MORAL DAMAGES UNDER INTERNATIONAL INVESTMENT LAW

THE PATH TOWARDS CONVERGENCE

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Anneme, babama ve eşime şükranlarımla…

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[Foreword]

Preface

The availability of and entitlement to moral damages under international investment law has been a hotly-debated topic of the past decade, an interest ignited principally by the ICSID tribunal's award in *Desert Line*[1], the first publicly known ICSID case where an award for moral damages was made under a modern investment treaty and pursuant to customary international law[2]. The tribunal considered that it possessed the requisite jurisdiction to award moral damages and granted the investor moral damages in the sum of USD 1 million. Other ICSID tribunals have since largely followed suit.

Until the *Desert Line* award, foreign investors (and their counsel) would not have generally considered that there was an entitlement to moral damages in connection with the host state's treaty (or other international law) violations, and therefore did not (seemingly) as vehemently seek such damages in investment arbitration cases. However, the position appears to have changed. There has been a steady increase of investment awards addressing the issue of moral damages since the seminal *Desert Line* award.

Notwithstanding the above, there is a lack of unanimity, amongst arbitrators and scholars, in particular amongst the latter camp, on the applicable rules and principles of international investment law as regards entitlement to moral damages. There is a difference of opinion on, *inter alia*, (i) who should be entitled to seek moral damages, (ii) the legal test to determining moral damages claims, in respect of both substantive and evidential issues, and (iii) the quantification of moral damages. The state of the law on moral damages is in its infancy and requires refinement and further development.

This book seeks to undertake a thorough review of the relevant case law and scholarly views on the issue of moral damages under international investment law, and critically analyse the current state of the law on the matter. In aid of the said exercise, this book performs a deep-dive into the sources of and the fundamental rules and principles of customary international law. The research findings suggest that the *Desert Line* tribunal deviated off-course, away from settled rules and principles of customary international law, by conditioning entitlement to moral damages to exceptional circumstances and/or grave international law violations, constituting further evidence of the fragmentation of (the various sub-disciplines of) international law.

This book advocates that though international investment (mainly ICSID) awards seemingly converge with the rules and principles of customary international law in terms of the general entitlement to moral damages, there is a clear divergence in respect of the substantive legal test applied to determine moral damages claims, signalling a degree of fragmentation of international law. This book therefore amplifies the call for greater convergence of various sub-disciplines of international law, especially in respect of the entitlement to moral damages by divorcing itself from the requirement to show "exceptional" or "grave" circumstances. The book makes certain suggestions and recommendations to

[1] *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No ARB/05/17, Award, 6 February 2008.
[2] Unless otherwise stated, references in this book to "customary international law", "international law" and "general international law" shall mean the same thing and will be used inter-changeably.

facilitate international investment law taking the path towards convergence, so as to avoid risking the coherence, uniformity and stability of international law and of the international legal order.

List of Abbreviations

American Convention	American Convention on Human Rights
Arab Investment Agreement	Unified Agreement for the Investment of Arab Capital in the Arab States
BIT	Bilateral Investment Treaty
CETA	EU-Canada Comprehensive Economic and Trade Agreement
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EU	European Union
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on The Settlement of Investment Disputes Between States and Nationals of Other States
ISDS	Investor-State Dispute Settlement
ILC	International Law Commission

ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
IPA	EU-Singapore Investment Protection Agreement
MIT	Multilateral Investment Treaty
NAFTA	North American Free Trade Agreement
PCIJ	Permanent Court of International Justice
UN	United Nations
UN Charter	Charter of the United Nations
USMCA	Agreement between the United States of America, the United Mexican States and Canada

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CHAPTER 1

Introduction

"*Remember upon the conduct of each depends the fate of all*"

Alexander the Great

§1.01 BACKGROUND AND PURPOSE OF RESEARCH

In 1923, less than a century ago, an international tribunal reaffirmed the following principle of international law in respect of compensation due as a result of an internationally wrongful act causing moral harm:

> *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.*[3]

In similar vein and a few years later, the Permanent Court of International Justice ("PCIJ") enunciated in its decision in the *Chorzów* case the following principle of international law:

> *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.*[4]

The *Chorzów* decision and the principle enunciated therein was noted with approval in the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles").[5] The decision in *Chorzów* seemingly constitutes the foundation of Article 31 of the ILC Articles, concerning reparations for internationally wrongful acts. Furthermore, investment tribunals have on many occasions

[3] *Opinion in the Lusitania Cases*, United Nations Reports of the International Arbitral Awards, 1 November 1923, Vol VII 32, 40.
[4] *The Factory at Chorzów (Germany v Poland), Decision on Indemnity*, 1928 PCIJ (Ser A).
[5] See, for instance, ILC Articles, Article 31, Commentaries (1) - (3). For the full text (together with commentaries) see <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 2 April 2021.

referred to the principle laid down in *Chorzów* with approval.[6] Building on that general rule, the ILC Articles expressly recognise that "*[I]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State*".[7] Note that no distinction has been made between entitlement to and recoverability of either head of loss or damage, i.e., material or moral.

Fast-forward to a little over a decade ago, in 2008 the ICSID investment tribunal in *Desert Line*[8] ruled, commonly regarded as being for the first time in the international investment law context, that moral damages are recoverable by an investor in the investor-state dispute context, pursuant to customary international law principles. However, the tribunal limited such entitlement to the most grave and exceptional cases. In that particular case, exceptional circumstances were found to exist and an award of moral damages was consequently made in the investor's favour in the sum of US$ 1 million. The *Desert Line* tribunal's reasoning has recently been noted with approval and followed by several other ICSID tribunals.[9]

The recent line of cases are suggestive of a mismatch between the decisions in those cases and the established principles of customary international law, which serve as the foundation for the former. This has naturally caused a shift in focus back to the principles concerning entitlement to non-pecuniary compensation under international law, particularly in the investor-state disputes context. In particular, given the visibly raised threshold in connection with investor (and, in some rare cases, host state) moral damages claims under international investment law, some scholars have questioned the fundamental principles and concepts of international law relating to non-pecuniary compensation, and whether and how they should be applied in the international investment law context. This endeavour calls into question the following overarching theoretical, central question, which this book is engaged to analyse and elaborate upon:

> *Whether and under which circumstances international investment tribunals, applying international law rules and principles, should have jurisdiction to award moral damages, as well as the remedies available and the nature of any required quantification exercise.*

The answer to the above overarching question will be attempted via three separate major themes of analysis and approach. The first theme focuses on the historical origins and current position of international law in respect of non-pecuniary (moral) damages, and whether over the years there has been a preference for fragmentation over convergence. This will involve an in depth review and analysis of the historical and current position in respect of the rules applicable to the awarding of non-pecuniary (moral) damages under international law generally, and specifically under international investment law. It will be suggested that, despite superficial denials by recent investment tribunals, international investment law has broken off in some respects from its roots, and differs in its approach to compensation for non-pecuniary harm.

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[6] See, for instance, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, [776].
[7] ILC Articles, Article 31(2).
[8] *Desert Line* (n 1).
[9] See below under section §4.02[A].

This has resulted in calls for convergence and greater cross-fertilization between different branches of international law, so as to ensure their continuance in the centuries to come, begging the question whether international investment law must embark on the path towards convergence, at least in respect of moral damages claims. Echoing the words of one of the greatest leaders of all time, "*upon the conduct of each depends the fate of all*", which is why it is so imperative that the various related sub-disciplines of international law are aligned and converge with one another on the treatment of moral damages claims. Disunity will often result in the unintended and undesired.

Further, and relatedly, the results of the above enquiry will shape the discussion to follow, which forms the second theme of the analysis. The focus will be on whether the current approach taken by recent investment tribunals aligns with the selected theories relating to corrective justice and law and economics. The above-mentioned theories are considered to be relevant and worthy of analysis given their perceived ability to (at least partially) explain the *raison dêtre* of investment law and the investor-state dispute resolution mechanism, which issue is analysed in detail below, predominantly in Chapter 2. The third and final theme, chiefly concerning the quantification phase, focuses on the theory of loss aversion, a sub-branch of the currently dominant prospect theory in the study of behavioural sciences. The final theme endeavours to explain what it is that compensation seeks to achieve in respect of moral harms and, accordingly, what is required of investment law to materialise that aim. An understanding as to the reasons behind the focus and desire of individuals to avoid losses and, relatedly, seek compensation for losses, more so in comparison with their desire for further gain, will enable a more accurate analysis to be made in respect of when and how an individual should be compensated for the moral harm suffered. These issues are particularly considered in Chapter 5. The theories and methodologies underpinning the research, in particular those mentioned above, will be elaborated in greater detail below in this chapter, as well as penetrating into the other chapters of this book at the relevant junctures, in the form of a golden thread running through the book.

For completeness, this book will not consider the treatment of moral damages under national (local) laws and/or under the law of the World Trade Organisation. Both (and other similar sources) are considered to have little (or inconsequential) relevance in respect of investment disputes between foreign investors and host states concerning the award of moral damages, and a study into them will likely yield little benefit. In particular, given the state-to-state nature of WTO disputes, WTO law will unlikely provide for substantial and/or particularly useful moral harm related resource. In respect of the utility of considering national laws, this book does not seek to serve as a comparative undertaking in respect of the treatment of moral harm by different national legal systems, given that its focus is on international (investment) law. To the extent such national laws may have shaped or formed part of customary international law rules and principles, such will be addressed in this research given the focus and close analysis of the latter.

§1.02 INTERNATIONAL INVESTMENT LAW

[A] History and foundation

International investment law, in its current form, has somewhat recent roots. The modern network of BITs, which frequently form the basis of investor claims against states, is considered to have initiated with the signing of the first BIT between Germany and Pakistan in 1959.[10] However, international investment law, in the general sense, has much older, almost ancient roots and provides for "*a far more complex picture*".[11] The true origins of international investment law can be traced to the expansion of European trade and investment activity, beginning in the seventeenth century. The system was established to protect the interests of the capital exporting states and their nationals. Although, on the surface, the rules and principles that materialised claimed universality and impartiality, they essentially comprised protection for investors and obligations for capital importing states to facilitate trade and investment.[12] Miles consequently argues that one should approach and consider foreign investment protection laws and principles in light of their socio-political history and context.[13]

The international rules on the protection of foreign-owned property is said to have first originated in the reciprocal arrangements of European nations.[14] As the European states possessed relatively equal bargaining powers, they sought to secure minimum levels of protection for their nationals, operating on the basis of reciprocity. However, as rules were being devised to protect investor interests on non-European soil, where the European states enjoyed an elevated bargaining position, foreign investment protection law moved from reciprocity, towards imposition.[15] Eventually, following power struggles, legal doctrinal contentions and military force (latter often referred to as gunboat diplomacy), the European understanding of international law replaced the then pre-existing rules and systems.[16] It is on that foundation that the modern network of BITs operated and continue to operate, albeit in an amended form given the evolving nature of international law in light of recent (arbitral and other) developments.[17]

[B] Investor-state dispute settlement provisions

The widespread adoption of arbitration as an ISDS mechanism in BITs has, especially in the past couple of decades, caused a dramatic increase in investment arbitration activity, in turn

[10] See Germany-Pakistan BIT (1959), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1387/download> accessed 2 April 2021.
[11] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013), 19. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012), 1 *et seq*; Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd edn, OUP 2015), 87 *et seq*.
[12] Miles (n 11) 19; Salacuse, Investment Treaties (n 11) 91.
[13] Miles (n 11) 20.
[14] ibid 21.
[15] ibid.
[16] ibid 23 *et seq*.
[17] See Salacuse, Investment Treaties (n 11) 100.

contributing to the development and evolution of international investment law.[18] In particular, the increased popularity of BITs since the early 1990s has produced a significant amount of, in some cases conflicting, case law, granting international law jurists and lawyers the opportunity to refine, develop and advance the rules of customary international law.[19] Langford and Behn explain that, by August 2017, around 900 investment treaty arbitrations were known to have been initiated, almost all of them from the prior 15 years.[20] Nowadays it would be highly unusual to locate a BIT that does not, in some form or shape, grant the investor covered the right to bring a claim before an international investment tribunal.[21]

However, the ISDS mechanisms are not without criticism.[22] Many capital-importing, developing states have expressed concern about the one-sided nature of standard form BITs, with some states taking positive action to amend their model BITs and ordering an overhaul of their existing commitments.[23] The states' concern with ISDS provisions in BITs usually manifest themselves in treaty revocations and denunciations, termination or substantial alterations of existing treaties, and increasingly aggressive litigation tactics in defending investment claims.[24] Connectedly, as part of a recent and increasing trend, permanent court-style dispute resolution mechanisms are being rolled-out in various MITs, instead of the ISDS mechanisms contained in most BITs.[25] Whether this is a sign of the end for BITs is yet to be seen, but it is certainly an indication that the much often discussed legitimacy crisis is not a legal fiction and requires immediate remedial steps to reinstate trust in the decades old system.[26]

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[18] See Dolzer (n 11) 11. See also Szilard Gaspar-Szilagyi and Maxim Usynin, 'Investment Chapters in PTAs and Their Impact on Adjudicative Convergence' in Szilard Gaspar-Szilagyi, Daniel Behn and Malcom Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020), 22-23.

[19] See Yannick Radi, 'International Investment Law and Development: A History of Two Concepts', *Grotius Centre Working Paper 2015/045 - IEL*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572987> accessed 2 April 2021, 3. See also Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73(4) Fordham Law Review 1521, 1538.

[20] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29(2) European Journal of International Law 551, 552.

[21] See, for instance, Salacuse, Investment Treaties (n 11) 152 and 392 *et seq*. See, e.g., for the dispute resolution provisions of BITs entered into by the UK: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/221/united-kingdom> accessed 2 April 2021.

[22] See Langford (n 20) 553; Franck (n 19) 1582 *et seq*.

[23] See Dolzer (n 11) 11; Salacuse, Investment Treaties (n 11) 123; Langford (n 20) 556 *et seq*. See also Abhishek Dwivedi, '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 2 April 2021; the India 2015 Model BIT, Article 26.4 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> accessed 2 April 2021.

[24] Langford (n 20) 554 *et seq*.

[25] See Lisa Diependaele, Ferdi De Ville and Sigrid Sterckx, 'Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System' (2019) 24(1) New Political Economy 37, 42. See also Chapter 3 below under section §3.03[B][2] for a detailed analysis of some of the recent MITs.

[26] See Langford (n 20) 556. See also 'Mistelis calls for Aristotelean approach to ISDS reform' Global Arbitration News, 18 December 2020 <https://globalarbitrationreview.com/mistelis-calls-aristotelean-approach-isds-reform?utm_source=New+ICSID+claims+against+Canada+and+Kuwait&utm_medium=email&utm_campaign=%5bgar_daily%5d+-+2020-12-18+21%3a15%3a39+-+%5bNew+ICSID+claims+against+Canada+and+Kuwait%5d&utm_term=New+ICSID+claims+against+Canada+and+Kuwait&utm_content=123207&gator_td=P2qGO1sIw1itazrYPJF3sEKcfz80KDReobC7nUL0ErA0nkjqJXye19Q6BXZ2WBFjhRFMLH5ROEVkPT36Y70AnI7iUgEzjcLyyfsQ4n3v3cD2gw4%2bcRKv5xNiKB1G6soUs%2bI8nYpfvHpDukk29gto7SHReD%2fhoo7jEcIyD09E7vTNYjPbmNhqP4BEEzSvgoCwvHb6OMBMDQHxXkknbr8xEuaKHbYAEdkKplTMJ7%2fypFAd40w3CYDIGq%2b58rMOr3mKxpRvPg9ScQMgR%2fq3KPYJrZEhrskFSALTqWP4PQoKCp4%3d> accessed 2 April 2021.

§1.03 THE THEORETICAL FRAMEWORK

[A] Convergence in international law

This book approaches the overarching research question with the aim of exploring the possibility, appropriateness and utility of converging together and/or an increased cross-fertilization, in light of the perceived fragmentation (or divergence), of various disciplines of international law during the twentieth century, whether intentional or otherwise. Though, strictly speaking, convergence and cross-fertilization mean different things, in the present context cross-fertilization is referred to in its function as assisting in the convergence of fragmented areas and disciplines of international law through the use of already established legal norms and principles in certain disciplines of international law in other disciplines of the same.[27]

The fragmentation of international law has been a much discussed phenomenon in the past two decades, oftentimes referred to and considered as a threat to international law as a legal system.[28] There was a fear that "*[I]nternational law…was in danger of breaking up into a series of isolated and largely self-contained sub-disciplines, courts and tribunals were multiplying, creating divergent bodies of jurisprudence which it would be impossible to reconcile…*"[29] In fact, at its fifty-second session in 2000, the ILC included within its long-term programme of work the "*[R]isks ensuing from the fragmentation of international law*".[30] This in itself evidences the (then) perceived seriousness and prevalence of the issue. The report produced in 2006 acknowledges that fragmentation puts to question the coherence of international law.[31]

That said, it is, to some extent rightly, pointed out that coherence is only "*a formal and abstract virtue*", and that there is not much value in having a coherent legal system that is regarded in some respects as unjust or unworkable.[32] Convergence in itself is therefore no ultimate virtue. Nevertheless, perhaps the fruits of the past few decades' focus on the perils of fragmentation and attempt to cure such, some now suggest that there is a "*move towards convergence*".[33] This poses the question whether convergence is a virtue in itself or has arisen as a response to fragmentation and a way of curtailing its undesirable effects on international law.

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[27] See Antonio Augusto Cancado Trindade, 'A century of international justice and prospects for the future' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 77 *et seq*.
[28] Mads Andenas and Eirik Bjorge, *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 1.
[29] Christopher Greenwood, 'Unity and diversity in international law' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 37.
[30] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,' Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, A/CN.4/L.682, 8.
[31] ibid 248.
[32] ibid.
[33] Andenas (n 28) 1.

Convergence, in respect of its dictionary meaning, refers to the fact that two or more things, ideas, etc. become similar or come together.[34] In the present context, it refers to separate sub-branches/disciplines of international law, e.g., international investment law and international human rights law, continuing or adopting an identical or similar approach to the treatment of moral damages claims. Convergence has not, however, been much studied in international law; it has only somewhat recently gained widespread attention.[35] The latter half of the previous century saw an exponential growth and development of international law, in all its disciplines, during which phase focus was directed more at refining the rules and principles then being forged, as opposed to ensuring that there was an element of consistency in approach.

However, with customary international law rules and principles, generally and/or in their separate disciplines, now firmly settled in terms of its fundamentals, respected and generally applied across the spectrum, in particular given the involvement and assertiveness in approach of international judicial bodies, tribunals and institutions, most notably the International Court of Justice (the "ICJ"), focus has now shifted to ensuring that the various disciplines of international law do not display a disunited front.[36] This is essentially so that international law can live up to the challenges of the current century and remain as an effective legal system.[37] Andenas and Bjorge explain that, having taken their slightly different courses during the phase of development, the various disciplines of international law must take account of one another to address any conflicts and provide for an effective legal system.[38] This, they explain, "*may contribute to a stabilization of the (still) rapidly expanding international legal system*".[39]

As explained above, some consider that the move to convergence is explainable on the basis that such is in response to and necessitated by the undesired effects of fragmentation. Fragmentation has been described by one author as "*the competition of substantive interests and institutional preferences and the struggle for the prerogative of interpretation in the international legal order*".[40] Another has sought to identify it as the issue concerning whether international law has spawned a series of sub-fields that have developed doctrines according to sub-field-specific, rather than in accordance with the normal doctrines of general international law.[41] It is said that there are essentially three forms of fragmentation: (i) substantive fragmentation, (ii) institutional fragmentation and (iii) methodological fragmentation, all of which seemingly necessitate a move towards convergence.

Substantive fragmentation refers to different regimes or disciplines laying claim to autonomy and being self-contained fragmented regimes.[42] This is deemed undesirable because, in the words of the ICJ, considered as the preeminent judicial authority of general international

[34] Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/convergence> accessed 2 April 2021.
[35] Andenas (n 28) 2.
[36] ibid.
[37] ibid.
[38] ibid 2-3.
[39] ibid 3.
[40] See Mehrdad Payandeh, 'Fragmentation within international human rights law' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 318.
[41] Nigel Rodley, 'The International Court of Justice and human rights treaty bodies' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 91-92.
[42] Andenas (n 28) 4.

law[43], "*a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part*".[44] Disciplines of international law cannot, therefore, lay claim to autonomy and self-containment; they operate as parts of a larger existent set of rules. This was expressly recognised by the ICJ in the *Diallo* case, where the Court drew heavily on the experience of other international bodies, such as the human rights tribunals, when determining the quantum of the compensation due for various human rights abuses.[45]

Institutional fragmentation is a by-product of institutional proliferation. As Greenwood explains, there is much more international law than there was only a generation ago and the number of international courts and tribunals has since multiplied.[46]The increase in international permanent and *ad hoc* courts and tribunals has resulted in a fragmented approach to the interpretation and application of international law, caused in part due to the lack of any formal hierarchy between such courts and tribunals.[47] That said, as the only permanent tribunal of general jurisdiction, the decisions and opinions of the ICJ carry considerable weight.[48] Most notably, and in a move towards convergence to avoid a fragmented approach to determination of international disputes, Judge Greenwood expressly confirmed in the *Diallo* case that "*[I]nternational law is not a series of fragmented specialist and self-contained bodies of law… it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals*".[49]

Finally, methodological fragmentation refers to the preferential treatment granted to relevant applicable treaties over international law principles and customs of general applicability. Certain international courts and tribunals insist on regarding the treaty that forms the basis of their jurisdiction or which they are interpreting as being in some way special. This on occasion results in a conclusion that appears fragmented from customary international law.[50] However, in the words of Andenas and Bjorge, "*there is in the method of international law more that unites than which differentiates*".[51] On one view, methodological fragmentation is not a fragmentation in the true sense, principally given the requirement in the Vienna Convention that treaties be "*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[52] Giving the applicable treaty 'special' or 'preferential' treatment would generally amount to no more than obliging to the requirements of customary international law principles.

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[43] Rodley (n 41) 87.
[44] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73, [10].
[45] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Reports 2012, 324, 331 [13]; Greenwood, Unity (n 29) 48.
[46] Greenwood, Unity (n 29) 37.
[47] Andenas (n 28) 6; Greenwood, Unity (n 29) 46.
[48] ibid.
[49] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Declaration of Judge Greenwood, Compensation, Judgment, ICJ Reports 2012, 324, 394 [8].
[50] See Andenas (n 28) 7 *et seq*.
[51] ibid 12.
[52] Vienna Convention on the Law of Treaties (1969), Article 31(1), <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> accessed 2 April 2021.

As noted above, the recent calls for convergence of international law is the result of its perceived fragmentation, which some regard as threatening the stability of the international legal order.[53] This begets the question whether coherence, uniformity and stability are by themselves virtues international law should be striving to attain and/or maintain. In his paper focused on the issues of unity and diversity in international law, Greenwood contends that the international community is, by its nature, a decentralised society and that the international legal system is a reflection of that society.[54] Most notably, international treaties result in diversity of international law rules given the consensual nature of the exercise and often involving different parties.[55] In fact, disunity can at times have positive effect on the development of the law; it allows different ideas to be aired and debated, ultimately resulting in the acceptance of the most valid and strongest positions.[56]

However, Greenwood explains that the diverse nature of the legal system does not mean that international law is fragmenting. He reasons that "*[D]iversity exists without, on the whole, compromising the essential unity of the legal system*".[57] He does caution, however, that that unity cannot and should not be taken for granted, and that those involved in making and applying international law should be conscious of the place which the immediate task before them occupies in the legal system as a whole, to be aware of the work of others and to respect their efforts. He therefore concludes that though fears of fragmentation may be over exaggerated, a certain wariness is necessary.[58]

Overall, it is contended that a coherent, unified, just and workable legal system is preferable to an incoherent one, particularly for its predictability and legal security.[59] Although some diversity may be unavoidable given the nature of the international legal order, and in some cases such may prove beneficial, there is merit in achieving a balance and providing for unity amongst various disciplines of international legal order so far as is possible. As Rodley puts it, "*[C]onsistency and coherence are inescapable demands of the rule of law*".[60] The desire of various international courts and tribunals, in particular of the ICJ, to take account of the practice of other international courts and tribunals is demonstrative of the utility and necessity of unity.

The doomsday predictions of 'fragmenteers' may indeed be exaggerated given the current deference of international courts and tribunals to the decisions and opinions of their counterparts, but this will certainly not be the case if they were to start laying claim to autonomy and creating self-contained fragmented regimes. Greenwood's warning that a certain wariness is necessary is therefore appropriate and well made. To ensure that the international legal order remains effective and workable, the need to remain on, and in some cases steer to, the path

[53] Andenas (n 28) 2.
[54] Greenwood, Unity (n 29) 54.
[55] ibid 40-42.
[56] See Peter W. Hogg and Ravi Amarnath, 'Why Judges Should Dissent' (2017) 67(2) The University of Toronto Law Journal 126. See also John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20(2) Oxford Journal of Legal Studies 221, 238-239; Edward McGlynn Gafney Jr, 'The Importance of Dissent and the Imperative of Judicial Civility' (1994) 28(2) Valparaiso University Law Review 583, 592.
[57] Greenwood, Unity (n 29) 55.
[58] ibid.
[59] Koskenniemi (n 30) 248.
[60] Rodley (n 41) 108.

towards convergence is of utmost importance. Indeed, such may explain the increasing jurisprudential focus on convergence of international law in recent years.[61] As Andenas explains, the "*[F]ear of fragmentation as a threat to the unity and coherence of international law or its future as a legal system may explain why convergence and unity are becoming more of a dominating feature of international law*".[62]

That said, it is worth noting that some have voiced conflicting opinions on the existence of the threat of fragmentation, opining that the threat never actually materialised and that differently constituted international courts and tribunals lacking any hierarchical connection in effect frequently help produce "*a high degree of consistency*" in their decisions and awards.[63] It has been said that various international courts and tribunals enrich and strengthen international law, as opposed to threatening its cohesion.[64] Nevertheless, it is conceded that there are occasions whereby different and conflicting positions are adopted by different courts and tribunals, with "*numerous differences…to be found in the jurisprudence of investment arbitration tribunals*".[65] But even then, a settled view eventually sinks in and brings an end to the seemingly fragmented area of international law.[66] The decentralised, diverse nature of international law, it is argued, should not be confused with fragmentation, the fear of which has been "*greatly exaggerated*".[67]

Unsurprisingly, not all jurists share the view that fragmentation of international law is nothing but a mere and misplaced worry or threat, who instead perceive the issue as a real problem which the international community has a duty to address.[68] Webb, for instance, explains that the risk of fragmentation increases in situations where there are "*[V]ariations in fact-finding and the assessment of evidence, lack of attention to existing case law, and decentralized and delegated judgment-drafting processes*".[69] In particular, she reasons that the risk of fragmentation is increased in cases where the court or tribunal is temporary, as well as in cases where an area of law is governed by customary international law, is relatively underdeveloped, and is controversial.[70] The debate is therefore unlikely to be settled anytime soon given the lack of any precise systems or formal tools for measuring convergences and divergences that occur among the relevant subfields of law.[71]

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[61] See Andenas (n 28) 1.
[62] ibid 1-2.
[63] Greenwood, Unity (n 29) 51. See also Dean Spielmann, 'Fragmentation or partnership? The perception of ICJ case-law by the European Court of Human Rights' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 173.
[64] Trindade (n 27) 77.
[65] Greenwood, Unity (n 29) 53.
[66] ibid 54.
[67] ibid 54-55. See also Eirik Bjorge, 'The convergence of the methods of treaty interpretation: Different regimes, different methods of interpretation?' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 533.
[68] See, for instance, Philippa Webb, 'Factors influencing fragmentation and convergence in international courts' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 146. See also Spielmann (n 63) 189-190.
[69] ibid 168.
[70] ibid.
[71] See Yuliya Chernykh, 'Assessing Convergence between International Investment Law and International Trade Law through Interpretative Commissions/Committees: A Case of Ambivalence?' in Szilard Gaspar-Szilagyi, Daniel Behn and Malcom Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020), 213.

In any event, there is certainly a greater discussion and consideration of convergence amongst international law circles. In line with the move towards and/or preference for convergence where such would assist in providing for predictability and legal security, whilst not producing unjust or unworkable outcomes, this book generally advocates in favour of convergence of international law in respect of moral damages claims. This is done particularly in the shadow of what is perceived to be unintentional fragmentation of international investment law from customary international law in respect of moral damages entitlement, a process seemingly initiated with the ICSID tribunal's award in *Desert Line*.[72] For instance, and principally, this book explores the appropriateness of different rules and principles applying to moral damages claims and the related compensation, under various disciplines of international law, given the seeming indifference between the moral harm suffered by victims of wrongful acts. This issue is more fully discussed in Chapter 3.

This enquiry is considered most relevant given the comparatively increased risk of fragmentation in investment arbitrations. Webb's analysis that there is a heightened risk of fragmentation in cases involving *ad hoc* tribunals considering under-developed and controversial customary international law issues is particularly applicable in respect of moral damages claims in investment arbitration cases, the accuracy of which is, in fact, demonstrated by the analysis of relevant investment awards considered in Chapters 3 and 4. Fragmentation and the risks associated, in this context, refers to fragmentation in terms of both treaty interpretation and ultimate remedies available to claimants.[73] Relatedly, Gaspar-Szilagyi and Usynin explain that the standalone nature of BITs have an existence of their own, which hampers convergence.[74]

In light of the above, this book will also consider and analyse in some level of detail the decisions of certain international human rights courts, i.e., the European Court of Human Rights ("ECtHR") and the Inter-American Court of Human Rights ("IACtHR"), to consider the approach adopted by such courts to the issue of moral damages and assess, by way of comparison, the appropriateness of the stance taken by international investment tribunals, if any different. The focus of the book will be on the decisions of international human rights courts as opposed to the decisions of other international courts or tribunals, such as the International Tribunal for the Law of the Sea, given the fact that the former provide for a wealth of jurisprudence on the issue of moral harm and moral damages, as demonstrated in the analysis contained in Chapter 4. Further, and relatedly, international human rights law is regarded to have "*become a vector in the debates concerning fragmentation and convergence in international law*", and is therefore a useful and appropriate point of focus for the analysis.[75]

[B] Theory of corrective justice

[72] See below under section §4.02[A].
[73] See, for instance, Paolo Palchetti, 'Halfway between fragmentation and convergence: the role of the rules of the organization in the interpretation of constituent treaties' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 486.
[74] Gaspar-Szilagyi (n 18) 25.
[75] Andenas (n 28) 3.

Law and justice are closely intertwined.[76] Law usually aims to produce for a just result or, at the very least, a result that would not appear unjust. There are various interpretations and explanations provided in respect of the entitlement under private law for a person wrongfully harmed to seek to recover compensation for the harm caused.[77] The earliest and still prevalent elucidation of private law has been Aristotle's corrective justice theory, which Weinrib considers as being the "*normative structure that underlies the private law relationship*".[78] The theory features an equality of quantities, focusing on a quantity that represents what rightfully belongs to one party but is now wrongfully possessed by another party, which must be shifted back to its rightful owner.[79] A violation that would require corrective justice would typically involve one party's gain at the other's expense, which requires that the wrongdoer "*restore to the victim the amount representing [its] self-enrichment at the victim's expense*".[80] Accordingly, many scholars see corrective justice as essentially compensatory.[81] Coleman contends that corrective justice is simply the principle that those who are responsible for the wrongful losses of others have a duty to repair them.[82] There are, however, outliers, some of whom consider corrective justice as "*the equalizing of goods and evils*".[83]

According to Coleman, unlike in cases such as requiring distributive justice, corrective justice becomes activated only in situations where a wrong has been committed.[84] That is, the duty to repair the victim's loss arises only in respect of wrongful losses; an individual is duty bound to make good another's wrongful loss only if he is responsible for having brought about the loss.[85] Corrective justice claims therefore arise only with respect to losses occasioned by human agency; natural event losses are, for instance, excluded.[86] Weinrib explains that corrective justice has a rectificatory function; by correcting the injustice inflicted, corrective justice asserts a connection between a remedy and the wrong.[87] The duty and role of the court (or arbitrator, as the case may be) is consequently to correct the injustice done, which involves ensuring that the remedy responds to the injustice.[88]

Coleman adds that corrective justice involves an element of correlativity.[89] He explains that claims of corrective justice are limited or restricted to parties who bear some normatively important relationship to one another. Hedley terms the element of correlativity as the hallmark of corrective justice accounts.[90] He explains, in support, that this view has legal historical backing, given that claimants were (and still are) under a burden not simply to explain why

[76] Alf Ross and Jakob v. H. Holtermann, *On Law and Justice* (OUP 2019), 347.
[77] See Ernest J. Weinrib, 'Corrective Justice' (1992) 77 Iowa Law Review 403.
[78] ibid 403-404.
[79] ibid 408.
[80] ibid 409.
[81] See Erik Encarnacion, 'Corrective Justice as Making Amends' (2014) 62(2) Buffalo Law Review 451.
[82] Jules L. Coleman, 'The Practice of Corrective Justice' (1995) 37 Arizona Law Review 15.
[83] Thomas C. Brickhouse, 'Aristotle on Corrective Justice' (2014) 18(3) The Journal of Ethics 187, 200.
[84] Coleman (n 82) 18.
[85] ibid.
[86] ibid 26.
[87] Ernest J. Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) The University of Toronto Law Journal 349, 350. See also Coleman (n 82) 26.
[88] ibid.
[89] Coleman (n 82) 26.
[90] Steve Hedley, 'Is an ahistorical corrective justice theory useful in explaining modern private law?' 2013 UK IVR Conference, QMW, 12-13 April, 4, <https://www.qmul.ac.uk/law/media/law/research/centres/clsgc/ivr/members/docs/HEDLEY.pdf> accessed 2 April 2021.

they deserve compensation, but why they deserve it from the defendant they have sued, which chimes with corrective justice.[91] Weinrib considers that private law must be coherent. He considers coherence as being essential for the justification of private law.[92] This is because private law connects persons through rules, doctrines, principles, etc. that come into play when a legal claim is asserted, which relationships must be coherent and, accordingly, based on a single justification: corrective justice.[93]

As to how corrective justice is to be achieved, Aristotle points to the judge as the agent of rectification, that is, the person who is to rectify the injustice done.[94] In the context of investment arbitrations, this role would usually be reserved to the arbitrator(s). Although ISDS mechanisms, including the remedies they make available, do not provide corrective justice in its literal sense and instead focus on 'rectifying' the economic loss caused by the wrongful act to the victim, it is considered by some as a form of corrective justice, aiming to restore what individuals or companies have lost (in the material and moral sense) due to the injustice of host states.[95]

Certain scholars have been vocal against the corrective justice theory, on the basis that it fails to adequately account for the important features of tort (and similar areas of the) law. Compensation in investor-state arbitrations for moral damages would fall into that general category. For instance, it is contended that corrective justice cannot explain the diversity of remedies beyond compensatory damages (such as injunctive relief, declarations and punitive damages).[96] More notably, Fell explains that Weinrib was incorrect to argue that private law must only do corrective justice, which he regards as being overly restrictive.[97] He reasons that private law need not be 'coherent' in the way Weinrib suggests.[98] He argues that, to be rational and justified, it is not necessary for private law to restrict itself to doing corrective justice and ignoring distributive and other concerns, in fact suggesting that the opposite is closer to the truth.[99] He therefore concludes that corrective justice may serve as a justification for private law in certain instances, but that it can never be the case that it should be relied on whenever it applies, even in instances where irrationality will result from its application.[100] Corrective justice is therefore not an end in itself. Though some scholars have attempted to address the various concerns raised[101], this nevertheless shows that one theory may prove incapable of explaining fully the basis for damages suffered from wrongful harm, as a standalone theory, and that support may need to be sought from a complementing, and ideally harmonious, theory. The supplementary theory in this context, and in keeping with the investment and wealth focus

[91] ibid.
[92] Weinrib, Corrective Justice in a Nutshell (n 87) 356.
[93] See Andrew Fell, 'Corrective justice, coherence, and Kantian right.' (2020) 70(1) University of Toronto Law Journal 40, 43-44.
[94] Weinrib, Corrective Justice (n 77) 410.
[95] See, for instance, GAR, Mistelis (n 26).
[96] See John C.P. Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 Georgetown Law Journal 513, 576; Prince Saprai, 'Restitution Without Corrective Justice' (2006) 14 Restitution Law Review 41.
[97] Fell (n 93).
[98] ibid 63.
[99] ibid.
[100] ibid 51.
[101] See Encarnacion (n 81) 451.

of investment arbitration, is the theory of and interaction between law and economics, which is considered below.

In light of the above, this book will seek to consider whether moral damages should be available under international investment law and, if so, to what extent such will align with Aristotle's theory of corrective justice. Corrective justice may not be the sole justification or reason underlying private law, but it is considered to be one of the main justifications upon which it is based. Accordingly, Chapter 2 will consider the victim status of certain categories of persons who are often participants of investor-state disputes, and whether the obligation to compensate extends to harm done to such persons. Further, Chapter 4 will consider how one should determine whether an obligation to correct the injustice has arisen in terms of the legal standards applicable. Finally, Chapter 5 will seek to spell-out what the precise nature of the compensation ought to be in cases where corrective justice calls for some form of compensation.

[C] Law and economics

The theory of law and economics is capable of further explaining many aspects and intricacies of international investment law, and to offer a "*rational perspective*".[102] Many legal rules and principles are scrutinised by jurists and lawmakers from an economic perspective, assessing it from its economic utility and efficiency angle. As Perez elaborates, the law and economics movement emphasizes on efficiency.[103] Economic analysis of the law has its roots in the works of Gary Becker in the mid- twentieth century, who argued that punishment should be based on cost-internalisation. He explained that a system of penalties should be developed whereby penalties would be maximised to deter rule breaking.[104] The theory was further developed by Richard Posner in the 1970s.[105] Posner aligns himself with rational-choice economics, which he explains, so far as rationality is concerned, as being focused on choosing the best means to the chooser's end.[106]

Economic analysis of the law takes a utilitarian view and argues for the implementation of legal rules that generate the most social welfare or benefits.[107] That is not to say, however, that utilitarianism and economics are the same thing. According to Posner, wealth maximisation provides for "*a firmer basis for a normative theory of law than does utilitarianism*", as well as providing for a firmer foundation for a theory of justice, both distributive and corrective.[108] He explains that an economist, when speaking normatively, tends to define the good, the right, or the just as the maximization of welfare in a sense

[102] Smits (n 28) 62.
[103] Nahshon Perez, 'Posner's "Law and Economics" and Politics: Bringing State-Skepticism Back In' (2018) 49(4) Journal of Social Philosophy 589.
[104] Coleman (n 82) 18-19.
[105] Richard A. Posner, *Economic Analysis of Law* (Little, Brown 1973).
[106] Richard A. Posner, 'Rational Choice, Behavioral Economics, and the Law' (1998) 50(5) Stanford Law Review 1551.
[107] Perez (n 103) 589.
[108] Richard A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8(1) The Journal of Legal Studies 103, 103 and 125. See also Richard A. Posner, 'Wealth Maximization Revisited' (1985) 2(1) Notre Dame Journal of Law, Ethics & Public Policy 85, 87.

indistinguishable from the utilitarian's concept of utility or happiness.[109] That said, Weinrib reasons that both wealth-maximization and utilitarianism are aggregative in that they favour the production of the highest total of whatever each respectively considers good; the sole difference between them lies in the way they specify the want-regarding maximand.[110] They therefore tread similar paths.

Posner, writing whilst in judicial office but extra-judicially, contends that when faced with difficult cases which require the exercise of substantial discretion, judges should exercise such discretion in accordance with the wealth maximisation principles.[111] He suggests that maximization combines elements of utilitarianism and individualism, and in so doing comes closer to being a consensus political philosophy than any other overarching political principle. He explains that wealth maximisation is indeed recognised and applied by law, albeit in a disguised fashion, on the basis that many invocations of fairness and justice, balancing and due process and other familiar principles or methods of judicial decision-making are proxies for wealth maximization.[112]

Good reasons would generally have to be prevalent for an uneconomic and inefficient result producing rule to be accepted.[113] The theory of law and economics therefore has efficiency at its forefront and drives to make law more economical and efficient. Coleman explains, relatedly, that economic efficiency is the theory of choice of legal theorists as compared with corrective justice in respect of the analysis of tort law, the former generally considered more persuasive or compelling by the legal community.[114] The economic analysis of the law and the general focus on efficiency is consequently of some relevance in respect of explaining the reasons behind certain rules and principles of customary international law, given the similarity between international law and tort law in respect of harms to persons.

The economic analysis of the law can be used to enable a better understanding of how the law works, or how it can be made to work to obtain specific goals. The former is the positive approach to economics; economic analysis is used to account for 'what is or has been or predict what will be'. The latter is the normative approach, which "*evaluates the desirability of acts, rules, policies, projects, etc., solely according to their outcomes*".[115] It attempts to change the world by making the law a more efficient tool for regulating social behaviour.[116] This book will embody and concentrate to a greater extent on the normative approach to economics given the task at hand. Mercuro and Medema explain that the assumption that economic agents are rational maximizers, that is, they make purposeful choices so as to pursue consistent ends using efficient means, stands as a cornerstone of modern economic theory.[117] They explain that the idea that individuals are rational maximizers implies that they respond to price incentives.[118]

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[109] ibid 119.
[110] Ernest J. Weinrib, 'Utilitarianism, Economics, and Legal Theory' (1980) 30(3) The University of Toronto Law Journal 307, 310.
[111] Posner, Wealth Maximisation (n 108) 104.
[112] ibid.
[113] See, for instance, Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169.
[114] Coleman (n 82) 18-19.
[115] Eyal Zamir and Barak Medina, *Law, Economics, and Morality* (OUP 2010), 12.
[116] ibid. See also Smits (n 28) 23.
[117] Nicholas Mercuro and Steven G. Medema, *Economics and the Law* (Princeton University Press, 2006), 102.
[118] ibid 104.

Accordingly, as within the legal arena legal rules establish prices, such as fines, community service and incarceration, for engaging in various types of illegal behaviour, the rational maximizer will compare the benefits of each additional unit of illegal activity with the costs, where the costs are weighted by the probability of detection and conviction, and act accordingly.[119] Where one wishes to reduce the amount of such (illegal etc.) activities, they explain that one could simply raise their price through the imposition of higher fines or greater jail time by an amount sufficient to induce the desired degree of behavioural change.[120]

The economic analysis of the law is therefore of relevance to the present book not only because of its ability to explain the wealth maximising and efficiency focus of individuals and firms, but also, and rather more importantly, given its ability to dictate the economic value of legal rules and how certain acts and conduct may be incentivised via value designation in respect of such rules. In respect of the former, the rationale of the economic analysis of the law can be used to guide the approach to host state counterclaims for moral damages in light of the desire to achieve economic efficiency and wealth maximisation. For instance, sitting under the umbrella of law and economics is the rational choice concept, regarded as being one of the most vital concepts underlying the economic analysis of law. The concept seeks to explain why exactly states choose to comply with their international law obligations. A central presupposition of economic reasoning is that rational individuals (and states) will act strategically to maximise their utility on the basis of a set of preferences.[121] Guzman explains, relatedly, that compliance by states with their international law obligations is assured with, what he calls, the "*Three Rs*": reputation, reciprocity and retaliation. He argues that states may have an added incentive to comply with international law were the costs of violation increased. As to the latter, the economic analysis of the law will be useful in assisting determine and/or set the ground-rules in respect of moral damages valuation in an effort to deter treaty breaches and incentivise treaty-compliant conduct by host states. This book will also explore, connectedly with the theory of law and economics, the ways in which investment arbitration could be made more efficient and economical, both in terms of the rules applicable, as well as in respect of the procedure and the outcome. The endeavour will hopefully assist in the effort to ensure the ongoing existence of the investment arbitration framework given the fierce legitimacy crisis it faces.[122]

[119] ibid.
[120] ibid.
[121] See Andrea Bianchi, *International Law of Theories* (OUP 2016), 272. See also Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008).
[122] See Thomas H. Webster, 'Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues' (2009) 25(4) Arbitration International 469; David Collins, 'The line of equilibrium: improving the legitimacy of investment treaty arbitration through the application of the WTO's general exceptions' (2016) 32(4) Arbitration International 575. See also Malcolm Langford, Cosette D. Creamer and Daniel Behn, 'Regime Responsiveness in International Economic Disputes' in Szilard Gaspar-Szilagyi, Daniel Behn and Malcom Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020), 245 and 267 *et seq*.

CHAPTER 2

Jurisdiction *Rationae Personae* over Moral Damages Claims

§2.01 INTRODUCTION

Ratione personae, in the present context, relates to whether a person may be permitted to raise a claim and be party to investment proceedings. Accordingly, it directs itself to consider the jurisdiction of an arbitral tribunal over a person.[123] If the arbitral tribunal's jurisdiction *ratione personae* is in the negative, the claim will usually need to be dismissed for lack of jurisdiction.[124] In the context, it refers to the jurisdiction of an arbitral tribunal over a party to the dispute in respect of moral damages claims. In *Abaclat*, the tribunal sought to explain the concept in general terms as follows:

> *[…] this section will deal with the question of the Tribunal's jurisdiction over the claims… [A]fter dealing with the nature of the dispute and examining whether it arises out of the BIT ((2)) and relates to an "investment" (jurisdiction rationae materiae) ((3)), the Tribunal will address relevant issues of nationality, capacity and characteristics of the Parties involved (jurisdiction rationae personae) ((4)), before examining the existence and scope of Claimants' and then Argentina's consent.*[125]

Ratione personae jurisdiction is therefore a pre-requisite to an arbitral tribunal's jurisdiction and ability to rule on substantive matters, including in respect of moral damages claims. To determine whether the arbitral tribunal possesses the requisite jurisdiction, one must consider whether the relevant person is a true beneficiary of the rights and protections made available by the applicable investment treaty. If affirmative, the issue for determination then is whether there has been a violation of such rights and protections, causing moral harm. The Aristotelian theory of corrective justice dictates that where one has violated the rights of another, the wrongdoer must be obliged to "*restore to the victim the amount representing [its] self-enrichment at the victim's expense*".[126] It accordingly requires the equality of quantities, focusing on a quantity that represents what rightfully belongs to one party but is now wrongfully possessed by another party.[127] The requirement focused on wrongful possession emphasises the importance of wrongful acts and that the principles of corrective justice are triggered only in instances where the loss complained of arises from a wrongful act committed.[128]

The claim for moral damages must accordingly be brought against the person, entity or institution that is responsible for the loss in question. Coleman terms this as 'correlativity',

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[123] See, for instance, *Bernhard Friedrich Arnd Rudiger von Pezold et. al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, [205], [225]-[226].
[124]United Nations Conference on Trade and Development, 'International Centre for Settlement of Investment Disputes - 2.4 Requirements Ratione Personae' (2003) <http://unctad.org/en/docs/edmmisc232add3_en.pdf> accessed 2 April 2021.
[125] *Abaclat and Others v. The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.
[126] Weinrib, Corrective Justice (n 77) 409.
[127] ibid 408. See also Coleman (n 82).
[128] Coleman (n 82) 18.

explaining that claims of corrective justice are limited or restricted to parties who bear some normatively important relationship to one another.[129] That said, legal theories and statements are often easier put on paper than applied in practice.[130] This difficulty equally applies with some force in respect of *ratione personae* in the context of moral damages claims in investment arbitrations. There is some debate and difference in opinion between scholars, and also amongst arbitrators, as regards entitlement to raise moral damages claims. There is therefore a need for a thorough analysis of the law and practice on entitlement to moral damages in investment law. This is a much-needed scrutiny given the paramount importance matters of jurisdiction have on cases and the consequences that follow from non-compliance. This chimes with the fact that jurisdictional objections are becoming the norm in investment arbitrations.[131] Lalive notes, for instance, that "*it is unlikely that the tendency of States or Governments to object to arbitral jurisdiction will diminish*".[132] This is a clear warning to those representing investors, as well as those representing host states where relevant, to ensure that the claim raised falls within the four corners of the arbitral tribunal's jurisdiction, as much as is possible in the circumstances. The remainder of this chapter will therefore seek to consider and analyse investment awards and scholarly opinions concerning *rationae personae* jurisdiction in the context of investment arbitration and moral damages claims. With that aim in mind, this chapter considers separately moral damages claims by investors and by host states, each sub-divided as necessary to deal with the relevant issues.

§2.02 INVESTOR MORAL DAMAGES CLAIMS

Given the power imbalance, it is unsurprising that moral damages claimants are generally foreign investors, not host states. Investors are more prone to suffering moral harm at the hands of mighty governments and their political machinery, given the vertical nature of the relationship. Simply put, the parties are on an unequal footing and host states usually enjoy an elevated position in the relationship.[133] A further reason why investors are often the claimants in respect of moral damages claims in investment cases is connected with the provisions of investment treaties. Investment treaties often contain wording aimed to protect investor interests, and make no or little mention of protecting host state interests.[134] This is understandable given that investment treaties aim the attraction of foreign investments and, therefore, contain incentives for investing in foreign states.[135] The wording of investment

[129] ibid 26. See also Hedley (n 90).
[130] Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2009), 211.
[131] See Pierre Lalive, 'Some Objections to Jurisdiction in Investor-State Arbitration' in A.J. van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer 2003).
[132] ibid 376.
[133] See Ina Popova and Fiona Poon, 'From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties' (2015) 2(2) BCDR International Arbitration Review 223.
[134] See Ingeborg Schwenzer and Pascal Hachem, 'Moral Damages in International Investment Arbitration' in Stefan Kroll et al. (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer 2011).
[135] See Gloria Maria Alvarez et al., 'A Response to the Criticism against ISDS by EFILA', (2016) 33(1) Journal of International Arbitration 1, 2.

treaties are therefore, at first sight, not as amenable to host state claims, including claims for moral damages.[136]

The availability of moral damages to investors may depend on whether the investor is an individual acting in its personal capacity or a corporation, acting through its agents, executives and employees. Different legal rules and principles come into play depending on the characteristic of the investor. For instance, natural persons are said to be capable of experiencing pain and suffering, whereas such may not always be the case for corporate investors. This point was eloquently, though bluntly, expressed by Lord Reid in *Rubber Improvements*, a non-investment case, where his Lordship opined that "*a company cannot be injured in its feelings, it can only be injured in its pocket*".[137] Though not a case concerning international investment law, the remark nevertheless carries some force. There is some truth in it. What drives corporations is their ultimate desire to increase financial gain to the extent possible, and their legal personality is essentially nothing more than an invention by bright legal minds, principally to assist in the endeavour to maximise profits and protect investors from personal liability.[138] This is all the more relevant and acute given that, although investments by natural persons are not uncommon, in the majority of cases investments in foreign states are realised through corporations.[139] The tax advantages available to corporations and the possibility of more efficient management through corporate management structures are some of the possible reasons why this may be the case.

For the above reasons, a separate analysis is called for in respect of moral damages claims made by natural person investors [A] and corporate investors [B]. The relevance and possibility of claiming for moral harm suffered by the employees and executives of investors, whether natural persons or corporations, will also be considered in this chapter for fullness of analysis [C].

[A] Moral damages suffered by natural persons

As explained above, in the great majority of cases investments in foreign jurisdictions are realised through corporations. However, that is not to say that investments by natural persons in their personal capacity is uncommon. For instance, in *Lemire*[140] the investor was a US national, a Mr. Joseph Charles Lemire, who had commenced proceedings against Ukraine for violation of substantive protections made available under the US-Ukrainian BIT and who had also claimed for moral damages, though the claim for moral damages was dismissed on other grounds.[141] Similarly, the ICSID tribunal in *von Pezold* recently granted a claim for moral damages and awarded USD 1 million to a dual German and Swiss national investor, a

[136] See below under section §2.03.
[137] *Rubber Improvements Ltd and Another v Daily Telegraph Ltd* [1964] AC 234 (HL), 262.
[138] See, for instance, *Salomon v Salomon & Co Ltd* [1897] AC 22; Simon P. Ville, 'Judging Salomon: Corporate Personality and the Growth of British Capitalism in a Comparative Perspective' (1999) 27(2) Federal Law Review 203.
[139] Merryl Lawry-White, 'Are moral damages an exceptional case?' (2012) 15(6) International Arbitration Law Review 236, 239. See also Muthucumaraswamy Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International 2000), 8.
[140] *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011.
[141] The *Lemire* award will be considered further in greater detail in Chapter 4 below.

Mr. Heinrich von Pezold, who had brought his claim, together with other natural person claimants, under the German-Zimbabwean and Swiss-Zimbabwean BITs.[142] This section will accordingly consider whether natural persons have an entitlement to moral damages in respect of their investments and, relatedly, whether the arbitral tribunal would have jurisdiction over such individual investors' claims.

Moral harm is naturally more associated with individuals than with corporations. The various attempts to define the concept and list out the possible types of moral harm one may suffer, such as those undertaken by investment tribunals and scholars, is suggestive of this. An example is the award of the US-German Claims Commission in *Lusitania*, which concerned the sinking by a German submarine of the British ocean liner Lusitania in May 1915, i.e., during the period of US neutrality, off the coast of Ireland, causing the death of 128 US nationals, with 69 survivors. Germany had assumed liability in early 1916, so the Commission's focus was to assess and rule on Germany's obligation to compensate the US for the loss suffered by its nationals. In its award, the Commission explained:

> *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 a penalty.*[143]

Wittich also attempts to define moral harm, somewhat more extensively, as follows:

> *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'.*[144]

To dissect the rather comprehensive attempt by Wittich to define moral harm, its first three parts seemingly demonstrates the accuracy of the above proposition, i.e., moral harm is more associated with natural persons than it is with corporations. The types of moral harm

[142] *von Pezold* (n 123).
[143] *Lusitania* (n 3) 40.
[144] Stephan Wittich, 'Non-Material Damage and Monetary Reparation in International Law', (2004) 15 Finnish Yearbook of International Law 321, 329-330.

specified above appear mostly to be relevant and sufferable only by individuals.[145] For instance, it would be rather difficult for a corporation to argue successfully that, due to an illegal act, it suffered "*mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock*". Similarly, any harm suffered by a corporation would usually (though not always) result in an economic loss. The various forms of emotional harm listed also would be unlikely suffered by corporations, with the exception of injury to reputation, but again some monetary value would often be possible to attribute to that injury. Although the final part of the definition, i.e., minor consequences of a wrongful act, could equally apply in respect of corporations, this arguably does not alter the fact that moral harm is more to do with natural persons than it is with corporations. It is therefore widely accepted that, conceptually speaking, moral damages are inherently more associated with natural persons than with corporations.[146] For fullness, the extract from the *Lusitania* award too seemingly confirms this view.

In support of the above, in their attempt to non-exhaustively list various forms of moral harm, Altwicker-Hamori et al. explain that "*non-pecuniary, immaterial damage… is the trauma, anxiety, anger, etc. coming with the attack on human dignity, the loss of trust in state institutions, the loss of beloved persons, the mental and physical pain lasting after torture, imprisonment, censorship, separation from family members, and so on.*"[147] This too is suggestive of an understanding and acceptance that moral harm is more closely associated with natural persons. Coriell and Marchili expressly concur with this view, noting that "*the specific types of damages involved—pain and suffering, psychological damages, emotional damages, and the like—usually are the result of harm against a natural person rather than against a legal entity like a corporation.*"[148]

Accordingly, in circumstances where the arbitral tribunal has jurisdiction to determine moral damages claims in light of the applicable treaty and the applicable legal requirements are satisfied,[149] the tribunal should have little hesitation in awarding such damages to natural person investors. This is of course subject to the terms of the applicable investment treaty. An arbitral tribunal's jurisdiction is founded, principally, on the terms of the treaty that allows the claim to be commenced in the first place.

Often investment treaties contain restrictions and requirements applicable to natural persons. Where that is the case, they need to be complied with. For instance, the Colombian 2011 Model BIT[150] provides that it does not apply to investments made by natural persons

[145] See Bernd Ehle and Martin Dawidowicz, 'Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation' in Jorge A. Huerta-Goldman et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International 2013), 293.
[146] Marc Allepuz, 'Moral Damages in International Investment Arbitration' (2013) 17(5) Spanish Arbitration Review 5, 11.
[147] Szilvia Altwicker-Hamori, Tilmann Altwicker and Anne Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights' (2016) 76 Heidelberg Journal of International Law 1, 7-8.
[148] Wade M. Coriell and Silvia M. Marchili, 'Unexceptional Circumstances: Moral Damages in International Investment Law' in Ian A. Laird and Todd J. Weiler (eds), *Investment Treaty Arbitration and International Law* (Juris 2010), 213, 215.
[149] See Chapters 3 and 4 below.
[150] Colombia 2011 Model BIT, Article 1(2), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3559/download> accessed 2 April 2021; similarly, the Colombia 2017 Model BIT excludes, *inter alia*, natural persons who are nationals of both contracting parties from being considered a "National" and, thus, a "Covered Investor" under the BIT, see: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6082/download> accessed 2 April 2021; *cf* Article 1 of US Model 2012 BIT, which provides that '*a natural person*

who are nationals of both contracting states. This is a requirement, by its nature, likely to apply only to natural persons. For instance and relatedly, in a recent decision the Paris Court of Appeal set aside a jurisdictional award rendered by an UNCITRAL tribunal in 2014 under the Spanish-Venezuelan BIT, on the basis that the claimant investors (dual Spanish-Venezuelan nationals) were not nationals of the home state (Spain) at the time they made their initial investments in Venezuela (host state).[151]

[B] Moral damages suffered by corporations

As alluded to above, it is comparatively more difficult, on its face, for corporations to suffer moral harm. Emanating from the fact that corporations are creatures of the law and that, therefore, they are incapable of 'personally' suffering moral harm in a way that does not adversely impact their finances, their entitlement to seek moral damages has been subject to rigorous debate.[152] The contention that corporate investors should not be entitled to moral damages relies on the understanding that they are incapable of suffering moral harm and that whatever harm they may suffer due to a legal wrong, it can always be attached a financial value, which would call for material damages. However, certain scholars disagree with this line of reasoning. This section will explore and analyse both sides of the argument. The principal contention put forward by scholars to dismiss the recoverability of moral damages by corporate investors is that corporations are, by their nature, incapable of suffering moral harm in the sense commonly understood. It is said that all harm that is potentially sufferable by corporations can be attached some monetary value. An assessment of damages suffered by corporations due to investment protection violations usually involve an assessment of the fair market value of the corporation and such, in most cases, would include any adverse impact on the goodwill and reputation of the corporation. In other words, the impact of moral harm suffered by a corporation will, almost always, penetrate into the fair market value assessment, which would make a separate award of damages for moral harm unnecessary and duplicative. This is the main pillar scholars rely on to counter any argument for the availability of moral damages to corporate investors.[153] Ehle, for instance, notes that "*compensable moral damage most often arises from a violation of the personality rights of natural persons…[and that such]…cannot normally be sustained by corporations or States.*"[154]

who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality', <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 2 April 2021.

[151] Cosmo Sanderson and Sebastien Perry, 'Dual nationals' award against Venezuela set aside' (*Global Arbitration Review*, 3 June 2020) <https://globalarbitrationreview.com/dual-nationals-award-against-venezuela-set-aside> accessed 2 April 2021. See also *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

[152] See Ehle (n 145) 313-314.

[153] See Stephen Jagusch and Thomas Sebastian, 'Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?' (2013) 29(1) Arbitration International 45, 56-57; Inna Uchkunova and Oleg Temnikov, 'The Availability of Moral Damages to Investors and to Host States in ICSID Arbitration' (2015) 6(2) Journal of International Dispute Settlement 380, 402.

[154] See Ehle (n 145) 318.

Scholars are not alone in their doubts as to the permissibility of moral damages claims by corporations. Arbitral tribunals considering investment law issues have also approached the issue with a negative eye. For instance, the tribunal in *Rompetrol* expressed that it was "*firmly of the view that 'moral damages' cannot be admitted as a proxy for the inability to prove actual economic damage*".[155] That was a case where a Dutch company, incorporated by a Romanian national, had acquired shares in Rompetrol, the second largest State-owned company in Romania.[156] The dispute arose out of investigations commenced in May 2004 by the National Anti-Corruption Office of Romania. The executive of the investor, the Romanian national who had incorporated it in The Netherlands, was briefly detained in May 2005. The claimant investor contended that the investigations were oppressive and in breach of the treatment to which its investment was entitled.[157] The investor made a claim for moral damages. The tribunal reasoned as follows in respect of that claim:

> *[…] reputational damage to a protected foreign investor is a perfectly conceivable consequence of unlawful conduct by the State of the investment, and if so is likely to show itself, for example, in increased financing costs, and possibly other transactional costs as well. But the Tribunal regards that as just another example of actual economic loss or damage, which is subject to the usual rules of proof. To resort instead to a purely discretionary award of moral solace would be to subvert the burden of proof and the rules of evidence, and that the Tribunal is not prepared to do.*[158]

The tribunal seems to have disregarded completely injury to reputation as a possible head of moral damage. This is seemingly on the basis that reputational damage will likely materialise itself in material loss. However, the reasoning overlooks cases where that may not be the case and where the harm to reputation cannot be established by evidence. Although the tribunal's reasoning is somewhat natural, it is probably an unnecessary and uncalled for leap to describe moral damages entitlement as "*purely discretionary*". Where there is moral harm by an investor, there must be a remedy. There may be instances where a moral harm is incapable of quantification and justice may require that the wrong be corrected through a moral damages award. The tribunal's approach not only evidences a divergence from the settled position under customary international law that harm caused by an internationally wrongful act must be fully compensated, regardless of whether the harm is material or moral,[159] but it also disregards the necessity of correcting the injustice caused. The theory of corrective justice, considered as the "*normative structure that underlies the private law relationship*",[160] requires that every harm caused by a wrongful act must be compensated for. The wrongdoer must restore to the victim the amount representing its self-enrichment at the

[155] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, [293].
[156] The deails of the complex corporate structure employed have been omitted so as not to cause an unnecessary deviation from the topic of discussion. For the details of such complex corporate structure, see *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, [32]-[43].
[157] The investigations were still ongoing in 2008 when the tribunal had rendered its Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility ([48]).
[158] *Rompetrol*, Award (n 155) [289].
[159] See Chapter 3 below.
[160] Weinrib, Corrective Justice (n 77) 403-404.

victim's expense.[161] Ruling out moral damages claims in respect of corporate claimants entirely is likely to result in cases where harm inflicted goes unpunished.

There are other arbitral tribunals who have expressed a more positive view in respect of the availability of and entitlement to moral damages by corporations in investment cases. In *Desert Line*,[162] the first publicly known ICSID case where an award of moral damages was made under a modern investment treaty,[163] the tribunal held that corporate investors are entitled to moral damages in investor-state arbitrations. The tribunal, in doing so, granted the corporate investor's claim for moral damages with respect to moral harm to its executives and harm to its reputation. The tribunal reasoned that it is "*generally recognized that a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances only*".[164] This seemingly contradicts openly with the approach taken by the tribunal in *Rompetrol*. However, subsequent cases have shown a preference for the *Desert Line* approach. For instance, in *von Pezold*, a more recent ICSID case, the tribunal expressly approved and followed the *Desert Line* tribunal's reasoning and conclusions to the letter, and similarly awarded the corporate claimants USD 1 million in the form of moral damages.[165]

The tribunal in *Desert Line* did not clarify what exactly would constitute the "*specific circumstances*" referred to, but the fact that the "*prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation*" was seemingly influential in moral damages being awarded.[166] This is understandable as tribunals need to retain some level of discretion and flexibility to be able to make moral damages awards only in the appropriate cases, mostly where the harm to reputation cannot be quantified in the usual way. In keeping with the tribunal's positive attitude in *Desert Line*, many scholars have heavily criticised the linguistic approach to determining corporate investors' entitlement to moral damages. They argue against there being an automatic restriction to their entitlement to moral damages.[167] The scholars do indeed recognise the risk associated with double counting, i.e., possibly compensating twice for the same loss through a material damages award and a moral damages award. However, they advocate for caution and proper scrutiny of claims, as opposed to an outright restriction on moral damages claims by corporations, to avoid any double counting.[168] It is incumbent on the arbitrators to ensure that they are not over-compensating the loss sustained when awarding both material and moral damages.

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[161] ibid 409.
[162] *Desert Line* (n 1).
[163] Jennifer Cabrera, 'Moral Damages in Investment Arbitration and Public International Law' in Ian A. Laird and Todd J. Weiler (eds), *Investment Treaty Arbitration and International Law - Volume 3* (Juris 2010), 197; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007), 447 [9.147].
[164] *Desert Line* (n 1) [289].
[165] *von Pezold* (n 123) [911]-[917].
[166] *Desert Line* (n 1) [290].
[167] See Patrick 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, 227-229; Ehle (n 145); Coriell (n 148) 224.
[168] See Lars Markert and Elisa Freiburg, 'Moral Damages in International Investment Disputes – On the Search for a Legal Basis and Guiding Principles' (2013) 14(1) The Journal of World Investment & Trade 1, 37-38.

The scholars advocating for corporations' ability to seek moral damages differ, however, in their reasoning. One view is that domestic laws usually make no distinction between individuals and corporations on the recoverability of moral damages, and that there are no good reasons to adopt different set of rules in the investment law context.[169] Absent any special reasons why a different regime should be applied in investor-state arbitrations, it is argued that, as a rule, corporate investors should be able to seek moral damages. In this respect, it should be noted that there are calls for greater resort to be made to cross-fertilization, i.e., established national and international laws and rules being used as a source of inspiration in the context of investment law.[170] Ehle, for instance, notes that in at least six investment arbitration cases, foreign investors requested moral damages on a contractual basis where the law applicable was the national law of the host state. On that basis, he says that such suggests that cross-fertilization between commercial and investment arbitration is both possible and appropriate in relation to monetary and non-monetary relief (in the form of a declaration of wrongfulness) for personal injury, loss of reputation and abuse of process.[171]

Another view is that corporations are now the main beneficiaries of investor-state arbitration and that a blanket ban on their entitlement to moral damages would give the host state a *carte blanche* to cause moral harm. For instance, Sabahi notes that in modern practice of investment arbitration corporations have become the main users of the dispute settlement mechanisms of investment treaties.[172] This is because investments are now mainly made by corporations, as opposed to natural persons.[173] If they are barred from seeking moral damages such would almost equate to the exclusion of moral damages in investor-state arbitration.

The arguments against granting corporations the right to seek moral damages may have some force from a purely legalistic view, but in an age of globalisation and where conduct of business through corporations has become the norm, it would appear most inappropriate to adopt such an exclusionary rule. The law exists to regulate social behaviour and should therefore evolve to reflect the needs of society. Accordingly, a purely (excessively) legalistic approach may be inappropriate and unduly technical. More importantly, the law exists to right wrongs and protect one's dignity. The Aristotelian theory of corrective justice explains that every wrong must be corrected by a counter action.[174] There must be an equality of quantities; where one wrongfully harms another, the wrongdoer must compensate the victim's loss.[175] Additionally, it would be the cause of economic

[169] Patrick Dumberry, 'Compensation for Moral Damages in Investor-State Arbitration Disputes' (2010) 27(3) Journal of International Arbitration 247, 265-266; Jagusch (n 153) 53-54.
[170] See Matthew T. Parish, Annalise K. Newlson and Charles B. Rosenberg, 'Awarding Moral Damages to Respondent States in Investment Arbitration' (2011) 29 Berkeley Journal of International Law 225, 227; Ehle (n 145) 318; Lawry-White (n 139) 246.
[171] Ehle (n 145) 318-319.
[172] Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (OUP 2011), 139. See also Lawry-White (n 139) 239.
[173] Christoph H. Schreuer, *The ICSID Convention - A Commentary* (2nd edn, Cambridge University Press 2009), 640; Schwenzer (n 134) 421. See also Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010), 61.
[174] See Weinrib, Corrective Justice (n 77).
[175] ibid 408-409.

inefficiency if corporate investor moral damages claims were not recognised, forcing the investors to separately seek moral damages before local courts. Duplicating the effort and financial resources needed to resolve disputes arising from identical or similar set of facts would very likely result in economic inefficiency, as well as in possible inconsistency of decisions. Any rational, wealth maximising person is likely to see the economic benefits of facilitating the resolution of disputes via a single venue so far as is possible and permitted.[176]

Moral damages therefore need to be made available to corporate investors where appropriate, so that host states are not handed an open-ended liberty to abuse legal obligations assumed and cause moral harm as a result, escaping from what must be the natural consequence to compensate. Where it is clear that the extent of a state's liability will never extend beyond the material damage sustained by the corporate investor, which claims may in certain cases fail purely on evidential or formalistic grounds, the state may be more tempted to breach its treaty obligations. There should not be such an incentive. Any such abuses of the investment treaty framework ought to be forcefully discouraged. Sabahi recognises, though indirectly, such inherent risk and notes that the exclusion of moral damages with respect to corporations purely for technical reasons would leave certain types of breaches that may result in moral damages without a remedy. This is because, most likely, the investor's only course of action may be a moral damages claim before the host state's domestic courts in accordance with its domestic laws. Leaving to one side whether the domestic laws would, as a matter of law, be amenable to such claims, the independence and impartiality of the state judges would, in most cases, certainly be open to question.[177] This again reinforces the understanding that wrongs may go unpunished and harms uncompensated should corporations not be granted the right to seek moral damages.

Further support for legal persons' entitlement to moral damages may be found in the jurisprudence of the ECtHR. In their empirical analysis of ECtHR awards concerning non-pecuniary damage (i.e., moral damage), Altwicker-Hamori et al. explain that the ECtHR has made non-pecuniary damage awards to legal persons despite their inability to feel anxiety or distress, on the basis that "*what matters is that non-pecuniary damage has been inflicted on the natural persons behind or mediated by the legal entity*".[178] They further note that the ECtHR's justification for such awards are often reliant on the company's reputation, the uncertainty in decision-making, management disruptions and, most notably, "*anxiety and inconvenience caused to the members of the management team*".[179] It is difficult to see why different compensation rules should apply in investment and human rights cases, given both regimes work towards the same overall objective.[180]

In light of the above, it would seem that there is certainly a case to be made in respect of permitting moral damages claims by corporate investors. A blanket ban on such claims risks jeopardising the ultimate purpose behind the execution of investment treaties, i.e., the

[176] See Perez (n 103); Posner, Economic Analysis of Law (n 105); Posner, Rational Choice (n 106); Posner, Wealth Maximisation (n 108); Mercuro (n 117).
[177] Sabahi (n 172) 139.
[178] Altwicker-Hamori (n 147) 16.
[179] ibid.
[180] Conway Blake, 'Moral Damages in Investment Arbitration: A Role for Human Rights?' (2012) 3(2) Journal of International Dispute Settlement 371, 407.

promotion and protection of investors and their investments, as well as preparing the groundwork for an unjust society in which wrongs are left unpunished and the victim unremedied. Host states may be tempted to breach their treaty obligations where they consider that their breach(es) would only attract the obligation to compensate the investor's material damages, which in certain cases may position the host state financially in the same position it would have been had it complied with its treaty obligations, or in an even more desirable or advantageous position.

[C] Moral damages suffered by investors' employees

The actions of host states may also morally harm the investors' employees and executives. This gives rise to thorny issues in respect of recoverability in the context of an investment treaty. Investment treaties generally protect investors and their investments. It is not entirely clear whether the latter part would include employees. A starting point may be the decision in the *Chorzów* case, a most celebrated and leading case on damages for breach of international law obligations. The tribunal in that case enunciated the following general rule:

> *On approaching this question, it should first be observed that, in estimating the damage caused by an unlawful act, only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible.*[181]

This dictates that an assessment of damages should exclude injury to third parties. It is clear from the above passage that this is "*accepted in the jurisprudence of arbitral tribunals*". In fact, this is unsurprising. A claimant should be permitted to claim only for its own losses due to an alleged breach. This is termed as the principle of correlativity by the proponents of corrective justice.[182] Corrective justice dictates that the obligation to compensate arises in respect of and is limited or restricted to parties who bear some normatively important relationship to one another.[183] However, in certain situations the line becomes blurred and it is difficult to adopt a determinative approach. Moral harm suffered by an investor's employees and executives could fall on either side of that line. This precise issue fell for consideration in *Desert Line*,[184] where the investor's employees and executives were subjected to threats and attacks by the Yemeni army and militia. There the tribunal held

[181] *Chorzów* (n 4) 31.
[182] Coleman (n 82) 26.
[183] ibid; Hedley (n 90).
[184] *Desert Line* (n 1).

Yemen liable for moral damages caused to the investor's executives. The tribunal reasoned as follows:

> *The Arbitral Tribunal finds that the violation of the BIT by the Respondent, in particular the physical duress exerted on the executives of the Claimant, was malicious and is therefore constitutive of a fault-based liability. Therefore, the Respondent shall be liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature. The Arbitral Tribunal agrees with the Claimant that its prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation.*[185]

This is a landmark and ground-breaking case in the investment arbitration framework. It is the first publicly reported case where an investor's moral damages claim founded on a BIT, which did not expressly permit moral damages claims but equally did not expressly exclude such, was upheld.[186] Further, and relatedly, the award expressly notes that the "*physical duress exerted on the executives of the Claimant*" was considered relevant for the purposes of the moral damages award. However, much remains uncertain as to the implications of the *Desert Line* award. It is unclear whether the award requires a relaxation of the rules on recoverability of damages sustained by third parties, extending to moral harm suffered by employees and executives. This is unlikely to be the case. The *Desert Line* tribunal's formulation does not lend itself to the conclusion. It is clear that the tribunal considered the acts aimed at the investor's employees to adversely affect the investor, and that is the basis on which the moral damages award was seemingly made. The reference to the "*injury suffered by the [investor]*" supports this reasoning. Further, this issue does not seem to have been considered at sufficient length by the tribunal. The tribunal's remarks therefore need to be approached with caution. The unusual and peculiar facts of that case and its impact on the tribunal's reasoning should also be factored into any such analysis. Otherwise it would essentially mean an express divergence from the established principle, as enunciated in the *Chorzów* case, that an assessment of damages should exclude injury to third parties. Although theories of economic efficiency (i.e., law and economics) and corrective justice may dictate that such claims should ideally also be considered by the same tribunal, they stand unconvincing given the express rule-out of third party losses under well-settled international law principles. In any event, justice is theoretically possible for the employees of the investor via domestic judicial means.

That said, the ICSID tribunal in *von Pezold* seems to have preferred and expressly approved the interpretation that sits rather at odds with the principle of international law that the claimant can only claim for the losses it has suffered. Adopting a "*pragmatic solution to an unappealing situation*" the tribunal held that "*it is appropriate that staff members of a company have recourse to competent, fair tribunals that can reflect the consequences of their poor treatment in an award of moral damages in favour of their employer.*"[187] What is even more surprising is that the tribunal accepted that "*[O]n a strict legal approach, a tribunal would not have jurisdiction to make an award to the physical persons as their claim would*

[185] ibid [290].
[186] Uchkunova (n 153) 383.
[187] *von Pezold* (n 123) [915]-[916].

not concern an "investment"".[188] In other words, the tribunal ventured on making a moral damages award despite conceding that on a "*strict legal approach*" it lacked the jurisdiction to do so. It is also questionable whether the award of moral damages in favour of the company benefitted the employees in any way. If not, such risks over compensating the employer. The reasoning in the award will most certainly set alarm bells ringing for those fearing the fragmentation of international law, and may strengthen the need for convergence of the various disciplines of international law, including international investment law. The adoption of conflicting approaches to the determination of investment claims will likely give rise to uncertainty and unpredictability, putting to question the coherence of international law and possibly resulting in a loss of trust in the international legal order.[189]

There is, unsurprisingly, a lack of unanimity between scholars as to the principle to apply in cases where the investor's employees or executives suffer moral harm due to unlawful acts of the host state. For instance, Uchkunova and Temnikov, regard permitting moral damages claims by corporate investors with respect to moral harm suffered by their employees as being questionable.[190] They consider such to grant corporate investors a broad licence to present moral damages claims. In this respect, they question the accuracy of the tribunal's ruling in *Desert Line*[191], where the investor was permitted to recover moral damages for harm to credit and reputation, as well as with respect to actions against its employees (physical duress) as a whole sum.[192] To support their contention, Uchkunova and Temnikov refer to the arbitral tribunal's award in *Bogdanov*, where it had been held that "*[M]oral damages may be awarded only for personal damage to an individual, not for damage inflicted to a juridical person*".[193] They seek to explain the approach adopted in *Desert Line* by reference to the possible (inaccurate) influence of *Benvenuti and Bonfant*,[194] where moral damages had been awarded for disturbance to the company's activities, not the forced departure of the investor and its employees.[195]

Uchkunova and Temnikov also counter the proposition that employees' moral harm should be recoverable by investors on the basis that such may give rise to the risk of double recovery. They argue that natural persons on behalf of whom investors assert moral damages claims are always at liberty to sue the host state before local courts and obtain damages in their own name.[196] Allepuz agrees that investors should not be permitted to raise moral damages claims for harm suffered by employees, but on different grounds. He explains that the usual definition of the term investor under most BITs would not, in principle, include the

[188] ibid [915].
[189] See Greenwood, Unity (n 29); Koskenniemi (n 30); Andenas (n 28).
[190] Uchkunova (n 153) 383.
[191] ibid.
[192] *Desert Line* (n 1) [289].
[193] *Yury Bogdanov v Republic of Moldova*, SCC Arbitration No V (114/2009), [61].
[194] *SARL Benvenuti & Bonfant v People's Republic of the Congo*, ICSID Case No ARB/77/2, Award, 8 August 1980.
[195] Uchkunova (n 153). Note that there is an error in Uchkunova and Temnikov's reference to the *Bogdanov* award. They treat the summary of the respondent state's objection to the investor's moral damages claim as the tribunal's opinion on the matter. The tribunal had in fact rejected the moral damages claim on the basis that the investor had not "*been able to demonstrate that he is entitled to such as a matter of Moldovan law*"; see *Yury Bogdanov* (n 193) [98]. Nevertheless, their analysis, admittedly, has some validity.
[196] Uchkunova (n 153) 384.

representatives of an investing company. He therefore reasons that a claim for moral damages filed in connection with that alleged breach would not be legally feasible.[197]

There is some degree of force in the arguments raised above. First, and foremost, absent express treaty wording, holding investor claims for moral harm sustained by employees valid may constitute a disregard for jurisdiction. The *von Pezold* tribunal was alive to the issue, but seemingly decided not to give it much weight.[198] This risks the unenforceability of the award rendered through a challenge or a motion to vacate. The conclusion is in direct conflict with and diverges from the requirements of customary international law, which governs such claims for moral damages, as was seemingly accepted by the *Desert Line* tribunal.[199] Relatedly, it should perhaps be noted that, due to widespread perception that arbitrators are exceeding their jurisdiction set out in investment treaties, states are opting for restrictive drafting of investment treaties. This is already reflected in certain states' updates to their model BITs. For instance, the Indian Model BIT of 2015[200] contains an express prohibition on punitive and moral damages. India is also known to advocate fiercely that a new and specially designed arbitration framework should be established to protect their regulatory and economic freedom, reasoning that India and other developing economies have been the victim of the inherent structural bias that prevails in the traditional frameworks of international arbitration, with great emphasis on the fact that certain tribunals have "*travelled beyond their mandates*".[201] Scholars emphasise that there are signs of "*a general legitimacy deficit in the regime*",[202] which perhaps remains largely untouched to this day given the lack of real alternatives to the current ISDS mechanism.[203] Arbitrators should therefore tread very carefully on issues that could call into question the legitimacy of their award and of the investment arbitration regime generally.

Schwenzer and Hachem also express support for the contention that treaties do not generally permit investor claims for harm suffered by their employees. They argue that the core aim of BITs, and other treaties concerning trade and investment, is the protection of the investor and its investment. Investors must therefore substantiate their own loss or damage.[204] As rightly noted by a different scholar, "*a claimant can only recover compensation for the loss suffered by itself, not by other persons*".[205] Consequently, Schwenzer and Hachem note that "*personality rights infringements sustained by the representatives of the investor may be subject of treaty arbitration, if this infringement at the same time affects the investment itself*".[206] They therefore find the awarding of moral damages to corporate investors for infringement of personality rights of employees and

[197] Allepuz (n 146) 7.
[198] *von Pezold* (n 123) [915].
[199] See *Desert Line* (n 1) [286] and [289].
[200] India 2015 Model BIT, Article 26.4 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> accessed 2 April 2021. The Colombia 2017 Model BIT similarly expressly prohibits the tribunal from awarding moral damages (page 21), see: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6082/download> accessed 2 April 2021.
[201] Dwivedi (n 23).
[202] Blake (n 180) 380. *Cf* Alvarez (n 135).
[203] See Rolf Knieper, 'Rethinking Investment Arbitration' (2015) 13(1) German Arbitration Journal (SchiedsVZ) 25.
[204] Schwenzer (n 134) 421-422.
[205] Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008), 311.
[206] Schwenzer (n 134) 421.

executives to be unconvincing.[207] On that basis, they find the conclusion in *Desert Line* to be "*only partly convincing*".[208] They agree to the extent the award relates to the effect of the breach on the investor's credit and reputation, although they opine that such could be remedied pursuant to the general law of damages, without resort to moral damages.[209] In support, Jagusch and Sebastian note that mental distress inflicted on employees can be the basis of an award of damages in favour of a corporation if it "*results in business interruption losses or additional expenses to the corporation*".[210] In other words, only to the extent the mental distress inflicted on the employees result in economic loss to the investor can a claim be made by such investor for moral (or other) damages. The scholars state that there is no need to use terminology associated with moral damages in such contexts given that what is being considered is actual material damage.[211]

There are scholars who stand on the other side of the fence and see some benefit of permitting moral damages claims by investors for harm suffered by their employees and executives. The main justification for this view is that it is necessary to achieve fairness and full compensation. Their arguments are therefore fuelled with the fire of corrective justice. The scholars explain that the outright dismissal of such claims will leave the employees and/or the investor without a choice, forcing them to commence separate proceedings before the host state's domestic courts.[212] In most cases, this would have limited prospects of success, for obvious reasons. Judges are more prone to bias and political pressure than arbitrators, the latter mostly (at least in majority) consisting of persons not nationals of host states in investment arbitrations. The very reason for the existence of the investment treaty regime is the perceived notion of lack of independence of state courts.[213] Indeed this point seems to have weighed heavily on the *von Pezold* tribunal's mind, given its comment in the award that "*the physical staff of the [corporate investor] would only ever be able to get relief through domestic courts, which… may be unable to provide justice*".[214]

Dumberry follows this line of reasoning. He concedes that an investor's executive or employee's claim will unlikely be considered an 'investment' within the meaning of most investment treaties. However, he maintains the view that, unless such claims are permitted, corporate executives would have no recourse to arbitration under the treaty to obtain redress for the harm suffered.[215] Article 1 of the Canadian 2014 Model BIT, which explains in detail what is regarded as an investment to qualify for the protections in the BIT and which makes no mention of the investor's employees or directors, can be pointed to in support.[216] For that reason, he considers the tribunal's approach in *Desert Line* 'sensible', which he anticipates

[207] ibid 423.
[208] ibid 422.
[209] ibid 423.
[210] Jagusch (n 153) 57.
[211] ibid.
[212] Dumberry, Compensation (n 169) 266. See also Jarrod Wong, 'The Misapprehension of Moral Damages in Investor-State Arbitration' in A.W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2012); Markert and Freiburg (n 168) 35-37.
[213] See Xavier Taton and Guillaume Croisant, 'Judicial Protection of Investors in the European Union: The Remedies Offered by Investment Arbitration, the European Convention on Human Rights and EU Law' (2018) VII(2) Indian Journal of Arbitration Law 61, 143.
[214] *von Pezold* (n 123) [915].
[215] Dumberry, Compensation (n 169) 266.
[216] Canada 2014 Model BIT, <https://www.italaw.com/sites/default/files/files/italaw8236.pdf> accessed 2 April 2021.

will be followed by other tribunals in the future.[217] Allepuz agrees, foreseeing future arbitral tribunals adopting the flexible approach outlined in *Desert Line*.[218] Their prediction seems to have proved correct so far given, for instance, the *von Pezold* tribunal's reasoning and conclusions, which award contains express references to Dumberry's writings, with approval.[219]

Wong also agrees that moral damages should be recoverable by investors with respect to moral harm of their employees and executives, but for different reasons. He suggests the adoption of subrogation principles. He reasons that as investors would potentially be liable towards their employees for failing to protect them in the course of their employment, such makes moral damages claims by corporate investors admissible.[220] This is because there is a (likely) material damage to which the investor can point. However, he does concede that his proposal may not be the perfect solution to the problem. Also noteworthy is that Wong does acknowledge that investors, strictly speaking, have no entitlement in bringing such a claim, noting the legally distinct personalities of investors and their employees and executives.[221] Relatedly, Wong dismisses resort to the doctrine of corporate espousal in the context,[222] a theory dictating that damage to an employee of a corporation should be considered as damage to the corporation itself. He finds this doctrinally problematic, an attempt to gloss over the distinct personalities of investors and their employees.[223]

To the extent they permit recoverability of moral damages in respect of harm to employees which does not have a direct impact on the investor, Wong and Dumberry's views seemingly advocate clear departure from the purpose and terms of investment treaties. Most notably, the views advocated would result in the further fragmentation of international law. As explained above, the rule under customary international law that compensation for loss cannot extend to the losses of third parties is clear and well established.[224] Adopting a different approach in respect of international investment law would cause uncertainty and unpredictability, and risk the coherence of the international legal order.[225] Further, the arguments based principally on fairness and correction of wrongs contain inherent weaknesses. First, the mere reason that moral harm suffered by employees would be uncompensated justifies investor claims for moral damages appears insufficient to justify the adoption of a rule that contradicts the very foundation and purpose of the investment arbitration framework, and divergence from the well-established rule of customary international law. As was explained in detail above, the aim sought by BITs is the protection of investments alone; not of third parties (i.e., employees), not even the interests of host states, unless the applicable treaty clearly provides otherwise.[226] The 'investment' definition in most BITs lead one to reach the same conclusion. Consequently, unless moral harm

[217] Dumberry, Compensation (n 169) 266.
[218] Allepuz (n 146) 8.
[219] *von Pezold* (n 123) [915].
[220] Wong (n 212) 31-32.
[221] ibid 31.
[222] For more, see Sabahi (n 172) 140.
[223] Wong (n 212) 31.
[224] See *Chorzów* (n 4).
[225] See Greenwood, Unity (n 29); Koskenniemi (n 30); Andenas (n 28).
[226] See Alvarez (n 135) 2.

sustained by employees somehow adversely effects the investors' investment (in which case a claim for material (or possibly moral) damage should be raised), arbitral tribunals should disregard moral damages claims brought by investors simply for harm to employees. To hold otherwise, would likely be an apparent disregard of jurisdiction.

Further, Wong's theory of subrogation makes certain assumptions, the fall of one capable of rendering his contention insupportable. For instance, the employee may not have a legitimate claim against the investor in connection with the moral harm suffered. The harm may simply not fall within the realm of liability of the employer in the applicable jurisdiction and/or under the relevant employment contract. Wong's theory could result in a scenario where the investor has a valid claim and succeeds against the host state, but is not obligated to hand over the compensation to the employee because the employee's claim (if any) against it fails for some reason, thereby resulting in over compensation for the investor. Jagusch and Sebastian further add, in support, that there is no guarantee that the employees would obtain any redress if the investor is awarded moral damages, expressing that such could involve a windfall benefit for the corporation.[227] In fact, Wong acknowledges the existence of the flaw in the argument; he concedes that "*[the approach] supposes that the injured employee will ultimately receive compensation*". For completeness, Wong states that it is unclear whether such was the case in *Desert Line*, or that the tribunal actually cared whether such was the case.[228]

Consequently, absent clear and unambiguous wording in the treaty, it would be most appropriate for arbitral tribunals to dismiss moral damages claims relating to harm sustained by employees for lack of jurisdiction. Failure to do so may create a chain of events that ultimately put the entirety of the investment arbitration framework at risk, with states losing trust in the system and taking counter-productive measures to eliminate such perceived risks. More importantly, the approach collides with the well-established principle of customary international law that third party losses are excluded from the equation, disregard of which furthers the fragmentation of international law, risking the existence and survivability of the international legal order. Adherence to the universally accepted and sacrosanct rule will assist in ensuring the consistency and predictability of international law, giving it continued legitimacy.

§2.03 HOST STATE MORAL DAMAGES CLAIMS

It is uncommon but not unheard of for host states to raise moral damages claims against foreign investors in investment proceedings commenced by the latter. The claim is usually brought by way of counterclaim. Whether host states should be permitted to bring such claims in investment proceedings commenced against them has attracted some commentary. Scholars are disunited in their opinions and suggested approach, calling for clarification.[229]

[227] Jagusch (n 153) 57. Note that although they were commentating on the doctrine of corporate espousal, the argument nevertheless remains valid.
[228] Wong (n 212) 32.
[229] See Uchkunova (n 153).

The lack of clarification and arbitral precedent on host states' entitlement to bring counterclaims has been noted by certain arbitral tribunals. The tribunal in *Saluka* acknowledged the existence of limited precedent on the issue and emphasised the significance of treaty interpretation: "*[T]here is not a wealth of precedent concerning the specific question whether a State may bring a counterclaim against an investor pursuant to a BIT … [and that] … such precedent as exists is often…based on treaty language...*"[230] This was a sentiment in respect of host state counterclaims in the general sense. However, it equally applies in respect of counterclaims for moral damages. This section will consider and critically analyse the relevant issues.

[A] Purpose and wording of treaty

An investment claim brought by a foreign investor is most often founded on an investment treaty. The treaty serves as the foundation for the investor's claim, as well as identifying the boundaries of the arbitral tribunal's jurisdiction. A claim not accommodated by the treaty is therefore not one the arbitral tribunal can consider and determine. The investment treaty in question must therefore support, in express or implied terms, the claim made. As one eminent international judge has noted, "*it should always be remembered that each treaty is an agreement in its own right and that the words used have to be interpreted in the light of the context, object and purpose and, where appropriate, drafting history of that treaty*".[231]

Some scholars argue that, by their very nature, investment treaties preclude any host state counterclaims. They reason that the purpose and wording of almost all BITs preclude state counterclaims. The contention is that the true purpose behind the execution of BITs and other investment treaties is the protection of investors and their investments, not of host state interests.[232] This chimes with arbitral guidance that "*treaties have to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Treaty*".[233] In fact, this guidance is a reflection of Article 31 of the Vienna Convention.[234]

In this respect, it is worth noting that most treaties explicitly provide that they aim the promotion and protection of investments. For instance, the Canadian 2014 Model BIT ("Canadian Model BIT"), "*[r]ecognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity*", provides that "[*a]n investor of a Party may submit to arbitration under this Section a claim that the respondent Party has breached an obligation under Section B (Substantive Obligations)…and the investor has*

[230] *Saluka Investments BV v The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, [37].
[231] Greenwood, Unity (n 29) 53.
[232] See Alvarez (n 135) 6. See also Popova (n 133); Markert and Freiburg (n 168) 33.
[233] *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, [50].
[234] Vienna Convention (n 52) - Article 31(1): "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."

incurred loss or damage by reason of, or arising out of, that breach".[235] The entirety of the text of the model BIT is in line with the spirit of the above. The structure and wording of the Canadian Model BIT therefore suggests that its purpose is the resolution of investment disputes commenced by investors only. In fact, Article 28(1) of the Canadian Model BIT provides explicitly that the consent to arbitration is restricted to claims submitted in accordance with the procedures set out therein. In other words, if one reaches the conclusion that the Canadian Model BIT does not envisage a claim being brought by the relevant contracting state, counterclaims under it would be inadmissible. This would apply equally to host state moral damages claims. Similarly, Article 10(2) of the German 2008 Model BIT provides that the dispute shall be submitted to arbitration "*at the request of the investor of the other Contracting State*".[236] The wording used similarly demonstrates an intention that a dispute may only be elevated to investor-state arbitration level by the investor. The ordinary meaning of the words used do not lend to the interpretation that host states may raise moral damages claim by way of counterclaims, whether before or after proceedings have been commenced by the investor. Note that the vast majority of BITs in force are similar to the model BITs exampled above.

Certain scholars agree with this line of thinking. They express the opinion that to permit moral damages counterclaims by host states would not sit easily with the purpose and wording of most BITs. Dumberry, for instance, states that under most BITs arbitral tribunals will simply not have jurisdiction over claims raised by host states.[237] He explains that "*[I]nvestment treaties essentially provide foreign investors with unprecedented substantive and procedural legal protection when they invest abroad [and such] instruments do not provide any legal protection for the host state against the actions of investors.*"[238] Schwenzer and Hachem concur. They state that the core of all such instruments is the protection of the investor and of the investment.[239] Jagusch and Sebastian also agree with Dumberry, noting that two principal reasons create a fundamental difficulty in permitting host state moral damages claims. First, given the purpose and wording of most BITs aim the protection of investments and investor interests, it would be difficult to locate a treaty breach that can be invoked by the host state as the basis for its claim for moral damages. As already explained, the source of jurisdiction for the arbitral tribunal in investment cases is the investment treaty, and support for host state counterclaims must exist in the treaty, express or implied, before the arbitrators can consider and determine such claims.[240]

Second, on a point of procedure, they argue that there would be a difficulty in extending the arbitration agreement to counterclaims brought by respondent states.[241] They foresee both substantive and procedural obstacles to host states' entitlement to moral damages. Dumberry concurs and expresses that certain additional jurisdictional hurdles would have to be overcome by the host state advancing a moral damages counterclaim, even

[235]Canada 2014 Model BIT, Articles 21 and 22, <https://www.italaw.com/sites/default/files/files/italaw8236.pdf> accessed 2 April 2021.
[236] Germany 2008 Model BIT, <www.italaw.com/sites/default/files/archive/ita1025.pdf> accessed 2 April 2021.
[237] Dumberry, Satisfaction (n 167) 235.
[238] Dumberry, Compensation (n 169) 267.
[239] Schwenzer (n 134) 417.
[240] Dumberry, Satisfaction (n 167) 235.
[241] Jagusch (n 153) 52.

in cases where it is conceded that the BIT in question permits moral damages counterclaims. On that basis, Dumberry concludes that "*the possibility for States to claim compensation for moral damages under BITs is quite limited*".[242]Kryvoi similarly acknowledges that "*BITs neither provide for the procedure for submission of State's counterclaims nor even mention the right of investor to submit counter-claims*".[243] This is because, he notes, BITs are concluded with the purpose of protecting foreign investors in host states. Finally, Alvarez consider that, given it is the intention of states when negotiating and signing up to BITs to create a broad framework to attract inward investment and create legal certainty, arbitral tribunals cannot be criticised for adopting, in certain cases, an expansive approach to interpretation. They are simply "*interpreting treaty provisions in line with the states' express intention at the time of the BITs' creation.*"[244]

There is also some degree of guidance on the issue from investment awards. The tribunal in *AMTO*[245] considered Ukraine's counterclaim for harm to reputation. The case concerned the investor's claim against Ukraine, under the Energy Charter Treaty of 1994 (the "ECT"), for various alleged breaches of the treaty.[246] The claim was disputed by Ukraine, who responded with a counterclaim for harm to its investment reputation. The counterclaim was for a symbolic amount of EUR 25,000.[247] The investor requested dismissal of the counterclaim on two grounds: first, that the tribunal lacked jurisdiction with respect to the counterclaim on the basis that the treaty does not permit host state counterclaims; second, that no injury was suffered by Ukraine simply because of the investor's claim against it. The investor argued that, absent any harm, it should not be penalised for simply presenting a claim for compensation under the treaty.[248] In dismissing the host state's counterclaim for non-material (moral) injury, the tribunal reasoned as follows:

> *The Respondent has not presented any basis in this applicable law [ECT and 'the applicable rules and principles of international law'] for a claim of nonmaterial injury to reputation based on the allegations made before an Arbitral Tribunal. Accordingly, the Arbitral Tribunal finds that there is no basis for a counterclaim of this nature and it is accordingly dismissed.*[249]

The tribunal dismissed the counterclaim because Ukraine had failed to establish that the claim had basis under the applicable treaty (i.e., the ECT) or international law. The tribunal accordingly concluded that it had no jurisdiction to determine the counterclaim. The *AMTO* award suggests that host state moral damages (counter-) claims have no basis under the ECT or the rules and principles of customary international law. That certainly seems a reasonable interpretation. However, it is also possible that the tribunal considered Ukraine as having failed to discharge its burden of proof and to establish that the arbitral tribunal had

[242] Dumberry, Satisfaction (n 167) 236.
[243] Yaraslau Kryvoi, 'Counterclaims in Investor-State Arbitration', (2012) 21(2) Minnesota Journal of International Law 216, 226.
[244] Alvarez (n 135) 7.
[245] *Limited Liability Co. AMTO v. Ukraine*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No 080/2005, Award, 26 March 2008.
[246] Articles 10(1), 10(12) and 22(1).
[247] *AMTO* (n 245) [116].
[248] ibid [117].
[249] ibid [118].

jurisdiction to hear and determine the counterclaim. That said, and in any event, Ukraine's failure to establish a basis for its counterclaim under the ECT or customary international law is indicative of the nature and coverage of obligations under international law. Investment law treaties generally serve to protect investments and investors, not the interests of the host state. However, a sufficiently broad dispute resolution clause in the applicable investment treaty may permit claims that do not necessarily need to have a basis in the treaty itself. For instance, Kryvoi explains that where the relevant BIT dispute resolution provision is sufficiently wide and not limited to obligations specifically provided for in the BIT, it may be possible for host states to assert counterclaims against investors.[250] Lalive and Halonen agree, expressing that the terms of the consent given under the BIT must be carefully scrutinised to ascertain whether the counterclaim is intended to be covered.[251] Each case must therefore be considered on its own merits, on the basis of the treaty wording, its facts and the surrounding circumstances.

A host state raised moral damages claim by way of counterclaim was similarly dismissed in *Cementownia*.[252] This was another ECT-based claim by the investor. In support of its moral damages claim, Turkey (as the host state) argued that the investor's conduct in the arbitration proceedings was egregious and malicious, that the investor had asserted and pursued a baseless claim, making spurious allegations against it, with the intent of damaging its international stature and reputation.[253] Turkey relied on the *Desert Line*[254] and *Benvenuti* cases [255] in support of its claim for moral damages. Recognising that those cases involved moral damages claims by investors, Turkey contended that "*there is no principal reason why equivalent relief should not be available to the respondent State in an appropriate case*".[256] The moral damages claim was essentially clothed as a claim for abuse of process. The investor did not dispute the tribunal's jurisdiction to grant moral damages, but requested dismissal of the counterclaim on the basis that exceptional and specific circumstances required for moral damages claims were not present. The "*exceptional and specific circumstances*" requirement was set out for the first time in the *Desert Line* award where moral damages were awarded to the investor.[257] Dismissing the moral damages counterclaim, the tribunal doubted that the principle of abuse of process "*may constitute a sufficient legal basis for granting compensation for moral damages*" to a host (respondent) state.[258] The tribunal did note, however, on the matter of jurisdiction regarding the rules of procedure, that there is nothing in the ICSID Convention, Arbitration Rules and the Additional Facility preventing an arbitral tribunal from granting moral damages.[259] Note that this is seemingly a reference to the permissibility of moral damages pursuant to the procedural rules, as

[250] Kryvoi (n 243) 230.
[251] Pierre Lalive and Laura Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration' (2011) 2 Czech Yearbook of International Law 141, 146.
[252] *Cementownia "Nowa Huta" S.A. v. Turkey*, ICSID Case No ARB (AF)/06/2, Award, 17 September 2009.
[253] ibid [165].
[254] Desert Line (n 1).
[255] Benvenuti (n 194).
[256] *Cementownia* (n 252) [165].
[257] *Desert Line* (n 1).
[258] *Cementownia* (n 252) [170].
[259] ibid [169].

opposed to as a matter of substance under international law. The reasoning in *AMTO* therefore appears unaffected.

The cases considered above demonstrate that state counterclaims for moral damages are unlikely to succeed given the purpose and content of most BITs. The counter-claimant state must overcome the difficult jurisdictional hurdle of establishing that the claim falls within the four corners of the applicable treaty. In the absence of clear wording in the treaty, arbitrators would likely act with caution before they find that they have jurisdiction. The tribunal in *AMTO*, aware of the significance of keeping within jurisdiction and respecting the boundaries set out by the applicable treaty, had stated that tribunals' jurisdiction in respect of respondent state counterclaims "*under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration.*"[260] The construction of the relevant investment treaty is therefore key. In considering host state counterclaims for moral damages, arbitral tribunals should first construe the terms of the applicable treaty to see whether it permits state counterclaims. If affirmative, the claim should then be considered on its merits. This aligns with the principle of international law that treaties must be "*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[261] If the treaty is silent or appears ambiguous on the issue, an arbitral tribunal should be hesitant in holding the host state entitled to counterclaim for moral damages, subject to party submissions and any exceptional circumstances.

[B] Harm to investment reputation

Host state entitlement to moral damages by way of counterclaim has also been questioned on the basis of any lack of harm that require a remedy. Host states often seek moral damages for harm to reputation due to the commencement of the investment claim, on the basis that such is maliciously asserted or is an abuse of process. It is said that the commencement of investment arbitration proceedings against the host state will not, of itself, cause harm to the state's reputation or dignity to justify a moral damages claim.[262] This is even where the claim is fraudulently or frivolously made. The reasoning is that should the claim be fraudulent or frivolous as alleged, it will be dismissed and there will be no harm to reputation. Conversely, if the claim is meritorious and succeeds, the claim will have been justified. Dumberry accordingly notes that situations where an investor could commit a breach resulting in any sort of moral damages for the host state will be very rare.[263]

Investment arbitration awards are generally in support of the above line of reasoning. For instance, in *Europe Cement*[264] the tribunal dismissed Turkey's (the respondent state)

[260] *AMTO* (n 245) [118].
[261] Vienna Convention (n 52).
[262] Dumberry, Satisfaction (n 167) 238.
[263] ibid 234.
[264] *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009.

counterclaim based on alleged abuse of process. There the investor commenced investment arbitration against Turkey under the ECT, alleging that concession agreements granted to Turkish companies in which the investor held shares were unlawfully terminated. Turkey disputed the investor's shareholding in such companies, and alleged that the investor's evidence had been forged. Turkey therefore argued that the investor's actions constituted an abuse of process and requested monetary compensation for the assertion of a manifestly ill-founded claim using inauthentic documents.[265] The tribunal dismissed the investor's case for lack of jurisdiction. It held that the claimant investor had failed to establish that it had an investment in Turkey at the relevant time.[266] With respect to Turkey's claim for moral damages for abuse of process, the tribunal dismissed the request on the basis that exceptional circumstances, such as physical duress, were not present in the case to justify the granting of moral damages.[267] On the specific matter of harm to reputation due to having to defend a fraudulent claim, the tribunal had this to say:

> *The Tribunal believes that any potential reputational damage suffered by the Respondent will be remedied by the reasoning and conclusions set out in this Award, including an award of costs, which as set out below is significant. This provides a form of "satisfaction" for the Respondent. In the circumstances, therefore, the Tribunal decides not to make a monetary award of compensation to the Respondent.*[268]

This passage provides clear support to the proposition that harm to a state's reputation will be corrected by virtue of a favourable award, and that there is therefore no need for a moral damages award to be made by virtue of the commencement of investment arbitration proceedings. The award itself would secure the aim sought by a moral damages award. It may be said that the above fails to take into account harm to reputation or dignity in the several years during which the proceedings are in continuance. In this respect, it is true that a significant amount of time usually passes between the commencement of an investment arbitration and the issuance of a final award, with an average of approximately 4 years.[269] Allee and Peinhardt, for instance, explain that their research suggests that a state's reputation is tarnished to a certain extent by the mere commencement of investment arbitration proceedings.[270] However, there is no hard, empirical data to suggest that there would be a temporary adverse effect on a state's reputation, or its dignity affected, until the conclusion of proceedings. Indeed, Allee and Peinhardt acknowledge that their research is not conclusive.[271] They consider their findings to be preliminary, and that further enquiries

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[265] ibid [65].
[266] ibid [122] and [145].
[267] ibid [181].
[268] ibid.
[269] Parish (n 170) 237. See also Anthony Sinclair et al., 'ICSID arbitration: how long does it take?' (*Global Arbitration Review*, 26 October 2009) <https://globalarbitrationreview.com/article/1028686/icsid-arbitration-how-long-does-it-take> accessed 2 April 2021.
[270] Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment', (International Arbitration Information, 25 September 2008) <https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationarbitrationlawAllee-Peinhardt-Sept2009.pdf> accessed 2 April 2021.
[271] ibid 22.

should be made to substantiate the initial findings.[272] It is also worth noting that Allee and Peinhardt's research is confined to low and middle income countries, whose reputation is likely to be fragile.[273] Further, their research is dependent upon many variables, the inaccuracy of one capable of rendering their conclusions unreliable. Finally, they do concede that what matters most in such cases is whether states are seen to uphold their BIT commitments.[274] They therefore opine that the credibility of a BIT signatory's commitment to respecting foreign investment is "*contingent on continued good behavior*".[275] Conversely, whether investment arbitrations cause a decrease in foreign direct investment and, therefore, capable of affecting adversely its reputation and dignity, should depend again on the state's reputation concerning compliance with awards. A state's reputation, and therefore any possible harm to reputation and dignity, is therefore more dependent on its own actions towards its investment obligations than the actions of the investor(s). It is their reputation in the long-run that counts.

It may be an over-stretch to argue that a reputation for not upholding BIT commitments will be built or affected by a single claim. A reputation depends on many factors, such as the number of investment arbitration proceedings commenced against the state, the findings of arbitral tribunals in those cases, the state's track record as regards compliance with awards rendered against it and general treatment of investors by the host state's domestic courts. A state's reputation may be harmed and its investment environment negatively affected where a multitude of investment cases have been commenced against it. Whether the state should be entitled to moral damages in such cases would, however, ultimately depend on the background of and circumstances giving rise to those cases. If all such cases were not unmeritorious and fraudulently or frivolously commenced by a single investor, or a group of investors acting jointly with an illegitimate purpose in mind, then moral damages should not, as a rule, be recoverable for harm to reputation or dignity. This is because the harm is unlikely to be solely a consequence of investor action. There is indeed force in the argument that "*it would be naive to conclude that because of the density of causal factors, ICSID filings have no effect upon foreign investment flows*".[276] However, it may be equally naive to consider that a single or several investment claims would have a direct adverse effect on a state's foreign direct investment inflow, and therefore capable of harming the state's reputation or dignity during the limited number of years it takes for the said cases to conclude, assuming such cases eventually fail. Where they succeed, then the host state has only itself to blame for any harm to reputation.

There are scholars who disagree and consider that host states should also be permitted to raise moral damages claims. Parish et al., for instance, reject that investment arbitration is a one-way street, and argue that host state counterclaims for moral damages may be justified, particularly in egregious or frivolous cases.[277] As a fitting analogy for such awards, they

[272] ibid.
[273] ibid 16.
[274] ibid 3.
[275] ibid 2-3.
[276] Parish (n 170) 238.
[277] ibid 226, 234-240.

point to the concept of malicious prosecution.[278] Parish et al. consider opposing scholars' reasoning based on Article 36(2) of the ILC Articles, that such precludes host state moral damages claims, to be flawed. They opine that the ILC Articles actually confirm the availability of moral damages to host states. The contention is that the ILC Articles provide for the recoverability of material and moral damages arising from an internationally wrongful act, as such would be financially assessable, which does not need to be associated with actual damage to property or persons. They further note that a form of satisfaction, foreseen for states in the ILC Articles, has indeed been expressed as the payment of money.[279]

The ILC Articles will be analysed in detail in Chapter 3. It suffices to note here that they are a set of rules drafted with the aim of codifying the law relating to state responsibility. It is the product of half a century's work, commissioned by the UN General Assembly in 1953 and finalised in 2001.[280] Caron, on the significance of the ILC Articles in international law, explains that it is "*a proposed piece of legislation; it looks like a law, it reads like a law, it might even be mistaken for a law*".[281] The ILC Articles have also been widely referred to in investment arbitration awards. In *Noble Ventures*, for instance, the tribunal expressed that "*[W]hile those Draft Articles are not binding, they are widely regarded as a codification of customary international law*."[282]

It would seem that Parish et al.'s assertion is not entirely correct in reflecting the contents of the ILC Articles on the matter. Upon careful reading, the ILC Articles are understood to exclude host state entitlement to moral damages. The commentary to Article 36 provides clearly that "*the qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State*".[283] Parish et al.'s interpretation of Article 37 and the commentary thereto is therefore considered inaccurate. For the sake of fullness, Article 37, Commentary (3) provides, in full, as follows:

> *In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State". Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.*

[278] ibid, 238-240.
[279] ibid 230.
[280] UN General Assembly, Resolution 799 (VIII), Request for the codification of the principles of international law governing State Responsibility (7 December 1953). For the full text (together with commentaries) see <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 2 April 2021.
[281] David D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', (2002) 96 The American Journal of International Law 857, 866.
[282] *Noble Ventures* (n 233) [69].
[283] ILC Articles, Article 36, Commentary (1).

Accordingly, absent a clear causal link between the claim and harm to reputation or dignity, arbitral tribunals should exercise great care before granting host state counterclaims for moral damages. An award in the host state's favour should usually be sufficient to cure any harm to reputation. Any harm suffered by the host state between the commencement of the investor's claim and its dismissal may need to be remedied, but extreme caution must be exercised in such cases. It would be extremely unlikely for a single investment claim to harm a state's reputation or dignity so as to warrant moral damages. The threshold should not be set so low. Dumberry lends support to the above line of reasoning, expressing that "*one of the only cases where the 'investment reputation' of a State will truly be tarnished is in the (rare) event it simply refuses to pay the investor the amount allocated by a tribunal in a winning award*".[284] In support, he points to the fact that 17 out of 81 states against whom investment proceedings were commenced are developed countries and that there is no evidence to suggest that investments in such states have been negatively impacted.[285] Relatedly, Dumberry is surprised by host state claims for moral damages, explaining that states generally refrain from requesting quantification of their moral injury to preserve dignity and honour.[286] It is perhaps unsurprising that one observes a real lack of precedent whereby host states have been granted financial compensation for non-material (i.e., moral) harm, the absence of which will likely serve to create an uphill struggle for moral damages claiming host states.[287]

[C] Equality and justice

There are scholars and arbitrators who consider that the principles of equality and justice require that host states should also be permitted to raise moral damages claims by way of counterclaims. They do not see the investor-state dispute resolution mechanism as a one-way street. To do so, it is argued, would contravene the fundamental notions of equality and justice. Kryvoi adopts the above line of reasoning. He argues that permitting state counterclaims would facilitate greater equality. Kryvoi highly regards procedural equality, to the extent that he seemingly suggests, albeit indirectly, piercing the corporate veil of local undercapitalised subsidiaries so that there is a level playing field between the parties.[288] Although Kryvoi speaks generally on host states' entitlement to counterclaims, the principles would apply equally to moral damages counterclaims. To support his views and demonstrate that it is backed by arbitral precedent, Kryvoi refers to the *SGS Société Générale* award, where the tribunal had expressed:

> *It would be inequitable if, by reason of the invocation of ICSID jurisdiction, the Claimant could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the Respondent from pursuing its own claim*

[284] Dumberry, Satisfaction (n 167) 239.
[285] ibid 238-239.
[286] ibid 240-241.
[287] See Markert and Freiburg (n 168) 6. *Cf* Juan Pablo Moyano Garcia, 'Moral Damages in Investment Arbitration: Diverging Trends' (2015) 6 Journal of International Dispute Settlement 485, 515 *et seq*.
[288] Kryvoi (n 243) 231-234.

for damages by obtaining a stay of those proceedings for the pendency of the international proceedings, if such international proceedings could not encompass the Respondent's claim.[289]

Arbitral tribunals appear alive to the inherent unfairness and inequity in allowing one party to raise claims, whilst precluding or restricting the other party from doing the same. To paraphrase English equity and trusts lawyers' popular expression, in investment arbitration host states are equipped with a shield for defence, but deprived of the sword to mount an attack. Kryvoi's contention is therefore not without some basis and justification. Kryvoi's views are echoed by Uchkunova and Temnikov. In their paper addressing the availability of moral damages to investors and host states in ICSID arbitrations, they agree that permitting state counterclaims for moral damages would adhere with the principle of equality. They draw analogy from the practice of the ICJ, where the latter had noted that procedural rights must be available to all parties unless objective and reasonable grounds exist for the distinction, expressing that "*if the remedy of moral damages is available to investors, then it should be likewise available to States*".[290] Indeed, the corrective justicists would support a move to grant host states the opportunity to strike back. All forms of wrongful act causing harm to another requires one to balance the scale; there must be an equality of quantities.[291] Where the wrongdoer has benefitted from its wrongful act in any manner whatsoever, that benefit must be shifted back to its rightful owner. In fact, given the compensatory nature of corrective justice, there is potentially room for the argument that the obligation to cure extends simply to cases where harm has been caused by a wrongful act, irrespective of whether the wrongdoer has gained any benefit in return, so long as the required element of correlativity exists.[292]

Admittedly, this is a well-formulated argument. It is difficult to stand in the way of fairness and equality. However, a distinction must be made between a system where the parties are on an equal footing to begin with, in which case they must be treated equally, and a system where such is simply (and blatantly) not the case. In the latter type of cases, striving for total equality may not be entirely appropriate; in fact, it may be counter-productive. The inherent inequality may be a product of design, based on justifiable reasons. This certainly appears to be the case in respect of investment arbitration. The international investment arbitration regime was created to provide a level playing field between investors and their host states, prior to which the latter enjoyed an elevated position and considerable and, in some cases, unchecked power, and any attempt to adjust and balance the level of that field may have undesired consequences. For completeness, note must be made of the fact that host states are always at liberty to seek remedy for wrongs done to them through their domestic (and other national) courts, and enforce any favourable judgment in the investor's state. There is therefore, on its face, no substantial inequality or injustice caused to host states by precluding moral damages counterclaims.

[289] *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002, [302].
[290] Uchkunova (n 153) 393.
[291] Weinrib, Corrective Justice (n 77) 408.
[292] Encarnacion (n 81); Coleman (n 82) 18 and 26.

[D] Efficiency of arbitral proceedings

With the aim of achieving greatest possible efficiency, scholars also suggest that host state counterclaims, including claims for moral damages, should be considered and heard together with investor claims in the same proceedings.[293] Otherwise host states would be left with no alternative but to commence separate proceedings, most often litigation proceedings before its domestic courts. This is considered an undesirable outcome, to be avoided if possible. Proponents of the law and economics school of thought would undoubtedly echo in support.[294] Kryvoi, for instance, contends that counterclaims arising from separate but related agreements between the parties would enhance the efficiency of dispute resolution.[295] He says that it would be preferable and less time-consuming to resolve all disputes in one set of proceedings. Kryvoi does acknowledge, however, that most BITs enable the investor, rather than the host state, to submit claims to investment arbitration. He concedes that investors are privileged, traditionally afforded rights without being imposed any obligations; akin to third party beneficiaries in contractual relationships.[296] Kryvoi is not alone in his desire to promote arbitral efficiency. Lalive and Halonen also emphasise the importance of striving for efficiency in arbitral proceedings. They suggest that investors should consider consenting to the admissibility of the host state's counterclaim to save time and money.[297] They acknowledge, however, that this is unlikely to find favour with investors.

Arbitral awards also underscore the significance of ensuring efficiency of proceedings. For instance, the tribunal in *Guaracachi* expressed that "*[T]he efficiency of proceedings is paramount to a fair arbitral process*".[298] This is unsurprising given most arbitral rules place a positive obligation on arbitral tribunals to conduct proceedings efficiently. For instance, the UNCITRAL Arbitration Rules (2013) direct arbitrators to "*conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*".[299] Similarly, Article 22 of the International Chamber of Commerce Arbitration Rules (2021) require the arbitral tribunal to "*conduct the arbitration in an expeditious and cost-effective manner*". Efficiency is certainly considered one of the significant attractions of arbitration, and a commendable aim it is to seek to maximise it as much as is possible.[300] This is particularly vital in investment cases

[293] See Lars Markert, 'Improving Efficiency in Investment Arbitration' (2011) 4(2) Contemporary Asia Arbitration Journal 215, 218-219, for the difficulty in defining efficiency.
[294] See Perez (n 103); Posner, Economic Analysis of Law (n 105); Posner, Rational Choice (n 106); Posner, Wealth Maximisation (n 108); Mercuro (n 117).
[295] Kryvoi (n 243) 220.
[296] ibid 225.
[297] Lalive and Halonen (n 251) 142.
[298] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 6, 30 August 2012, [8.b].
[299] Article 17(1).
[300] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3(1) Groningen Journal of International Law 110. See also Loukas A. Mistelis, 'Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems theories and party autonomy', Queen Mary University of London, School of Law, Legal Studies, Research Paper No. 313/2019, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372341> accessed 2 April 2021; Webster (n 122).

given the millions, and on occasions billions, at stake, and the corresponding high sums spent to fight these cases. [301] This aligns with the nature of individuals as rational wealth maximisers, who strive towards choosing the most economical outcome.[302]

However, it cannot justify something not seemingly permitted by the treaty that forms the basis of a claim. The promotion of efficiency cannot justify a departure from the generally accepted view that investment arbitration exists solely to protect investor interests, and where this is supported by treaty wording. Other avenues of making investment arbitration more efficient should be explored in its stead.[303] Relatedly, Markert expresses that efficiency may be ensured if "*[P]arties…use their procedural autonomy and arbitral tribunals their procedural authority to further streamline the arbitration process.*"[304] In any event, there is no guarantee that permitting host state moral damages counterclaims would ensure efficiency. In fact, it may be the cause of inefficiency. Certain host states may abuse the entitlement and bring frivolous counterclaims against investors to place undue pressure, and force the investor to drop its claim(s). Investors do not usually have the resources host states possess, and this may mean that they find themselves going to battle without the needed ammunition.

[E] Activation of arbitration clause

An inherent difficulty in justifying a host state counterclaim for moral damages, as sporadically noted above, is that investment treaties usually dictate for a one-way street. They do not foresee host state claims. A suggested solution to this difficulty is that, once activated with the investor's claim, the dispute resolution mechanism contained in the applicable treaty transforms and permits host state counterclaims. The one-way street transforms, so to speak, into a dual carriageway (or a two-way street).[305] Blanke and Sabahi contend that investment treaties contain unilateral offers to arbitrate in the investor's favour,[306] which give rise to an arbitration agreement in the classic sense when activated by the investor through a claim, and which is capable of conferring on the host state rights it may rely upon. Concurring with that reasoning, Parish et al. contend that if the investor brings a fraudulent or frivolous claim, constituting an abuse of process, the host state should be entitled to raise a moral damages claim in response. This is because the investor's abusive behaviour constitutes a breach of the agreement to arbitrate, giving rise to an entitlement to damages.[307] Blanke and Sabahi also opine that an investor who triggers the unilateral offer to arbitrate must not abuse its rights.[308] Lalive and Halonen add weight to the above line of thinking, explaining that when faced with restrictive treaty wording, the host state could

[301] See Allee (n 270); Markert, Improving Efficiency (n 293); Parish (n 170).
[302] See Perez (n 103); Posner, Economic Analysis of Law (n 105); Posner, Rational Choice (n 106); Posner, Wealth Maximisation (n 108); Mercuro (n 117).
[303] Markert, Improving Efficiency (n 293).
[304] ibid 242.
[305] See Gordon Blanke and Borzu Sabahi, 'The new world of unilateral offers to arbitrate: investment arbitration and EC merger control' (2008) 74(3) Arbitration 211.
[306] ibid 218.
[307] Parish (n 170) 242-243.
[308] Blanke (n 305).

possibly bring a counterclaim for abuse of process, which arises directly from the investor's act of commencing arbitration, and independent of the applicable treaty and the restrictions contained therein. They note that "*[A]lthough BITs do not in principle create obligations on investors as such, invoking the arbitration clause arguably binds the investor to act in good faith, an obligation which would be breached by an abuse of process*".[309] Ehle and Dawidowicz follow suit, expressing that "*[A]buse of process in investment arbitration can surely amount to a violation of an investment treaty; namely, the obligation on parties to perform in good faith the dispute settlement obligations contained therein.*"[310]

Arbitral precedent provides support for the contention that the commencement of arbitration proceedings gives rise to a duty to act in good faith and refrain from abuse of process. The tribunal in *Cementownia,* for instance, expressed that "*[P]arties to an arbitration proceeding must conduct themselves in good faith. This duty…is owed to both the other disputing party and to the Tribunal*".[311] That said, the tribunal in that case dismissed the claim for moral damages although it had concluded that the investor had "*intentionally and in bad faith abused the arbitration*".[312] The tribunal reasoned that "*[I]t is doubtful that [abuse of process] may constitute a sufficient legal basis for granting compensation for moral damages*".[313] The tribunal, however, rather contradictorily remark that "*[A] symbolic compensation for moral damages may indeed aim at indicating a condemnation for abuse of process*", though concluding that an adverse cost order was sufficient remedy in the circumstances.[314]

An investment award more to the point and which supports the contention that moral damages counterclaims should be permitted is *Italy v. Cuba*.[315] There the tribunal accepted that each party was entitled to commence arbitration proceedings under the BIT and that, unless such proceedings were abusive, they could not be illegal and cause any compensable damages. Although this relates to inter-state arbitration, scholars have placed reliance on the award to support calls for host state counterclaims.[316] It seems that the tribunal in *Italy v. Cuba* impliedly conceded that moral damages may be sought where there is an abuse of process in respect of the commencement or pursuance of proceedings and such causes moral harm.

The above investment awards and scholarly opinions are not considered to be entirely satisfactory. They do not fully explain the basis for an independent legal action not supported by the investment treaty that gives the tribunal its jurisdiction to begin with. Query whether an arbitral tribunal can find jurisdiction for a claim based solely on abuse of process independent of the investment treaty. If the answer is negative, which it surely must, then it is difficult to accept that arbitral tribunals have jurisdiction to hear matters not contemplated by the treaty. It goes without saying that arbitrators should punish unsportsmanlike conduct,

[309] Lalive and Halonen (n 251) 149.
[310] Ehle (n 145) 310-311.
[311] *Cementownia* (n 252) [153].
[312] ibid [159].
[313] ibid [170].
[314] ibid [171].
[315] *République d'Italie v République de Cuba*, *ad hoc arbitration*, Final Award, 15 January 2008 (as cited in Dumberry, Satisfaction (n 167) 229-230).
[316] Uchkunova (n 153) 388, fn 65.

but they should make use of the powers granted to them by the applicable treaty and arbitration rules. An adverse costs order is usually available to be utilised for such purposes, as well as strike-out of frivolous claims early on in the proceedings.

As a matter of course, where the underlying investment treaty permits counterclaims, the above discussion is moot. For instance, the Claims Settlement Declaration with respect to the Iran-US Claims Tribunal ("IUSCT"), established under the Algiers Accords of 19 January 1981, provides the tribunal with the following express authority:

> *[To decide] claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim […].*[317]

It is obvious from the above that the IUSCT possessed jurisdiction with respect to counterclaims arising out of the same contract, transaction or occurrence. Relatedly, Kryvoi notes that by virtue of the broad wording in respect of jurisdiction, thousands of counterclaims were filed before the IUSCT.[318] Similarly, the tribunal in *Saluka*[319] had before it a claim concerning alleged breach of the fair and equitable treatment obligation and deprivation of investment, arising from the Czech-Dutch BIT. On the matter of whether the BIT in that case provided jurisdiction to counterclaims, the tribunal held the relevant provision in the BIT to be sufficiently wide to encompass counterclaims. The tribunal reasoned as follows:

> *The language of Article 8, in referring to "All disputes," is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. The need for a dispute, if it is to fall within the Tribunal's jurisdiction, to be "between one Contracting Party and an investor of the other Contracting Party" carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims.*[320]

The relevant provision in the said BIT (Article 8) provided that "*[A]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably*", in the event of failure the dispute to be referred to arbitration.[321] The treaty also stipulated that the arbitral tribunal was to decide on the basis of the law, including the law of the host state.[322] Following a similar logic, in respect of a BIT which concerned the resolution of disputes "*between an investor of a contracting party and the other contracting party concerning an obligation of the latter under this agreement*", the tribunal in *Spyridon Roussalis* held that it lacked jurisdiction. The

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[317] *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration)*, 19 January 1981, <www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf> accessed 2 April 2021.
[318] Kryvoi (n 243) 223.
[319] *Saluka* (n 230).
[320] ibid [39].
[321] ibid [21]. For an official copy of the BIT between The Netherlands and the Czech Republic see <https://www.italaw.com/sites/default/files/laws/italaw6080%283%29.pdf> accessed 2 April 2021.
[322] Article 8; see *Saluka* (n 230) [20].

tribunal reasoned, it is submitted rightly, that its jurisdiction was limited to disputes concerning obligations owed by the host state to the investor.[323] A similar conclusion was reached also in *AMTO*[324] and *Cementownia*.[325]

There is force in the argument that arbitral tribunals should sanction abuses of process through fraudulent and frivolous claims. However, some jurisdictional basis for the sanction applied must be found in the treaty forming the foundation of the entire proceedings. That is essentially the reason Uchkunova and Temnikov opine that state counterclaims for moral damages may pass the jurisdictional barrier where the dispute settlement clause in question refers to "*all disputes*" and does not set out any other stringent limits.[326] Lalive and Halonen concur.[327] Thus, only in the very rare situations where the applicable treaty seemingly permits host state moral damages counterclaims and where the claim is meritorious, i.e., actual harm has been suffered by the state, should moral damages be awarded to host states. The mere activation of the arbitration clause in the treaty by the investor, through an investment claim, should not automatically render host state claims permissible, which claim would not otherwise have been possible without the treaty. Absent permitting wording in the treaty, arbitral tribunals should refrain from finding jurisdiction and refuse to consider moral damages counterclaims. In fact, as above noted, at least one tribunal has expressly doubted the availability of moral damages for mere abuse of process.[328] As the tribunal in *Cementownia* noted, perhaps the most appropriate remedy to sanction abuse of process is an adverse costs order against the investor.[329] The power to strike-out frivolous or abusive natured claims early on during the proceedings should also be more readily utilised by arbitral tribunals to thwart such iniquitous behaviour.

§2.04 CONCLUSION

It seems that moral damages in investor-state arbitrations, though a relatively new phenomenon, is here to stay. It is therefore important for its boundaries to be clearly identified to ensure that future awards are consistent and outcomes are predictable. The certainty, predictability and coherence of international law is of paramount importance to ensure that international (investment) law is capable of continuing its presence in the international legal order for decades to come. This chapter has sought to further that aim. Through the examination of scholarly opinions, investment awards and other relevant sources of international law, this chapter considered the availability of moral damages to investors, whether natural persons or legal entities, and their employees and executives. Host state entitlement to moral damages by way of counterclaim has also been considered.

[323] *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, [828].
[324] *AMTO* (n 245).
[325] *Cementownia* (n 252).
[326] Uchkunova (n 153) 398.
[327] Lalive and Halonen (n 251) 143.
[328] *Cementownia* (n 252).
[329] ibid [171].

In summary, depending on the context and the terms of the applicable treaty, natural and legal person investors should be entitled to moral damages caused by host states through internationally wrongful actions. Harm to employees should be recoverable only to the extent such results in harm to the investor's interests. In respect of host states' moral damages counterclaims, an arbitral tribunal is unlikely to have jurisdiction to hear such claims, subject to the terms of the applicable treaty. Any claim not supported by the treaty is likely to be doomed to fail, and should be treated with utmost caution by tribunals.

CHAPTER THREE

Jurisdiction *Rationae Materiae* over Moral Damages Claims

§3.01 INTRODUCTION

Moral damage as a concept is difficult to define in an all-inclusive, comprehensive manner. Many have struggled in the endeavour. However, it is generally understood to refer to non-pecuniary harm, i.e., harm that is difficult to quantify in monetary terms.[330] Examples of non-pecuniary harm include personal injury, various forms of emotional harm and non-material damage of a 'pathological' character, such as mental stress, anxiety, pain and suffering.[331] In investment arbitrations, claims for moral damages was not a seemingly common occurrence until the *Desert Line* award of 2008.[332] The ICSID tribunal's award in *Desert Line* is considered as the first ever publicly known ICSID award granting moral damages to a corporation pursuant to customary international law principles.[333] It was coined as the "*most significant investment arbitration decision in moral damages to date*".[334]

Many scholars have since extensively commented on entitlement to moral damages as a matter of international (investment) law, arbitral jurisdiction in respect of moral damages claims and what, if any, conditions are required to grant moral damages claims.[335] As a result, there is an observable increase in the making of such claims, which has emanated in awards of almost precedential value in respect of jurisdiction and limits of entitlement.[336] As explained elsewhere, it seems that there is now a consensus among investment tribunals that investors are entitled to moral damages in certain circumstances under customary international law.[337] This chapter will consider whether arbitral tribunals possess jurisdiction to award moral damages in investment cases pursuant to international investment law. In doing so, it will consider arbitral tribunals' jurisdiction pursuant to customary international law and international investment treaties, in that order.

§3.02 MORAL DAMAGES UNDER CUSTOMARY INTERNATIONAL LAW

[A] In general

[330] See Dumberry, Compensation (n 169).
[331] See Dumberry, Satisfaction (n 167) 208.
[332] *Desert Line* (n 1).
[333] See Uchkunova (n 153) 382-384. See also Blake (n 180) 375.
[334] Blake (n 180) 375.
[335] See, for instance, Uchkunova (n 153) 382-384; Allepuz (n 146); Dumberry, Compensation (n 169).
[336] See *Europe Cement* (n 264); *Cementownia* (n 252); (more importantly) *Lemire*, Award (n 140).
[337] See Doğan Gültutan, 'Moral Damages and Arbitral Jurisdiction in International Investment Arbitration' in Tom Mortimer and Chrispas Nyombi (eds), *Rebalancing International Investment Agreements in Favour of Host States* (Wildy, Simmonds & Hill 2018), 417, 435.

[1] Definition and sources

It is similarly not an easy task to define customary international law. It is a somewhat vague concept and has no unanimously accepted definition. However, it is widely accepted that the concept has two elements: the objective element and the subjective element. According to Guzman, the objective element concerns the requirement for sufficient state practice. In other words, the legal principle in question must have been adhered to and applied by states for a long period. The subjective element, on the other hand, refers to the need for such practice to be accepted as law or followed from a sense of legal obligation (*opinion juris*). States must not only follow the law or rule, but must consider themselves bound to do so. In other words, compliance must not be purely because of a moral desire or obligation to comply.[338] For instance, in its Annex 14-A headed "*Customary International Law*", the recently signed (but not yet in force) Agreement between the United States of America, the United Mexican States and Canada ("USMCA") explains the parties' shared understanding that: "*…"customary international law" generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation.*"[339] International court judgments and tribunal awards, as well as relevant international texts, confirm that customary international law requires consistent and settled practice (the objective element) and recognition by states as regards the binding nature of the relevant laws and rules and compliance with such rules (*opinion juris*) (the subjective element). This enables one to assess whether a certain law or rule forms part of customary international law. For instance, the ICJ, in its *North Sea Continental Shelf* judgment, expressed that:

> *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.*[340]

> Article 38(1) of the Statute of the ICJ corroborates this, and 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*

[338] Andrew T. Guzman, 'Saving Customary International Law' (2005) 27 Michigan Journal of International Law 115, 123.
[339] See <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 2 April 2021.
[340] *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, 3, 44.

publicists of the various nations, as subsidiary means for the determination of rules of law.

The Report of the ICSID Executive Directors has approved the validity of this definition.[341] The Report provides:

> *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 ICJ, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.*

The following are considered as the (non-exhaustive) main sources of customary international law: (i) the ILC Articles; (ii) judgments and awards of international courts and tribunals; and, in certain circumstances (iii) UN General Assembly Resolutions.[342] Note that the ILC Articles were drafted by the ILC, upon request by the UN General Assembly, for the codification of the principles relating to responsibility of states and general rules on compensation. The ILC Articles have been widely applied by international tribunals.[343] The ILC Articles are considered in further detail below in section [B].

[2] Utility of customary international law in international investment arbitrations

The rules and principles of customary international law serve to assist, where appropriate and relevant, interpretation of or fill gaps in applicable treaties and contracts. For instance, customary international law usually becomes applicable in international investment arbitrations where the investment or some other treaty or agreement that governs the relationship between a state and an investor, upon which the relevant claim has been advanced, is ambiguous, unclear or in need of construction.[344] Customary international law therefore generally serves a supplementary role. It is subject to the terms of the underlying treaty or contract, which take precedence. The treaty or contract in question is the law of the parties, and guidance will be sought form the rules and principles of customary international law where they are silent on a given issue. Its utility therefore must be considered on a case specific basis. The fact that customary international law serves a supplementary role has been confirmed in treaty cases. For instance, in *Noble Ventures*, in discussing attribution of liability to states, the tribunal relatedly expressed that:

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[341] Report of Executive Directors on the ICSID Convention, [40] <http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB-section06.htm#ft1> accessed 2 April 2021. See also Kryvoi (n 243) 243.
[342] See Ripinsky (n 205) 27.
[343] See James 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 2 April 2021.
[344] See Ripinsky (n 205) 25.

> *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.*[345]

Further, Article 42(1) of the ICSID Convention mirrors the above in respect of the role of customary international law to fill an unaddressed gap. Consequently, where the applicable instrument fails to guide the parties or the arbitral tribunal as to the parties' rights and obligations, customary international law will help facilitate in finding the solution. Although the ICSID Convention requires arbitral tribunals to 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*" in the absence of an agreement, Kryvoi notes that ICSID tribunals often afford primacy to international law and disregard the applicable domestic laws.[346] Stephan concurs.[347]

The application of customary international law principles to aid interpretation or fill gaps in treaties or contracts is not an uncommon occurrence. As Ripinsky notes, up until the twentieth century customary international law was the main tool available to investors seeking compensation for unlawful acts of host states.[348] This changed with the widespread execution of BITs and other investment treaties in the twentieth century. As a result, customary international law now serves a supporting role, supporting and supplementing obligations embodied in investment treaties.[349] Salacuse notes that in the 30 years following the execution of the first ever BIT between Germany and Pakistan in 1959, there are now almost 3,000 BITs in force between all of the world's principal capital exporting States and around 80 developing nations.[350]Customary international law therefore continues to play an important role in international investment law, albeit a secondary, supplementary role. Investment treaties are often skeletal and are therefore almost always in need of interpretation. There is and will always be a room for customary international law, and arbitral tribunals will continue to seek guidance from its principles where required. As Wolfke explains, in most cases it will be a serious mistake to neglect the present role of customary law.[351] However, one should approach customary international law with some caution. Principally, customary international law aims to regulate relationship between states, and certain principles embodied may be unsuited for investor-state arbitrations. [352]

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[345] *Noble Ventures* (n 233) [69].
[346] See Kryvoi (n 243) 243.
[347] See Paul B. Stephan, 'Disaggregating Customary International Law' (2010) 21 Duke Journal of Comparative & International Law 191, 194 *et seq*.
[348] Ripinsky (n 205) 26.
[349] Asoka de Z. Gunawardana, 'The Inception and Growth of Bilateral Investment Promotion and Protection Treaties' (1992) 86 American Society of International Law Proceedings 544, 546 *et seq*.
[350] See Jeswald W. 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. For an in depth analysis see Stephen M. Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 American Society of International Law Proceedings 27.
[351] Karol Wolfke, 'Practice of International Organizations and Customary Law' (1996) Polish Yearbook of International Law 183. See also Ripinsky (n 205) 311; Sabahi (n 172) 138-139.
[352] See Kryvoi (n 243) 243.

Consequently, customary international law principles should be used as guidance and a source of inspiration by investor-state arbitral tribunals only in appropriate cases.

[B] ILC Articles

[1] In general

As noted above, a main source of customary international law is the ILC Articles. The ILC, an organ of the UN General Assembly, was entrusted with the task of drafting the ILC Articles and codifying the law relating to state responsibility. The completed text of the ILC Articles was submitted to the General Assembly in 2001, almost 50 years following the initiation of the task-force.[353] The ILC produced a detailed set of commentary on each provision, together with the substantive articles.[354] The ILC Articles were not ratified in the form of an international convention or treaty, although such was initially the aim. It was merely taken note of, commended to the attention of states and approved by the General Assembly in various UN General Assembly resolutions.[355]

However, the ILC Articles are an extremely valuable source of customary international law, despite the absence of any codification. It is the product of a comprehensive review of the principles of international law, undertaken by eminent lawyers and scholars of international law. They are therefore regarded as carrying considerable force and are often referred to by arbitral tribunals with approval.[356] It is an authoritative re-statement in a collective form of the various principles and rules of customary international law. For instance, the tribunal in *Noble Ventures* expressed that "*[W]hile those Draft Articles are not binding, they are widely regarded as a codification of customary international law*."[357] Although the ILC Articles were drafted with inter-state disputes in mind, investor-state tribunals have confirmed on numerous occasions that they serve as useful guidance in the investment cases. Most recently, an ICSID tribunal declared that "*the ILC Articles will be of considerable guidance*" to investor-state tribunals.[358]

Scholars also, almost unanimously, agree that the ILC Articles should be highly regarded as an embodiment of international law rules and principles. For instance, Crawford notes that they "*have been very widely approved and applied in practice, including by the International Court of Justice*".[359] More forcefully, 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*".[360] The fact that Dumberry undertakes his in-depth analysis of moral damages in

[353] UN General Assembly, Resolution 799 (VIII), Request for the codification of the principles of international law governing State Responsibility (7 December 1953).
[354] See ILC Articles.
[355] Crawford (n 343).
[356] See *Rompetrol*, Award (n 155) [289].
[357] *Noble Ventures* (n 233) [69]. See also *von Pezold* (n 123) [624] *et seq*.
[358] *von Pezold* (n 123) [691].
[359] Crawford (n 343).
[360] Caron (n 281) 866.

the context of investor-state arbitration by proposing to "*revisit the question of moral damages in international law*" based on the work of the ILC further demonstrates that the ILC Articles play a vital role in determining rights and obligations, including in respect of the availability and entitlement to moral damages in the investment arbitration context.[361] Finally, Lawry-White refers to the ILC Articles as an "*authoritative guide*".[362] One is relieved, to some extent, of the obligation to turn through the pages of previous international awards and judgments to ascertain the rationale and validity of a certain rule or principle of international law. A thorough review of the ILC Articles will show that they were drafted following a careful scrutiny of the relevant case law. There are continuous references to key cases in the commentary to each article in support of the rule set out therein. As a result, unless one has good grounds to argue that the ILC Articles do not represent the state of customary international law on a given issue, or that it would be inappropriate in the circumstances, one must consider the ILC Articles when determining the rights and obligations under international law, any applicable treaty permitting. This logic applies equally to claims for moral damages, as considered in detail below.

[2] Moral damages and the ILC Articles

In respect of liability for moral damages, the ILC Articles provide that "*[T]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*".[363] Article 31(2) then explains that "*[I]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State*". It seems that the language of Article 31 is clear, and without any ambiguity. A state is obligated to make full reparation for any injury caused by an internationally wrongful act. In other words, if an act of the state in question is considered a wrongful act, any injury caused must be fully repaired. This includes an obligation to repair any moral damage due to the act. The commentary in the ILC Articles confirms this:

> *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.*[364]

As to what moral damage means as a concept, the ILC Articles note 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*".[365] It is clear that this formulation was not designed as being exhaustive. It is only demonstrative of the types of moral damage one may suffer. For completeness, Wittich provides a wider formulation of moral damage, already quoted hereinabove.[366] Dumberry adds to Wittich's definition another

[361] See Gültutan (n 337); Dumberry, Compensation (n 169).
[362] Lawry-White (n 139) 237.
[363] Article 31(1).
[364] ILC Articles, Article 31, Commentary (5).
[365] ibid.
[366] See Wittich (n 144) 329-330.

type of moral damage: injury to the credit and reputation of a legal entity, i.e., a corporation.[367] Many scholars have argued in favour of entitlement to moral damages as a matter of international law, in light of Article 31 of the ILC Articles.[368] Coriell and Marchili, for instance, find no doctrinally sound basis to require proof of bad faith or malice as an element of a moral damages claim, given its compensatory nature.[369] Arbitral tribunals have expressed similar views. For instance, the tribunal in *Rompetrol* explained entitlement to moral damages as a matter of international law with reference to the ILC Articles.[370]

It seems, therefore, that the ILC Articles provide for a strong foundation for moral damages claims pursuant to customary international law. In fact, to this end, the ILC Articles note that "*[I]nternational tribunals have frequently granted pecuniary compensation for moral injury to private parties*".[371] Although some have questioned whether moral damage is something that can be financially assessed[372], the commentary to Article 36 negates this view. The commentary explains 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*".[373] Furthermore, the tribunal in the renowned *Lusitania* case, generally considered to be the first case expressly acknowledging that reparation due includes non-pecuniary damage[374], affirmatively explained that international law entitles an injured person to compensation "*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*" even where such is "*difficult to measure or estimate by money standards.*"[375] Accordingly, there is force in the argument that, in the appropriate cases, moral harm caused will require compensation and investment tribunals must grant claims for moral damages where governed by customary international law and where the requisite conditions exist. They certainly have the jurisdiction to do so pursuant to customary international law, treaty wording permitting.

[C] Awards and judgments of international courts and tribunals

[1] Awards and judgments as a source of customary international law

[367] Dumberry, Satisfaction (n 167) 208-209.
[368] See, for instance, Dumberry, Satisfaction (n 167) 208.
[369] Coriell (n 148) 223. See also Borzu Sabahi, 'Should Moral Damages Be Compensable in Investment Arbitration? Panel Discussion', in Ian A. Laird and Todd J. Weiler (eds), *Investment Treaty Arbitration and International Law* (Juris 2010), 233, 245-246.
[370] *Rompetrol*, Award (n 155) [289].
[371] ILC Articles, Article 36, Commentary (16), fn 540.
[372] Jagusch (n 153) 49-50.
[373] ILC Articles, Article 36, Commentaries (1) and (16). See also Lawry-White (n 139) 236.
[374] See also Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press 2014), 117.
[375] *Lusitania* (n 3).

Awards and judgments of international courts and tribunals constitute a further important source of customary international law.[376] As noted above, the ILC Articles were drafted with the aim of codifying customary international law, principally through the examination of relevant judgments, decisions and awards.[377] Judgments, decisions and awards, handed both before the ILC Articles were approved and thereafter, therefore, constitute an extremely valuable source and reference point in respect of the rules and principles of customary international law.[378] The treatment of moral damages claims by such awards and judgments will therefore assist one determine entitlement to moral damages as a matter of customary international law. It is worth noting that, notwithstanding the above, the ILC Articles and the awards and judgments rendered by international (investment and other) courts and tribunals constitute two separate sources of customary international law. This is despite the inter-link and connectivity between the two, and the fact that the ILC Articles were drafted with the purpose of codifying the then existing rules and principles of international law on the responsibility of states.[379]

As is the case with any attempt at codification, the law continues to evolve and does not remain idle following the (in this case attempted) codification. This has equally been the case in respect of international investment law. Partly due to the non-binding nature of the ILC Articles and partly due to the fact that the ILC Articles do not seek to regulate all matters brought before investment tribunals in the event of a dispute, arbitral tribunals have, as dictated by occasion, departed from or expanded the rules and principles contained in the ILC Articles.[380] The ILC Articles may therefore not properly reflect the developments to customary international law following its publication, hence obligating the need to consider awards and judgments rendered thereafter to ascertain the exact position under customary international law on a given issue. This may be particularly true in respect of the position with respect to moral damages entitlement of foreign investors.

It is noteworthy that there is some lack of clarity as to when a change in position evidenced in arbitral decision making becomes "settled" and forms part of customary international law. The objective element of customary international law requires there to be sufficient (state) practice. In other words, continued and/or repeated application of a rule or principle will likely satisfy the objective element and render such as forming part of customary international law. Whether and when that happens will essentially depend on the subject matter concerned, the unanimity of support and the relevant period of time within which the new rule or principle introduced remains unchallenged.

With the emergence of a few number of arbitral awards dealing with this issue, it could be said that the starting point to determine whether customary international law permits moral damages claims of foreign investors is the awards and judgments post-2001.[381] Further, and more importantly, given certain awards and judgments of international courts and

[376] See I.C. MacGibbon, 'Customary International Law and Acquiescence' (1957) 33 British Year Book of International Law 115.
[377] Caron (n 281).
[378] ibid.
[379] Crawford (n 343). See also Ripinsky (n 205) 27.
[380] See Caron (n 281) 873.
[381] That is, following the approval of the ILC Articles by the UN General Assembly.

tribunals would more directly relate to disputes between investors and host states, the principles voiced therein may be more appropriate for an analysis relating to investor-state relations. As noted above, the ILC Articles were drafted with a greater focus on intra-state responsibility for internationally wrongful acts.[382] That said, this should not underplay the relevance and importance of the ILC Articles to investor claims. As noted in the general commentary to the ILC Articles, they "*are concerned with the whole field of State responsibility…[and]… apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole*".

[2] Authorities before Desert Line

The starting-point in relation to the availability of moral damages under customary international law is the seminal decision of the PCIJ in the *Chorzów* case. In seeking to set out the principles of international law regarding the consequences of committing an internationally wrongful act, the Court explained as follows:

> *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.*[383]

The case concerned Germany's claim against Poland for reparation due to the latter's unlawful expropriation of a nitrate factory and related immoveable property belonging to two German companies, contrary to the terms of the Geneva Convention of 13 May 1922, signed by both nations following the end of the First World War. The decision and the principle enunciated was noted with approval in the ILC Articles.[384] It appears that the decision constitutes the foundation of Article 31, which concerns reparations for internationally wrongful acts. Further, arbitral tribunals have on many occasions referred to the principle laid down in the *Chorzów* case with approval.[385] This has resulted in scholars advocating for the availability of moral damages to foreign investors under international law.[386]

If the ultimate aim is to put the claimant in the position it would have been but for the wrongful act, and all consequences flowing from the said act is to be wiped out so far as such is possible, then all harm caused must be addressed, including any moral harm. Article 31 expressly affirms this.[387] Indeed, there is some strength in the argument that investor moral damages claims should be permitted if the aim is to "*wipe out all the consequences of*

[382] See above under section §3.02[B][1]. See also ILC Articles, Article 42, and Commentary (2).
[383] *Chorzów* (n 4) 47.
[384] See, for instance, ILC Articles, Article 31, Commentaries (1) - (3).
[385] See *Biwater* (n 6) [776].
[386] See Ehle (n 145) 293-294.
[387] Article 31(2).

the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[388] It is noteworthy that the general statement of customary international law propounded in the *Chorzów* case reverberates the dictations of the theory of corrective justice postulated by Aristotle many centuries earlier. Corrective justice requires that an injustice be corrected by equalling the scale and ensuring an equality of quantities.[389] The wrongdoer is required to cure the harmful consequences of its wrongful act.[390]

The principle articulated in the *Chorzów* case was also mirroringly enunciated in the earlier *Lusitania* case.[391] Notably, the tribunal in *Desert Line* specifically referred, with approval, to the *Lusitania* case in its award.[392] One must now consider how recent investment cases dealing with investor moral damages claims treat such established and widely respected decisions. This will assist determine the relevance of such decisions, as well as that of the ILC Articles, to the topic under consideration, and the guidance available to future courts and tribunals considering similar issues.

[3] Desert Line

As above noted, *Desert Line* is the first known ICSID investment case where moral damages were awarded to an (corporate) investor on the basis of customary international law.[393] The investor (Desert Line) successfully claimed breaches of the Oman-Yemen BIT by the host state (Yemen) on the basis of, *inter alia*, expropriation and unfair and inequitable treatment. A full factual matrix of the case is provided in Chapter 4 below, as well as a detailed analysis of the award, given the importance and centrality of the award to the topic of this book.[394]

As noted above, the award was the first publicly known investment award where a moral damages claim by an investor succeeded pursuant to customary international law principles. This is despite the absence of clear words in the BIT in question regarding the recoverability of moral damages; nor did the arbitral tribunal's view that the BIT primarily had in mind the protection of property and economic values have an otherwise impact on the perceived entitlement. The tribunal reasoned that even though investment treaties primarily aim at protecting property and economic values, they do not exclude the right of a party to seek, in exceptional circumstances, compensation for moral damages. This resonates the principle enunciated in the *Chorzów* case that "*it is a principle of international law…that any breach of an engagement involves an obligation to make reparation…and there is no*

[388] *Chorzów* (n 4) 47.
[389] See Weinrib, Corrective Justice (n 77) 408.
[390] See Encarnacion (n 81); Coleman (n 82) 18 and 26.
[391] *Lusitania* (n 3) 40; see Chapter 2 above under section §2.02[A] for the particulars of that case.
[392] *Desert Line* (n 1) [289].
[393] See Blake (n 180) 375.
[394] See Chapter 4 below under section §4.02[A][4].

necessity for this to be stated in the [treaty] itself".[395] This line of thinking is aligned with the dictations of the Aristotelian theory of corrective justice.[396]

The *Desert Line* award is suggestive of an implied obligation to compensate for moral harm, but only in exceptional circumstances. Absent any such exclusion in the applicable investment treaty, the customary international law obligation to "*wipe out all the consequences of the illegal act*" applies. The fact that the investor corporation in that case based its claim on international law principles[397] and that the tribunal did not consider the BIT between Oman and Yemen, the applicable BIT, when addressing entitlement to moral damages validates this conclusion. The reference in the *Desert Line* award to the *Lusitania* case, referred to above, further validates this view.[398] It was said in the latter 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*".[399] It is clear that the *Desert Line* tribunal's reasoning in respect of moral damages was heavily, if not solely, based on international law principles. Allepuz concurs with this understanding.[400]

Further and in support, Jagusch considers the *Desert Line* award to be the foundational precedent on moral damages in international law.[401] Weiniger and Garcia further explain that in recent cases concerning moral damages, arbitral tribunals appear to have assumed jurisdiction as a matter of customary international law.[402] Parish et al. concur with this view, but concede that there is a conceptual difficulty at first blush in respect of awarding moral damages in investment arbitrations.[403]

In summary, the *Desert Line* award underwrites the assertion that foreign investors are entitled to moral damages as a matter of customary international law. This is aided by the earlier cases referred to in that award that have helped shape international customary law, as well as by scholars. One must now consider post-*Desert Line* cases on moral damages to be able to conclude positively whether the awards and judgments of international courts and tribunals speak in favour of entitlement to moral damages pursuant to customary international law.

[4] The Desert Line legacy

The moral damages debate in the international investment context did not, expectedly, cease with the *Desert Line* award. Conversely, the award was the cause of acceleration. This is

[395] *Chorzów* (n 4) [73].
[396] See Weinrib, Corrective Justice (n 77) 410.
[397] *Desert Line* (n 1) [286].
[398] ibid [289].
[399] *Lusitania* (n 3) 40.
[400] Allepuz (n 146) 8.
[401] Jagusch (n 153) 50.
[402] Matthew Weiniger and Alejandro Garcia, 'Treaty Column: Jurisdiction over moral damages claims' (*Global Arbitration Review*, 21 May 2013) <https://globalarbitrationreview.com/article/1032354/treaty-column-jurisdiction-over-moral-damages-claims> accessed 2 April 2021.
[403] Parish (n 170) 225-226.

only natural. It issued the green light to a new head of claim, little known in investment cases until then, which claimant investor counsels were naturally ready and willing to utilise. Most investors whose investments are expropriated or not treated in a fair and equitable manner would have some basis to contend that they suffered moral harm at the hands of the host state, however trivial that harm may be. A key post-*Desert Line* award dealing with moral damages entitlement in investor-state arbitration is the ICSID arbitral tribunal's award in *Lemire*.[404] The award is arguably the second most important case on the issue of moral damages in international investment arbitration. It is the first known case where an investment tribunal has attempted to follow, refine and reformulate the *Desert Line* test in respect of moral damages claims. Blake considers *Lemire* as "*the most far reaching analysis to date on the question of moral damages in international investment law*".[405] To this is added the recent ICSID tribunal's decision in *von Pezold*, where the tribunal followed the *Desert Line* and *Lemire* principles to exactitude, and awarded USD 1 million to one of the natural investor claimants and also separately to a group of corporate investors.[406]

Lemire was a case where the investor (a US national) had indirectly invested, through a Ukrainian entity, in the Ukrainian music radio industry. Mr. Lemire claimed loss due to breaches of the 1994 Ukraine-US BIT by virtue of the Ukrainian authorities' refusal to grant him radio frequency licences and broadcasting channels in certain Ukrainian cities. The licences were all ultimately extended with the payment of correct fees, with warnings quashed by the Ukrainian courts. Mr. Lemire had also claimed moral damages in the amount USD 3 million for harassment in breach of the Ukraine-US BIT.[407] The tribunal awarded the investor compensation for violation of the fair and equitable treatment obligation contained in the BIT, but dismissed the claim for moral damages. The tribunal reiterated the statement in *Desert Line* that moral damages would be awarded only in exceptional circumstances.[408] The tribunal then opined that to ascertain the exact meaning to be afforded to exceptional circumstances one ought to consider the existing case law, and in doing so it first considered the decision in *Desert Line*.

Following a review of the cases[409] the tribunal regarded as being relevant, it concluded that moral damages are available only in exceptional circumstances where the host state's:

> "*…actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act…[and which causes] a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and both cause and effect are grave or substantial.*"[410]

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[404] *Lemire*, Award (n 140).
[405] Blake (n 180) 378.
[406] *von Pezold* (n 123).
[407] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, [38]-[39]. See Chapter 4 below under section §4.02[A][10] for more on *Lemire*.
[408] *Lemire*, Award (n 140) [326].
[409] *Desert Line* (n 1); *Lusitania* (n 3); *Siag* (n 151).
[410] *Lemire*, Award (n 140) [333].

The tribunal thereafter proceeded to apply the above-stipulated and reformulated test to the facts of the case, concluding that the facts were not exceptional or reaching the required level of severity to justify a moral damages award.[411] As the author noted elsewhere, the seminal ruling in *Desert Line* is a landmark ruling 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.[412]

To that, a further brick was added by the *von Pezold* award, where the tribunal, following *Desert Line* and *Lemire* almost to the letter, found that the required exceptional circumstances existed and separately awarded moral damages to a natural person and a group of corporate claimants.[413] That was a case where an ICSID claim had been brought by a group of German and Swiss national investors, and also separately by Zimbabwean entities in which such investors held shares, alleging that Zimbabwe, through its 1992 land acquisition programme, unlawfully expropriated their investment, i.e., lands belonging to Zimbabwean entities in which they held shares. The claim in that case was based on both the German-Zimbabwean and Swiss-Zimbabwean BITs. The tribunal accepted the claim brought on the basis of, *inter alia*, unlawful expropriation, unfair and inequitable treatment and failure to provide full protection and security.[414] It awarded restitution, failing that, compensation for the unlawful expropriation.[415] The tribunal also awarded one of the claimants, a Mr. Heinrich von Pezold, as well as the relevant Zimbabwean entities, moral damages in the sum of USD 1 million each, in connection with threats of death and violence endured by Mr. Pezold and the companies' employees at the hands of illegal settlers.[416] They had "*firearms put to [their] heads, and were kidnapped*", were beaten and tortured, and further humiliated by other means.[417] The tribunal undertook an extensive review of the issue of moral damages under international investment law in its award, focusing on the ICSID awards in *Desert Line*[418] and *Lemire*[419], and reaffirmed the principle that a state's obligation to provide reparation for an injury covers both material and moral damage, referring to the ILC Articles for support.[420] It also reiterated the rule enunciated in *Desert Line*, and confirmed in *Lemire*, that moral damages should be awarded in exceptional circumstances only.[421]

It is noteworthy, and supportive of the above, that the tribunal in *Franck Charles Arif* noted boldly, citing Article 31(2) of the ILC Articles as support, that "*[T]here is no doubt that moral damages may be awarded in international law*".[422] The tribunal did, however, caveat this bold proposition by stating that moral damages is an exceptional remedy in investment cases and that appropriate facts and circumstances would need to exist before

[411] ibid [336]-[344].
[412] Gültutan (n 337).
[413] *von Pezold* (n 123).
[414] ibid [1016].
[415] ibid [10212] *et seq*.
[416] ibid [923], [1020.5].
[417] ibid [898]-[899], [902].
[418] *Desert Line* (n 1).
[419] *Lemire*, Award (n 140).
[420] *von Pezold* (n 123) [908].
[421] ibid [908-[910]. See also *Desert Line* (n 1) [289]; *Lemire*, Award (n 140) [333].
[422] *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, [584].

such an award is made.[423] The basis of this caveat, however, is not fully explained. Having regard to the publicly available sources, including *Franck Charles Arif*, Dumberry explains that there is no known investment award where an arbitral tribunal has expressly refused, as a matter of principle, to award compensation to an investor for moral damages.[424]

However, not all arbitral tribunals share the view that the right to moral damages exists as a matter of customary international law and that an award should be made where moral harm has been suffered due to a treaty breach. Some arbitral tribunals have expressed concern, doubt and reservation. In respect of a request for moral damages on the basis of abuse of process, the tribunal in *Cementownia* doubted that such a principle can constitute a sufficient legal basis for granting compensation for moral damages.[425] The tribunal sought to differentiate the *Desert Line* award on the basis that that was a case where "*the investor based its request for compensation for moral damages on the Yemen-Oman BIT*".[426] *Cementownia* was a case where the investor claimed unlawful expropriation, which claim was later withdrawn due to the investor's inability to produce the required original share certificates as proof of shareholding. Turkey claimed moral damages on the basis that the investor's conduct in the arbitration had been egregious and malicious, and that the investor had "*asserted and pursued a baseless claim and…made spurious allegations against Turkey with the intent of damaging its international stature and reputation*".[427] Turkey placed reliance on the *Desert Line* and *Benvenuti* awards, noting that although such cases concerned damages to the claimant investors, "*there is no principal reason why equivalent relief should not be available to the respondent State in an appropriate case*".[428]

The *Cementownia* award calls for a few clarificatory remarks. The tribunal seems to have misunderstood the basis of the moral damages award in *Desert Line*. The award for moral damages in *Desert Line* was made under international law principles, not under the BIT as suggested. The award clearly states this:

> *Based on international law, the Claimant claims the amount of OR 40,000,000 for moral damages including loss of reputation…[the 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.*[429]

Allepuz concurs with this reading.[430] The narrow approach to moral damages entitlement in *Cementownia* may be explained by two factors. First, in that dispute the tribunal essentially considered whether an abuse of process would give rise to an obligation to remedy moral harm suffered as a result. This is a different point than the one the *Desert Line* tribunal was asked to consider. Second, in *Desert Line* neither party objected to the tribunal's jurisdiction to award moral damages. The investor's claim for moral damages was

[423] ibid [584] and [603] *et seq.*
[424] Dumberry, Compensation (n 169) 252. See also Patrick Dumberry, 'Moral Damages' in Christina Beharry (ed) Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration (Brill, 2018), 142, 146.
[425] *Cementownia* (n 252) [170].
[426] ibid.
[427] ibid [165].
[428] ibid.
[429] *Desert Line* (n 1) [286] and [290].
[430] Allepuz (n 146) 8.

countered with the host state's counterclaim for moral damages.[431] In other words, both parties were in agreement that the tribunal could grant moral damages. That was not the case in *Cementownia*, where the claimant investor, in response to the host state's claim for moral damages based on the principle of abuse of process, contended that the issue of moral damages in international law required clarification, thereby raising a challenge as to jurisdiction. As an alternative, the investor argued that the host state had failed to demonstrate the presence of conditions necessary for moral damages claims.[432] These may explain the *Cementownia* tribunal's cautious and narrow approach and attempt to confine the *Desert Line* award to the relevant treaty and the facts of the case.

A claim for moral damages was also dismissed in *Rompetrol* on the premise of proof and recoverability.[433] The tribunal reasoned that moral damages cannot be resorted to whenever the claimant fails to prove actual economic damage.[434] The tribunal's reasoning suggests that one cannot seek moral damages in circumstances where one does not suffer actual economic harm, i.e., pecuniary harm, and therefore cannot be sought as a standalone remedy. However, this is contrary to the established principles of customary international law, as set out in the ILC Articles and precedents considered above.[435] A review of the award suggests that the tribunal did not undertake as detailed review and analysis of entitlement to moral damages under customary international law. The over-generalization made in *Rompetrol* should therefore be approached with some level of caution.

For completeness, a fuller and more detailed analysis of the above awards, particularly the awards in *Desert Line*[436], *Lemire*[437] and *von Pezold*[438], is contained in Chapter 4 considering the importance, centrality and impact of such decisions on the substantive elements required for an award of moral damages.

[D] Conclusion

The two primary sources of customary international law, i.e., the ILC Articles and the awards and decisions of international courts and tribunals, lean strongly in favour of permitting moral damages claims in investment arbitrations, where appropriate and the requisite conditions exist. Moral damage is a concept that is widely recognised under international law, dictating that any moral harm sustained due to an internationally wrongful act must be remedied as far as such is possible. This, in most cases, will be by way of a monetary award of damages, as was the case in *Desert Line*[439] and *von Pezold*[440]. That is, of course, unless the applicable treaty and/or contract excludes, by express or implied terms, claims for moral

[431] *Desert Line* (n 1) [288].
[432] *Cementownia* (n 252) [166].
[433] *Rompetrol*, Award (n 155).
[434] ibid [293].
[435] See above under section §3.02[B] and [C].
[436] *Desert Line* (n 1).
[437] *Lemire*, Award (n 140).
[438] *von Pezold* (n 123).
[439] *Desert Line* (n 1).
[440] *von Pezold* (n 123).

damages. That said, to the author's knowledge there is no investment treaty currently in force that expressly excludes moral damages claims.[441] Where not so excluded, it is rightly suggested that it is only natural that an investment arbitration tribunal applying customary international law should consider itself able to award a claimant moral damages for the intangible, moral harm that it has suffered in connection with an investment.[442] A failure to do so would result in a situation where the claimant is denied its full and fair determination of compensation for the injury under the applicable international law principles.[443]

It is concerning, however, to observe a reluctance on the part of investment tribunals to follow the well-established principles of customary international law in respect of recoverability of damages, moral damages in particular. The *Desert Line*, *Lemire* and *von Pezold* line of cases have refused to follow international law by imposing an additional requirement of exceptionality, something not required by customary international law, as the above analysis has demonstrated. Additionally, some tribunals have sought to impose a higher evidential threshold in respect of moral damages claims.[444] This is an obvious indication of fragmentation of international law, particularly given that other disciplines of international law, such as international human rights law, impose no such limitation, as the detailed analysis in Chapter 4 demonstrates. Such uncontrolled and unexplained fragmentation risks the coherence, stability and predictability of international law and of the international legal order.[445] It is difficult to justify one approach to moral damages claims under customary international law, and also under various disciplines of international law, such as under international human rights law, and another approach in respect of international investment law, where one is essentially concerned with the same type of harm to individuals.

§3.03 MORAL DAMAGES UNDER INVESTMENT TREATIES

[A] Introduction

Investment treaties often constitute the foundation of investment arbitrations. Prior to the emergence of BITs and other treaties which permit foreign investor claims against host states, investors had little direct recourse to international law.[446] Their options were, in most cases, limited to legal avenues available under the host state's domestic laws or through diplomatic assistance and protection by its patron state. This was largely the position before the BIT-era. The validity of an investor's claim in an investor-state dispute therefore depends on the applicable investment treaty or agreement, and the provisions and obligations contained

[441] See Dumberry, Satisfaction (n 167) 235. See also Allepuz (n 146) 6.
[442] Cabrera (n 163) 198.
[443] Coriell (n 148) 215.
[444] See *Rompetrol*, Award (n 155) [289].
[445] See Greenwood, Unity (n 29); Koskenniemi (n 30); Andenas (n 28).
[446] See Tom Mortimer and Chrispas Nyombi, 'The Evolution of International Investment Law Pre-1965' in Tom Mortimer and Chrispas Nyombi (eds), *Rebalancing International Investment Agreements in Favour of Host States* (Wildy, Simmonds & Hill 2018).

therein. Accordingly, where the claim rests on a treaty, one must begin with construing the terms of the treaty to ascertain whether there has been a breach and, if so, what compensation is due. Unless excluded by the terms of the treaty, any ambiguity or lacuna will usually be assisted by reference to customary international law. Customary international law is supplemental to and cannot override the terms of the treaty, whether express or implied.[447] Support can be found for this proposition also in the ILC Articles. Article 55 provides that the Articles do not apply where "*special rules of international law*" govern the internationally wrongful act. In explanation, the commentaries refer to circumstances where the treaty expressly dictates the terms of its relationship with other rules and where the terms of the treaty cannot be read harmoniously with the ILC Articles. Where that is so, the treaty will enjoy primacy. This is fitting with the understanding that the ILC Articles are considered by many as the codification of customary international law on state liability.[448] This also conforms to the principle of law that the parties' agreement would override any non-mandatory legal rule or principle.[449] For completeness, scholars also widely advocate the primacy of treaty over customary international law.[450] Allepuz, for instance, explains that "*...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*".[451]

However, certain scholars have questioned whether the treaty will trump customary international law where a claim is brought under customary international law principles. Ripinsky, for instance, explains that since international investment agreements usually seek to regulate the consequences of lawful expropriations and are silent as to whether the same principles should apply in unlawful expropriation cases, an award of damages by a tribunal in unlawful expropriation cases would be governed by the principles of customary international law.[452] It is questionable therefore, whether in such cases the treaty should override, for instance, the compensation related rules of customary international law. This view has found some support in awards of certain arbitral tribunals. For instance, the tribunal in *ADC* explained that "*Since the BIT [did] 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 [was] required to apply the default standard contained in customary international law in the present case.*"[453] The tribunal then cited the *Chorzów* case and made an order accordingly. Other investment tribunals have adopted a similar reasoning.[454] Some arbitral tribunals, however, have diverged from this line of thinking. They consider that limiting damages recoverable to the standard contained in the applicable treaty even in unlawful

[447] See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, [187].
[448] Caron (n 281); Crawford (n 343).
[449] See Hugh Beale, *Chitty on Contracts: Volume I - General Principles* (33rd edn, Sweet & Maxwell 2019), [1-032].
[450] See, for instance, Allepuz (n 146) 6. See also Schwenzer (n 134) 419.
[451] Allepuz (n 146) 6.
[452] See Ripinsky (n 205) 83-84.
[453] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, [483].
[454] See *Siemens AG v. The Argentine Republic*, ICSID Case No ARB/02/8, Award, 17 January 2007, [349]; *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, [8.2.5].

expropriation cases (e.g., market value / commercial value of investment) is the most appropriate thing to do. For instance, the tribunals in *Tecmed*[455] and *Metalclad*[456], which concerned indirect and therefore unlawful expropriations of investments, held that compensation should be awarded based on the standard dictated by the applicable treaty and not on the basis of customary international law principles, which may have dictated a higher monetary award.

[B] Review of select investment treaties

One simply cannot ascertain whether investment treaties generally permit recovery of moral damages without an empirical review of certain select few treaties, both in force and in draft form. This part accordingly undertakes a detailed review of certain of those relevant investment treaties, both bilateral and multilateral, in an effort to clarify the issue, with an analysis of the position under BITs first [1], followed by an analysis of MITs [2]. There are thousands of BITs currently in force, and many MITs.[457] It would be a herculean-like task to aim to review all such treaties. Accordingly, certain sample-selected treaties will be considered below, selected to represent the terms of treaties relating to states located in different economic regions and with different economic outputs. The aim is to ensure that the principles elicited are as widely representative as is possible of the many investment treaties in existence. The below analysis should therefore provide one with a good understanding of how treaties treat moral damages claims.

[1] Review of BITs

A very large proportion of investment claims commenced by foreign investors are brought under the dispute resolution mechanisms contained in BITs. In fact, the investment arbitration framework owes its existence largely to the introduction of BITs.[458] For instance, as of 31 December 2019, in 60% of all cases registered with ICSID, the Centre's jurisdiction was invoked based on the terms of a BIT.[459] This is unsurprising given there are currently in excess of 3,000 BITs in force.[460] The below empirical analysis, of both model and currently in force BITs, analysed in that order, will therefore be of some utility to those considering whether BITs generally permit recoverability of moral damages.

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[455] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, [187]-[188].
[456] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, [112] and [118]-[122].
[457] See Mortimer and Nyombi (n 446).
[458] ibid 70.
[459] International Centre for Settlement of Investment Disputes, The ICSID Caseload - Statistics (Issue 2020-1) <https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdf> accessed 2 April 2021.
[460] See Salacuse, BITs (n 350); Schwebel (n 350).

[a] Israeli Model BIT

The Israeli 2003 Model BIT[461] includes the standards of protection often found in BITs, such as the duty to provide fair and equitable treatment and full protection and security (Article 2(2)), most favourable nation treatment (Article 3), and compensation in cases of expropriation (Article 5). In the event of an investor-state dispute "*between a Contracting Party and an investor of the other Contracting Party*" which cannot be settled through negotiations, such dispute "*shall be on the request of the investor settled*" through the host state's courts or by arbitration, including ICSID arbitration as one of the choices available (Article 8).

On the issue of moral damages entitlement, the Israeli Model BIT remains silent. It does not expressly permit or preclude moral damages claims by the investor and/or the host state. Consequently, a tribunal faced with a moral damages claim in proceedings founded upon the Israeli Model BIT, would most likely consider and determine the issue based on the principles of customary international law. This view is supported by the fact that the model BIT contains several references to customary international law. For instance, Article 12 explains that more favourable international law rules and obligations shall apply, whether existing at the time of the BIT's execution or thereafter. This is an important provision. It dictates that where remedies available under international law are more favourable to the investor than the terms of the BIT, the former will prevail. Thus, if it can be said with some comfort that customary international law recognises moral damages entitlement of foreign investors, the Israeli Model BIT would recognise such express entitlement. This is because such would undoubtedly be more favourable to the investor in comparison to the terms of the model BIT (which remains silent on the matter), and will allow the arbitral tribunal to find that it has jurisdiction to grant moral damages.

As was explained above[462], the authoritative guidance on moral damages claims in investment cases is the award in *Desert Line*, where an award of moral damages was made on the basis of international law.[463] There the tribunal concluded 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.*"[464] Furthermore, the ILC Articles recognise entitlement to moral damages as a matter of international law.[465] Consequently, investor moral damages claims appear permitted under the Israeli Model BIT. An arbitral tribunal with jurisdiction under the BIT should find jurisdiction in respect of moral damages claims. In respect of moral damages claims by host states, the position does not appear to be as straightforward. The wording and structure of the BIT seems to suggest that its main aim is the protection of investors and their

[461] "Israeli Model BIT", <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5427/download> accessed 2 April 2021.
[462] See above under section §3.02[C][3].
[463] *Desert Line* (n 1) [289]-[291].
[464] ibid [289].
[465] See above under section §3.02[B][2].

investments, in line with many other BITs. The BIT does not appear to envisage host state claims.

[b] French Model BIT

The French 2006 Model BIT[466] also, unsurprisingly, contains the usual standards of protection afforded by BITs. It stipulates for the duty to provide fair and equitable treatment (Article 3), national and most-favourable-nation treatment (Article 4), protection of investments (Article 5(1)), prohibition against expropriation (Article 5(2)), and investor-state (Article 7) and inter-state (Article 10) dispute settlement mechanisms. The French Model BIT also does not contain an express provision on moral damages claims. However, similar to the Israeli Model BIT, the French Model BIT provides that the host state must provide fair and equitable treatment to investments of investors of the other contracting party in a manner that accords with the principles of international law. In line with the reasoning above, investors are likely to succeed in a claim for moral damages under the French Model BIT, provided the requisite conditions exist. In terms of the host state's entitlement to moral damages, the French Model BIT seemingly provides for a different outcome, permitting both investor and host state claims. Article 7 of the BIT provides:

> *If this dispute [any dispute concerning the investment] 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…*

This implies that disputes may be commenced by either the investor or the host state. One may therefore argue that the French Model BIT permits host state counterclaims for failure to observe treaty obligations, and possibly also those under customary international law, including entitlement to moral damages. BITs usually concern themselves with the protection of investors and their investments. They are aimed at regulating state behaviour. However, this BIT appears to have been drafted with a wider perspective and intent. It suggests that arbitration proceedings may be commenced by either side. Accordingly, in circumstances where moral damages entitlement exists as a matter of international law to host states and the conditions are ripe[467], the French Model BIT may permit host state counterclaims for moral damages. For completeness, one notes the reasoning of the tribunal in *Saluka*, where it had been held that the reference in the BIT to 'all disputes' "*is wide enough to include disputes giving rise to [state] counterclaims, so long as, of course, other relevant requirements are also met*".[468] It is open, however, to construe this more narrowly given the reference in the BIT to 'any dispute concerning the investments', and argue that a moral damages claim by the host state would not concern the investment.

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[466] "French Model BIT" <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5874/download> accessed 2 April 2021.
[467] Host States' entitlement to moral damages is open to serious debate and possibly questionable. This issue is considered in detail in Chapter 2 above.
[468] *Saluka* (n 230) [39].

[c] Indian Model BIT

The Indian 2015 Model BIT[469] also contains the usual standards of protection available to foreign investments under BITs. The host state must not subject investors of the other contracting party to measures that violate the principles of customary international law (Article 3(1)), must provide full protection and security to their investments (Article 3(2)), must not subject investors or their investments to less favourable treatment when compared with the treatment of its own nationals in connection with their investments (Article 4(1)) and must not expropriate the investment unless it is required for a public purpose, is in accordance with the due process of law and upon payment of an adequate compensation (Article 5(1)). It is noteworthy that the Indian Model BIT does not contain the usual fair and equitable treatment clause often found in BITs, likely given the view adopted by some that such clauses are often too liberally interpreted by arbitral tribunals and that the exercise of such excessive jurisdiction must be curbed.[470] A review of the model BIT suggests that its drafters had in mind the intention of addressing certain undesired consequences of arbitral decisions that do not particularly favour the interests of host states.[471] For instance, Article 5(3) seeks to regulate expressly the circumstances that would give rise to direct and indirect expropriation. On that note, Article 5(5) explains that regulatory measures that are not discriminatory and required to protect legitimate public interest or public purpose objectives (e.g., public health) will not amount to expropriation, i.e., there will be no breach of the BIT in such cases. The investor will have to resort to any domestic remedies available in such cases.

The most relevant section of the model BIT is its Chapter IV, which concerns the ISDS mechanism. It consists of 17 detailed and lengthy articles, a change in attitude given BITs are usually skeletal and are in the nature of framework agreements. It appears to seek to impose a great deal of restriction on arbitral jurisdiction, corroborating further the statement that the drafters of the model instrument sought to bring case law to life and neutralise arbitral awards that give away too much power to the investor and, similarly, arbitrators.[472] For instance, the Indian Model BIT does not grant the arbitrators the jurisdiction to hear "*disputes arising solely from an alleged breach of a contract between a Party and an investor*" (Article 13(3)). This will neutralise the line of cases which have permitted elevating contractual claims to investor-state arbitration, often by virtue of umbrella clauses.[473] Moreover, the arbitral tribunal does not have jurisdiction to review the merits of a decision of the host state's judicial authority (Article 13(5)). The Indian Model

[469] "Indian Model BIT", <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> accessed 2 April 2021.
[470] See Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38(1) Northwestern Journal of International Law & Business 1, 28.
[471] ibid.
[472] ibid.
[473] See, generally, Katia Yannaca-Small, 'OECD Working Papers on International Investment, 2006/03: Interpretation of the Umbrella Clause in Investment Agreements' (OECD Publishing, 2009) <https://www.oecd-ilibrary.org/finance-and-investment/interpretation-of-the-umbrella-clause-in-investment-agreements_415453814578> accessed 2 April 2021.

BIT also lays down a very tightly monitored obligation to exhaust domestic legal avenues before seeking investment protection under the BIT. The BIT requires that the investor exhausts local remedies for at least five (5) years, coupled with a mandatory negotiation period of six (6) months (Articles 15(2) and (4), respectively). Most important of all, the Indian Model BIT contains an express prohibition on punitive and moral damages. It states that arbitral tribunals do not possess jurisdiction to "*award punitive or moral damages or any injunctive relief against either of the Parties under any circumstance*" (Article 26(4)). This provision appears to have been in response to cases such as *Desert Line*, *Lemire* and *Cementownia*, which considered investor and host-state entitlement to moral damages in investment cases. A moral damages claim under the executed form of the model BIT will, therefore, unlikely be permitted.

[d] UK-Turkey BIT

The BIT currently in force between the UK and Turkey has been in force since 1996.[474] Article 2(2) explains that investments made by nationals of the other contracting party must be treated fairly and equitably and provided with full protection and security, prohibiting unreasonable or discriminatory measures that may impair the management, maintenance, use, enjoyment or disposal of investments. The BIT also provides for national treatment and most-favoured-nation clauses (Article 3), and prohibits unlawful expropriation (Article 5). The dispute resolution mechanism is set out in Article 8. The BIT provides that "*any legal dispute*" arising between an investor and the host state may be submitted to ICSID arbitration.

The BIT defines legal dispute as "*an alleged breach of any right conferred or created by this Agreement with respect to an investment*". The instrument further states 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*". Most importantly, Article 11 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*".

Accordingly, it is plausible to suggest that an investor (not the host state, given the words used) is entitled to invoke rights under international law that provide for a better remedy in comparison to those offered by the BIT. With respect to moral damages claims of host states, as noted above, Article 11 appears to contemplate only investor reliance on national or international law. The qualification of legal disputes in Article 8 to those being "*with respect to an investment*" further corroborates this. Moral damages claims by host states in the form of a counterclaim under the UK-Turkey BIT appears unlikely to succeed

[474] 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 <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3042/turkey---united-kingdom-bit-1991-> accessed 2 April 2021.

for lack of jurisdiction. However, there is some room for argument, given that the BIT stipulates that "*either party may institute proceedings*".

[e] China-Singapore BIT

The final BIT considered as part of the empirical study is the BIT between China and Singapore.[475] This BIT also features the often-found protections contained in BITs. It states that the host state must treat approved investments fairly and equitably and protect such investments (Article 3). The BIT also contains the usual most-favoured-nation clause, though excluding expropriation cases from its remit (Article 4). Investments may not be expropriated unless carried out in a non-discriminatory manner, in accordance with the laws of the state and against prompt compensation (Article 6).

The procedure for dispute resolution is set out in Article 13. The BIT states that, with respect to disputes between an 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 be submitted to an international arbitral tribunal only if it involves "*expropriation, nationalization or other measures having equivalent effect*". The effect of this provision seems to be that only disputes concerning expropriation, nationalisation and measures having equivalent effect may be submitted to an investment tribunal, the others must be submitted to the courts of the host state. This is unlike the BITs considered above. That said, the BIT also appears widely drafted to permit moral damages claims. It refers to disputes that are in connection with the investment and that is likely to be sufficient for a *Desert Line* type conclusion. This conclusion appears likely to remain valid even in cases where the dispute, being a non-expropriation dispute, is submitted to the courts of the host state, but governed by the terms of the BIT. The court seized will have to apply the principles of international law to determine the matter.

[f] Effect of MFN clauses in BITs

The above review demonstrates that BITs are far from identical. They do generally contain similar substantive and procedural protections pertaining to foreign investments. The need to treat investors fairly and equitably, protect their investments, not to expropriate investments without good cause and to provide adequate compensation are almost universal and exist in almost all BITs. However, they do diverge in some respects, some minor some substantial, and some relating to substantive issues and others relating to issues of procedure. For instance, some of the BITs considered above provide expressly that the arbitral tribunal

[475] China and Singapore Agreement on the Promotion and Protection of Investments of 21 November 1985 (the "China-Singapore BIT") <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5377/download> accessed 2 April 2021.

must resort to international law to determine the rights and obligations of the parties, whereas others remain silent on the point. The question then arises is the extent to which most-favoured-nation clauses can be utilised to 'transport' favourable treaty clauses that appear more permissive of moral damages claims. To put matters into context, the issue is whether the terms of a BIT which provides that the arbitral tribunal must consider the principles of customary international law when determining a claim could be utilised by way of a most-favoured-nation clause in another BIT to allow a moral damages claim under the latter BIT, where the latter BIT on its face appears more restrictively worded and not permissive of moral damages claims. Given that approximately 80% of BITs contain most-favoured-nation clauses[476], this is not an insignificant issue and one likely to trouble many arbitrators. Caron seeks to define and explain the utility of MFN clauses as follows:

> *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").*[477]

The threshold to succeeding in gaining the protection of a more favourable clause in another treaty (comparator treaty) is, however, rather high. Caron notes that the "*successful invocation of the MFN provision to reach a stronger substantive protection obligation is extremely rare in practice*".[478] *MTD* is an example of a case where a most-favoured-nation clause was successfully transported into the base treaty.[479] That was a case where regional authorities had refused the Malaysian investor's rezoning application, in circumstances where the Foreign Investment Commission of Chile had approved the application and led the investor into believing that regional authorities would follow suit. However, the Ministry of Housing and Urban Development refused to grant the application. The Foreign Investment Commission seemingly declined to intervene and the application remained rejected. One of the issues before the investment tribunal was whether the investor was entitled to rely on protections contained in two other (comparator) treaties Chile had entered into with Denmark and Croatia, by virtue of a most-favoured-nation clause in the applicable Chile-Malaysia BIT. The MFN clause 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. (Article 3(1))*

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[476] 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 2 April 2021.
[477] David D. Caron and Esme Shirlow, 'Most-Favored-Nation Treatment: Substantive Protection' in Meg Kinnear et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015), 399-414.
[478] ibid.
[479] *MTD*, Award (n 447). See also *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, [377].

The arbitral tribunal decided in the investor's favour and held that the clause permitted reliance on the more favourable clauses in the comparator treaties.[480] The ICSID Annulment Committee upheld the ruling on appeal. In fact, the Annulment Committee advocated a wider interpretation in respect of MFN clauses, reasoning that:

> *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.*[481]

It seems, therefore, that MFN clauses could potentially be deployed to support moral damages claims in circumstances where the underlying BIT is less favourable and there is a comparator treaty that permits or strengthens the claim. As noted by the author elsewhere, if a comparator treaty provides for entitlement to moral damages, expressly or impliedly, then an MFN clause may prove sufficient to incorporate such entitlement into the applicable base treaty and grant the investor the right to seek moral damages.[482] However, as Caron notes, "*[D]etermining the scope and applicability of MFN clauses will… necessarily be a treaty - and fact- specific exercise*".[483] One must consider the contents of each specific treaty (base and comparator treaties) and the facts of the case before ascertaining whether a more favourable clause in a comparator treaty can be transported into the base treaty. For fullness, there are no known reported cases considering the use of MFN clauses in connection with moral damages claims.

[2] Review of MITs

MITs are seemingly on the rise. This is particularly the case in respect of the European Union ("EU"), with the block using its collective economic power to obtain more advantageous trade terms, while preserving its right to regulate. For instance, the EU-Canada Comprehensive Economic and Trade Agreement ("CETA") provisionally entered into force on 21 September 2017, with the EU Member States' approval needed before it can have full effect.[484] It is considered unlikely to be ratified for several years.[485] Similarly, the EU-Singapore Investment Protection Agreement ("IPA") was signed on 19 October 2018 and approved by the EU Parliament on 13 February 2019. It will, when in force, replace the

[480] *MTD*, Award (n 447) [104].
[481] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, [64].
[482] Gültutan (n 337).
[483] Caron and Shirlow (n 477) 404.
[484] European Commission, 'EU-Canada Comprehensive Economic and Trade Agreement' <https://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm> accessed 2 April 2021.
[485] See Graham Coop and Gunjan Sharma, 'Investment Arbitration, Procedural Innovations to ISDS in Recent Trade and Investment Treaties: A Comparison of the USMCA and CETA', in Christian Klausegger et al. (eds), *Austrian Yearbook on International Arbitration* (Austrian Yearbook on International Arbitration, 2019), 467, 471.

existing (currently 12) BITs between Singapore and EU Member States.[486] There were also attempts to form a trade partnership between the US and the EU, but those talks have so far failed to produce any meaningful fruit.[487]

The rise of MITs is partly tied to the current unpopularity of bilateral engagements (i.e., BITs), some undesired aspects of which MITs strive to address.[488] BITs and other orthodox ISDS mechanisms have been the subject of criticism for various reasons. Primarily they are criticised for lacking legitimacy, requiring a costly and lengthy procedure, being operated by a small pool of self-serving arbitrators, and producing inconsistent interpretation of rules.[489]Given the shift from bilateral to multilateral engagements with investor court provisions built in, it is as important to consider the position of moral damages claims under multilateral treaties dealing with investment protection. With that in mind, select few of the most recent, important and/or geographically representative MITs are considered below.

[a] CETA[490]

CETA was the result of a five-year long process of negotiations between the EU and Canada, commencing in May 2009 and concluding on 26 September 2014.[491] The agreement is currently applied on a provisional basis, with its ratification process still ongoing at the EU Member State level. Canada has already completed its ratification process. The overall aim of CETA is to increase the trade in goods, services and investment between its signatory parties, most notably by removing 98% of duties on goods.[492] It is already producing its fruits. Statistics suggest that EU exports to Canada in the first year of its provisional application (October 2017 - June 2018) increased by 7% year on year.[493] CETA is particularly important from the EU's perspective given it is the EU's first comprehensive economic agreement with a highly industrialised western economy.[494] The European Commission considers it to be the "*most far reaching agreement the EU has ever concluded*".[495]

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[486] European Parliament, 'Legislative Train 03.2021 - EU-Singapore Investment Protection Agreement (IPA)' <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-singapore-ipa> accessed 2 April 2021.

[487] See European Parliament, 'TTIP Negotiations on Investment Protection: Investor-State Dispute Settlement (ISDS)' <https://www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-investment-protection-investor-state-dispute-settlement-(isds)> accessed 2 April 2021.

[488] See Ameyavikrama Thanvi, 'The Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement: Proposal and Some Unaddressed Issues' (2019) VIII(2) Indian Journal of Arbitration Law 97.

[489] See Rizky Banyualam Permana, 'Achieving Multilateral Investment Court Through EU-ASEAN Expansion of Bilateral Investment 'Court': Is It Possible?' (2019) 16(4) Indonesian Journal of International Law 453.

[490] For a copy of the full text, see: <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 2 April 2021.

[491] European Parliament, 'Legislative Train 03.2021 - EU-Canada Comprehensive Economic and Trade Agreement (CETA)' <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta> accessed 2 April 2021.

[492] ibid.

[493] ibid.

[494] ibid.

[495] European Commission, 'CETA explained' <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm> accessed 2 April 2021.

CETA is a "*mixed agreement*", meaning that it regulates issues falling within the exclusive competence of the EU, as well as issues that fall within the exclusive competence of the Member States. This was confirmed by the Court of Justice of the European Union, which held that the establishment of an ISDS mechanism fell outside the exclusive competence of the EU, and instead fell under shared competence.[496] This is because the adoption of the ISDS mechanism "*removes disputes from the jurisdiction of the courts of the Member States…and cannot, therefore, be established without the Member States' consent*".[497] As a result, CETA must be approved by the EU and all individual Member States to become fully applicable.[498] It became provisionally applicable on 21 September 2017, following the European Council's decision on provisional application on 28 October 2016 and the European Parliament's consent given on 15 February 2017.[499] The majority of its provisions are now applicable; only a few of the provisions related mainly to investment are currently inapplicable. So far 12 Member States (of a total of 27) notified the European Council of the completion of national ratification procedures in respect of CETA.[500]

As noted above, one common concern legislators and representatives of states have is that the customary ISDS mechanism inhibits the states' right to regulate, particularly in respect of sensitive issues. This concern was shared also by the European Parliament. It adopted, as early as 2011, a resolution on EU-Canada trade relations, in which it set out its position on key chapters of CETA, including investment disputes, the right to regulate, regulatory differences and agriculture. The Parliament, in 2015, specifically requested the replacement of the ISDS mechanism with a new system, which ultimately became the new investment court system ("ICS"), with provisions reaffirming the right to regulate also included in the agreement. The request in its 2011 resolution to exclude sensitive sectors from the scope of CETA's investment chapters was also followed-up on by the negotiators.[501] In fact, Article 8.9(1) of CETA affirms clearly the contracting parties' "*right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity*". Noting the European scepticism and dislike of the ISDS mechanism given the constraints imposed on the ability of host states to regulate in the public interest, as well as the perceived lack of transparency of the process, Nyer explains that the drafters of CETA, anticipating the opposition, created a "*uniquely balanced and innovative agreement*" which "*reflects and seeks to address*

[496] *Court of Justice of the European Union, Opinion 2/15 of the Court* (16 May 2017) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN> accessed 2 April 2021.
[497] ibid [292].
[498] The UK in a Changing Europe Initiative, 'Wat is a Mixed Agreement?' <https://ukandeu.ac.uk/fact-figures/what-is-a-mixed-agreement/> accessed 2 April 2021. See also Andrei Suse and Jan Wouters, 'The Provisional Application of the EU's Mixed Trade and Investment Agreements', KU Leuven Working Paper No. 201 (May 2018) <https://ghum.kuleuven.be/ggs/publications/working_papers/2018/201suse> accessed 2 April 2021.
[499] European Parliament, 'Legislative Train 03.2021 - EU-Canada Comprehensive Economic and Trade Agreement (CETA)' <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta> accessed 2 April 2021.
[500] ibid.
[501] European Parliament, 'Legislative Train 03.2021 - EU-Canada Comprehensive Economic and Trade Agreement (CETA)' <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta> accessed 2 April 2021.

European skepticism towards ISDS", and could serve as a template for future similar trade agreements.[502]

The investment related provisions of CETA are contained in Chapter Eight. CETA requires each contracting party to accord to an investor of the other treatment no less favourable than the treatment it accords, in like situations, to its own investors and to their investments (Article 8.6 - National treatment), as well as treatment no less favourable than the treatment it accords, in like situations, to investors of a third country and to their investments (Article 8.7 - Most-favoured-nation treatment). The most-favoured-nation treatment does not extend to procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements, nor does it extend to substantive obligations in other international investment treaties and other trade agreements (Article 8.7(4)). The scope and reach of the most-favoured-nation treatment clause is therefore exceedingly restricted.

CETA also requires that investors of the other party be granted fair and equitable treatment and full protection and security, subject to the terms contained therein (Article 8.10(1)). The parties' right to expropriate investments in a lawful manner is regulated by Article 8.12, which requires expropriations to be (a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and (d) on payment of prompt, adequate and effective compensation. In respect of the resolution of disputes between investors and states, CETA replaces the usual ISDS mechanism with the ICS.[503] The ICS will become operational once the EU Member States have all finished their national ratification procedures. Some have questioned the willingness of states to embrace the jurisdiction of a multilateral investment court, which would require them to surrender the freedom the ISDS mechanism provides.[504] Only time will tell whether the EU Member States are willing to raise the white flag. The debate around this issue is currently on pause given the ICS is still in dormant stage and practically ineffective.[505] Article 8.18(1) provides that an investor of a Party may submit to the tribunal "*a claim that the other Party has breached an obligation under: (a) Section C [Non-discriminatory treatment], or (b) Section D [Investment protection]…[and] where the investor claims to have suffered loss or damage as a result of the alleged breach.*" If a dispute cannot be resolved amicably through consultations (Article 8.19) or mediation (Article 8.20), a claim may be submitted to the tribunal by "*(a) an investor of a Party on its own behalf; or (b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly.*"

The tribunal is intended to have a total of 15 members, 5 nationals of each contracting party and the remainder 5 being nationals of third countries (Article 8.27). The tribunal will usually hear cases in divisions consisting of three members, but cases may also be heard by a sole (independent) member upon agreement of the parties (Article 8.27(6) and (9)). There will also be an appellate tribunal to review awards essentially on a *de novo* basis (Article

[502] Damien Nyer, 'The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement' (2015) 32(6) Journal of International Arbitration 697, 698-699 and 710.
[503] European Commission, 'CETA explained' <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm> accessed 2 April 2021.
[504] See Thanvi (n 488).
[505] See Permana (n 489) 466.

8.28).[506] In respect of the applicable law, CETA requires the tribunal to apply the agreement itself "*and other rules and principles of international law applicable between the Parties*" (Article 8.31(1)). The tribunal may only award monetary damages or restitution of property (Article 8.39(1)); it is expressly precluded from awarding punitive damages (Article 8.39(4)). Similar to the majority of currently in force and model BITs considered above, CETA envisages claims by investors against the host state, i.e., Canada or the EU and/or the relevant Member State(s). This intention is clear from the provisions of Section F of Chapter Eight. The provisions do not envisage a claim by the host state. The definitions of "*disputing party*"[507] and "*respondent*"[508] further support this view.

On the issue of moral damages entitlement, CETA is similarly silent. However, there is no express exclusion. Only punitive damages are excluded by express provision. Moral damage are not considered to be punitive under customary international law and is recognised as a general head of damage.[509] The exclusion in respect of punitive damages is not therefore of relevance. To the contrary, and for similar reasons, investors should be entitled to moral damages under CETA given the express reference to international law principles in Article 8.31(1). Simply put, CETA requires tribunals to have regard to international law principles, and such principles clearly recognise entitlement to moral damages as a matter of right.

[b] IPA[510]

As a mixed agreement, the IPA also requires both EU and individual Member State approval.[511] So far only 8 member states have notified the EU Council of the completion of their domestic procedures as regards ratification.[512] It is likely that the process of ratification will take some time, before the IPA becomes legally binding as a matter of international law. Once the EU Member States have ratified the IPA, the European Council will then have to adopt a decision to conclude the agreement before it enters into force.[513] The aim of the IPA is to enhance the investment climate between its signatory parties.[514] It almost mirrors CETA in terms of the investment protections and reservations. For instance, it states clearly that the parties reserve their right to regulate within their territories to achieve legitimate policy

[506] See Coop (n 485) 492.
[507] Article 8.1: "***disputing party*** *means the investor that initiates proceedings pursuant to Section F or the respondent. For the purposes of Section F and without prejudice to Article 8.14, an investor does not include a Party*".
[508] Article 8.1: "***respondent*** *means Canada or, in the case of the European Union, either the Member State of the European Union or the European Union pursuant to Article 8.21*".
[509] See above under section §3.02.
[510] For a copy of the full text, see: <https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF#page=2> accessed 2 April 2021.
[511] See UK Parliament, 'EU trade deals: EU-Singapore Free Trade Agreement (FTA) and Investment Protection Agreement (IPA)' <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-xxxiii/30104.htm#footnote-208-backlink> accessed 2 April 2021.
[512] European Parliament, 'Legislative Train 03.2021 - EU-Singapore Investment Protection Agreement (IPA)' <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-singapore-ipa> accessed 2 April 2021.
[513] See European Commission's Guide to the EU-Singapore Free Trade Agreement and Investment Protection Agreement (April 2018) <http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156885.pdf> accessed 2 April 2021, 35.
[514] Article 1.1.

objectives.[515] It requires each contracting party to accord to an investor of the other treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments.[516] It further requires each party to provide investments fair and equitable treatment and full protection and security, and lists measures which would constitute a breach of the obligation of fair and equitable treatment.[517] The IPA also restricts expropriations to cases where such is (a) for a public purpose; (b) in accordance with due process of law; (c) on a non-discriminatory basis; and (d) against payment of prompt, adequate and effective compensation.[518]

In case of a dispute between an investor and a party to the IPA concerning an alleged breach of the relevant provisions, the parties are encouraged to resolve the dispute amicably through negotiations.[519] Where the dispute cannot be thus resolved, the claimant investor may submit to the respondent state a request for consultations to resolve the dispute.[520] The parties are also at liberty to have recourse to mediation at any time.[521] Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party. Should the dispute remain unresolved, the investor will need to submit its notice of intent, to be followed by the submission of the claim itself to the tribunal.[522] The IPA also lays down a permanent court system, with a 6-member tribunal of first instance, 2 of whom will need to be nationals of a third party state.[523] Similar to CETA, a permanent appeal tribunal is established to hear appeals in connection with awards issued by the tribunal of first instance. The appeal tribunal will also have a total of 6 members.

The IPA mirrors CETA also in respect of the applicable law. It explains that "*the Tribunal shall apply this Agreement interpreted in accordance with the Vienna Convention on the Law of Treaties and other rules and principles of international law applicable between the Parties*".[524] The tribunal is only permitted to make an award of, separately or in combination, monetary damages and restitution of property.[525] It does not have the power to grant punitive damages.[526] Given the close similarity between CETA and the IPA, almost to the extent of mirroring one another, the reasoning and analysis above in respect of CETA and the connected permissibility of moral damages would equally apply in respect of the IPA. Applying international law principles, a tribunal formed under the IPA should consider itself possessing jurisdiction to award moral damages should the appropriate factual circumstances arise.

[515] Article 2.2.
[516] Article 2.3.
[517] Article 2.4.
[518] Article 2.6.
[519] Article 3.2.
[520] Article 3.3.
[521] Article 3.4.
[522] Articles 3.5 and 3.6.
[523] Article 3.9.
[524] Article 3.13.
[525] Article 3.18(1).
[526] Article 3.18(2).

[c] Energy Charter Treaty[527]

The ECT was signed in December 1994 and entered into legal force in April 1998, and currently has 53 signatories and contracting parties.[528] It provides a multilateral framework for energy cooperation, and is designed to promote energy security through the operation of more open and competitive energy markets. The ECT focuses on four broad areas: (i) the protection of foreign investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable), and protection against key non-commercial risks; (ii) non-discriminatory conditions for trade in energy materials, products and energy-related equipment based on the WTO rules, and provisions to ensure reliable cross-border energy transit flows through pipelines, grids and other means of transportation; (iii) the resolution of disputes between participating states, and -in the case of investments- between investors and host states; and (iv) the promotion of energy efficiency, and attempts to minimise the environmental impact of energy production and use.[529]

The ECT's investment promotion and protection provisions are contained in its Part III. For instance, it dictates, among others, that investments must be accorded fair and equitable treatment at all times.[530] More importantly, it provides that investments must not be accorded treatment less favourable than that required by international law, including treaty obligations.[531] The dispute settlement provisions of the ECT are set out in its Part V. Article 26, concerning investor-state disputes, provides that in case a dispute relating to an investment and concerning an alleged breach of an obligation by the host state cannot be resolved amicably within a 3 month period, the investor may submit it for resolution to one of three forums: (i) courts or administrative tribunals of the host state, (ii) a previously agreed dispute settlement procedure, or (iii) international arbitration or conciliation, latter including ICSID and UNCITRAL arbitration. Any arbitral tribunal constituted under the ECT must "*decide the issues in dispute in accordance with [the ECT] and applicable rules and principles of international law*".[532] The treaty does not refer expressly to moral or punitive damages.

On the basis of the analysis above in respect of CETA and the IPA, the ECT should also be construed as permitting moral damages claims. To the extent an arbitral tribunal constituted under it considers that the treaty does not impliedly exclude such damages, given the absence of an express exclusion, it must, applying international law principles, make an award for any moral harm suffered. This is the logical conclusion given the widespread acceptance and recognition that customary international law recognises moral damages as a concept and treats it the same way material damages are treated.[533]

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[527] For a copy of the full text, see: <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> accessed 2 April 2021.
[528] ibid.
[529] ibid.
[530] Article 10(1).
[531] ibid.
[532] Article 26(6).
[533] See above under section §3.02.

[d] USMCA[534]

The USMCA seeks to replace the North American Free Trade Agreement ("NAFTA")[535] between the same three nations, the latter in force since 1 January 1994. Its principal aim is to strengthen the already existing strong economic cooperation and relationship, and replace NAFTA with a twenty-first century equivalent. It entered into force on 1 July 2020.[536] The USMCA contains the usual forms of protection accorded to investments under similar MITs, such as national treatment,[537] most favoured nation treatment,[538] treatment that is in accordance with customary international law, including fair and equitable treatment and full protection and security,[539] and prohibition against unlawful expropriation.[540] The agreement also requires, in line with the other multilateral treaties considered above, disputes to be resolved in accordance with its terms and the applicable rules and principles of international law.[541] However, rather uniquely, the USMCA restricts the ability of certain US and Mexican investors to commence arbitration proceedings in the other jurisdiction or limits the right to arbitration only in respect of certain select few substantive treaty obligations.[542] In terms of loss or damage payable to US or Mexican investors for breach,[543] an arbitral tribunal may only award monetary damages and/or restitution of property.[544] An investor "*may recover only for loss or damage that is established on the basis of satisfactory evidence and that is not inherently speculative…[and]…may recover only for loss or damage incurred in its capacity as an investor*".[545] The tribunal is expressly prohibited from awarding punitive damages.[546]

On its face, the USMCA also seemingly permits moral damages claims by investors. The same could not be said about host state counterclaims for moral damages as its structure and contents suggests that claims can only be brought by investors, with the host state referred throughout as the respondent.[547] The USMCA does not expressly prohibit moral

[534] For a copy of the full text, see: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 2 April 2021.
[535] For a copy of the full text, see: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2412/download> accessed 2 April 2021.
[536] See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation> accessed 2 April 2021.
[537] Article 14.4.
[538] Article 14.5.
[539] Article 14.6.
[540] Article 14.8.
[541] See, for instance, Annex 14-A and Article 14.D.9.
[542] See Annexes 14-C, 14-D and 14-E. See also Hugo Dubovoy, et al., USMCA Restricts Access to International Arbitration (Baker McKenzie, 13 February 2020) <https://bakerxchange.com/rv/ff0059edc3e5681cdf90fd36f849af0bef13a4b9> accessed 2 April 2021.
[543] See Annex 14-D, Mexico-United States Investment Disputes. Canada withdrew from the dispute resolution regime as existed under the NAFTA: see Daniel Garcia-Barragan, Alexandra Mitretodis and Andrew Tuck, 'The New NAFTA: Scaled-Back Arbitration in the USMCA', (2019) 36(6) Journal of International Arbitration 739, 741. See also Niyati Ahuja, 'USMCA: An Analysis of the Proposed ISDS Mechanism' (Kluwer Arbitration Blog, 26 November 2019) <http://arbitrationblog.kluwerarbitration.com/2019/11/26/usmca-an-analysis-of-the-proposed-isds-mechanism/?doing_wp_cron=1592557811.3756530284881591796875> accessed 2 April 2021.
[544] Article 14.D.13(1).
[545] Article 14.D.13(2) and (3).
[546] Article 14.D.13(6).
[547] See, for instance, Article 14.D.1 of Annex 14-D.

damages, nor does it imply such prohibition. In fact, the references to customary international law imply that moral damages claims should be permitted.[548] For completeness, under customary international law moral damages are neither punitive in nature nor speculative, and are aimed at compensating for loss or damage suffered by an investor.[549] An arbitral tribunal constituted under the USMCA should therefore find itself with jurisdiction to hear moral damages claims.

[e] CPTPP

Another important MIT worthy of some consideration is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which currently has 11 member states.[550] It has been in force since 30 December 2018. Chapter 9 of the CPTPP concerns investment protection. The CPTPP also contains the standard forms of investment protections found in most investment treaties. For instance, it provides that investors making covered investments must be provided no less favourable treatment than that provided to domestic investors (national treatment).[551] The treaty also recognises and stipulates for the most-favoured-nation treatment, i.e., the relevant investor must be provided no less favourable treatment than that provided to the investors of other states.[552] More importantly, the treaty explains that "*[E]ach Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security*".[553] Whilst this recognises and re-affirms the widely encountered protections in investment treaties for the provision of fair and equitable treatment and full protection and security, what is remarkable is that it imposes an overriding duty to treat investments in accordance with applicable customary international law principles. The CPTPP also makes it unlawful to expropriate or nationalise a covered investment unless the investor is duly compensated, as well as imposing the need to show that the expropriation is for a public purpose, non-discriminatory in nature and in accordance with due process of law.

The ISDS provisions are contained in Section B of Chapter 9. It provides that where an investment dispute between the claimant and the respondent cannot be resolved via consultations and negotiations, such may be submitted to arbitration by the claimant.[554] The treaty defines claimant as "*an investor of a Party that is a party to an investment dispute with another Party*" and respondent as "*the Party that is a party to an investment dispute*". The arbitration claim would relate to a breach by "*the respondent [of an obligation assumed and]*

[548] See above under section §3.02.
[549] See *Chorzów* (n 4); and *Lusitania* (n 3).
[550] Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. See <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3808/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp-2018-> accessed 2 April 2021. See also <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng> accessed 2 April 2021.
[551] Article 9.4.
[552] Article 9.5.
[553] Article 9.6(1).
[554] Article 9.18.

that the claimant has incurred loss or damage by reason of, or arising out of, that breach".[555] Where the claim is premised on an alleged breach of an investment authorisation or investment agreement, the host state has the right to commence a counterclaim.[556] Any claim brought on the allegation that the host state has breached its Section A obligations, e.g., national treatment, most-favoured nation treatment, fair and equitable treatment and full protection and security, shall be determined pursuant to the CPTPP "*and applicable rules of international law*".[557] An arbitral tribunal constituted under the treaty has jurisdiction to make both monetary and/or restitution of property awards.[558] However, the treaty expressly spells out that the tribunal has no power to award punitive damages, consistent with some of the BITs and MITs considered above.[559] Somewhat unusually, the CPTPP seeks to set out the contracting parties' understanding of the requirements of customary international law. It explains that the term, as referred to in the treaty, "*results from a general and consistent practice of States that they follow from a sense of legal obligation [and] refers to all customary international law principles that protect the investments of aliens*".[560]

The CPTPP also seemingly does not exclude entitlement to moral damages claims founded on the basis of the principles of customary international law. The references to the applicability of customary international law to the traditional heads of investment claims, such as fair and equitable treatment and the rule against unlawful expropriation, speak in support. As already noted herein above, under customary international law moral damages are neither punitive in nature nor speculative, and are aimed at compensating for loss or damage suffered in one's capacity as investor.[561] An arbitral tribunal constituted under the CPTPP should therefore find itself with jurisdiction to hear moral damages claims brought by investors. However, given the respondent state's ability to bring counterclaims has been restricted to alleged breaches of an investment authorisation and/or investment agreement, it seems unlikely that such entitlement would similarly be available to the host state.

[C] Conclusion

First and foremost, there is seemingly a high level of structural consistency and convergence between the standalone BITs and MITs considered, both generally and in respect of moral damages claims. In other words, the design and structure of dispute settlement mechanisms in the treaties are largely similar. They also contain almost identical protections and safeguards as regards investments.[562] Investment agreements reviewed, both bilateral and multilateral, seemingly support entitlement to moral damages in investment cases, with the exception of the Indian Model BIT. They are generally widely drafted to permit moral damages claims, though less so with respect to host state counterclaims for moral damages.

[555] Article 9.19.
[556] Article 9.19(2).
[557] Article 9.25.
[558] Article 9.29(1).
[559] Article 9.29(6).
[560] Annex 9-A: Customary International Law.
[561] See *Chorzów* (n 4); and *Lusitania* (n 3).
[562] See Gaspar-Szilagyi (n 18) 31.

It is worth pointing out that some investment treaties are more accommodating of moral damages claims than others. For instance, the Israeli Model BIT expressly provides for the application of international law principles as a matter of primacy, which recognises the availability of moral damages where a state's wrongful act causes moral harm. The same conclusion could be reached in respect of the Turkey-UK and China-Singapore BITs. This supports the view enunciated in *Desert Line* that, even though investment treaties primarily aim at protecting property and economic values, they do not exclude compensation for moral damages.[563] As the PCIJ noted in the seminal *Chorzów* case, it is a principle of international law that any breach of an engagement involves an obligation to make reparation, that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for such to be stated in the convention itself.[564] This is because the obligation strikes to the very root and essence of the law and what is regarded as fair and just. It rests on the Aristotelian theory of corrective justice, which dictates that every wrong requires a positive action to correct that wrong.[565] In other words, the wrongdoer must compensate the harmed individual and balance the scale of justice.[566]

With respect to moral damages claims by host states by way of counterclaim, the treaties do not generally lend themselves to similar interpretation. Most treaties appear drafted with investor claims in mind and therefore unsuitable to accommodate host state claims, including claims for moral damages. However, there are exceptions, such as the French Model BIT, and one will therefore need to carefully review the treaty in question and consider the relevant factual matrix before reaching a conclusion. The exercise calls for a case-specific enquiry. That said, for the reasons explained in detail above in Chapter 2, one should not be too willing to permit host state counterclaims for moral damages and the issue must be approached with a certain degree of caution and reservation.

[563] *Desert Line* (n 1) [289].
[564] *Chorzów* (n 4) [73].
[565] See Weinrib, Corrective Justice (n 77) 410.
[566] See Encarnacion (n 81); Coleman (n 82) 18 and 26.

CHAPTER FOUR

Substantive Elements Required of Moral Damages Claims

§4.01 INTRODUCTION

In circumstances where a moral damages claimant has standing to bring such a claim and the arbitral tribunal considers itself to possess jurisdiction to award moral damages pursuant to the applicable treaty and/or principles of international investment law, the next step is to determine whether the claim has any merits. The outcome of this exercise will be informed by the applicable legal test (under section §4.02 below). Issues as to the burden of proof and the standard of proof are also related issues which require consideration (under sections §4.03 and §4.04 below, respectively). Investment treaties, BITs in particular, are skeletal in nature. They usually contain concisely worded investment protections, but fall short of stipulating how arbitral tribunals are required to determine whether there has been a breach, or by fleshing out the provision through examples of prohibited interference with the investment. Arbitral tribunals therefore naturally often turn their eyes to customary international law for guidance and steer.[567] This is particularly true of moral damages claims, which are not usually expressly regulated in investment treaties.[568] Accordingly, one must turn its attention and scrutiny to legal criteria formulated and applied in cases considering identical or similar issues to ascertain and set out the test that ought to apply in the determination of moral damages claims.

§4.02 THE APPLICABLE TEST

Allepuz boldly asserts that "*moral damages have come to stay and one can only expect further development, especially after Desert Line and Lemire*".[569] The *Desert Line* award signalled the start of a new era in respect of moral damages claims in investment cases. It is the first known case where moral damages was awarded in an investment treaty arbitration pursuant to customary international law principles.[570] It was therefore termed as the "*foundational precedent in this area*".[571] Unsurprisingly, therefore, the *Desert Line* award was treated with approval by the arbitral tribunal in *Lemire*[572], where the entitlement and the test was further fleshed out. The starting point when considering moral damages under international law should therefore be the *Desert Line* award[573], as developed and further articulated in *Lemire*.[574] The review of those two cases will assist in deducing the relevant

[567] See, for instance, *MTD*, Award (n 447) [204].
[568] See Chapter 3 above.
[569] Allepuz (n 146) 14.
[570] Dumberry, Satisfaction (n 167) 206; Dumberry, Compensation (n 169) 247. Jagusch (n 153) 45.
[571] Jagusch (n 153) 50.
[572] See above under section §4.02[A][10].
[573] *Desert Line* (n 1).
[574] *Lemire*, Award (n 140).

principles that come to play in the determination of moral damages claims. However, certain awards rendered before and after *Desert Line* are also likely to be of some relevance and shed further light on the relevant principles. Accordingly, the analysis below is not confined to the two mentioned cases; a chronological study of all known and relevant investment (and certain non-investment) cases will be undertaken below, essentially to track the origins and development of the entitlement under international investment law and the path that lies ahead.

A note of caution, however, is called for in respect of the precedential value of awards and decisions under customary international law. The system of binding precedent is not applicable under customary international law, and this applies equally under international investment law.[575] In other words, awards and decisions rendered by international courts and tribunals bind only the parties to the particular dispute. They do not bind future courts and tribunals, regardless of whether future cases involve identical parties and/or issues.[576] Accordingly, previous awards and decisions rendered by international law tribunals and bodies should be treated with some degree of care, and one must not haste towards making concluding remarks or drawing conclusive principles on the basis of a single case or fresh and properly untested line of authorities. That said, their steering and persuasive power cannot and should not be understated. Later tribunals afford some considerable weight to the conclusions and reasoning of earlier tribunals, particularly in the investment law cases.[577] In fact, Cohen boldly asserts that "*[T]he worst kept secret in international law is that international tribunals rely on precedent*".[578] He suggests that precedents in international investment cases have the ability to "*play a powerful role as a neutral, predictable source of law*" and provide the "*investors and states (along with the lawyers who advise them) [the] certainty and predictability*" they so crave.[579]

[A] Investment arbitration cases

[1] Benvenutti & Bonfant v. Congo of 1980[580]

This was a contractual dispute between an Italian investor and the Congolese government concerning a mineral water bottling factory. Any dispute in connection with the joint venture arrangement between the company and the government, with the latter having a 60%

[575] See Alvarez (n 135) 9. See also *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment, I.C.J. Reports 1998, 275, [28], <https://www.icj-cij.org/files/case-related/94/094-19980611-JUD-01-00-EN.pdf> accessed 2 April 2021; *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, [234].
[576] See Niccolo Ridi, 'Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement' in Szilard Gaspar-Szilagyi, Daniel Behn and Malcom Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020), 121.
[577] See Alvarez (n 135) 9.
[578] Harlan Grant Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community' (2011) 44 NYUJ International Law and Politics 1049, 1078.
[579] ibid 1083.
[580] *Benvenuti & Bonfant* (n 194).

shareholding stake, was made subject to ICSID arbitration. Congolese law governed the contract, which largely mirrored French law given the nation's colonial link to France. The investor commenced ICSID proceedings following the Congolese government's expropriation of its investment, chiefly the result of (seemingly) differences as to management and the joint venture entity's funding. The joint venture entity's Italian manager and the investor's own employees fled the country on the advice of the Italian embassy, following threats of arrest. Shortly thereafter, the Congolese army occupied the joint venture entity's registered office.

The investor commenced ICSID proceedings following the parties' failure to reach an amicable settlement of the issues. In addition to material damages principally for the loss of its investment, the investor sought damages for intangible loss, which it termed as "*prejudice moral*", in the sum of CFA 250 million. In particular, the investor claimed that the unlawful expropriation of its investment (i) caused a loss of work and investment opportunities in Italy; (ii) prevented the resumption of its own activities in Italy by reason of lack of capital, given it had invested all its financial resources in the Congo; (iii) caused it to lose its credit with suppliers and banks, having put the banks in touch with the Congolese Government for business matters in which it later defaulted; and (iv) caused it to suffer loss of its own organisation at management level and of its own technical staff, following the forced and hasty departure from the Congo.[581] The tribunal agreed with the investor and found that the government had expropriated its investment, and therefore granted the investor both material and moral damages, the latter under the umbrella heading "*intangible loss (prejudice morale)*". However, the tribunal awarded the investor only CFA 5 million. A few noteworthy remarks are called for in respect of the tribunal's ruling.

First, the tribunal made the award in respect of the intangible loss head of claim despite its view that there was no "*evidence capable of establishing the truth of B&B's claims*".[582] The investor had limited itself to "*simple statements, unsupported by any concrete evidence*".[583] The tribunal therefore had doubts about "*B&B's simple statement that it lost its credit with its suppliers or bankers or that it could not obtain the necessary personnel*".[584] This begs the question as to why any award was made in the first place if the tribunal was unsatisfied as to the proof of the claims made. The reasoning runs against the well-established principles of international law.[585] Although not expressly stated in the award, the tribunal does note that the unlawful measures of the respondent state "*certainly disturbed B&B's activities*", which seemingly suggests that the tribunal was satisfied that at least some intangible loss had been caused, sufficient to warrant the exercise of its discretion.

Second, the tribunal noted that it considered the award of CFA 5 million to be "*equitable*". That statement is, unfortunately, not further explained. It seems that, under the law applicable and rather unusually, the tribunal had the power to rule *ex aequo et bono* in

[581] ibid [4.95].
[582] ibid [4.96].
[583] ibid.
[584] ibid.
[585] See Chapter 3 above.

that case.[586] The tribunal's awarded quantum of damages therefore has a lesser (if any) precedential value for cases considered under international law principles. The obligation under international law is to wipe out all the consequences of the illegal act and remedy the wrong, not to reach a conclusion based on the principles of equity and conscience, though such may have a role to play in the wiping-out exercise.[587]

[2] Técnicas v. Mexico of 2003[588]

Técnicas was a typical unlawful (indirect) expropriation case, coupled with a claim for harm to reputation (seemingly labelled as a moral damages claim).[589] The investor sought monetary damages for unlawful expropriation of its investment, alleging also, *inter alia*, the host state's failure to provide fair and equitable treatment. In particular, the investor claimed that the refusal by the relevant Mexican public authorities of the application to renew an authorisation required for the operation of a landfill and the order for its closure amounted to a breach of the Mexico-Spain BIT, international law and Mexican law. The investor sought USD 52 million as compensation for the unlawful expropriation and other acts of violation, with the harm to reputation item (i.e., moral damages claim) seemingly unquantified.

The tribunal held that Mexico had breached its obligations under the BIT, relating to the obligation to provide fair and equitable treatment (Article 4(1)) and to refrain from unlawful expropriation or nationalisation (Article 5(1)), ordering the host state to pay approximately USD 5.5 million, plus interest. However, the tribunal dismissed the moral damages claim, principally on the basis of lack of evidence and causation. The tribunal reasoned as follows:

> *[There is] no reason to award compensation for moral damage, as requested by the Claimant, due to the absence of evidence proving that the actions attributable to [Mexico] that the Arbitral Tribunal has found to be in violation of the Agreement have also affected the Claimant's reputation and therefore caused the loss of business opportunities for the Claimant.*[590]

The tribunal further noted that there was no evidence that the adverse press coverage was fostered by the respondent state or that it was the result of actions attributable to the respondent.[591]

In this pre-*Desert Line* award, the tribunal does not seem to have questioned, as a matter of principle, the availability of moral damages to investors. Nor does it appear that the tribunal seemed to have favoured the contention that a damages award on the basis of the

[586] *Benvenuti & Bonfant* (n 194) [4.98]. In respect of the principles relating to *ex aequo et bono* jurisdiction, see Sabahi (n 172) 186-188.
[587] See Chapter 3 above under section §3.02.
[588] *Técnicas* (n 455).
[589] ibid [93] *et seq*.
[590] ibid [198].
[591] ibid.

market value of the investment expropriated sufficiently compensates an investor, rendering it unnecessary for a moral damages award or, indeed, undesirable to prevent over-compensation through double-counting. The claim was seemingly dismissed on evidential and causative grounds alone.

However, the award does signal some confusion and uncertainty as regards the nature of the claim; the fact that the claim was interchangeably referred to as a claim for moral damages and harm to reputation fuels the confusion. Nevertheless, it appears that had the investor satisfied the tribunal that (i) actions attributable to Mexico and in violation of the BIT negatively affected the investor's reputation and (ii) provided satisfactory evidence in support to evidence the (moral) harm, the tribunal may have moved to consider whether such an award was warranted under the facts and in accordance with international law. This suggests that the tribunal considered itself to possess the jurisdiction to consider and rule on moral damages claims. There is nothing to the contrary in the award. Otherwise, the claim would most likely have been dismissed on jurisdictional grounds.

[3] Bogdanov v. Moldova of 2005[592]

This was an investment claim commenced under the Russia-Moldova BIT for compensation due to losses arising from Moldova's attempt to retroactively apply certain Moldovan legislation, which had the effect of limiting the investor's right to compensation under a privatisation agreement. The claim was based on Moldovan law. However, the "*BIT [was] put forward by the [investor] as one of the legal sources to be applied*".[593] The tribunal relatedly noted that it was "*not limited to the legal arguments made by the parties… it remains free, within the borders of the applicable law…, to give the legal qualifications and determine the legal consequences that it deems appropriate, even if they were not pleaded by the parties*".[594] This, it was said, was permitted by Swedish arbitral practice, applicable by virtue of the place of the arbitration, so long as the parties were not taken by surprise by the consideration of legal issues that were not taken into consideration in the proceedings.[595] Accordingly, the tribunal moved to consider the host state's conduct in the light of the principles of full protection, fair and equitable treatment, and indirect expropriation contained in the BIT.[596]

The investor's claim for compensation was coupled with a claim for moral damages due to Moldova's illegal conduct, which claim was also seemingly based on Moldovan law. The tribunal held that Moldova had violated the fair and equitable treatment obligation embodied in Article 3 of the BIT and ordered it to pay compensation.[597] The moral damages

[592] *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Award, 22 September 2005.
[593] ibid 14.
[594] ibid.
[595] ibid.
[596] ibid 15.
[597] ibid 17.

claim, however, was dismissed.[598] Since the claim was made on the basis of Moldovan law, one may consider that the tribunal's reasoning and conclusion is irrelevant in respect of moral damages claims in investment cases governed by international law principles, and therefore irrelevant for the purposes of the current analysis. However, that logic is unlikely to hold water, especially given the tribunal's declaration that "*the BIT constitute[d] the legal basis of the arbitral proceeding*".[599] The tribunal's determination therefore is of relevance in respect of moral damages and international investment law.

Similar to the approach of the tribunal in *Técnicas*[600], the tribunal dismissed the claim for moral damages for lack of evidence. It seems that the tribunal in *Bogdanov* also considered moral damages claims to be permissible in investment cases as a matter of principle. The claim would likely have been granted had the evidential bar been satisfied. It is more likely that the two separate tribunals (*Técnicas* and *Bogdanov*) would have dismissed the claims on jurisdictional grounds had they considered that investors have no right to moral damages claims under BITs pursuant to customary international law principles.

[4] Desert Line v. Yemen of 2008[601]

The award made by the tribunal in *Desert Line* is almost universally regarded as the seminal case on moral damages in international investment law. It was described by Blake as the "*most significant investment arbitration decision on moral damages*".[602] This is essentially because it is the first reported case where a moral damages claim founded on customary international law was granted and a relatively substantial sum awarded in favour of the investor, which also enunciated the legal test applicable to such claims.[603]

[a] Facts[604]

Desert Line Projects LLC (Desert Line) was a limited liability construction company established in the Sultanate of Oman. It was contracted by the Republic of Yemen to construct asphalt roads, pursuant to the latter's project to develop asphalt road connections within the country, including connections with neighbouring countries. A total of eight contracts were executed between 20 June 1999 and 25 September 2002, each concerning a specific part of the overall project. All construction works were completed by late 2003, with the exception of works under contracts 4 and 6.[605] Yemen and Desert Line disagreed on the

[598] ibid 19.
[599] ibid 15.
[600] *Técnicas* (n 455).
[601] *Desert Line* (n 1).
[602] Blake (n 180) 375.
[603] ibid.
[604] *Desert Line* (n 1) [3] *et seq*.
[605] As defined in the award: *Desert Line* (n 1) [9] and [11]. All definitions used herein, unless otherwise states, are from the original source.

actual works completed. On 5 January 2004, Desert Line wrote to the Yemeni Minister of Public Works to request payment for works it considered completed, and threatened to suspend works unless payment was timely made. On 6 March 2004, there was an interruption of works at the Al Mahweet – Al Qanawis site, as a result of a subcontractor and 15 armed individuals' demand for payment of outstanding invoices. They made threats against Desert Line's personnel. Further, Sheikh Mouthir El Chazil (a member of the local council at Al Mahweet) and certain members of his tribe confronted Desert Line's personnel at the same site, on 18 March 2004, opening fire with automatic weapons. Desert Line wrote to the President of Yemen following the incident and requested protection and security.

On 17 April 2004, following Yemen's refusal to pay, Desert Line commenced legal proceedings before the Yemeni courts, requesting the release of bank guarantees provided by Desert Line, reimbursement of guarantee amounts retained and the payment of outstanding sums. The threat to suspend works and remove equipment from site was renewed by Desert Line to Yemen also that day. On 2 May 2004, Desert Line came forward with an offer: to complete the work on the Al Mahweet – Al Qanawis segment (contract 6), but withdraw from the other site (contract 4). This was rejected by the Yemeni President, who directed Desert Line to continue with the performance of the works, with the following assurance "*don't worry; your rights will be paid pursuant to the evaluation of the executed works by a third technical neutral party*". Desert Line refused to continue with the works and, on 19 May 2004, suspended works at both sites. On 23 May 2004, Desert Line wrote to the Yemeni President, complaining that its attempts to evacuate equipment from the sites were being unlawfully prevented by armed forces dispatched by the Minister of the Interior. On the same day, the Chief of Staff and Commander of the Central Military Region of the Ministry of Defence of Yemen wrote to the President, advising him to lift the siege over Desert Line's personnel and equipment and to resolve the conflict amicably.

On 3 June 2004, the President informed Desert Line that it was instructed to complete the Al Mahweet – Al Qanawis segment, and that it was authorised to remove only its excess equipment from the site. It was further noted that the works completed would be evaluated by British and Jordanian companies on the average pricing formula, and with consideration of terms and specifications agreed on. To that end, an arbitration agreement was signed on 26 June 2004, between Yemen and Desert Line, agreeing on the appointment of two contractors who would act as arbitrators to examine and value the works. The arbitrators' determination was to be final, binding and unchallengeable. Desert Line agreed and withdrew its claim before the Yemeni courts. The arbitrators ultimately held Yemen liable to pay Desert Line approximately USD 100 million for works performed, plus an additional USD 8 million for additional costs, minus amounts already paid by Yemen. However, the Yemeni government was seemingly unhappy with the award as, on 28 August 2004, an altercation took place at the Al Mahweet – Al Qanawis site between Desert Line's personnel and the Yemeni army, resulting in the arrest of three of the investor's personnel, who were detained for three days.

On 11 September 2004, the Yemeni Prime Minister wrote to the President reminding the latter that the award was final and binding, and that the award should be complied with.

However, on 22 September 2004, Yemen applied to the Yemeni courts to annul the arbitral award, on the basis of invalidity of the arbitration agreement and violation of due process. Between 2 and 7 September 2004, Desert Line complained to Yemeni authorities in respect of harassment, threats to persons and property, and theft by armed groups, renewing its request for protection. In October 2004, Yemen offered settlement on terms less attractive than the award rendered in Desert Line's favour. The amount offered was less than a quarter of what was awarded by the arbitral tribunal. Desert Line refused the offer, writing on several occasions between 20 October and 8 December 2004 to complain of arbitrariness and the injustice caused by the proposed settlement. Further letters were exchanged between the parties, on 1 December 2004, whereby the Yemeni President advised Desert Line to accept the offer, noting that the arbitral tribunal had incorrectly calculated the value of the works and that "*they do not know how to evaluate the works*". On 22 December 2004, Desert Line filed a motion before the Yemeni courts and opposed Yemen's request for annulment, and sought to enforce the award. That very same day, the settlement agreement as proposed was signed, which was endorsed by the Yemeni Court upon Desert Line's application. Yemen paid out the sums agreed and released the relevant bank guarantees.

Between 10 January 2005 and 7 May 2005, Desert Line wrote to Yemen on several occasions to challenge the validity of the settlement agreement and request payment of the "*true*" outstanding amounts, as had been awarded by the arbitral tribunal. Yemen refused. On 2 August 2005, Desert Line rescinded the settlement agreement and commenced ICSID proceedings, claiming compensation for various BIT violations. Desert Line also sought moral damages, including loss of reputation, in the amount of OR 40 million. In particular, the investor argued that it suffered extensive moral damages as a result of Yemen's BIT breaches, which consisted of (i) its executives suffering stress and anxiety due to harassment, detainments and threats; (ii) intimidation of its executives in relation to the contracts; and (iii) itself suffering significant injury to credit and reputation, as well as loss of prestige.[606]

[b] Tribunal's award

The tribunal[607] granted Desert Line's claim and held that the Yemeni arbitral award was binding on the parties, and to be implemented in its entirety. The tribunal also granted Desert Line's claim for moral damages and awarded USD 1 million.[608] On the matter of moral damages, the tribunal concluded that moral damages are available to investors in investor-state arbitrations, pursuant to customary international law, and that the circumstances of the case before them justified the award.

Desert Line's claim was based on international law.[609] It seems Yemen did not raise an objection to the tribunal's jurisdiction to award moral damages under international law.[610]

[606] ibid [286].
[607] Consisting of Prof Pierre Tercier (President), Prof Jan Paulsson (appointed by Desert Line) and Prof Ahmed S El-Kosheri (appointed by Yemen).
[608] *Desert Line* (n 1) [289] *et seq*.
[609] ibid [286].
[610] ibid [288].

Its contention was that Desert Line's quantification was speculative and unsubstantiated, noting that no evidence had been presented demonstrating loss of reputation or any other losses due to alleged acts causing moral harm. Yemen further contended that Desert Line had not established that harassment of its executives was related or attributable to the construction contracts. Most strikingly, Yemen argued that if any moral damages were suffered, the actual victim was Yemen itself, who was "*faced with a spurious allegation of coercion and whose President has been subject to abusive, threatening and unjustified letters from the Claimant's Chairman*".[611] Yemen therefore (impliedly) accepted the tribunal's jurisdiction to award moral damages, which was expressed by the tribunal in the award.[612] On the subject of entitlement to moral damages under investment treaties, the tribunal stated the following:

> *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. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them.*[613]

The tribunal was conscious that "*it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award*"[614], but that did not preclude a moral damages award. In support of its reasoning, the tribunal cited, with approval, the statement contained in the *Lusitania* case that non-material damages are real and that "*the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated*".[615] The tribunal also noted that both natural and legal persons may be awarded moral damages, including for loss of reputation, but only in specific circumstances. Applying the relevant principles to the facts, the tribunal ruled as follows:

> *The Arbitral Tribunal finds that the violation of the BIT by the Respondent, in particular the physical duress exerted on the executives of the Claimant, was malicious and is therefore constitutive of a fault-based liability. Therefore, the Respondent shall be liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature. The Arbitral Tribunal agrees with the Claimant that its prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation.*[616]

However, the tribunal considered the amount requested as exaggerated, and awarded USD 1 million, which sum it considered to be "*more than symbolic yet modest in proportion to the vastness of the project*".[617] The tribunal did not elaborate any further as to why it

[611] ibid.
[612] ibid [289].
[613] ibid.
[614] ibid.
[615] ibid. See also *Lusitania* (n 3).
[616] ibid [290].
[617] ibid.

considered the sum claimed to have been the produce of exaggeration, or what factors were influential in the exercise of the discretion to award the sum actually awarded.

The *Desert Line* award establishes that moral damages are available to investors in investor-state arbitrations as a matter of customary international law. In doing so, it seemingly confirms the underlying assumptions that had been made in the *Técnicas*[618] and *Bogdanov*[619] awards, where the two tribunal did not question investor entitlement to moral damages as a matter of principle. The tribunal opined that BITs generally do not exclude moral damages, and the Oman-Yemen BIT was no different, and that therefore the residuary rules of international law were triggered. Acknowledging the superiority of the terms of a treaty over customary international law, the tribunal explained it was "*empowered to deal only with claims arising [under the BIT]*" which had "*created*" the tribunal.[620] In the absence of an exclusion in the Oman-Yemen BIT, the residual rules of customary international law were applied. What is most interesting is that the tribunal seems to have considered moral damages to be available only in exceptional cases, suggestive of an entitlement only in grave cases involving malice or some other form of fault requiring punishment and/or deterrence. The rationale behind such restrictive and fault-based formulation is unclear. It is difficult to trace the restrictive formulation in earlier decisions, such as in the *Técnicas* and *Bogdanov* awards[621], or in international law generally. In fact, the ILC Articles make clear that fault, in the sense of an intent to harm, does not constitute a necessary element of the internationally wrongful act of a state for liability purposes.[622] The liability of a state under international law is based on an objective standard, and does not therefore depend on the proof of malice on the part of the state.[623] This finds support in various investment arbitration awards.[624]

The *Desert Line* award provides no reasons for the restrictive formulation dictated, despite the above.[625] Coriell and Marchili suggest that the fact that the claimant was a corporation rather than an individual seems to have had some bearing on the tribunal's apparent use of the heightened standard, though they do note that the tribunal's specific rationale remains unexplained.[626] A possible explanation, derived from the wording used by the tribunal, appears to be that it was conscious of the primary aim of investment treaties to protect property and economic values, and not to regulate moral harm suffered by investors or their executives. However, that is difficult to justify. In circumstances where an investor suffers moral harm, a claim for moral damages should be granted provided the requisite conditions under international law exist. Categorising moral damages entitlement as a liability dependent on malice or fault and restricting the entitlement is inconsistent with the principles of customary international law.[627]

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[618] See above under section §4.02[A][2].
[619] See above under section §4.02[A][3].
[620] *Desert Line* (n 1) [148].
[621] See above under section §4.02[A][2] and [3].
[622] ILC Articles, Article 2, Commentary (10).
[623] See Coriell (n 148) 220-221.
[624] See, for instance, *CMS Gas* (n 479) [280]; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77].
[625] Coriell (n 148) 229.
[626] ibid.
[627] See Chapter 3 above.

The gravity and seriousness of the relevant act causing moral harm may be a relevant factor in respect of quantum.[628] The international human rights cases are demonstrative of this rule.[629] As Coriell and Marchili suggest, the principle derived from the *Chorzów* case requires that a tribunal make a victim whole, and this means that, "*in theory the victim of a human rights violation (or any other internationally-wrongful act) should be compensated for the non-material consequences of that violation, whether the circumstances of the violation were "grave" or not*".[630] The mid-way solution suggested in *Desert Line*, perhaps to ensure that moral damages claims are not over-utilised in a context where the ultimate aim is to protect economic investments, creates uncertainty and grants arbitrators unnecessary discretion. It may be the case that the tribunal was heavily influenced by how Desert Line and its executives were treated by the Yemeni Government and its apparatus, and that its statements should be read in that light, and that one must abstain from drawing principles from every statement made in the award. That said, the award muddies the water. The position under the general rules of customary international law as to the availability of moral damages is clear,[631] but the *Desert Line* award does not seem to sing the same tune. Although the award is to be welcomed for bringing some needed clarity, the introduction of additional components to the equation not present in the rules and principles of international law has been most undesirable and unwelcome.

The *Desert Line* award has received mixed-views from scholars. Some argue in support and contend that moral damages claims should succeed only in the most exceptional cases. However, the majority suggest that the additional requirement of fault or malice strays away from the principles of customary international law, which was the basis of the claim in *Desert Line*.[632] Lawry-White belongs to the latter camp of scholars. She opines that, unless otherwise stated, damages for breach of an investment treaty are usually determined in accordance with the principles of international law. She contends that the standards for the awarding of moral damages under international law are well established and do not require a claimant to prove exceptional circumstances.[633] She does recognise, however, that the application of such standards in practice carry with it certain difficulties, demonstrated by arbitral awards rendered concerning moral damages, one of which is the *Desert Line* award.[634] Lawry-White notes that at the forefront of arbitrators' consideration is the need to render an enforceable award, and an award granting moral damages causes for a complex situation "*given the inherent difficulty in proving, and quantifying, non-pecuniary injury such as reputational harm and "suffering"*".[635] However, despite the concern, Lawry-White concludes that the requirement as to exceptional circumstances represent a *prima facie* departure from the standards for the awarding of moral damages under international law. This is because it implies that a different bar applies to the award of moral damages than it

[628] See Markert and Freiburg (n 168) 32; Garcia (n 287) 503.
[629] See above under section §4.02[B][1].
[630] Coriell (n 148) 217.
[631] See Chapter 3 above under section §3.02.
[632] *Desert Line* (n 1) [286] and [289].
[633] Lawry-White (n 139) 236. See also Ehle (n 145) 304; Patrick Dumberry and Sebastien Cusson, 'Wrong Direction: "Exceptional Circumstances" and Moral Damages in International Investment Arbitration (2014) 1(2) The Journal of Damages in International Arbitration 33, 74.
[634] Lawry-White (n 139) 236.
[635] ibid.

does to material damages.[636] This would sit uncomfortably with international law principles.[637] That said, Lawry-White explains-away the *Desert Line* formulation as amounting to nothing more than an emphasis by the tribunal to avoid double counting. It was not an attempt by the tribunal to lay down a general exceptionality requirement.[638] This is, rather unfortunately, an unsatisfactory attempt to explain the award; the tribunal's statement is clear and does not limit the reference to exceptional circumstances to the facts of the case. It is in the shape of a general statement of principle: "*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*".[639]

Sabahi concurs with Lawry-White, noting that while scholars have expressed fault or degrees of fault to have an impact on the reparation due for committing an unlawful act, they rarely deem fault as a necessary condition for awarding moral damages.[640] He considers fault to play the role of a quantum gatekeeper, the presence of which permits arbitrators to become more generous in awarding higher sums as compensation, particularly in respect of moral damages.[641] He agrees that the *Desert Line* tribunal's statements simply describe the gravity of the situation in which the investor found itself, and not the imposition of an additional hurdle to moral damages entitlement. Blake also concurs, arguing that fault cannot be imposed as a requirement to the law on moral damages since that would be at odds with the general position at international law.[642] He explains that if such requirement were to be imposed, moral damages would no longer be compensatory in nature, but instead punitive.[643]

Dumberry also strongly advocates the view that moral damages are not dependent upon the presence of exceptional circumstances, noting that such would be undesirable. He rightly points out that there may be situations where state actions will not necessarily reach such a high threshold of unacceptable conduct, but will nonetheless cause mental suffering in the form humiliation, shame etc. He expresses, citing the *Lusitania* case in support, that "*such damages are no less "very real" and should be compensated*".[644] It is worth noting that the *Desert Line* tribunal also relied on the *Lusitania* case and expressly cited the passage quoted.[645] Dumberry therefore agrees with those who consider *Desert Line* as a case where exceptional circumstances were present, but not one which requires that such circumstances be present in every case for an award of moral damages to be made.[646] It is said that no trace of the high threshold for moral damages can be found in the *Desert Line* award, and that the reference to exceptional circumstances is "*simply a reference to the rarity and uniqueness of such claims given the particular nature of investment treaties*".[647] Ehle seeks to explain the reference to fault based liability in *Desert Line* as an attempt by the tribunal to establish

[636] Lawry-White (n 139).
[637] See Chapter 3 above.
[638] Lawry-White (n 139) 239.
[639] *Desert Line* (n 1) [289].
[640] Sabahi (n 172) 140-141.
[641] ibid 141.
[642] Blake (n 180) 398. See also *Lusitania* (n 3) 40; Coriell (n 148) 214.
[643] ibid 399.
[644] Dumberry, Compensation (n 169) 268.
[645] *Desert Line* (n 1) [289].
[646] Dumberry, Compensation (n 169) 268-269.
[647] ibid 268.

sufficient causal link, though recognising that such was not made explicit by the tribunal in its reasoning.[648]

Blake, examining the issue from a human rights jurisprudence angle, approvingly argues that the issue of gravity will operate merely to regulate the level of damages a claimant is to be awarded, not whether such damages should in fact be awarded in the first place.[649] In other words, the question of gravity does not operate as a precondition for the award of moral damages.[650] Blake argues that the rich jurisprudence developed by human rights courts, guided by the principles of international law on state responsibility, should no longer be ignored and investment tribunals should make greater use of them. Overall, while Blake welcomes the *Desert Line* award for having opened the door for greater recognition of moral damages in investment disputes, he simultaneously criticises the award, and later awards that have followed *Desert Line*, for seemingly introducing troubling departures from generally accepted principles of international law.[651] Blake states that, in adherence to the principle stated in the *Chorzów* case,[652] the obligation to compensate for moral damage is a corollary obligation to make full reparation for injuries. The approach adopted by arbitral tribunals therefore threaten to significantly limit the scope of moral damages awards,[653] which Blake finds unjustifiable given that the ILC Articles draw no distinction between the duty to compensate for material and non-material harm.[654] In an effort to align *Desert Line* with international law principles, Blake considers that the better analysis is that the *Desert Line* award does not impose a rule that moral damages may only be granted where the circumstances are exceptional, and that such erroneous thinking is the result of a "*mis-reading of the principles enunciated in that case*".[655]

Jagusch follows the same train of thought and argues that all that matters when determining whether to award moral damages is whether the breach has caused non-pecuniary injury.[656] If moral damages are to be regarded as compensation for non-pecuniary injury, they should be awarded where a treaty violation causes mental distress to the claimant investor.[657] He therefore concludes that "*[T]he manner in which the state breached its obligation is not determinative and there can be no requirement of deliberate, malicious or egregious breach, fault or intent*".[658] The reason provided for such an assertion is that if the opposite were to be the case, it would be "*difficult to escape the conclusion that the resulting award is a form of punitive damages*", which cannot be awarded by tribunals under international law, absent express authorisation.[659]

In contrast, voices have been raised in support of an element of exceptionality as a threshold to permitting moral damages claims. Uchkunova et al. argue that the threshold of

[648] Ehle (n 145) 304.
[649] Blake (n 180) 402.
[650] ibid 387-388.
[651] ibid 394.
[652] *Chorzów* (n 4).
[653] Blake (n 180) 372.
[654] ibid 394.
[655] ibid. See also Markert and Freiburg (n 168) 32.
[656] Jagusch (n 153) 55.
[657] ibid.
[658] ibid.
[659] ibid 59 and 61.

substantial cause and effect is necessary to avoid 'double-counting'.[660] Double counting refers to the possibility of over-compensating, e.g., through an order for material and moral damages for the same loss.[661] Quoting Sabahi in support, who had expressed that there is some overlap between moral damage and material or physical damage, Uchkunova et al. contend that one should approach the issue of awarding compensation for moral harm with caution. Noting Dumberry's opposition to the applicability of the substantial cause and effect test threshold on the basis of the objective responsibility of states under international law, they respond that it is needed to avoid double counting, and point out that the threshold has now been widely accepted in the jurisprudence of ICSID tribunals, referring to *Desert Line*, *Franck Charles Arif*, *Europe Cement*, *Cementownia* and *Lemire*.[662] Uchkunova et al. therefore boldly conclude that moral damages are "*reserved for the most shocking of cases*".[663] That said, they fall short of advocating for the availability of moral damages only in cases involving malice, on the basis that such would "*turn moral damages into punitive damages which have not been accepted as part of international law*".[664] This is extremely contradictory, to say the least.

If malice is rejected as being part of the equation on the basis of prohibition of punitive damages under international law, it would be difficult to justify the introduction of other additional components into the equation that do not exist under customary international law and which import subjective components. In that respect, there is no requirement under international law for exceptional circumstances to be present for a moral damages award.[665] It would seem inappropriate for arbitral tribunals to be permitted to "cherry pick" and apply only certain rules of international law. Further, Uchkunova et al.'s contention that the exceptionality requirement is necessary to avoid problems relating to double counting appear unpersuasive.[666] As considered above in Chapter 2 in a different setting, there are more appropriate solutions to avoiding over-compensation.[667] In any event, the risk of double counting is not confined to only non-exceptional cases. It is of relevance also in exceptional cases, hence the undesirability of imposing an exceptionality requirement to avoid double-counting. The most appropriate, and perhaps the only, solution is for the arbitral tribunals to exercise caution to ensure that an investor is not over-compensated. The possibility of over-compensation does not, in itself, justify a blanket exceptionality requirement, which is likely to be the cause of substantial unfairness.

It is worth noting that some scholars, such as Jagusch and Wong, consider that should the availability of moral damages be dependent on the existence of exceptional circumstances, that will in itself render the award punitive, and therefore fall foul of the principles of international law. Jagusch explains that if the level of damages awarded varies with the degree of egregiousness of state conduct, it would be difficult to escape the

[660] Uchkunova (n 153) 386.
[661] See Dumberry, Satisfaction (n 167) 227-229; Ehle (n 145).
[662] *Desert Line* (n 1); *Franck Charles Arif* (n 422); *Europe Cement* (n 264); *Cementownia* (n 252); *Lemire*, Award (n 140).
[663] Uchkunova (n 153) 386-387.
[664] ibid 387.
[665] See Chapter 3 above.
[666] Uchkunova (n 153) 386.
[667] See Chapter 2 above under section §2.02.

conclusion that the award is a form of punitive damages.[668] He therefore argues that when considering moral damages claims one should concern itself only with the harm suffered by the investor, the state's actions should be afforded no importance at all.[669]

The *Desert Line* award consequently signals a substantive fragmentation; fragmenting international investment law away from settled international law principles. As demonstrated by the detailed analysis above in Chapter 3, customary international law recognises the right to moral damages, but without subjecting it to the requirement of exceptionality. In other words, a claimant is entitled to seek moral damages for any moral harm even where the violation(s) of international law complained of are not grave, egregious or of particularly serious nature. However, with the requirement to demonstrate that exceptional circumstances exist, the *Desert Line* tribunal deviated away from settled international law principles. As elaborated in detail above in Chapter 1, various disciplines of international law must converge and appear united, so as not to risk the coherence, stability and predictability of the international legal order.[670] It is no secret that international investment law is under a serious threat of legitimacy.[671] The legitimacy crisis is, in part, attributed to the inconsistency of arbitral awards rendered, which stems largely from the absence of a system of precedent and of an appeal body.[672] It would therefore be most wise for arbitral tribunals to keep in line with the generally accepted and well establishes principles of international law to cease displays of a fragmenting international legal order.

[5] Funnekotter v. Zimbabwe of 2009[673]

This was a claim brought under the Netherlands-Zimbabwe BIT. The Dutch investors claimed compensation for unlawful expropriation of their farmlands. They also claimed for moral damages. The investors had direct and indirect investments in large commercial farms in Zimbabwe. The Zimbabwean government developed a land acquisition programme from 1992 onwards, which aimed to compulsorily acquire rural land necessary for agricultural settlement purposes. The law required payment of a fair compensation to the owner of the land acquired. The investors argued that their lands were acquired without the payment of a fair compensation. The Zimbabwean government proposed a new constitution in 2000, which suggested that acquisitions of land may be made without compensation, but this was defeated in a referendum. The defeat at referendum resulted in war veterans illegally invading commercial farms. According to investors, the Zimbabwean courts later established that such actions were encouraged and supported by the Zimbabwean government and that the investors received "*little if any protection from the police*". The Zimbabwean High Court later declared the occupations unlawful and ordered the police to carry out the terms of its

[668] Jagusch (n 153) 60.
[669] ibid 55. See also Wong (n 212) 26 and 33; Cabrera (n 163) 212.
[670] See Andenas (n 28) 1; Greenwood, Unity (n 29) 55; Rodley (n 41) 108.
[671] See Webster (n 122); Collins (n 122); Langford, Regime Responsiveness (n 130); Franck (n 19).
[672] See Thomas Dietz, Marius Dotzauer and Edward S. Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' (2019) 26(4) Review of International Political Economy 749.
[673] *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009.

order to that effect. The investors argued that the court order was ignored by the police and the invasions continued. Finally, the investors argued that the Zimbabwean government had reneged on its promise to the Dutch Embassy that property protected by investment agreements would be exempt from acquisition. In June 2001, a law was passed which provided qualified persons occupying rural land immunity from eviction and liability for damages or trespass, and were permitted to continue their occupation. Thereafter, the Zimbabwean Supreme Court, apparently under political pressure, ruled that the police could not be held in contempt of court for refusal to obey the High Court order, and found that there was no breach of the rule of law concerning actions taken on farms. Finally, in September 2005, the constitution was amended so that all agricultural land owned by the investors were acquired by the Zimbabwean state.[674]

The investors commenced investment proceedings on the basis of alleged breach of Article 6 of the Netherlands-Zimbabwe BIT, which prohibited expropriation without adequate compensation and not carried out in accordance with the due process of law.[675] The investors also alleged breach of the fair and equitable treatment obligation, embodied in Article 3(1) of the BIT. The investors further claimed for moral damages in the sum EUR 100,000 for each investor; there were 13 in total.[676] The claim for moral damages was made during the evidentiary hearing for the first time and no mention of it had been made in pleadings.[677] Zimbabwe disputed the claim, contending that it was not justified.[678]

The tribunal ruled for the investors and held that Zimbabwe had violated its treaty obligations. The host state was ordered to pay approximately EUR 8 million in compensation.[679] However, the tribunal dismissed the moral damages claim. The tribunal provided two reasons for the dismissal. First and foremost, it held that the claim was "*formulated briefly and only at a very late stage of the proceedings and are, therefore, for that reason inadmissible*".[680] It also opined that such claim "*partially concern damages already compensated by the allocation of a disturbances indemnity*".[681] The investors had asserted the disturbance indemnity claim in addition to the moral damages claim, and was valued at EUR 40,000 for each investor.[682] The investors contended that they should be compensated for the disturbance they and their families suffered from the unlawful decisions of the Zimbabwean authorities. The tribunal granted that claim, reasoning that "*[the investors] must obtain reparation for the disturbances resulting from the taking over of their farms and for the necessity for them to start a new life often in another country*", but valued the entitlement at EUR 20,000 for each investor.[683] Again, in tune with the awards in *Técnicas* and *Bogdanov*[684], the tribunal did not dismiss the moral damages claim on jurisdictional grounds. The claim was dismissed because the moral harm was considered partially

[674] ibid [19]-[34].
[675] ibid [39].
[676] ibid [88].
[677] ibid.
[678] ibid [139].
[679] ibid [148].
[680] ibid [140].
[681] ibid.
[682] ibid [137].
[683] ibid [138].
[684] See above under section §4.02[A][2] and [3].

compensated through the disturbance indemnity. Further, and in any event, the claim was not properly and timely formulated to be seriously considered by the tribunal, and hence "*inadmissible*".[685] It is further noteworthy that, although issued more than a year after the *Desert Line* award, the tribunal's award makes no mention of the exceptional circumstances threshold. Nonetheless, that may be easily explained on the basis of the reasons of dismissal and the short shrift the tribunal gave to the claim.

[6] Siag v. Egypt of 2009[686]

This was a claim commenced pursuant to the Italy-Egypt BIT, whereby two Italian investors sought compensation for unlawful expropriation, Egypt's failure to provide full protection of investment and ensure fair and equitable treatment. The claim concerned the alleged expropriation of a large parcel of oceanfront land to companies incorporated in Egypt, whose principal investors were the claimants, for the purpose of developing a tourist resort.[687] For various reasons, the land was assigned to a third party for the construction of a gas pipeline following its expropriation by the Egyptian government.[688] The investors also sought "*enhanced damages*", which they considered justified given Egypt's conduct.[689] Although the investors disowned any claim for a separate lump sum award of punitive damages, they urged the tribunal to "*indulge all reasonable inferences in favour of the [investors]*" so as to ensure full reparation.[690]

The tribunal upheld the investors' claim and awarded them compensation, approximately USD 75 million. However, the tribunal refused to award "*enhanced damages*", reasoning that "*the recovery of punitive or moral damages is reserved for extreme cases of egregious behaviour*".[691] The tribunal cited the *Desert Line* case in support.[692] It appears that the *Desert Line* award was cited for the first time in this award with respect to its moral damages angle.

The tribunal's reasoning illustrates why the exceptionality threshold introduced in *Desert Line* leads to uncertainty and undesirable results. In light of the references in the *Desert Line* award to malice and fault, the tribunal in *Siag* has seemingly levelled moral damages with punitive damages, and that both are "*reserved for extreme cases of egregious behaviour*". This sits uncomfortably with the position under customary international law in respect of moral damages entitlement, which permits recoverability of moral damages on the same basis and test as ordinary material damages.[693] More importantly, it is generally accepted that arbitral tribunals do not have the power under international law to award punitive damages; the like-for-like comparison is therefore most unfortunate and

[685] *Funnekotter* (n 673) [140].
[686] *Siag* (n 151).
[687] ibid [2].
[688] ibid [78].
[689] ibid [505].
[690] ibid.
[691] ibid [545].
[692] ibid, fn 738.
[693] See Chapter 3 above under section §3.02.

misleading.[694] However, it is noteworthy that in *Siag* the claim was for enhanced damages, not moral damages. Further, the investor had expressly stated that they were not seeking punitive damages. Their request was one aimed at full reparation of harm sustained due to breach. Lawry-White therefore, somewhat rightly, considers the *Siag* award to be of little importance in respect of moral damages, and sees the tribunal's statements as only *obiter*.[695] She further notes that the *Siag* tribunal incorrectly applied the *Desert Line* standard by "*effectively [equating] the standard for moral damages and punitive damages*" given "*it placed the focus of any award of moral damages on the behaviour of the perpetrator of the illegal act rather than the harm suffered*", which had not been the standard applied by the tribunal in *Desert Line*.[696] This line of reasoning is reinforced given the *Siag* tribunal's, somewhat limited, focus was on punitive damages, not moral damages.[697] Consequently, its reasoning cannot and should not be considered as the produce of a thorough analysis of the relevant principles and cases, and of limited value on the subject matter. It would therefore be incorrect to say that moral damages can only be awarded in the "*extreme cases of egregious behaviour*". This does not appear to have been the intention of the *Desert Line* tribunal, even if one considers that it sought to establish the exceptionality requirement. Exceptional circumstances, on a plain and natural reading, does not encompass only egregious behaviour. The latter is narrower than the former.

The *Siag* award illustrates that, if literally applied, the formulation proposed in *Desert Line* blurs the line between compensatory and punitive damages; the latter not generally permitted under customary international law.[698] This is unsurprising. The elevation of the threshold regarding moral damages naturally resulted in moral damages being available only in cases where a state's conduct deserved punishment. As articulated by Lawry-White, adherence to the literal formulation in *Desert Line* has "*confused the picture by increasing the focus on the subjective when the bar is objective*".[699]

[7] Europe Cement v. Turkey of 2009[700]

This was a case where the moral damages claim was raised by the host state, not the investor. This does not negate, however, the utility of the reasoning in the award in respect of moral damages. The same principles of customary international law apply. The investor, Europe Cement Investment & Trade SA, a Polish entity, alleged unlawful termination of certain concession agreements granted to two Turkish companies in which the investor allegedly held shares. The claim was founded on the ECT, on the basis of unlawful expropriation, and failure to treat the investment fairly and equitably. The two Turkish entities were engaged in the electricity sector and had been granted certain concession agreements in 1998 by the

[694] See Jagusch (n 153); Blake (n 180) 398-399.
[695] Lawry-White (n 139) 240.
[696] ibid.
[697] *Siag* (n 151) [545].
[698] See Blake (n 180) 398-399. *Cf* Schwenzer (n 134) 428.
[699] Lawry-White (n 139) 240.
[700] *Europe Cement* (n 264).

Turkish Ministry of Energy, relating to the generation, transmission, distribution and marketing of electricity in certain parts of Turkey. The concession agreements were terminated in June 2003. The investor alleged that it had acquired shares in the Turkish companies in May 2003, i.e., shortly before the termination of the concession agreements. Turkey disputed the investor's ownership of shares in the Turkish entities. It alleged that the investor's statements were false and that the claim brought was an abuse of process. Turkey challenged the authenticity of the copies of share certificates and share purchase agreements submitted by the investor in support of its case.

Ultimately the tribunal did not have to rule on the matter. The investor informed the tribunal that it would discontinue the proceedings on the basis that "*the management of the Company had concluded that it would not be in the best interests of Europe Cement to continue the case*".[701] Maintaining its argument that it owned shares in the two Turkish entities, the investor requested the case to be dismissed on jurisdictional grounds given its "*inability to show the shares legally acquired by our company*".[702] Turkey objected to the request for discontinuance, on the basis of Article 49(2) of the ICSID Arbitration (Additional Facility) Rules, which required mutual agreement for proceedings to be discontinued. Turkey requested monetary compensation for the assertion of a manifestly ill-founded claim using inauthentic documents.[703] It relied on the *Desert Line* award in support of its claim, and requested USD 1 million on the basis that such "*represent[ed] an appropriate amount*".[704] The investor disagreed that *Desert Line* applied, explaining that the facts were dissimilar.[705] It also argued that the respondent state failed to prove reputational damage, as alleged. Ultimately, the tribunal was faced with an "*unusual circumstance that both Parties claim that the case should be dismissed for lack of jurisdiction*", though on different grounds.

The tribunal rejected the investor's request for dismissal for lack of jurisdiction on the basis of its inability to produce the share certificates in the two Turkish entities; but did dismiss on the basis of lack of jurisdiction given the investor's failure to establish its investment in Turkey at the relevant time.[706] It found that the "*claim to ownership of shares in [the Turkish entities] was based on documents that on examination appear to have been back-dated and thus fraudulent…[and an]…abuse of process*".[707] However, the tribunal rejected the respondent state's request for monetary compensation in the form of moral damages due to harm to reputation and international standing. The tribunal did "*not consider that exceptional circumstances such as physical duress are present in this case to justify moral damages*".[708] The tribunal further reasoned that "*any potential reputational damage suffered by the Respondent will be remedied by the reasoning and conclusions set out in this Award, including an award of costs, which as set out below is significant*".[709] The investor

[701] ibid [57].
[702] ibid [66].
[703] ibid [65].
[704] ibid [128] and [135].
[705] ibid [131] and [179].
[706] ibid [122] and [145].
[707] ibid [180].
[708] ibid [181].
[709] ibid.

was ordered to pay the respondent state its full costs in the case, in excess of USD 4 million.[710]

It is clear that the tribunal's reference to exceptional circumstances is an implied approval of the *Desert Line* formulation. Although the tribunal seems to have refrained from an express approval of *Desert Line*, referring to it only when summarising the respondent state's claim for monetary compensation, the adoption of the test set out in *Desert Line* seems undisputable. Had exceptional circumstances been present in *Europe Cement*, the tribunal would probably have been, it seems, positively influenced into awarding monetary compensation. The decision in *Europe Cement* may therefore be taken as another award whereby the formulation with respect to moral damages enunciated by the *Desert Line* tribunal was approved and applied. The *Europe Cement* award can therefore be said to have cemented the exceptionality requirement into international investment law. Later arbitral tribunals may find it difficult to depart from the path laid down.

[8] Cementownia v. Turkey of 2009[711]

This case was a repeat of the *Europe Cement* case, but with a different tribunal. It was another attempt by the Turkish Uzan family, who had fallen from grace and whose investments in Turkey were terminated or seized by the Turkish government for various (seemingly political) reasons, to create international jurisdiction and seek compensation through international tribunals. Again, a Polish entity was established and portrayed as a shareholder of two Turkish energy companies. The Polish entity (i.e., the investor) alleged that the Turkish state had unlawfully expropriated its investment, and subjected it to unreasonable and discriminatory measures through its termination of certain concession agreements, in breach of the protections contained in the ECT. The investors in both *Europe Cement* and *Cementownia* were seemingly represented by the same person, a Mr Biser Biserov. The existence of parallel requests for arbitration submitted under similar circumstances were raised by the respondent state and noted by the tribunal.[712] Further, the respondent state in *Cementownia* submitted, on several occasions, letters and memorials that had been submitted in the *Europe Cement* proceedings.[713]

Similar to the course of events in *Europe Cement*, the investor sought discontinuance on the basis of its inability to produce the original share certificates as proof of shareholding. Turkey objected and argued that the investor never had any shareholding in the two Turkish entities at the relevant time and that its claim was therefore a claim manifestly ill-founded and asserted using inauthentic documents. The issue for the tribunal was therefore to decide on which jurisdictional ground to dismiss the proceedings.[714] Turkey had also requested a declaratory relief and monetary compensation for moral damages suffered[715], which also fell

[710] ibid [186].
[711] *Cementownia* (n 252).
[712] ibid [4] and [98].
[713] See, for instance, ibid [43].
[714] ibid [109].
[715] ibid [165].

for determination. There was therefore a great degree of overlap in respect of the facts and claims of the two separate proceedings.

The claim for moral damages was one based on general international law.[716] Turkey argued that Cementownia's conduct in the arbitration had been egregious and malicious, and that the investor had asserted and pursued a baseless claim, making spurious allegations against Turkey with the intent of damaging its international stature and reputation.[717] Turkey placed reliance on the *Desert Line*[718] and *Benvenuti*[719] awards, noting that although such cases concerned damages to the claimant investors, "*there is no principal reason why equivalent relief should not be available to the respondent State in an appropriate case*".[720] The tribunal held that it was satisfied that the investor had no shareholding in the two Turkish entities at the relevant time and that its "*conduct in bringing the instant claim fails to meet the requisite standard of good faith conduct… [and was]…manifestly ill-founded.*"[721] It noted that the proceedings constituted an abuse of process.[722] The tribunal therefore saw no harm in declaring that Cementownia had commenced a fraudulent claim against Turkey.

However, the tribunal dismissed the request for monetary compensation in the form of moral damages. Noting that "*there is nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an arbitral tribunal from granting moral damages*",[723] the tribunal reasoned that it was doubtful that a general principle, i.e., abuse of process, could constitute sufficient legal basis for granting compensation for moral damages. Although the tribunal noted that a "*symbolic compensation for moral damages may indeed aim at indicating a condemnation for abuse of process*", it was deemed more appropriate in light of the facts of the case to sanction Cementownia with respect to an allocation of costs, a figure exceeding USD 5 million.[724]

The tribunal distinguished the *Desert Line* case[725], relied on by Turkey in support of its moral damages claim, on the basis that in that case the tribunal had decided on the basis of the obligation contained in the Oman-Yemen BIT, in particular the obligation of security. It was further reasoned that the exceptional circumstances of that case, such as physical duress suffered by the investor, justified compensation.[726] The tribunal also justified its dismissal of the moral damages claim on the basis that such compensation would go beyond the general sanction of awarding the total costs of the arbitration on the defeated party, a sanction provided for in Article 58 of the Arbitration (Additional Facility) Rules. The tribunal further noted that Turkey's "*objective [was] already achieved*" given it had been granted the fraudulent claim declaration requested.[727]

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[716] ibid [165].
[717] ibid.
[718] See above under section §4.02[A][4].
[719] See above under section §4.02[A][1].
[720] *Cementownia* (n 252) [165].
[721] ibid [157].
[722] ibid [159].
[723] ibid [169].
[724] ibid [170]-[172] and [178].
[725] See above under section §4.02[A][4].
[726] *Cementownia* (n 252) [169].
[727] ibid [171].

The *Cementownia* tribunal appears to have largely followed in the *Europe Cement* tribunal's footsteps. The principal reason for dismissing the claim in both cases was the lack of exceptional circumstances. This adopts the criteria laid down in *Desert Line*, and not found in any of the earlier cases considered. The additional reasons for dismissal of the claims, i.e., sufficiency of adverse costs order as a sanction against the investors and the declaration / reasoning contained in the awards, appear as justifications that would apply only in respect of state moral damages claims.

The tribunal incorrectly saw the *Desert Line* award as one where the "*the investor based its request for compensation for moral damages on the Yemen-Oman BIT*".[728] In the circumstances, this was suggestive of a contention that moral damages are not available as a matter of international law. This is inconsistent with the principles of international law and, in fact, seemingly with the *Desert Line* tribunal's statements. As explained above in Chapter 3, customary international law recognises the general availability of moral damages. Such a claim will not be limited to the terms of a treaty, provided the latter does not exclude moral damages entitlement. Further and connectedly, the moral damages claim in *Desert Line* was considered on the basis of customary international law, not the Oman-Yemen BIT, as was suggested by the tribunal in *Cementownia*. The *Desert Line* tribunal made it clear that the investor claimed moral damages "*[B]ased on international law"* given Yemen's "*breaches of its obligations under the BIT*".[729] That is not the same as the claim being based on the BIT. It would therefore be incorrect to suggest that moral damages claims are wholly dependent on the terms of the BIT or other applicable treaty. That would be so only in circumstances where the BIT excludes moral damages, but where that is not the case, the principles of customary international law come to play. The author is unaware of any BIT or other treaty currently in force which specifically precludes moral damages claims.

The *Desert Line* case concerned the provision in the Oman-Yemen BIT relating to the obligation to provide security. It may be that the tribunal in *Cementownia* considered that moral damages should be awarded only in cases involving such substantial failures, and not in simple abuse of process or investor fraud based claims. However, that too conflicts with the general availability of moral damages under international law, essentially on the same basis as the availability of material damages. The nature and gravity of a breach does not act as the gateway for a claim, but determines the measure of compensation due. To blur the line is to enter the realms of punitive damages, which is generally prohibited under international law.[730] For that reason, it has been most unfortunate for the tribunal in *Cementownia* to have indicated that a "*symbolic compensation for moral damages may indeed aim at indicating a condemnation for abuse of process*".[731] Moral damages seek to compensate damage sustained and ensure full reparation, it does not operate as a punitive tool.[732]

Consequently, where moral harm has actually been suffered and the claim in connection with it stands to be determined pursuant to the principles of international law, the

[728] ibid [170].
[729] *Desert Line* (n 1) 286.
[730] See Blake (n 180) 398-399. *Cf* Schwenzer (n 134) 428.
[731] *Cementownia* (n 252) [171].
[732] Lawry-White (n 139). *Cf* Uchkunova (n 153).

appropriate remedy is a moral damages award. This cannot be pushed away in favour of a replacement remedy, whether that be a favourable costs award or a declaration of abuse of process. The successful party, in most cases and in any event, is entitled to its costs. It would be most unsatisfactory and inappropriate for an arbitral tribunal to award moral damages clothed as an award on costs. That betrays the very system within which arbitrators act, and hinders jurisprudential development.

[9] Bogdanov v. Moldova of 2010[733]

The *Bogdanov* saga continued with a second investment claim.[734] The investor claimed compensation for breach of investment protections contained in the Russia-Moldova BIT, related to the introduction of a customs declaration requirement requiring the payment of a certain fee. This was claimed to be in breach of Article 2(2) of the BIT, which guarantees "*complete and unconditional legal protection of the capital investments of the investors*". Article 3(1) of the BIT, concerning non-discriminatory and fair and equitable treatments, was further invoked on the basis that no other enterprise had received similar treatment. The investor also sought moral damages in the rather nominal amount of EUR 5,000.[735] Moldova resisted the substantive claim on both jurisdictional and substantive grounds. Moldova also resisted the moral damages claim, asserting that moral damages could only be awarded to personal damage to an individual, not for damage inflicted to a juridical person.[736]

The tribunal held that Moldova had violated Articles 2(2) and 3(1) of the BIT, and therefore liable to compensate the investor for damages. The claim for moral damages was, however, dismissed on the basis that "*[the investor] ha[d] not against the objections of the Republic of Moldova been able to demonstrate that he [was] entitled to such as a matter of Moldovan law*".[737] This is somewhat surprising given the claim was based on the BIT and, hence fell for determination, under international law.[738] The tribunal's conclusion would therefore be erroneous if, as it appears, the investor did not explicitly base his moral damages claim on Moldovan law. Otherwise, the principles of customary international law would have been applicable, given the absence of prohibitory language in the BIT. Consequently, this case is of little utility and assistance in respect of the analysis of principles relating to moral damages under international investment law.

[10] Lemire v. Ukraine of 2011[739]

[733] *Yury Bogdanov* (n 193).
[734] See above section §4.02[A][3].
[735] *Yury Bogdanov* (n 193) [37].
[736] ibid [61].
[737] ibid [98].
[738] ibid [4], [76], [85] and [91].
[739] *Lemire*, Award (n 140).

This is arguably the second most important case on the issue of moral damages under international investment arbitration. It is the first known case where an investment tribunal has attempted to follow and reformulate the *Desert Line*[740] test in respect of moral damages.[741] Blake considers *Lemire* as "*the most far reaching analysis to date on the question of moral damages in international investment law*".[742]

The facts of the case were as follows. Mr. Joseph Charles Lemire, a US national, had invested indirectly, through another corporation, in CJSC Radiocompany Gala ("Gala"), a Ukrainian entity. By 2006, Mr. Lemire indirectly held 100% shares in Gala. Gala was a music radio station in Ukraine licensed to broadcast on various frequencies. A dispute arose between the investor and Ukraine following the latter's refusal to grant the investor radio frequency licences and broadcasting channels in certain cities. Mr. Lemire argued, *inter alia*, that the Ukrainian National Council, in a concerted effort to force him out of the radio industry, abusively monitored and inspected Gala between 2005-2008, issued warnings and threatened revocation of licences, threatened non-renewal of licences, delayed renewal of licences to impose a tenfold licence fee under a newly enacted formula and allowed unrealistically short period of time for payment for an exorbitant licence fee.[743] The licences were all ultimately extended with the payment of correct fees, with warnings quashed by the Ukrainian courts.[744] Although Mr. Lemire had explained that his good relationship with the National Council had gone sour due to his refusal to pay bribes, no evidence of such was produced in support.[745]

Investment arbitration proceedings were commenced in November 1997 under the 1994 Ukraine-US BIT. A settlement was eventually reached in late 2000, recorded in the form of an award (settlement agreement). On 11 September 2006, the claimant investor commenced fresh proceedings against Ukraine on the basis that it had failed to comply with the terms of the settlement agreement, and also violated certain protections contained in the Ukraine-US BIT, in particular the fair and equitable treatment obligation and not to subject investments to arbitrary or discriminatory measures. Mr. Lemire sought material and moral damages, the latter in the amount USD 3 million for harassment in breach of the Ukraine-US BIT.[746]

The tribunal reiterated the statement in *Desert Line* that moral damages would be awarded only in exceptional circumstances.[747] The tribunal then opined that to ascertain the exact meaning to be afforded to exceptional circumstances one ought to consider the existing case law, and in doing so it first considered the decision in *Desert Line*. Following a review of the cases[748] the tribunal regarded as being relevant, it concluded as follows:

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[740] See above under section §4.02[A][4].
[741] *Lemire*, Jurisdiction and Liability (n 407) [476]. This may partly have been due to Professor Jan Paulsson sitting as arbitrator in both cases, appointed rather fittingly by the investors in both cases. Interestingly, the claimant investors in both cases were also represented by the same chief legal counsel.
[742] Blake (n 180) 378. See also Garcia (n 287) 499.
[743] *Lemire*, Jurisdiction and Liability (n 407) [426].
[744] ibid [435].
[745] ibid [235].
[746] *Lemire*, Jurisdiction and Liability (n 407) [38]-[39].
[747] *Lemire*, Award (n 140) [326].
[748] *Desert Line* (n 1); *Lusitania* (n 3); *Siag* (n 151).

The conclusion which can be drawn from the above case law is that, as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that: the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and both cause and effect are grave or substantial.[749]

The tribunal thereafter proceeded to apply the above-stipulated reformulated test to the facts of the case. In respect of the first act alleged to have caused moral damages (i.e., refusal to award frequencies), the tribunal noted that exerting excessive or disproportionate effort to acquire administrative licences are unlikely to give rise to entitlement to moral damages. The tribunal opined that an injury resulting from such difficulties would not meet the standards required for moral damages.[750] Mr. Lemire was an experienced professional and a seasoned entrepreneur. The rejection of applications could not therefore have caused him extraordinary stress or anxiety. Although the tribunal accepted that recurring rejections would have negatively impacted Mr. Lemire's entrepreneurial image, and that therefore "*the second requirement for the existence of moral damages – a requirement which inter alia includes loss of reputation – is probably met*", it was not of a substantial nature.[751] It is interesting to see that the tribunal considered the harm insubstantial, but remained silent as to whether Ukraine's actions implied "*physical threat, illegal detention or other analogous situations*". In fact, the tribunal seemingly made no reference to the first limb of the test, merely finding the harm insubstantial. It is unclear as to what importance, if any, is to be attributed to it.

With respect to the second act alleged to have caused moral harm (i.e., excessive inspections), the tribunal acknowledged that "*inspections by a regulator, if improperly used as tools of intimidation against regulated entities, constitute egregious behaviour and an abuse of power, which can cause extreme stress and anxiety to the supervised and result in an entitlement to be compensated for the moral damage inflicted*". However, it did not consider the case before it as reaching such level of severity. The tribunal could find no attempts on the National Council's part to intimidate Gala Radio and, further, two warnings issued were ultimately annulled by Ukrainian courts.[752] Note, however, that the example given would not involve any physical threat etc. (i.e., the first limb of the *Lemire* test), but nevertheless it was said that in such circumstances the investor would be entitled to moral damages. Finally, in respect of the alleged attempts to charge abusive renewal fees, the tribunal again disagreed with the investor, reasoning that the National Council's initial

[749] *Lemire*, Award (n 140) [333].
[750] ibid [336].
[751] ibid [338].
[752] ibid [341].

incorrect decision was corrected and Mr. Lemire had paid the renewal fee at the correct (lower) rates.[753]

In conclusion, the tribunal held that "*the extraordinary tests required for the recognition of separate and additional moral damages have not been met in this case*".[754] However, the tribunal also, rather contradictorily, expressed that "*[T]he moral aspects of his injuries have already been compensated by the awarding of a significant amount of economic compensation*". If there were any moral injuries, such surely should have been addressed as part of an award of moral damages, given the acceptance that moral damages can be awarded by investment tribunals. If, conversely, there were no moral damages inflicted on the investor, then the reference to moral damages is absurd. The belt-and-braces-like approach adopted does little but muddy the water.

The *Lemire* award deserves the same arrows of criticisms as those directed at the *Desert Line* award. It moves against the rules and principles of customary international law. The award of moral damages is not, under established principles of international law, subject to exceptional circumstances and/or entirely at the tribunal's discretion. It must be awarded if moral harm is suffered. *Lemire* further represents a significant divergence from the settled principles of international law, signalling substantive fragmentation of the international legal order. Ehle notes, for instance, that once the tribunal had accepted as a fact the investor's loss of reputation, the availability of moral damages should not have turned on whether the injury was grave or substantial, but rather on a less stringent test, namely whether a sufficient causal link could be established.[755] The presence of exceptional or grave circumstances can only serve to shape the quantum element. Allepuz agrees with this line of thinking, noting that fault and malicious intent to harm should not be taken to operate as a prerequisite to moral damages since the ILC Articles establish an objective responsibility of the state.[756] He considers that the relevance attributed in *Lemire* to the fact that the allegedly harassing inspections were not undertaken with a view to intimidate the investor is inconsistent with the notion of objective liability.

[11] Franck Charles Arif v. Moldova of 2013[757]

This was an investment claim brought under the France-Moldova BIT, the investor seeking compensation for breach of BIT and international law protections, in particular the expropriation of his investment and breach of the fair and equitable treatment obligation. The investor was the sole shareholder of a Moldovan entity. The entity had successfully participated in a tender organised by the Moldovan government in respect of the establishment and management of a duty-free store network at pre-established state border crossing points on the border with Romania, acquiring the necessary licences. The company

[753] ibid [343].
[754] ibid [344].
[755] Ehle (n 145) 306.
[756] Allepuz (n 146) 11-12.
[757] *Franck Charles Arif* (n 422).

was informed that some of its stores had to close for failure to comply with mandatory fire safety regulations. Further, the company's competitors commenced legal action seeking cancellation of certain tenders, which actions succeeded and tenders were cancelled. There were parallel and ongoing disputes with local customs offices regarding cancellation of lease agreements[758] and with competitors with respect to the airport duty free stores.[759] The investor claimed material and moral damages in connection with the adverse impact of the above on its investment. The claim was granted. The tribunal ordered Moldova to make proposals to the investor for the restitution of its investment and, if rejected, to pay a specified amount as compensation. The claim for moral damages in the amount of EUR 5 million, however, was dismissed.

The investor's claim for moral damages was premised on the pain, stress, shock etc. suffered due to Moldova's alleged acts and omissions in relation to the investment, resulting in the investor having to leave the country for his own safety, depriving him of the opportunity to personally manage his own business and to pursue new business opportunities, in addition to general damages for breach of BIT protections.[760] The investor contended that moral damages included a broad range of elements, such as personal injury, emotional harm, pathological harm and minor consequences of a wrongful act.[761] In support, the investor relied on relevant investment case law and contended that tribunals and umpires have regularly awarded compensation for moral damages in situations of "*injury to a corporation's credit, reputation and prestige*".[762] The investor relied, in particular, on the *Desert Line*[763] and *Lemire*[764] awards. Moldova resisted the claim, on the basis that the investor was not entitled to moral damages because it had not satisfied the extraordinary tests required for the recognition of separate and additional moral damages.[765] In support of its position, Moldova cited and relied on the *Lemire* award, expressing that the gravity of harm suffered by the investor could not be likened to the hurt caused by armed threats, the witnessing of the deaths of others, etc.[766] Moldova also dismissed the presence of the other two elements set out in *Lemire*.[767]

The tribunal refused to grant the investor moral damages. It did accept, however, the general obligation of a state guilty of an internationally wrongful act to make reparation. It had "*no doubt that moral damages may be awarded in international law*".[768] The tribunal cited Article 31(2) of the ILC Articles in support of its conclusion. The tribunal explained that such was, however, an exceptional remedy,[769] only applicable in cases where the conduct and suffering is "*so grave and substantial, as to amount to such exceptional*

[758] ibid [41]-[86].
[759] ibid [87].
[760] ibid [562].
[761] ibid [585].
[762] ibid [586].
[763] *Desert Line* (n 1).
[764] *Lemire*, Award (n 140).
[765] *Franck Charles Arif* (n 422) [565].
[766] ibid [588].
[767] ibid.
[768] ibid [584].
[769] ibid.

circumstances that necessitate a pecuniary compensation for moral damages".[770] The tribunal reasoned that when attempting to assess what is normal and what is exceptional in commercial life, one must naturally examine and appreciate the facts of each case. It is not a matter that can be considered in isolation of the underlying facts of each case.[771] The tribunal concluded that, on the facts, although "*the conduct of the Moldovan authorities provoked stress and anxiety to Claimant…the different actions did not reach a level of gravity and intensity which would allow it to conclude that there were exceptional circumstances which would entail the need for a pecuniary compensation for moral damages.*"[772] The investor was an experienced professional and seasoned entrepreneur, who in 1998 took the courageous decision to invest in the emerging market economy of Moldova. He must have expected to face difficulties in investing in such a market, which was characterized by the instability and the unpredictability of its economic and political institutions. He therefore went in with an open eye and what he faced was not something wholly unexpected or uncalled for. The investor was aware that Moldova's state institutions were weak and its governance in need of improvement, not comparable to long established democracies and market economies.[773] The tribunal considered that the degree of shock in such cases is reduced, in line with the expectations. It explained that:

> *The perception of an egregious behavior is different in different business traditions. On the one hand, the loss of reputation as a consequence of governmental and police interference is much less dramatic in countries where the rule of law and protection against administrative discretion are low and any business is exposed to this risk, irrespective of its conduct, and, on the other hand, the individual's expectations are different and less easily to be shocked.*[774]

While acknowledging that these factors do not lower the standard of protection provided by BITs, the tribunal considered them relevant for the purposes of exceptionality in respect of moral damages claims.[775] The tribunal dismissed the claim for moral damages, primarily on the basis that neither the investor nor any of his relatives or employees were exposed to physical violence, armed threats, deprivation of liberty or a forceful taking of property. [776] The investor's claims relating to threats of physical harm were unsubstantiated.[777]

The tribunal also commented on the utility and applicability of previous investment awards and the principles and tests laid out therein. It noted that the reformulated version of the test in *Lemire* was based on a "*limited discussion of three cases, with no broader consideration of underlying principles or policies*". It cannot be considered as a cumulative list of criteria in respect of moral damages claims. [778] It rather authoritatively noted that "*the*

[770] ibid [602].
[771] ibid [603].
[772] ibid [615].
[773] ibid [605].
[774] ibid [606].
[775] ibid.
[776] ibid [607].
[777] ibid [608] and [611].
[778] ibid [590].

facts of a single case do not define the availability of moral damages as a remedy".[779] In the tribunal's view, it was the test laid down in the *Lusitania* case, corresponding to the second part of the *Lemire* test, that correctly set out the test applicable for moral damages claims.[780] The tribunal noted that this granted arbitrators a certain degree of discretion "*within the general framework that moral damages are an exceptional remedy*".[781] On the issue of exceptionality and its justification, the tribunal expressed as follows:

> *A breach of a contract or any wrongful act can lead to a sentiment of frustration and affront with the victim. A pecuniary premium for compensation for such sentiment, in addition to the compensation of economic damages, would have an enormous impact on the system of contractual and tortious relations. It would systematically create financial advantages for the victim which go beyond the traditional concept of compensation. The fundamental balance of the allocation of risks would be distorted. It would have similar effects if permitted in investment arbitration. The tribunal is therefore aligning itself to the majority of arbitral decisions and holds that compensation for moral damages can only be awarded in exceptional cases, when both the conduct of the violator and the prejudice of the victim are grave and substantial.*[782]

The award in *Franck Charles Arif* is another link in the *Desert Line* bandwagon. It deserves to be applauded for crystallising the rule that moral damages are available as a matter of international law, but it deserves the same criticism for similarly departing from the established principles of international law and upholding the exceptionality requirement. It is yet a further sign of the fragmentation of international law. *Desert Line* did truly involve exceptional circumstances. However, that is no reason to limit moral damages claims to like situations going forward. The unwise move in *Desert Line* has rather unfortunately caused a domino effect. The change in the law is perhaps now irreversible. Certain scholars have expressed that, following the award in *Franck Charles Arif*, considered together with *Desert Line* and *Lemire*, the exceptional circumstances requirement has now been "*relatively settled*" in investment law.[783] However, that being said, and as conceded by the *Franck Charles Arif* tribunal, we have not reached the end of the road with the *Lemire* formulation. It is likely to be reconsidered and re-formulated in the cases to follow. Now that investment tribunals' jurisdiction to award moral damages is deeply rooted in international investment law, there will unavoidably be an increase in such claims being raised by investors, resulting in more awards considering the issue and providing opportunities for further distillation of the principles. The path towards convergence therefore remains open for those wishing to take it.

[12] Rompetrol v. Romania of 2013[784]

[779] ibid.
[780] ibid [591].
[781] ibid.
[782] ibid [592].
[783] Uchkunova (n 153) 385-386.
[784] *Rompetrol*, Award (n 155).

The issue of moral damages was discussed also in *Rompetrol*. The Dutch investor commenced investment proceedings, alleging breach of the fair and equitable treatment obligation, the obligation to provide protection and security and protection against unreasonable or discriminatory measures.[785] The case, for brevity's sake, concerned the commencement of investigations by Romanian authorities for alleged economic crimes and brief detainment of the Dutch investor's former chief executive officer. The claimant commenced proceedings alleging that the investigations were oppressive and in breach of the BIT protections.

The tribunal held that the fair and equitable treatment obligation had been violated, but only with respect to procedural irregularities during the criminal investigation of the investor's former chief executive officer.[786] However, no damages were awarded on the basis that the investor had failed to discharge the burden of proof that rested on its shoulders by proving that it suffered economic loss or damage resulting from the breach. The tribunal also dismissed the claimant's claim for moral damages. The tribunal noted the investor's statements, in its post-hearing brief, that an award of moral damages grants a tribunal a certain degree of discretion. This statement was supported by references to the *Benvenuti*[787] and *Desert Line*[788] cases, as well as a passage in a leading commentary on damages in investment law.[789] The tribunal opined that "*[T]he very fact, however, that this alternative claim for damages is both notional and widely discretionary prompts a considerable degree of caution on the part of the present tribunal in facing the proposition that compensable 'moral' damage can be suffered by a corporate investor.*"[790] The tribunal reasoned that reputational damage to a foreign investor will most likely show itself, for instance, as "*increased financing costs, and possibly other transactional costs as well*", which it regarded as an example of actual economic loss subject to the rules of proof. It declined to accept the awarding of moral damages to investors since such would, to quote the tribunal, "*subvert the burden of proof and the rules of evidence*", something it was unprepared to do.[791] The tribunal concluded by saying that moral damages cannot be admitted as a proxy for the inability to prove actual economic damage.[792]

The reasoning in the *Rompetrol* award is erroneous on several fronts. First, it suggests that moral damages are not available in investor-state arbitrations since such would provide an escape route to investors unable to prove their economic damage. This reasoning ignores entirely the position under customary international law that moral damages are as real as material damages and must be awarded where moral harm is suffered.[793] This is widely accepted by the awards considered above. The tribunal also seems to have had hesitations as to whether moral damages may be awarded to corporate investors. The availability of moral

[785] ibid [53].
[786] ibid [279].
[787] See above under section §4.02[A][1].
[788] See above under section §4.02[A][4].
[789] Ripinsky (n 205).
[790] *Rompetrol*, Award (n 155) [289].
[791] ibid.
[792] ibid [293].
[793] See Chapter 3 above under section §3.02.

damages to corporations has not been restricted under customary international law, neither under the ILC Articles nor in arbitral awards.[794] In fact, the *Desert Line*[795] and *von Pezold*[796] awards involved corporate claimants and the tribunals in those cases had no problem in awarding moral damages. Note that this aspect of *Desert Line* was not doubted in *Lemire*.[797]

[13] Al-Kharafi v. Libya of 2013[798]

This was an *ad hoc* arbitration conducted under the Unified Agreement for the Investment of Arab Capital in the Arab States (the "Arab Investment Agreement"). The claimant investor sought compensation for damage sustained due to Libya's failure to honour its contractual obligations, which related to a land lease agreement concerning the establishment of a tourism investment project in Tripoli, by its decision to cancel the project and sell the land to a third party. The investor also sought moral damages under Libyan law. The applicable law was Libyan law.

The tribunal granted the investor's claim for compensation, ordering Libya to pay over USD 900 million for lost profits and other losses and expenses. The tribunal further awarded USD 30 million as moral damages for the harm the investor incurred as a result of the damage caused to its reputation in the stock market, as well as in the business and construction markets in Kuwait and around the world.[799] With respect to its moral damages claim, the investor had placed reliance on Article 166 of the Libyan Civil Code, which obligates a party causing damage to another through fault liable to pay compensation. The investor contended that the damage mentioned covered both material and moral damage.[800] The investor expressed that it was one of the leading international companies in the field of investment and contracting, and that the project had added to its moral credit in the international finance and business market. It argued therefore that its 'moral credit', i.e., reputation and international position, had been harmed by the Libyan authorities' failure to honour their contractual obligations.[801] As compensation for harm to moral credit, the claimant requested USD 50 million, which it expressed as being purely symbolic.[802] Libya resisted the claim on the basis of (i) absence of moral harm and (ii) lack of any evidence to substantiate the claim. The tribunal, granting the moral damages claim, explained that damages, by virtue of Articles 166 and 225 of the Libyan Civil Code, included material and moral damage.[803] Consequently, an award of moral damages was made, under Libyan law, for "*damage to its worldwide professional reputation after the [Libyan authorities'] abusive*

[794] See above under sections §2.02[B] and §3.02.
[795] See above under section §4.02[A][4].
[796] See below under section §4.02[A][14].
[797] For a detailed consideration of corporate investors' entitlement to moral damages, see Chapter 2 above under section §2.02[B].
[798] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Award, 22 March 2013.
[799] ibid 369.
[800] ibid 52.
[801] ibid 53.
[802] ibid 54 and 66.
[803] ibid 365-366.

cancellation of the important project that they previously approved its establishment and investment".[804]

The tribunal's award may not possess an obvious connection to the issue of moral damages under international investment law. It was a claim decided purely under Libyan law. Nevertheless, it is of some value for our purposes, principally because it demonstrates that international investment tribunals are capable of assessing and valuing moral harm sustained due to a breach of an obligation causing loss of reputation. The alleged difficulty in connection with assessing moral harm in cases governed by international investment law is therefore seemingly over-exaggerated. More importantly, the award demonstrates that where the applicable rules and principles permit the recoverability of damages and that is considered to encompass both material and moral harm, as is the rule under customary international law, then there is no obvious barrier to moral damages claims provided the harm can be evidenced to the arbitral tribunal's satisfaction.

[14] von Pezold v. Zimbabwe of 2015[805]

The *von Pezold* award is the second publicly known ICSID award wherein the tribunal ruled that it had jurisdiction to hear and award, and in fact did award, moral damages. The sum awarded was, mirroring that in *Desert Line*, USD 1 million.[806] The facts of *von Pezold* closely resemble those of *Funnekotter*[807], in that it concerned claims by foreign investors that Zimbabwe, through its 1992 land acquisition programme and its actions in connection with it, unlawfully expropriated their investment, i.e., lands belonging to Zimbabwean entities in which they held shares. The claim in that case was based on both the Germany-Zimbabwe and the Switzerland-Zimbabwe BITs given the claimants' nationalities.

The tribunal accepted the claim brought on the basis of, *inter alia*, unlawful expropriation and awarded restitution, failing that, compensation of circa USD 200 million.[808] It held that Zimbabwean state organs aided the invasions by providing invaders with logistical support and supplies.[809] Further, the police took little or no action in respect of the acts of the invaders, despite multiple court orders declaring them unlawful and ordering the police to ensure that the invaders vacated the farms.[810] The tribunal stopped short of attributing the acts of the invaders, settlers and war veterans to the Zimbabwean government on the basis that their acts were not "*based on a direct order or under the direct control of the Government*", albeit that the government had "*encouraged (and endorsed) the action once it had begun*".[811] The tribunal also awarded one of the claimants, a Mr. Heinrich von Pezold, moral damages in the sum of USD 1 million, in connection with threats of death and violence endured by Mr.

[804] ibid 369.
[805] *von Pezold* (n 123).
[806] See *von Pezold* (n 123) [1020.5]; see also *Desert Line* (n 1) [291].
[807] *Funnekotter* (n 673).
[808] *von Pezold* (n 123) [10212] *et seq*.
[809] ibid [112].
[810] ibid [113].
[811] ibid [448].

Heinrich von Pezold and the employees at the hands of illegal settlers.[812] They had had "*firearms put to [their] heads, and were kidnapped*", were beaten and tortured, and further humiliated by other means.[813] This was against the backdrop of a request for moral damages totalling USD 13 million, USD 5 million in respect of Mr. Heinrich von Pezold and the remainder allocated as USD 1 million for each of the other von Pezold claimants.[814] Zimbabwe objected to the award of moral damages on the basis that there was "*no justification for [such an] award*" and, further, that any award must be substantially reduced so that it is symbolic in nature.[815] Zimbabwe further contended that the claim for moral damages had not been sufficiently established.[816] The Zimbabwean entities, defined and referred to as the Border Company Claimants in the tribunal's award, in which the von Pezold claimants held majority shares, who had also initiated a separate arbitration and which claim was heard by an identical panel, were also jointly awarded a total sum of USD 1 million as moral damages.[817] This was a reduction from the USD 5 million they claimed in the arbitration.[818]

The tribunal undertook an extensive review of the issue of moral damages under international investment law in its award, focusing on the ICSID awards in *Desert Line*[819] and *Lemire*[820]. It reaffirmed the principle that a state's obligation to provide reparation for an injury covers both material and moral damage, and referred to the ILC Articles for support.[821] Rather unfortunately, it reiterated the rule enunciated in *Desert Line*, and confirmed in *Lemire*, that moral damages should only be awarded in exceptional circumstances.[822] The tribunal also focused its mind on the issue of whether corporate claimants may be awarded moral damages in investment cases. This was relevant because the Zimbabwean entities (i.e., the Border Company Claimants) in which the claimant investors held shares had also brought ICSID investment proceedings against Zimbabwe, relying on the nationalities of their shareholders (i.e., the von Pezold claimants), and were also seeking moral damages. Those proceedings were heard by the same tribunal, but under a separate ICSID case reference. Referring approvingly to and considering the approach adopted in *Desert Line*, the tribunal reiterated the "*principle that a corporation can receive damages based on actions that affected members of its staff*".[823]

Recognising that "*the harm suffered by the executives is not the harm to the company*", the tribunal agreed with the views advocated by Sabahi and Dumberry that "*the decision in Desert Line offers a pragmatic solution to an unappealing situation*".[824] The tribunal noted that such an approach "*serves not only the function of repairing intangible harm, but also of condemning the actions of the offending State*".[825] Following from its analysis of *Desert Line*[826]

[812] ibid [932] and [1020.5].
[813] ibid [898]-[899] and [902].
[814] ibid [88].
[815] ibid [90] and [906].
[816] ibid [907].
[817] ibid [923] and [934].
[818] ibid [89].
[819] See above under section §4.02[A][4].
[820] See above under section §4.02[A][10].
[821] *von Pezold* (n 123) [908].
[822] ibid [908]-[910]. See also *Desert Line* (n 1) [289]; *Lemire*, Award (n 140) [333].
[823] ibid [913].
[824] ibid [915].
[825] ibid [916].
[826] See above under section §4.02[A][4].

and *Lemire*[827], the tribunal held that the treatment Mr. Heinrich von Pezold was subjected to at the hands of the illegal settlers "*warrant[ed] moral damages based on the principles outlined by the tribunal in Lemire*".[828] Zimbabwe had failed in its obligation by virtue of, at the very least, the failure of the state security forces to protect the investor from the settler and war veterans over a long period of time. The investor was entitled to expect the full protection of the law, but this was not forthcoming.[829] However, in respect of quantum, the tribunal found the USD 5 million claim "*excessive in light of the decision in Desert Line*" and awarded USD 1 million, which it considered to be appropriate.[830] The tribunal reasoned that the claimant investor in *Desert Line* was exposed to conduct analogous with that evidenced in the case before it.[831] It further noted its aim to ensure consistency with other ICSID decisions.[832]

The tribunal dismissed the claims for moral damages asserted by the other von Pezold claimants. They had not resided in Zimbabwe and had not experienced first-hand the threats and violence Mr. Heinrich von Pezold had experienced.[833] Their claim was based on their fears for Mr. Heinrich von Pezold and the company staff, but the tribunal, though noting that the events "*must have caused them great worry*", was not convinced that such entitled moral damages.[834] The tribunal emphasised, with reference to the *Lemire* award[835], that there must be some physical threat, illegal detention or other analogous situation to justify moral damages.[836] The tribunal also awarded a "*modest*" amount of USD 1 million to the Border Company Claimants as moral damages for the same reasons and on the same principles as those set out in respect of the award to Mr. Heinrich von Pezold.[837] The tribunal noted that the sum was not significant but "*appropriately reflect[ed] the wrongfulness of the actions that occurred in respect of the [company] staff*".[838]

The *von Pezold* tribunal has similarly overlooked and failed to properly apply the principle of customary international law that moral damages are due where any form of moral harm has been suffered. Moral damages are not, under established principles of international law, subject to exceptional circumstances. It is telling that the *von Pezold* tribunal has not cited any historical authority in support of its point that "*moral damages will be awarded only in exceptional circumstances*", despite doing so for almost every other major point or conclusion it makes in the award.[839] It is rather unfortunate that the investors did not seek to steer the tribunal in the right direction, and challenge and seek to correct this misconception when making their moral damages claims.[840] It may have yielded a different result in respect of the other von Pezold claimants.

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[827] See above under section §4.02[A][10].
[828] *von Pezold* (n 123) [920].
[829] ibid.
[830] ibid [921].
[831] ibid.
[832] ibid.
[833] ibid [922].
[834] ibid.
[835] See above under section §4.02[A][10].
[836] *von Pezold* (n 123) [922].
[837] ibid [923].
[838] ibid.
[839] ibid [908].
[840] ibid [897].

Whatever the cause of it may be, whether a lack of awareness on the arbitrators' part of the applicable rules of customary international law relating to moral damages or a desire to force moral damages in the investment cases into a narrow path and control an otherwise uncontrollable beast, some now regard that, given the recent cases and the principles enunciated therein, there is a growing consensus amongst tribunals that compensation for moral damages should only be awarded in exceptional circumstances.[841] There is no reason why the von Pezold family members should not have been compensated for their moral harm, which does not necessary require direct physical harm. This is demonstrated clearly in the decisions of other international courts applying international law principles, such as those of the IACtHR, where family members have also been compensated for their moral harm caused by physical harm to a member of their family.[842] This difference in approach is especially striking in the face of reference, with approval, by the *von Pezold* tribunal to the decisions of the IACtHR in its award in respect of the assessment of moral damages.[843] Finally, the *von Pezold* tribunal has also erred in its reasoning that moral damages awards serve the dual function of repairing the intangible (moral) harm and condemning the state's actions.[844] This falls foul of the clear and universally accepted rule in international law that punitive damages cannot be awarded by tribunals, absent specific authorisation in the treaty or elsewhere.[845]

[15] Other recent ICSID cases

The positive treatment of the investor's moral damages claim in *Desert Line*[846] resulted in an apparent surge of moral damages claims being brought against host states. Dumberry notes that since the seminal *Desert Line* award, "*more than 30 decisions have addressed claims related to moral damages and a number of cases involving the issue are presently pending*".[847] The trend is likely to continue. This is despite the fact that the majority of claims for moral damages fail for want of exceptional circumstances. Indeed, such has been the fate of all claims put forward since *Desert Line*, with the exception of *von Pezold*[848] and *Al-Kharafi*[849], the latter of reduced relevance given it was based on Libyan law and therefore principally unconcerned with the principles of customary international law. For instance, in *Helnan*, decided the same year as *Desert Line*, the ICSID tribunal ignored the investor's claim for moral damages, valued at EUR 10 million, having found that there was no treaty breach as alleged and dismissed the investor's all claims raised.[850] The *Helnan* approach was similarly adopted in *Caratube International Oil*[851], where the ICSID tribunal held that it lacked the jurisdiction over the

[841] See, for instance, Dumberry, Moral Damages (n 424) 157.
[842] See below under section §4.02[B][1][b][iii].
[843] *von Pezold* (n 123) [910], fn 95.
[844] ibid [916].
[845] Jagusch (n 153) 59 and 61.
[846] *Desert Line* (n 1).
[847] Dumberry, Moral Damages (n 424) 146.
[848] *von Pezold* (n 123).
[849] *Al-Kharafi* (n 798).
[850] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, [89], [129] and [170].
[851] *Caratube* (n 575).

investor's claims for nationality and investment related reasons, which consequently meant that arguments regarding admissibility and merits were moot.[852]

The UNCITRAL tribunal in *Oxus Gold*[853] considered in greater detail and depth the investor's moral damages claim, before dismissing it on evidential grounds. The investor's claim for moral damages in that case, for the sum of USD 2 million, was based on the ILC Articles and the *Lusitania* and *Desert Line* cases.[854] The investor alleged that there was a campaign of persecution against it, mostly relating to an aggressive state audit, including charges of espionage and imprisonment of one of its employees, as well as charges or a harassment campaign against other employees, all of which allegedly affected its reputation and finances.[855] Uzbekistan objected to the claim on the basis that (i) the claim was unsupported in fact and as a matter of law and (ii) that moral damages are only rarely recoverable under international law, and only in extraordinary circumstances.[856] It argued that the required egregious behaviour was not present in the concrete case.[857] The tribunal, essentially approving and restating the principles enunciated in *Desert Line*[858] and *Lemire*[859], which it expressly noted were accepted by the claimant investor, concluded that the investor had not succeeded in satisfying the legal criteria on which both parties were in agreement.[860] The evidence was simply insufficient to support a conclusion that the prosecutions complained of were not justified in the circumstances or were of such an egregious nature as to constitute a breach of Uzbek or international law.[861] The tribunal also noted evidential deficiencies in respect of proof of violation and damages sustained.[862]

It seems that post-*Desert Line* tribunals, ICSID or otherwise, have so far universally accepted the *Desert Line* proposition that investment tribunals have jurisdiction to make moral damages awards, but that there must be exceptional circumstances for the claim to succeed.[863] As noted above, this diverges from the accepted position under international law and signals the international investment law's fragmentation away from international law and its various disciplines.

[B] Non-investment cases

The concept of moral damages and its recognition in investor-state arbitration cases is relatively recent. Until very recently, it was seemingly either under-utilised by investors or,

[852] ibid [470].
[853] *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, 17 December 2015.
[854] ibid [892]. See also, *Lusitania* (n 3); *Desert Line* (n 1); and ILC Articles above under section §3.02[B].
[855] ibid [893].
[856] ibid [894].
[857] ibid [900].
[858] *Desert Line* (n 1).
[859] *Lemire*, Award (n 140).
[860] *Oxus Gold* (n 853) [895] *et seq*.
[861] ibid [903].
[862] ibid [902]-[904]. See also *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, [908] and [917], where the tribunal reached a similar conclusion on the point of evidence.
[863] See, for instance, *OI European Group* (n 862) [908] and [917]; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, [618].

possibly, swept aside for irrelevancy by arbitral tribunals given the somewhat greater focus on material damages when it comes to compensating for the loss of an investment. Given the usually confidential nature of investment arbitration proceedings, it is difficult to say with some certainty the real cause of any under-utilisation or consideration. There is therefore a need for a wholesome review and consideration of the other relevant disciplines of international law that may serve as a source of steer and inspiration in respect of moral damages under international investment law. In fact, the call for cross-fertilization of different areas of international law with respect to moral damages claims has gained the support of some influential scholars. For instance, Lawry-White expects the current trend of cross-fertilization of different areas of international law to continue and influence claims before investment arbitration tribunals, particularly given that "*the key players in both arenas are often the same*". She further notes that there may be scope for international legal bodies to "*debate and publish guidelines for such tribunals…[to ensure] consistency and…that claimants with meritorious moral damages claims obtain their due compensation under international law as part of an enforceable award.*"[864]

In fact, there is widespread recognition that international courts and tribunals take inspiration from and, where appropriate, follow the decisions and awards of other international courts and tribunals to ensure the cohesion and uniformity of international law so far as possible.[865] As explained above, there has been an increased focus by international lawyers and scholars on the need for different disciplines of international law to take a path towards convergence and avoid the international law from fragmenting.[866] As Andenas explains, international law must display unity and coherence to live up to the challenges of the current century and remain as an effective legal system.[867] Relatedly and echoing in support, Ridi's empirical analysis leads him to conclude that "*[I]nvestment tribunals have been particularly active in invoking external authorities*".[868] This is partly the product of the awareness and desire of international dispute settlement bodies to seek convergence of various disciplines of international law, recognising that they function (or at least purport to function) within the same ocean of international law, and that their use of external precedent reflects shared effectiveness concerns.[869] Given their relevance to the topic at hand, i.e., moral harm to persons and corporations and the moral damages due as a result, the focus in this part will be on human rights cases decided by international tribunals, most notably by the ECtHR and the IACtHR. Attention will also be paid to the decisions of the ICJ, and of its predecessor the PCIJ, whose decisions remain a valid source of international law.

[1] Human rights cases

[864] Lawry-White (n 139) 246. See also Blake (n 180) 372; Ehle (n 145) 316.
[865] See Trindade (n 27) 77-78.
[866] See Chapter 1 above under section §1.03[A].
[867] Andenas (n 28) 2.
[868] Ridi (n 576) 141.
[869] ibid 148.

For obvious reasons, international human rights tribunals have heard and determined not an insignificant number of cases involving moral harm allegations.[870] Human rights cases very often involve harm that could properly be categorised as moral harm. In fact, it is rightly said that non-pecuniary harm, which includes moral harm, is the more typical harm caused by human rights violations.[871] Human rights tribunals therefore have substantial experience with moral damages claims, and have helped create a helpful jurisprudence on the subject matter.[872] This has caused, most expectedly, scholars to call for greater cross-fertilization between the two areas of international law, i.e., to take the path towards convergence.[873] In support, it is said that the ILC Articles refer and draw inspiration from the decisions of international human rights on issues of compensation.[874]

That said, one must approach and analyse human rights principles in the context of investment law with some caution. The purpose and content of international treaties permitting such claims to be made against states vary considerably. As Coriell notes, "*human rights tribunals tend to focus primarily on identifying and condemning a state's violation of an individual's human rights, whereas investment tribunals tend to focus on compensating an investor for the damage that a state's measures have caused to his investment*".[875] Accordingly, only those principles of international human rights law that are truly generally applicable in all cases of moral harm, whether in the investment, human rights or other contexts, and capable of withstanding the express terms of the applicable investment treaty or instrument, should be transported into the realms of international investment law.

[a] ECtHR

The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, commonly referred to as the European Convention on Human Rights ("ECHR")[876], is an international human rights treaty and currently has 47 member states.[877] It was opened for signature in Rome, Italy on 4 November 1950 and came into force in 1953. The ECHR aims to protect certain fundamental human rights specified in the convention and its protocols, and created a permanent court made up of independent and impartial judges and jurists, so as to provide the convention with teeth, i.e., the ECtHR. The ECtHR therefore acts as the enforcer and protector of the ECHR. It will consider any allegation of breach, made by a contracting state or an individual affected, and render a final and binding

[870] Altwicker-Hamori (n 147) 6.
[871] ibid.
[872] See Markert and Freiburg (n 168) 14-15.
[873] Blake (n 180) 372; Lawry-White (n 139) 246; Coriell (n 148) 217.
[874] Coriell (n 148) 215-216.
[875] ibid 217.
[876] For a copy of the convention, see: <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 2 April 2021.
[877] For a full list of the member states, see Council of Europe portal: <https://www.coe.int/en/web/portal/47-members-states> accessed 2 April 2021.

judgment.[878] It is considered as being one of the most experienced and efficient human rights courts onto which other bodies have looked for guidance.[879]

Article 41 of the ECHR provides that the ECtHR, if it considers that a convention right has been violated, must "*afford just satisfaction to the injured party*" in cases where the concerned state's internal laws allow only partial reparation and such satisfaction is necessary in the circumstances. By the term just satisfaction, the convention is understood to refer to monetary payment in connection with the human rights violation concerned, whether that be in respect of pecuniary or non-pecuniary harm.[880] It does not encompass punitive damages.[881] Further, it has a different meaning than that understood in the context of the general international law of state responsibility.

The jurisprudence of the ECtHR makes it clear that the Court is guided by the principle of and a desire to achieve equity when making its awards for non-pecuniary harm.[882] The Court's aim is to achieve what is just, fair and reasonable in the circumstances of each specific case. That necessarily entails some degree of flexibility and discretion, carrying with it a high degree of unpredictability and little clarity. Consequently, many have questioned whether it would be possible to elicit from the Court's judgments consistently applied principles with some transparency in respect of non-pecuniary harm.[883] The ECtHR's judgments relating to non-pecuniary harm are therefore considered as having been "*cloaked in mystery*"[884] and the "*the least reasoned part in the Court's jurisprudence*".[885] Be that as it may, a principled but overly rigid and practically inapplicable basis for assessing non-pecuniary (i.e., moral) harm would similarly not be desirable. Where principles are seemingly in contention with what is fair and equitable, one needs not haste to adopt the former.

[i] Aydin v. Turkey of 1997[886]

The case concerned whether the applicant's, Mrs Aydin, a Turkish national, Articles 3 (prohibition of torture), 6 (right to a fair trial) and 13 (right to an effective remedy) convention rights had been violated. The applicant alleged that, on 29 June 1983, when the applicant was 17 years of age, a group of people comprising village guards and a gendarme arrived at the village where she lived and that some of those individuals entered her family's home and

[878] See ECHR, Article 46.
[879] See Magdalena Forowicz, 'Factors influencing the reception of international law in the ECtHR's case law: an overview' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015), 191.
[880] Altwicker-Hamori (n 147) 4-5. See also ECHR Practice Direction on "Just satisfaction claims" (28.03.2007), <https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf> accessed 2 April 2021.
[881] Altwicker-Hamori (n 147) 17.
[882] See cases considered below. See also Altwicker-Hamori (n 147) 15-16.
[883] See Veronika Fikfak, 'Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it's all about the state' (2020) 33 Leiden Journal of International Law 335, 337; Altwicker-Hamori (n 147) 3.
[884] Fikfak (n 883) 336.
[885] Altwicker-Hamori (n 147) 3.
[886] *Aydin v Turkey*, Merits and Just Satisfaction, Judgment of 25 September 1997.

questioned her family about recent visits to the house by a certain terrorist organisation.[887] She alleged that the village guards and gendarme threatened and insulted her family, took her and her family to the village square where they were joined by other villagers who had also been forcibly taken from their homes, after which the applicant, her father and sister-in-law were singled out from the rest of the villagers, blindfolded and driven away to the gendarmerie headquarter in that area.[888] The applicant claimed that she was raped and tortured during her detention at the gendarmerie headquarters, which lasted 3 days.[889] She suffered long-term psychological damage as a result. The applicant also alleged that she and her family had been subjected to intimidation and harassment due to their ECHR claim.[890]

The applicant had filed a complaint in respect of the above with the public prosecutor, together with her father and sister-in-law, on 8 July 1993, however that process yielded no satisfactory results.[891] Accordingly, a claim was lodged with the Commission on 21 December 1993. The applicant sought both pecuniary and non-pecuniary damages by way of compensation. In respect of the former, she claimed GBP 50 to compensate for her need to leave town and travel to another to avoid intimidation and harassment by public authorities.[892] As to the latter, she claimed GBP 30,000 for the mental anguish and physical pain which she suffered as a result of the ill-treatment to which she was subjected while in custody, and an additional GBP 30,000 in respect of the physical and enduring psychological suffering resulting from the alleged rape. She requested a further GBP 30,000 to be paid to a charitable institution in Turkey, by way of aggravated damages for the practice of ill-treatment amounting to torture and of intimidation in relation to proceedings under the ECHR. Finally, she invited the Court to express its condemnation of the serious violations of the ECHR of which she had been the victim by awarding the sum of GBP 30,000 by way of exemplary or punitive damages.[893]

The Turkish Government denied the allegations.[894] In respect of the quantum claimed, Turkey argued that, should the Court find it to have violated convention rights, no compensation need be awarded on the basis that "*a finding by the Court that Turkey had breached the ECHR…would in itself constitute just satisfaction*".[895] Turkey submitted, as an alternative, that the sum claimed was excessive and would unjustly enrich the applicant, having regard to salary levels in Turkey, as well as the general state of the country's economy.[896]

The ECHR Commission, as part of its factual findings, was satisfied that "*the applicant was blindfolded, beaten, stripped, placed inside a tyre and sprayed with high-pressure water, and raped…*"[897] The Commission also found that the applicant and her family had been "*subjected to significant pressure from the authorities*" in respect of the applicant's claim before

[887] ibid [16]-[17].
[888] ibid [18].
[889] ibid [20].
[890] ibid [35].
[891] ibid [23].
[892] ibid [126].
[893] ibid [127].
[894] ibid [19] and [21].
[895] ibid [129].
[896] ibid. For completeness, the Commission's view was that "*the award of compensation made by the Court should be significant, having regard to the gravity of the violation under Article 3 and the fundamental importance of the right guaranteed therein*" [130].
[897] ibid [40].

the Court.[898] The ECtHR, sitting as a Grand Chamber composed of 21 judges, accepted, by a substantial majority, the facts as established by the Commission, holding that the applicant's allegations were proven beyond reasonable doubt and that Turkey had violated her Article 3 rights, i.e., prohibition of torture, as well as a breach of Article 13 rights (right to an effective remedy).[899] The decision is considered to be the first time the Court recognised that an act of rape by public officials or another person acting in an official capacity constitutes a form of torture.[900]

As to the issue of compensation, the Court dismissed the claim for pecuniary damages, given its finding that there was insufficient factual evidence as to the applicant and her family being intimidated and harassed by public authorities; but awarded GBP 25,000 by way of non-pecuniary damages.[901] The Court noted the seriousness of the violation and the enduring psychological harm which the applicant may be considered to have suffered on account of being raped, as the basis and justification of the compensation awarded. The Court provided no further explanation on the issue of quantum.

[ii] A v. UK of 1998[902]

The applicant, who wished not to reveal his identity, claimed compensation for the grave physical abuse he had suffered at the hands of his stepfather, and the UK Government's failure to protect him from his ill-treatment. The applicant was beaten by his stepfather on several occasions with a garden cane so as to 'discipline' him. Though the stepfather was charged with assault occasioning actual bodily harm and tried before a jury, he was acquitted. The direction from the judge had been that "*[I]t is a perfectly good defence that the alleged assault was merely the correcting of a child by its parent, in this case the stepfather, provided that the correction be moderate in the manner, the instrument and the quantity of it.*"[903] The applicant alleged that the UK Government failed to abide by its obligations under Articles 3 (prohibition of torture), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the ECHR, by failing to protect him from ill-treatment by his step-father and his denial of a remedy for his complaints. The applicant sought GBP 15,000 in respect of compensation for non-pecuniary harm.[904] The UK Government accepted that there had been a violation of Article 3 of the ECHR, but asked the Court to confine itself to considering the facts of the case without making any general statement about the corporal punishment of children.[905]

[898] ibid.
[899] ibid [73].
[900] LSE Centre for Women, Peace and Security, Aydin v. Turkey (1997): Rape of a detainee by an official of the state is torture, <https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/aydin-v-turkey/#:~:text=Significance-,Aydin%20v.,constitutes%20a%20form%20of%20torture.> accessed 2 April 2021.
[901] ibid [131].
[902] *A v United Kingdom*, Merits and Just Satisfaction, Judgment of 23 September 1998.
[903] ibid [7]-[11].
[904] ibid [32].
[905] ibid [18]-[19].

The Court, unsurprisingly given the admission of violation, ruled that the UK's failure to provide adequate protection constituted a violation of Article 3 of the ECHR. It reasoned that ECHR contracting states are required to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals.[906] The Court considered that it was unnecessary to consider the other alleged violations of the ECHR, for various reasons.[907] As compensation for the non-pecuniary harm caused by the violation, the applicant was awarded GBP 10,000.[908] The Court was seemingly influenced by the UK Government's offer of an *ex gratia* payment for the same amount prior to the hearing, which offer was however withdrawn at the hearing on the basis that a finding of a breach would be adequate, just satisfaction given the undertaking to amend the law.

[iii] Garabayev v. Russia of 2008[909]

The case concerned an alleged violation, *inter alia*, of Articles 3 and 5 of the ECHR, i.e., prohibition of torture and right to liberty and security, respectively. The applicant, a Russian and Turkmen dual-national, Murad Redzhepovich Garabayev, claimed, *inter alia*, that he had been unlawfully extradited to Turkmenistan on request from the Turkmen authorities on the basis of criminal charges relating to the embezzlement of USD 40 million worth of state property, allegedly committed through abuse of power.[910] The applicant had objected to his extradition on the basis that the criminal charges were politically motivated and that, given the situation in Turkmenistan, there was a well-established fear that torture and other forms of inhumane or degrading treatment would be used against him. However, despite all efforts, the applicant was extradited to Turkmenistan on 24 October 2002. The Moscow City Court ruled however, on 5 December 2202, upon application, that the applicant's detention in Russia and extradition to Turkmenistan had been unlawful.[911] The applicant claimed that he was threatened with torture towards himself and his family following his arrival in Turkmenistan. He was also physically assaulted on the head and his back when being questioned by the public prosecutor, the effects of which lasted for several months. He was denied access to his lawyer, detained in a very small cell without toilet facilities, and generally not allowed any exercise or contact with the outside world. The applicant denied the charges brought against him.[912] On 1 February 2003, the applicant was temporarily extradited to Russia in connection with related criminal charges brought by the Russian authorities.[913] However, on 9 March 2004, he was acquitted of all charges relating to embezzlement of state assets, except the charge of using a forged document, for which he was ordered to pay a specified fine.

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[906] ibid [22].
[907] ibid [28] and [30].
[908] ibid [34].
[909] *Garabayev v Russia*, Merits and Just Satisfaction, Judgment of 30 January 2008.
[910] ibid [9].
[911] ibid [11]-[21].
[912] ibid [29]-[31].
[913] ibid [36] and [43].

The applicant did not claim any pecuniary damages, but claimed EUR 81,000 in respect of non-pecuniary harm he had sustained during the whole detention period, and a further sum of EUR 50,000 in respect of non-pecuniary harm sustained as a result of the fear and suffering caused by his extradition to Turkmenistan.[914] The respondent state argued that the amount claimed was exaggerated and not supported by relevant evidence.[915] The Court found, unanimously, that at the date of the applicant's extradition to Turkmenistan there existed substantial grounds for believing that he faced a real risk of torture. The Court also found that his extradition was carried out without giving a proper assessment to that threat. Accordingly, the applicant's Article 3 rights had been violated, as well as his Article 5 and 13 rights, i.e., right to liberty and security and right to an effective remedy, respectively.[916] In respect of compensation due, the Court awarded the applicant a total sum of EUR 20,000.[917] In making its award, the Court noted that its assessment was made on an equitable basis. The Court explained, in response to Russia's objection, that there is no requirement that an applicant furnish any proof of the non-pecuniary harm he or she has sustained.[918] The Court reasoned that the applicant's suffering could not be compensated by a mere finding of a violation given the combination of grievous violations of the ECHR.[919]

[iv] Varnava v. Turkey of 2009[920]

The case concerned the disappearance of certain Cypriot nationals following their detainment by Turkish military forces in connection with Turkey's military operations in northern Cyprus in the summer of 1974. The applicants alleged violations of Articles 2, 3, 4, 5, 6, 8, 10, 12, 13 and 14 of the ECHR.[921] The Court granted the claim on the basis of Article 2, holding that in a zone of international conflict, ECHR member states are under an obligation to protect the lives of those not, or no longer, engaged in hostilities, and that this extends to the authorities collecting and providing information about the identity and fate of the persons concerned. The Court found that Turkey had violated its continual obligation through its failure to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974.[922] The Court also found Turkey to have violated Article 3 of the ECHR. It reasoned that the phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty, which may disclose inhuman and degrading treatment. Article 3 is breached not only where the respondent State is held responsible for the disappearance, but also where the authorities fail to respond to the requests for information or place obstacles in their way. The

[914] ibid [110] and [111].
[915] ibid [112].
[916] ibid [77]-[83].
[917] ibid [115].
[918] ibid [113].
[919] ibid [114].
[920] *Varnava and others v Turkey*, Merits and Just Satisfaction, Judgment of 18 September 2009.
[921] Concerning, respectively, the right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, right to respect for private and family life, freedom of expression, right to marry, right to an effective remedy and prohibition of discrimination.
[922] *Varnava* (n 920) [185]-[194].

Court concluded that the "silence of the authorities of [Turkey] in face of the real concerns of the relatives could only be categorised as inhuman treatment".[923] Given its findings under Articles 2, 3 and 5 of the ECHR, the Court deemed it unnecessary to consider the applicants' additional claims.[924]

The ECtHR moved to consider the appropriate level of damages to ensure just satisfaction in respect of the convention right violations. The applicants had sought, in respect of non-pecuniary damages, EUR 407,550 as regards the violations suffered by each of the missing men and EUR 543,400 for each of the applicants or their successors. They noted that Turkey's ECHR violations were numerous and grave, continuing for over thirty-four years, and aggravated by blatant disregard of the findings of the ECHR organs.[925] Turkey objected on the basis that, *inter alia*, the sums requested were excessive and unprecedentedly high.[926] The Court seems to have agreed that the sums claimed by the applicants were excessive and unprecedentedly high, as it ordered the payment of only EUR 12,000 per application in respect of the non-pecuniary harm for having to endure decades of not knowing what happened to their relatives, which the Court noted "must have marked them profoundly".[927]

The ECtHR's reasoning in respect of its non-pecuniary damage awards are seldom detailed and elaborate. However, in its *Varnava* judgment the Court was a little more generous and free-handed. The Court noted that absent an express provision for non-pecuniary or moral damage in the ECHR, its task is to award just satisfaction. In cases where the violation significantly impacts the moral well-being of the applicant and requires something more than a mere finding of violation, an award of damages may be necessary. This is likely to be the case where the applicant has suffered, for instance, evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity. If so, the Court will be guided by the principle of equity, which involves some element of flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case. Although the Court noted that the above-mentioned types of harm "do not lend themselves to a process of calculation or precise quantification", it reasoned that such is no bar to making non-pecuniary awards.[928]

[v] Hellig v. Germany of 2011[929]

The applicant, a German national serving a prison sentence, alleged that his detention in a security cell amounted to inhuman and degrading treatment or punishment within the meaning of Article 3 of the ECHR, and sought compensation as just satisfaction of the violation. In particular, he claimed that he had been removed from his single cell to a cell which he had to

[923] ibid [200]-[202].
[924] ibid [211].
[925] ibid [215] and [216].
[926] ibid [217].
[927] ibid [225].
[928] ibid.
[929] *Hellig v Germany*, Merits and Just Satisfaction, Judgment of 7 July 2011.

share with two other inmates and which lacked a screen or curtain separating the toilet from the rest of the cell.[930] He alleged that, upon his refusal to move, he was threatened with the use of force to effect the move, upon which he vacated his cell and was taken to the multi-occupancy cell. He further alleged that on his refusal to enter the multi-occupancy cell, the prison staff used physical force to put him inside the cell. [931] He was thereafter forcibly taken to a security cell, where he was strip-searched and undressed.[932] The German Government denied the allegations, arguing that the applicant himself had physically assaulted the prison staff.[933]

The Court held, operating on the assumption that the applicant had been kept naked in the security cell for the entirety of his seven-day stay there, that the applicant's convention rights had been violated.[934] The Court reasoned that to deprive an inmate of clothing is capable of arousing feelings of fear, anguish and inferiority capable of humiliating and debasing him and, further, that the prison authorities had failed to consider the use of less intrusive means, such as providing the applicant with tear-proof clothing, instead of undressing him and keeping him naked for a lengthy period of time. The German Government's failure to submit sufficient reasons to justify such harsh treatment as to deprive him of his clothes during his entire stay was influential in the finding that he had been subjected to inhuman and degrading treatment. The applicant had claimed EUR 40,000 as compensation for the pain and suffering resulting from the injuries, his forced transfer to the security cell and his detention therein. The Court awarded a quarter of the sum claimed, i.e., EUR 10,000, on an equitable basis and reflecting the fact that the applicant's complaint was only partially successful.[935]

[vi] Zontul v. Greece of 2012[936]

The facts of this case resembled the facts of Aydin, considered above, in that a person was sexually assaulted by state actors. The present case concerned the rape of an illegal immigrant, Mr Zontul, a Turkish national, by a Greek coastguard officer. The applicant had boarded, in May 2001, a boat in Istanbul bound for Italy. The vessel was intercepted by the Greek coastguard and escorted to a port on the island of Crete. On 5 June 2001, the applicant reported that two coastguard officers had forced him to undress while he was in the bathroom. One of the two officers allegedly threatened him with a truncheon and then raped him with it. The next day, on 6 June 2001, the commanding officer of the coastguard service, who had not been present during the incident, ordered an inquiry after hearing the detainees' account. That same month, the Greek Naval Appeals Tribunal heard the matter and sentenced the relevant coastguard officer to a suspended term of six months' imprisonment, which was commuted to

[930] ibid [6].
[931] ibid [8].
[932] ibid [9].
[933] ibid [8].
[934] ibid [55]-[58].
[935] ibid [63]-[65].
[936] *Zontul v Greece*, Merits and Just Satisfaction, Judgment of 17 January 2012. As the ECtHR's judgment is provided only in Greek and French, the summary of the facts and judgent is based on the official legal summary provided by ECtHR.

a fine. The applicant had by that time left Greece, in February 2004, travelling first to Turkey and then to the United Kingdom.

Referring to its judgment in *Aydin*, and noting that the rape of a detainee by a state official is considered as an especially grave and abhorrent form of ill-treatment, given the ease with which the offender could exploit the vulnerability and weakened resistance of his or her victim, the Court unanimously concluded that the treatment to which the applicant had been subjected had amounted to an act of torture. The Court criticised the Greek authorities' investigation into the actions of the coastguard officers, doubting whether a thorough and effective investigation had been carried out in the context of the disciplinary proceedings brought against the coastguard officers. The applicant's request for an examination by the doctor had been refused, and the beating inflicted on him had not been entered in the infirmary's patient records. Furthermore, the applicant's witness evidence in the inquiry had been falsified, as the rape of which he had complained had been recorded as a "slap" and "use of psychological violence". In addition, the events had been summarised inaccurately and the applicant had been reported as saying that he did not wish to see the coastguard officers punished. The Court also found that the leniency of the penalty imposed on the coastguard officer concerned was manifestly disproportionate in view of the seriousness of the treatment inflicted on the applicant.

The applicant's efforts to follow the progress of related civil proceedings and participate in them were thwarted by the Greek authorities through their failure to keep him timely informed of the relevant matters. The applicant had, as a result, been unable to exercise his rights as a civil party for the purpose of claiming compensation. The Court concluded that Greece had not afforded sufficient redress for the treatment inflicted on the applicant in breach of Article 3 of the ECHR (i.e., prohibition of torture).

The applicant requested the payment of EUR 75,000, as non-pecuniary damages (in French, *dommage moral*), for the moral harm suffered due to his rape, and a further EUR 20,000 in connection with the conditions of his detention. The Greek Government objected to the award of any monetary damages on the basis that a finding of violation would constitute sufficient just satisfaction. The Court disagreed, and awarded the applicant moral damages in the sum of EUR 50,000, noting that the fact that the violation was deemed to have caused the applicant lasting psychological damage.

[vii] Z v. Bulgaria of 2020[937]

The applicant complained of ineffective investigation and prosecution in connection with her allegation that she had been raped, and also in connection with the inadequate punishment given to the offender. In particular, upon her complaint of the alleged rape, the regional prosecutor allegedly refused to prosecute for rape on the basis of lack of evidence, which resulted in the accused charged only for sexual intercourse with a person under the age of

[937] *Z v Bulgaria*, Merits and Just Satisfaction, Judgment of 28 May 2020.

fourteen, which carried a lower custodial sentence.[938] The accused was found guilty, but sentenced to only 16 months' imprisonment on the basis that the case had followed the summary judicial investigation procedure.[939] The sentence was also suspended for three years.

The ECtHR held that there had been procedural violations of Article 3 (prohibition of torture) and 8 (right to respect for private and family life) of the ECHR by the Bulgarian Government.[940] It reasoned that the prosecutor had failed in its obligations by failing to carry out certain investigative measures requested by the applicant, such as the request that an expert examination of the applicant be ordered for traces of self-harming after the incident and their significance in interpreting the applicant's consent to the sexual act.[941] The prosecutor had also failed to examine the actions of the applicant and her mental state at the time of the assault in light of the psychological report, and failed to assess the overall context, in deciding what charges to bring against the accused.[942] In the Court's opinion, the case called for an investigation and a consideration of bringing rape charges.[943] The Court accordingly concluded that the relevant Bulgarian authorities failed to carry out the careful scrutiny required of them to properly discharge their positive obligations under the ECHR.[944] The Court awarded the applicant non-pecuniary damages for the distress suffered resulting -at least partly- from the shortcomings in the authorities' approach, in the sum of EUR 12,700.[945] That was squarely the sum claimed by the applicant.[946] The Bulgarian Government's objection that the sum claimed was "unjustified and excessive" was accordingly dismissed.[947]

[b] IACtHR[948]

The IACtHR has similarly rendered not an insubstantial number of judgments that touch upon the issue of non-pecuniary harm (i.e., moral damages). The analysis of its case law and established principles will therefore be useful to understand the approach adopted by the court in respect of such claims. The IACtHR was founded with the objective of interpreting and applying the American Convention on Human Rights ("American Convention"), which was adopted after the Inter-American Specialized Conference on Human Rights, held on 22 November 1969, in the city of San José, Costa Rica, and entered into force on 18 July 1978.[949] The American Convention currently has 23 signatory states.[950] However, note that only 20 of

[938] ibid [16]-[18].
[939] ibid [35].
[940] ibid [83].
[941] ibid [73].
[942] ibid [76].
[943] ibid [78].
[944] ibid [82].
[945] ibid [91].
[946] ibid [85].
[947] ibid [86].
[948] For a copy of the full text, see: <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> accessed 2 April 2021.
[949] American Convention, Article 62(1).
[950] See Inter-American Court of Human Rights, "What is the I/A Court H.R.?" <https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en> accessed 2 April 2021.

the 23 states have accepted the IACtHR's contention jurisdiction, i.e., its jurisdiction to resolve contentious cases and supervise judgments.[951] The IACtHR also has advisory functions.[952]

Alongside the IACtHR, the American Convention also established the Inter-American Commission of Human Rights ("IACHR") to ensure that member states fulfil their commitments under the Convention.[953] The IACHR's main function is to "promote respect for and defense of human rights".[954] With that aim, it has been armoured with the following principal functions and powers: to make recommendations to the governments of the member states, to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights and to take action on petitions and other communications pursuant to its authority.[955] For instance, upon receipt of a petition or communication alleging violation of any of the rights protected by the American Convention, the IACHR may submit a matter not appropriately settled or resolved to the IACtHR for final and binding determination.[956] In fact, the convention makes it clear that only states and the IACHR has the right to submit a case to the IACtHR.[957]

The American Convention establishes the obligation of states to respect the rights and liberties stated in the convention, and imposes the duty to adopt internal laws to effectuate the enjoyment of the rights enshrined in the convention. For instance, the American Convention establishes the right to life, the right to humane treatment, freedom from slavery, the right to a fair trial, the right to compensation, freedom of thought and expression and the right to judicial protection.[958] Article 63(1) of the American Convention stipulates that, in case the IACtHR finds that a right protected by the American Convention has been violated, it "*shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated… [and] also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party*". This resembles the requirement in Article 41 of the ECHR for the provision of a "*just satisfaction*". This section considers and analyses, in the same vein as above in respect of the jurisprudence of the ECtHR, a select few of the judgments of the IACtHR concerning or relating to the award of moral or non-pecuniary damages to the extent relevant to the matters considered in this paper.

[i] Velásquez Rodríguez v. Honduras of 1988[959]

[951] ibid.
[952] American Convention, Article 64.
[953] American Convention, Article 33.
[954] American Convention, Article 41.
[955] ibid.
[956] American Convention, Articles 48 and 61.
[957] American Convention, Article 61(1).
[958] Respectively, Articles 4, 5, 6, 8, 10, 13 and 25.
[959] *Velásquez Rodríguez v Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (29 July 1988). See also, with similar facts, *Godínez Cruz v Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5 (20 January 1989); *Fairén Garbi and Solís Corrales v Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 6 (15 March 1989).

This was the IACtHR's first ever judgment. The case concerned the kidnapping (and later disappearance) of Mr. Angel Manfredo Velásquez Rodríguez, a student of the National Autonomous University of Honduras, on 12 September 1981, on the basis that he was involved in activities that Honduras considered dangerous to national security. He was kidnapped by several heavily armed men in civilian clothes, driving a white Ford vehicle without license plates. He was taken to and detained at an armed forces station, where he was accused of political crimes, and was subjected to harsh interrogation and torture.[960]

This is reflective of a similar pattern observed in Honduras between 1981 and 1984, during which period approximately 150 people disappeared after being kidnapped by civilian clothed army / police officers on the basis that they were a threat to national security. These kidnappings have either been denied or explained away by state authorities on the basis that those responsible cannot be found or punished. The investigative committees created by the Honduran Government and its armed forces have been ineffective in producing results, and judicial proceedings regarding these disappearances were handled with little efficiency.[961]

On 7 October 1981, a petition was submitted on Mr. Velásquez Rodríguez's behalf to the IACHR. On 4 October 1983, the Commission issued its resolution in respect of the petition, presuming the allegations therein as true and accurate.[962] The Honduran Government denied all allegations, and referred to rumours that Mr. Velásquez Rodríguez was "*with Salvadoran guerrilla groups*". The Commission determined that the "*new information presented by the Government [was] insufficient to warrant reconsideration*".[963] The matter was accordingly referred to the IACtHR.

The IACtHR held, unanimously, that Honduras had violated Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the American Convention[964].

In respect of reparations, the IACtHR noted that the judgment and the findings therein constituted a form of reparation and gave significant moral satisfaction to Mr. Velásquez Rodríguez's family.[965] The Court also ordered the Honduran Government to continue its investigation into Mr. Velásquez Rodríguez's disappearance and find out what happened to him.[966] As part of its analysis into reparations and the compensation due for the violation of an international law obligation, the IACtHR referred to the *Chorzów* case with approval and reiterated the principle of international law that "*every violation of an international obligation which results in harm creates a duty to make adequate reparation [and] [c]ompensation… is the most usual way of doing so*".[967] The Court further explained that:

> *Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification*

[960] *Velásquez Rodríguez*, Merits (n 959) [1]-[10] and [147].
[961] ibid.
[962] ibid [4].
[963] ibid [5].
[964] ibid [185] and [194].
[965] *Velásquez Rodríguez v Honduras*, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, (21 July 1989) [36].
[966] ibid [34].
[967] ibid [25]; *Chorzów* (n 4).

for patrimonial and nonpatrimonial damages, including emotional harm… Indemnification must be based upon the principles of equity.[968]

The Court also clarified that where a convention or treaty refers to compensation payable to an injured party, such does not include punitive damages awards, noting that "*[such] principle is not applicable in international law at this time*".[969] The IACtHR also awarded moral damages to the victim's wife and children in respect of the psychological damage and loss of income due to the loss of their husband and father.[970] When making its award of moral damages, the Court explained that the existence of moral harm had been established by way of expert evidence from a psychiatrist at the University of Toronto, Canada, who had concluded that the wife and children had "*symptoms of fright, anguish, depression and withdrawal, all because of the disappearance of the head of the family*".[971] The Court also noted that the Honduran Government had failed to disprove the existence of the said psychological problems.[972] The Court awarded a total sum of 750,000 Honduran lempira as moral damages to Mr. Angel Manfredo Velásquez Rodríguez's wife and children, a quarter of that sum being awarded to the wife.[973]

[ii] *Atala Riffo v. Chile* of 2012[974]

The case concerned an application by a Chilean judge on the basis that the she was unlawfully discriminated and lost custody battle in respect of her children when she came out as a lesbian, thereby violating her American Convention rights, which protects one against "*discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition*".[975] It is considered one of the first cases of the IACtHR to address squarely LGBTI rights and discrimination on the basis of sexual orientation.[976]

Ms. Atala married Mr. Allendes in 1993, and come early 2002 they had decided to end their marriage through a *de facto* separation.[977] They agreed that Ms. Atala would maintain the care and custody of their three girls. In November 2002, Ms. Atala's partner Ms. de Ramón moved in and they all started to live together. Mr. Allendes was seemingly unhappy with this new development and, on 14 January 2003, filed a custody suit with the competent juvenile court on the basis that "*the physical and emotional development [of the girls] was seriously at risk*" if they continued to live with Ms. Atala.[978] He contended that Ms. Atala "*[was] not*

[968] ibid [26] and [27].
[969] ibid [38].
[970] ibid [50], [51] and [60].
[971] ibid [51].
[972] ibid.
[973] ibid [58] and [60].
[974] *Atala Riffo and Daughters v Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 254 (24 February 2012).
[975] American Convention, Article 1(1).
[976] Shushan Khorozyan, 'Atala Riffo and Daughters v. Chile' (2017) 40(3) Loyola of Los Angeles International and Comparative Law Review 1513.
[977] ibid [30].
[978] ibid [31].

capable of watching over and caring for [the three girls, given that] her new sexual lifestyle choice, together with her cohabiting in a lesbian relationship with another woman, [were] producing […] harmful consequences for the development of these minors …"[979] He also argued that the girls were exposed to a greater risk of contracting sexually transmitted diseases "*given the sexual practices of a lesbian couple*".[980] On 2 May 2003, the lower court granted the father provisional custody over the children. However, the court ultimately decided in favour of Ms. Atala, which decision was upheld on appeal.[981] The father appealed to the Chilean Supreme Court. On 31 May 2004, the Supreme Court, with a bare three-to-two majority, granted the appeal and gave permanent custody to the father.[982]

The Court reasoned that Ms. Atala "*put her own interests before those of her daughters when she chose to begin to live with a same sex partner, at the same home where she raised and cared for her daughters, separately from the girls' father*".[983] There was a real possibility that the girls could be the target of social discrimination due to their mother's cohabitation with her homosexual partner and, further, that testimony showed that the girls were confused about the sexuality of the mother. The Court noted that the potential confusion over sexual roles that may be caused by the absence of a father figure and his replacement by another person of the female gender posed a risk to the integral development of the children. The Supreme Court also regarded with some importance the fact that the girls were placed in a "*situation of risk*" due their being left in a vulnerable position in their social environment, given that their unique family environment differed significantly from that of their school companions and acquaintances in the neighbourhood where they live, possibly exposing them to ostracism and discrimination.[984] Shortly after the Supreme Court's decision, on 24 November 2004, Ms. Atala filed her petition with the IACHR. After a lengthy process of investigation and interactions with Chile, which produced little fruit, the IACHR filed, on 17 September 2010, its claim against the Republic of Chile before the IACtHR.[985]

The IACtHR ruled in Ms. Atala's favour, and held that Chile had, *inter alia*, violated the right to equality and non-discrimination and the right to privacy.[986] The IACtHR noted, in particular, that "*the language used by the Supreme Court of Chile regarding the girls' alleged need to grow up in a "normally structured family that is appreciated within its social environment," and not in an "exceptional family", reflects a limited, stereotyped perception of the concept of family*".[987] The IACtHR awarded Ms Atala USD 10,000 as pecuniary damages to compensate for costs incurred in connection with medical and psychological care.[988] She also sought non-pecuniary damages, in the value of USD 100,000 for each of Ms Atala and her daughters. This was based on the "*suffering and afflictions caused by the violation of [Ms. Atala´s] fundamental rights*", the detriment to her life plan and the pain of separation and

[979] ibid.
[980] ibid.
[981] ibid [39]-[52].
[982] ibid [54].
[983] ibid [56].
[984] ibid [57].
[985] ibid [10].
[986] ibid [314].
[987] ibid [145].
[988] ibid [294].

mutual loss of the mother and the daughters.[989] However, the Court granted Ms. Atala USD 20,000 and the daughters USD 10,000 each, applying its usual equity approach and what it deemed appropriate in the circumstances.[990] The Court's non-pecuniary damages award was said to have been impacted by "*the compensation ordered by the Court in other cases… the circumstances of the present case, the suffering caused to the victims, as well as the change in their living conditions and other intangible consequences*".[991]

[iii] *Gonzales Lluy et al. v. Ecuador* of 2015[992]

The case concerned doctorial errors during a transfusion resulting in a young girl contracting HIV. Talía Gabriela Gonzales Lluy, born on 8 January 1995, was three years old when she was infected with HIV on receiving a transfusion of blood from a Red Cross blood bank in a private health clinic.[993] The blood transfusion was necessitated due to a non-stopping nose bleed. Blood donated by a donor found by Ms. Lluy's mother (Mrs. Teresa Lluy) was given to Ms. Lluy on the same day, due to the urgency of her condition. The blood was tested for the first time for HIV, among others, only the next day, on 23 June 1998, by a biochemist of the Red Cross Blood Bank.[994] The donor was asked to attend for further samples around 15 days after the incident, on the basis that "*the phials had spilled*".[995] Upon enquiry from the donor as to why the process had to be repeated, he was informed that he need not worry and that "*it was to keep the sample at the Red Cross*".[996] The next time he heard from the Red Cross, which was a week later, he received a telephone call whereby he was informed that he was infected with HIV. Further tests confirmed this beyond doubt.[997] However, he had been reassured by Red Cross that his blood was not used for Ms. Lluy's transfusion.[998] Tests were also carried out on blood samples taken from Ms. Lluy, confirming that she too had transmitted AIDS.[999] Mrs. Lluy filed various civil and criminal actions in Ecuador to determine and punish those responsible and seek compensation.[1000] Medical expert evidence concluded that the donor had transmitted the HIV virus to Ms. Lluy through the blood transfusion.[1001]

The IACtHR held Ecuador liable for the transmission of the HIV virus by Ms. Lluy on the basis that the consequences of private health care providers' actions were attributable to the state.[1002] The Court explained that states not only have an obligation to regulate and supervise

[989] ibid [296].
[990] ibid [299].
[991] ibid.
[992] *Gonzales Lluy et al. v Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 102/13, (1 September 2015). See also Emma Samyan, 'Gonzales Lluy et al. v. Ecuador' (2017) 40(3) Loyola of Los Angeles International and Comparative Law Review 1697.
[993] ibid [64].
[994] ibid [75]-[78].
[995] ibid [79].
[996] ibid.
[997] ibid [80].
[998] ibid [90].
[999] ibid [82] and [85].
[1000] ibid [85].
[1001] ibid [105].
[1002] ibid [175].

the conduct of public health care entities, but also any private institutions that provide health care services. The reasoning of the Court was that states have an obligation to prevent third parties from unduly interfering with the enjoyment of the rights to life and to personal integrity, which are particularly vulnerable when a person is undergoing health treatment. States must therefore regulate and supervise all activities relating to the health care provided to persons subject to their jurisdiction, and that the failure to regulate and supervise such activities gives rise to international responsibility.[1003] They must in particular, establish proper mechanisms to inspect institutions, submit, investigate, and resolve complaints, and establish appropriate disciplinary or judicial procedures where patients' rights are violated.[1004]

In finding Ecuador responsible, the IACtHR explained that the delegation of the management of the blood banks to the Red Cross in the way it was done failed to establish adequate levels of supervision. Further, it was established, *inter alia*, that the Red Cross Blood Bank operated with limited resources, without establishing and keeping records with complete and detailed information on the donors, the tests performed, and the delivery of blood products.[1005] Ecuador was consequently found to have violated Articles 4 (right to life) and 5 (right to humane treatment) of the American Convention.[1006] The IACtHR also found Ecuador to be in violation, *inter alia*, of Article 5(1) (right to physical, mental and moral integrity) to the detriment of Mrs. Lluy and Mr. Iván Mauricio Lluy, Ms. Lluy's brother, on the basis that they were often stigmatized due to their relationship with someone infected with HIV.[1007] Mrs. Lluy was dismissed from several jobs and, at school, Mr. Lluy was subject to comments and finger-pointing. Both had to devote most of their physical, material and economic efforts to trying to ensure Ms. Lluy's survival and a decent life for her, all of which gave rise to a permanent situation of anguish, uncertainty and insecurity in the their and Ms. Lluy's life.[1008] In addition to satisfaction by way of judgment as a reparation for the violations established, the IACtHR ordered Ecuador to provide Ms. Lluy prompt and free medical and physiological or psychiatric treatments which included, free of charge, any medication required for her illness.[1009] The Court also required Ecuador to provide a scholarship and study grant in respect of Ms. Lluy's undergraduate and postgraduate studies, respectively.[1010]

By way of compensation, the IACtHR awarded, on the basis of equity, the sum of USD 50,000 each to Mrs. Lluy and Mr. Lluy as pecuniary damages in respect of the expenses incurred for Ms. Lluy's medical treatment and care. The Court also ordered the payment of non-pecuniary damages. It ordered, on the basis of equity, the payment of a sum of USD 350,000 to Ms. Lluy for the serious psychological effects and a prolonged depression, as well as a personality and behavioural disorder, due to being infected and having to live with HIV.[1011] Further non-pecuniary damages were awarded to Mrs. Lluy and Mr. Lluy in the sum of USD 30,000 and USD 25,000, respectively, for the various forms of moral harm suffered due to Ms.

[1003] ibid.
[1004] ibid [177].
[1005] ibid [188].
[1006] ibid [191].
[1007] ibid [213] and [214].
[1008] ibid [216].
[1009] ibid [358], [359] and [412].
[1010] ibid [372] and [373].
[1011] ibid [413] and [416].

Lluy's illness.[1012] It is noteworthy that the award in total was less than half that requested by the victims, which was not to be less than USD 1 million.[1013]

[iv] *Favela Nova Brasilia v. Brazil* of 2017[1014]

The case concerned the alleged excessive use of force by police forces during raids in favelas around Rio de Janeiro. A raid was conducted by around 40-80 police and military officials in the morning of 18 October 1994. It was established that such officials entered at least five houses, killed some of their occupants on sight or following a short period of detainment, and took the bodies to the main square. They also sexually assaulted three women in two of the said homes, two of them being 15 and 16 years old. In total, 13 men and boys were killed, all with multiple bullet wounds.[1015] A special committee was established by the governor of Rio de Janeiro the very next day, on 19 October 1994, to investigate the said raid.[1016] A police enquiry was also conducted by the Division of Narcotics Control later that year, which found that the killings during the raid were justified due to community resistance.[1017] On 12 November 1994, the governor's special committee heard the testimony of the three alleged victims of sexual violence. They gave particulars of the alleged sexual assaults and explained that some men taken by the officials in handcuffs were later found dead in the main square.[1018] A month later, in December 1994, the special commission of inquiry presented a report to the governor of Rio de Janeiro, which stated that the evidence indicated that some of the dead had died by execution. The Head of Public Prosecutions commenced an investigation into the matter.[1019] The investigations achieved little in terms of holding accountable any perpetrators of the crimes.

The matter was brought before the IACtHR for determination whether Brazil violated the protections embodied in the American Convention by virtue of the extrajudicial killings and sexual assaults by officers, and the conduct of the various investigations relating to them. The Court found that Brazil had violated Article 8 of the American Convention (right to a fair trial), on the basis that the investigations experienced substantial delay (of up to 15 years) and that they were not carried out with the requisite level of diligence and objectivity.[1020] Brazil was also found to have violated Article 25 (right to judicial protection), essentially on the basis that the investigations into the raid failed to analyse the merits of the case, nor did they take appropriate steps towards material judicial protection. This failed short of the requirement that

[1012] ibid [414]-[416].
[1013] ibid [410].
[1014] *Favela Nova Brasilia v Brazil*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 333 (16 February 2017). The IACtHR's judgment is in Spanish only; as it seems so are most of the Court's most recent judgments. The summary to follow is accordingly based on the case report published in the Loyola of Los Angeles International and Comparative Law Review: Adam Knighton, 'Favela Nova Brasilia vs. Brazil' (2019) 42(4) Loyola of Los Angeles International and Comparative Law Review 1107.
[1015] Knighton (n 1014) 1107.
[1016] ibid.
[1017] ibid 1108.
[1018] ibid 1108 and 1109.
[1019] ibid 1109.
[1020] ibid 1123 and 1124.

states provide effective judicial remedies against human rights violations.[1021] Additionally, in respect of the three women who had been sexually assaulted by the officers during the raid, the IACtHR held that their rape, considered as a form of torture, violated the protections in the American Convention that prohibit torture and inhumane treatment.[1022] Note that this finding closely resembles the approach and conclusions of the ECtHR in *Aydin*.[1023] There was also a finding of violation of Article 5 (right to physical, mental and moral integrity) in respect of the victims' relatives.[1024]

Brazil was ordered, *inter alia*, to (i) reopen its investigation relating to the raid, (ii) offer immediate and appropriate psychological treatment, free of charge, to the victims and their affected relatives, (iii) hold a public ceremony with the victims and their representatives, and recognize international responsibility for its actions, (iv) adopt legislation to enable victims of state violence to have effective investigation free from prejudice and (v) pay the victims and their relatives non-pecuniary damages to recompense for psychological and material damage. As regards the quantum of the non-pecuniary damages awarded, the Court awarded each named victim a sum of USD 35,000, with the three sexual assault victims receiving a further USD 15,000 each. The total compensation awarded, including costs and expenses of the proceedings (which seemingly did not exceed USD 65,000), amounted to USD 2.5 million.[1025]

[c] Conclusion

The above review of the ECtHR and IACtHR cases concerning non-pecuniary (i.e., moral damages) claims and awards demonstrates that moral damages awards are indeed more frequent and more readily made in the human rights context.[1026] The aim under the ECHR and the American Convention, mirroring that of customary international law principles, is to compensate for the mental and physical suffering sustained by the victim; it does not serve a punitive function.[1027] The reasoning provided for the awards by both the ECtHR and the IACtHR illustrate this in no uncertain terms.[1028] There does not seem to be any readily apparent reason as to why the award of moral damages in the investment law context should be more restricted.[1029] Some contend that certain international human rights courts focus more on the infringing state and its financial means, than on the victim. As explained, this is generally impermissible under the applicable rules. It will almost never be the intention of any international convention, and certainly is not in respect of the conventions considered above, that "*rich countries pay more for the same type of behaviour than poor countries*".[1030] This is certainly not the case in respect of the ECHR, the instrument empirically analysed by Fikfak

[1021] ibid 1125.
[1022] ibid 1125-1126.
[1023] *Aydin* (n 886).
[1024] Knighton (n 1014) 1126 and 1127.
[1025] ibid 1128-1131.
[1026] See Jagusch (n 153) 47.
[1027] ibid. See also Blake (n 180) 388.
[1028] See *Aydin* (n 886) [131]; *Velásquez Rodríguez*, Merits (n 959) [38], [50] and [51].
[1029] See Blake (n 180) 389 *et seq*.
[1030] Fikfak (n 883) 360.

and in respect of which she makes the said observation.[1031] As explained above, Article 41 of the ECHR explains that the duty of the ECtHR is to "*afford just satisfaction to the injured party*".[1032] The level of satisfaction cannot surely differ merely by virtue of the infringing state's financial capability. However, admittedly matters may not be entirely reflective of theory and the principles given the broad discretion enjoyed by the judges.

The ECtHR and IACtHR cases analysed above show, in a rather consistent manner, that moral damages awards principally rest on equitable principles. In fact, this is expressly confirmed in the ECtHR's practice direction.[1033] There is therefore naturally a high degree of discretion involved. The ECtHR does, however, strive to remain consistent and apply the principles and standards which emerge from its pre-existing case law.[1034] This reflects also the position under customary international law, demonstrating that there is more in common between the two than their differences.[1035] The facts of a particular case will substantially influence the court or tribunal's determination on whether to grant a moral damages claim where advanced and, if so, the appropriate quantification of that claim. The seriousness of the violation seemingly plays a vital role, particularly in respect of quantum. This refers principally to the intensity of the violation, its consequences and duration.[1036] The overall context and the position and circumstances of the victim also play a crucial role in determining how the courts exercise their discretion and apply the principle of equity.[1037] This too mirrors the approach adopted by investment law tribunals.[1038] Whilst this need for discretion and flexibility is considered necessary and indeed appropriate to ensure that judges and arbitrators are able to address and compensate non-pecuniary, moral harm and put the victim, as far as money can do, in the position it would have been had the violation not occurred, the natural consequent of it is that the system lacks predictability.[1039] As a result, parties lack the means of being able to judge beforehand whether and how much moral damages may be awarded in respect of a certain violation. The scarcity of reasoning in the ECtHR and IACtHR cases in respect of the basis for making and quantifying moral damages awards is a further difficulty, and another strand of criticism levelled against the current judicial approach and attitude.

In summary, the international human rights jurisprudence offers a promising and rich source of inspiration for investment tribunals in respect of moral damages awards. There is a close resemblance between the purpose of and the applicable principles under both disciplines of international law. It would be a mistake for one branch not to utilise and be inspired by the experience of the other, to the extent such is appropriate. Arbitrators, and counsel for parties, engaged with investment disputes should increase their awareness of and familiarity with the principles developed in the human rights arena and utilise them in the investment cases where necessary and appropriate. This would permit for the development of the international

[1031] ibid.
[1032] See also ECtHR, Practice Direction on "Just satisfaction claims" dated 28 March 2007, <https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf> accessed 2 April 2021.
[1033] ibid, 64.
[1034] ibid.
[1035] See above under section §4.02[A].
[1036] Altwicker-Hamori (n 147) 17.
[1037] ibid 15-21. See also Ichim (n 374) 117, 260.
[1038] See above under section §4.02[A].
[1039] See Altwicker-Hamori (n 147) 3.

investment law jurisprudence, aligned with the principles and rules of international human rights law.[1040] The general rule of international law that the court or tribunal must strive to put the wronged party in the position, so far as money can do, it would have been had the relevant right not been violated applies equally to both human rights and investment cases. There is no readily apparent and objectively acceptable reason to allow the two main branches of international law to be at such divergent ends from one another, with one of the two disciplines taking a divergent course away from the settled position under customary international law. In fact, to permit such would be recipe for unfairness of treatment of persons, which would be difficult to objectively justify. Given that the approach adopted by the international human rights courts is closely aligned with and converges with the settled principles of customary international law, international investment law should ideally take the same path towards convergence of the various disciplines of international law.

[2] International Court of Justice

Other international courts and tribunals have also had to grapple with moral damages claims, such as the ICJ. The ICJ, seated in The Hague (Netherlands), is the United Nation's principal judicial organ.[1041] Its role is to settle legal disputes submitted to it by the UN member states, in accordance with international law, and to give advisory opinions on legal questions referred to it by various bodies and agencies.[1042] The decisions of the ICJ are binding on each UN member state that is a party to the proceedings before the Court.[1043] However, only states may be parties to a case before the ICJ.[1044] As a result, there is not a significant ICJ jurisprudence on the issue of moral damages given that, as considered below in detail[1045], the appropriate remedy to a state for international wrong suffered by it would usually be satisfaction, as opposed to monetary compensation. The scarcity of ICJ jurisprudence on moral damages is evident in its references in *Diallo* to ECtHR and IACtHR decisions, and the lack thereof to past ICJ decisions.[1046]

The ICJ's decision in *Diallo*[1047] is perhaps its most often quoted decision concerning the award of damages for non-pecuniary injury, partly due to the scarcity of any recent related decision by the Court on the matter.[1048] That case concerned an application filed with the Court by Guinea against Congo, by way of diplomatic protection, concerning alleged "*serious violations of international law*" committed on one of its nationals, a Mr. Ahmadou Sadio

[1040] See Blake (n 180) 379 *et seq*.
[1041] Charter of the United Nations of 26 June 1945 ("UN Charter"), Article 92. See <https://www.icj-cij.org/en/charter-of-the-united-nations> accessed 2 April 2021.
[1042] Statute of the International Court of Justice (annex to the UN Charter) ("ICJ Statute"), Articles 36 and 38 - <https://www.icj-cij.org/en/statute> accessed 2 April 2021.
[1043] UN Charter, Article 94.
[1044] ICJ Statute, Article 34(1).
[1045] See Chapter 5 below.
[1046] See *Diallo*, Compensation (n 45) 335.
[1047] ibid.
[1048] See Ehle (n 145) 296; Allepuz (n 146) 5-6.

Diallo.[1049] The allegations were that he was unjustly and unlawfully imprisoned, having resided in Congo for 32 years, dispossessed of all his investments and assets and expelled from the country in 1996.[1050] The alleged violations "*came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder*".[1051] The ICJ found Congo to have breached various international obligations it had undertaken. In particular, the Court held that Mr. Diallo's expulsion had been unlawful.[1052] The Court also concluded that his arrest and detention was arbitrary, contrary to Congo's international law obligations.[1053]

Having concluded that Congo was in violation of certain of its international law obligations, the ICJ moved to consider the appropriate reparation due. Reiterating the *Chorzów* formulation with approval, the Court opined that compensation should be awarded to Guinea for the injury suffered by Mr. Diallo, in addition to its judicial finding of the violations.[1054] It awarded USD 10,000 in respect of material injury suffered by Mr. Diallo in relation to his personal property, and USD 85,000 for non-material injury.[1055]

On the issue of non-pecuniary harm, the ICJ made several observations of relevance. First, the Court explained that moral harm can be established even without specific evidence.[1056] It considered that, given its findings to the effect that Mr. Diallo had been unlawfully arrested and detained, made the object of accusations that were not substantiated and wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities, it was reasonable to conclude that Congo's wrongful conduct caused him significant psychological suffering and loss of reputation.[1057] Second, the ICJ expressly confirmed that the "*[Q]uantification of compensation for non-material injury necessarily rests on equitable considerations.*"[1058] To demonstrate the validity of the point, the Court referred to various decisions of international courts and tribunals, including those of the ECtHR and the IACtHR.[1059] Exercising its discretion in light of the circumstances of the case, the Court considered USD 85,000 as constituting appropriate compensation for the moral injury suffered. This was a substantial reduction from Guinea's claim for USD 250,000 in respect of the mental and moral damage suffered by its national, including injury to his reputation.[1060]

[C] General conclusions

[1049] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, 639.
[1050] ibid 645, 650 *et seq*.
[1051] ibid.
[1052] ibid 666.
[1053] ibid 669.
[1054] ibid 691. See *Chorzów* (n 4).
[1055] *Diallo*, Compensation (n 45) 344-345.
[1056] ibid 334.
[1057] ibid.
[1058] ibid.
[1059] ibid 334-335.
[1060] ibid 330.

Moral damages as a concept has had its place in international law for some time.[1061] It can be traced back, at the very least, to the early twentieth century arbitral decisions decided pursuant to international law.[1062] It ultimately found its way into the ILC Articles, now almost universally regarded as a restatement of the international law principles relating to responsibility of states for internationally wrongful acts.[1063] It clearly stipulates that, under international law, moral damage is no different than material damage and must be similarly compensated.[1064] The study of various recent ICSID and other investment awards in this part demonstrates that the principle of international law is now entrenched also into international investment law.

If one concedes that investment claims founded upon BITs and other applicable treaties fall to be considered under international law principles in respect of the awarding of damages, one must therefore be unhesitant in conceding that the same principles must apply to the awarding of material and moral damages. International law makes no distinction between the two heads of damages, and there appears to be no valid reason to adopt a contrary position in the investment cases. Indeed, as noted by Allepuz, "*both claims share the same function: the full reparation and the wiping out of all the consequences of wrongful acts*".[1065] In fact, consistency and predictability in investment law requires that the same rules apply to both. As one commentator has noted, "*where a treaty violation exists and international law applies to the dispute, the authority of investment tribunals to consider claims for moral damages should be sufficiently clear*".[1066] This view accordingly advocates in favour of convergence of international investment law with customary international law and its various disciplines.

However, concerns raised by certain scholars as to the risks associated with making moral damages available on the same terms as material damages in the investment law context cannot simply to be ignored. Arbitral tribunals must be alive to such issues and cushion their awards accordingly, as the international human rights courts seemingly do. They may therefore wish to turn to the jurisprudence of other international courts and tribunals, such as the ECtHR and IACtHR, who have had to grapple with such issues, for guidance. For instance, the risk of double-counting the investor's loss is one such issue arbitral tribunals should be alive to and take appropriate measures to counteract. As dictated by the principle of international law enunciated in the *Chorzów* case[1067], the aim of an award of damages should be to ensure full reparation, but nothing more than that. It should not unjustly enrich the wronged party. In the investment law context, the claimant investor should not be over compensated for its losses emanating from the wrongful act of the host state. This requires the arbitral tribunal to undertake a detailed analysis of the alleged losses, any possible overlap which may cause over-compensation, and determine the quantum

[1061] See, for instance, Allepuz (n 146) 5; Dumberry, Compensation (n 169) 248.
[1062] See *Chorzów* (n 4); *Lusitania* (n 3).
[1063] See *Rompetrol*, Award (n 155) [289]; Caron (n 281) 866; Crawford (n 343).
[1064] ILC Articles, Article 31.2: "*Article 31. Reparation. 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*"
[1065] Allepuz (n 146) 6.
[1066] Garcia (n 287) 496.
[1067] *Chorzów* (n 4).

accordingly. Inevitably, this is a case dependent exercise and one which will not harmoniously accommodate rigid rules. That said, such potential risk cannot justify the exclusion of moral damages claims or render them dependent on the satisfaction of a higher threshold criteria, one which does not have its basis on international law principles.[1068]

Recent investment awards rendered by arbitral tribunals, especially the *Desert Line*[1069] award and the later awards that followed in its footsteps[1070], have seemingly deviated from the principles of international law, by requiring that there must be exceptional circumstances before investment tribunals can award moral damages.[1071] This signals a serious fragmentation of international law. Although certain scholars have advocated the position that the tribunal in *Desert Line* did not seek to establish that moral damages may only be awarded in investment cases only where there are exceptional circumstances, and that the statements to that effect in the award simply mirrored the facts of the case,[1072] later ICSID investment tribunals seemingly disagreed. Investment tribunals have consistently cited *Desert Line* as the authority for the requirement of exceptionality.[1073] Some scholars therefore consider the requirement for exceptionality now to be a pre-condition to entitlement to moral damages under international investment law.[1074] Although such continued practice points towards the development of international investment law, it is a development in the wrong direction given the difference in approach to that taken in the other sub-disciplines of international law.

It is difficult to appreciate the need for a different and stricter requirement than that exists under customary international law.[1075] The principle that moral damages are as real as material damages under international law and should be remedied as such in the usual way, without the imposition of an exceptionality requirement, entered the casebooks almost a century ago and has consistently been applied and upheld since then, particularly by the human rights courts. The jurisprudence of international human rights courts and tribunals confirm that, under international law, entitlement to moral damages is not dependent on proof of exceptionality or fault of the wrongdoer.[1076]

No real justification has been provided for the divergence. In fact, it is difficult to see any such justification. Why should an investor claiming under a BIT be obligated to meet a higher threshold in respect of its damages claim for moral harm, in comparison to what a human rights claimant would be required to show to prove its case and entitlement? Both claims would have their basis in international law and the *Lusitania* principles[1077], and both aim to wipe out all consequences of the internationally wrongful act. If international human

[1068] Allepuz (n 146) 11.
[1069] *Desert Line* (n 1).
[1070] See, for instance, *Lemire*, Award (n 140); *von Pezold* (n 123).
[1071] See Dumberry and Cusson (n 633) 54; Garcia (n 287) 520.
[1072] See, for instance, Lawry-White (n 139) 239; Sabahi (n 172) 141; Jagusch (n 153) 54; Isabelle Michou, 'Compensation of the moral injury in investor-state arbitration' (2011) International Business Law Journal 41, 42; Wade M. Coriell, 'Should Moral Damages Be Compensable in Investment Arbitration? Panel Discussion', in Ian A. Laird and Todd J. Weiler (eds), *Investment Treaty Arbitration and International Law* (Juris 2010), 233, 237.
[1073] See, for instance, *Lemire*, Award (n 140) [333]; *von Pezold* (n 123) [908]-[910].
[1074] See, for instance, Parish (n 170) 9; Uchkunova (n 153) 387.
[1075] See, for instance, Blake (n 180) 395; Coriell (n 148) 229.
[1076] See, for instance, *Aydin* (n 886); *Gonzales Lluy* (n 992).
[1077] See *Lusitania* (n 3).

rights and investment laws both seek to correct the injustice caused by the unlawful act, surely their offered remedy should be alike. A contrary finding would give rise to unfairness in treatment of wronged persons and run contrary to the very principles advocated by the theory of corrective justice.[1078]

Scholars have also generally expressed disapproval of establishing different thresholds for material and moral damages, making the latter available only in exceptional cases, given that both are accepted as being 'financially assessable'. Dumberry, for instance, reasons that there may be certain situations where state actions result in mental suffering without reaching the desired level of severity. If a higher threshold were to be established, such harms would be left uncompensated, although, as noted in the *Lusitania* case, such damages are 'very real'.[1079] Further, such would contradict the general obligation laid out in the ILC Articles to make "*full reparation for the injury caused*".[1080]

Moral damages should therefore not be restricted only to the most shocking of cases in investment arbitrations. Future tribunals should, considering the issue more fully, correct the wrong and end the unpermitted divergence at first opportunity, entering the path towards convergence with the other related disciplines of international law. In particular, international investment law, as a discipline of general international law, must be aligned with the latter. Exceptional facts should simply guide arbitral tribunals in the exercise of their discretion in respect of quantum, as illustrated by the decisions of the ECtHR and the IACtHR, as well as the ICJ.[1081] As Judge Greenwood expressed in his declaration in the ICJ's *Diallo* case:

> *International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.*[1082]

There is also scholarly support for the view that exceptionality cannot be imposed as a requirement if, as is the case, international law aims to compensate not punish the wrongdoer.[1083] As noted above, punitive damages are not generally permitted under international law.[1084] Consequently, as Coriell and Marchili have expressed, moral damages "*should be subject to the same rules that govern all compensatory damage claims – no more and no less…*"[1085]

Fragmenting international law into various different sub-disciplines with differing standards and principles risks the coherence, consistency and predictability of international law, and unduly hampers its development,[1086] further fuelling the serious legitimacy crisis

[1078] See Weinrib, Corrective Justice (n 77) 410.
[1079] See *Lusitania* (n 3).
[1080] ILC Articles, Article 31.1.
[1081] See above under section §4.02[B]. See also Sabahi (n 172) 140-141; Blake (n 180) 402-403.
[1082] Greenwood, Declaration (n 57) [8].
[1083] See Jagusch (n 153) 55; Ripinsky (n 205) 312.
[1084] See Blake (n 180) 398-399; Jagusch (n 153) 60. *Cf* Schwenzer (n 134) 428.
[1085] Coriell (n 148) 230.
[1086] See Andenas (n 28) 1; Greenwood, Unity (n 29) 55; Rodley (n 41) 108.

which international investment law now faces.[1087] It is therefore not the time to adopt an approach of fragmentation and depart from the well-settled principles of international law, without good reasons. The safest and correct approach would be to keep aligned with the already established principles of customary international law, a culmination of decades of refinement and development. The approach adopted by the international human rights courts works well, seemingly produces fair and just results and is in in line with the position under customary international law and, therefore, justifiable, unlike the fragmenting approach adopted by international investment tribunals by the imposition of an exceptionality threshold. This is ever more important as the disciplines of international law continue in their outward expansion.[1088] Accordingly, although investment tribunals, starting with the *Desert Line* tribunal[1089], are to be commended for recognising the right to seek moral damages in investment cases, in convergence with the position under customary international law, that approach should similarly be displayed in terms of the substantive test applicable to such claims. Entitlement to moral damages should not therefore be restricted to the most serious, grave and exceptional cases. Any moral harm suffered must be adequately compensated.

§4.03 BURDEN OF PROOF

It is an almost universal rule that, unless otherwise dictated, he who asserts must prove.[1090] Accordingly, the claimant usually bears the burden of proving the required elements to find liability and deserve compensation. This is a general rule of international law.[1091] In investor-state arbitrations the burden, unless one is dealing with a state counterclaim or objection, is consequently on the investor. It is the investor who in most cases takes action against the host state's alleged breach of treaty standards. This was neatly put by the *Rompetrol* tribunal in the following terms:

> *[…] the Tribunal finds that it can safely rest, so far as the burden of proof is concerned, on the widely accepted international principle that a party in litigation bears the burden of proving the facts relied on to support its claim or defence. This is often put as a maxim: he who asserts must prove (onus probandi incumbit actori). A claimant before an international tribunal must establish the facts on which it bases its case or else it will lose the arbitration.*[1092]

Other ICSID tribunals have adopted a similar approach. For instance, in the ICSID case of *Franck Charles Arif*, the tribunal noted that, on the facts, the investor "*Claimant ha[d] to successfully prove how the alleged acts and omissions [were] in breach of Respondent's alleged obligation not to impose arbitrary or unreasonable measures*".[1093] Similarly, speaking in connection with the obligation to prove investor-status so as to benefit from the

[1087] See Webster (n 122); Collins (n 122); Langford, Regime Responsiveness (n 130); Franck (n 19).
[1088] Andenas (n 28) 3.
[1089] *Desert Line* (n 1).
[1090] See, for instance, Sabahi (n 172) 183; Allepuz (n 146) 12; Markert and Freiburg (n 168) 38.
[1091] *Diallo*, Merits (n 1049) 660.
[1092] *Rompetrol*, Award (n 155) [179].
[1093] *Franck Charles Arif* (n 422) [500].

treaty protections, the tribunal in *Cementownia* explained that "*[I]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred.*"[1094] Further, and in the same vein and as analysed in detail above, the tribunals in *Técnicas*[1095] and *Bogdanov*[1096] dismissed the investors' claims for moral damages given their inability to discharge the burden of proof which rested on their shoulders. The rule was further adhered to in the recent ICSID arbitration award in *von Pezold*, where the tribunal stated the following principle of international law:

> *The general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections. Conversely, the Claimants must prove any facts asserted in response to the Respondent's objections and bear the overall burden of establishing that jurisdiction exists…The main exception to the above rule is where a rebuttable presumption exists.*[1097]

The investor must, therefore, satisfy the arbitral tribunal of all elements of liability to succeed in being entitled to a moral damages award, i.e., breach, loss and causation, unless otherwise provided by the applicable treaty and/or law.

Human rights tribunals have seemingly adopted a different approach. The ECtHR, for instance, generally operates on the basis of a rebuttable presumption that a violation of the ECHR engenders non-pecuniary damage.[1098] The IACtHR follows a similar approach.[1099] Additionally, the ICJ noted in *Diallo* that the general rule should not be regarded as an absolute rule to be applied in all circumstances.[1100] The Court observed as follows:

> *The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case… In particular, where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the*

[1094] *Cementownia* (n 252) [112]. See also *von Pezold* (n 123) [918]-[919].
[1095] *Técnicas* (n 455).
[1096] *Iurii Bogdanov* (n 592).
[1097] *von Pezold* (n 123) [174]-[175].
[1098] See *Gridin v Russia*, Merits and Just Satisfaction, Judgment of 1 June 2006 ("*Gridin*"), [20]: "*Nor is there a requirement that an applicant furnish any proof of the non-pecuniary damage he or she sustained.*" See also *Garabayev* (n 909) [113]; Altwicker-Hamori (n 147) 11-12.
[1099] See *Aloeboetoe et al. v Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11 (10 September 1993) ("*Aloeboetoe*"), [52].
[1100] *Diallo*, Merits (n 1049) 660.

guarantees required by law - if such was the case - by producing documentary evidence of the actions that were carried out.[1101]

It remains to be seen whether, as the investment law jurisprudence in respect of moral damages is further developed and becomes further settled, arbitral tribunals determining such claims in the investment context will adopt a similarly more relaxed approach to matters of evidence. It is worth noting that the *Lusitania* tribunal had recognised the right to non-pecuniary damages despite the fact that "*they are difficult to measure or estimate by money standards*".[1102] International law therefore generally adopts a lenient approach to matters of proof of non-pecuniary harm and consequent damages, as displayed by the judgments of the ECtHR and the IACtHR. To converge with the general rule under international law and ensure fairness and consistency of application, investment tribunals should also refrain from adopting a rigid approach to matters of proof of such harm and related damages.

§4.04 STANDARD OF PROOF

An interesting and often topical discussion concerns the standard of proof and related evidential issues under customary international law. The ILC Articles remain silent on the issue, noting that "*[Q]uestions of evidence and proof of [a breach of an international obligation] fall entirely outside the scope of the articles*".[1103] Sabahi therefore notes that it is unclear what amount of evidence one must produce to satisfy a particular burden.[1104] The articulation of the issue in investment and other awards and decisions is therefore of some importance in lighting the way.

By way of background, in most jurisdictions, the domestic standard of proof in non-criminal matters is or mirrors what is known as the 'balance of probabilities'. It means that a court would be satisfied that an event occurred if it considers that, on the evidence available, the occurrence of the event was more likely than not. This is the position, for instance, in England and Wales.[1105] A good starting point in respect of investment arbitration cases is the *Rompetrol* award[1106], where the tribunal provided useful guidance on how one should approach standard of proof related issues. The tribunal, refusing to accept the host state's submission that 'clear and convincing evidence' is required to sustain allegations of unlawful or malicious conduct, or of bad faith, against a state, explained as follows:

[The Tribunal] starts from the position that in international arbitration – including investment arbitration – the rules of evidence are neither rigid nor technical… an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, whether particular evidence or kinds of evidence should be admitted or excluded, what weight (if any)

[1101] ibid 660-661.
[1102] *Lusitania* (n 3) 40.
[1103] ILC Articles, Chapter III, Commentary (4); ILC Articles, Article 20, Commentary (8).
[1104] Sabahi (n 172) 184.
[1105] Chitty (n 459) [3-089]; *In re B (Children) (FC)* [2008] UKHL 35, [2009] 1 AC 11.
[1106] *Rompetrol*, Award (n 155).

> *should be given to particular items of evidence so admitted, whether it would like to see further evidence of any particular kind on any issue arising in the case, and so on and so forth.*[1107]

The tribunal also noted that, whilst not bound by the awards of previous tribunals, it will not hesitate to "*draw on the accumulated experience of other tribunals for help and guidance when it finds that they have dealt with issues of the same kind*".[1108] The tribunal considered that the particular circumstances of a case would be determinative in any given case, which in its view "*defy codification*".[1109] That said, the *Rompetrol* tribunal did consider that the 'balance of probabilities' was the "*normal rule*" to apply to the generality of the factual issues before it.[1110] Other investment tribunals have also shown some regard for the civil law standard based on the 'balance of probabilities'. For instance, in the famous *Desert Line* case, the tribunal considered that its satisfaction on the said standard was sufficient to enable it to make various findings, commenting as follows:

> *The Arbitral Tribunal's understanding of the circumstances has not been assisted in equal measure by the Parties. The Respondent presented no witnesses and few documents. It contented itself with expressing doubts as to the accuracy of the Claimant's version of events. Nevertheless, after evaluating the evidence put forward by the Claimant and the critical comments thereon proffered by the Respondent, the Arbitral Tribunal is satisfied, at least on the balance of probabilities, that it is in a position to make the following findings in relation to the circumstances surrounding the Settlement Agreement.*[1111]

The ICSID tribunal in *von Pezold* adopted the same approach, noting that "*[I]n general, the standard of proof applied in international arbitration is that a claim must be proven on the "balance of probabilities"*".[1112] It considered that, on the facts, there were no special circumstances or any reason to depart from the standard practice so as to "*warrant the application of a lower or higher standard of proof*".[1113] Both the investor and the host state were therefore required to prove their claims on the balance of probabilities. In *Pey Casado*, however, the tribunal suggested a different standard. It required "*sufficient proof of injury or damage*" to be adduced to make an assessment or quantification of that damage.[1114] There are, undoubtedly, other variations and formulations in circulation, though 'sufficiency' of evidence has certainly gained some traction with investment tribunals.[1115] Clarity on the standard of proof is of importance for all parties involved. The claimant investor needs to know the standard it must meet to succeed on its claim. Similarly, the respondent state must be able to ascertain and mould its defence according to whether the requisite standard has

[1107] ibid [181].
[1108] ibid [182].
[1109] ibid.
[1110] ibid [183].
[1111] *Desert Line* (n 1) [159].
[1112] *von Pezold* (n 123) [177].
[1113] ibid.
[1114] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016, [235].
[1115] See, for instance, *Iurii Bogdanov* (n 592), where the tribunal referred to 'sufficient' proof and evidence; *Técnicas* (n 455), where the tribunal's emphasis was on 'sufficient evidence'. See also Ehle (n 145) 304.

been met and make submissions accordingly. Most importantly, an arbitral tribunal must know and be consistent among its members as to how to judge and assess the issues and make relevant findings. A clear standard will assist ensure that all members approach evidential issues from the same perspective.

As demonstrated by the cases considered above in section §4.02., moral damages claims are often dismissed due to the investor's failure to prove the existence of moral harm.[1116] Accordingly, it is of vital importance that the standard of proof required is clear and understandable. Otherwise, investors would be placed in a position where they commence proceedings not knowing what exactly is required of them to succeed. Perhaps the lack of clarity is the product of an intentional choice to grant investment and other tribunals a wide discretion and room for manoeuvre to ensure that they reach a fair and just outcome. Notwithstanding, some principles may be laid down for assistance to the parties, without formulating an all-encompassing and definitive rule. Sabahi comments that, absent a generally applicable rule, there are some general considerations which guide arbitral tribunals as to how high the burden is to be set.[1117] For instance, a complex case may lead an arbitral tribunal to increase the burden.[1118] The burden may be lowered and a more lenient approach to causation of damages adopted where the respondent state is clearly at fault.[1119] Relatedly, Schwenzer expresses that the standard of proof should be lowered if the conduct of the responsible party can be labelled as "*outrageous or otherwise reckless*".[1120]

In fact, the ICJ in *Diallo* followed such an approach, with the Court stating that non-material injury can be established even without specific evidence.[1121] The Court considered that it was "*reasonable to conclude that the [respondent state's] wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation*" given he was arrested without being informed of the reasons for his arrest and without being given the possibility to seek a remedy, was detained for an unjustifiably long period pending expulsion, made the object of accusations that were not substantiated, and was wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities. However, note that this was not an investment arbitration case and may therefore be treated with caution by investment tribunals.[1122] That said, the case was referred to with approval in *von Pezold* on the precise point.[1123] Query therefore whether investment tribunals are similarly moving towards a more lenient approach in respect of substantiating moral damages claims.

The IACtHR reached a similar result in *Aloeboetoe*.[1124] In connection with the arbitrary arrest and eventual murder of an indigenous group of people, for which the Republic of Suriname accepted full responsibility, the IACtHR reasoned that the victims did not have to adduce any evidence to show moral damages given that "*it is characteristic of*

[1116] See Michou (n 1072) 64; Dumberry, Compensation (n 169) 252-253; Allepuz (n 146) 12.
[1117] Sabahi (n 172) 183.
[1118] ibid, fn 86.
[1119] ibid. See also Lawry-White (n 139); Blake (n 180) 384, 402-404.
[1120] Schwenzer (n 134) 423.
[1121] *Diallo*, Compensation (n 45) 334.
[1122] Allepuz (n 146) 12.
[1123] *von Pezold* (n 123) [910], fn 95.
[1124] *Aloeboetoe* (n 1099).

human nature that anybody subjected to the aggression and abuse described above will experience moral suffering". [1125] However, the Court did state that the state's acknowledgement of responsibility sufficed. Although it is unclear whether the Court would have reached the same conclusion absent the acknowledgement of responsibility, the reasoning suggests that it probably would have. The Court's focus was more on the type of harm and its natural consequences as opposed to the acknowledgement of responsibility. The ECtHR too has adopted the approach of not requiring strict evidence to demonstrate moral damages.[1126]

However, note that some of these remarks have been made in connection with quantifying damages, and focus on foreseeability and remoteness of loss. They should therefore be approached with some level of caution.[1127] Further, and in any event, given the absence of a universal rule in respect of the standard of proof required under international law, it should not be assumed that general natured statements in awards and decisions would be applied in the same fashion by future tribunals. They are case dependent, and very much reflect the particular arbitral tribunal's views and thoughts on the facts.[1128] Given the lack of clarity and vagueness, parties would be well advised to be as clear on the facts and adduce as much relevant evidence as one possibly can to avoid the risk of falling below the requisite threshold.[1129] Working towards, at the very least, proving the claims raised on the balance of probabilities would be a sensible aim to desire to achieve given the state of the authorities.

[1125] ibid [52].
[1126] See *Gridin* (n 1098) [20]. See also Altwicker-Hamori (n 147) 11-12.
[1127] Lawry-White (n 139) 244-245.
[1128] See Sabahi (n 172) 184.
[1129] ibid.

CHAPTER FIVE

Compensation for Moral Harm

§5.01 THE THEORETICAL UNDERPINNING TO COMPENSATION

Chapters 3 and 4 sought to explain the general rule under international investment law that an investor (or in certain cases the host state) is entitled to compensation for loss or damage sustained due to violations of international law violations. This begets the following question: what is compensation and what does it seek to achieve? Compensation is a rather elusive concept and can easily be moulded to mean what one desires it to mean. At its simplest, compensation serves to right the wrong inflicted on another.[1130] The ultimate aim is to correct the injustice caused to the victim. The Aristotelian theory of corrective justice theory dictates that the wrongdoer must "*restore to the victim the amount representing [its] self-enrichment at the victim's expense*".[1131] It requires the equality of quantities, focusing on a quantity that represents what rightfully belongs to one party but is now wrongfully possessed by another party.[1132] It is important to note that the self-enrichment need not necessarily involve monetary or financial gain for the wrongdoer. Corrective justice is essentially a compensatory theory and is generally accepted to dictate that any harm caused to another by virtue of a wrongful act must be compensated.[1133]

It is generally accepted that compensation is more frequently and insistently sought in certain areas of the law than others. For instance, Zamir explains that a common feature of all legal systems is the manifest gap between the centrality of tort law and the relative marginal status of the law of restitution or unjust enrichment.[1134] One consequently wonders why people seek to right wrongs inflicted on them more frequently in certain cases than others. Behavioural theories have embarked on the endeavour to explain people's preferences and choices in risk-type situations. The first and the more predominant and established theory in law, as well as in other disciplines such as economics, is the rational choice theory. The rational choice theory of human behaviour explains that people strive to enhance their own well-being and, among the choices that are available to them, they rationally choose the one that would maximise their expected utility, determined in absolute terms.[1135]

However, the rational choice theory has been under attack and criticised these past few decades. In particular, it is argued that people generally do not perceive outcomes as final states of wealth or welfare, but rather as gains and losses, which are defined relative to a baseline or reference point. This is referred to as the prospect theory, developed by Kahneman and Tversky

[1130] Robert E. Goodin, 'Theories of Compensation' (1989) 9(1) Oxford Journal of Legal Studies 56.
[1131] Weinrib, Corrective Justice (n 77) 409.
[1132] ibid 408. See also Coleman (n 82).
[1133] See Encarnacion (n 81).
[1134] Eyal Zamir, 'Loss Aversion and the Law' (2012) 65 Vanderbilt Law Review 829, 843. See also Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (OUP 2018), 189.
[1135] See Alexander Thompson, 'Applying Rational Choice Theory to International Law: The Promise and Pitfalls' (2002) 31 Journal of Legal Studies 285, 287. See also Robert O. Keohane, 'Rational Choice Theory and International Law: Insights and Limitations' (2002) 31 Journal of Legal Studies 307; Zamir, Loss Aversion (n 1134) 830.

in the late 1970s.[1136] They concluded that the value function is generally steeper for losses than it is for gains, suggesting that people are very much loss averse.[1137] Zamir, connectedly, explains that because of the generally loss averse nature of human beings, "*the law more readily and effectively rectifies unjustified losses than helps people recover gains that they failed to obtain*".[1138]

The seeming preference of the law for loss aversion, and the inter-connection between the two, is stipulated as being a reflection of litigants' behaviour. Zamir suggest that since people find losses more painful than unobtained gains, they file lawsuits in connection with losses suffered than gains unobtained, which naturally develop and grow the law and the legal doctrines pertaining with the former.[1139] It has been advocated that fighting to recoup what has been lost has biological and evolutionary roots.[1140] For instance, numerous studies seemingly suggest that territorial animals defending their territory against an invader almost invariably overcome the intruder of the same species, as residents who face the risk of losing their territory appear to exert more effort than challengers. This may explain the loss averse nature of human beings and the comparatively more developed nature of tort law when compared with other areas of law focused on gaining, e.g., the law relating to unjust enrichment.

The impact of loss aversion on human behaviour has been studied, most relevantly in the field of legal fee arrangements, in particular arrangements concerning contingency fees. It is suggested that empirical data illustrates that lawyers often earn a considerably higher effective hourly fee when they charge their clients on a contingency fee basis and that clients are willing to agree to pay such higher fees, since a non-contingent fee would otherwise expose it to a risk of loss, i.e., paying for the lawyer's full fees in the event of a loss.[1141] Clients are willing to pay a considerably higher fee to avoid a smaller risk of loss.

The general tendency for people to be loss averse is explained by some by reference to human beings' common sense morality.[1142] It is contended that a disinterested arbiter, i.e., a judge or an arbitrator, is likely to see compensating the injured person for its strongly felt loss as more pressing than entitling the recovery of the unattained benefit.[1143] Moral damage is definitely the type of loss that would fall in the former bucket. This may explain the recent uptick trend in respect of moral damages claims in investment arbitrations, as parties start to pursue more frequently moral harm done to them. Current dominant behavioural science theory suggests that investors are unlikely to remain dormant in the face of wrongs done to them and likely to pursue legal remedies to recoup what they have 'lost'.

Notwithstanding the above, in terms of measuring the 'loss' and the appropriate level of compensation, one needs to consider where to set the reference point, i.e., the benchmark from

[1136] See Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision Under Risk' (1979) 47 Econometrica 263.
[1137] See also Zamir, Loss Aversion (n 1134) 830. *Cf* see David Collins, 'Loss Aversion Bias or Fear of Missing Out: A Behavioural Economics Analysis of Compensation in Investor–State Dispute Settlement' (2017) 8 Journal of International Dispute Settlement 460.
[1138] Zamir, Loss Aversion (n 1134) 832.
[1139] ibid 833.
[1140] ibid 840.
[1141] ibid 838.
[1142] ibid 879 *et seq*.
[1143] ibid 847.

which any loss must be ascertained and calculated.[1144] The answer to that question will determine the level of appropriate compensation that is due to a complainant. Oftentimes, the status quo before the violation, i.e., the infliction of moral harm, will be the appropriate benchmark to determine what loss has been suffered by virtue of the violation. However, it may be that the benchmark for calculation purposes may have to be altered depending on the circumstances of each particular case and what the injured, loss-suffering, party was legitimately entitled to expect, which would be determinative in respect of its actual 'loss' suffered.[1145] A case-by-case analysis is therefore called for. This is befitting with the general requirement that an award for non-pecuniary harm must seek to achieve fairness and justice.[1146]

§5.02 PROPER REMEDY

Reparation for harm suffered at the hands of another, under international law, can take substantially three different forms. It can take the form of restitution, monetary compensation or satisfaction, "*either singly or in combination*".[1147] The general rule under international law is that a state must make restitution as far as is possible.[1148] Restitution is where the responsible party, in most cases the host state, must "*re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.*"[1149] Given the nature of the harm involved, it is generally regarded that restitution cannot be the appropriate remedy for moral damages.[1150]

There is a general obligation, under international law, to compensate for damage or harm caused by an internationally wrongful act "*insofar as such damage is not made good by restitution*".[1151] The compensation can only relate to "*any financially assessable damage*".[1152] In this respect, it is worth noting that the ILC Articles expressly note that "*[M]aterial and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation*".[1153] The ILC Articles further note in their commentaries that "*[C]ompensable personal injury encompasses not only associated material losses… but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems)*".[1154] Accordingly, compensation is regarded as the appropriate remedy for moral damages to an investor.[1155] This is because, as above noted, moral damage is a financially assessable form of damage and such must be remedied by compensation, where restitution fails

[1144] ibid 836-837.
[1145] Zamir, Behavioral Law (n 1134) 45.
[1146] See, generally, ECHR, Article 41; *Varnava* (n 920); American Convention, Article 63(1); *Desert Line* (n 1).
[1147] ILC Articles, Article 34.
[1148] ILC Articles, Article 35. See Dumberry, Satisfaction (n 167) 209.
[1149] ibid.
[1150] Dumberry, Satisfaction (n 167) 209.
[1151] ILC Articles, Article 36(1).
[1152] ILC Articles, Article 36(2).
[1153] ILC Articles, Article 37, Commentary (3).
[1154] ILC Articles, Article 36, Commentary (16).
[1155] See Dumberry, Satisfaction (n 167) 210 *et seq*, 242; Ripinsky (n 205) 308.

to completely remedy the wrong. Finally, an obligation to give satisfaction for the injury caused arises where such cannot be made good by restitution or compensation.[1156] The ILC Articles explain that satisfaction may take the form of an acknowledgement of breach, an expression of regret, a formal apology or another appropriate modality.[1157] The form of satisfaction will therefore highly likely be case dependent. However, it cannot be something that is out of proportion to the injury or take a humiliating form.[1158]

Satisfaction as a form of reparation for any form of injury is considered the exception. Most injuries will be capable of repair by restitution and/or compensation. It is therefore "*only in those cases where [restitution and/or compensation] have not provided full reparation that satisfaction may be required*".[1159] The generally accepted position is that where, in the rare cases, a claim for moral damages is raised by the host state against the investor, satisfaction would be the appropriate remedy. This is connected with the difficulties of attributing a value to a state's moral harm.[1160]Therefore, as a general rule under international law, monetary compensation is the appropriate remedy for moral damages affecting an individual, whereas satisfaction is appropriate where one is concerned with an award in favour of a state.[1161] This general rule is also valid in the field of international investment law, as observable in the various ICSID and other awards rendered by various tribunals. For instance, the arbitral tribunals in both *Desert Line*[1162] and *von Pezold*[1163] awarded the successful investors monetary compensation by way of moral damages. Restitution would not have remedied the international wrongs committed.[1164] The decisions of international human rights courts, the ECtHR and the IACtHR in particular, are aligned with the said general rule.[1165]

Conversely, in the *Europe Cement* case, where Turkey, the host state, had unsuccessfully claimed USD 1 million as monetary compensation for the assertion of a manifestly ill-founded claim using inauthentic documents, and where reliance had been placed on the *Desert Line* award, the tribunal had dismissed the claim, reasoning that "*any potential reputational damage suffered by the Respondent will be remedied by the reasoning and conclusions set out in this Award, including an award of costs, which as set out below is significant*".[1166] The tribunal therefore seemingly considered the conclusions in the award, akin to a declaration, sufficient reparation in respect of any harm to the host state. A similar result was reached in *Cementownia*.[1167] Dumberry regards the two ICSID cases as confirming the principle that satisfaction is the proper remediation for moral damages suffered by a state.[1168] The approach adopted by said tribunals is in line with the ILC commentaries, which explain

[1156] ILC Articles, Article 37(1).
[1157] ILC Articles, Article 37(2).
[1158] ILC Articles, Article 37(3).
[1159] ILC Articles, Article 37, Commentary (1).
[1160] See Chapter 2 above under section §2.03[B].
[1161] See Dumberry, Satisfaction (n 167) 242. See also the ECtHR decisions analysed above under section §4.02 [B][1][a].
[1162] *Desert Line* (n 1).
[1163] *von Pezold* (n 123).
[1164] See also Dumberry, Satisfaction (n 167) 220 *et seq*.
[1165] See, for instance, *Aydin* (n 886); *Gonzales Lluy* (n 992).
[1166] *Europe Cement* (n 264) [181].
[1167] *Cementownia* (n 252) [165].
[1168] Dumberry, Satisfaction (n 167) 233.

that "*[S]atisfaction… is the remedy for those injuries, not financially assessable, which amount to an affront to the State.*"[1169]

Although monetary compensation is theoretically available as a form of satisfaction, termed as pecuniary satisfaction, this is generally considered to encompass nominal damages only and aimed at providing a symbolic amount to remedy the violation, as opposed to providing for appropriate compensation.[1170] It seems that the arbitral tribunals in *Europe Cement* and *Cementownia* preferred not to make such awards and were content with the declarations in their awards, or perhaps this point was never raised and brought to the tribunal's attention during the proceedings. Such may be reflective of the trend in literature by some authors contending in favour of abandoning the concept of pecuniary satisfaction altogether.[1171] In fact, Dumberry notes that tribunals almost never explicitly award pecuniary satisfaction to states.[1172]

§5.03 QUANTUM

The last hurdle that one must overcome before an award of moral damages can be made is perhaps the trickiest of all and, naturally, a rather troublesome task for the parties and, more importantly, for the arbitral tribunal. Where the arbitral tribunal is satisfied that the moral damages claimant has met all of the requirements necessary for a moral damages award, it will face the very difficult challenge of quantifying the loss and, accordingly, making an award in monetary terms. It has been said, of such harm, that "*immaterial damage…can never be truly compensated with material goods or money*".[1173] Therein lies the problem and issue. How is one to put a price tag on remedying moral harm? That said, the difficulty has not and should not deter one from engaging in the consequent exercise of calculation. Although their submissions will be self-serving, arbitral tribunals will usually be assisted by the parties on issues of quantum, particularly in respect of the applicable principles.[1174] The amount claimed may also assist the arbitral tribunal in terms of its use as a ball-park figure. Most important of all, however, the arbitral tribunal will likely be guided by the awards and reasoning of previous international courts and tribunals.

The *Lusitania*[1175] case is considered to be the starting point in international law in respect of the appropriate measure of damages for moral harm. In that case, Umpire Parker, delivering the Commission's opinion, had explained that "*[I]t is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy [which] must be commensurate with the injury received.*"[1176] That compensation must, he further noted, "*be adequate and balance as near*

[1169] ILC Articles, Article 37, Commentary (3).
[1170] Dumberry, Satisfaction (n 167) 214.
[1171] ibid 215.
[1172] ibid.
[1173] Altwicker-Hamori (n 147) 9.
[1174] ibid 16.
[1175] *Lusitania* (n 3).
[1176] ibid 35.

as may be the injury suffered".[1177] This was reiterated in the opinion as requiring the compensation awarded to be "*full, adequate, and complete*".[1178] Recognising that this was not an easy task and that "*it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula the damages sustained*", the Umpire nevertheless saw no reason not to award such damages and allow "*the wrongdoer [to] escape repairing his wrong or why he who has suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise*".[1179]

The guidance and steer issued by Umpire Parker was followed by the *Desert Line* tribunal, among many others. In fact, in the award, granting the claimant investor's moral damages claim, the *Desert Line* tribunal referred expressly and approvingly to the *Lusitania* case.[1180] The difficulty surfaces, however, in respect of the assessment exercise. Both in the *Lusitania* and *Desert Line* awards it was expressly noted that the exercise is fraught with challenges. How does one assess the proper level of damages that would be "*commensurate to the injury*" and "*full, adequate, and complete*"?[1181] There is certainly a lack of clarity and guidance in the current state of the case law.[1182] This is in part a consequence of the fact that moral harm, as with other damage to non-economic interests, is not something that can be objectively and accurately assessed.[1183] A tribunal faces the almost impossible challenge of reconciling the general and abstract principle of full reparation, as enunciated in the *Lusitania*[1184] and the *Chorzów*[1185] cases, with the obvious subjectivity and indeterminacy involved in the evaluation of non-pecuniary injuries.[1186] The process of quantification is therefore seemingly extremely discretionary, involves some degree of flexibility and based upon the arbitrators' perception of fairness and equality.[1187]

Some observe that, in the exercise of their discretion, arbitrators are influenced by the degree of fault, which operates as a gatekeeper allowing arbitrators to be more generous with their moral damages awards.[1188] The gravity and seriousness of the breach and the consequent harm, as would be perceived and considered through the arbitrators' spectacles, therefore seems to play a pivotal role.[1189] Equally, the positive and remorseful acts of the state may affect the compensation due for moral damages, by reducing the ultimate sum.[1190] However, one must observe the utmost caution and refrain from seemingly advocating an increase in moral damages awarded simply by virtue of the existence of circumstances or

[1177] ibid 36.
[1178] ibid 44.
[1179] ibid 36.
[1180] *Desert Line* (n 1) [289].
[1181] *Lusitania* (n 3) 35 and 44.
[1182] See Coriell, Panel Discussion (n 1072) 250.
[1183] Ripinsky (n 205) 307. See also Appeluz (n 19) 13.
[1184] *Lusitania* (n 3).
[1185] *Chorzów* (n 4).
[1186] Blake (n 180) 401.
[1187] Ripinsky (n 205) 307. See also Michou (n 1072) 65-66; Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP 2012), [3.116].
[1188] ibid.
[1189] See Sabahi, Panel Discussion (n 369) 245-246. See also Blake (n 180) 402-404; Dumberry, Compensation (n 169) 270-273; Altwicker-Hamori (n 147) 17; Dumberry and Cusson (n 633) 74; Parish (n 170) 9.
[1190] See *Dispute concerning responsibility for the deaths of Letelier and Moffitt (United States, Chile)*, Reports of International Arbitral Awards Vol XXV, 1-19 (January 11, 1992), 16; Cabrera (n 163) 202.

treatments that may be described as being 'exceptional', 'egregious' or 'aggravating'.[1191] It is not the nature of the act or circumstance in question but its effect on the individual that matters for the purposes of assessing and remedying moral harm. As explained above on numerous occasions, punitive damages are prohibited under international law.[1192]

Given the inherently discretionary and highly fact-dependent nature of moral damages quantification, some have questioned whether it may ever be possible to develop or discern any guidelines.[1193] It ultimately hangs on the "*arbitrators' collective understanding of what is equitable, reasonable and proportionate in the circumstances of a specific case*".[1194] The ICJ's decision in *Diallo*[1195] also supports this view, where the Court explained that, as a matter of principle, the "*[Q]uantification of compensation for non-material injury necessarily rests on equitable considerations*". The jurisprudence of the ECtHR and the IACtHR further corroborate this.[1196]

However, principles and rules are seemingly emerging from decided cases, investment law related and others, which are likely to assist in discerning appropriate guidelines and potentially offer arbitral tribunals some assistance when quantifying moral damages.[1197] The judgments of the ECtHR and the IACtHR are exceedingly valuable in this regard.[1198] The said international courts have to date considered and decided innumerable moral damages claims, awarding moral damages to victims in many of their judgments.[1199]

As the first publicly known ICSID award based on international law in which an award for moral damages was made, the *Desert Line* award is an obvious first port of call and is likely to shed some helpful light on the principles applicable to the assessment of moral damages. *Desert Line* was a case where armed individuals had entered the investor's construction site to demand payment on behalf of a subcontractor, opened fire with automatic weapons and made threats to the investor's employees and officers. The investor was also physically and unlawfully obstructed from evacuating its equipment from its sites by armed forces acting on the orders of the Minister of the Interior. Desert Line’s personnel and equipment were effectively under siege. During the altercations, three of the investor's personnel, including its chairman's son were arrested for 3 days.[1200] Declaring that Yemen had failed to provide fair and equitable treatment to Desert Line's investment, as required by the applicable BIT, the tribunal held that the violation and "*in particular the physical duress exerted on the executives of the Claimant, was malicious*" and also "*substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation*".[1201] It therefore opined that a moral damages award was necessary. Given the gravity of the breaches and the seriousness of their impact, the tribunal awarded Desert Line

[1191] Dumberry and Cusson (n 633) 74-75.
[1192] See Blake (n 180) 398-399; Jagusch (n 153).
[1193] Ripinsky (n 205) 312.
[1194] ibid. See also Markert and Freiburg (n 168) 42.
[1195] *Diallo*, Compensation (n 45) 334.
[1196] See Chapter 4 above under section §4.02[B][1].
[1197] Blake (n 180) 401. See also Coriell, Panel Discussion (n 1072) 250.
[1198] Garcia (n 287) 510.
[1199] See Chapter 4 above under section §4.02[B][1].
[1200] For a fuller factual account, see Chapter 4 above under section §4.02[A][4].
[1201] *Desert Line* (n 1) [290].

a sum of USD 1 million. It reasoned that "*based on the information at hand and the general principles*" the sum was "*more than symbolic yet modest in proportion to the vastness of the project*".[1202] It is noteworthy that the tribunal considered the investor's claimed sum of OR 40 million[1203] to have been exaggerated. The tribunal gave no further clarification or explanation as to its assessment.

The tribunal's reasoning calls for some comment. First, it is slightly unclear what the tribunal meant by its reference to the "*information at hand*" and the "*general principles*". In respect of the former, it probably is a reference to the facts of the case as a whole, with some level of importance attached to actions it considered to constitute "*physical duress exerted on the executives of the Claimant*". In other words, the tribunal seems to have been influenced by the gravity and seriousness of the actions of the host state and its impact on the investor and its personnel when considering the appropriate quantum. Quantum is therefore determined in most part by the impact of the wrongdoer's unlawful conduct on the victim. Accordingly, the more serious a breach, the greater its impact will likely be on the investor and cause greater moral harm, justifying a larger sum compensation. In respect of the latter, i.e., the reference to the "*general principles*", there is even a lesser degree of clarity. One thing is clear, however. The tribunal was guided by the general principles of international law in its assessment of its moral damages quantum. This reasoning is supported by references and remarks made in the award.[1204] In particular, given the express reference with approval to the *Lusitania* case[1205], the *Desert Line* tribunal seems to have considered that the award made was both "*commensurate to the injury*" and "*full, adequate, and complete*". Finally, the tribunal's assessment and reasoning demonstrates that there is an element of proportionality involved in the exercise of assessing quantum. This is supported by the reference in the award to "*modest [nature of the moral damages award] in proportion to the vastness of the project*". The fact that the tribunal considered the investor's claimed amount to be "*exaggerated*" further supports this.

A very similar, almost identical, approach was adopted by the tribunal in *von Pezold*.[1206] The tribunal, expressly approving the principles established by and the approach of the *Desert Line* tribunal, awarded also a sum of USD 1 million as moral damages separately to one of the von Pezold claimants (Mr. Heinrich von Pezold) and also to a group of Zimbabwean entities, on the basis that they and their employees had been subjected to analogous conduct, involving physical threats and assaults.[1207] The tribunal had found that Mr. Heinrich von Pezold's claim for USD 5 million in respect of moral damages quantum was excessive in light of the *Desert Line* award, given the similarity between the cases in respect of unlawful conduct exposed to.[1208] The *von Pezold* award gives rise to the query of whether USD 1 million has now become the default price tag for moral damages where the claim involves a serious degree of physical threats and assault, which it seems is a

[1202] ibid [290]-[291].
[1203] This is understood as being the "Omani Rial", which currently carries the international currency code OMR. OR 40 million equated to circa USD 100 million in July 2020.
[1204] *Desert Line* (n 1) [227] and [290].
[1205] *Lusitania* (n 3).
[1206] *von Pezold* (n 123).
[1207] ibid [908] *et seq*.
[1208] ibid [921].

requirement for moral damages and will therefore likely be so in the majority of cases.[1209] It is also noteworthy that the *von Pezold* tribunal affirmed the view expressed by earlier tribunals that, in respect of quantum, tribunals enjoy a discretion as to the sum to award, but must confine itself to what would be a "*prudent assessment*" in light of the facts.[1210] Query whether the facts in that case were identical in terms of the wrongful conduct and its effect on the victims so as to justify the awarding of exactly the same sum.

Benvenuti & Bonfant was another ICSID investment case where the moral damages claim was permitted to succeed, though on the basis of Congolese law.[1211] It is therefore of some limited use and guidance in comparison to the *Desert Line* and *von Pezold* awards. Nevertheless, it will assist in understanding the thinking and reasoning of ICSID investment tribunals in respect of moral damages awards. As will be recalled[1212], the case concerned a contractual dispute between an Italian investor and the Congolese government concerning a mineral water bottling factory. There were threats of arrest made by the state representatives towards the investor's personnel, though no actual arrests were made given the warning from the Italian embassy, which shortly thereafter resulted in the said persons fleeing the country. The investment was ultimately expropriated by the Congolese army. The investor sued for unlawful expropriation, together with a claim for damages for intangible loss, which it termed as "*prejudice moral*", in the sum of CFA 250 million.

The tribunal agreed with the investor and found that the government had expropriated its investment, and therefore granted the investor both material and moral damages, the latter under the umbrella heading "*intangible loss (prejudice morale)*". However, the tribunal awarded the investor only CFA 5 million. This is a substantial reduction of the amount claimed; a reduction of 98%. In respect of the quantum element, the tribunal noted that it considered the award of CFA 5 million to be "*equitable*". That statement is, unfortunately, not further explained. It seems that, under the law applicable and rather unusually, the tribunal had the power to rule *ex aequo et bono* in that case.[1213] The tribunal's award may therefore have a lesser precedential value for cases considered under international law principles. The obligation under international law is to wipe out all the consequences of the illegal act and remedy the wrong, not to reach a conclusion based on the principles of equity and conscience, though such may have a role to play in the wiping-out exercise.[1214] That said, it reflects a trend in arbitral thinking that parties do exaggerate their claims and that a substantive reduction may be necessary to achieve a proportionate and/or equitable, fair result. In that sense, the award is aligned with the thinking portrayed in the *Desert Line* award.[1215]

The investor's moral damages may not always be exaggerated and require very substantial reduction. For instance, in *Al-Kharafi*[1216], decided pursuant to Libyan law, the

[1209] ibid [922].
[1210] ibid [910]. See also *Desert Line* (n 1) [290].
[1211] *Benvenuti & Bonfant* (n 194).
[1212] See Chapter 4 above under section §4.02[A][1].
[1213] *Benvenuti & Bonfant* (n 194) [4.98]. In respect of the principles relating to *ex aequo et bono* jurisdiction, see Sabahi (n 172) 186-188.
[1214] See Chapter 3 above under section §3.02.
[1215] *Desert Line* (n 1).
[1216] *Al-Kharafi* (n 798).

investor's claim for moral damages in the sum of USD 50 million was only reduced to USD 30 million, i.e., a reduction of only 40%, which almost pales into insignificance in light of the reductions in *Desert Line*[1217] and *Benvenuti & Bonfant*[1218]. This case, though seemingly irrelevant to the issue of assessment of moral damages claims under international investment law, further demonstrates that international investment tribunals are capable of assessing and valuing moral harm sustained due to a breach of an obligation. More importantly, the award demonstrates that where the applicable rules and principles permit the recoverability of damages and that is considered to encompass both material and moral harm, as is the rule under customary international law, then there is no obvious barrier to moral damages claims provided the harm be evidenced to the arbitral tribunal's satisfaction. The arbitrators must be aware, however, of the risk of double-counting when deciding on the appropriate compensation due. Their assessment should reflect the possibility and degree of double-counting, i.e., over compensating. This problem is especially acute in cases where the compensation awarded aims to reflect the "*fair market value*" of the investment expropriated or otherwise adversely affected.[1219]

It is noteworthy that international human rights courts award substantially lower sums than those awarded by their investment law counterpart(s). Moral damages compensations awarded by international human rights courts are generally in the thousands and sometimes, though rarely, in the hundreds of thousands of US Dollars, whereas investment awards speak in millions. As will be recalled, the ECtHR awarded Mr. Garabayev EUR 20,000 for his unlawful deportation, arrest and physical assault, as well as threats of torture,[1220] whereas in the *Desert Line* and *von Pezold* cases similar and/or resembling circumstances warranted awards of USD 1 million.[1221] The divergent sums awarded are difficult to justify and result in unfairness, hence the greater need for cross-fertilization and convergence between the two areas of international law, to ensure fairness and consistency of treatment. Moral damages aim to compensate moral harm suffered by an individual or corporation, and the value of that harm should not differ purely on the basis of the venue and audience of a particular claim. The divergence may be explained away on the basis that in the two ICSID cases the tribunals also had to address reputational harm to the corporate investors. However, the *Desert Line* tribunal, for instance, seemed more focused on the "*physical duress exerted on the executives of the Claimant*".[1222] Some jurisdictions seem to have adopted rough upper limits for compensation in respect of non-pecuniary losses.[1223] Query whether this may be a possible option for international courts and tribunals, with the ICJ possibly taking the lead.

Finally, when making any moral damages award to compensate the wronged party, the tribunal must be alive to the issues of remoteness and causation, granting compensation

[1217] *Desert Line* (n 1).
[1218] *Benvenuti & Bonfant* (n 194).
[1219] Allepuz (n 146) 13-14.
[1220] *Garabayev* (n 909). See also *Diallo*, Compensation (n 45), to the same effect.
[1221] *Desert Line* (n 1); *von Pezold* (n 123) [921] and [923].
[1222] *Desert Line* (n 1) [290].
[1223] See S. M. Waddams, 'Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention' (1985) 63 The Canadian Bar Review 734; Nicholas Mullany, 'A New Approach to Compensation for Non-Pecuniary Loss in Australia' (1990) 17 Melbourne University Law Review 714.

only for the direct and natural consequences of a violating act.[1224] For instance, in *Lauder*[1225], the UNCITRAL tribunal considered that an award of damages would not be appropriate on the basis that the treaty violation in question was "*too remote to qualify as a relevant cause for the harm*".[1226] The focus on the actual and proximate cause of the loss is also observable in other decided investment cases.[1227]

[1224] See Blake (n 180) 404 *et seq*.
[1225] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001.
[1226] ibid [235].
[1227] See, for instance, *Desert Line* (n 1) [181]; *Lemire*, Award (n 140) [247]; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Final Award, 25 July 2007, [50].

CHAPTER SIX

CONCLUSION

§6.01 SUMMARY OF RESEARCH

This book has examined the doctrinal and arbitral treatment of moral damages claims under international investment law, considering in particular whether the position converges or diverges with that under customary international law, as well as other disciplines of international law, with a particular focus on international human rights law given the subject matter under scrutiny. The overarching theoretical question of this book asked whether and under which circumstances international investment tribunals, applying international law rules and principles, should have jurisdiction to award moral damages, as well as the remedies available and the nature of any required quantification exercise.

Chapter 1 sought to set the essential foundation and backdrop to the topic of this book, by initially providing a background to the relevant matters and setting out the ultimate purpose, i.e., the overarching theoretical question of this book.[1228] It also provided an introduction into international investment law to provide context to the chapters and discussion to follow.[1229] Most importantly, Chapter 1 addressed and considered the theoretical framework underpinning the discussion and conclusions contained in this book. In particular, the relevance and utility of ensuring the convergence of various sub-disciplines or branches of international law was considered and debated.[1230] Further, two selected theories of (or relating to) law, i.e., the theory of corrective justice and law and economics, were scrutinised with a view to assessing whether the current treatment of moral damages claims in international investment arbitrations conform to their dictations, an exercise considered essential to permit an analysis as to whether changes or difference in approach is warranted.[1231] The said theoretical framework considered in some depth in Chapter 1 was intended to (and indeed runs) through this book in the chapters to follow as almost a "golden thread" to command the discussion and, more importantly, assess the utility and appropriateness of various rules and principles of international investment law, including those recently established by arbitral tribunals.

Chapter 2 considered the standing of claimants in investment arbitrations and the jurisdiction of arbitral tribunals to hear such cases (i.e., *rationae personae*). In particular, the chapter focused on whether and in which circumstances investors have a right to bring moral damages claims against the host state.[1232] This was considered both from the perspective of natural person and corporate claimants.[1233] The ability of investors to bring claims on behalf of or relating to harm to their officers and employees was also considered.[1234] Finally, and for

[1228] See Chapter 1 above under section §1.01.
[1229] See Chapter 1 above under section §1.02.
[1230] See Chapter 1 above under section §1.03[A].
[1231] See Chapter 1 above under section §1.03[B] and [C].
[1232] See Chapter 2 above under section §2.02.
[1233] See Chapter 2 above under section §2.02[A] and [B].
[1234] See Chapter 2 above under section §2.02[C].

completeness, the chapter considered whether host states may similarly be permitted to raise moral damages claims against investors, usually by way of counterclaims.[1235] The conclusion reached, following a detailed analysis of the relevant arbitral awards and scholarly writings, is that, dependent upon the context and the terms of the applicable investment or other treaty, natural and legal person investors are entitled to moral damages caused by host states through internationally wrongful actions, but that harm to employees should be recoverable only to the extent such results in harm to the investor's interests. The latter is dictated by the established principle of customary international law that harm to third persons are excluded from the compensation calculation exercise. The investment awards, as well as in-force and model investment treaties, considered above are generally in support of the above conclusions.[1236] In respect of host states' moral damages counterclaims, the research findings suggest that an arbitral tribunal is unlikely to have jurisdiction to hear such claims subject, as always, to the terms of the applicable treaty.

Chapter 3 thereafter considered whether arbitral tribunals possess, as a matter of customary international law, subject-matter jurisdiction (i.e., *rationae materiae*) to consider and determine moral damages claims. To ascertain whether customary international law permits moral damages claims, the two main sources of customary international law were analysed with some level of detail, i.e., the ILC Articles and the judgments and awards of international courts and tribunals.[1237] Additionally, the treatment of moral damages claims, if any, by international investment treaties was considered given that such treaties often constitute the foundation of investment arbitrations.[1238] This involved the review of both BITs[1239], both currently in force and those in draft form, as well as certain selected MITs[1240]. The treaties considered were selected to represent the terms of treaties relating to states located in different economic regions and with different economic outputs. The key finding of that exercise was that there seems to be a high level of structural consistency and convergence between the standalone BITs and MITs considered, both generally and in respect of moral damages claims, and that they contain almost identical protections and safeguards as regards investments.[1241]

With that being said, the extensive analysis of relevant arbitral awards contained in Chapter 4 demonstrates that the circumstances required by investment tribunals as precondition to entitlement to moral damages diverge from the general requirements under customary international law, as well as under international human rights law, evidencing the fragmentation of international law on the issue in question.[1242] Investment awards seem to consistently require the existence of exceptional circumstances or grave violations for an award of moral damages to be made, regardless of the fact that such is not a requirement under international law, as evidenced by the awards and judgments of various international human

[1235] See Chapter 2 above under section §2.03.
[1236] See *Desert Line* (n 1); *Lemire*, Award (n 140); *von Pezold* (n 123); *Cementownia* (n 252); and *Europe Cement* (n 264). See also Chapter 3 above under section §3.03[B].
[1237] See Chapter 3 above under section §3.02[B] and [C].
[1238] See Chapter 3 above under section §3.03.
[1239] See Chapter 3 above under section §3.03[B][1].
[1240] See Chapter 3 above under section §3.03[B][2].
[1241] See Chapter 3 above under section §3.03[C].
[1242] See Chapter 4 above under section §4.02.

rights courts.[1243] Most strikingly, the seminal and celebrated *Chorzów*[1244] and *Lusitania*[1245] cases, both of which have been cited by the said investment tribunals with approval, impose no such requirement and, to the contrary, dictate that the measure of damages should seek to ensure full reparations by way of material and/or moral damages awards, as appropriate.[1246] The disregard of such, admittedly non-binding but highly persuasive and authoritative "precedents" by investment tribunals has resulted in some to contend that the fragmentation of international law is underway, posing as a real threat to the coherence, unity and stability of the international legal order.[1247] This book seeks to divert international investment law to the path towards convergence so that the various disciplines of international law are aligned in their approach to moral damages claims, and that international law can continue to function as a viable system and face the challenges to come.

In addition to the rules concerning the applicable test to moral damages claims, both under international investment law and international human rights law, Chapter 4 also considers the issues relating to the burden of proof and standard of proof imposed on such claims. In line with the principle of law accepted in most western jurisdictions, the party asserting is generally under an obligation to prove the asserted matters. This would ordinarily be the claimant investor in the investment cases. The approach adopted by ICSID and non-ICSID tribunals demonstrate this.[1248] Note, however, that international human rights courts have seemingly adopted a different, more relaxed, approach to matters of proof of claims. They generally operate on the rebuttable presumption that a breach of the human rights protections would ordinarily result in non-pecuniary, moral harm.[1249] It remains to be seen whether, as the investment law jurisprudence in respect of moral damages is further developed and becomes further settled, arbitral tribunals determining such claims in the investment context will adopt a similarly more relaxed approach to matters of evidence. This is something to be actively encouraged to aid convergence efforts and, more importantly, ensure that moral harm claimants are not differently and unfairly treated dependent on the international arena in which they raise their claims. In respect of the standard of proof, although the language differs, the general requirement is that the claimant must establish its moral harm (and other) claims on the balance of probabilities or thereabouts, i.e., it was more likely than not for the event, harm etc. to have occurred.[1250] That said, investment tribunals enjoy a wide margin of discretion and are not bound by and may decide not to follow the "normal rule".

Finally, Chapter 5 considers matters relating to compensation, in particular its purpose, the proper remedy due in connection with moral harm claims and the quantum calculation exercise. A review of the rational choice and prospect theories suggest that human beings are focused on maximising their gains and also avoiding any losses.[1251] As a result, persons seek compensation in circumstances where they consider that they have been caused to suffer loss

[1243] See Chapter 4 above under section §4.02[A] and [B].
[1244] *Chorzów* (n 4).
[1245] *Lusitania* (n 3).
[1246] See Chapter 3 above under section §3.02[C][2].
[1247] See Greenwood, Unity (n 29); Koskenniemi (n 30); Andenas (n 28).
[1248] See Chapter 4 above under section §4.03.
[1249] Id.
[1250] See Chapter 4 above under section §4.04.
[1251] See Chapter 5 above under section §5.01.

or damage, such as moral harm, which in turn explains the popularity of tort law in many jurisdictions.[1252]

There is a greater degree of alignment between international law and its sub-branch international investment law as regards the available remedy in respect of and the quantification of moral damages claims.[1253] Compensation is commonly regarded as the appropriate remedy for moral damages where such is due to an investor, given that moral damage is a financially assessable form of damage and must be remedied by compensation where restitution fails to completely remedy the wrong.[1254] In respect of any moral harm to host states, satisfaction is likely to be the appropriate remedy, which will likely take the form of an acknowledgement of breach, an expression of regret, a formal apology or another appropriate modality.[1255] The form of satisfaction will (highly) likely be case dependent. However, it cannot be something that is out of proportion to the injury or take a humiliating form.[1256]

In respect of the quantification of moral damages awards, the international law arbitrators and judges naturally and unavoidably enjoy a high degree of discretion.[1257] However, that discretion is not unlimited and the tribunal or court must seek to grant "*a remedy [that is] commensurate with the injury received*", which compensation must "*be adequate and balance as near as may be the injury suffered*".[1258] In other words, the compensation awarded must be "*full, adequate, and complete*".[1259] That said, there is a notable difference between the sums awarded by international investment tribunals and international human rights courts, the latter generally speaking in terms of thousands and the former in millions.[1260] Such divergence is difficult to explain, let alone justify, given that in both cases one is ultimately concerned with the same form of harm.[1261] This supports calls for greater convergence, via cross-fertilization, between the various disciplines of international law, to ensure fairness and consistency of treatment.

§6.02 RECOMMENDATIONS

This book has sought to determine whether and under which circumstances international investment tribunals, applying international law rules and principles, should have jurisdiction to award moral damages, as well as commenting on the remedies available and the nature of the required quantification exercise. In doing so, it explored, *inter alia*, various international investment and other tribunal and courts' characterisation and treatment of moral damages claims. In the exercise, this book has also identified various shortcomings or possible issues

[1252] Id.
[1253] See Chapter 5 above under section §5.02.
[1254] See Dumberry, Satisfaction (n 167) 210 *et seq*, 242; Ripinsky (n 205) 308.
[1255] ILC Articles, Article 37(2). See also *Cementownia* (n 252); and *Europe Cement* (n 264).
[1256] ILC Articles, Article 37(3).
[1257] See Chapter 5 above under section §5.03. See also Ripinsky (n 205) 307; Michou (n 1072) 65-66; Marboe (n 1187) [3.116].
[1258] *Lusitania* (n 3) ibid 35-36.
[1259] ibid 44. See also *Desert Line* (n 1).
[1260] See Chapter 4 above.
[1261] See *Garabayev* (n 909); *Diallo*, Compensation (n 45); *Desert Line* (n 1); *von Pezold* (n 123) [921] and [923].

that require addressing relating to moral damages and/or international investment law more generally, to make international investment law more aligned with international law, and also serve the needs of its users and participants. In that vein and in line with the above, this book makes the below recommendations. Given the focus of and the conclusions reached in this book, certain of these recommendations will likely warrant or benefit from further research to fully analyse the issues concerned and their possible implications.

Firstly, given the perceived divergence and fragmentation of international law so far as moral damages claims are concerned, the time is seemingly ripe for a detailed and thorough examination to be conducted into the issue of and entitlement to moral damages by the UN, via the ILC. Anything short of such may prove insufficient to divert international investment tribunals onto the path towards convergence and ensure that the treatment of moral damages claims under the various disciplines of international law are aligned, as they should be. A consistent line of ICSID cases seemingly impose a requirement of exceptionality, contrary to the rules and principles of customary international law, and it may be difficult for that unpermitted deviation to be brought to an end by future tribunals by way of a gradual process of refinement and development, though that possibility is certainly not ruled out and is to be actively encouraged. An authoritative approach is required to turn the tide.

The suggested tide-turning may be possible by way of amendments to the ILC Articles, an addendum to such and/or a stand-alone guidance or position note to seek to clarify the issues concerned and aid future tribunals. A working group or commission may be created by the UN/ILC for such purpose. The fact that the treatment of moral damages by investment tribunals has been a hotly debated topic amongst international legal scholars, with a serious number questioning the approach taken by the recent investment tribunals, speaks in support of the need for such a "legislative" intervention. However, realistically speaking, this recommendation is unlikely to be implemented with success anytime soon, if at all. The process, even if embarked upon without delay, is likely to take many years of negotiations. The fact that the drafting and approval process pertaining to the ILC Articles took almost 50 years following the initiation of the task force demonstrates the difficulty of the task and the likely duration and delays.[1262] As an alternative, a UN / ILC instructed commission focused on analysing the position on moral damages alone and considering the recent line of ICSID and other investment cases will likely take comparatively much shorter time to produce results. This would be the preferred approach forward.

Alternatively, or in combination with the above, states should consider taking the matters into their own hands and clearly stipulate in their BITs and MITs whether moral damages claims are to be permitted and under what circumstances. This will bring an end to the arguments concerning the fragmentation of international law and differing treatment of investor claims, given that international law dictates that the terms of the applicable treaty trump the rules of customary international law.[1263] In such a scenario, the relevant investment tribunal will simply be applying the terms of the treaty on which its jurisdiction rests. It would

[1262] See Chapter 3 above under section §3.02[B].
[1263] See *MTD*, Award (n 447).

be difficult to speak of fragmentation of international law under such circumstances. It appears that certain states are seriously considering this as an option.[1264] More may soon follow suit.

Moreover, investment arbitrations continue to enjoy a high degree of privacy, at the cost of transparency, uniformity and consistency.[1265] It is often said that arbitration, whether investment or otherwise, resembles a black-box; no one except the parties (including their representatives) and the arbitrators get to see what really goes on during the arbitral proceedings and, with certain few exceptions, how certain issues are decided in the (interim or final) award.[1266] It would be an almost impossible task to seek to refine and develop the law relating to moral damages and arrive at consistent and accurately reflective set of conclusions and principles without analysing all relevant material, most importantly the awards rendered, but also extending to party submissions and other documents of the proceedings. Accordingly, going forward, the rule around the privacy of investment arbitrations should be carefully reconsidered and reversed or exceptions introduced, if and where necessary.

For completeness, it is not suggested that international investment arbitrations should cease to be private and become public as a matter of custom and/or rule. This book simply suggests that the issue is one that would likely benefit from an in depth analysis and consideration, particularly given and in light of the perceived fragmentation of various disciplines of international law. Although, as was more fully considered in Chapter 1, transparency, uniformity and consistency are not complete and indispensable virtues in and of themselves and in certain contexts the requirements of privacy may outweigh such competing considerations, the necessity for and utility of transparency, uniformity and consistency of law should not be underestimated. This is particularly so in respect of investment arbitrations, which depend on and utilise public trust and finances.[1267] Those virtues help instil trust and confidence in the system and, to some extent, ensure their stability and durability. It is no surprise that the backlash against investment arbitration has in part been due to the privacy of and perceived inaccessibility to investor-state proceedings.

Last but certainly not least, it is time to reconsider whether a binding system of precedents would assist in ensuring that international investment law, especially in respect of moral damages claims, is consistent, uniformly applied and is in line with the established and respected principles of customary international law. Under the current system, investment tribunals are not bound or restricted by earlier awards when making a determination on issues in dispute.[1268] This is naturally a recipe for inconsistent awards and findings, resulting in the fragmentation of international law. Although the annulment procedure that exists under the ICSID Convention[1269] assists maintain some level of consistency, such is limited in its approach and naturally only applies to ICSID arbitrations. As Schreuer explains, the ICSID

[1264] See, for instance, Indian Model BIT, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> accessed 2 April 2021.
[1265] See Alessandra Asteriti, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010), 787.
[1266] See Todd Tucker, 'Inside the Black Box: Collegial Patterns on Investment Tribunals' (2016) 7(1) Journal of International Dispute Settlement 183.
[1267] See Stavros Brekoulakis and Margaret Devaney, 'Public-Private Arbitration and the Public Interest under English Law' (2017) 80(1) Modern Law Review 22.
[1268] See Alvarez (n 135) 9; *Land and Maritime Boundary* (n 575); *Caratube International Oil* (n 575) [234].
[1269] Article 52, ICSID Convention.

annulment procedure "*is only concerned with the legitimacy of the process of decision: it is not concerned with its substantive correctness*".[1270] It is quite different from an appeals process, which would generally allow the appellate court to review the merits of the case, as well as other issues of substance. An appeals system of general application should therefore be considered to ensure that awards, particularly in respect of moral damages, are consistent and that any inconsistency is weeded-out by the appellate body established, thereby promoting convergence. The task may be assigned to the ICJ, as the only standing court with the general jurisdiction to settle legal disputes in accordance with international law. At the very least, given that most BITs provide for ICSID arbitration and investment arbitrations are often heard under the auspices of ICSID, the scope and extent of the annulment mechanism may need to be widened to accommodate for appeals. However, given the requirement of unanimous approval under Article 66 of the ICSID Convention, it is generally acknowledged that an amendment, though legally possible, would be practically almost impossible to achieve.[1271]

Alternatively, and seemingly more likely, the gradual and apparently unstoppable introduction of regional permanent investment court systems to replace the current ISDS system may prove successful in establishing a binding system of precedents, or as near thereto as is possible under international law, to further the aim of a consistent and uniformly applied set of international legal rules. The ICS, a general description and explanation of which has been provided in Chapter 3 when considering the CETA, and a system which is at present being promoted and its development spearheaded by the EU[1272], will likely yield in case law that is more consistent and deferential to previously decided cases, even those that do not go through the appellate tribunal process. A judicial process of dispute determination, by its nature, will most likely produce more consistent decisions than one would usually expect to see yielded from the ISDS system. The ICS will therefore assist establish a more predictable and fairly applied system of law. It is unclear, however, whether the non-EU states will follow in the EU's footsteps and similarly adopt the ICS to replace the current ISDS system, whether in respect of their treaties with the EU/EU states, or in their treaties with other third states. Should different approaches be taken in respect of investor-state disputes, it will only advance the pace of fragmentation of international law. Extremely difficult it may be, any attempt to create a globally/widely applicable precedential dispute settlement mechanism requires the support and backing of a large collection of capital importing and exporting states for it to be successful and durable.

In summary, the above recommendations should, standalone or in combination, be seriously considered and further analysed to assist in revising the current ISDS system and creating one that addresses the serious issue of fragmentation of international law, particularly in respect of moral damages. The ultimate task of ensuring convergence is, admittedly, not an easy one, especially given that the current tide of investment awards run contrary, and the path to convergence seems laden with difficulties and obstacles. However, that is certainly no reason to refrain from taking the first step towards development. As the great general once said,

[1270] Schreuer (n 173) 901.
[1271] See August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19 Journal of International Economic Law 761.
[1272] ibid.

"…*upon the conduct of each depends the fate of all*"; accordingly, the various disciplines of international law must come together in support and be aligned with one another to ensure the continuance of the international legal order for the years to come.

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