VALE COLUMBIA CENTER
ON SUSTAINABLE INTERNATIONAL INVESTMENT
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE AT COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues by
the Vale Columbia Center on Sustainable International Investment
No. 88 February 4, 2013
Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Jennifer Reimer (jreimer01@gmail.com)

The compensatory nature of moral damages in investor-state arbitration

by
Jarrod Wong*

There has been a pervasive failure by investment tribunals to grasp the singularly compensatory nature of moral damages awarded to investors. The failure to distinguish moral damages from other forms of reparation such as satisfaction and restitution -- never mind punitive damages -- has led to various doctrinal and practical difficulties in the treatment of moral damages.[1]

Moral damages have enjoyed a long history in public international law. In that tradition, the venerable *Lusitania* decision defined moral damages as compensation "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,"[2] thereby identifying those injuries remedied by moral damages as mental or reputational injuries. Significantly, that decision emphasized that moral damages "are very real"[3] despite their intangible nature, which "affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty."[4] This is still

* Jarrod Wong (jwong@pacific.edu) is Associate Professor at the University of the Pacific, McGeorge School of Law. The author wishes to thank Mark Kantor, Charles Rosenberg and Borzu Sabahi for their helpful peer reviews. ***Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

[1] See Jarrod Wong, "The misapprehension of moral damages in investor-state arbitration," in Arthur Rovine, ed., *Contemporary Issues In International Arbitration And Mediation: The Fordham Papers 2012* (Leiden: Martinus Nijhoff, 2013 forthcoming). International law requires states to make full reparation for any injury wrongfully caused. Reparation takes one of three forms: restitution, compensation or satisfaction. Restitution focuses on reversing material injuries where possible; compensation remedies financially assessable injuries, whether material or moral, that are not made good by restitution; and satisfaction remedies non-financially assessable, often symbolic, injuries that represent affronts to the state. See ibid. at Part I.

[2] Opinion in the Lusitania Cases, 7 R.I.A.A 32, 40 (1923).

[3] Ibid.

[4] Ibid.

eminently good law, as the International Law Commission has made clear in its Draft Articles on Responsibility of States for Internationally Wrongful Acts. The Draft Articles clarify that states must make full reparation for injury caused, "whether material or moral," which are "financially assessable and may be the subject of a claim for compensation" rather than satisfaction or restitution, or *a fortiori* punitive damages.[5]

Despite this guidance, investment law has been slow to comprehend moral damages, and then in less than coherent fashion. It was not until 2011 in the ICSID case of Lemire v. Ukraine that an investment tribunal articulated the requirements of moral damages, concluding that moral damages are appropriate only if the host state's actions involve physical duress, result in mental suffering or loss of reputation, and whose cause and effect are grave.[6] However, while *Lemire* clarified the elements of moral damages, various doctrinal and practical difficulties persist. For instance, many cases neglect to identify the specific categories of moral damages (mental or reputational injuries), thereby contributing to their uncertainty. Take Benvenuti v. Congo, which involved an Italian investor whose personnel fled Congo after being warned of their imminent arrest. Although unpersuaded that the claimant had suffered moral damages from losing its personnel or credit, the *Benvenuti* tribunal nonetheless awarded moral damages for "disturb[ances]" caused by the expropriation, but without elaborating on what injuries such "disturbances" inflicted.[7] Separately, a risk of double-counting is present when categories of moral damages are ill-defined; for example, damages awarded for expropriation that are based on fair market value may already factor in loss of reputation. Conversely, neglecting to identify the precise category may lead to a failure to recognize existing moral damages. For example, the majority decision in Biwater Gauff v. Tanzania found moral damages "inappropriate" after determining that no injury was suffered as the investment had already failed at the time of its expropriation.[8] However, this finding conflates economic injury to the investment with moral (i.e., mental or reputational) injury sustained by the investor.

A related difficulty concerns the haphazard quantification of moral damages. Various tribunals have suggested that such calculation is "equitable,"[9] satisfied by awarding on the investor's principal claims,[10] or measured "in proportion" to the investment's value.[11] However, these approaches are inconsistent with compensation offsetting the particular damages suffered.[12] The task instead must be to affix a sum representing the loss suffered, which in turn requires specific identification of the moral injuries caused.

---

[5] See ILC Draft Articles, arts. 31 and 34-37.
[6] See *Lemire*, ICSID Case No. ARB/06/18, *award*, at para. 333.
[7] See *Benvenuti*, ICSID Case No. ARB/77/2, *award*, at para. 4.96.
[8] See *Biwater Gauff*, ICSID Case No. ARB/05/22, *award*, at para. 808.
[9] *Benvenuti*, op. cit., at para. 4.96.
[10] See Pey Casado v. Chile, ICSID Case No. ARB/98/2, *award*, at para. 704.
[11] Desert Line v. Yemen, ICSID Case No. ARB/05/17, *award*, at para. 289.
[12] ILC Draft Article 36, cmt. 3-4 (quoting *Lusitania*).

Another difficulty relates to the suggestion that moral damages are premised on "fault-based liability,"[13] which in turn implies that they are punitive. Yet, neither *Lusitania* nor the Draft Articles require "fault" as an element of moral damages, but rather regard such damages as purely compensatory.

In sum, many difficulties relating to moral damages can be ameliorated by identifying the distinct categories of moral damages suffered, and treating them categorically as compensation rather than as satisfaction, restitution or punitive damages.

Most recent Columbia FDI Perspectives

All previous *FDI Perspectives* are available at http://www.vcc.columbia.edu/content/fdi-perspectives.

[13] *Desert Line,* op. cit., at para. 290.