CHAPTER 15: Moral Damages and Arbitral Jurisdiction in International Investment Arbitration

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14. Introduction

Moral damages, in its simplest formulation, refers to non-pecuniary harm that is difficult to put a price on.[1722] Since *Desert Line,*[1723] the first reported ICSID case where moral damages was awarded to a corporation pursuant to international investment law,[1724] the availability of moral damages in the investment arbitration context has attracted considerable attention, both by scholars[1725] and parties in arbitrations[1726]. It seems there is now a general consensus among arbitral tribunals that moral damages should be available to foreign investors in certain circumstances under customary international law.[1727] This paper seeks to test the accuracy of such perceived consensus and scrutinise the issue a little deeper by considering whether and when arbitral tribunals possess jurisdiction to hear and grant moral damages claims in investment cases.

Undoubtedly, an understanding of investor entitlement to moral damages will add to the perceived imbalance created by international investment agreements in favour of large corporations and wealthy individuals and therefore, though indirectly, their home States. As the below discussion will provide a glimpse into the debate, developing States, being in most cases the host State, consider such agreements to be one sided and in need of revision. Allowing investment tribunals to grant moral damages to investors, a type of damage admittedly somewhat susceptible to almost limitless use and application, will certainly add fuel to the fire. The debate herein should enable one to ascertain whether entitlement to moral damages is likely to have such an effect and, if so, what could be done to minimise any damage to international investment law.

This paper is separated into three separate parts to properly address the above issues. The first part will analyse whether arbitral tribunals have jurisdiction in respect of moral damages claims under the

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[1722] See, P Dumberry, 'Compensation for Moral Damages in Investor-State Arbitration Disputes' (2010) 27(3) Journal of International Arbitration 208, quoting Wittich. See below, fn 39.

[1723] Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008.

[1724] See, I Uchkunova and O Temnikov, 'The Availability of Moral Damages to Investors and to Host States in ICSID Arbitration' (2015) 6(2) Journal of International Dispute Settlement 380, 382-384.

[1725] See, for instance, Uchkunova (1724), 382-384; M Allepuz, 'Moral Damages in International Investment Arbitration' (2013) 17(5) Spanish Arbitration Review 5; and Dumberry, Compensation (1722).

[1726] See, Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009; Cementownia "Nowa Huta" S.A. v. Turkey, ICSID Case No. ARB (AF)/06/2, Award, 17 September 2009; and (more importantly) Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, 28 March 2011.

[1727] Id.

principles of customary international law. Part two will then consider jurisdiction to grant moral damages claims under international investment agreements (IIAs), concentrating on certain selected executed and model bilateral investment treaties (BITs). Each instrument will be analysed in some detail so as to ascertain its approach to tribunal jurisdiction and moral damages. The impact of most favoured nation clauses in IIAs, if any, will also be addressed. Part three will then address any contract related jurisdiction that may be of relevance in relation to moral damages claims in the investment arbitration setting. A conclusion will thereafter follow to sum up the discussion and make suggestions going forward.

This paper is caveated with the fact that not all international investment awards are made public, given the confidential nature of investment arbitration; the analysis contained herein is therefore based on a review of a limited number of publicly available investment awards. Further, only a select few investment treaties have been reviewed as part of the exercise and other treaties may suggest a different conclusion. However, it is hoped that the discussion to follow will afford the reader a wide as possible snapshot of the position on moral damages in international investment law, to the extent made possible in a limited review such as the present, and generate further discussion. Finally, investment awards have no precedential effect and future tribunals are not obligated to follow the reasoning of previous tribunals. It is therefore a truly case by case analysis exercise. However, guidance is often sought from reasoning and principles established by previous tribunals and decided cases are therefore of some utility, therefore warranting their scrutiny herein, and more generally.

1.5.1. Part One: Jurisdiction pursuant to customary international law

15.1.1. In general

Customary international law is said to have two elements: the objective element and the subjective element. Guzman explains that the objective element refers to sufficient State practice and the subjective element referring to the need for the practice to be accepted as law or followed from a sense of legal obligation (*opinion juris*).[1728] Simply put, it is the law that governs State behaviour and encompasses rights and obligations established between States over a long period of time.

Customary international law is generally applicable where the investment treaty in question, upon which a claim is based, is ambiguous and there is a need to determine what the respective parties' rights and obligations are.[1729] Customary international law also serves the function of gap-filling. For instance, international law becomes applicable in ICSID arbitrations, alongside the domestic law of the host State, by virtue of Article 42(1) of the ICSID Convention, which provides that where the parties have not agreed on the applicable rules, the law of the host State and "*such rules of international law as may be applicable*" shall become applicable. In fact, it is said that in practice investment tribunals have afforded primacy to

[1728] AT Guzman, 'Saving Customary International Law' (2005) 27 Michigan Journal of International Law 115, 123. However, note that this is only a very simple definition of customary international law. It is only aimed to provide an understanding of the concept for the present purposes. For detailed discussion on this see ibid 124 and the discussion therein.

[1729] See, S Ripinsky and K Williams, Damages in International Investment Law (British Institute of International and Comparative Law 2008), 25. The Tribunal in Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005, para 69, when discussing attribution of liability to States, explained this as follows: "As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in this respect."

international law over the agreed upon domestic law.[1730] In such cases, arbitral tribunals will need to resort to international law to determine the parties' rights and obligations.[1731]

As rightly noted by Ripinsky, up until the twentieth century, customary international law was the main tool available to investors when seeking compensation due to an unlawful act of the host State.[1732] IIAs that permit investor claims before investment tribunals are indeed a phenomenon of the twentieth century, which quite naturally found its way into the twenty-first century, though its legitimacy has been questioned at times.[1733] This is mainly due to its success in protecting investor interests.[1734] Salacuse notes, for instance, that within 30 years following the execution of the first ever BIT between Germany and Pakistan in 1959, almost 3,000 BITs have been concluded between all of the world's principal capital exporting States and around 80 developing nations.[1735]

Under the previous legal regime, claims were generally based on customary international law, contract or any international treaty then existing.[1736] Absent such, diplomatic protection was the only available tool, which unsurprisingly was difficult to engage and hardly came to fruition. Now investor claims are almost always made under IIAs. Nevertheless, customary international law continues to occupy a position of high importance and utility with respect to investor-State arbitration. This is despite the fact that, as explained, today most States have entered into BIT's with one another, in addition to being parties to other IIAs, e.g. certain multilateral investment agreements. There may be cases where the applicable IIA fails to come to the investor's (or the host State's) aid, necessitating resort to customary international law. It is therefore a most useful device in filling a lacuna. For instance, an IIA may be drafted restrictively or broadly and may therefore serve to bar a claim or a defence. Customary international law may come to the aid of the claimant in such cases. Of course, to what extent customary international law may aid one where there is a restrictive provision is to be judged on a case by case basis considering the wording of the treaty. Further, as is the case with entitlement to moral damages, the treaty in question may be ambiguous or silent as regards entitlement and conditions that apply. In such cases, the importance and utility of customary international law is necessarily elevated.

[1730] See, Y Kryvoi, 'Counterclaims in Investor-State Arbitration' (2011) LSE Law, Society and Economy Working Papers 8/2011, 17 <www.lse.ac.uk/collections/law/wps/WPS2011-08_Kryvoi.pdf> accessed 15 October 2016.

[1731] See, PB Stephan, 'Disaggregating Customary International Law' (2010) 21 Duke Journal of Comparative & International Law 191, 194 et seq.

[1732] Ripinsky (1729), 26.

[1733] See, for instance, A Diwivedi, 'India Pursues A New Investment Arbitration Regime To Protect Itself' (Swarajya, 18 September 2016) <http://swarajyamag.com/world/india-pursues-a-new-investment-arbitration-regime-to-protect-itself> accessed 14 May 2018.

[1734] AZ Gunawardana, 'The Inception and Growth of Bilateral Investment Promotion and Protection Treaties' (1992) 86 American Society of International Law Proceedings 544, 546 et seq.

[1735] See, JW Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24(3) The International Lawyer 655.

[1736] For an in depth analysis see, SM Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 American Society of International Law Proceedings 27.

Generally speaking, as noted above, for a rule or a principle to be considered as forming part of customary international law, the presence of two elements are required: (i) consistent and settled practice and (ii) a subjective element of recognition by States as regards binding nature of such rules and compliance with such rules (*opinion juris*).[1737] This formulation was expressed by the International Court of Justice in its judgment in *North Sea Continental Shelf*, relating to the delimitation of the continental shelf between Germany, Denmark and the Netherlands, as follows:

"*Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.*"[1738]

Corroborating the above, Article 38(1) of the Statute of the International Court of Justice provides as follows:

"*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*"

The applicability of this definition to investor-State disputes was expressed with approval in the Report of ICSID Executive Directors.[1739]

Consequently, and as will be appropriate in the majority of cases, rules and principles of customary international law should be adopted in investment arbitration cases where the primarily applicable instrument, i.e. treaty or contract, fails to assist. One must, however, keep in mind the fact that customary international law was created and moulded by States to regulate conduct between States.[1740] Consequently, principles of international law may be irrelevant or inappropriate in certain cases relating to investor-State disputes. One should therefore approach the matter with some caution before making a dogmatic analysis. However, that said, in the majority of cases it will be appropriate to seek guidance from the principles of international law.

As to what constitutes a source of international law, it has been said that in practice arbitral tribunals will typically turn to the following three sources: (i) International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles),[1741] (ii) decisions and awards of

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[1737] See, Ripinsky (1729), 26.

[1738] North Sea Continental Shelf, Judgment, ICJ Reports 1969, 3, 44.

[1739] Report of Executive Directors on the ICSID Convention para 40, < http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB-section06.htm#ft1> , accessed on 14 May 2018. The report provides that: "Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes." See also, Kryvoi (1730), 18.

[1740] See, Kryvoi (1730), 18.

[1741] The Articles were drafted by the ILC upon request by the United Nations General Assembly to codify principles relating to responsibility of States and general rules on compensation, and have been widely applied by international tribunals: see,

international courts and investment tribunals and, in certain circumstances, (iii) UN General Assembly Resolutions.[1742] The first two of these sources will be considered in detail below. Given that UN General Assembly Resolutions add little to the moral damages debate, they will not be considered any further in this paper.

15.1.2. Customary international law and moral damages

Given customary international law has a role to play in ascertaining entitlement to moral damages, that role depending on the applicable treaty and circumstances of the case, the approach of customary international law to moral damages becomes important and one worthy of analysis. Although the rapid development of international law by treaties has reduced the importance of custom in international relations, and thus of customary international law, that is not to say that the rules of customary international law should be cast aside. As Wolfke puts it, it would be a heavy mistake to neglect the present role of customary law.[1743] There are still branches of life regulated by old customary rules. Further, treaties are limited in their scope and content, and do not always provide for a solution, making it necessary to refer back to the basic principles. For instance, where, as is in the majority of cases, the investment treaty makes no express reference to entitlement to moral damages, the importance of customary international law is significantly elevated.[1744] The analysis below is therefore very much warranted.

15.1.3. ILC Articles and moral damages

One of the main sources of customary international law is the ILC Articles.[1745] As may be known, the ILC, an organ of the United Nations General Assembly, commenced works for the drafting of the ILC Articles upon the latter's request, with the aim of codifying the law relating to State responsibility. The final text was submitted to the General Assembly in 2001, almost 50 years after putting pen to paper.[1746] The rules are accompanied by detailed commentary on each provision.[1747]

J Crawford, 'Articles on Responsibility of States for Internationally Wrongful Acts' United Nations Audiovisual Library of International Law (<http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf> accessed on 14 May 2018). For the full text (together with commentaries) see <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed on 14 May 2018.

[1742] Ripinsky (1729), 27.

[1743] K Wolfke, 'Practice of International Organizations and Customary Law' (1996) 1 Polish Yearbook of International Law 183.

[1744] See generally, Ripinsky (1729), 311; and B Sabahi, Compensation and Restitution in Investor-State Arbitration, Principles and Practice (Oxford University Press 2011), 138-139.

[1745] For text (with commentaries), see: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf accessed on 14 May 2018.

[1746] United Nations General Assembly, Resolution 799 (VIII), Request for the codification of the principles of international law governing State Responsibility (7 December 1953).

[1747] For the full text (together with commentaries) see <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed on 14 May 2018.

Although the ILC Articles were not ratified in the form of an international convention, which was in fact the initial aim, it was taken note of, commended to the attention of States and approved by the General Assembly in various UN General Assembly resolutions.[1748] It would therefore be an easy and incorrect conclusion to draw to say that the ILC Articles have little force. They carry some considerable force, are highly considered and are often referred to by tribunals in awards.[1749] It is the end product of many decades of work by a respected organisation and drafted by prominent international lawyers. Further, as noted above, the initial aim was to codify the already existing international rules on State responsibility.

Consequently, one may say that the ILC Articles encapsulate and represent to some extent the current position in international law on State liability. For instance, the Arbitral Tribunal in *Noble Ventures* explained, with approval, that "[*W]hile those Draft Articles are not binding, they are widely regarded as a codification of customary international law.*"[1750] Consequently, where customary international law has applicability, whether by virtue of a treaty, contract or otherwise, i.e. to simply fill a state of vacuum, the starting point should be the ILC Articles. Unless it could be said that the ILC Articles no longer properly reflect the state of customary international law, the ILC Articles should determine State liability. There is likely to be very few cases where the ILC Articles do not apply.

On this note, Crawford explains that the "*[ILC Articles] have been very widely approved and applied in practice, including by the International Court of Justice*".[1751] Similarly, Caron notes that the ILC Articles is "*a proposed piece of legislation; it looks like a law, it reads like a law, it might even be mistaken for a law*".[1752] By way of illustration only, Dumberry undertakes his in-depth analysis of moral damages in the context of investor-State arbitration by proposing to "*revisit the question of moral damages in international law based on the work of the International law commission (ILC)*", thus accepting explicitly that the ILC Articles have a great role to play in the determination of availability and entitlement to moral damages in investment arbitration.[1753] In the same vein, Lawry-White refers to the ILC Articles as an "*authoritative guide*".[1754]

The liability of States for moral damages is considered in Article 31 of the ILC Articles, entitled 'Reparation'. Article 31(1) stipulates that *"[T]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act"*. Article 31(2) then explains that "*[I]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State*".

The language of Article 31 appears rather self-explanatory. It explains that a State is obliged to make full reparation for the injury it has caused by virtue of its internationally wrongful act, and that injury is understood to encompass any damage, including non-material moral damage. This understanding is in fact confirmed by the ILC's commentary to the ILC Articles. The commentary to Article 31 provides that:

[1748] Crawford (1741).

[1749] See, The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013, para 289.

[1750] Noble Ventures (1729), para 69.

[1751] Crawford (1741).

[1752] DD Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 The American Journal of International Law 857, 866.

[1753] Dumberry, Compensation (1722).

[1754] M Lawry-White, 'Are moral damages an exceptional case?' (2012) 15(6) International Arbitration Law Review 236, 237.

"The formulation [in Article 31] is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach".[1755]

In attempting to define the concept of moral damages, the ILC notes that '*[M]oral' damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life*'.[1756]

It is perhaps on this basis many scholars and arbitrators rightfully advance the view that entitlement to moral damages exists as a matter of customary international law.[1757] For instance, in *Rompetrol* the Arbitral Tribunal expressed the view that as a matter of general international law, the awarding of moral damages is certainly accepted, referring to the ILC Articles.[1758]

However, naturally, the wording of the applicable IIA or contract must be taken into account. For instance, a provision in the applicable instrument may negate the applicability of customary international law.[1759] Where that is the case, the position under international law may be of little guidance.

It is worth noting that Article 31 does not seek to lay down a prescriptive definition of moral damage. It only seeks to exemplify the types of moral damages one may suffer. In fact, the reference to 'any damage' in Article 31(2) is indicative of this. For instance, Wittich provides us with the following definition of moral damages:

"*First, it includes personal injury that does not produce loss of income or generate financial expenses. Secondly, it comprises the various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life. A third category would embrace what could be called non-material damage of a 'pathological' character, such as mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock. Finally, non-material damage would also cover minor consequences of a wrongful act, e.g. the affront associated with the mere fact of a breach or, as it is sometimes called, 'legal injury'.*"[1760]

Dumberry notes that to this definition should be added another specific type of moral damage, that is, injury to the credit and reputation of a legal entity, i.e. a corporation.[1761] For the sake of fullness, both Dumberry and Wittich note that the distinction between material and moral damages may become blurred in certain circumstances, though they do not suggest, that such justifies refusal of moral damages claims.[1762] Arbitral tribunals should simply be more cautious in such cases and consider the circumstances and the types of loss sustained and claimed before making any determination.

In conclusion, it seems that the ILC Articles acknowledge and support the availability of moral damages under customary international law. In fact, the commentary to the ILC Articles note that "*[I]nternational*

[1755] ILC Articles, Article 31, Commentaries, (5).

[1756] Id.

[1757] Dumberry, Compensation (1722), 249. P Dumberry, 'Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes' (2012) 3(1) Journal of International Dispute Settlement 205, 208.

[1758] Rompetrol (1749), para 289.

[1759] Allepuz (1725), 6.

[1760] Quoted in Dumberry, Satisfaction (1757), 208.

[1761] Ibid, 208-209.

[1762] Ibid, 209.

tribunals have frequently granted pecuniary compensation for moral injury to private parties".[1763] Although some commentators question whether moral damages is truly financially assessable[1764], there appears to be little force in this argument given it is negated by the commentary to Article 36. The commentary makes it clear that "*Article 36, paragraph 2, develops*" the "*notion of "damage" [which] is defined inclusively in article 31, paragraph 2, as any damage whether material or moral*".[1765] Further support for the proposition can be found in the statement of the tribunal in the *Opinion in the Lusitania Cases*, where it was said that:

"*That one injured is. under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor [sic] as compensatory damages, but not as a penalty.*"[1766]

In light of the above, it appears one is permitted to say with some force and certainty that, in appropriate circumstances and where the moral harm is proven, claims for moral damages in investment arbitrations should succeed where the matter falls within the four corners of customary international law. Arbitral tribunals possess the requisite jurisdiction to consider and determine moral damages under customary international law.

15.1.4. Awards and decisions of courts and tribunals on moral damages

Awards and decisions of international courts and tribunals determining international law related disputes are a further source of customary international law.[1767] This part will therefore consider the position under arbitral awards and court decisions as regards the permissibility of moral damages claims.

It is worth noting that although the ILC Articles were drafted in an effort to codify international law on State responsibility[1768], and that there are continuous references in the ILC Articles to arbitral awards and court decisions, and *vice versa*, ILC Articles and arbitral awards/court decisions are two separate sources of international law. Each therefore need to be looked at and considered separately. For instance, as the discussion below will seek to demonstrate, there has been several cases dealing with the availability of moral damages to investors since the finalisation of the ILC Articles and it could be said that they now add a new, fresh angle to the debate, developing customary international law. Further, given the fact that the ILC Articles appear to have at its forefront intra-State responsibility, arbitral awards are potentially more relevant.[1769]

The starting point in relation to liability for moral damages where one is dealing with arbitral awards and court decisions is the decision of the Permanent Court of International Justice (PCIJ) in the *Factory of*

[1763] ILC Articles, Article 36, Commentary (16), fn 540.

[1764] S Jagusch and T Sebastian, 'Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?' (2013) 29(1) Arbitration International 45, 50, 49.

[1765] ILC Articles, Article 36, Commentary (1), and also (16). See also, Lawry-White (1754), 236.

[1766] UNRIAA, vol. VII (Sales No. 1956.V.5), p. 32, at 39 (1923).

[1767] See, IC MacGibbon, 'Customary International Law and Acquiescence' (1957) 33 British Year Book of International Law 115.

[1768] Crawford (1741). See also, Ripinsky (1729), 27.

[1769] See Kryvoi (1730), 19. See also, Article 42 of ILC Articles, and its Commentary (2).

Chorzow case. In that case the PCIJ sought to set out the general principle on the consequences of committing an internationally wrongful act. The Court ruled that:

"*The essential principle contained in the actual notion of an illegal act-a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals-is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*"[1770]

This decision was noted with approval by the ILC in the commentaries to the ILC Articles[1771] and appears to constitute the foundation of Article 31 concerning reparations. It has also been referred to with approval by most arbitral tribunals.[1772] It is on the basis of this decision -more particularly, on the basis of the sentence quoted- that many have argued in favour of the permissibility of moral damages in investment arbitrations.[1773] If the claimant is to be put in the position he would have been had the act complained of not been committed and all consequences caused by such illegal act(s) is to be properly wiped out, then all damages sustained, whether material or moral, must be compensated for. The ILC Articles is certainly reflective of this (see above).

The decision in the *Factory of Chorzow* case therefore seems to support the view that moral damages may be sought by investors, where such claim is made on the basis of customary international law, if such is needed to put the investor in the position he would have been had the wrongful act not occurred. It is on this basis the Arbitral Tribunal in the *Desert Line*[1774] case granted the claimant investor moral damages, despite the absence of supportive wording in the applicable BIT and the tribunal's view that the BIT primarily had in mind the protection of property and economic values. In that case, the first known ICSID case where an investor's claim for moral damages succeeded, the Arbitral Tribunal held that "*[E]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages*".[1775]

This suggests that the Arbitral Tribunal in *Desert Line* was of the opinion that although investment claims concern primarily the payment of compensation for the loss of property, international law also embodies an obligation to compensate other losses caused and that, in certain cases, non-material harm will require compensating. Given that the claimant investor in *Desert Line* based its claim on international law and the Arbitral Tribunal did not go into depths to consider whether the BIT between Yemen and Oman permitted such claims, this appears a valid inference to draw.

For fullness of analysis, it is submitted that the reasoning set out in *Cementownia "Nowa Huta" SA v Turkey* in relation to the reasoning of the tribunal in *Desert Line* is incorrect. In *Cementownia*, the Arbitral Tribunal expressed that "*in the Desert Line Projects case, the arbitral tribunal decided, on the basis of the obligations contained in the Bilateral Investment Treaty (BIT) between Yemen and Oman, in particular the obligation of security, that exceptional*

[1770] The Factory at Chorzów (Germany v Poland), Decision on Indemnity, 1928 PCIJ (Ser A) No 17 (13 September), 47.

[1771] See for instance Article 31, Commentaries, (1)-(3).

[1772] See, for instance, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, para 776.

[1773] See B Ehle and M Dawidowicz, 'Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation' in FX Stirnimann, A Romanetti and JA Huerta-Goldman (eds), WTO Litigation, Investment Arbitration, and Commercial Arbitration (Kluwer 2013) 293, 294.

[1774] Desert Line (1723).

[1775] Ibid, para 289.

circumstances, such as physical duress suffered by the investor, justified the compensation".[1776] As noted above, the claimant investor in *Desert Line* based its claim on international law and the Arbitral Tribunal did not question its accuracy or expressly state that moral damages was being awarded on the basis of the obligations contained in the BIT. Similarly, one finds oneself unable to accept the proposition advanced by Uchkunova and Temnikov that all past tribunals seem to connect the investor's claim for moral damages to a breach of the relevant BIT, meaning that if the main claim fails, there can be no claim for moral damages, for the same reasons.[1777]

Further, the Arbitral Tribunal in *Desert Line* specifically referred to the *Lusitania* case in its award, where it had been held that:

"*That one injured is under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as penalty.*"[1778]

Reliance on the above passage by the Arbitral Tribunal in *Desert Line* demonstrates that the tribunal relied on customary international law in reaching its decision, and therefore lending weight to the proposition that moral damages is available as a matter of customary international law. In fact, this view is supported by Allepuz, who notes the importance of the fact that *"[T]he Desert Line Tribunal did not refer to the wording of the applicable investment treaty to find jurisdiction to hear the moral damages claim…[but that]…the claimant had based its moral damages claim on "international law"*".[1779]

The decision in *Desert Line* was approved and followed in another ICSID award. In *Lemire*[1780] the Arbitral Tribunal quoted with approval the conclusion and reasoning in *Desert Line* as regards availability of moral damages to claimant investors[1781], seeking to further develop the conditions for entitlement[1782].

The decision in *Desert Line* has also found support amongst scholars. For instance, it was referred to by Jagusch as being the foundational precedent on moral damages in international law.[1783] Further, Weiniger and Garcia note that arbitral tribunals in more recent cases that concerned claims for moral damages appear to have assumed that they possessed jurisdiction to grant moral damages as a matter of customary international law.[1784] Parish also acknowledges that investment tribunals now regard entitlement to moral

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[1776] Cementownia (1726), para 169.

[1777] See, Uchkunova (1724), 382.

[1778] Opinion in the Lusitania cases, UN Reports of International Arbitral Awards, Volume VII, 1 November 1923, 40.

[1779] Allepuz (1725), 8.

[1780] Lemire (1726).

[1781] Ibid, para 326.

[1782] Ibid, para 326-333.

[1783] Jagusch (1764), 50.

[1784] M Weiniger and A Garcia, 'Treaty Column: Jurisdiction over moral damages claims' (2013) 8(3) Global Arbitration News.

damages as being firmly established in international investment law, though conceding that there is a conceptual difficulty at first as to awarding moral damages in investment arbitrations.[1785]

Lemire is not the only case giving much needed support to *Desert Line*. Further two cases where arbitral tribunals were asked to consider investor moral damages claims also portray a readiness on arbitrators' part to find jurisdiction. Neither in *Rompetrol v Romania*[1786] nor in *Franck Charles Arif v Moldova*[1787] did arbitral tribunals feel the need to consider their jurisdiction to consider and grant moral damages claims. It seems both tribunals considered that they possessed the requisite jurisdiction as a matter of right, and that no substantive challenges were mounted by the parties.

For instance, in *Franck Charles Arif* the Arbitral Tribunal, citing Article 31(2) of the ILC Articles as support, noted boldly that *"[T]here is no doubt that moral damages may be awarded in international law*".[1788] However, the Arbitral Tribunal caveated this statement with its view that such is an exceptional remedy and that one would have to consider the facts of each given case to determine whether an award for moral damages should be made on the facts.[1789] Considering the publicly available awards on the matter, including that of *Franck Charles Arif*, Dumberry notes that no arbitration case has been found where the arbitral tribunal expressly refused, as a matter of principle, to award compensation to an investor for moral damages.[1790]

Further, although a dissenting opinion, Gary Born sought to extend even further the limits of moral damages in investment arbitration in his dissenting opinion delivered in *Biwater*.[1791] He opined that where a breach of international law is committed, moral damages should be available even where no material harm can be substantiated. He reasoned as follows:

"…*as the ILC's Articles and accompanying commentary make clear, injury is distinguishable from the form and quantum of damage. Here, the Republic caused BGT injury through the premature and wrongful expropriation of its property -- regardless whether that injury had a quantifiable monetary value…. It is ancient law that there is no right without a remedy (Ubi jus ibi remedium) and that adage applies here no less than elsewhere. Whether denominated as moral damages (as some tribunals have done, but which has not been specifically requested here), recognized by way of a costs award (as other tribunals have done), or otherwise, it better advances the objectives of bilateral investment treaties and the ICSID Convention to require a measure of tangible reparations for violation of internationally-protected rights.*"[1792]

In reaching the above conclusion, he referred to Crawford's commentary on the ILC Articles, where the latter expresses the view that "*there is no general requirement of material harm or damage for a State to be entitled to some form of reparation.*"[1793]

[1785] MT Parish, AK Newlson and CB Rosenberg, 'Awarding Moral Damages to Respondent States in Investment Arbitration' (2011) 29(1) Berkeley Journal of International Law 225, 225-226.

[1786] Rompetrol (1749), para 289.

[1787] Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013.

[1788] Ibid, para 584.

[1789] Ibid, paras 584 and 603 et seq.

[1790] Dumberry, Compensation (1722), 252.

[1791] Biwater (1772).

[1792] Ibid, paras 26-27 and 32.

[1793] Ibid, para 25.

The majority in *Biwater*[1794] disagreed and granted a declaratory relief only. They opined that the element of causation would be rendered obsolete if one were to conclude that injury exists in all cases where a wrongful act has been committed. They seem to have preferred a narrower and the conventional approach of awarding damages, as opposed to affording primacy to the realisation of the perceived objectives of treaties. Although very attractive from the viewpoint of moral damages claims, in the sense that entitlement to moral damages is rarely likely to be made a matter of contention should the suggested approach be adopted, it seems too radical an approach and could result in excessive discretion being entrusted with arbitrators. In the face of growing mistrust by developing states to investment arbitration and that arbitrators enjoy an almost endless discretion[1795], it is submitted that arbitral tribunals should not be too ready in expanding their jurisdiction. Moral damages awards where no harm has been suffered may indeed be difficult to justify. Jagusch, in support, notes that no authority was cited in support of such broad understanding of the concept and that the majority correctly eschewed this approach.[1796] In such cases an adverse costs order may indeed be the best possible solution to ensure that a wrong does not escape unpunished.

However, it is important to note that the majority did not dismiss the availability of moral damages as a principle, but rather opined that "*no claim has ever been made (or quantified) for so-called "moral" damages, and no argument was advanced on this issue by any party at any stage.*" The majority held that even if a claim for moral damages had been advanced by the investor, the circumstances of the case, and in particular the investor's own conduct, rendered the awarding of moral damages inappropriate.[1797] The majority's decision in *Biwater* cannot therefore be put forward as one that dismisses entitlement to moral damages in investment cases. To the opposite, it supports the entitlement by implication. It only seeks to put a cap on what was seen as an excessively wide formulation.

It would, however, be incorrect to paint a picture totally in favour of the *Desert Line* approach. In other words, hesitations have been voiced by arbitrators against the availability of moral damages as a matter of customary international law. For instance, in *Cementownia* the Arbitral Tribunal took a different approach and reasoned that:

"*In contrast to the Desert Line Projects case (see above para. 165), where the investor based its request for compensation for moral damages on the Yemen-Oman BIT, the Respondent requests, in the case at hand, that the Arbitral Tribunal grant compensation for moral damages based merely on a general principle, i.e., abuse of process. It is doubtful that such a general principle may constitute a sufficient legal basis for granting compensation for moral damages.*"[1798]

First, the effect of the above reservation should perhaps be limited with the fact that it is an incorrect statement as regards *Desert Line*. As explained above, the Arbitral Tribunal appears to have overlooked the fact that in *Desert Line* reference was made to *Lusitania*[1799] in support of its conclusion. In other words,

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[1794] Toby Landau and Bernard Hanotiau (President).

[1795] For instance, see P Ranjan and P Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 Northwestern Journal of International Law & Business 1, 8, 17, where authors explain that one motive behind the drafting of the Indian 2015 Model BIT was to make the treaty provisions more precise so as to minimise arbitral discretion.

[1796] Jagusch (1764), 53.

[1797] Biwater (1772), para 808.

[1798] Cementownia (1726), para 170.

[1799] Opinion in the Lusitania Cases, United States–Germany Mixed Claims Commission, 1923, VII U.N.R.I.A.A. 32.

international law was at play in *Desert Line*, contrary to what is being suggesyted by *Cementownia*. This is in fact made clear in the *Desert Line* award[1800], as well as being expressly confirmed by scholars[1801].

Further, the difference in approach between that in *Desert Line* with that in *Cementownia* may be explained by the fact that in *Desert Line* the respondent State did not object to the tribunal's jurisdiction to grant moral damages. To the contrary, the State also claimed moral damages.[1802] In *Cementownia*, conversely, the claimant investor contended that the issue of moral damages was not clarified and that, in any event, the conditions required for a moral damages award were not present.[1803] The arbitral tribunal in the *Cementownia* case may have approached the issue of moral damages with excessive caution given the objection raised. Finally, the claim being based on abuse of process in *Cementownia* is different to the claim in *Desert Line*, where the claim was founded expressly on the general principles of customary international law. That may further explain the difference in approach.

Moreover, it is noteworthy that the Arbitral Tribunal in *Lemire* decided to follow *Desert Line* approach, as opposed to the approach taken in *Cementownia*. Thus, it may be said that the availability of moral damages as a general principle under international law has been established by *Desert Line* and confirmed by *Lemire*. That said, it would not be entirely correct to say that the position is now settled, more guidance and clarification is needed in this area of investment law to cement the availability as a matter of customary international law. The fact that investment awards have no precedential value and are only persuasive authority is a further reason for the need to cement.

The fact that the Arbitral Tribunal in *Cementownia* appears to have reached its conclusion without a proper analysis of the jurisprudence on the matter and that the Arbitral Tribunal itself appears, rather contradictorily, to acknowledge the availability of moral damages without any reference to the BIT in question[1804], are further considerations why the reasoning and conclusion in *Desert Line* more accurately reflects the position in customary international law and, therefore, more justifiable.

It may be that the Arbitral Tribunal in *Cementownia* was concerned more with moral damages claims of host States by way of counterclaim as opposed to considering the position more generally under international law, perhaps hence the under-focused analysis of the issue. However, when it comes to formulation of a general principle, the reasoning in *Cementownia* seems to have little persuasiveness.

In addition to the above, the Arbitral Tribunal in *Rompetrol* dismissed a moral damages claim on the basis that the investor had failed to show that any economic loss or damage was sustained due to a minor

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[1800] Desert Line (1723), para 286: "Based on international law, the Claimant claims the amount of OR 40,000,000 for moral damages including loss of reputation." The Arbitral Tribunal further noted that "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." (para 290).

[1801] See, for instance, Allepuz (1725), 8.

[1802] Desert Line (1723), para 288: "If any Party has suffered any moral damages, it is the Respondent which has been faced with a spurious allegation of coercion and whose President has been subject to abusive, threatening and unjustified letters from the Claimant's Chairman."

[1803] Cementownia (1726), para 166.

[1804] "A symbolic compensation for moral damages may indeed aim at indicating a condemnation for abuse of process. However, in the case at hand, the Arbitral Tribunal deems it more appropriate to sanction the Claimant with respect to the allocation of costs" (para 171).

breach of the fair and equitable treatment standard.[1805] The Tribunal reasoned that moral damages cannot be resorted to where actual economic damage cannot be proven. It said:

"*The Tribunal is firmly of the view that 'moral damages' cannot be admitted as a proxy for the inability to prove actual economic damage. Given, therefore, the failure by the Claimant to produce any reliably concrete evidence of actual losses incurred under this head by TRG, as analysed in the preceding paragraphs, the Tribunal declines to make any award of damages under this head.*"[1806]

The implication here seems to be that moral damages cannot be sought as a standalone remedy and needs to couple a material damages claim. This would, quite naturally, not sit well with the above cases pointing to an automatic entitlement to moral damages where the requisite conditions are satisfied. However, it should be noted that the Arbitral Tribunal in that case does not appear to have intended to make a sweeping statement in relation to the recoverability of moral damages, its reasoning appears confined to the facts of that particular case.[1807] The statements made should therefore, it is submitted, be confined to the peculiar facts of the case.

In conclusion, international investment awards and court decisions appear to support entitlement to moral damages as a matter of customary international law, reinforcing the conclusion reached above with respect to the position under the ILC Articles. This seems to be the stronger voice one is able to trace within the publicly available investment awards; the irregular and patchy opposing views fail to suppress the strong voice of the pro-advocates. The ruling in *Desert Line* is a landmark ruling in this respect and its approval in *Lemire* adds another brick to the wall, strengthening the proposition in favour of entitlement to moral damages under customary international law. *Desert Line* is a seminal award in the sense of confirming availability of moral damages in investment arbitration by virtue of customary international law.

15.1.5. Summary

The above discussion illustrates that the two main sources of customary international law lend strong support to the availability of moral damages under the said customary international law. A claimant investor, or a host State in certain cases, is therefore able to ground his claim for moral damages on the basis of customary international law, relying on the provisions of the ILC Articles and/ or investment awards.

Naturally, this is subject to the claimant's ability to locate a provision of the treaty or contract that permits the investment claim and one that does not restrict or exclude expressly -or perhaps impliedly- moral damages claims. For instance, where an IIA precludes moral damages claims either expressly or by implication, a claim for moral damages may be difficult to justify. The author is unaware of any BIT that is in force and that expressly prohibits arbitral tribunals from awarding compensation for moral damages.[1808] However, note that the Indian Model BIT does seek to exclude moral damages claims (see part 2(b)(iii) below). A claimant seeking moral damages on the basis of such worded treaty will no doubt struggle persuading the arbitral tribunal that it has jurisdiction to hear the claim. As noted by Allepuz, "*unless the applicable treaty states otherwise (in which case —unlikely— the availability of a moral damages claim would be more questionable), a moral damages claim does not need an express legal base within the applicable treaty*".[1809] The

[1805] Rompetrol (1749).

[1806] Ibid, para 293.

[1807] Ibid, para 289.

[1808] Dumberry, Satisfaction (1757), 235.

[1809] Allepuz (1725), 6.

claimant may need to consider alternative routes to a moral damages award, e.g. a claim before host State's national courts.

This brings us to the next part of our discussion, that is, the jurisdiction of arbitrators to grant moral damages under IIAs.

15.2. Part Two: Jurisdiction pursuant to applicable treaty

15.2.1. Introduction

Investment arbitration claims are premised on investment treaties. Treaties are the legal foundation upon which investment claims come to exist. Without a right to bring a claim founded in a treaty, the investor does not have an entitlement, as of right, to bring an investment claim against the host State before international courts or tribunals. Consequently, whether an investor is able to bring a claim for moral damages depends very much on whether the treaty in question permits it or, at the very least, does not exclude entitlement, thereby potentially permitting a claim based on customary international law. It should be noted that there are currently almost 3,000 BITs in force, in addition to many other multilateral treaties.[1810] Most investment claims are therefore likely to be governed by a BIT and/or another form of IIA. In fact, ICSID statistics show that overall BITs constituted 60.6% of the basis of consent invoked to establish ICSID jurisdiction in all cases registered under the ICSID Convention and the Additional Facility Rules.[1811] The figure for 2017 was 69%.

To put it concisely, where an IIA appears to exclude, from its wording or spirit, moral damages claims, claims brought pursuant to such IIA is likely to fail, absent special considerations. Customary international law becomes operative only where the applicable treaty is silent or ambiguous, necessitating the involvement of the rules and principles of customary international law. This point was neatly, though indirectly, put by the Arbitral Tribunal in *MTD v Chile* as follows: "*[T]he Tribunal has to apply the BIT. The breach of the BIT is governed by international law.*"[1812] Article 55 of the ILC Articles also supports this understanding. It provides that it does not apply where "*special rules of international law*" govern the internationally wrongful act. This is explained in its commentary as referring, for instance, to cases where a treaty expressly provides for its relationship with other rules, and where the terms of such treaty cannot coexist with the ILC Articles, in which case the treaty will (usually) be granted primacy.[1813] The priority of terms of applicable treaties over customary international law has also been acknowledged by scholars.[1814]

[1810] See, OECD Dispute Settlement Provisions in international investment agreements: A large sample survey, <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf> (para 6), accessed on 14 May 2018.

[1811] See, The ICSID Caseload - Statistics (Issue 2018-1) <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf>, accessed on 14 May 2018.

[1812] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004, para 187.

[1813] ILC Articles, Article 55, Commentary (1)-(3).

[1814] See, Allepuz (1725), 6: "...unless the applicable treaty states otherwise (in which case-unlikely-the availability of a moral damages claim would be more questionable), a moral damages claim does not need an express legal base within the applicable treaty". See also I Schwenzer and P Hachem, 'Moral Damages in International Investment Arbitration' in SM Kröll et al (eds), International Arbitration

However, some scholars have questioned the priority of terms of a treaty over customary international law where the act complained of and the remedy sought has its basis solely in customary international law. In other words, although an investment claim can only be legitimately brought by virtue of the dispute resolution mechanism contained in the applicable treaty, once proceedings have been commenced and one of the remedies sought in such proceeding falls outside the scope of the provisions of the treaty but is sought instead as an entitlement under customary international law, then the treaty is to be afforded priority no more in relation to that issue. This line of reasoning, if accepted, could potentially serve as an open cheque to moral damages claims even where the treaty precludes the right.

For instance, it is said that since IIAs primarily regulate consequences of lawful expropriations, and stay silent as to the consequences of unlawful expropriations, damages awarded in cases of unlawful expropriations should be exclusively governed by customary international law.[1815] On this point, some tribunals have made a distinction between, for instance, lawful and unlawful expropriations, holding that BITs only foresee compensation for lawful expropriation; where there is unlawful expropriation, the award of compensation should be governed by customary international law. For instance, in *ADC v Hungary* the Arbitral Tribunal held:

"*Since the BIT does not contain any lex specialis rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.*"[1816]

The Arbitral Tribunal then referred to *The Factory at Chorzow* case as setting out the customary international law standard for the assessment of damages resulting from an unlawful act.[1817] Similar conclusions were reached in *Siemens v Argentina*[1818] and *Vivendi v Argentina*[1819].

However, this approach has not been unanimously adopted by arbitrators. Some arbitral tribunals considered it more appropriate to limit damages recoverable to the standard set out in the applicable treaty, i.e. market value/ commercial value, even in cases of unlawful expropriations. Such was the case in two investment cases involving Mexico as the respondent host State: *Tecmed v Mexico*[1820] and *Metalclad v Mexico*[1821], both cases concerning indirect expropriation. In both cases the Arbitral Tribunal awarded compensation on the basis of the standard set out in the applicable treaty, without resorting to customary international law.

Perhaps a rather circular point, but where a claim is founded upon a treaty and the remedy sought is based on customary international law, because the treaty does not envisage such claim by virtue of its

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and International Commercial Law: Synergy, Convergence and Evolution (Kluwer Law International 2011), 419.

[1815] See Ripinsky (1729), 83-84.

[1816] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No ARB/03/16, Award, 2 October 2006, para 483.

[1817] Ibid, para 484.

[1818] Siemens AG v. The Argentine Republic, ICSID Case No ARB/02/8, Award, 17 January 2007, para 349.

[1819] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007, para 8.2.5.

[1820] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paras 187-188.

[1821] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras 112 and 118-122.

silence or ambiguity, that is to impliedly concede the priority of treaty over customary international law. It is only because the treaty does not address the issue directly that the investor is able to seek a remedy under customary international law. Where the claim is restricted by treaty, it cannot be said that the investor is nevertheless able to advance the same claim and seek remedy under customary international law once a claim has been commenced. It seems a far stretched contention to make. Consequently, customary international law on moral damages should be invoked where the applicable IIA does not exclude, expressly or impliedly, such claims. Though not sounded in the sense of absolute principle, that appears a good starting point and one to be adhered to, to be departed in exceptional circumstances only.

15.2.2. Review of certain BITs

It would be an impossible task for one to review and analyse every single IIA currently in force or awaiting ratification, or simply each State's model BIT, in an effort to ascertain the treatment of moral damages claims in such treaties. The best one is perhaps able to do within the framework of a limited project such as the present is to sample-select IIAs from different regions and concerning nations with different economic output and different role they play in facilitating international investments. In that sense, the BITs considered below have been 'cherry picked'. The BITs analysed below should therefore provide one with a good picture of how BITs approach the issue of moral damages and whether the position changes depending on the country's role in investments.

It should be noted that there are, to the extent known, no BITs in force that expressly prohibit arbitral tribunals from awarding compensation for moral damages, as the below review will also demonstrate.[1822] This is qualified, however, with the restriction on moral damages claims under the Indian Model BIT (see (iii) below), which is yet to be executed in its current form.

15.2.2.1. Colombian Model BIT

The Colombian 2007 Model BIT ("Colombian Model BIT") contains the usual strands of protections found in BITs: rule against discriminatory measures (Article III(2)); duty to provide fair and equitable treatment and full protection and security (Article III(3)); most favourable nation treatment (Article IV(1)); investors' right to transfer investments, profits etc. (Article V); and adequate compensation for lawful expropriation (Article VI).[1823]

With respect to dispute settlement, Article IX provides, after setting out a phase for compulsory negotiation and notification periods before commencement of proceedings, provides that "*[A]ny disputes arising between an investor of a Contracting Party and the other Contracting Party in connection to the interpretation or application of this Agreement, including a claim that the other Contracting Party has breached an obligation of this Agreement and therefore has generated damages to the investor*" shall be referred to, at the investor's choosing, to competent tribunals of the host State, UNCITRAL ad hoc arbitration or ICSID arbitration.

Unsurprisingly, the Colombian Model BIT contains no provision in relation to moral damages. It remains silent on the matter. However, in line with the thinking enunciated in *Desert Line*,[1824] it does not exclude moral damages, either expressly or by implication. Further, although not a proof of the assertion, the Colombian Model BIT contains many references to customary international law with respect to how certain provisions are to be interpreted. For instance, Article III(3) provides that "*[E]ach Party shall accord*

[1822] Dumberry, Satisfaction (1757), 235.

[1823] Colombian 2007 Model BIT <http://www.italaw.com/documents/inv_model_bit_colombia.pdf> accessed on 14 May 2018.

[1824] Desert Line (1723), para 289: "Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages."

fair and equitable treatment in accordance with customary international law, and full protection and security in its territory to investments of investors of the other Contracting Party." Further, Article XI, entitled 'Other Provision', provides that:

"*If, from legal provisions of a Contracting Party or from current or future obligations derived from international law different from those contained in this Agreement, a general or particular regulation results between the Contracting Parties thereby providing a more favourable treatment to the investment of investors than that foreseen in the present Agreement, the aforementioned regulation shall prevail over this Agreement, to the extent that it is more favourable.*"

The above passages may be relied upon as supporting entitlement to moral damages under the Colombian Model BIT. It does not impose a restriction on the recoverability of moral damages; to the contrary, the Colombian Model BIT continuously refers to the applicability of customary international law with approval. In fact, Article XI alone, it is argued, may be shown as justification for the recoverability of moral damages under the Colombian Model BIT. It clearly recognises and affords primacy to obligations derived from international law over the terms of the BIT should such be more favourable to the investment of investors.

It is difficult to reach a conclusion of similar certainty with respect to host State moral damages claims. In fact, the wording and structure of the Colombian Model BIT appears to rule it out. Almost every provision of the Colombian Model BIT suggests or clearly stipulates that the safeguards contained therein serve to protect investments made by investors. In fact, Article IX, which concerns settlement of disputes between a contracting party and an investor of the other contracting party, suggest clearly that the dispute settlement mechanism is there to be invoked and operated by the investor. Most importantly, sub-article (2) expressly provides that the disputes foreseen include claims "*that the other Contracting Party has breached an obligation of this Agreement and therefore has generated damages to the inve*stor".

In conclusion, the wording of the Colombian Model BIT appears to permit the recoverability of investor moral damages claims, whereas the position with respect to host States remains unclear. A more reasonable interpretation of the treaty is that State moral damages claims are not permitted under the model BIT.

15.2.2.2. French Model BIT

The French 2006 Model BIT ("French Model BIT")[1825] also includes the usual protections found in BITs. It provides for the duty to provide fair and equitable treatment to investors (Article 3), national and most favoured nation treatment (Article 4), full and complete protection (Article 5(1)), prohibition against unlawful expropriation (Article 5(2)), free transfer of assets, profits etc. (Article 6), mechanisms for settlement of disputes between investors and a contracting party (Article 7) and between contracting parties (Article 10).

Similar to the above, the French Model BIT contains no express or implied prohibition of moral damages claims. Thus, again in adherence with the reasoning enunciated in *Desert Line*[1826], and the fact that customary international law recognises the recoverability of moral damages with approval (for reasons discussed above in part one), moral damages claims should be permitted where a claim is brought under the treaty. Further, the French Model BIT also contains a reference to the principles of international law when stipulating the duty to provide fair and equitable treatment (Article 3). Such may be interpreted as supportive of moral damages claims based on customary international law.

[1825] French 2006 Model BIT <http://www.italaw.com/documents/ModelTreatyFrance2006.pdf> accessed on 14 May 2018.

[1826] Ibid.

With respect to possible moral damages counter claims by either contracting party as host State, the wording of the French Model BIT is slightly different than that of the Colombian Model BIT. The latter appeared to have in mind investor claims only. However, Article 7 of the French Model BIT [1827], which contains the dispute resolution mechanism concerning disputes between investors and the host State, appears to imply that claims may also be asserted by the host State. It is therefore reasonable to conclude that under the French Model BIT the host State may also have a right to bring a claim for breach of treaty obligations by the investor, including a right to seek moral damages.

Although BITs usually regulate State behaviour and seek to protect investor interests, this particular BIT seems to have been drafted with a different intention in mind. It foresees that the arbitration proceedings may be commenced by either party, that is, by the investor or the host State. If moral damages exist as a matter of customary international law, and if such is available to host States as well as investors[1828], then the French Model BIT may be accepted as permitting moral damages claims by host States. On this point, it is worth noting that the Arbitral Tribunal in *Saluka* held that the reference in the BIT to 'all disputes' "*is wide enough to include disputes giving rise to [State] counterclaims, so long, of course, as other relevant requirements are also met*".[1829] However, this could be qualified with the reference to 'any dispute concerning the investments'. It could be said that such necessarily implies that the dispute could only be brought by the investor as a host State claim is unlikely to concern the investment, depending of course on how one interprets it.

In conclusion, given the above discussion, it seems that the wording of the French Model BIT seems sufficiently wide to cover moral damages claims, whether by investors or one of the contracting parties (i.e. host State). Therefore, should a claim be brought under a treaty such as the one concerned, moral damages claims pursuant to customary international law should normally succeed.

15.2.2.3. Indian Model BIT

The Indian 2015 Model BIT ("Indian Model BIT")[1830] also contains the usual and customary strands of protection. It stipulates that the contracting parties must not subject investors to measures which constitute violation of customary international law (Article 3(1)) and must accord full protection and security to investments and investors (Article 3(2)). Article 4 provides that investments and investors of the other contracting party must be accorded treatment which shall not be less favourable than that accorded to investments of its nationals with respect to the management, conduct, operation, sale or other disposition of investments in its territory (Article 4(1)); however, the classic most favoured nation clause appears absent in the model text. It also provides that investments of investors of the other contracting party must not be expropriated unless for public purpose, in accordance with the due process of law, and on payment of an adequate compensation (Article 5(1)). However, note that the Indian Model BIT does not contain a fair and equitable treatment provision, most likely due to the understanding that

[1827] "If this dispute [any dispute concerning the investments] has not been settled within a period of six months from the date on which it occurred by one or other of the parties to the dispute, it shall be submitted at the request of either party to the arbitration".

[1828] Although the issue is not considered in this paper, the entitlement is open to serious debate and possibly questionable. See, for instance, Dumberry, Satisfaction (1757), 241; Schwenzer (1814), 417; and Jagusch (1764), 56-57. Contra see, Kryvoi (1730).

[1829] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, para 39.

[1830] India 2015 Model BIT <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> accessed on 14 May 2018.

they are broadly interpreted by arbitral tribunals and in an attempt to curb such 'excessive' exercise of jurisdiction.[1831]

It seems, upon a review of the changes brought about by the Indian Model BIT, the instrument is case law come to life.[1832] It appears that, in an effort to protect the host State's right to regulate, limit arbitral discretion and clarify uncertainties, the drafters of the text have considered key investment awards of the last few decades and sought to incorporate or exclude principles established by such awards, as deemed appropriate to best protect national interests, but at the same time incentivise foreign investment.[1833] Article 5.3 concerning when a direct or indirect expropriation would arise is a perfect illustration of this. Another dominant theme of the Indian Model BIT is the purpose of balancing investment protection with the host State's right to regulate. The preamble expressly emphasises this point. Further, Article 5.5 provides that non-discriminatory regulatory measures designed and applied to protect legitimate public interest or public purpose objectives (e.g. public health) will not constitute expropriation.

Chapter IV of the Indian Model BIT then deals with investor-State disputes and consists of a total of 17 detailed articles. It is significantly lengthier and more detailed in comparison to the investor-State dispute provisions in other old-form BITs. Further, there are many restrictions imposed on the arbitral tribunal's jurisdiction. For instance, a tribunal constituted under the Indian Model BIT does not have jurisdiction to decide "*disputes arising solely from an alleged breach of a contract between a Party and an investor*" (Article 13(3)), thereby lacking the typical umbrella clause often found in BITs. Further, the tribunal does not have jurisdiction to review the merits of a decision made by a judicial authority of the relevant contracting party (Article 13(5)).

The Indian Model BIT also embodies an obligation to seek/exhaust local remedies for at least 5 (five) years, with a further compulsory minimum 6 (six) month negotiation period (Articles 15(2) and (4), respectively). There is also a 90 days prior notice requirement as regards submitting a claim for arbitration. An interesting feature of the Indian Model BIT is that it foresees a very limited period for commencing proceedings; a claim cannot be commenced if more than 6 (six) years have elapsed since gaining knowledge of the breach and loss. This may mean that if an investor commences action on day one, it may end up with only a 3 (three) month window for commencing arbitration proceedings where domestic proceedings are not concluded within 5 (five) years, taking into account the 6 (six) month negotiation period and the 90 days' notice of arbitration requirement. The investor could possibly be out of time if it commences its claim more than 3 (three) months after gaining knowledge. The interpretation of Article 15(5) will play a pivotal role in terms of the stop date when calculating the 6 (six) year period. In any event, Article 15 is very restrictive and unusual.[1834] It seems that having decided not to drop investor-State dispute settlement mechanism in its model BIT as had been suggested, India thought the next best option to be the imposition of very restrictive condition precedents to commencing investment claims in an effort to limit the number of such claims.[1835] It will be interesting to see how the mechanism proposed will be interpreted by arbitral tribunals, if the model BIT sees the day of light.

Most importantly, under the Indian Model BIT the tribunal does not have jurisdiction to "*award punitive or moral damages or any injunctive relief against either of the Parties under any circumstance.*" (Article 26(4)). This last provision is ground-breaking. The author is unaware of any other model BIT that expressly excludes jurisdiction to award moral damages. As was stated above, the Indian Model BIT is case law come to life,

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[1831] See, Ranjan (1795), 28. However, authors argue that the current formulation tilts the scale in favour of host State's regulatory power (29).

[1832] See, Ibid, in particular 31-36.

[1833] See generally, Ibid.

[1834] For a fuller analysis see, Ibid, 45-51.

[1835] See, Ibid, 16.

and it seems its drafters decided that *Desert Line* is not a scenario they wish India to face and perhaps was a step too far. The host State will therefore have the right, under Article 21(1), to raise a challenge to jurisdiction and seek an order for dismissal of a moral damages claim on the basis that such claim does not fall within the scope of the tribunal's jurisdiction and is therefore a frivolous claim.

In conclusion, for very obvious reasons, a tribunal constituted under the Indian Model BIT is highly unlikely to find itself with jurisdiction to hear and grant moral damages claims. It would be very difficult to justify any jurisdiction in the face of an express prohibitive rule. Any creative attempt, for instance by seeking to find jurisdiction under customary international law principles (i.e. its corrective function enunciated in *Autopista v Venezuela*[1836]), is a highly risky route and one that must be tread with caution.

A review of only model BITs would indeed be a limited review. Model documents are almost always subject to revisions before being executed. They therefore cannot reflect acceptable standards in practice. Conclusions purely from model form documents would lack the requisite foundation to be credible. Consequently, the review would benefit from the inclusion of certain BITs that are actually in force. On that basis, the BITs between Turkey and the UK[1837] and that between China and Singapore will now be considered to see whether the above analysis relating to model BITs hold their sway.

15.2.2.4. UK - Turkey BIT

The BIT between Turkey and the UK also contains the usual protections contained in most BITs. It provides that investments made by nationals or companies of one contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party (Article 2(2)). The said provision also prohibits unreasonable or discriminatory measures that may impair the management, maintenance, use, enjoyment or disposal of investments. The BIT also contains the national treatment and most favoured nation treatment clauses, on similar terms to those contained in model BITs considered above (Article 3). The rule against unlawful expropriation is set out in Article 5 of the BIT.

Article 8 of the BIT sets out the dispute resolution mechanism. It permits the submission of any 'legal dispute' arising between an investor and the host State to ICSID arbitration. The term legal dispute is defined in the BIT as a dispute involving '*an alleged breach of any right conferred or created by this Agreement with respect to an investment*'. The BIT further provides that "*either party may institute proceedings by addressing a request to that effect*", provided that "*the national or company affected…consents in writing to submit the dispute to [ICSID] for settlement by arbitration*".

A provision of particular importance in the BIT with respect to the topic of this study is Article 11, which is entitled "National or International Law". It provides that "*[N]othing in this Agreement shall prejudice any rights or benefits under national or international law accruing to an investor of one Contracting Party in the territory of the other Contracting Party*".

The terms of the UK-Turkey BIT appear to confirm, just as the model BITs reviewed above have confirmed (except the 'innovative' Indian Model BIT), that BITs speak in the language of permissiveness in relation to moral damages claims. Article 11 acknowledges expressly that rights under international law are preserved. Given that customary international law permits moral damages claims (see part one above), this could reasonably be interpreted as entitlement to moral damages under the BIT.

[1836] Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela, ICSID Case No ARB/00/5, Award, 23 September 2003, para 102. See part three below.

[1837] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Turkey for the Promotion and Protection of Investments of 15 March 1991 (entry into force 22 October 1996) <http://treaties.fco.gov.uk/docs/pdf/1997/TS0013.pdf> accessed on 14 May 2018.

In relation to host State counter claims for moral damages, the position seems to be rather different when one considers the language used in the BIT. The BIT appears to seek to protect investor interests only. The wording used does not suggest that it envisages State counter claims, particularly given the definition of the term legal dispute, which has been restricted to breaches "*with respect to an investment*". It would be difficult to argue that a moral damages claim by a host State could be termed as concerning the breach of a right conferred or created "*with respect to an investment*".

In conclusion, the BIT currently in force between the UK and Turkey confirms the results of the review with respect to the model BITs analysed above. BITs do not exclude moral damages claims, or similar entitlements, and mostly speak widely in relation to investor claims. As long as a claim appears to relate to or concern an investment, moral damages should, in principle, be available. This is also confirmed by the China - Singapore BIT.

15.2.2.5. China - Singapore BIT

The BIT between China and Singapore[1838] is one between two different States than that previously analysed and has at its forefront commerce in different part of the planet. The BIT between China and Singapore also has similar features to the model and in force BITs discussed above. It too provides that the host State must accord fair and equitable treatment and protection to investments that are approved and that benefit from the terms of the BIT (Article 3). It also contains a most favoured nation provision, though Article 6 relating to expropriations is excluded within the remit of the most favoured nation provision (Article 4). The provision on expropriation (Article 6) provides the customary rule that investments shall not be expropriated unless carried out in a non-discriminatory manner, in accordance with the laws of such State and against prompt compensation.

Article 13 of the BIT provides for the procedure for the resolution of disputes between an investor and the host State. It provides that, with respect to any dispute between the investor and the host State in connection with the investment, "*either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.*" The dispute may, alternatively, be submitted to an international arbitral tribunal if it involves "*expropriation, nationalization or other measures having equivalent effect*". Article 13 is a rather odd provision. It provides that only expropriation cases may be submitted to international arbitration, and that others must be submitted to the competent court of the host State.

Similar to the other BITs considered above, the BIT between China and Singapore is also worded widely and covers any dispute in connection with an investment. This could, for the reasons given above, include disputes concerning moral damages.[1839] In any event, given the absence of restrictive wording, moral damages would be available under customary international law once proceedings based on the BIT have been commenced. Again, given the reference to disputes concerning an investment, host State counter claims for moral damages are unlikely to be accommodated by the terms of the BIT. The above should apply even where the dispute is submitted to the competent courts of the host State, i.e. in non-expropriation cases, given the dispute will be governed by the terms of the BIT and customary international law where the BIT is silent or ambiguous on the matter.

15.2.3. Effect of Most Favoured Nation clauses on jurisdiction

As will have become obvious from executed and model BITs reviewed above, there is some degree of variance between BITs. Some expressly provide for the applicability of international law in interpreting

[1838] Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments of 21 November 1985 (entry into force 7 February 1986) < http://investmentpolicyhub.unctad.org/Download/TreatyFile/5377> accessed on 14 May 2018.

[1839] See, Article 13.

the investor's rights and obligations, with some actually affording primacy to international law, while others make no such reference. The same lack of consistency is observable in respect of host State claims. The issue here is whether a more favourable treatment clause contained in a BIT, with regards recoverability of moral damages, can be 'transported' into a dispute arising from a different BIT that appears to preclude moral damages claims or is silent on the matter.

As discussed above, the recoverability of moral damages is generally accepted in customary international law. Arbitral tribunals have jurisdiction under customary international law to consider and determine moral damages claims. Therefore, a claim for moral damages should normally succeed if commenced pursuant to an IIA, unless such IIA excludes moral damages claims, whether expressly or by implication. The discussion above has demonstrated that most IIAs do not restrict arbitral tribunals' jurisdiction to grant moral damages claims. However, there may be certain IIAs where the more appropriate conclusion is that moral damages claims should not be permitted on the basis of such IIA (e.g. the Indian Model BIT). It is in such cases one will need to consider whether a most favoured nation clause will permit the transportation of the terms of a more favourable IIA and allow an investor to rely on such favourable terms to keep alive its moral damages claim. The below analysis will seek to discuss whether such an approach can be justified and should be permitted.

This is an important issue and one likely to arise often. It is said that approximately eight out of 10 treaties contain a most favoured nation clause[1840] and that the majority of such clauses "*reflect principles of equality and non-discrimination*".[1841] As was noted by the Arbitral Tribunal in *Bayindir Insaat v Pakistan*, its purpose is the creation of "*a level playing field*".[1842] According to Caron:

"*As a substantive protection obligation, an MFN clause in a "base treaty" operates by reference to any more favorable standards of protection accorded by the host State to investors of third party nationality – whether that treatment is accorded in practice ("comparator practice"), or is stipulated in a provision of a treaty between the host State and a third State (a "comparator treaty").*"[1843]

However, the implementation and treatment of most favoured nation treatment provisions has not been extremely straightforward in practice. As noted by Caron, "*successful invocation of the MFN provision to reach a stronger substantive protection obligation is extremely rare in practice*".[1844]

A pivotal case on this point is *MTD v Chile*, which concerned the relevant regional authorities' refusal of the Malaysian investor's rezoning application with respect to a site selected for the construction of a residential and commercial complex in Chile.[1845] The Foreign Investment Commission of Chile (FIC) had approved the application and led the investor into believing that the regional authorities would do the same. However, the regional Ministry of Housing and Urban Development refused to modify the zoning and the investor's application was thereafter formally rejected. The FIC declined to interfere on

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[1840] United Nations Conference on Trade and Development, Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II (2010), 12 <http://unctad.org/en/Docs/diaeia20101_en.pdf> accessed on 14 May 2018.

[1841] DD Caron and E Shirlow, 'Chapter 29: Most-Favored-Nation Treatment: Substantive Protection' in MN Kinnear et al (eds), Building International Investment Law: The First 50 Years of ICSID (Kluwer Law International 2015) 399.

[1842] Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. IslamicRepublic ofPakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, para 386.

[1843] Caron (1841), 399.

[1844] Id.

[1845] MTD Equity (1812).

MTD's behalf and MTD commenced arbitration proceedings under the auspices of ICSID. One issue the Arbitral Tribunal was invited to determine was whether MTD was entitled to rely on the substantive protections contained in the two comparator treaties Chile had executed (with Denmark and Croatia), through the MFN clause contained in the applicable Chile-Malaysia BIT.

The most favoured nation clause (Article 3(1)) contained in the Malaysia-Chile BIT provided as follows:

"*Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.*"

The Arbitral Tribunal held that the most favoured nation clause was sufficient to cover and transport provisions in the comparator treaties (Chile-Denmark and Chile-Croatia BITs) into the base treaty (Malaysia-Chile BIT).[1846] The Annulment Committee, on appeal, upheld the Arbitral Tribunal's ruling. In fact, the Annulment Committee held that the Arbitral Tribunal was incorrect in limiting the applicability of the most favoured nation clause to the fair and equitable treatment strand; the Committee opined that the two were separate and that the former was independent of the latter. In other words, the Committee gave the most favoured nation clause a wider sphere of application than had been provided by the Arbitral Tribunal. The Committee reasoned as follows:

"*The most-favoured-nation clause in Article 3(1) is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard. Article 3(1) attracts any more favourable treatment extended to third State investments and does so unconditionally.* "[1847]

The decisions of both the Arbitral Tribunal and the Annulment Committee show that most favoured nation clauses can be successfully used to transport protections contained in comparator treaties into base treaties. If a comparator treaty provides for entitlement to moral damages, expressly or impliedly, then a most favoured nation may prove sufficient to incorporate such entitlement into the applicable base BIT (or other form of IIA) and grant the investor the right to seek moral damages. The reasoning can be supported by the decision in *CMS v Argentina*.[1848]

In conclusion, it is all a matter of treaty interpretation. As was noted by Caron, "*[D]etermining the scope and applicability of MFN clauses will therefore necessarily be a treaty- and fact- specific exercise*".[1849] One will have to examine the wording of the base and comparator treaties and come to a conclusion on whether the comparator treaty in question does contain a more favourable treatment and whether such can be transported into the base treaty via the most favoured nation clause. However, the author is unaware of any previous attempt to adopt the most favoured nation for a moral damages claim and it therefore remains to be seen whether arbitral tribunals will consider such permissible.

15.2.4. Summary

In conclusion, it would be fair to say that the selective IIAs reviewed above, with the exception of the Indian Model BIT, are almost consistently widely drafted to accommodate investor claims for moral damages and can therefore be said to grant arbitral tribunals jurisdiction when faced with such claims. However, certain IIAs are more accommodating than others, in the sense that they expressly provide for the application of international law which, as was explained above, provides for the right to seek moral

[1846] MTD Equity (1812), para 104.

[1847] Ibid, para 64.

[1848] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, para 377.

[1849] Caron (1841), 403.

damages. For instance, the Colombian Model BIT refers expressly to international law and affords it primacy if more favourable to the investor. Further, the BITs between Turkey and the UK and between China and Singapore also seem to provide for the application of international law and consequently, for the same reasons, for the right to seek moral damages.

Moreover, a central theme of the IIAs reviewed above is that most of them do not expressly or impliedly appear to rule out investor entitlement to moral damages, and therefore tribunals' jurisdiction to grant moral damages claims. Consequently, although not definitive, the outcome of this study, which admittedly relies heavily on the author's interpretation of the applicable treaties and selected BITs, seems to be one that confirms the ruling in *Desert Line*. In other words, "*[E]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude…compensation for moral damages.*"[1850] However, the Indian Model BIT may turn that tide. It contains an express prohibition in relation to punitive and moral damages. If other States similarly re-draft their model BITs or other IIAs to mirror the prohibition, then moral damages in investment claims may become a thing of the past. Until then, however, it seems moral damages claims may be entertained. In any event, such a turn of tide appears unlikely.

With respect to moral damages claims by host States, however, it appears difficult for one to justify the same conclusion. Most model and executed BITs considered above, with the exception of the French Model BIT, suggest that such claims should not be permitted. The IIAs reviewed lend themselves to an interpretation that claims can only be brought by investors, in line with the purpose behind the execution of such treaties. Indeed, by stipulating that the tribunal may not award moral damages against either of the contracting parties, the Indian Model BIT indirectly supports the proposition. It is submitted that even where an IIA is slightly widely worded to suggest permissibility of host State claims, the conclusion should not be one easily reached. There should be clear words before one is able to justify a conclusion which runs against such theme dominant amongst IIAs.

Finally, it should be noted that even in cases where the base treaty appears to exclude the availability of moral damages, most favoured nation clauses, if such exists in the base treaty, can potentially allow moral damages claims through a more favourable treaty provision in the comparator treaty. Consequently, where the wording of the base treaty appears restrictive in terms of providing jurisdiction to arbitrators with respect to moral damages claims, one should consider connected IIAs (comparator treaties) to see whether a most favoured nation clause exists in the base treaty so as to keep alive the moral damages claim.

15.3. Part Three: Jurisdiction pursuant to contract and/or domestic laws

Investors usually enter into contractual relationships with the host State or a commercial enterprise of the host State, a state entity, when making an investment. Indeed, this is not an unusual phenomenon. ICSID's statistics show that in 16% of cases the basis of consent invoked to establish ICSID jurisdiction under the ICSID Convention and the Additional Facility Rules was an investment contract between the investor and the host State.[1851] The figure for 2017 was 10%.

As the principle of party autonomy dictates, parties to a contract are at liberty to agree the terms of their agreement, including the law and any rules that is to govern the contractual relationship. For instance, parties can agree that their rights and obligations are to be governed by customary international law, as

[1850] Desert Line (1723), para 289.

[1851] See, The ICSID Caseload - Statistics (Issue 2018-1) <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf>, accessed on 14 May 2018.

opposed to the laws of a designated country.[1852] There are also cases where parties, for one reason or another, do not agree on the applicable law or rules.[1853]

Where the contract provides for international law, then it should be easy for the tribunal to find itself with jurisdiction in relation to moral damages claims, for the reasons explained above in part one. Both the ILC Articles and international court decisions and arbitral awards largely confirm this.

Where the contract is governed by the laws of the host State (or another State), however, the position may not be as straightforward. Absent good reasons to dictate the contrary, the success of a moral damages claim should depend on the law applicable and its position on moral damages claims. In this respect, the award of the ICSID tribunal in *Benvenuti & Bonfant v Congo* is worthy of mention.[1854] In that case an Italian company (Benvenuti and Bonfant Srl) and the Congolese government jointly established a company in the People's Republic of the Congo with the purpose of manufacturing plastic bottles. Following certain interventionist actions of the Congolese government, the investor argued that its investment, the joint venture company, was effectively nationalised. The claim was therefore one based on expropriation ('creeping' expropriation). In addition, the investor's senior management and the majority of its Italian national personnel were forced to hastily leave Congo, following a warning by the Italian Embassy of their imminent arrest.[1855]

The contract executed between the Italian investor and Congo foresaw the establishment of a joint venture company and provided for ICSID arbitration to resolve any dispute. The contract did not provide for the applicable law. The Arbitral Tribunal, in the circumstances, considered Congolese law to apply[1856] and decided the case on that basis[1857].

In the arbitration proceedings, in addition to damages for expropriation, the claimant investor sought in excess of USD 1 million as moral damages, which constituted a third of its total claim for compensation.[1858] The investor based its claim for moral damages on the following grounds: (i) loss of work and investment opportunities in Italy; (ii) inability to resume activities in Italy; (iii) loss of credit with suppliers and banks; and (iv) loss of certain staff following the forced departure from Congo.[1859]

[1852] According to Ripinsky (1729), 103, such "has almost never been done given that international law is essentially an inter-State system, and hence considered unsuitable for contracts between States and private parties, at least as the only governing law."

[1853] Ripinsky (1729), 103.

[1854] SARL Benvenuti & Bonfant v People's Republic of the Congo, ICSID Case No ARB/77/2, Award, 8 August 1980.

[1855] As summarised in Parish (1785), 231.

[1856] Through application of Article 42(1) of the ICSID Convention, which provides that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[1857] See Parish (1785), 232.

[1858] See Parish (1785), 231. Note that Congo also requested moral damages, in the same amount, a request which was dismissed by the Arbitral Tribunal on the basis that the claimant could hardly be criticised for bringing an international claim in which it prevailed; see Parish (1785), 234.

[1859] Ibid, 231.

The Arbitral Tribunal granted the claim for moral damages. However, the amount awarded represented a mere two per cent (2%) of what had initially been requested.[1860] The Arbitral Tribunal also criticised the investor for having "*limit[ed] itself to simple statements, unsupported by any concrete evidence*".[1861] The tribunal reasoned that, despite the lack of evidence, it was evident that the Congolese government's actions disturbed the investor's activities. It appears that the Arbitral Tribunal made a judgment call and exercised its discretion, invoking its inherent jurisdiction as to proof and quantum and reached a decision it considered just and fair in the circumstances.

This award is an illustration of a moral damages claim being subject to the laws of the host State where the laws of such State governs the contractual relationship. Necessarily, where the contract is the only route to a claim, a claim for moral damages is unlikely to succeed unless the applicable law acknowledges moral damages as a legal concept and deems such recoverable in the circumstances. However, as noted above, where the national domestic law is silent or ambiguous, the applicability of customary international law will be triggered in most cases, particularly in ICSID cases. This is because Article 42(1) of the ICSID Convention permits, to some extent, an arbitral tribunal to import international law rules. It provides:

"*In the absence of [agreement by parties as to applicable rules], the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*"[1862]

The reference to the rules of international law in the second sentence has been interpreted as providing for a 'corrective' and 'complementary' function of international law.[1863] For instance, in *Autopista v Venezuela*, a case concerning alleged breaches of a concession contract concerning the design, construction, operation etc. of a highway system, the Arbitral Tribunal referred to the 'corrective' and 'complementary' functions of international law with approval, clarifying when such may become operative. The Arbitral Tribunal noted as follows:

"*It is certainly well settled that international law may fill lacunae when national law lacks rules on certain issues (so called complementary function). It is also established that it may correct the result of the application of national law when the latter violates international law (corrective function).*"[1864]

Consequently, even where the parties agree that the laws of the host State or another State are to apply, any gaps in such legal system or any violations of international law by such legal system could justify applying the rules of international law. In that sense, the latter element is somewhat unorthodox. The tribunal suggests that the provisions of the domestic law may be disregarded where such violate international law. The latter conclusion, admittedly, would need strong grounds to justify and its accuracy is somewhat questionable. It should be noted that in that case the parties had agreed that international law would prevail over the domestic law in case of conflict, hence perhaps justifying the wide statement made by the Arbitral Tribunal.[1865] This is a perfect illustration of why a case by case analysis is required. That said, the fact that the Arbitral Tribunal opined that such principle was settled in international law and did not qualify its statement to the facts of the case demonstrates that the reasoning was thought of as having general applicability.[1866]

[1860] Id.

[1861] Id.

[1862] Note the reference to the "rules of international law as may be applicable".

[1863] Ripinsky (1729) 104.

[1864] Autopista (1836), para 102.

[1865] Autopista (1836), para 103.

[1866] See, Ripinsky (1729), 104, fn 189.

15.4. Concluding Remarks

In conclusion, the above discussion demonstrates that arbitral tribunals have jurisdiction to grant moral damages as a matter of customary international law. Both the ILC Articles and international investment awards and court decisions, the two main pillars of customary international law, appear to permit moral damages claims. In fact, recent ICSID investment awards have confirmed the availability of moral damages to investors, thereby confirming that arbitrators possess the requisite jurisdiction. Additionally, IIAs generally appear to support investor entitlement to moral damages. A selection of IIAs studied show that moral damages claims are capable of being accommodated by such instruments. With the exception of the Indian Model BIT, none of the IIAs considered appear to contain restrictive wording that exclude moral damages claims by investors.

Finally, where the claim is premised on a contract between the investor and the host State or its connected entity, the availability of moral damages would be a matter of determining the treatment of such claims under the domestic law and the wording of the contract. However, that said, there are ways of bringing into play international law rules in cases of ambiguity or silence of the law/contract (international law's complementary function), or even where the provisions of the said law violate international law, as the case may be (international law's corrective function).

Whether the Indian approach will catch the force of the wind and moral damages outlawed, only time will tell. But such is considered unlikely. Arbitrators should therefore not feel constrained to dismiss moral damages claims simply because a party objects. If the entitlement is recognised as a matter of international law (and the above discussion demonstrates that it is), it should be awarded where the conditions exist. Simply put, such is the aggrieved party's right.

That said, the ever rising demand from developing host States that investment agreements inherently imbalanced in favour of investors from developed nations should be revised should not be ignored. As always, ignoring a problem is not the solution and often back fires. This can be clearly seen from the Indian example. It may therefore be more appropriate to revise treaties so that they clearly cater for moral damages, so that developing States accept moral damages claims as a matter of principle. At the very least, arbitral tribunals should develop consistently applicable rules for granting moral damages so that developing States do not feel unfairly treated. A beast that is known and controllable is better than one that isn't. Thus, with respect to moral damages awards at the very least, there is indeed a need to re-balance investment agreements to ensure survivability of moral damages claims.