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How to remediate moral damages suffered by a State?

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The concept of "moral damage" as long been recognised at international law. Article 31 of the International Law Commission ("I.L.C.")'s Articles on State Responsibility provides that a State must make full reparation for any "injury" caused to another State by an internationally wrongful act and defines "injury" as "any damage, whether material or moral, caused by the internationally wrongful act of a State." 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. 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 contribution addresses another interesting question: what is the proper form of reparation to remediate moral damages suffered by a State (and not a foreign investor). This issue was discussed for the first time in the context of investor-State disputes in two separate awards both rendered in 2009.

The first case (Europe Cement Investment & Trade S.A. v. Turkey, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009) involved, a Polish company, which commenced arbitration proceedings against Turkey under the Energy Charter Treaty alleging its termination of concession agreements granted to two Turkish electricity corporations of which Europe Cement purported to be a shareholder. The Tribunal declined jurisdiction over the dispute based on the claimant's inability to prove its ownership of shares in the corporations and further stated that the proceedings constituted an "abuse of process" by the claimant. The second case (Cementownia "Nowa Huta" S.A. v. Turkey, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009) also involved a Polish company commencing arbitration proceedings against Turkey under the same Treaty and under the exact same circumstances and breaches allegations. The Tribunal also declined jurisdiction over the dispute for the same reasons and added that this was a fraudulent claim.

In the Europe Cement case, Turkey submitted a counterclaim seeking compensation in the amount of US$1 million for moral damages it allegedly suffered to its "reputation and international standing" as a result of the "jurisdictionally baseless claim asserted in bad faith and for an improper purpose" which caused it "intangible but no less real loss." (see, para. 118 & 177). A similar moral damages claim was also submitted by Turkey in the Cementownia case.

Both tribunals refused to award any compensation for moral damages, but based on different reasons.

The Europe Cement Tribunal noted that it was a "difficult question" to determine whether a conduct involving fraud "warrant[ed] an award of damages" (para. 181). In any event, the Tribunal held that such an inquiry was not necessary because "it [did] not consider that exceptional circumstances such as physical duress [were] present in this case to justify moral damages" (para. 181). The Tribunal therefore rejected the claim essentially based on lack of evidence.

The Cementownia Tribunal first noted that "there is nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an arbitral tribunal from granting moral damages" (para. 169). However, the Tribunal distinguished the present claim where the request for moral damages was "based merely on a general principle, i.e., abuse of process" from the Desert Line award where the claim was based on obligations contained in a BIT (para. 170). For the Tribunal, "it is doubtful that such a general principle may constitute a sufficient legal basis for granting compensation for moral damages" (Id.). The Tribunal therefore dismissed Turkey's request because the Treaty did not provide any legal basis for awarding compensation for moral damages suffered by a State party.

More interestingly for the purpose of this contribution, the Europe Cement Tribunal added that any "potential reputational damage" suffered by Turkey would be "remedied by the reasoning and conclusions set out in this Award, including an award of costs" and that such an award would provide it "a form of 'satisfaction'" (para. 181). In this case, although Turkey did formally claimed monetary compensation for the moral damages it suffered, it also added that such an award would, in any event, most likely take the form of "satisfaction" since the award would probably never be paid by the investor. The Tribunal ordered the Claimant to pay for the full costs of the proceedings (some US$3.9 millions) as well as half the arbitration costs (US$129,000). For the Tribunal, such an award of full costs in favour of the Respondent "will go some way towards compensating [it] for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims" (para. 185).

In the Cementownia case, Turkey first argued that "tribunals applying international law may award to a State the remedy of satisfaction where it has suffered an intangible injury, such as injury to its reputation or prestige", but then also added that "in investment treaty cases, compensation has been awarded where the injury was inflicted maliciously" (para. 165). Turkey therefore contended that in some circumstances monetary compensation could be the proper remedy for moral damages suffered by a State. The Tribunal noted that although "a symbolic compensation for moral damages" could show its condemnation of the abuse of process, in the present case, however, it was more appropriate "to sanction the Claimant with respect to the allocation of costs" (in the amount of close to US$5 millions). The Tribunal also declared that in any event a mere declaration would be a proper form of reparation to Turkey: "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" (para. 171).

Both awards confirm the principle set out in the work of the I.L.C. on State responsibility that the proper remedy for moral damages suffered by a State is, as a matter of principle, satisfaction and not monetary compensation. It is true that in both cases, the tribunals did make an award of costs in favour of Turkey, but this was simply because the alleged moral damages resulted from misconduct taking place during the arbitration proceedings. The allocation of costs on the party in bad faith is one form of sanction that can be used by a tribunal to deal with such abuse of process.

According to the I.L.C. satisfaction is the appropriate remedy for "those injuries, not financially

assessable, which amount to an affront to the State." (see, J. Crawford, I.L.C.'s Articles on State Responsibility, Introduction, Text and Commentaries, p. 231). Satisfaction is, indeed, the normal remedy for moral damages suffered by a State in the context of State-to-State disputes (see, for instance, Affaire du Manouba (France v. Italy), 1913, "Affaire du Carthage (France v. Italy), 1913, etc.). One may think, for instance, of insults to State symbols, such as the national flag, or to violation of territorial integrity, the premises of embassies and consulates, attacks on ships and aircrafts, attacks on heads of State or diplomatic and consular representatives, etc. There are very few cases where a moral damage to a State itself (as opposed to one of its nationals) has been remedied by monetary compensation and not by satisfaction. One famous example is the S.S. "I'm Alone" (Canada v. United States). Another one where an injury was remedied by both satisfaction and monetary compensation is the Rainbow Warrior arbitration between France and New Zealand.

The two ICSID cases just examined therefore confirm that in the context of investor-State disputes the proper remedy for moral damages suffered by a State is also satisfaction and not monetary compensation. In fact, this seems to be the only option available for tribunals settling disputes arising under investment treaties. These treaties essentially provide foreign investors with unprecedented substantive and procedural legal protection when they invest abroad. They typically do not provide any legal protection for the host State against the actions of investors. In this context, a mere declaration by a tribunal condemning an investor for wrongdoing seems to be the most States can truly hope for.

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