Line Projects LLC v. Republic of Yemen*. §289; CCJA. A*fricard Co Ltd. v. State of Niger*. Case no. 003/2013/ARB. Final Award of 6 December 2014. §45; ICSID. *Benvenuti & Bonfant v. Congo*. Case no. ARB/77/2. Award of 8 August 1980. §4.96.

40 Ehle B., Dawidowicz M. *Op.cit.* P. 294.

41 ARSIWA, with commentaries. Article 36. §16. P. 32, 40.

42 SCC. *Limited Liability Company Amto v. Ukraine*. Case no. 080/2005. Award of 26 March 2008. §116–118.

43 Wittich S. *Op.cit.* P. 321, 336.

argued that the water production plant was unfinished, the sanitary standards were not complied with, and the fact of being brought before the tribunal was unjust.[44] However, the tribunal unsurprisingly concluded that this was all due to the own actions of the respondent, hence "there is no question of the Government having suffered prejudice moral and that for this reason its counterclaim has no basis in law at all".[45]

A similar argument was brought by Turkey in *Europe Cement v. Turkey*, when it asked the tribunal to award it compensation "for the moral damage it has suffered to its reputation and international standing through the bringing of a claim that is baseless and founded on fabricated documents".[46] Notably, Turkey relied on *Desert Line v. Yemen*, in which the tribunal awarded US$1 million in moral damages for reputational harm. In turn, Europe Cement argued that the facts of the two cases were completely different, as there was no physical duress of the respondent in the way there was in *Desert Line*. In the end, the tribunal did not award moral damages as it could not conclude that "exceptional circumstances such as physical duress are present in this case to justify moral damages".[47]

Another case where the state had tried to claim moral damages was *Cementownia v. Turkey*, in which Turkey argued that the conduct of the claimant had been "egregious and malicious".[48] Namely, Turkey insisted that Cementownia made spurious allegations with the intent of "damaging Turkey's international stature and reputation".[49] However, the tribunal found it "doubtful that such a general principle [of abuse of process] may constitute a sufficient legal basis for granting compensation for moral damages".[50] Hence, the request of the respondent for moral damages was dismissed.

Given the above, the historical background behind moral damages sheds a light on their place in international law. At the first glance, moral damages reflect the international customary principle of full reparation, which was codified by ARSIWA, and further reflected in *Lusitania* case. On the other hand, it is clear that international law has not been overly concerned with their assessment within the last hundred years. As such, despite their almost universal acceptance by international courts and tribunals, neither BITs, nor any other investment law document provide any guidance for tribunals on how to approach moral damages, making their assessment a modern enigma of international law.

2. Tests applied by tribunals for the award of moral damages

There is no shortage of opinions among international tribunals on the test to be applied in awarding moral damages. Since there is no consistency, tribunals often have to create their own tests based on rejections of certain principles, rather than on affirmative findings. As such, tribunals have already rejected the abuse of process and absence of economic harm as reasonable grounds for the award of moral damages.[51] In the meanwhile, the doctrine of "clean hands" has been known to preclude the award of moral damages.[52] Notably, it is easier to say what makes arbitrators reject moral damages rather than award them. As such, moral damages claims are usually rejected due to the lack of proof,[53] lack of tribunal competence,[54] non-existence of the treaty breach,[55] lack of entitlement under the applicable domestic law,[56] absence of the fee payment.[57]

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44 ICSID. *Benvenuti & Bonfant v. People's Republic of the Congo…* §4.120.
45 *Ibid.,* §4.121–4.122.
46 ICSID. *Europe Cement Inv. & Trade S.A. v. Republic of Turkey*. Case no. ARB(AF)/07/2. Award of 13 August 2009. §177.
47 *Ibid,* §181.
48 ICSID. *Cementownia "Nowa Huta" S.A. v. Republic of Turkey.* §165.
49 *Ibid*.
50 *Ibid,* §170.
51 *Ibid*; ICSID. *Rompetrol v. Romania*. Case no. ARB/06/3. Award of 6 May 2013. §293.
52 PCA. *KCI v. Gabon.* Case no. 2015–25. Final award of 23 December 2016. §285; CNUDCI. *Al Warraq v. Indonesia*. Final Award of 15 December 2014. §654.
53 PCA. *Bank Melli and Bank Saderat v. Bahrain.* Case no. 2017–25. Final Award of 9 November 2021. §793, 794; ICSID. *Funnekotter v. Zimbabwe.* Case no. ARB/05/6. Award of 22 April 2009. §139, 140; ICSID. *Arif v. Moldova*. Case no. ARB/11/23. Award of 8 April 2013. §584, 590–593, 597, 602–615; ICSID. *Toto v. Lebanon*. Case no. ARB/07/12. Award of 7 June 2012. §255; ICSID. *Caratube v. Kazakhstan (I).* Case no. ARB/08/12. Award of 5 June 2012. §212, 468, 469, 470; ICSID. *Inmaris Perestroika v. Ukraine.* Case no. ARB/08/8. Award of 1 March 2012. §428; ICSID. *Roussalis v. Romania*. Case no. ARB/06/1. Award of 7 December 2011. §166. 167; ICSID. *MMS v. Central African Republic*. Case no. ARB/07/10. Award of 12 May 2011. §423, 435; SCC. *Bogdanov v. Moldova (III)*. Case no. 114/2009. Final Award of 30 March 2010. §37, 61, 98.
54 PCA. *Bahgat v. Egypt (I).* Case no. 2012–07. Final Award of 23 December 2019. §519–521.
55 ICSID. *Aven and others v. Costa Rica*. Case no. UNCT/15/3. Final Award of 18 September 2018. §688.
56 SCC. *Bogdanov v. Moldova (III)...* §98.
57 MCCI. *OKKV v. Kyrgyzstan*. Case no. A–213/10. Award of 21 November 2013. §158.

Therefore, as different tribunals apply different approaches it can be hard to find some common ground with regard to the test to be applied. However, the case law within investment arbitration compensates for the lack of such unified test by providing a number of tests with different requirements.

2.1. The problem of evidence

Investment tribunals have numerously referred to the insufficiency of evidence in the context of moral damages in investment claims.[58] As such, evidence "must be sufficiently clear to prove a chain of causality that is sufficiently proximate".[59] Hence, the following question inevitably arises: do moral damages always entail a certain degree of arbitrariness and speculation?

For instance, in *Benvenuti & Bonfant v. People's Republic of the Congo* the claimant initiated arbitration with regard to the alleged expropriation that had taken place due to the actions of People's Republic of the Congo. As a result of the respondent breaches, the claimant requested CFA 250 million for moral damages arising out of, inter alia, "lost work and investment opportunities in Italy".[60]

Although the tribunal awarded *prejudice moral* to the investor in the amount of CFA 5 million, it highlighted that the investor had presented "simple statements, unsupported by any concrete evidence".[61] As such, the tribunal was not convinced that even "after receiving the compensation owed to it, with interest, [the claimant] would have the possibility to work or to invest or to resume its activities in Italy or elsewhere".[62] Further, the tribunal "had reason to doubt"[63] that the claimant "lost its credit with its suppliers or bankers or that it could not obtain the necessary personnel".[64] It is also notable that although the tribunal did not elaborate on the legal test employed, it relied on Congolese law which akin to French law[65] allowed moral damages.

In a similar manner, in *Rompetrol v. Romania* the tribunal denied moral damages to the claimant since it failed "to produce any reliably concrete evidence of actual losses".[66] In that case, the tribunal was unprepared to "subvert the burden of proof and the rules of evidence"[67] by resorting to a "purely discretionary award of moral solace".[68] Following this line of reasoning, the tribunal in *Amoco v. Iran* asserted that "one of the best settled rules of the law of international responsibility of States" is that "no reparation for speculative or uncertain damages can be awarded".[69]

In another case of *Tecmed v. Mexico* the tribunal granted compensation to a Spanish company, which claimed that Mexico had indirectly expropriated the claimant's investment, and breached fair and equitable treatment standard. However, the tribunal denied moral damages "due to the absence of evidence proving that the actions attributable to the respondent <…> affected the Claimant reputation and therefore caused the loss of business opportunities for the Claimant".[70]

2.2. Exceptional circumstances test

In the meanwhile, despite the promising search for the perfect test to evaluate moral damages, it has long been established that only exceptional events may serve as grounds for the award of moral damages.[71]

The exceptional circumstances test proposed by the *Desert Line* tribunal, which held that "a party may, in exceptional circumstances, ask for compensation for moral damages",[72] is often relied upon in the

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58 ICSID. *Técnicas Medioambientales Tecmed, SA v. United Mexican States*. Case no. ARB(AF)/00/2. Award of 29 May 2003. §198.
59 Weber S. *Op.cit*. P. 449.
60 ICSID. *Benvenuti & Bonfant SARL v. People's Republic of Congo.* §4.95.
61 *Ibid.,* §4.96.
62 *Ibid.*
63 *Ibid.*
64 *Ibid.,* §4.95.
65 French Civil Code, Article 1382.
66 ICSID. *Rompetrol v. Romania*. §293.
67 *Ibid.,* §289.
68 *Ibid.,* §293.
69 Iran-United States Claims Tribunal. *Amoco International Finance Corp. v. Islamic Republic of Iran*. Case no. 56. Partial Award of 14 July 1987. §238.
70 ICSID. *Técnicas Medioambientales 'Tecmed', S.A. v. Mexico*. §198.
71 ICSID. *Desert Line Projects LLC v. Republic of Yemen.* §289; ICSID. *Joseph Charles Lemire v. Ukraine*. Case no. ARB/06/18. Award of 28 March 2011. §326; ICSID. *Arif v. Moldova*, §584; ICSID. *Quiborax S.A. v. Plurinational State of Bolivia*. Case no. ARB/06/2. Award of 16 September 2015. §618; UNCITRAL. *Oxus Gold v. The Republic of Uzbekistan*. Final Award of 17 December 2015. §895.
72 ICSID. *Desert Line Projects LLC v. Republic of Yemen.* §289.

practice of international tribunals both by parties and tribunals.[73] Following the violent events between the claimant personnel, the respondent and armed groups, Yemen manipulated the claimant into privately signing a settlement agreement, which the company had no intention of signing but did anyway to avoid being harmed by the state. Hence, Desert Line argued that the respondent "created severe pressures both economic and relating to the physical security of claimant's investment — to build up in such a manner so as to coerce Claimant into the Settlement Agreement dictated by the Respondent".[74]

As a result, the claimant requested a sum of over US$ 100 million of moral damages on the basis of emotional distress and reputational harm suffered by the investor due to Yemen's actions. In particular, the investor sought moral damages including loss of reputation for having suffered "the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes".[75]

In its decision the tribunal again referred to *Lusitania* case by calling the non-material damages "very real".[76] The tribunal further concluded that the claimant has suffered the "malicious" and "constitutive of a fault-based liability" due to "physical duress exerted on the executives of Claimant".[77] Hence, Yemen was "liable to reparation for the injury suffered <…> whether it be bodily, moral or material in nature".[78] Nevertheless, the tribunal concluded that the amount requested by the claimant was disproportionate and "exaggerated", and therefore awarded US$1 million for moral damages, which was "more than symbolic yet modest".[79] The tribunal did not specify the objective criteria on which arbitrators based their decision on.

Hence, however small, compensation for moral damages was awarded for the first time in history. Yet in the absence of a strict test, it is clear that tribunals exercise subjective quantification of damages, calling the sum they personally deem inappropriate "exaggerated". Furthermore, the tribunal did not introduce or explain the idea behind its method for quantifying damages based on the exceptional circumstances test. That said, it also considered the existence of fault to be a necessary pre-requisite for the award of moral damages, which partially contradicts the common approach.[80]

All in all, even though the *Desert Line* tribunal made a groundbreaking decision by being the first to award compensation for moral damages, the assessment of which are "difficult if not impossible",[81] the way of reliance on exceptional circumstances test had been far from perfect. Unsurprisingly, the test has often been called a "wildcard"[82] or "another undefined term"[83] as it merely provided tribunals an opportunity to evaluate compensation claims at their own discretion.

2.3. The *Lemire* test

In *Lemire*, which concerned the alleged breach by Ukraine of the USA-Ukraine BIT, the tribunal introduced a three-part test for the award of moral damages which allowed the award of moral damages in the following cases: first, "the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilised nations are expected to act; second, 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; third, both cause and effect are grave or substantial".[84]

In its submission the claimant, a US investor in a Ukraine broadcasting company, relied on the infamous *Lusitania* case to argue that "injuries that result in mental suffering, injury to his feelings, humiliation"[85] are entitled to compensation. Mr Lemire sought moral damages due to the actions of the

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73 Ad Hoc Tribunal. *Oxus Gold v. Uzbekistan.* Final Award of 17 December 2015, §895; ICSID. *Quiborax v. Bolivia*, §618; ICSID. *Border Timbers v. Zimbabwe,* §905; ICSID. *von Pezold and others v. Zimbabwe*, §908; ICSID. *Arif v. Moldova*, §592, 606; ICSID. *Tza Yap Shum v. Peru*. Case no. ARB/07/6. Award of 7 July 2011. §281.

74 ICSID. *Desert Line Projects LLC v. Republic of Yemen*. §146.

75 *Ibid.,* §286.

76 *Ibid.,* §289.

77 *Ibid.,* §290.

78 *Ibid.*

79 *Ibid.*

80 ICSID. *CMS Gas Transmission Co. v. Argentina*. Case no. ARB/01/8. Award of 12 May 2005. §280; LCIA. *Occidental Exploration & Production Company v. Ecuador.* Award of 1 July 2004. Case no. UN 3467. §186.

81 ICSID. *Desert Line Projects LLC v. Republic of Yemen*. §289.

82 Weber S. *Op.cit*. P. 447.

83 *Ibid.*

84 ICSID. *Joseph Charles Lemire v. Ukraine (II).* §333.

85 Mixed Claims Commission. *Opinion in the Lusitania cases.* P. 40.

Ukrainian authorities, which denied the claimant applications for new radio frequencies. In turn, Ukraine contested that the conditions for the test had not been complied with while referring to the *Siag* case, where the tribunal rejected the claim as "the exceptional circumstances threshold is very high and applies only to extreme cases of harassment".[86]

Although the tribunal acknowledged the ill-treatment the claimant had suffered in the *Lemire* case it found that "the moral aspects of his injuries have already been compensated by <…> economic compensation, while the extraordinary tests required for the recognition of separate and additional moral damages have not been met in this case",[87] hence why a separate redress for moral damages"[88] was not necessary. Interestingly, the tribunal confirmed that no precise definition of exceptional circumstances exists, and it "must be induced from case law".[89] In this regard, one can also suggest that due to the inconsistency of case law, such *inducing* would inevitably lead to the tribunals awarding moral damages at their discretion.

The tribunal also highlighted that the claimant conduct towards the Ukrainian authorities "may have appeared rude and disrespectful",[90] which "reinforce[d] the conclusion that a separate redress for moral damages is not appropriate".[91] The tribunal's remark may illustrate the shift that occurred in the nature of moral damages which started turning away from compensatory towards more equitable.

In *Quiborax S.A. v. Plurinational State of Bolivia,* the tribunal also confirmed the high level of threshold to award moral damages.[92] It is worth noting, however, that the given approach indeed sets out rather strict conditions for the exceptional circumstances test to be met, and has often been criticised due to its unreasonable harshness. For example, the tribunal in the case *Arif v. Moldova* characterised it as "based on a limited discussion of three cases, with no broader consideration of underlying principles or policies, <…> which should not be taken as a cumulative list of criteria that must be demonstrated for an award of moral damages".[93] It thus rejected the claim for moral damages as "it did not reach a level of gravity and intensity which would allow it to conclude that there were exceptional circumstances which would entail the need for a pecuniary compensation for moral damages".[94]

Nevertheless, even though the moral damages claim was rejected, the tribunal still made a number of very important findings. As such, it once again reestablished the high threshold of exceptional circumstances, setting a very strong ground for future rejections of moral damages claims due to the inconsistency with such threshold,[95] as well as for the effect of overpowering between moral and economic.

Another important case is *Pezold v. Zimbabwe,* which concerned the alleged seizure by Zimbabwe of the farms and farmland belonging to the Pezold family. The claimant requested the moral damages to be awarded in the amount similar to the one requested by the claimant in the *Lemire* case, asserting that it had suffered losses due to the respondent's threats, attacks, and humiliations.

Relying on *Desert Line*, the tribunal argued that "although it is difficult to substantiate an appropriate sum for moral damages, [it] should not be a deterrent".[96] Further using the *Lemire* test, the tribunal analysed moral damages from the point of view of all claimants, and awarded moral damages in the amount of US$ 1 million for stress and anxiety.

Therefore, although the tribunal was consistent in once again using the *Lemire* test, it did not analyse the nature of the awarded amount. Indeed, due to the absence of an objective standard in quantification of damages, the existing case law raises more flaws and questions than answers. Hence, it would have provided an effective approach if the tribunals explored the notion behind such symbolic awards.

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86 ICSID. *Joseph Charles Lemire v. Ukraine (II).* §321.
87 *Ibid.,* §344.
88 *Ibid.,* §345.
89 *Ibid.,* §326.
90 *Ibid.,* §345.
91 *Ibid.*
92 ICSID. *Quiborax S.A. v. Plurinational State of Bolivia*. §618.
93 ICSID. *Arif v. Moldova*. §590.
94 *Ibid.,* §615.
95 SCC. *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*. Case no. 116/2010. Award of 19 December 2013. §1782.
96 ICSID. *Bernhard von Pezold and others v. Republic of Zimbabwe*. Case no. ARB/10/15. Award of 8 July 2010. §910.

3. Evaluation of moral damages and the problem of methodology: a human way out?

Naturally, determining the quantum of damages is one of the most difficult[97] issues in the context of compensation in international investment arbitration. Evaluating moral damages is even more challenging because these damages are intangible, hence not easy to quantify. And though the issue of evaluation of damages now attracts attention of a great number of scholars, as well as arbitrators in investment disputes, this was not always the case.[98]

As such, moral damages have typically been awarded as compensation[99] or satisfaction.[100] The ICJ in the *Guinea v. Democratic Republic of the Congo* case suggested taking into account the "equitable considerations" for the quantum of moral damages.[101] As was stated by the tribunal in the landmark *Lusitania* case, evaluation of moral damages is "manifestly impossible to compute mathematically or with any degree of accuracy or by any use of any precise formula".[102] That said, this inevitably creates a risk that the tribunal "will pick a figure out of the air".[103]

The fact of these difficulties "furnishes no reason the wrongdoer should escape repairing his wrong or why he who has suffered should not receive reparation therefore measured by rules as nearly approximating accuracy as human ingenuity can devise".[104] Likewise, in *Desert Line v. Yemen* it was asserted that "it is difficult, if not impossible, to substantiate a prejudice of this kind",[105] still characterising moral damages as "very real".[106] In the end, the tribunal in *Desert Line* awarded moral damages in the amount of US$1 million, describing the initial amount requested by the claimant as exaggerated.

Due to the lack of consensus among investment tribunals[107] as regards the method of evaluation of moral damages, no uniform approach exists. In some cases, tribunals may rely on domestic law to quantify the amount of moral damages. For instance, in *Al-Kharafi & Sons Co. v. The Government of the State of Libya* the tribunal granted an investor US$30 million of moral damages relying on the Libyan Civil Code which provides that compensation covers moral injury.[108] Similarly, in another case the tribunal relied on Egyptian law when awarding US$2 million of moral damages to a state tourism authority because a private firm created a "very bad image of the country".[109] In contrast, in *Generation v. Ukraine* the tribunal rejected a claim due to the fact that the law applicable to the claim for moral damages was Ukrainian law and thus outside the scope of the tribunal's jurisdiction *ratione materiae*.[110]

Notably, international human rights law has often dealt with the issue of moral damages in the practice of ECtHR and other tribunals in a more extensive way.[111] For this reason, quantification of moral damages in investment law may rely on human rights jurisprudence. For instance, in the *Diallo* case the ICJ awarded the claimant US$85 thousand for "moral and mental harm, including emotional pain, suffering and shock, as well as the loss of his position in society and injury to his reputation as a result of his

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97 ICSID. *Desert Line Projects LLC v. Republic of Yemen*. §289.

98 Aaken A. van *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View // International Investment Law and Public Law* / ed. by S. Schill. Oxford : Oxford University Press, 2010. P. 721–754, 722.

99 Ad hoc Arbitration*. Zhongshan Fucheng v. Nigeria.* Final Award of 26 March 2021. §178; ICSID. *Border Timbers v. Zimbabwe.* §916; ICSID. *von Pezold and others v. Zimbabwe.* §920, 921.

100 ICSID. *Europe Cement v. Turkey*. §180, 181; CIRDI. *Pey Casado v. Chile (I)*. Sentence of 8 May 2008. §704.

101 ICJ. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. §24.

102 Mixed Claims Commission. *Opinion in the Lusitania cases.* P. 36.

103 Parish M., Nelson A., Rosenberg C. *Awarding Moral Damages to Respondent States in Investment Arbitration //* Berkeley Journal of International Law. 2011. Vol. 29. № 1. P. 225.

104 *Ibid.*

105 ICSID. *Desert Line Projects LLC v. The Republic of Yemen.* §289.

106 *Ibid.*

107 ICSID. *Rompetrol v. Romania.* §289; ICSID. *Desert Line Projects LLC v. Republic of Yemen*. §291; ICSID. *Benvenuti & Bonfant v. Congo*. §4.96.

108 Libyan Civil Code, Article 225(1); *Mohamed Abdulmohsen Al-Kharafi and Sons v. Libya, Economy Ministry of Libya*. Finance Ministry of Libya and General Board of Investment Promotion and Privatization and the Libyan Investment Authority. Award of 22 March 2013. §365–370.

109 CRCICA. Case no. 117/1998. Final award of 17 March 1999 / *Arbitral Awards of the Cairo* R*egional Centre for International Commercial Arbitration II 1997–2000* / ed. by M. I. Alamedin. Kluwer Law International. 2003. P. 125–128; Egyptian Civil Code, Article 222(1).

110 ICSID. *Generation Ukraine, Inc. v. Ukraine*. Case no. ARB/00/9. Award of 16 September 2003. §17.6.

111 ECtHR. *Byrzykowski v. Poland*. Application no. 11562/095. Judgement of 27 June 2006. §50, 127; ECtHR. *Papamichalopoulous v. Greece*. §41–43; ECtHR. *Case of Elci and Others v. Turk*. Application no. 23145/93. Judgement of 13 November 2003. §723–729; ECtHR. *Perks and others v. The U.K.* Application no. 25277/94. Judgement of 12 October 1999. §78–82; ECtHR. *Cf. Ruiz Torija v. Spain*. Judgement of 9 December 1994. §33; ECtHR. *Boner v. the United Kingdom*. Judgement of 28 October 1994. §46; *Kroon and Others v. the Netherlands*. Judgement of 27 October 1994. §45; ECtHR. *Darby v. Sweden*. Judgement of 23 October 1990. §39–40; ECtHR. *Koendjbiharie v. the Netherlands*. Judgement of 25 October 1990. §34; ECtHR. *McCallum v. the United Kingdom*. Judgement of 30 October 1990. §35; Shelton D. *Remedies in International Human Rights Law*. Oxford University Press. 2005. P. 248.

arrests, detentions and expulsion by the DRC".[112] When making its decision the Court relied on the United Nations Human Rights Committee, the African Commission on Human and People's Rights, and decisions of other international organs. Such a systemic approach seems reasonable in case of human rights violations.

On the other hand, the approach of relying on international human rights law in calculation of investment damages has long been deemed "inadequate",[113] and taken with a certain degree of caution. While investment law aims at providing protection to foreign investors, the very notion of human rights law is concerned with protecting the rights of the people under the state jurisdiction. And finally, it is argued that the approach of rapprochement between compensation in investment arbitration and human rights can lead to inadequate compensation sums[114] awarded by tribunals. Nevertheless, despite the possible critique, investment tribunals should not turn a blind eye to the existing practice of human rights instruments as "international investment protection and human rights are not separate worlds"[115] but rather very close "in their protection of the individual against the power of the State".[116]

The precise amount of damages awarded indeed varies from case to case. Generally, it seems like tribunals are more prone to either awarding a symbolic sum,[117] or a medium number of US$1 million.[118] Indeed, it is very rare that tribunals award large sums.[119] In this regard, it seems *unfair* that victims of state violations cannot rely on a strict test of quantification set down specifically for evaluation of moral damages. On the one hand, it is true that human rights cases differ from investor-state disputes where tribunals are generally more concerned with compensating rather than with punishing the wrongdoer (hence the allegedly compensatory nature of moral damages). On the other hand, the recent practice shows that there is a growing pattern[120] of invoking human rights law with regard to those affected by investors' actions, rather than with regard to investors suffering because of the state.[121]

Additionally, one also cannot ignore the impact of the chilling effect on compensation awards. The chilling effect is related to regulatory chill, which is the phenomenon "when governments will respond to a high threat of investment arbitration by failing to enact or enforce *bona fide* regulatory measures (or by modifying measures to such an extent that their original intent is undermined or their effectiveness is severely diminished)".[122] As such, this phenomenon can adversely affect the enactment of particularly needed provisions in the areas of international environmental law or human rights law.

It is worth noting that the practice with respect to the interest in the award of moral damages also differs. According to Article 38 ARSIWA, "interest on any principal sum due under this chapter shall be payable, when necessary, in order to ensure full reparation". For instance, in *Benvenuti & Bonfant,* which had been analysed above, the tribunal also awarded interest on compensation for moral damages. That said, in the *Desert Line* case the tribunal asserted that with regard to moral damages, "there should not be granted any interest because this amount is at the entire discretion of the Arbitral Tribunal".[123]

As for pre- and post-award interest, some tribunals do not differentiate between the two. For instance, in the *Micula v. Romania* the tribunal stated that "does not see why the cost of the deprivation of money (which interest compensates) should be different before and after the Award".[124] On the other hand, some tribunals do. As was confirmed in the *Gold Reserve v. Venezuela* case, "the purpose of post-Award

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112 ICJ. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo).* §19.
113 Weber S. *Op.cit.* P. 417–450.
114 Ad hoc Arbitration*. Zhongshan Fucheng v. Nigeria.* Final Award of 26 March 2021. §178; ICSID. *Benvenuti & Bonfant v. Congo*. §4.96.
115 Simma B. *Foreign Investment Arbitration: A Place for Human Rights?* // International and Comparative Law Quarterly. Vol. 60. 2011. P. 576.
116 *Ibid.*
117 Ad hoc Arbitration. *Zhongshan Fucheng v. Nigeria*. §178; ICSID. *Benvenuti & Bonfant v. Congo.* §4.96.
118 ICSID. *Border Timbers v. Zimbabwe*. §927; ICSID. *von Pezold and others v. Zimbabwe*. §932; ICSID. *Desert Line v. Yemen*. §291.
119 *Africard Co Ltd. v. State of Niger*. Case No. 003/2013/ARB. Final Award of 6 December 2014. §45.
120 ICSID. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* Award of 8 December 2016. §1187–1192, 1195–1199; Supreme Court of Canada. *Nevsun Resources Ltd. v. Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle*, Case no. 37919. Judgement of 28 February 2020. §132.
121 ICSID. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*. §1187–1192, 1195–1199, 1187–1192, 1195–1199.
122 Tienhaara K. *Regulatory chill and the threat of arbitration: A view from political science* // *Evolution in Investment Treaty Law and Arbitration* / ed. by C. Brown, K. Miles. Cambridge: Cambridge University Press, 2011. P. 606–628.
123 ICSID. *Desert Line Projects LLC v. Republic of Yemen*. §297.
124 ICSID. *Micula v. Romania.* Award of 11 December 2013. §1269.

interest is arguably different — damages become due as at the date of the Award, and from this time, Respondent is essentially in default of payment".[125]

Therefore, despite the lack of consensus in the existing case-law it only seems reasonable to suggest that post-award interest on moral damages should be granted as the money belongs to the claimant at that time, and until the moment of payment the claimant might not be able to invest it.

Conclusion

To sum up, in recent years there has been an increased recognition of the importance of moral damages in international investment law. This recognition represents a significant step forward in protecting the rights of foreign investors and promoting a more equitable and predictable investment environment. Yet, the same problems persist.

The analysed case law illustratively shows that although moral damages claims are not alien to international law, they continue to hold one of the vaguest definitions in international investment law which allegedly does not always have a place for moral. Clearly, this is not true. Unsurprisingly, the problems associated with moral damages claims appear to be just as vague. In the area of international law where case law is both a starting and an end point, dealing with undefined notions can be a rather dangerous practice.

Although moral damages align with the international customary principle of full reparation, it is evident that international law has not prioritised their assessment in the past century. Despite their widespread acceptance by international courts and tribunals, neither BITs nor any other investment law documents provide guidance on how to approach moral damages. As a result, their assessment has become an unsolved problem of modern international law.

In addition, the absence of an unified test for quantification of moral damages claims leads to either a very high threshold as established by the *Lemire* tribunal, or the lack of such whatsoever, which again leads to rather broad and subjective decisions rendered by the tribunals. As a result, the harsh reality of most claims related to moral damages is either the lack of the award as such, or a merely symbolic sum awarded by the tribunal. However, there is always a silver lining. In this regard, in the absence of a clearly defined standard, it may be reasonable for investment tribunals to rely on human rights law, which has extensively dealt with the issue of moral damages, and continue advocating for the need for moral damages to be more *moral*.

МОРАЛЬНЫЙ ВРЕД В МЕЖДУНАРОДНОМ ИНВЕСТИЦИОННОМ ПРАВЕ

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Аннотация

В данной статье рассматривается понятие морального вреда в международном инвестиционном арбитраже. Хотя в настоящее время действует более 2500 двусторонних инвестиционных договоров, ни один из них не регулирует моральный вред. Автор исследует исторический контекст, в котором формировался институт морального вреда, и приходит к выводу, что на протяжении последнего столетия международное право не уделяло должного внимания проблеме оценки такого ущерба. В результате, несмотря на едва ли не универсальное признание этого института международными судами и трибуналами, для трибуналов до сих пор не существует руководящих указаний о том, как подходить к возмещению морального вреда, что делает проблему его оценки актуальной для международного права. В статье освещаются причины, по которым суды либо полностью игнорируют требования о возмещении морального вреда, либо присуждают лишь символические суммы, связывая незначительные объемы возмещения с нематериальным характером морального вреда, отсутствием каких-либо конкретных доказательств или чрезвычайно высоким порогом доказывания. Автор приходит к выводу, что международному праву до сих пор не хватает четкого критерия для определения возмещения морального вреда. В отсутствие методологии оценки морального вреда трибуналы часто ссылаются на национальное право отечественных правовых систем вместо единого стандарта. В некоторых случаях трибуналы не приводят никаких обоснований или правовых оснований для такой оценки. Автор приходит к выводу, что при отсутствии единообразного стандарта инвестиционные трибуналы могут обратиться к инструментам, применяемым в области защиты прав человека, чтобы сделать оценку морального вреда более четкой и последовательной.

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[125] ICSID. *Gold Reserve v. Venezuela.* Case No. ARB(AF)/09/1. Award of 22 September 2014. §856; Marboe I. *Calculation of Compensation and Damages in International Investment Law.* Oxford University Press, 2009. §6.243–6.246.

[126] Место работы автора, актуальное на момент принятия статьи к публикации.

Ключевые слова

моральный вред, компенсация, урегулирование споров между инвесторами и государством

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