

WTO Litigation, Investment Arbitration, and Commercial Arbitration

Edited by

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CHAPTER 10

Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation

Bernd Ehle & Martin Dawidowicz

§10.01 INTRODUCTION: THE NOTION OF ‘MORAL DAMAGES’

In all legal systems damages are intended to compensate a person for loss or injury. In principle, the loss or injury is tangible and as such compensable in monetary terms. In addition, as the International Centre for the Settlement of Investment Disputes (ICSID) tribunal in *DLP v. Yemen* observed, ‘it is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages’.¹ The same point was repeated by the ICSID tribunal in *Lemire v. Ukraine*.² The emergence of moral damages in international law was influenced by the corresponding evolution of a number of civil law codes introduced in the late nineteenth and the early twentieth century which provided for such a remedy.³ The function of moral damages is to provide monetary compensation, quantified on essentially equitable grounds, in order to remedy an intangible, non-material loss or injury, one that has no fair market value, but is nevertheless real. Moral damages thus provide a form of monetary compensation for intangible but nevertheless *actual* injury, but only in so far as they are financially

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1. *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, para. 289 (2008).
 2. *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, para. 476 (2010) (‘In most legal systems, damages which can be recovered by the aggrieved include not only the *damnum emergens* and *lucrum cessans*, but also moral damages’).
 3. Ladislav Reitzler, *La réparation comme conséquence de l’acte illicite en droit international* 129 (Sirey 1938). See also e.g. Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration* 44 (OUP 2011) (with further references).

assessable. In those instances where moral damages cannot be financially assessed, an injured party may instead be remedied by satisfaction through various forms of non-pecuniary relief.

Three broad types of moral damage can be distinguished.⁴ The first is non-material damage done to the personality rights of individuals. This is perhaps the most common and obvious form of moral damage recognized in most legal systems. The International Law Commission's (ILC) commentary to its Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) provides the following (non-exhaustive) examples of such moral damage: 'loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life'.⁵ At least in theory, this type of moral damage cannot be suffered by legal persons such as corporations or States. Second, moral damage may also result from a loss of reputation or credit as distinct from purely material loss.⁶ Third, moral damage may result from so-called 'legal damage',⁷ i.e., the very fact of the violation of a legal obligation, irrespective of any material harm caused thereby.⁸

This contribution assesses the practice of awarding monetary or non-monetary relief for these broad types of moral damage in investment arbitration (section §10.03), commercial arbitration (section §10.04) as well as WTO litigation (section §10.05), and offers an assessment as to where and to what extent 'cross-fertilization' could or should take place. In so doing, this contribution examines both monetary and non-monetary reparation for moral damage, namely reparation through declaratory relief (declaration of wrongfulness), as the proper remedy for moral damage in certain circumstances.

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4. Sabahi, 136–137; Stephan Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 15 Finnish Y.B.I.L. 321, 329–330 (2004).
 5. See International Law Commission, Commentary to the Draft Articles on Responsibility of States of Internationally Wrongful Acts [ARSIWA Commentary], Arts 31, para. 5, and Art. 36, para. 16, in *Report of the International Law Commission*, 2(2) Y.B.I.L.C. (2001, 53d sess.), UN GAOR, 56th sess., Supp. No. 10, UN Doc. A/56/10. For a more comprehensive list of examples, see also Wittich, 329–330.
 6. See, e.g., Sabahi, 136–137; Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* 309 (B.I.I.C.L. 2008); Wittich, 329; Patrick Dumberry, *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes*, 3 J. Int. Disp. Settlement 199, 208–209 (2012). For early recognition of this head of moral damage, see *Opinion in the Lusitania Cases*, 7 R.I.A.A. 32, 40 (US-Germany Mixed Claims Commission, 1932).
 7. See, e.g., *Case Concerning the Difference between New Zealand and France Concerning the Interpretation or Application of two Agreements, concluded on 9 Jul. 1986 between the Two States and which Related to the Problems Arising from the Rainbow Warrior Affair*, 20 R.I.A.A. 215, para. 123 (Ad hoc arbitration, 1990) [*Rainbow Warrior* arbitration]; Gaetano Arangio-Ruiz, *Second Report on State Responsibility*, para. 14(a), 2(1) Y.B.I.L.C. 1 (1989, 41st sess.), UN Doc. A/CN.4/425 & Corr.1 and Add.1 & Corr.1; Roberto Ago, *Third Report on State Responsibility*, para. 74, 2(1) Y.B.I.L.C. 199 (1971, 23d sess.), UN Doc. A/CN.4/246 and Add.1-3; Gerald Fitzmaurice, *The Case of the 'I'm Alone'*, 17 B.Y.I.L. 82, 109 (1936); Brigitte Stern, *Le préjudice dans la théorie de la responsabilité internationale* 33–34, 49 (Pedone 1973); Paul Reuter, *Le dommage comme condition de la responsabilité internationale*, in *Estudios de derecho internacional: Homenaje al Profesor Miaja de la Muela* 844 (vol. 2, Tecnos 1979); Ian Brownlie, *Principles of Public International Law* 459–460 (7th ed., OUP 2008); Sabahi, 137; Wittich, 330.
 8. See ARSIWA Commentary, Art. 37, para. 3. For influential early support, see Dionisio Anzilotti, *La responsabilité internationale des États à raison des dommages soufferts par des étrangers*, 13 Revue générale de droit international public 5 (1906).

However, the analysis cannot advance without an understanding of the role and function of moral damages in general international law. It is therefore to this issue that we turn first.

§10.02 MORAL DAMAGES AS A REMEDY IN INTERNATIONAL LAW

A useful starting point of any analysis of moral damages in international law is the well-established basic principle of ‘full reparation’ as codified in Article 31(1) ARSIWA.⁹ This principle was perhaps most famously affirmed by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* case:

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 re-establish the situation which would, in all probability, have existed if that act had not been committed.¹⁰

A few years earlier, the United States–Germany Mixed Claims Commission in *Lusitania* had already explained in similar terms that:

The fundamental concept of ‘damages’ is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.¹¹ (Emphasis in original.)

In principle, such full reparation – the main purpose of which is to ‘wipe out all the consequences of the illegal act’ – can take three forms: restitution, compensation and satisfaction, either singly or in combination.¹² The *Chorzów Factory* formula may thus in a given case require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.¹³

Article 31(2) ARSIWA has codified a further uncontroversial basic principle, namely that ‘there can be no doubt’¹⁴ that the injury for which reparation can be sought includes any material or moral damage caused by a breach. While the existence of actual loss or injury will be of utmost importance to determine the form and quantum of reparation, there is no general requirement under international law, absent a

9. See ARSIWA Commentary, Art. 31(1), para. 3.

10. *Case Concerning the Factory at Chorzów*, Merits, PCIJ, Ser. A, No. 17 2, at 47 (1928).

11. *Opinion in the Lusitania Cases*, 39. The passage was quoted with approval in *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, 14 ICSID Rep. 158, para. 401 (2005); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, para. 302 (2011).

12. The remedy of satisfaction may arguably also take the form of assurances or guarantees of non-repetition of wrongful conduct, although there is no indication in practice that parties in investment arbitration have shown any particular inclination to request such relief. See generally ARSIWA Commentary, Art. 30, paras 5 and 11, and Art. 37, para. 5.

13. See ARSIWA Commentary, Art. 34, para. 2. For an early example of double relief for moral damages (public apology and monetary compensation), see *The Borchgrave Case (Belgium v. Spain)*, Judgment on Preliminary Objections, PCIJ, Ser. A/B, No. 72 2, at 158 (1937).

14. *Opinion in the Lusitania Cases*, 40.

relevant primary obligation to the contrary,¹⁵ for an aggrieved party to have suffered material loss or injury before it can seek reparation for a breach.¹⁶ Moral damage must therefore, in principle, be repaired as any other head of loss or injury in international law.¹⁷

In those instances where moral damages are ‘financially assessable’¹⁸ within the meaning of Article 36(2) ARSIWA they must be compensated in monetary terms much like any other head of compensatory damages. While moral damages may admittedly be difficult to quantify in monetary terms (at least with any degree of precision) this makes them no less real.¹⁹ This point was famously made in emphatic terms by Umpire Parker in *Lusitania* and applies with equal force today:

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.²⁰

As Umpire Parker observed, “reparation” ... is measured by pecuniary standards, because, says Grotius, “money is the common measure of valuable things”.²¹ In terms of compensable heads of damage, *Lusitania* thus suggests that monetary compensation for non-material injury is available both for personal injury as well as loss of reputation and credit. Already in the *Fabiani* case, substantial moral damages were awarded by the French-Venezuelan Mixed Claims Commission as a result of a declaration of

15. The absence of any such primary rule (purporting to exclude moral damages) in the ICSID Convention and typical bilateral investment treaties has been confirmed in arbitral practice: see *Cementownia ‘Nowa Huta’ S.A. v. The Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, para. 169 (2009); *Desert Line Projects LLC v. The Republic of Yemen*, para. 289. With the possible exception of the *Energy Charter Treaty*, Art. 26(8) (17 Dec. 1994), 2080 U.N.T.S. 95, 34 I.L.M. 360 (1995), the authors of this contribution (like the tribunal in *DLP v. Yemen*) are not aware of any investment treaties which purport to exclude moral damages. In contrast, for modern examples of investment treaties which exclude punitive damages, see the 2012 US Model BIT, Art. 34(3), and the *North American Free Trade Agreement*, Art. 1135(3) (17 Dec. 1992), 32 I.L.M. 289, 605 (1993).

16. See ARSIWA Commentary, Art. 31, para. 7; *Rainbow Warrior* arbitration, paras 107, 109.

17. To similar effect, see, e.g., Sabahi, 141.

18. For a somewhat circular definition, see ARSIWA Commentary, Art. 36(2), para. 5, which defines financially assessable damage as ‘any damage which is capable of being evaluated in financial terms’.

19. The same difficulties of quantification could equally be said to apply to the assessment of certain damages for purely financial loss, including lost profit claims. For a general discussion, see Sabahi, 102–133.

20. *Opinion in the Lusitania Cases*, 40.

21. *Ibid.*, 35; Hugo Grotius, *De iure belli ac pacis libri tres* 437 (Clarendon Press 1925). See also to similar effect *Russian Indemnity* case, 11 R.I.A.A. 421, 440 (PCA, 1912) (‘It is certain, indeed, that all liability, whatever its origin, is finally valued in money and transformed into obligation to pay; it all ends, or can end, in the last analysis, in a monetary debt’).

personal bankruptcy and consequent loss of reputation.²² Likewise, the International Court of Justice (ICJ) in *Application for Review* confirmed obiter dictum that moral damage may result from the loss of ‘professional reputation and career prospects’.²³ The ICSID tribunal in *DLP v. Yemen* has made a similar point.²⁴

More recently, the ICJ in *Diallo* explicitly reaffirmed the position in *Lusitania*, clarifying simply that ‘quantification of compensation for non-material injury necessarily rests on equitable considerations’.²⁵ Any moral damage arising from an internationally wrongful act will normally be ‘financially assessable’ and hence in principle remedied in an equitable matter by monetary compensation in accordance with the well-established principle codified in Article 36 ARSIWA.²⁶

In those more uncommon situations where States suffer moral damage – or perhaps more aptly, ‘non-material injury’²⁷ – which is not financially assessable within the meaning of Article 36 ARSIWA, the non-pecuniary remedy of satisfaction is ‘well-established’²⁸ as codified in Article 37 ARSIWA. Satisfaction is intended to ensure that an injured State is made whole and receives full reparation in accordance with international law. This remedy is admittedly ‘not a standard form of reparation’²⁹ but nevertheless ‘it is generally considered the remedy *par excellence* in cases of non-material damage’³⁰ where the injured State cannot be made whole by restitution or compensation. Such moral damage is often of a purely symbolic or legal character; it does not result in any material loss or injury but is limited to the non-material injury arising from the very fact of the breach of the international obligation itself.

Article 37(2) ARSIWA provides that satisfaction may include ‘an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality’. The ILC commentary makes clear that these examples are merely illustrative as ‘[t]he appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance’.³¹ Thus many possibilities exist, but ‘one of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or

22. See Jackson H. Ralston, *Report of French-Venezuelan Mixed Claims Commission of 1902*, 182 (1906). For a discussion, see Francisco V. Garcia-Amador, Louis B. Sohn & Richard Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 116 (Oceana Publications 1974).

23. *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Rep. 1973, para. 59.

24. *Desert Line Projects LLC v. The Republic of Yemen*, para. 289.

25. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment on the compensation owed by the Democratic Republic of the Congo to the Republic of Guinea, para. 24 (ICJ, 2012). See also e.g. ARSIWA Commentary, Article 36, paras 16, 19; *Al-Jedda v. The United Kingdom*, Application No. 27021/08, para. 114 (ECtHR, 2011).

26. See ARSIWA Commentary, Art. 37, para. 3.

27. See *ibid.*, Art. 37, para. 4; International Law Commission, *Report of the International Law Commission* para. 154, Y.B.I.L.C. (2000, 52d sess.), UN Doc. A/55/10 [ILC Report 2000] (‘it was awkward to speak of moral damage in relation to States, since this appeared to attribute emotions, affronts and dignity to them’).

28. *Ibid.*

29. See ARSIWA Commentary, Art. 37, para. 1.

30. *Rainbow Warrior* arbitration, para. 112.

31. See ARSIWA Commentary, Art. 37, para. 5.

tribunal'.³² The PCIJ in *Factory at Chorzów (Interpretation)* described the purpose of declaratory relief more generally as follows:

The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.³³

Additionally, as Germany stressed before the ICJ in *LaGrand*, a second related function of a judicial declaration of wrongfulness is that it 'provides satisfaction to the injured party'.³⁴

Already in 1913, the Permanent Court of Arbitration (PCA) in the *Manouba* and *Carthage* cases observed that:

Whereas, in case a Power has failed to fulfil its obligations, whether general or special, to another Power, the statement of this fact, particularly in an arbitral award, constitutes in itself a severe penalty.³⁵

Similarly, in more recent times, the arbitral tribunal in *Rainbow Warrior* observed that '[t]here is no doubt both that this power exists and that it is seen as a significant sanction'.³⁶ Leaving aside whether a declaration of wrongfulness can truly be characterized as a 'significant sanction' in every case, what matters more in the first instance is that international law recognizes such a judicial remedy as a *possible* sanction in appropriate circumstances.

The ICJ in its very first case, *Corfu Channel*, included a declaration of wrongfulness in the operative part of the judgment as reparation for Albania's legal injury in that case.³⁷ In *Aerial Incident*, Israel requested that the ICJ include a declaration of wrongfulness as full reparation for its legal injury, but the Court did not pronounce on the issue for lack of jurisdiction.³⁸ More recently, in *Pulp Mills*,³⁹ *Certain Questions of Mutual Assistance in Criminal Matters*,⁴⁰ and *Bosnia Genocide*,⁴¹ the ICJ also included a declaration of wrongfulness in the operative part of the respective judgments as

32. See *ibid.*, Art. 37, para. 6.

33. *Interpretation of Judgments Nos. 7 and 8 Concerning the Case of the Factory at Chorzów*, Judgment, PCIJ Ser. A, No. 13, at 20 (1927).

34. See Memorial of the Federal Republic of Germany, vol. 1, para. 6.50 (16 Sep. 1999), submitted in *LaGrand (Germany v. United States of America)*, ICJ Rep. 2001, 466.

35. *The Manouba Case (France v. Italy)*, 11 R.I.A.A. 449, 460 (PCA, 1913) and *The Carthage Case (France v. Italy)* 11 R.I.A.A. 471, 475 (PCA, 1913). The tribunals in both cases considered a declaration of wrongfulness as a 'severe penalty' as compared to the possible remedy of nominal damages (of 1 French franc in the *cas d'espèce*) which was rejected.

36. *Rainbow Warrior* arbitration, para. 123.

37. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania) (Merits)*, ICJ Rep. 1949, 36; see also 35. The remedy for Albania's counter-claim as set out in the *compromis* was explicitly limited to satisfaction. While alluding in passing (and ostensibly *ultra vires*) to the possibility of a token payment at the hearing, Albania made no specific claim for pecuniary satisfaction but merely requested in unspecified terms 'the application of a moral sanction' (*ibid.*, Dissenting Opinion of Judge Azevedo, 113–114). Thus the only effective remedy available to the Court was satisfaction in the form of a declaration of wrongfulness.

38. *Aerial Incident (Israel v. Bulgaria)*, Judgment on Preliminary Objections, ICJ Rep. 1959, at 130 (1950) ('Whereas the Government of Israel has stated that a declaration by the Court regarding

appropriate satisfaction for legal injury, while in *Application of the Interim Accord*,⁴² the Court found a declaration of wrongfulness appropriate but nevertheless did not include it in the *dispositif*. Several other examples of ICJ and inter-State arbitral practice can be mentioned.⁴³ In short, there is ample and long-standing evidence in judicial practice to confirm that, as a matter of general international law, '[r]eparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right'.⁴⁴

Another form of satisfaction, sometimes described as 'pecuniary satisfaction',⁴⁵ is more controversial. This is so not only because judicial practice is rather limited but also because the analytical distinction with monetary compensation is somewhat blurred posing a risk of double counting (i.e., reparation over and above the *Chorzów Factory* formula).⁴⁶ Two types of pecuniary satisfaction should be distinguished, namely, nominal and more substantial damages. Scholarly opinion remains divided in relation to the availability of both types of damages.⁴⁷ However, it seems that whatever the proper analytical basis and corresponding denomination, there is no *a priori* reason

the international responsibility of Bulgaria, as contained in Submission No. 1 [re: purely legal injury], would be sufficient satisfaction and that it was waiving any further claim to reparation').

39. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Rep. 2010, paras 269, 282(1).
40. *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ Rep. 2008, paras 204, 205(2)(a).
41. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, paras 463, 465, 469, 471(9) [*Bosnia Genocide*].
42. *Application of the Interim Accord of 13 Sep. 1995 (Former Yugoslav Republic of Macedonia v. Greece)*, paras 168–169 (2011), <http://www.icj-cij.org/docket/files/142/16827.pdf> (accessed 28 Oct. 2012).
43. See *LaGrand (Germany v. United States of America)*, para. 128(6) (assurances and guarantees of non-repetition were deemed adequate satisfaction for legal injury); *Arrest Warrant of 11 Apr. 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Rep. 2002, para. 75; *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea intervening)*, ICJ Rep. 2002, para. 319; *Guyana v. Surinam*, Award, paras 450–452, 485–486, 488(3) (PCA, 2007), http://www.pca-cpa.org/showfile.asp?fil_id=664 (accessed 28 Oct. 2012); *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, 38 I.L.M. 1323, para. 176 (ITLOS, 1999).
44. *M/V 'Saiga' (No. 2)*, para. 171; *Guyana v. Surinam*, para. 485.
45. See, e.g., Brownlie, 461; Christine Gray, *Judicial Remedies in International Law* 42 (Clarendon Press 1987); Arangio-Ruiz, para. 107.
46. See, e.g., ILC Report 2000, para. 211; Eric Wyler & Alain Papaux, *The Different Forms of Reparation: Satisfaction*, in *The Law of International Responsibility* 631 (James Crawford, Alain Pellet & Simon Olleson eds., OUP 2010); Brownlie, 461; Sabahi, 145; Arangio-Ruiz, paras 14–17, 137–138; Gray, 33–34. The monetary compensation awarded to New Zealand in *Rainbow Warrior* could be mentioned as an example of possible double counting; see *Case Concerning the Differences between New Zealand and France Arising from the Rainbow Warrior Affair*, Ruling of 6 Jul. 1986 by the Secretary-General of the United Nations [Rainbow Warrior UNSG Ruling], 19 R.I.A.A. 199, 213 (1986). See further James Crawford, *Third Report on State Responsibility* para. 170, 2 Y.B.I.L.C. 50 (2000), UN Doc. A/CN.4/507/Add.1; Arangio-Ruiz, para. 138.
47. For a useful summary of the debate see Wittich, 351–363; Gray, 85–95 (both with many further references).

to exclude monetary compensation for non-material injury done to a State.⁴⁸ As the relevant part of the ILC commentary to Article 36 ARSIWA observes:

[i]t is true that monetary payments may be called for by way of satisfaction under Article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.⁴⁹

Thus the function of ‘pecuniary satisfaction’ may be distinct from compensation but it could nevertheless still be called for in appropriate circumstances. This reading finds support in the ILC commentary to Article 37 ARSIWA.⁵⁰ Though limited, practice appears to further bear out this conclusion.

International arbitral tribunals have on rare occasions awarded nominal damages, including in ICSID arbitration,⁵¹ but it is unclear in any event what (if any) purpose such a remedy would serve above and beyond the more ‘significant sanction’ of a declaration of wrongfulness⁵² – as we noted above, a point already emphasized a century ago by the PCA tribunals in the *Manouba* and *Carthage* cases. Still, in *Bosnia Genocide*, Bosnia and Herzegovina asked the ICJ to award it ‘symbolic compensation’ following Serbia’s failure to comply with provisional measures ordered by the Court in that case.⁵³ Similarly, in a rare inter-State BIT arbitration, Italy evidently found it useful to claim from Cuba:

the symbolic amount of 1 euro for the continued and reiterated violation of the terms, the spirit, and the purposes of the BIT, and the refusal, the indifference and the silence by the Cuban authorities vis-à-vis the innumerable diplomatic initiatives directed at the amicable settlement of the disputes concerning the Italian investors.⁵⁴

48. See, e.g., ARSIWA Commentary, Art. 37, para. 5; Crawford, *Third Report on State Responsibility*, para. 191; Wittich, 367; see also Turkey’s position in *Cementownia ‘Nowa Huta’ S.A. v. Republic of Turkey*, para. 165. For the view that pecuniary satisfaction is available to foreign investors for purely legal injury, see *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Concurring and Dissenting Opinion of Mr Gary Born, ICSID Case No. ARB/05/22, paras 32-33 (2008).

49. See ARSIWA Commentary, Art. 36, para. 4.

50. See ARSIWA Commentary, Art. 37, para. 5 (referencing as a mode of satisfaction, ‘the award of symbolic damages for non-pecuniary injury’). As examples, the commentary points to the *‘I’m Alone’* and *Rainbow Warrior* cases, where the damages awarded were substantial. This suggests (albeit somewhat confusingly) that both nominal and more substantial monetary damages are admissible forms of satisfaction within the meaning of Art. 37 ARSIWA.

51. See *AGIP Spa. v. The Government of the People’s Republic of the Congo*, ICSID Case No. ARB/77/1, 329 (1979), where an ICSID tribunal curiously awarded 3 French francs as compensation for lost profit.

52. For a rare inter-State example, see the *Lighthouses Arbitration (France/Greece)*, 12 R.I.A.A. 155, 216 (PCA, 1956). For further historical examples from practice see Gray, 28–29.

53. *Bosnia Genocide*, para. 65(7). The Court rejected the claim for lack of a sufficient causal nexus between Serbia’s violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica. The Court instead ruled that a declaration of wrongfulness was an appropriate form of satisfaction (*ibid.*, paras 462, 471(9)).

54. See *Republic of Italy v. Republic of Cuba*, Interim Award, para. 34 (Ad hoc arbitration, 2005) (translation supplied); see also *ibid.*, Final Award, para. 246 (Ad hoc arbitration, 2008),

Having rejected all of Italy's claims on jurisdictional grounds and on the merits, the tribunal dismissed the claim for nominal damages without any further discussion.⁵⁵

At least compared to nominal damages, claims for more substantial damages as pecuniary satisfaction in inter-State cases have been more common. In 1905, the French-Venezuelan Mixed Claims Commission in *Heirs of Jean Maninat* awarded France 100,000 Francs in pecuniary satisfaction for the legal (non-material) injury it was itself deemed to have suffered as a result of the violent death of one of its nationals during unrest in Venezuela.⁵⁶ In the 1930s, the arbitral tribunal in the '*I'm Alone*' case recommended that the United States should pay Canada USD 25,000 'as a material amend in respect of the wrong' done to Canada in her capacity as flag State following the sinking of a Canadian ship by the US coast guard.⁵⁷

In more recent times, the UN Secretary-General awarded New Zealand the sum of USD 7 million in *Rainbow Warrior* as compensation for all the damage it was deemed to have suffered, including moral damage for 'the violation of sovereignty and the affront and insult that that involved'.⁵⁸ In the same case, the arbitral tribunal explicitly affirmed a right to pecuniary satisfaction:

The Tribunal next considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is not material damage.⁵⁹

The tribunal immediately went on to explain that '[i]t is true that such orders are unusual but one explanation of that is that these requests are rare ... [and] ... the Tribunal can understand that position in terms of an assessment made by a State of its dignity and its sovereign rights'.⁶⁰ Thus the putative scarcity of practice does not appear to arise from a sense of States' legal conviction (*opinio juris*) but rather from a more acute sense of political convenience.

In *M/V 'Saiga' (No. 2)*, Saint Vincent and the Grenadines requested unspecified monetary compensation from Guinea for the violation of its rights in respect of ships flying its flag occasioned by the Guinean arrest and detention of the '*Saiga*'. The claim was unsuccessful as the International Tribunal for the Law of the Sea (ITLOS) considered that its declaration that Guinea had acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate satisfaction.⁶¹

<http://italaw.com/cases/documents/581>. See further Michele Potestà, *Republic of Italy v. Republic of Cuba*, 106 A.J.I.L 341, 341–347 (2012); Enrico Milano, *The Investment Arbitration Between Italy and Cuba: The Application of Customary International Law Under Scrutiny*, 11(3) L.P.I.C.T. 1 (2012).

55. *Republic of Italy v. Republic of Cuba*, Final Award, paras 246–247, 103.

56. *Heirs of Jean Maninat Case*, 10 R.I.A.A. 55, 81–83 (France-Venezuela Mixed Claims Commission, 1905). For a brief discussion, see Wittich, 356.

57. S.S. '*I'm Alone*' (*Canada v. United States*), 3 R.I.A.A. 1609, 1618 (Ad hoc arbitration, 1933 and 1935). See further Fitzmaurice, 82; Gray, 43–44.

58. *Rainbow Warrior* UNSG Ruling, 202, 213.

59. *Rainbow Warrior* arbitration, para. 118.

60. *Ibid.*, paras 118–119.

61. *M/V 'Saiga' (No. 2)*, paras 30(1), 136, 159, 176. See further ARSIWA Commentary, Art. 36, para. 10.

In *Land and Maritime Boundary between Cameroon and Nigeria*, Cameroon requested pecuniary satisfaction ‘in an amount to be determined by the [ICJ]’⁶² from Nigeria for occupation of territory that the Court had ruled appertained to Cameroon. The ICJ did not award pecuniary satisfaction as it considered that Cameroon’s claims had been ‘sufficiently addressed’⁶³ by the Court’s declaratory judgment (indicating that Cameroon had title over the disputed territory) and the evacuation order of the Cameroonian territory occupied by Nigeria included in the *dispositif*. The issue of Nigeria’s potential responsibility (including forms of full reparation) towards Cameroon therefore did not arise.⁶⁴ In other words, a declaratory judgment sufficed to ‘satisfy’ Cameroon’s request for relief.

Finally, in *Guyana v. Surinam*, Guyana claimed approximately USD 34 million in pecuniary satisfaction for various alleged serious violations of international law committed by Surinam following an armed incident at an offshore drilling rig in disputed maritime territory.⁶⁵ Guyana claimed ‘compensation for losses occasioned by the adverse effect of Surinam’s actions on Guyana’s standing as a nation’.⁶⁶ While the PCA tribunal in this case (controversially) declared in the operative part of the award that the actions of Surinam violated the prohibition on the use of force under international law, it rejected the substantial claim of pecuniary satisfaction for lack of evidence.⁶⁷

In sum, the *Rainbow Warrior* case is admittedly the only case in modern times in which an international tribunal has explicitly affirmed a right of pecuniary satisfaction. However, there is substantial and growing practice developed over the course of at least a century to suggest that States (whenever appropriate) are claiming pecuniary satisfaction before international tribunals as of right. It is also noteworthy that no tribunal to date has rejected the remedy as a matter of principle. Similarly, it appears that no party (with the notable exception of France in *Rainbow Warrior*)⁶⁸ has questioned the general right of a party to be awarded moral damages in appropriate circumstances.

§10.03 MORAL DAMAGES AS A REMEDY IN INVESTMENT ARBITRATION

While it is still relatively uncommon for investment tribunals to award moral damages (whether in the form of compensation, a declaration of wrongfulness, or a combination of both), it is not uncommon for parties in investment arbitration to request such damages as a specific form of relief. Indeed, modern practice suggests that these

62. *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea intervening)*, para. 25(e’).

63. *Ibid.*, para. 319.

64. *Ibid.*, paras 25(e’), 319, 325(D).

65. *Guyana v. Surinam*, paras 157, 263, 266, 401 (2007).

66. *Ibid.*, para. 266.

67. *Ibid.*, paras 452, 488(2).

68. *Rainbow Warrior* arbitration, para. 112.

requests are increasingly common – as witnessed most recently by the claimant’s (unsuccessful) claim for moral damages before an ICSID tribunal in *The Rompetrol Group N.V. v. Romania*.⁶⁹

[A] Moral Damages Requested by (and Sometimes Awarded to) Foreign Investors

In *LAFICO v. Burundi*,⁷⁰ a Libyan State-owned company investing in Burundi requested moral damages occasioned by Burundi, in 1989, breaking off diplomatic relations with Libya, and as a result, ordering the expulsion of all Libyan nationals from its territory, including two senior members of LAFICO’s management. The company itself was also prohibited from continuing its business activities in Burundi. The matter went to arbitration where LAFICO *inter alia* claimed USD 3 million for the non-pecuniary losses suffered by the company and its two senior managers. In 1991, an ad hoc tribunal found that the mass expulsions violated international law and approved the claim for moral damages on the basis that:

the actions of the government of Burundi caused serious harm to the *reputation and honour* of LAFICO which always behaved as a loyal partner ... following current international practice ... the finding in the award that the behaviour of Burundi constituted an unlawful act from the standpoint of international law itself constitutes appropriate satisfaction for LAFICO as a legal body.⁷¹ (Emphasis added.)

In addition to the declaration of wrongfulness, the tribunal also awarded USD 10,000 as monetary compensation for non-material injury to account for the fact that:

the accusation against all Libyan nationals contained in the *Note verbale* of 5 April, 1989 [i.e. that Libyans had participated in activities that threatened the peace and security of Burundi], which implicitly and without just cause, affected [the two senior managers] and [their] expulsion at forty-four hours’ notice caused non-pecuniary loss and prejudice to the honour of the person[s] concerned.⁷²

Perhaps most famously, an ICSID tribunal in 2008 for the first time awarded moral damages of USD 1 million to the claimant in *DLP v. Yemen*.⁷³ It is therefore useful to consider this case in a bit more detail. In this case, an Omani construction company requested moral damages of USD 100 million under the Oman-Yemen BIT in particularly egregious circumstances. The claimant had been contracted by the Yemeni government to construct several asphalt roads. The claimant completed most of the

69. *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, paras 289–293 (2013).

70. *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi (Dispute concerning the Libyan Arab-Burundi Holding Company)*, 96 I.L.R. 279 (1991). For a discussion, see Dumberry, 221–223.

71. *Ibid.*, 329.

72. *Ibid.*, 329–330.

73. The earlier ICSID awards of moral damages in *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo and AGIP Spa. v. The Government of the People’s Republic of the Congo* were both based on Congolese law, not international law.

works but was never paid resulting in financial distress, unpaid debts to sub-contractors and the on-off suspension of outstanding works. Yemeni sub-contractors appeared at the site of the works demanding payment of outstanding invoices and (for good measure) threatened the company's personnel by opening fire with automatic weapons. The company urged the President of Yemen to provide full protection and security in order to 'protect lives'. Yemen's reply was: '[p]erform the works and don't worry; your rights will be paid ...', but to no avail.⁷⁴

The claimant (again) interrupted the outstanding works, and in response Yemeni armed forces occupied the site preventing the evacuation of the company's personnel and equipment. The incident was temporarily resolved and the parties referred the contractual dispute to local arbitration in Yemen. An award for damages of about USD 41 million was rendered in favour of the company. The award was not paid; instead three of the company's personnel were temporarily arrested. Armed groups continued their campaign of 'harassment, threat and theft' against company personnel and equipment. Instead of offering full protection and security as required by the applicable BIT, the Yemeni government in peremptory language forced the company into signing away half the value of the award in a final settlement agreement ultimately resulting in the claims for moral damages of USD 100 million brought before the ICSID tribunal.⁷⁵ The claimant justified its request for relief as follows:

Based on international law, the Claimant claims the amount of OR 40,000,000 [ca. USD 100 million] for moral damages including loss of reputation. The Claimant states that it has suffered extensive moral damages as a result of the Respondent's breaches of its obligations under the BIT: the Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes; the Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant's executives have been intimidated by the Respondent in relation to the Contracts ...⁷⁶

For its part, Yemen indicated that:

[i]f any Party has suffered any moral damages, it is the Respondent which has been faced with a spurious allegation of coercion and whose President has been subject to abusive, threatening and unjustified letters from the Claimant's Chairman.⁷⁷

Far from questioning the availability of moral damages in investment arbitration, Yemen instead suggested (albeit in passing) that it was itself entitled to such relief.⁷⁸

The tribunal indicated that moral damages, though intangible, are nevertheless 'very real' and available in 'exceptional [factual] circumstances'.⁷⁹ It further observed that '[i]t is also generally recognized that a *legal person* (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances

74. For the factual background see generally *DLP v. Yemen*, paras 3–49.

75. *Ibid.*

76. *Ibid.*, para. 286.

77. *Ibid.*, para. 288.

78. *Ibid.*, para. 289.

79. *Ibid.*

only⁸⁰ (emphasis added). On the facts of the case, the tribunal found that ‘the physical duress exerted on the executives of the Claimant, was malicious and ... constitutive of a fault-based liability ... the prejudice was substantial as it affected the physical health of the Claimant’s executives and the Claimant’s credit and reputation’.⁸¹ While the tribunal found the claim for USD 100 million ‘exaggerated’ it held that ‘an amount of USD 1,000,000 should be granted for moral damages, including loss of reputation ... [an] amount more than symbolic yet modest in proportion to the vastness of the project’.⁸²

It is not the purpose of this contribution to offer a detailed assessment of this case. A few brief observations are nevertheless warranted. In particular, it is doubtful as a matter of principle whether moral damages are only available in ‘exceptional circumstances’ on the basis of ‘fault-based liability’. First, Article 1 ARSIWA indicates that international responsibility is objective: ‘every internationally wrongful act of a State entails the international responsibility of that State’. Second, Article 31(1) ARSIWA provides that the responsible State is under an obligation to provide full reparation for every breach of international law. Third, Article 31(2) ARSIWA provides that ‘injury includes any damage, whether material or moral, *caused* by the internationally wrongful act of a State’ (emphasis added).

What matters in the first place for the availability of moral damages is therefore ‘the existence of a *causal link* between the internationally wrongful act and the injury’ (emphasis added).⁸³ As the ILC commentary makes clear, ‘causality ... is a necessary but not a sufficient condition for reparation’: the remoteness of damage is ultimately decisive.⁸⁴ Thus exclusionary notions such as ‘remoteness’, ‘foreseeability’ or ‘proximity’ to the (moral) injury are highly relevant.⁸⁵ This is not to say that other factors such as deliberate acts of harm may not be relevant.⁸⁶ But it seems that this is principally so because a deliberate act of harm makes the injury all the more ‘foreseeable’ and ‘proximate’ to the breach. The relevant test for the availability of moral damages in a given case could therefore perhaps be described as requiring a ‘sufficient causal link which is not too remote’.⁸⁷ It may be that this is what the *DLP* tribunal had in mind when it alluded to ‘fault-based liability’ although it certainly did not say so explicitly.

In *Funnekotter v. Zimbabwe*, an ICSID tribunal held that ‘the Claimants must obtain reparation for the disturbances resulting from the taking over of their farms and

80. *Ibid.*

81. *Ibid.*, para. 290.

82. *Ibid.*; see also at 69. In support of its substantial claim (amounting to one third of the total claimed amount), the Claimant relied on the very substantial award of moral damages in the *Fabiani* case (Ralston, 182) following a declaration of bankruptcy and consequent loss of reputation.

83. See ARSIWA Commentary, Art. 31, para. 9.

84. *Ibid.*, para. 10.

85. *Ibid.*

86. *Ibid.*

87. *Ibid.* See also the analysis in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Award, paras 779 ff. (2008); *Lauder v. The Czech Republic*, Final Award, para. 235 (UNCITRAL ad hoc arbitration, 2001), <http://italaw.com/cases/documents/611> (accessed 28 Oct. 2012).

for the necessity for them to start a new life often in another country. It evaluates the moral damages suffered in this respect for each Claimant at 20,000 Euros'.⁸⁸ In *Pey Casado v. Chile*, an ICSID tribunal dismissed the claimant's request for moral damages in the form of monetary compensation for lack of evidence and in any event held that a declaration of wrongfulness constituted adequate satisfaction.⁸⁹

Lemire v. Ukraine is another important recent case where the tribunal considered the issue of moral damages in some detail.⁹⁰ In this case, the claimant, a US investor in the Ukrainian radio industry, requested USD 3 million in moral damages as compensation for alleged harassment resulting *inter alia* in humiliation and loss of reputation occasioned by the 'Ukrainian authorities' desire to get rid of an annoying American investor, by systematically denying any application for further frequencies, thwarting plans to create new channels, and harassing him with irregular inspections and difficulties for the renewal of his licence'.⁹¹ In essence, the claimant alleged that Ukraine had demonstrated:

systematic bias ... by reject[ing] the 200 applications made by the [Gala] radio station for new frequencies, jeopardizing Gala's plans to expand its activities, but it also maliciously subjected Gala to a series of inspections, with the hidden agenda to close it down, and then in bad faith delayed the renewal of the licence, until a new regulation had come into force, which increased the renewal fee by 10.⁹²

The tribunal reaffirmed the position adopted in *DLP v. Yemen* stating that 'moral damages may be awarded, but only in exceptional circumstances'.⁹³ Such relief could accordingly be provided in 'exceptional circumstances' if:

- 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.⁹⁴

On the facts of the case, the tribunal dismissed the claimant's various personal injury claims (stress, humiliation, anxiety, etc.) but did acknowledge that a loss of business reputation had probably occurred. But this was not sufficient: the 'extraordinary

88. *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, paras 138–140 (2009). The five claimants had requested moral damages of EUR 100,000 each (*ibid.*).

89. *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, 6 ICSID Rep. 375, para. 704 (2008). For the view that satisfaction is not an available remedy to foreign investors, see *CMS Gas Transmission Company v. The Argentine Republic*, para. 399.

90. *Joseph Charles Lemire v. Ukraine*, Award (2011).

91. *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, para. 449 (2010); see also para. 475; *ibid.*, Award, para. 315.

92. *Ibid.*, Decision on Jurisdiction and Liability, para. 479.

93. *Joseph Charles Lemire v. Ukraine*, Award, para. 326.

94. *Ibid.*, para. 333.

tests⁹⁵ (as outlined above) required for an award of moral damages had not been met as the injury was not deemed ‘substantial’.⁹⁶ The tribunal accordingly denied monetary compensation for non-material injury on that basis.⁹⁷ In terms of relief it concluded:

the acknowledgement in the First Decision [on jurisdiction and liability] that Ukraine has indeed breached the BIT, and the present award of substantial compensation, are elements of redress which may significantly repair Mr. Lemire’s loss of reputation.⁹⁸

Thus a declaration of wrongfulness was deemed appropriate satisfaction for the claimant’s moral damage.

In terms of the tribunal’s analysis of the availability of moral damages, the same observations made above regarding *DLP v. Yemen* apply. There is no clear basis under international law for the proposition that moral damages are limited to ‘exceptional circumstances’ where ‘both cause and effect [must be] grave or substantial’. There is no *lex specialis* to suggest this in foreign investment law – a point implicitly recognized in *DLP v. Yemen* and *Cementownia ‘Nowa Huta’ S.A. v. Turkey*.⁹⁹ In short, the (residual) secondary rules of State responsibility under general international law apply and the key issue appears to be one of causation and proximity of the breach. Once the *Lemire* tribunal accepted as fact the claimant’s loss of reputation, it seems that the availability of moral damages for this non-material injury 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 which is not too remote’ could be established.

In at least six other cases, foreign investors have (twice successfully) made claims for moral damages, often on the basis of a loss of reputation and/or coercive and threatening acts by the host State, under various applicable national laws governing the settlement of the respective disputes.¹⁰⁰ As an illustration, in *Zhinvali Development Ltd. v. Georgia*,¹⁰¹ the claims were dismissed for lack of jurisdiction. Still, Ambassador Jacovides suggested in a separate opinion that under Georgian law ‘[a] plausible case can be made also for the award of moral damages, even at minimal or nominal amount,

95. *Ibid.*, para. 344.

96. *Ibid.*, paras 338–339.

97. *Ibid.*, para. 344.

98. *Ibid.*, para. 339.

99. *Cementownia ‘Nowa Huta’ S.A. v. Republic of Turkey*, para. 169; *Desert Line Projects LLC v. The Republic of Yemen*, para. 289.

100. See *AGIP Spa. v. The Government of the People’s Republic of the Congo*, 329 (moral damages of 5,000,000 CFA awarded, ca. EUR 7,600; Congolese law applicable); *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, paras 4.3, 4.96 (1980) (nominal damages of 3 French francs awarded; Congolese law applicable); *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 95 I.L.R. 184, at 203 (UNCITRAL ad hoc arbitration, 1989) (moral damages denied; Ghanaian law applicable); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (2003), 44 I.L.M. 404 (2005), para. 17.6 (moral damages denied; Ukrainian law applicable); *Yury Bogdanov v. Republic of Moldova*, Final Award, SCC Arbitration No. V, 114/2009, para. 98 (2010) (moral damages denied; Moldovan law applicable); *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, 10 ICSID Rep. 3, paras 278, 363 ff. (2003) (lack of jurisdiction; Georgian law applicable).

101. *Zhinvali Development Ltd. v. Republic of Georgia*, 6.

to compensate the constitute parts of ZDL ... for injury to their professional reputations vis-à-vis potential lenders/investors'.¹⁰² As a multitude of other recent examples indicates, foreign investors are increasingly requesting moral damages in order to obtain full reparation for alleged breaches of international law.¹⁰³

[B] Moral Damages Requested by (and Sometimes Awarded to) States

Claims for moral damages have also been made and sometimes awarded to States in investment arbitration. Two cases merit particular attention. First, in *Europe Cement v. Turkey*, Turkey was not content to merely request that the case be dismissed on jurisdictional grounds: it also requested a specific declaration indicating that 'the claim is manifestly ill-founded, and has been asserted using inauthentic documents'.¹⁰⁴ In other words, Turkey was essentially requesting a declaration that there had been an

102. *Ibid.*, Separate Opinion of Andreas Jacovides, para. 31.

103. See *Spyridon Roussalis v. Romania*, para. 550 (claim of USD 25 million in moral damages rejected on multiple grounds); *Bidzina Ivanishvili v. Georgia*, ICSID Case No. ARB/12/27 (registered in 2012); Global Arbitration Review (GAR), News, 'Georgian Political Battle Escalates' (20 Aug. 2012), <http://www.globalarbitrationreview.com/news/article/30769/> (accessed 28 Oct. 2012); *Telefónica S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/12/4 (registered in 2012); see GAR News, 'Mexico Hit by Billion-Dollar Telecoms Claim' (26 Jun. 2012), <http://www.globalarbitrationreview.com/news/article/30635/mexico-hit-billion-dollar-telecoms-claim/> (accessed 28 Oct. 2012); *Oxus Gold v. Uzbekistan* (UNCITRAL ad hoc arbitration, Notice of Intent filed in 2011), <http://italaw.com/sites/default/files/case-documents/ita0589.pdf> (accessed 28 Oct. 2012); see GAR News, 'Gold Mining Arbitration Gets Under Way in Geneva' (8 Feb. 2012), <http://www.globalarbitrationreview.com/news/article/30152/gold-mining-arbitration-gets-geneva/> (accessed 28 Oct. 2012); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33 (registered in 2011); see GAR News, 'US Limestone Investor Sues Oman' (13 Dec. 2011), <http://www.globalarbitrationreview.com/b/30037/> (accessed 28 Oct. 2012); *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4 (registered in 2010); see GAR News, 'Lebanese Nationals File against DRC' (22 Feb. 2010), <http://www.globalarbitrationreview.com/news/article/27746/> (accessed 28 Oct. 2012); *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9 (registered in 2009); see GAR News, 'ICSID Registers Claim against Turkmenistan' (27 May 2009), <http://www.globalarbitrationreview.com/news/article/16035/icsid-registers-claim-against-turkmenistan/> (accessed 28 Oct. 2012); *Trinh Vinh Binh v. Vietnam* (UNCITRAL ad hoc arbitration, 2007), unpublished settlement; see Ian Laird & Todd Weiler (eds.), *Investment Treaty Arbitration and International Law* 239 (vol. 3, Juris 2010) (intervention by Wade Coriell); Luke E. Peterson, *The Future of Moral Damages in Investment Treaty Arbitration*, Kluwer Arbitration Blog (14 Apr. 2009), <http://kluwerarbitrationblog.com/blog/2009/04/14/the-future-of-moral-damages-in-investment-treaty-arbitration/> (accessed 28 Oct. 2012); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, para. 89 (2008) (claim of EUR 10 million in moral damages; jurisdiction denied); *Technicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2 (2003), 19 ICSID Rev.—FILJ 158 (2004), para. 198; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, paras 505, 547 (2009).

104. *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, paras 123, 128 (2009).

abuse of process.¹⁰⁵ In addition, Turkey claimed USD 1 million in monetary compensation for the reputational harm done to its international standing that the fraudulent claim was deemed to have caused it.¹⁰⁶

In support of this additional claim for moral damages, Turkey argued that ‘the effect of a declaration was narrow’ as the ‘future preclusive effect is limited to the parties to the proceeding in which the declaration is issued’.¹⁰⁷ Moreover, Turkey argued that ‘monetary damages was an established remedy for moral damage’ (i.e., including for States) and that the claimant in this case in bringing a “jurisdictionally baseless claim asserted in bad faith and for an improper purpose” had caused the Republic of Turkey “intangible but no less real loss”.¹⁰⁸ Turkey added that, even if the award were never to be paid, an order for moral damages would still provide it with ‘a form of satisfaction’.¹⁰⁹ For its part, the claimant argued that declaratory relief as a form of moral damages made more sense in inter-State cases and had less relevance in investment arbitration but (while denying its application on the facts of the case) nevertheless accepted as a matter of principle that an investment tribunal could award such relief.¹¹⁰

On the request for a declaration, the tribunal found that there had been abuse of process as the claim was deemed fraudulent. However, since the tribunal had set this out clearly in the award there was no need for a separate declaration.¹¹¹ The claim for monetary compensation was denied as no ‘exceptional circumstances’ (such as physical duress) justified moral damages.¹¹² In any event, the tribunal held that any potential reputational damage suffered by Turkey was remedied by the reasoning and conclusions set out in the award and the award on costs. This relief provided ‘a form of “satisfaction”’ to Turkey.¹¹³

Second, in *Cementownia ‘Nowa Huta’ S.A. v. Turkey*, Turkey again asked for the same double relief in a nearly identical case.¹¹⁴ Thus Turkey asked for a formal declaration that the claimant’s case was ‘manifestly ill-founded, and has been asserted using inauthentic documents’¹¹⁵ (emphasis in the original), as well as unspecified monetary compensation for moral damage done to its ‘international stature and reputation’¹¹⁶ as a result of ‘spurious allegations’¹¹⁷ and a fraudulent claim. In relation to the latter claim, Turkey observed that tribunals applying international law may award to a State the remedy of satisfaction to restore moral damage done to its reputation or prestige. It added that while monetary compensation for such damage in

105. *Ibid.*, para. 147.

106. *Ibid.*, para. 128.

107. *Ibid.*

108. *Ibid.*

109. *Ibid.*, para. 135.

110. *Ibid.*, paras 130, 148.

111. *Ibid.*, para. 176.

112. *Ibid.*, para. 181.

113. *Ibid.*

114. *Cementownia ‘Nowa Huta’ S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2 (2009).

115. *Ibid.*, para. 75.

116. *Ibid.*, paras 75, 165.

117. *Ibid.*, para. 165.

ICSID arbitration had heretofore only been awarded to investors, ‘*there is no principal reason why equivalent relief* [i.e. pecuniary satisfaction] *should not be available to the respondent State in an appropriate case.* The Respondent therefore requests an award of [moral] damages separate from and additional to a costs award’ (emphasis in the original).¹¹⁸

As in *Europe Cement*, the tribunal found that the claim was ‘manifestly ill-founded’.¹¹⁹

the Claimant has intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case. This constitutes indeed an abuse of process. In addition, the Claimant is guilty of procedural misconduct: once the arbitration proceeding was commenced, it has caused excessive delays and thereby increased the costs of the arbitration.¹²⁰

The tribunal indicated that the abuse of process originated in the fact that the claimant had (1) pursued the arbitration for two and a half years without being an investor; (2) invented *post factum* the underlying transaction and the transfer of shares in the alleged investment in order to gain access to international jurisdiction where none existed; (3) on numerous occasions caused excessive delays to the conduct of the proceedings through dilatory tactics; (4) constantly changed its request for relief and in the 11th hour agreed to dismiss the case on a without prejudice basis; and (5) pursued the claim (initially valued at USD 4 billion) through an empty shell company the purpose of which was to avoid an adverse award on costs.¹²¹

The tribunal concluded that the general sanction for procedural misconduct – an adverse decision on costs – was not sufficient in this case:

As the present case concerns an accumulation of liabilities – abuse of process and procedural misconduct – there is good cause for the Arbitral Tribunal to go beyond the general sanction and to declare that the Claimant has brought a *fraudulent* claim against the Republic of Turkey.¹²² (Emphasis in the original.)

On the rationale for a formal declaration of wrongfulness the tribunal held as follows:

By agreeing to dismiss the present claim on the basis of lack of jurisdiction, but only without prejudice to its rights, the risk is considerable that the Claimant will file other similar or identical requests before other international jurisdictions or even before ICSID. The Arbitral Tribunal condemns such conduct, which constitutes a manifest abuse of the international institutional arbitration system. A formal declaration in the present Award would therefore constitute a fully justified remedy in order to prevent the Claimant from filing this baseless claim before other international jurisdictions or even before ICSID again.

118. *Ibid.*

119. *Ibid.*, para. 157.

120. *Ibid.*, para. 159.

121. *Ibid.*, para. 158.

122. *Ibid.*, para. 159.

Consequently, the Arbitral Tribunal accepts the Respondent's request for a declaration in the Award that the Claimant has filed a fraudulent claim before ICSID.¹²³

On the issue of monetary compensation for moral damage, the tribunal reaffirmed the position in *DLP v. Yemen* that investment treaties '... do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages'¹²⁴ (emphasis in the original) and added that 'there is nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an arbitral tribunal from granting moral damages'.¹²⁵ It further stressed that the stringent 'exceptional circumstances' standard adopted in *DLP v. Yemen* did not follow from general international law but from the specific moral damage associated with the violation of the provision for full security and protection in the applicable BIT in that case.

In contrast, Turkey's request was deemed not to be based on the Energy Charter Treaty (ECT) but 'merely on a general principle, i.e., abuse of process'.¹²⁶ From this the tribunal concluded that:

It is doubtful that such a general principle may constitute a sufficient legal basis for granting compensation for moral damages. In any event, such compensation goes clearly beyond the general sanction of awarding the total costs on the responsible Party, a sanction that is based on Article 58(1) of the Arbitration (Additional Facility) Rules.

A symbolic compensation for moral damages may indeed aim at indicating a condemnation for abuse of process. However, in the case at hand, the Arbitral Tribunal deems it more appropriate to sanction the Claimant with respect to the allocation of costs ... In any case, since the Arbitral Tribunal has already accepted the Respondent's request with respect to the fraudulent claim declaration, the Respondent's objective is already achieved.

Consequently, the Respondent's request for moral damages is dismissed.¹²⁷

Thus the tribunal found it 'more appropriate' in this case to sanction the claimant through the allocation of costs and remedy the moral damage through a formal declaration which was deemed to provide appropriate satisfaction. Still, the tribunal explicitly did not rule out the possibility of pecuniary satisfaction as a matter of principle, at least not as a remedy for abuse of process. This prompts one brief observation.

The tribunal's reading of *DLP v. Yemen* regarding the standard of 'exceptional circumstances' – i.e., that this standard followed from a violation of the provision for full security and protection in the applicable BIT in that case – may be correct but it is doubtful whether it is of general application. Abuse 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.¹²⁸

123. *Ibid.*, paras 162–163, 179(1)(b).

124. *Ibid.*, para. 168.

125. *Ibid.*, para. 169.

126. *Ibid.*, para. 170.

127. *Ibid.*, paras 170–171.

128. See, e.g., the *Republic of Italy v. Republic of Cuba* tribunal (discussed immediately below).

More generally, it cannot be presumed from mere silence that investment treaties purport to exclude the application of general international law, especially the law of remedies.¹²⁹ As Gary Born put it (albeit in a slightly different context) in *Biwater Gauff v. Tanzania*, ‘there is no right without a remedy (*Ubi jus ibi remedium*)’.¹³⁰ In sum, where a party has suffered moral damage as a result of a breach of a rule of general international law which is relevant for the interpretation and application of a given investment treaty, moral damages should in principle be available as of right subject to basic principles of causality and remoteness.

In *Republic of Italy v. Republic of Cuba*, a rare inter-State BIT arbitration, both parties claimed moral damages. As already discussed above, Italy unsuccessfully claimed EUR 1 in moral damages for alleged legal injury.¹³¹ In addition, Italy also unsuccessfully requested a declaration concerning Cuba’s alleged breaches of the BIT and general international law on the treatment of aliens; the claims were rejected on the merits.¹³² For its part, Cuba requested a declaration to the effect that Italy ‘publically and diplomatically withdraw the allegations of wrongdoing as a form of reparation for moral damages suffered by the very fact of starting the arbitral procedure’ (translation supplied).¹³³ The tribunal observed that the parties were perfectly entitled to commence arbitral proceedings under the applicable BIT concerning its interpretation and application. However, even if Italy had failed in all of its claims, the pursuit of arbitration in itself did not warrant an award of moral damages unless it amounted to an abuse of process contrary to the terms of the applicable BIT.¹³⁴ Evidently a different (and arguably more convincing) conclusion than the one reached by the tribunal in *Cementownia ‘Nowa Huta’ S.A. v. Turkey* on the same point.

In *AMTO v. Ukraine*, Ukraine requested moral damages of EUR 25,000 ‘for non-material injury to the Respondent’s reputation as a result of the Claimant’s wrongful allegations of collusion between Energoatom and DonetskOblEnergo’.¹³⁵ More specifically, Ukraine claimed that the ‘[c]laimant has irresponsibly and insistently disseminated to the SCC Institute and to the Arbitral Tribunal untrue information about collusion between two state-owned entities, with the implication that Ukraine was involved. The Respondent considers that such dissemination does not deviate very much from libel’.¹³⁶ The tribunal held that it did not have jurisdiction over the counter-claim under the ECT and accordingly dismissed the request.¹³⁷

129. See *Georges Pinson (France v. United Mexican States)*, 5 R.I.A.A. 325, 422 (French-Mexican Claims Commission, 1928) (‘a treaty must tacitly be seen as referring to general international law for all questions which it does not itself resolve expressly and in a different way’).

130. *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Concurring and Dissenting Opinion of Mr Gary Born, para. 32.

131. See above, text accompanying footnotes 54–55.

132. *Republic of Italy v. Republic of Cuba*, Final Award, para. 244.

133. *Ibid.*, para. 253.

134. *Ibid.*, para. 254.

135. *Limited Liability Company AMTO v. Ukraine*, Final Award, SCC Case No. 080/2005, para. 116 (2008).

136. *Ibid.*, para. 117.

137. *Ibid.*, para. 118.

Most recently, Ecuador unsuccessfully claimed unspecified monetary compensation for moral damage in *Occidental v. Ecuador* for abuse of process ‘based principally on allegations of bad faith and coercion on the part of the Claimants’ in relation to its decision to bring ‘baseless claims’. Ecuador notably alleged that these claims were brought in order:

to apply further severe pressure on Ecuador – both in itself and in combination with procuring the U.S. Government pressure noted herein – in order to coerce settlement and other concessions by making it extremely difficult for Ecuador to maintain its defense in this action, and also to avoid the financial consequences of creating a means by which synthetic interests in Block 15 could be traded and profits thereby earned and concealed.

... recovery of fees and costs alone could by no means compensate Ecuador for all of the harm it has suffered from OEPC’s wrongful conduct, which includes not only the expense associated with defending these unworthy claims, but also the loss of profits arising on the improper trading of Block 15 interests, and the substantial damage to Ecuador’s reputation and economic prejudice in the market for foreign investment and world opinion.¹³⁸

§10.04 MORAL DAMAGES AS A REMEDY IN COMMERCIAL ARBITRATION

We have seen that in investment arbitration moral damages have emerged in recent years as a form of relief that is increasingly sought by investors and States and sometimes granted by arbitral tribunals in addition to compensation for material losses. In commercial arbitration, however, moral damages appear to be almost inexistent. Indeed, only few published cases exist where moral damages have played a role. Certainly, unlike in investment arbitration, awards in commercial arbitration are rarely published and classified; it is therefore difficult, if not impossible, to conduct exhaustive research and obtain a reliable overview of cases. In addition, recent publications on the topic exclusively deal with moral damages in disputes between foreign investors and States. Hardly any doctrine can be found relating to moral damages in commercial arbitration. This seems to demonstrate that the practical relevance of this kind of remedy in commercial disputes must be limited.

The reason why moral damages are a seemingly rare species in commercial arbitration may be the nature of the legal bases upon which such compensation can be sought. The availability of moral damages as a remedy depends on the applicable substantive law, or in some jurisdictions procedural law, which varies from case to case. The 1980 UN Convention on Contracts for the International Sale of Goods does not know the concept of moral damages.¹³⁹ In most national jurisdictions, however, moral damages can be sought as a result of tort liability, i.e., an extra-contractual claim

138. *Occidental Petroleum Corporation et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, paras 283–285 (2012).

139. Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, Art. 74, para. 3 (3d ed., OUP 2010); E. Allan Farnsworth, *Damages and Specific Relief*, 27 Am. J. Comp. L. 247, 249 (1979).

based on a wrongful act that did not involve a breach of contract. Claims in tort are generally arbitrable as long as they are covered by the broad wording of an arbitration agreement referring for instance to ‘any disputes arising from or in relation to the contract’.¹⁴⁰ However, they do not generally correspond to the relief sought by the ‘typical’ claimant in commercial disputes following a breach of contract.

For instance, under Article 47 of the Swiss Code of Obligations (SCO), courts may award victims of personal injury or the dependents of the deceased in a case of homicide an appropriate sum by way of satisfaction. Furthermore, under Article 49(3) of the SCO, any person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction, provided this is justified by the seriousness of the infringement and no other reparation has been made. The court may also order that satisfaction be provided in a manner other than, or in addition to, monetary compensation. Similarly, section 253 of the German Civil Code provides that equitable monetary relief can be sought in cases of non-economic loss or damage where an infringement of a person’s physical integrity and health, freedom and sexual self-determination has taken place.¹⁴¹ In English law one of the leading cases is *Ansell v. Thomas*¹⁴² in which the Court of Appeal awarded a managing director so-called aggravated damages as compensation for ‘indignity, mental suffering, disgrace and humiliation’ when, in a dispute with co-directors who alleged that he had resigned, refused to leave the company premises, police were called and threatened to use force if he did not leave. In the director’s action against his co-directors for assault and conspiracy, the county court judge awarded him a sum of money to include aggravated damages.

Hence, in the above-mentioned and most other jurisdictions, moral damages are primarily intended as reparation for a physical person’s emotional distress or severe pain and suffering. Generally speaking, this is not the type of injury typically suffered in commercial disputes where purely economic interests are at stake.¹⁴³ Furthermore, the vast majority of claims are made by legal entities rather than physical persons, and the claims are of a contractual rather than extra-contractual nature. Legal entities are generally not susceptible to intangible, non-material losses and, consequently, limit their relief sought to compensation for economic losses actually suffered. In fact, an

140. Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland* para. 473 (2d ed., Stämpfli 2010). Case between an African trading company and an African export/import company, CRCICA Case No. 110/1998 (1999), reported in Mohie Eldin I. Alam-Eldin (ed.), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration II 1997–2000*, 199–202 (Kluwer Law International 2003), in which the arbitral tribunal refused to rule on the moral damages claim ‘because it resulted from a tortious liability and not from the contractual liability, and thus it was not covered by the arbitration clause’.

141. For another example from a civil law jurisdiction, see Edith Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 *Loy. L.A. Int’l & Comp. L. Rev.* 235, 235 (1986).

142. *Ansell v. Thomas*, [1974] *Crim. L. R.* 31 (Engl. Court of Appeal, Civ. Division, 1974).

143. See Ingeborg Schwenzer & Pascal Hachem, *Moral Damages in International Investment Arbitration*, in *Liber Amicorum Eric Bergsten. International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* 411, 412, 425 (Stefan Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas & Vikki Rogers, eds., Kluwer Law International 2011).

arbitral tribunal sitting in Milan, deciding *ex aequo et bono* and applying the International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts, dismissed a claim for moral damages brought by a US company against an Italian company simply based on the fact that the claimant was not a physical person but a company and as such could not claim moral damages.¹⁴⁴

Another reason for the sparseness of moral damages claims in commercial arbitration is that an intangible, non-material loss is much more difficult to assess financially and to prove convincingly than economic loss, even if the awarded monetary relief for moral injury is to a large extent meant to be equitable and symbolic. One can assume that many claimants in commercial disputes shy away from bringing claims for moral damages when the prospect of success of such claims is slim and may even negatively impact on the validity of all other claims brought, which can be documented and quantified in a more comprehensible manner. Indeed, in a number of reported cases, arbitral tribunals have dismissed claims for moral damages on the ground that they were not substantiated or not proven, in particular where claimants argued that they had suffered a loss of their commercial image or reputation.¹⁴⁵

Nonetheless, a few commercial arbitration cases exist where moral damages were claimed and awarded. For instance, there are two reported arbitral awards of the Cairo Regional Center for International Commercial Arbitration (CRCICA) in each of which three Egyptian arbitrators applying Egyptian law granted moral damages. In the first one, an African software company brought claims against two software companies, one from North America and the other from Europe, based on a contract for the marketing of computer programs via the claimant as a non-exclusive agent. Under the arbitration agreement, '[a]ll disputes related to the interpretation of this contract, its application or any other matters related thereto' were to be referred to an arbitral tribunal. When the respondents terminated the agreement, the claimant brought a claim for damages, including for compensation of 'moral damages based on the concept of abusive use of rights'. More specifically, the African software company requested two types of compensation for moral damages, the first resulting from an alleged defamation of its reputation made by the respondents in the local and international marketplace. The claimant based this claim on Article 163 of the Egyptian Civil Code (tortious liability) because customers had stopped dealing with the claimant. Second, the claimant requested moral damages because of an alleged abusive use

144. Chamber of National and International Arbitration of Milan Case No. 1795, Award (1996), 24(a) Y.B.C.A. 196, 205-206 (1999).

145. ICC Case No. 5834, Final Award (1989), Extract, 5:1 ICC IC Arb. Bull. 65 (1994), finding that the claimant's argumentation was based on 'pure hypothesis'; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Case No. 304/1993, Award (1995), <http://cisgw3.law.pace.edu/cases/950303r2.html> (accessed 28 Oct. 2012); ICC Case No. 13133 between a contractor from Tunisia and a Supplier from India, Final Award, 35 Y.B.C.A. 129 (2010); Case between an African consulting company and Union of public sector construction companies, Final Award, CRCICA Case No. 173/2000, 57-62 (2000), reported in Alam-Eldin; LCIA Case No. 4533 between Dr Alla Chafic Dib and F & F International Ltd., Final Award (2004), 3(3) Intl J. Arab Arbitration 211 (2011); ICC Case No. 12580 between a Claimant from India and two Respondents, an Emirati company and a Lebanese company, 2(3) Intl J. of Arab Arbitration 270, 291 (2010).

of right by the respondents. The arbitral tribunal held that the claim stemming from tortious liability was within its jurisdiction because the provisions of the Civil Code in this respect apply to both tortious and contractual liabilities. It decided to award the claimant, *inter alia*, ‘damages for moral prejudice’.¹⁴⁶

In the other CRCICA case, an African tourism regional authority and an African tourism company had entered into a contract related to an international festival in one of the ports of an African State. The festival was to be a cultural event of the highest standards. Under the contract, the tourism company had committed to the organization of the event, including the ceremonies of inauguration and closure. When the respondent failed to comply with several of its contractual obligations and the festival turned out to be a failure ‘which gave a very bad image of the country’, the tourism authority brought damages claims for breach of contract. It argued *inter alia* that the non-performance of its contractual obligations amounted to ‘an element of tort in the contractual responsibility of the company’. The tribunal held that the claimant had suffered a loss of reputation both of the city and of the country and awarded USD 2 million in moral damages.¹⁴⁷

Moral damages also play a role in a recent arbitration before the International Chamber of Commerce (ICC) with seat in Paris between the Cuban government and the Chilean businessman Max Marambio, arising out of their joint venture Alimentos Río Zaza, which was Cuba’s main producer of fruit juice. After the joint venture was shut down as part of a criminal investigation in 2010, a Cuban court convicted Mr Marambio in his absence of bribery, fraud and falsification of bank documents and sentenced him to jail. Mr Marambio brought commenced arbitration proceedings against Cuba, requesting the liquidation of his 50% stake in Río Zaza and USD 140 million in compensation, as well as USD 10 million in moral damages. The case is still pending. In a partial award issued in July 2012, the arbitral tribunal ordered the liquidation of the company and postponed a determination of damages and costs.¹⁴⁸

The above-mentioned cases can hardly be considered to be the tip of an iceberg. They do however spark the question whether claimants in commercial arbitration cases should not more often, where appropriate, consider including moral damages into their relief sought, in particular where the claimant is an individual as in the case between Mr Marambio and Cuba. Given that moral damages generally arise out of tortious rather than contractual liability, which in turn depends on the applicable substantive law, it is difficult to define factual situations in which arbitral tribunals may be inclined to award such compensation.¹⁴⁹ Against the background of the recent developments in investment arbitration, it may however be safe to say that in

146. Case between an African software company and two software companies; one North American and the other European, CRCICA Case No. 109/1998 (1999), reported in Alam-Eldin, 183–190.

147. Case between an African tourism regional authority and an African tourism company, CRCICA Case No. 117/1998 (1999), reported in Alam-Eldin, 125–128.

148. See GAR News, ‘Cuba Told to Liquidate Juice Venture’ (2 Aug. 2012), <http://www.globalarbitrationreview.com/news/article/30733/cuba-told-liquidate-juice-venture/> (accessed 28 Oct. 2012).

149. See Ingeborg Schwenger & Pascal Hachem, *Moral Damages in International Investment Arbitration*, 417.

commercial arbitration there can in the same way be a need to redress the non-economic loss suffered from, for instance, a deliberate and abusive breach of contract, drastic cases of disruption to business, unfair competition or abuse of process (e.g., through witness intimidation or harm to the physical health of the claimant's executives), which may amount to tortious acts. In some cases, in particular where the reputation has been affected, non-monetary relief (in the form of a declaration of wrongfulness) can be the appropriate remedy.

§10.05 MORAL DAMAGES AS A REMEDY IN WTO LITIGATION

In contrast to the ICSID Convention and investment treaties, the World Trade Organization (WTO) *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) provides its own elaborate remedial regime.¹⁵⁰ It is well-established that the remedies in WTO dispute settlement are *lex specialis* and as such depart in several important respects from the law of reparation under general international law.¹⁵¹ Two important distinguishing features should be highlighted. First, unlike the availability of reparation under general international law which normally requires the breach of an international obligation, a WTO claim can be brought pursuant to Article 3(3) DSU irrespective of a formal breach if a Member State considers that any benefits accruing to it under the WTO covered agreements are being 'impaired' by trade measures taken by another Member State.¹⁵² Three types of trade complaints are available in WTO litigation in accordance with Article XXIII(1) of the *General Agreement on Tariffs and Trade* (GATT);¹⁵³ namely, 'violation complaints', 'non-violation complaints' and 'situation complaints'.¹⁵⁴ The language of 'nullification or impairment' embodied in Article XXIII(1) GATT and Article 3(8) DSU is specific to the WTO regime and is distinct from the notion of breach under general international law. Therefore, in principle, the general law of reparation is only relevant (if at all) to the WTO remedial regime for 'violation complaints'.¹⁵⁵

Second, while the general law of reparation is retrospective as it is intended as far as possible to 'wipe out' the consequences of an illegal act *ex tunc*, WTO remedies are generally prospective and operate *ex nunc*.¹⁵⁶ Articles 3(7) and 22 DSU which provide for the remedies available in case of a 'violation complaint' indicate that 'the first

150. *Understanding on Rules and Procedures Governing the Settlement of Disputes* (15 Apr. 1994), 1869 U.N.T.S. 401 [DSU].

151. See notably ARSIWA Commentary, Art. 55, para. 3.

152. See, e.g., Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System* 142–143 (Brill 1997).

153. *General Agreement on Tariffs and Trade* (15 Apr. 1994), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

154. See generally R. Rajesh Babu, *Remedies under the WTO Legal System* 205–211 (Martinus Nijhoff 2012).

155. As the other two types of complaints are largely irrelevant to the general law of reparation they will not be considered further.

156. For a possible exception see *Agreement on Subsidies and Countervailing Measures*, Art. 4.7 (15 Apr. 1994), 1867 U.N.T.S. 14, and the case law related thereto discussed in Chester Brown, *A Common Law of International Adjudication* 220–222 (OUP 2007).

objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.’ This is underlined by Article 19(1) DSU which provides that WTO panels or the Appellate Body can only make recommendations that a Member State ‘bring the measure into conformity with that agreement’.¹⁵⁷ Thus Article 19(1) DSU indicates that the primary form of reparation in WTO law for ‘violation complaints’ is essentially a declaration of wrongfulness within the meaning of Article 37(2) ARSIWA.¹⁵⁸

In the event that an Article 19 recommendation is not complied with within a reasonable time, the complaining State may enter into negotiations with the wrongdoing State ‘with a view to developing mutually acceptable compensation’ pursuant to Article 22(2) DSU, but it can only do so as a temporary measure pending the withdrawal of the illegal trade measure.¹⁵⁹ Article 22(1) DSU does not define the term ‘compensation’ for ‘violation complaints’; however, it is clear that it does not have the same meaning as in general international law. Two major differences can be mentioned. First, ‘compensation’ in WTO law mostly takes the form of trade concessions rather than money and is in any event a prospective measure as it merely offers temporary relief for harm that the complaining member will presumably suffer pending the implementation of the Article 19 recommendation.¹⁶⁰ Second, compensation is not obligatory but optional as it is dependent upon agreement between the disputing parties. The idiosyncratic features of this remedy have made it unattractive and meant that cases of agreed compensation in the WTO have been very rare.¹⁶¹

Finally, pursuant to Articles 22 and 23 of the DSU, if a defendant does not comply with a panel report finding a WTO violation, suspension of concessions or other obligations constitutes a last resort. Like compensation, this last remedy may be applied pending full implementation of the panel report as modified by the Appellate Body; and even without approval of the defendant, if the Dispute Settlement Body (DSB) authorizes the succeeding party to impose it. The level of retaliation has to be equal to the level of nullification or impairment caused by the WTO illegal measure, unless there is a case that warrants the application of countermeasures in accordance with the Agreement on Subsidies and Countervailing Measures. If within six months

157. For continuity with the GATT, see *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, Annex para. 4 (28 Nov. 1979), GATT BISD 26th Supp. 210 (1980); Mitsuo Matsushita, Timothy Schoenbaum & Petros Mavroidis, *The World Trade Organization: Law, Practice and Policy* 106 (2d ed., OUP 2006).

158. For a similar conclusion, see, e.g., Brown, 209; Brooks E. Allen, *The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, in *Performance as a Remedy: Non-Monetary Relief in International Arbitration* 281, 293 (Michael E. Schneider & Joachim Knoll eds., Juris 2011).

159. As a last resort, if no satisfactory compensation has been agreed within twenty days, the complaining State may request authorisation from the WTO Dispute Settlement Body to suspend trade concessions or other obligations under the covered agreements in the form of countermeasures (see Arts 2(1), 3(7), 22(2) DSU). WTO disputes may also be submitted to arbitration where the same remedial regime applies (see Art. 25 DSU).

160. However, if agreed by the disputing parties, monetary compensation may be granted under the current procedural rules.

161. For examples, see further Babu, 196–198.

from the date when the DSB adopts the panel report or the Appellate Body report the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

In cases of disagreement between the two parties, the level of retaliation is determined through arbitration. There seems to be no clear parameter as to how to quantify the level of nullification or impairment, but arbitral tribunals so far have not addressed the issue of moral damages occasioned by the violation of WTO law.¹⁶²

§10.06 CONCLUSION: IS 'CROSS-FERTILIZATION' POSSIBLE AND APPROPRIATE?

Moral damages are recognized in most national legal systems. Still, claims for moral damages in commercial arbitration appear to be rare. Given the widespread recognition of moral damages in national laws, the *lex causae* alone cannot explain why this is so. Two other factors can be mentioned which at least in part help provide an answer. First, compensable moral damage most often arises from a violation of the personality rights of natural persons. Such moral damage cannot normally be sustained by corporations or States. Second, transnational commercial disputes mostly concern the adjudication of claims of pure economic or financial injury. These factors (together with the *lex causae*) undoubtedly contribute to substantially limiting the relevance of moral damages in typical transnational commercial disputes.

Moral damages are also widely recognized in international law. Similar considerations as those just outlined above for commercial arbitration also apply to investment arbitration. Yet it is striking that these factors do not appear to have unduly limited the free choice of parties to request moral damages in investment arbitration, at least not in recent years. Indeed, there is by now a discernible trend (perhaps even a minor revolution) according to which monetary claims for moral damage are increasingly being requested by foreign investors in investment arbitration. The clear majority of such claims have been advanced by natural persons. However, the same practice indicates that corporations (and to a lesser extent, States) are also requesting monetary compensation to remedy moral damage. In addition, States in investment arbitration are also increasingly requesting non-pecuniary relief for moral damage in the form of a declaration of wrongfulness. Aside from various personal injury claims, the head of loss or injury for such moral damage essentially relates to loss of reputation and abuse of process.

Interestingly, in at least six investment arbitration cases, foreign investors have requested moral damages on a contractual basis where the law applicable to the dispute was the national law of the host State. This suggests that cross-fertilization

162. For a discussion on suspension of concessions or other obligations in the WTO see Chad P. Bown & Joost Pauwelyn (eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2010).

between commercial arbitration 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. Indeed, it is difficult to see why companies in commercial disputes should not be compensated for moral damage suffered in the same way as investors in investment disputes.

In contrast, there appears to be less room for cross-fertilization in relation to WTO litigation. The remedial regime within the WTO is *lex specialis* and departs from the law of reparation under general international law in several important respects. Notably, there is in principle no monetary compensation available to parties in WTO litigation. It follows that monetary compensation for moral damage is unavailable under WTO law. Still, the primary form of reparation for a violation of a WTO covered agreement is a declaration of wrongfulness. This remedy provides a form of satisfaction to injured States within the meaning of Article 37 ARSIWA and as such can be understood as entailing non-pecuniary relief for moral damage. It therefore appears that a declaration of wrongfulness is the remedy with the most potential in the future to redress moral damage in commercial arbitration, investment arbitration and WTO litigation.

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