
DEMYSTIFYING THE CONCEPT OF MORAL DAMAGES IN INTERNATIONAL LAW

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ABSTRACT

This research project explores the concept of moral damages within the framework of international law, particularly focusing on their application in investment arbitration. As globalization advances, the protection of individual rights against state misconduct has become increasingly critical. This study traces the historical evolution of moral damages, highlighting key cases such as *Lusitania*, *Chorzów Factory*, and *Lemire*, which have established foundational principles governing the award of moral damages. The project examines the legal instruments that underpin these principles, including bilateral investment treaties and the International Law Commission's Articles on State Responsibility. A significant focus is placed on the three-tier test from the *Lemire* case, which sets a high threshold for awarding moral damages by requiring evidence of ill-treatment, significant mental suffering, and a grave causal link. The research also addresses challenges and criticisms associated with these criteria, including their potential conflation with punitive damages and inconsistencies in application across different cases. Ultimately, this study aims to provide a comprehensive understanding of moral damages in international law while offering recommendations for refining the legal framework to ensure justice for victims of state misconduct.

Research Objectives:

1. **To Analyze Historical Evolution:** Examine the historical development of moral damages in international law, focusing on landmark cases that have shaped current practices.
2. **To Evaluate Legal Frameworks:** Assess the legal instruments and frameworks governing moral damages, including bilateral investment treaties and the ILC's Articles on State Responsibility.
3. **To Investigate Arbitral Standards:** Explore the three-tier test established in the *Lemire* case, analyzing its criteria for awarding moral damages and its implications for future arbitral decisions.
4. **To Identify Challenges:** Identify and discuss the challenges and criticisms associated with the application of moral damages in international arbitration, including issues related to evidence and consistency.

These objectives will guide the research process and ensure a comprehensive exploration of moral damages within international law.

Introduction to Moral Damages in International Law

The concept of moral damages within public international law, particularly in the context of investment arbitration, represents a significant area of inquiry that addresses the complexities surrounding non-material harm suffered by individuals or entities due to wrongful acts by states. As globalization increasingly shapes international relations and economic interactions, the necessity for robust legal frameworks that protect the rights of investors and individuals has become more pronounced. This paper aims to elucidate the significance of moral damages as a legitimate form of compensation, trace their historical evolution, and outline the legal frameworks governing them. By doing so, it establishes the imperative to demystify this complex concept to ensure equitable outcomes in international disputes.

Moral damages refer specifically to compensation for non-economic harm, encompassing psychological distress, loss of reputation, emotional suffering, and other intangible injuries that resist easy quantification in monetary terms. These damages are particularly relevant in cases where individuals or entities have suffered as a result of state actions that violate international norms or treaties. Under public international law, moral damages are recognized as a legitimate form of reparation for injuries resulting from internationally wrongful acts. Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) explicitly states that a state must provide full reparation for any damage caused, whether material or moral¹. This provision underscores the importance of acknowledging moral damages as essential to achieving justice for victims of state misconduct.

¹ Article 31(2) of the Articles on Responsibility of State for Wrongful Acts, United Nations General Assembly Resolution 56/83 (2001).

Historically, the recognition of moral damages in international law can be traced back to landmark cases such as the *Lusitania* case (1923)² and the *Chorzów Factory* case (1928³). Both cases established precedents for compensating moral injuries and emphasized that reparations should aim to eliminate all consequences of wrongful acts.

T. These historical milestones laid the groundwork for contemporary interpretations and applications of moral damages in international law.

The legal basis for claiming moral damages has evolved through various international treaties and arbitration rules. Investment treaties often incorporate principles from ARSIWA⁴, which provides a comprehensive framework for state responsibility and reparation. A notable example is the *Desert Line v. Yemen* case⁵, which marked a significant moment in investment arbitration where moral damages were awarded for psychological distress experienced by executives due to state actions. This case illustrates how tribunals can exercise discretion in determining the quantum of moral damages while adhering to established legal principles.

Understanding moral damages is crucial for several reasons. First, it ensures fair compensation for victims who have endured non-material harm due to state misconduct. A clear understanding allows claimants to articulate their claims effectively and ensures that arbitrators can award appropriate compensation reflecting the true nature of the harm suffered. Second, promoting consistency in awards is vital; by demystifying moral damages, arbitral tribunals can develop standardized methodologies for assessing non-material harm, thereby reducing disparities in awards across different cases. Third, enhancing legal clarity around this concept aids in navigating complex legal arguments surrounding the legitimacy and calculation of moral damages.

² United States-Germany Mixed Claims Commission, *The Lusitania Case*, RIAA. Vol. 1.

³ Permanent Court of International Justice, *Chorzów Factory Case*, Judgment No. 13 (1928).

⁴ U.S. Trade Representative, *Bilateral Investment Treaties*, <https://www.trade.gov/trade-guide-bilateral-investment-treaties> (last visited 26th September, 2024).

⁵ *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17

Despite its recognition, awarding moral damages presents challenges. The subjective nature of non-material harm complicates quantification and raises questions about evidentiary standards⁶. Tribunals often face difficulties in balancing discretion with the need for objective criteria when determining awards. Furthermore, ongoing debates regarding the appropriateness of awarding moral damages against states by investors or vice versa continue to shape this discourse.

⁶ Gultutan, D. A., *Moral Damages and Arbitral Jurisdiction in International Investment Arbitration*, in *Rebalancing International Investment Agreements in Favour of Host States*(Wildy, Simmonds & Hill 2018), available at <https://openaccess.city.ac.uk/id/eprint/32504/1/Moral%20Damages%20and%20Arbitral%20Jurisdiction%20in%20International%20Investment%20Arbitration.pdf>.

Evolution of Moral Damages

The concept of moral damages in international law has evolved significantly, particularly within the context of investment arbitration.

This evolution is marked by key cases that have established foundational principles regarding moral damages and influenced subsequent arbitral decisions.

One of the earliest and most influential cases is the *Lusitania* case (1923), where the United States-Germany Mixed Claims Commission recognized claims for mental suffering and emotional distress resulting from the sinking of the RMS *Lusitania* during World War I. The Commission affirmed that moral damages are valid claims under international law, establishing that compensation for non-material harm is essential to achieving justice for victims of state misconduct⁷[^1]. This case laid the groundwork for recognizing non-material harm as a legitimate basis for compensation.

Following closely was the *Chorzów Factory* case (1928), adjudicated by the Permanent Court of International Justice (PCIJ). The court ruled that full reparation must address all consequences of an internationally wrongful act, encompassing both material and moral damages. The PCIJ emphasized that compensation should be based on objective criteria and should aim to restore the injured party to its pre-injury status as much as possible⁸. This ruling reinforced the principle that moral damages are integral to achieving full reparation and established a precedent for future arbitral tribunals.

The codification of these principles can be found in Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission in 2001. This article explicitly states that a state must provide full reparation for any damage caused by its wrongful acts, including both

⁷ Aceris Law LLC, *Moral Damages in Investment Arbitration*, <https://arbitrationlaw.com/library/moral-damages-investment-arbitration-and-public-international-law-chapter-8-investment> (last visited 4th October, 2024).

⁸ Brill.com, *Demystifying Moral Damages in International Investment Arbitration*, https://brill.com/view/journals/lape/19/3/article-p417_4.xml?language=en (last visited 4th October, 2024)

material and moral damages⁹. The inclusion of moral damages in ARSIWA reflects a broader acceptance within international law regarding the need to compensate non-material harm.

In more recent investment arbitration cases, such as *Desert Line v. Yemen* (2008), tribunals have further developed the doctrine surrounding moral damages. In this case, the tribunal awarded moral damages for psychological distress experienced by executives due to state actions. It asserted that investment treaties do not exclude claims for moral damages and recognized their validity alongside economic claims¹⁰. The tribunal's decision illustrated a growing willingness among arbitral bodies to award moral damages, thereby expanding their scope in investment disputes.

However, some tribunals have approached awarding moral damages with caution. For instance, in *Lemire v. Ukraine*, an arbitral tribunal acknowledged that investors could claim moral damages under bilateral investment treaties (BITs) but ultimately denied such claims due to a lack of "exceptional circumstances"¹¹. This highlights an ongoing debate within investment arbitration regarding how best to quantify and substantiate claims for moral damages.

Despite these challenges, there is now a general consensus among arbitral tribunals that moral damages should be available to foreign investors under certain circumstances. The recognition that moral damages can arise from reputational harm caused by host state measures has become more common. For example, in *Cementownia v. Turkey*, the tribunal affirmed that there is nothing in the ICSID Convention or Arbitration Rules preventing it from granting moral damages¹².

⁹ Kluwer Arbitration Blog, *ISDS, Moral Damages, Reputational Harm... To The State – A Comment In The Wake Of Lundin*,

<https://arbitrationblog.kluwerarbitration.com/2017/01/13/isds-moral-damages-reputational-harm-to-the-state-a-comment-in-the-wake-of-lundin/> (last visited 4th October, 2024).

¹⁰ Berkeley Journal of International Law, *Russia-Ukraine Conflict and the Claim of Moral Damages on Psychological*, <https://doi.org/10.17104/0044-2348-2021-4-937> (last visited 4th October, 2024).

¹¹ *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.

¹² *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009.

Legal Framework

1. International Treaties

Several international treaties recognize the right to compensation for moral damages in various contexts, though their application may differ depending on the tribunal or jurisdiction.

- **ICSID Convention (1965):** The ICSID Convention provides a framework for resolving investment disputes between states and foreign investors. Moral damages, although not explicitly mentioned, have been claimed in certain investment arbitrations under this convention. They are awarded for non-material harm, such as emotional distress or reputational damage suffered by a claimant¹³.
- **International Covenant on Civil and Political Rights (ICCPR) (1966):** The ICCPR includes provisions regarding reparations for human rights violations, including non-material damages like suffering, humiliation, or mental distress. Article 2(3) of the ICCPR emphasizes that states must ensure effective remedies for violations of human rights, which can extend to moral damages¹⁴.
- **European Convention on Human Rights (ECHR) (1950):** Article 41 of the ECHR permits the European Court of Human Rights to award just satisfaction (including moral damages) if a state violates the rights protected by the convention¹⁵.

¹³ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

¹⁴ *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171

¹⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights), Nov. 4, 1950, 213 U.N.T.S. 221.

2. ILC Articles on State Responsibility (2001)

The **International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts** are a significant source of guidance on moral damages. These articles codify the rules regarding reparations for wrongful state conduct, including both material and non-material (moral) damages.

- **Article 31** obliges states to make full reparation for injury caused by wrongful acts, including moral damage¹⁶.
- **Article 34** specifies that reparation can take the form of restitution, compensation, or satisfaction. Compensation may include monetary damages for moral harm, such as injury to dignity or mental suffering¹⁷.
- **Article 37** introduces satisfaction as a remedy, which may take the form of acknowledgment of wrongful acts, expression of regret, or formal apologies for moral harm¹⁸.

However, the articles leave open the interpretation of what constitutes "moral damages," and the practical application of these principles remains a subject of debate in international law.

¹⁶ Article 31, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Int'l Law Comm'n, U.N. Doc. A/56/10 (2001).

¹⁷ Article 34, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Int'l Law Comm'n, U.N. Doc. A/56/10 (2001).

¹⁸ Article 37, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Int'l Law Comm'n, U.N. Doc. A/56/10 (2001).

Complexities in Assessing Moral Damages

1. Subjectivity and Intangibility of Harm

Moral damages typically involve non-material harm, such as emotional distress, harm to reputation, and psychological suffering. Assessing these damages is inherently complex due to their subjective nature. Unlike economic damages, moral damages cannot be easily quantified, making it difficult for tribunals to determine appropriate compensation.

- **Evidence of Harm:** Claimants may find it challenging to present concrete evidence of non-material harm, and tribunals often face difficulties in evaluating the severity of such harm¹⁹.
- **Cultural and Contextual Differences:** The perception of moral harm may vary significantly depending on cultural and societal contexts, making it difficult to apply a universal standard²⁰.

2. Varying Standards of Proof

Different tribunals apply varying standards of proof when assessing moral damages. Some tribunals have adopted a stricter approach, requiring clear and convincing evidence of the harm, while others may take a more lenient stance.

- In **ICSID arbitration**, tribunals have awarded moral damages where claimants demonstrated that the harm was significant and directly caused by the respondent state's actions. However, the level of proof required varies widely across cases²¹.

¹⁹ *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (Mar. 28, 2011).

²⁰ See *supra* note 11

²¹ *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2

3. Difficulty in Causation

Demonstrating the causal link between the wrongful act and the moral harm suffered is often contentious. Tribunals may find it difficult to assess whether the harm was directly caused by the respondent's actions or whether it arose from other external factors.

Inconsistencies in Tribunal Rulings

1. Awarding Moral Damages in Investment Arbitration

Moral damages have been awarded inconsistently in investment arbitration, leading to a lack of predictability in tribunal rulings. Some notable cases illustrate the variability:

- **Lemire v. Ukraine (2010):** In this ICSID case, the claimant, a U.S. investor, claimed moral damages due to the unfair treatment he suffered at the hands of the Ukrainian authorities, leading to psychological stress. The tribunal awarded him moral damages, recognizing that the state's actions caused non-material harm²².
- **Desert Line Projects v. Yemen (2008):** This case marked one of the few instances where moral damages were awarded to a claimant in an ICSID arbitration. The tribunal held that Yemen's actions, which included harassment and threats, caused significant moral harm to the claimant's executives. The award included compensation for moral damages, but the tribunal did not articulate a clear methodology for calculating the amount, contributing to legal uncertainty²³.

²² See supra note 19

²³ See supra note 11

- **Cementownia v. Turkey (2009):** In this case, the tribunal denied moral damages, despite the claimant arguing that it had suffered severe reputational harm. The tribunal ruled that the evidence provided was insufficient to support the claim for moral damages²⁴.

2. Human Rights Tribunals

In human rights cases, tribunals such as the European Court of Human Rights (ECHR) have a more established practice of awarding moral damages, but even here, inconsistencies can be found.

- **Papamichalopoulos v. Greece (1995):** The ECHR awarded moral damages to the claimants for the prolonged violation of property rights, recognizing the mental suffering caused by the violation.
- **Varnava v. Turkey (2009):** The ECHR awarded moral damages for the emotional suffering caused by Turkey's failure to investigate the fate of missing persons. However, the amount awarded was considered relatively low by some commentators, given the gravity of the violations²⁵.

²⁴ See supra note 21

²⁵ *Varnava and Others v. Turkey*, App. No. 16064/90, Eur. Ct. H.R. (2009)

Tests to Determine Moral Damages

Tests for Determining Eligibility for Moral Damages in International Arbitration

Arbitral tribunals often adopt various tests and criteria to determine whether a claimant is eligible for moral damages. These tests aim to establish the conditions under which moral damages can be awarded, reflecting the gravity and non-material nature of such claims. However, different tribunals have applied varying standards, contributing to an evolving but inconsistent body of jurisprudence.

The Three-Tier Test in the *Lemire* Case

In the landmark case *Lemire v. Ukraine* (2010), the tribunal developed a **three-tier test** to assess claims for moral damages. This case was crucial in setting a relatively high threshold for awarding moral damages, ensuring that only cases involving particularly egregious conduct by the respondent state would qualify. According to this test, for moral damages to be awarded, the claimant must demonstrate:

1. Ill-Treatment by the State

- The state's actions must constitute ill-treatment that goes beyond mere negligence or ordinary breaches of duty. Ill-treatment generally includes conduct that is abusive, harassing, or oppressive.
- In *Lemire*, the tribunal found that the actions of the Ukrainian authorities, which included discriminatory and obstructive behavior, amounted to such ill-treatment. However, it is emphasized that ordinary contractual breaches or simple administrative errors would not meet this threshold.

2. Significant Mental Suffering or Loss of Reputation

- There must be clear evidence that the claimant suffered significant non-material harm, such as emotional distress, humiliation, or reputational damage.
- The tribunal in *Lemire* acknowledged that moral damages could be appropriate where the harm is significant, not merely trivial. For example, in investment cases, this harm may include mental suffering resulting from threats or harassment by state actors, or from severe reputational harm affecting the claimant's professional standing.

3. Grave Causal Link Between the Actions and Harm

- The claimant must demonstrate a direct and proximate causal link between the state's wrongful actions and the moral harm suffered. This requirement serves to ensure that only those cases where the respondent's actions are the direct cause of the harm will be eligible for compensation.
- The *Lemire* tribunal emphasized that this causal connection should not be speculative. Instead, there should be a substantial basis for concluding that the state's actions led directly to the claimant's non-material suffering²⁶.

Purpose and Rationale of the Three-Tier Test

The criteria in the *Lemire* test establish a **high threshold** for awarding moral damages.

By setting rigorous standards, the tribunal aimed to:

- **Limit Awards to Serious Cases:** Moral damages are reserved for particularly egregious cases, where the state's conduct reflects a flagrant abuse of power, causing severe harm to the claimant.

²⁶ Brill.com, *Demystifying Moral Damages in International Investment Arbitration*, https://brill.com/view/journals/lape/19/3/article-p417_4.xml?language=en (last visited 8th October, 2024).

- **Prevent Frivolous Claims:** The stringent requirements reduce the likelihood of frivolous or exaggerated claims for moral damages, where claimants seek to obtain non-material compensation without clear evidence of harm.
- **Avoid Punitive Elements:** By focusing on compensatory, rather than punitive, criteria, the test helps arbitral tribunals avoid granting moral damages in a way that could be construed as punitive. International arbitration generally does not support punitive damages, which aim to punish the respondent rather than to compensate the claimant²⁷.

Challenges and Criticisms of the Three-Tier Test

1. Risk of Conflation with Punitive Damages

While the three-tier test attempts to limit awards to compensatory purposes, critics argue that some tribunals may apply it in ways that blur the line between compensation and punishment. If tribunals interpret the severity of ill-treatment or mental suffering too broadly, moral damages awards may begin to resemble punitive damages, which are not widely recognized in international law²⁸.

- For example, awarding moral damages for harm that seems trivial or that lacks clear evidence may result in amounts perceived as punitive. This can create ambiguity, as many states reject punitive damages on the grounds that they fall outside the scope of compensatory remedies.

²⁷ City, University of London, *Moral Damages and Arbitral Jurisdiction in International Investment Arbitration*, <https://openaccess.city.ac.uk/id/eprint/32504/1/Moral%20Damages%20and%20Arbitral%20Jurisdiction%20in%20International%20Investment%20Arbitration.pdf> (last visited 8th October, 2024)

²⁸ Kluwer Arbitration Blog, *ISDS, Moral Damages, Reputational Harm... To The State – A Comment In The Wake Of Lundin*, <https://arbitrationblog.kluwerarbitration.com/2017/01/13/isds-moral-damages-reputational-harm-to-the-state-a-comment-in-the-wake-of-lundin/> (last visited 8th October, 2024)

2. Inconsistent Application across Cases

The application of the *Lemire* test is highly context-dependent, and different tribunals may interpret the criteria inconsistently. The subjective nature of concepts like “ill-treatment” or “significant mental suffering” means that tribunal members’ cultural, social, or individual perspectives can significantly influence their decisions.

- In cases like **Desert Line Projects v. Yemen**, the tribunal awarded moral damages due to the abusive behavior of state actors toward the claimant’s employees. While the tribunal recognized the harm and awarded compensation, subsequent tribunals have approached similar claims more cautiously, rejecting moral damages in cases where the evidence of harm was less compelling.
- This variability results in an uncertain legal landscape for moral damages claims. Claimants may struggle to predict the likelihood of success based on past awards, and respondent states may find it difficult to assess their liability risk for moral damages.

3. Challenges in Proving Mental Suffering or Reputational Harm

- Demonstrating non-material harm with a high level of certainty remains a practical challenge for claimants. In cases where claimants allege emotional distress, humiliation, or loss of reputation, tribunals have struggled to quantify these harms, leading to wide disparities in awards.
- Furthermore, moral damages claims often rely on subjective accounts of mental suffering, with limited objective evidence to substantiate them. This can create difficulties for tribunals, which must balance the need for credible evidence with the reality that non-material harm is often intangible.

4. Complexities in Establishing a Grave Causal Link

Establishing a grave causal link between state actions and non-material harm can be difficult, particularly when multiple factors may contribute to the claimant's suffering. In the absence of a direct and clear causal connection, tribunals may struggle to apply the three-tier test consistently²⁹.

- **Papamichalopoulos v. Greece:** Although this case did not follow the *Lemire* test, it illustrates the complexity of establishing causation in cases involving indirect or cumulative harm. The tribunal recognized the harm caused by Greece's long-standing failure to return the claimants' property, which led to emotional suffering over time, but calculating the exact extent of moral harm remained a challenge³⁰.

²⁹ Ibid.

³⁰ *Papamichalopoulos and Others v. Greece*, App. No. 14556/89, 330 Eur. Ct. H.R. (ser. A) (1995)

Conclusion:

The evolving landscape of moral damages in international law reflects a critical intersection between justice, accountability, and the protection of individual rights in the face of state misconduct. As demonstrated through landmark cases and the established frameworks like the three-tier test from *Lemire v. Ukraine*, arbitral tribunals have sought to navigate the complexities of non-material harm with caution and rigor. By requiring clear evidence of ill-treatment, significant mental suffering, and a grave causal link, these criteria aim to ensure that moral damages are reserved for only the most egregious cases, thereby upholding high standards for compensation.

However, this cautious approach is not without its challenges. The potential conflation of moral damages with punitive damages raises important questions about the nature of justice in international disputes. Furthermore, inconsistencies in applying these criteria across various cases can create uncertainty for claimants seeking redress. The difficulties inherent in proving psychological harm further complicate the landscape, often leaving deserving victims without adequate compensation.

As international law continues to evolve, it is imperative for arbitral tribunals to strike a balance between safeguarding the rights of individuals and maintaining rigorous standards for moral damages. This balance is essential not only for ensuring fair outcomes but also for fostering confidence in international legal mechanisms. Moving forward, a more nuanced understanding of moral damages—one that appreciates the complexities of human experience while adhering to established legal principles—will be vital in achieving justice for victims of state wrongdoing.

In conclusion, as we reflect on the historical evolution and current practices surrounding moral damages, it becomes clear that these principles are not merely legal abstractions but vital components of a broader commitment to human dignity and accountability in our increasingly interconnected world. The pursuit of justice must remain steadfast, ensuring that those who suffer from wrongful acts by states are afforded the recognition and reparations they rightfully deserve.