The Future of Moral Damages in Investment Treaty Arbitration

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One of the more intriguing investment arbitration decisions rendered in 2008 has to be the final award in Desert Line Properties (DLP) v. Yemen.

In their February 2008 award, a tribunal of three arbitrators held that Yemen denied fair and equitable treatment to an Omani construction company.

The claimant turned to ICSID after Yemeni authorities refused to pay certain construction bills, and pressured DLP into an unfavourable settlement of the dispute. DLP also complained that company executives had been harassed and mistreated by armed tribes, and members of the Yemeni military.

Thus, in addition to seeking compensation for its financial losses, DLP also sought moral damages for the pain and suffering of its executives, and the harm inflicted upon its reputation, credit and business opportunities.

In the final award, the ICSID arbitrators nodded to other international cases where moral damages were awarded in certain exceptional circumstances.

And, on the facts of the DLP case, the arbitrators concluded that Yemen's breach of the Oman-Yemen investment treaty, and "in particular the physical duress exerted on the executives of the claimant, was malicious and is therefore constitutive of a fault-based liability."

While acknowledging that the calculation of moral damages can be difficult, the tribunal proceeded to award DLP the sum of $1 Million (US). The tribunal gave little indication as to how it reached the sum of $1 Million, other than to note that it was much less than the amount claimed, but still enough to be more than symbolic.

(For its part, DLP had cited, unsuccessfully, a century-old arbitral award from the Fabiani case, where an award of moral damages amounted to 1/3rd of the overall claim)

I've suggested elsewhere – in a discussion of a pending claim against Zimbabwe – that the amount awarded in the DLP case far exceeds the level of moral damages awards seen in other international proceedings, particularly human rights claims.

This is worth bearing in mind, particularly as we may see more claims for moral damages in future investment arbitrations.

At one extreme, moral damages may simply become another type of damages sought by claimants as a matter of course. Thus, the likes of Exxon-Mobil, Rio Tinto or General Electric may routinely plump for damages for their pain and suffering – or at least that of company employees or executives.

Another theory I've heard from several arbitration practitioners is that we may see a number of investment treaty claims which would be non-viable in financial terms but for the possibility of obtaining moral damages.

Indeed, on this view, potential claims by certain charities and humanitarian organizations – about which I've blogged previously – might also be viewed in an altogether different light.

In addition, we might see a new line of cases brought by individual businesspersons who've invested relatively modest sums – at least when compared with the typical investment treaty claim – and who have suffered personal indignities and abuses.

Indeed, for some this latter scenario may conjure memories of the older days of diplomatic protection of aliens, when alien claims oftentimes looked like "human rights" claims – with businesspersons roughed up, arrested on trumped up charges, and left to stew in custody for long stretches.

At least one recent BIT claim, Trinh Vinh Binh v. Vietnam, arguably fit into this

paradigm. However, this arbitration under the Netherlands-Vietnam investment treaty was settled before a tribunal could rule on the claimant's allegations of illegal pre-trial detention, torture and physical abuse at the hands of Vietnamese authorities.

More often, claims of this type have tended to be brought through human rights channels – either the UN covenants or the regional human rights courts.

However, if the investment treaty regime moves further into the business of handling some of those "human rights" style claims, don't be surprised if this engenders some side-by-side comparison of investment arbitration and human rights adjudication.

Newcomers to investment arbitration might inquire why claims before human rights tribunals require the exhaustion of domestic remedies, while investment treaties rarely impose such a requirement.

Others may marvel at the discretion accorded to victims of alleged investment treaty breaches when it comes to choosing who shall sit in judgment of a claim.

And, if the generous accounting of the DLP v. Yemen award is followed in other cases, I suspect we shall see questions as to why investment tribunals award moral damages which are markedly greater than those provided through human rights adjudicative mechanisms.

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