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Making a Muddle of Moral Damages

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Let's get this straight: When awarded to persons, including foreign investors, moral damages are compensatory in nature. They are not discretionary. They are not symbolic. They are not exemplary. They are not punitive. Rather, as the commentary to the *ILC Draft Articles 36 and 37 on State Responsibility* notes, “[c]ompensable personal injury encompasses not only associated material losses . . . but also non-material damage . . . (sometimes, although not universally referred to as ‘moral damage’).” Put differently, “[m]aterial and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation.” As with your run-of-the-mill material damages then, once it is determined that the investor has suffered moral damages, the tribunal *must* provide full reparation. This is accomplished by awarding “a judicially ascertained compensation for wrong” that is “commensurate with the loss, so that the injured party may be made whole.” (See [here](#) and [here](#) for a fuller exposition of the compensatory nature of moral damages.)

Alright then, but when should moral damages be awarded in the investment context? As laid out in the ICSID case of *Lemire v. Ukraine*, moral damages are appropriate only when the actions of the host state involve physical duress, have a grave cause and effect, and result in mental suffering or loss of reputation (which is the relevant moral injury that must be compensated). A prime example — indeed, the first case in which moral damages were awarded under a BIT — is the ICSID case of *Desert Line v. Yemen*. In *Desert Line*, the foreign investor had been coerced by the Yemeni government into an unfavorable settlement of a prior arbitral award concerning its investment, with its employees having been physically threatened, arrested and detained in the process. No wonder then that moral damages were appropriate and awarded there.

But despite *Lemire*'s articulation of moral damages and the precedent set by *Desert Line*, various tribunals continue to struggle with the concept of moral damages. In *Stati v. Kazakhstan*, the tribunal determined that Kazakhstan had violated its obligations under the Energy Charter Treaty to treat the claimants fairly and equitably by subjecting the investors to coordinated harassment from various state institutions, including the Financial Police. In the process, the tribunal also considered but rejected the investors' claim for moral damages. This was so even though the investors' employee had been detained, arrested and incarcerated for months pursuant to a criminal charge that the tribunal found was unjustified under Kazakh law. Indeed, the tribunal further acknowledged that Kazakhstan's treatment of the investors was “severe, intentional and multi-faceted.” Inexplicably, however, the tribunal concluded that the claimants did not prove the *Lemire* requirements, which it emphasized were found only in “very exceptional circumstances.” One

certainly hopes it is uncommon for host states to throw their investors' employees into jail without cause, but moral damages may not be refused when moral injury has been inflicted whatever its frequency of occurrence. There is surely no question here that the employee had endured mental suffering in a situation involving physical duress and a grave cause and effect, and that the investors should thus have additionally been compensated with moral damages. Even more starkly, in *Rompétrol Group v. Romania*, the tribunal characterized the claim for moral damages as “both notional and widely discretionary,” and thus contrary to the principles set forth in the ILC draft Articles and as applied in *Desert Line* and *Lemire*.

Amidst this confusion over moral damages, investment tribunals have been singularly hesitant to award the same. A notable exception can, however, be found in the recent case of *Al-Kharafi v. Libya*, in which the tribunal awarded the claimant USD 30 million in moral damages for the damage caused to its worldwide professional reputation (in the stock market as well as in the global business and construction markets) after the respondents had unjustifiably cancelled a project previously approved for a period of 83 years. But for better or worse, its contribution to the international jurisprudence in this area is arguably limited insofar as the tribunal was relying on the Libyan Civil Code provisions on moral damages in issuing its award.

So what else then is in store for moral damages? There are on the horizon two high-profile cases involving moral damages, but for different reasons, neither will test threshold questions pertaining to its doctrine. In *Mykhailenko v. Belarus*, the investors have filed a notice of intent to arbitrate what could become the mother of all moral damages claims. The notice alleges that Mr. Mykhailenko not only had his factory expropriated by Belarus but was forced to spend six years in an overcrowded Belarus labor camp under deplorable conditions. Assuming these allegations are true, the claim meets the *Lemire* requirements in spades, and the question will not be whether moral damages are due but rather how much. In *BSG Resources v. Guinea*, the claimant has very recently brought a claim against Guinea for the alleged unlawful taking of its mining investments in Guinea. While the request for arbitration seeks moral damages, it does not explicitly point to any physical duress on the part of Guinea. As such, it is highly unlikely that the tribunal there will award any moral damages, at least based upon the request. Accordingly, as preliminarily alleged, *Mykhailenko* is a slam dunk whereas *BSG Resources* is a losing proposition as far as moral damages are concerned. Notwithstanding these apparently clear-cut outcomes, one hopes that future tribunals visit no further violence upon the doctrine of moral damages by treating *Mykhailenko* as the new gold standard or *BSG Resources* as seeming evidence of such claims lacking merit in general. More immediately, one hopes that the tribunals in these cases will fully and finally appreciate the categorically compensatory nature of moral damages as awarded to investors.

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