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## Why and How Arbitral Tribunals Award Compensation For Moral Damages?

Patrick Dumberry (University of Ottawa Faculty of Law, Civil Law Section) · Monday, May 3rd, 2010

Until very recently, the issue of moral damages had arisen in only a handful of investor-State disputes. However in 2008 and 2009 alone, no less than five arbitration awards discussed the issue. While some tribunals dismissed moral damages claims based on lack of evidence ([Pey Casado v. Chile](#); [Biwater v. Tanzania](#) and [Europe Cement v. Turkey](#)) or lack of jurisdiction ([Cementownia v. Turkey](#)), in one such case, [Desert Line Projects LLC v. Yemen](#), the Arbitral tribunal awarded an amount of US\$1 million in compensation to a corporation. This post examines why and how arbitral tribunals established under investment treaties award monetary compensation for moral damages suffered by foreign investors as a result of treaty breaches committed by the host State of the investment (see, Patrick Dumberry, “Compensation for Moral Damages in Investor-State Arbitration Disputes”, 27(3) [Journal of International Arbitration](#), 2010).

The basic principle of State responsibility is, of course, that a State must make full reparation for any injury (whether material or moral) caused to another State or a foreign investor. A tribunal should therefore award an amount of compensation that is exactly equivalent to the actual moral damage suffered and should not award a single dollar in compensation over and above that.

The concept of moral damage is, however, vague and may be subject to different interpretations. The same is true for the quantification of moral damages. Thus, under the exact same circumstances, a certain type of moral damage that is considered by one tribunal to be worth US\$10,000 in compensation could very well be deemed worth US\$100,000 by another. There are only a select few instances where a tribunal, such as the UNCC, is bound by strict guidelines determining in advance the amount of compensation to be awarded for certain specific types of moral damages (see, [UNCC Governing Council Decision no. 3](#), S/AC.26/1991/3 (23 October 1991); [UNCC Governing Council Decision no. 8](#), S/AC.26/1992/8 (27 January 1992)). In all other cases where no guidelines exist, tribunals will necessarily have a great deal of flexibility and discretion to determine what amount should adequately compensate an investor for the moral damage suffered. How should tribunals then exercise such discretion? This is where the issue of culpa matters.

The [Desert Line](#) award’s reference to “the physical duress exerted on the executives of the Claimant” which “was malicious and therefore constitutive of a fault-based liability” (para. 290) suggests that the Tribunal considered Yemen’s fault when finding its international responsibility. Similarly, in his concurrent and dissenting opinion in the [Biwater v. Tanzania](#) case, Arbitrator Born referred to Tanzania’s “deliberate” conduct causing moral damages to the Investor (para. 33).

These statements seem to suggest that fault or malice by the host State is a condition for an award of compensation for moral damage. It should be recalled, however, that the work of the I.L.C. on State responsibility has clearly adopted the concept of the “objective” responsibility of a State whereby “it is only the act of a State that matters, independently of any intention” (J. Crawford, [I.L.C.’s Articles on State Responsibility, Introduction, Text and Commentaries](#), at p. 84). In my view, malice or any other intent is clearly not a necessary precondition for a tribunal to award compensation for moral damages.

The presence of culpa will undoubtedly, however, have an impact on a tribunal’s decision with respect to the consequences of responsibility. Thus, State’s fault or malicious intent will be taken into account by tribunals when they actually quantify the amount of compensation to be awarded to remediate moral damages. This has long been recognised in doctrine as well as by the I.L.C. Special Rapporteur Arangio-Ruiz in his [Second Report on State Responsibility](#) (Yearbook ILC, 1989, vol. II, Part one, at para. 145 and 180: “[I]t seems both logical and rational, as recognized by a number of authorities, that the presence or absence of fault, and, if there is fault, the degree of wilful intent or negligence, play some role in the determination of the degree of responsibility and therefore of the forms and degrees of the reparation due”).

Thus, the amount of compensation should be proportionate to the seriousness of the offence committed by a State and its degree of responsibility. A tribunal may award a greater amount of compensation for moral damages in a situation where the conduct of the State is especially malicious or shocking. Simple common sense would dictate such a solution. This does not mean that there exists any higher threshold for finding a breach of international law in the context of moral damages claims. In my view, it is undesirable that only “egregious” State behaviour should result in awarding compensation for moral damages.

One illustration of the approach proposed here is the 1992 case of [Letelier and Moffitt](#) where the ad hoc Commission established by the United States and Chile awarded more than US\$1 million in compensation for moral damages to three individuals and their heirs. This case arose from the assassination in 1973 in Washington of Mr. Letelier, a Chilean opponent to the Pinochet regime living in exile in the United States, by Chilean secret police agents. In his own “separate concurrent Opinion” Arbitrator Orrego Vicuña indicated that Chile “ha[d] given important steps to satisfy the moral dimension of the human rights situations with which it has had to deal” and that “[t]his positive attitude ha[d] certainly a bearing on the determination of compensation for moral damages.” (UNRIAA, vol. XXV, p. 16). The Commission therefore seems to have taken into account the “positive attitude” of Chile since the regime change in 1990 by awarding less monetary compensation than it would have had otherwise.

Arguably, tribunals should not only take into account the “positive” attitude of States regarding foreign investors but also, quite logically, any other “negative” factors. Any particularly condemnable governmental actions toward a foreign investor could have a bearing on the quantification of the actual amount of compensation to be awarded for moral damages.

When awarding compensation for moral damages, a tribunal is therefore not only wiping out all the negative consequences of a wrongful act. It is also sometimes expressing its strong concerns about a State’s unacceptable treatment of foreign investors, a concern which can be expressed in monetary terms. In such a case, the amount of compensation is not only attributed to remediate damage but also to send a clear message to the host State. There are several earlier examples of international law cases where arbitral tribunals have awarded monetary compensation in

circumstances akin to moral damages with the clear intent of condemning unacceptable State conducts (see, *Moke v. Mexico*, U.S.-Mexico Mixed Claims Commission, 1871, in J.B. Moore, *History and Digest of the International Arbitrations*, Vol. IV, 1898, p. 4311).

In my view, a tribunal expressing strong concerns about State actions through an award of compensation to remediate moral damages must be distinguished from the notion of punitive damages. The concept of punitive damages is not recognized under international law (I.L.C. Commentaries, p. 243). Investor-State arbitral tribunals have also refused to award punitive damages (see, *CMS v. Argentina*, at para. 404). On the one hand, a State is not being imposed an extra amount of compensation in addition to the actual damages suffered. The amount of compensation awarded is in fact equivalent to the actual damage. On the other hand, the goal of awarding compensation still remains to remediate the actual damage suffered; it is clearly not to punish the host State. It may be that the concept of “aggravated” damages would in fact be a better term to describe this situation.

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