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Damages in International Investment Arbitration and the future of moral damages

Master's Thesis

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Introduction

International investment arbitrations are an upcoming and dynamic factor within the current global economy.[1] They are well represented in Central Europe, which makes this topic even more prominent. They embody a need to protect and govern the globalization of international commerce and financial activities. International investment arbitrations are characterized by the involvement of a state or a state entity and in comparison, to commercial arbitrations, the sovereignty of the involved state plays a great role.[2]

On one hand, a state has rights and obligations to safeguard public interests, and on the other hand, such rights and obligations are bounding. International investment arbitration is characterized by International Investment Agreements, or better known as IIAs, that are to protect both parties involved, a state and an investor on another state, that is a party to such agreement. IIAs are treaties that serve to protect, promote a liberalize cross-border investments.[3] They serve as means of a direct right of action for a harmed party, an individual that qualifies as an investor. The most common type of IIAs is Bilateral Investment Treaties, BITs.[4]

States that conclude these BITs are bound to respect standards that arise treaty provisions. Such standards are notably "*fair and equitable treatment*", "*full protection and security*", "*national treatment*", "*most-favored-nation treatment*", "*transfer of funds*" or the so-called "*umbrella clauses.*"[5]

Damages embody one of the main characteristics of international investment arbitrations, the monetary aspect. Until 2015 most of the disputes have arisen from the energic sector, with roughly 62%.[6] In many cases damages that tribunals award, are in outrageous numbers and lack a sufficient basis. The awards can range from a

[1] Šturma, p. 175.
[2] Ripinsky, p. 7-8.
[3] Marboe, p. 5-7.
[4] Sabahi, p. 10.
[5] Abdala, p. 221.
[6] Denegri, p. 25.

couple of millions of U.S.$ to a couple of billions of U.S.$, such as in *Yukos v Russia*, when the tribunal has awarded U.S.$ 50 billion.[7]

Moral damages are less frequently awarded, and even though they do not reach the sum of billions of U.S.$, they are an impending concept for the development of the international investment arbitrations. Deriving from the nature of moral damages and their elusiveness, the more focus tribunals shall put into making sure, that no moral harm stays without reparation. Otherwise, the perpetrator would be awarded for its wrongful conduct.

Since moral damages are such a forthcoming topic, I have decided to focus my thesis on bringing more light on this topic. The objective of my thesis is to explain the concept of damages and particularly moral damages to a broader public. The questions that this thesis shall answer are (1) what the methods of reparation of damages are, and (2) what moral damages are and how their methods of reparation differ from the general methods. The focus of the thesis shall therefore lay on the value and valuation of damages and in particular moral damages.

With the help of the analysis method, the thesis is divided into eight chapters. Firstly, the thesis will set the scene with an introduction to the concept of international investment arbitrations. After a brief introduction, the thesis will examine the damages principles, the compensation, and the value of an investment in international investment arbitrations. Following, the thesis will inspect the valuation methods that tribunals use to measure the amount of damages, as well as methods of reduction of damages.

After a general assessment of damages in international investment arbitrations, the thesis will focus on the concept of moral damages. It will examine the types of wrongful acts that are compensable by moral damages and the definition and types of moral damages. It will touch on the distinction between moral and punitive damages. The thesis will furthermore examine the forms of reparation and the evolution of awarding moral damages. Second to last, the thesis will inspect the

[7] *Yukos v Russia*, para. 1888.

threshold that tribunals pose on moral damages and the valuation of moral damages. Lastly, challenges in awarding moral damages will be observed.

1. International Investment Arbitrations

When a breach of these standards happens, state bears responsibility under international law. BITs provide protection provisions against "*illegal nationalization and expropriation of foreign assets and other actions"*[8] by the host state. Most notably expropriation by the host state has always been feared by foreign investors. BITs that are concluded to attract foreign investments, therefore need to protect in case of political or economic change in leadership or direction, which could lead to seizure of foreign investment.[9]

Expropriation in its nature is deprivation of the enjoyment of property rights, which differentiates expropriation from other treatment standards.[10] Expropriation in itself is allowed under international law and BITs only set conditions for expropriation, but do not interfere with the sole right of a state to expropriate. Lastly, expropriation is the only treatment standard that contains directions of assessment of compensation.[11]

Legal basis for expropriation arises from so-called Friendship, Commerce and Navigation Treaties (FCN) that were concluded in the post-World War II era.[12] These treaties have later evolved into now used BITs. The foundation of these treaties ascends from the Hull formula that entails a public purpose and "*adequate, effective and prompt compensation*".[13] We can distinguish between direct and indirect expropriation. Direct expropriation entails the physical seizure of assets or revenue streams. On the other hand, indirect expropriation, which is much more difficult to prove, is a decrease in anticipated revenues without seizure of assets or revenue

[8] BIT.
[9] Denegri, p. 37.
[10] McLachlan, p. 360-361.
[11] Marboe, p. 18-20.
[12] *Ibidem.*
[13] *Tidewater v. Venezuela*, para. 86.

streams. In indirect expropriation, the host state does not take over the possession or control of the investor's asset.[14]

Deriving from the nature of expropriation, we can distinguish lawful and unlawful expropriation. In order for the expropriation to be lawful certain criteria need to be met. Firstly, the seizure needs to serve a public purpose, secondly, the act of expropriation needs to follow due process, thirdly, it needs to be non-discriminatory and lastly, the State has to pay the investor in question compensation.[15]

The last requirement is questionable. Arbitration tribunals have not agreed on whether a compensatory payment is a mandatory requirement, in other words, if the sole absence of compensation renders an act of expropriation to be unlawful.[16] The tribunal in *Tidewater v. Venezuela* found that "*an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation.*"[17] Furthermore, it stated that such lack renders the expropriation as provisionally lawful, meaning that a later payment of satisfactory compensation would consider the act to be lawful.[18] The tribunal in *Venezuela Holdings v. Venezuela* has arrived at the same conclusion, stating that "*the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful.*"[19]

In opposition, the tribunal in *Pezold v. Zimbabwe* concluded that since there was no compensation paid, the act of expropriation has not fulfilled the criteria of a lawful expropriation and therefore determined, that Zimbabwe has expropriated the investor in question unlawfully.[20] The same conclusion has been stated by the tribunal in *Unglaube v. Costa Rica.*[21]

[14] Abdala, p. 105.
[15] *Tidewater v. Venezuela,* para. 90.
[16] Denegri, p.38.
[17] *Tidewater v. Venezuela,* para. 140.
[18] *Tidewater v. Venezuela,* para. 141.
[19] *Ibidem.*
[20] *Von Pezold v. Zimbabwe*, para. 497.
[21] *Unglaube v. Costa Rica,* para. 305.

At first sight, the above-mentioned decisions are conflicting, but after a careful contemplation, the difference between these decisions is the fact, that in both *Tidewater v Venezuela* and *Venezuela Holdings v Venezuela* cases the host state has been willing to pay compensation, but rather the issue has been the specific amount.[22] Consequently, it could be concluded that the mere absence of payment, in case there is the willingness to compensate, should not render automatically an act of expropriation to be unlawful.[23] The distinction between lawful and unlawful expropriation has a significant impact when assessing damages.

2. Damages principles in International Investment Arbitration

Damages serve harmed party as a recovery rather than a penalty to the harming party. The aim of damages is to "*wipe out all the consequences of an illegal act*"[24] and in order to achieve a full reparation, the international law distinguishes between damages at large and mere compensation for lawful expropriation.[25]

The main difference between damages and compensation is from where they derive. Compensation, on one hand, is codified in international treaties, while damages derive from arbitral decisions when they are awarded by tribunals.[26] Therefore, a party in unlawful expropriation or harmed by other wrongful act is entitled to damages as well as other remedies for example restitution in kind, that are not available to a party, which has been lawfully expropriated.[27] Such difference protects the state itself when distinguishes it's acts in accordance with their lawfulness.[28]

As mentioned above, damages serve to wipe out all the consequences of an illegal act. The full compensation standard is largely connected to the *Chorzów factory* case. Thou the stones of this standard have been set out in the *Robinson v.*

[22] *Venezuela Holdings v Venezuela*, para. 301, 306.
[23] Trenor, p. 102-104.
[24] *Chorzów factory*, para. 125.
[25] Ripinsky, p. 4.
[26] McLachlan, p. 414-416.
[27] *Ibidem.*
[28] Trenor, p. 96.

Harman case in 1848 in England.[29] This case founded that the intention of damages is to provide a harmed party with the required sum of money in order "*put the claimant back in the position it would have been in had the breach never occurred.*"[30] Similarly, this view has been adopted by French and German law, stipulating the wronged party with resources to obtain the comparable position it would have been in if not for the harm done.[31]

Even though full compensation or sometimes known as full reparation standard existed before, it is largely intertwined with the *Chorzów factory* case. This case has been brought before the Permanent Court of International Justice in the 1920s. The basis of the claim has been the violation of an international agreement and thus the liability for such breach. The merit of the case was based on the international agreement between Germany and Poland, in which Germany has agreed on transferring the Upper Silesia area to Poland, which in return has agreed not to seize any of Germany's property. Poland has breached this agreement by confiscating two German factories. As a result, PCIJ has adjudicated that Poland has breach mentioned agreement and that Poland would be liable for such breach and any losses suffered by Germany from such breach.[32] PCIJ has therefore pronounced a full reparation standard stating that:

> "*… reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."*[33]

Moreover, the Court has articulated the remedies as such: *"(1) restitution in kind; or if that was not possible, as was the case here, its monetary equivalent"*[34] and *"(2) the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."*[35]

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[29] Trenor, p. 113-114.
[30] *Saint-Gobain Performance Plastics*, para. 38.
[31] Trenor, p. 113-114.
[32] Sabahi, p. 47-48.
[33] *Chorzów factory*, para. 125.
[34] Sabahi, p. 50.
[35] *Chorzów factory*, para. 175.

The standard of full reparation articulated in *Chorzów factory* has been codified into Articles of Responsibility of States for Internationally Wrongful Acts. The articles opted for „*a model of remedial justice as the objective of reparations.*"[36] In article n.31, states are bound to "*make full reparation for the injury caused by the internationally wrongful act*".[37] Moreover, in article n.36, states are required to "*compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*"[38]

Article n.36, therefore, articulates the *Chórzow* formula which states:

> *"Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."*[39]

Article 34. then states the various forms of reparation as follow:

> *"full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."*[40]

Firstly, restitution is a form of reparation, that commands restoration of the *status quo ante*, the state as it had been before an internationally wrongful act has been committed.[41] Restitution is widely acknowledged as the principal remedy in international law,[42] since it has "*the potential to eliminate, legally and materially, the consequences of an unlawful act, rather than providing compensation, which is mainly a monetary substitute for restitution.*"[43]

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[36] Sabahi, p. 53.
[37] ILC Articles, n. 31.
[38] ILC Articles, n. 36.
[39] *Chorzów factory*, para. 125.
[40] ILC Articles, n. 34.
[41] *USA v Norway*, para. 338.
[42] Kantor, p. 52-53.
[43] Sabahi, p. 61.

Secondly, compensation is the most used method of reparation in international investment arbitrations[44], and it will be discussed later in the thesis. Lastly, satisfaction, on the contrary, is rarely awarded by tribunals, and serves as a mean to repair "*non-material*" and "*non-financial assessable damages*."[45] And as such, it will be examined in the chapters concerning moral damages.

The tribunal in *Vivendi v. Argentina* took the *Chórzow* formula even further and ruled, that:

> „*Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.*"[46]

In the course of time, other tribunals have applied the full reparation standard set by *Chorzów factory* even outside of the scope of expropriation. For example, the tribunal in *BG Group v. Argentina* has applied the full reparation standard to a breach of fair and equitable treatment.[47]

3. Compensation in International Investment Arbitration

Legal expropriation as mentioned above requires payment of compensation. International investment treaties usually pronounce the compensation condition as an obligation to pay "*just compensation*" or "*prompt, adequate, and effective compensation*", and numerously expressly demand "*fair market value"* as the measure of that compensation.[48]

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[44] McLachlan, p. 413.
[45] Sabahi, p. 54.
[46] *Vivendi v. Argentina*, para. 224.
[47] *BG Group v. Argentina,* para. 413-414.
[48] Trenor, p. 101

A prompt compensation demonstrates that it must be reimbursed without unreasonable delay. An adequate compensation means equal to the fair market value of the seized asset instantly before the seizure. And lastly, effective compensation requires that it be made in a freely transferable currency.[49]

The tribunal in *CME v Czech Republic* stated that "*just compensation*" equates with a fair market value that represents the genuine value of the property affected.[50] The standard of "*just compensation*" is an international standard independent of national law.[51] "*International law requires that compensation eliminates the consequences of the wrongful act.*"[52] Accordingly, "*obligation to compensate for the damage caused…shall cover any financially assessable damage including loss of profits…*"[53]

The tribunal in *ADC v Hungary* rendered that a lawful and an unlawful expropriation require different treatments. Unlawful expropriations shall be subjected to customary international law as established in the *Chorzów factory* case, and not to a compensation provision in BITs.[54] In the case, the tribunal held that Hungary has expropriated ADC, as it has canceled its airport management contracts. Such actions have breached the Hungary–Cyprus BIT's provisions of public purpose, due process of law, non-discrimination, and compensation.[55]

The tribunal stated that even though BITs are *lex specialis* and therefore prevail over general international law, such rules do not apply for unlawful expropriation[56]. The reasoning behind such decision is the fact that such application would "*conflate compensation for a lawful expropriation with damages for an unlawful expropriation*".[57]

Following the tribunal in *ADC v Hungary*, the tribunal in *Siemens v Argentina* held that:

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[49] *USA v Norway*, para. 338-340.
[50] *CME v Czech Republic*, para. 497
[51] *Ibidem.*
[52] *Ibidem.*
[53] ILC Articles, n. 36.
[54] *ADC v Hungary,* para. 480-499.
[55] Sabahi, p. 98.
[56] *ADC v Hungary,* para. 429-443.
[57] *ADC v Hungary,* para. 481.

"The key difference between compensation under the Draft Articles and the Factory at Chorzów case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act' as opposed to compensation 'equivalent to the value of the expropriated investment' under the Treaty."[58]

The tribunal in *Siag v Egypt* upheld the difference between lawful and unlawful expropriations, even though it held that such distinction had no practical meaning since the award of the market value of the investment was equal under both.[59] The distinction between lawful and unlawful expropriations was set in two instances in *Philips Petroleum v Iran*. The tribunal there rendered the difference as "(1) *whether restitution of the property can be awarded, and (2) whether compensation can be awarded for increase of the value of the property between the date of the taking and the date of the judicial or arbitral decision awarding compensation.*"[60]

4. Value of an investment

A value of an object is generally assessed as a price that would bring in an open and competitive market, given by the demand and supply for such object.[61] In investment arbitrations, tribunals often use the term "*fair market value*" in connection to compensation in expropriation cases. A fair market value would also encompass terms such as "*genuine*", "*actual*" or "*true.*"[62] Fair market value is according to commentaries to ILC Articles "*general basis for assessment of compensation reflecting the capital value of property taken or destroyed.*"[63]

A full reparation standard requires that all financially assessable damages be compensated. A value or a decrease in a value of investment mostly operates as a measure of compensation. However, in some cases, tribunals have rendered

[58] *Siemens v Argentina*, para. 352.
[59] *Siag v Egypt*, para. 541.
[60] *Philips Petroleum v Iran*, para. 122.
[61] Price.
[62] Ripinsky, p. 183.
[63] ILC commentaries to Article n.36, para. 22.

compensation in addition to the value or the decrease in value of an investment, such as moral damages awarded besides a loss of value of an investment.[64]

Thus, there is a need that the tribunals quantify damages with the type of the breached obligation in mind. Different obligations require different valuations. Cases of unlawful expropriation shall be decided based on the value of the investment, parallelly to the treaty provisions on lawful expropriation.[65] As far as infringements of relative standards, for example, fair and equitable treatment, the method of the value of the investment is less proper. A breach of fair and equitable treatment demands widespread judicial analysis of the State's sovereign behavior.[66]

Tribunals use various measures of a value of an investment, primarily lost profits and investment expenditures. As to the investment expenditures, tribunals employ investment expenditures as (1) head of damage, (2) *damnum emergens* and *lucrum cessans* or (3) fair market value.[67]

Before allowing investment expenditures to be used in order to the assess value of an investment, the tribunal needs to evaluate the eligibility of such expenses. The eligibility of expenses comprises (1) a link with the investment, (2) a link with the investor, (3) reasonability, and (4) sufficient evidence.[68]

Firstly, there shall be a link between the expenses and the investment, meaning that the expenses need to be sustained for the purpose of a particular investment venture.[69] Secondly, there shall be a link between the expenses and the investor. This would mean that any losses that an investor can prove shall be compensated.[70] Thirdly, the expanses shall not be unreasonable, unnecessary, or excessive. According to the tribunal in *Himpurna* this demonstrates that "*as long as the expenditures were made in rational pursuit of the objectives of the Contract, there is no room to question their*

[64] Ripinsky, p. 262-263.
[65] Reghizzi, p. 62.
[66] Reghizzi, p. 62.
[67] Ripinsky, p. 264-266.
[68] Ripinsky, p. 266.
[69] *MTD v Chile,* para. 239.
[70] *Ibidem.*

cost-effectiveness ex post facto."[71] And lastly, there shall be sufficient evidence. The requirement of the proof of the expenses is borne by the Claimant. The evidence such as "*in general, contemporaneous books and record of a company regularly kept in normal course of business*"[72] shall according to *Biloune* be substantial.

As to which of the mentioned investment expenditures to use the tribunal in *Himpurna* stated the following:

> *"when awarding compensation for expropriated business ventures, there is generally no basis to apply the contractual reliance damages (damnum emergens), but only the expectancy damages (lucrum cessans). An undertaking has been expropriated; the prejudice suffered by its former owner is simply the worth of the venture as a going concern. That worth is crystallised in an analysis which discounts the future revenue stream of the enterprise to establish its present value. Leaving aside special considerations justifying higher recovery in the case of wrongful expropriation, there is no separate evaluation of sunk costs, whether or not represented by physical assets."*[73]

As far as fair market value is applied, in expropriation cases, it is closely linked to the discounted cash flow method and lost profits. Fair market value has been defined by the tribunal in *CMS v Argentina* as:

> *"the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms [sic] length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."*[74]

The fair market value, therefore, does not represent the value of the asset at any particular given moment but rather embodies the worth of such asset on the market.[75]

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[71] *Himpurna,* para. 241.
[72] *Biloune*, para. 223-224.
[73] *Himpurna,* para. 241.
[74] *CMS v Argentina,* para. 402.
[75] Sabahi, p. 103.

To calculate fair market value tribunals can use various methods, preferably based on the type of the business or asset in question and other criteria. The nature of the value property dictates which method of valuation would be better suited for the particular type of asset.[76] In a case of a tangible asset, such as gold, the method of valuation will differ from a case where the asset is intangible, such as social media. With that, the question of the state of the investment is closely intertwined. The tribunal needs to evaluate whether an asset is a going concern with future prospects or whether the asset is no longer viable and is in liquidation.[77]

The most significant principle in practice is the range of accessible information that tribunals can obtain, as well as at what time which information is available to them. "*The valuation of a business requires in-depth knowledge of the company and the industry in which it operates.*"[78] Additionally, tribunals need to apply a professional judgment when choosing the most suitable valuation factors.

And lastly, the choice of a valuation method simply depends on the discretion of the particular tribunal. It is up to each tribunal to decide what method suits the case the most taking into consideration all the available information. When exercising discretion, tribunals shall be directed by "*equitable considerations without thereby assuming the role of aritrators ex aequo et bono.*"[79] Tribunals can modify the quantum of equity depending on the relevant circumstances, such as an intensity of the State's breach[80], whether the State acted in good or bad faith[81], a possible enrichment[82], or the economic conditions of the host State.[83]

Apart from investment expenditures, the value of an investment can be assessed by lost profit. Lost profit in investment arbitrations can mean different things. The term can be used as a reference to cash flow, the lost past profits

[76] Sabahi, p. 107-108.
[77] *Rumeli Telekom*, para. 803.
[78] Blum, p. 2.
[79] *Tecmed v Mexico*, para. 190.
[80] Sabahi, p. 1056.
[81] *Techniques v Poland*, para. 2.
[82] Dolzer, p. 289.
[83] Reghizzi, p. 64.

(meaning from a date of a breach until date of an award), or the lost future profits (meaning subsequent to an award.)[84]

In claims of contract breaches, that do not entail expropriation, the tribunals most often calculate the value of the losses on the base of the loss of profits or consequential liability to a third party.[85] In such case, the tribunal would not take into consideration the alternative of capital expenditure. Nevertheless, in some contractual violations tribunals have considered both capital expenditure for the failure to supply the goods and the loss of profits.[86]

In order for the tribunal to calculate lost profits, it needs to determine whether or not the lost profits are recoverable. In order for the damages to be recoverable, there needs to be a "*reasonable degree of certainty*"[87] and they "*cannot be recovered for an uncertain loss."*[88] The Amoco tribunal noted that "*one of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damages can be awarded.*"[89] Therefore, a claim for lost profits shall be accompanied by a reasonable degree of certainty that the Claimant would have been able to make those lost profits, not for the wrongful act.[90] That implies, the Claimant is not obliged to present a precise valuation of lost profits.

Besides recoverable, the lost profits need to be foreseeable. The tribunal in *Micula v Romania* had proposed a test, that would indicate whether or not the lost profits are recoverable and foreseeable. Claimants must demonstrate that:

> *"(1) were engaged in a profit-making activity (or, at the very least, that there is sufficient certainty that they had engaged or would have engaged in a profit-making activity but for the revocation of the incentives), and*

[84] Clayton, para. 12-14, 37.
[85] Pryles, p. 5.
[86] Pryles, p. 5.
[87] Ripinsky, p. 164.
[88] *Ibidem.*
[89] *Amoco*, para. 238.
[90] Ripinsky, p. 281.

(2) that that activity would have indeed been profitable (at the very least, that such profitability was probable).”[91]

Three main types of recoverable loss of profits can be distinguished. First, there is the loss of profits that is a result of “*the temporary loss of use and enjoyment of the income-producing asset.*”[92] In such case, the tribunal in *LG&E v. Argentina* stated that the compensation equals “*the income to which the claimant was entitled by virtue of undisturbed ownership.*"[93] Such income is assessed thru a period in which the Claimant had lost it.

Second, there is a loss of profits connected to “*unlawful taking of income-producing property.*”[94] In this type, in comparison to the first type of loss of profits, the tribunal questions the property title to the asset. The compensation in this type usually encompasses the losses suffered in between the moment of expropriation and settlement of the dispute.[95]

And lastly, there is a loss of profits associated with concessions and further contractually protected interests.[96] In this type, the tribunal awards the compensation for lost profits estimated after the date of award till extinguishing the right.[97]

As far as calculations of lost profits go, there are various modalities of compensation for lost profits. These modalities arise from the different meanings of the term lost profit. Hence, lost profits can function to measure a fair market value of a business, primarily when applying the discounted cash flow method. They can serve as a type of compensation for losses of business opportunities, as well as to shield business interruptions, periods of time with less profit than normally. Lost profit, in the meaning of *lucrum cessans*, may even pair with *damnum emergens* to provide full reparation standard.[98]

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[91] *Micula v Romania*, para. 1009.
[92] ILC commentaries to Article n.36, para. 90.
[93] *LG&E v. Argentina*, para. 90.
[94] ILC commentaries to Article n.36, para. 30.
[95] *Chorzów factory*, p. 47.
[96] ILC commentaries to Article n.36, para. 31.
[97] ILC commentaries to Article n.36, para. 28.
[98] Ripinsky, p. 289.

5. Valuation methods

Now when we examined the value of an investment, we can apply that knowledge to examine the valuation of damages. To calculate damages there are various valuation methods used. There are no rules concerning requirements to use a certain method of valuation in customary law or treaty-based standards, therefore it is up to the tribunal to consider, which of the following valuation method is most suitable for the particular case.

Main valuation methods are: (1) Income-based approach, (2) Market-based approach, and (3) Asset-based approach. Besides these main methods, tribunals sometimes allow other methods or a mixture of the main methods.[99]

Before the application of either of these methods, it is vital to evaluate the specific circumstances of the particular case. The tribunal must outline the basis of valuation, together with the premises regarding the valuation procedure. The tribunal often bases its valuation upon the submission of either of the parties to the dispute, however, the tribunal is bound by its own valuation of the circumstances and at the end, it shall assess the damages according to its best knowledge.[100]

The valuation is influenced by various standards, such as fair market value or full reparation standard. Fair market value entails that the price upon which a hypothetical willing buyer and a hypothetical willing seller would agree is conclusive.[101] Full reparation standard, as deliberated above, demands that the injured party is put in the financial position he or she would be in if the unlawful act had not been committed.[102]

[99] Trenor, p. 104-107.
[100] Marboe, p. 44
[101] Abdala, p. 222-223.
[102] *Chorzów factory*, para. 125, 213.

5.1. Income-based approach

Income-based method reflects the ability of an asset to produce profit. The income-based method can mean one of three methods, DCF method, adjusted present value method, or capitalized cash flow method.[103] The DCF method, the most commonly used method, stands for discounted cash flow method. The DCF method operates with future expected cash flow that is converted to a single current capital value.[104]

Since the DCF method relies on a prediction of future revenue, an extensive collection of information on the future expected cash flow, including past and present data, is needed. The prediction of future revenue has to be credible in order to obtain its reasonableness and lack of contradiction. This prediction is based on a thorough analysis of the current and future market in which the valued business operates, the specific industry's economic conditions, and as well as the financial and competition conditions.[105] Such evaluation shall use an appropriate discount rate, that entails (1) the time value of money[106] and (2) the risk connected to the expected cash flow.[107] The most notably used discount rate is the Weighted Average Cost of Capital (WACC) which is based on the Capital Asset Pricing Model (CAPM).[108]

The fact that the DFC method is based on future expected cash flow deems it to be contended as speculation. In order to avoid speculative calculations, the tribunal needs to evaluate whether the particular case is based on adequate data.[109] Tribunal stated in *Rusoro Mining* that the DCF method works if *"there are reliable projections of its future cash flow."*[110] Moreover, the tribunal in *CME v Czech Republic* decided that in order to use the DCF method there needs to be "*continuing value*" of the company based on expected cash flows growing at a constant rate after the forecast period.[111]

[103] Abdala, p. 229.
[104] IIG Capital, para. 14.
[105] Ripinsky, p. 202-203.
[106] Marboe, p. 44-51.
[107] Dominguez, p. 106.
[108] Marboe, p. 44-51.
[109] Kantor, p. 18-19.
[110] *Rusoro Mining*, para. 759.
[111] *CME v Czech Republic*, para. 160.

The tribunal in *Rusoro Mining* established important steps to evaluate the application of the DCF method. It stated, that the DCF approach cannot be applied to all sorts of situations, and while in some businesses it provides effective assessments, in other cases it is inapplicable. "*DCF works properly if all, or at least a significant part, of the following criteria are met*:

(1) *The enterprise has an established historical record of financial performance;*
(2) *There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted in tempore insuspecto, prepared by the company's officers and verified by an impartial expert;*
(3) *The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;*
(4) *The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing;*
(5) *It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country;*
(6) *The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty."*[112]

5.1.1. Going concern

The tribunal in *Total v. Argentina* accepted the DCF method as the most appropriate way to determine the fair market value of a going concern.[113] Going concern value is a widely used term. Many tribunals in defining this term adhere to the definition that the World Bank has offered as such:

> "*an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had*

[112] *Rusoro Mining*, para. 759.
[113] *Total v. Argentina*, para. 136.

not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State."[114]

However, there is no generally upheld threshold defining a "*sufficient period of time*" and the criterion is often arbitrary and not rooted in economics.[115] The tribunals evaluate individual disputes on a case-by-case basis, considering numerous factors when deciding on whether such threshold was met.

The tribunal in *Amoco* has stated that in order to ascertain a going concern, one has to substantiate that "*an undertaking … had demonstrated a certain ability to earn revenues and was, therefore to be considered as keeping such ability for the future.*"[116] Tribunal thus shifted from focusing on the liquidation of an investment to its profitability in defining the ongoing concern value.

The tribunal in *Takavoli v Iran* has stated this alteration and acknowledged that:

"[i]*n accounting terms, the phrase going concern generally describes a company that 'can continue to trade, e.g., has adequate funds for doing so' … In the Tribunal's practice, however, the term 'going concern' generally has been used in a less technical sense. In determining whether a company is a going concern, the Tribunal generally examines whether the company had begun operations by the date of its expropriation and, if it had, whether it had a reasonable prospect of being able to continue its operations after the Revolution.*"[117]

To avoid awarding speculative damages tribunals rejected the DCF method when concluded that the business in question was not a going concern. Some tribunals have rejected the usage of the DCF method when the business in question has not been built or completed, for example in *Levitt v. Iran.*[118] Others, though, rejected the notion, that prevents compensation to a business that has not been operating for a sufficient period of time that would allow to establish a history of

[114] World Bank Guidelines.
[115] *Ibidem.*
[116] *Amoco*, para. 203
[117] *Takavoli v Iran,* para. 95.
[118] *Levitt v. Iran*, para. 56-58.

cash flow, as long as there is a satisfactory amount of data to allow reliable projections of the cash flow.[119] Consequently, the tribunal in *Gold Reserve v. Venezuela,* has awarded damages even though the mine in question has never been exploiting any minerals. The tribunal determined that the mining industry was one, that had enough data and therefore allowed the calculation of damages.[120]

Similarly, the tribunal in *Rumeli Telekom v. Kazakhstan* has allowed the usage of the DCF method, even though concluded that the asset in question, telecommunication services, did not fall under the "*going concern*" definition. The harmed party has lacked a consistent presence that would permit to generate necessary information for calculating the future profits. Nevertheless, the tribunal sustained the DCF method stating, that due to the direct link between the asset and its potential to generate profit, the tribunal could not find a suitable alternative method.[121]

Consequently, the appropriate use of the DCF method depends on the nature of valued business and assets.[122] If the valued business and assets are those that allow reliable calculations of lost profit, the tribunal can therefore consider the DCF method.

Additionally, tribunals consider if a business is going concern on the basis of whether the profitability endured for numerous years. The tribunal in *Asian Agricultural* stated that at least two or three years is the minimum period needed to establish continuing business connections, in other words for a company to be considered as going concern.[123] Similarly decided the tribunal in the case of *Metalclad.*[124]

However, the ruling of the tribunals in *Asian Agricultural* and *Metalclad* should be subjected to further consideration of the particular nature of the valued

[119] Denegri, p. 32.
[120] *Gold Reserve v. Venezuela,* para. 863.
[121] *Rumeli Telekom v. Kazakhstan*, para. 811.
[122] Ripinsky, p. 195-197.
[123] *Asian Agricultural,* para. 103.
[124] *Metalclad,* para. 120.

investment. The threshold stated in *Asian Agricultural* cannot be used in all cases, since not all investments are the same. In *Asian Agricultural*, the main assets affected were the shrimps destroyed on the shrimp farm by the local rebels.[125] However, in a case, where Claimants' intangible assets are of sale of advertising space and promotional content on their feed, the investment is much more difficult to evaluate. In other cases, the tribunal refrained from imposing a fixed extent of time, and have simply referred to the World Bank Guidelines, and their definitions of going concern.[126]

5.1.2. Discount rate

The tribunal in *Amoco* described that the DCF method discounts the projected future cash flow to its present value by applying the discount rate.[127] Weighted average cost of capital ("*WACC*") represents the average cost of raising funds from shareholders and lenders operating in the same industry as the damaged company.[128] The costs of raising funds from a lender are measured by interest rate, also called the cost of debt, and the interest rate related to raising funds from shareholders is called the cost of equity. WACC estimates the risk of future cash flows while considering the interest rate of both lenders and shareholders.

The key factor in the making up of the WACC is the country risk premium, which estimates how much riskier is investing in a country compared to *"a safe country"*. Country risk refers to the risk created by country-specific aspects, it may include business risks (such as macroeconomic factors, financial market factors, or local demand/supply factors)[129] and political risks (such as expropriation, tax and policy alterations, comprising currency convertibility, political violence such as civil war, mass strikes, and civil strife).[130]

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[125] *Asian Agricultural,* para. 3.
[126] World Bank Guidelines.
[127] *Amoco*, para. 238.
[128] Kantor p. 159.
[129] Ripinsky, p. 326.
[130] Abdala, p. 221.

The higher the country risk rate, the higher the WACC, and therefore, the lower the damages calculated.[131] Thomas Stauffer warned against the so-called *"Cinderella effect"*, which occurs when a party deliberately overvalues its assets and undervalues the country risk rate to achieve a more advantageous result from the DCF method.[132]

There is debate on whether to include country risk reflecting possible unlawful state behavior or not. When talking about risks related to unlawful state conduct, "*discounting the value of the investment in light of the prospect of such conduct is arguably in tension with the raison d'être of the investment treaty itself.*"[133] Hence, some tribunals have omitted the presence of an unlawful state action from the discount rate in order to prevent a possible windfall to the state. The tribunal in *Gold Reserve* stated that "*it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations."*[134]

However, others viewed these steps as allowing the windfall to the investor.[135] The tribunals in cases involving Venezuela have assumed this approach and therefore, encompassed distinctive sums of "*confiscation risk*" when calculating the country risk.[136] Thus the disagreement, tribunals have in some cases applied different discount rates for the same country. For example, in the case of Venezuela, the tribunal in *OI Group* has assessed the country risk premiums to 6%, whereas the tribunal in *Tidewater v Venezuela* to nearly 15%.[137]

As mentioned above, the country risk rate or discount rate serves the purpose of decreasing the level of speculation and asserting some degree of certainty and business sense in the calculations. The raw lost profits calculated from the past records of performance in the DCF method are from their very nature speculative, nevertheless, they are subjected to the country risk rate established from political

131 Craig, p. 236.
132 Stauffer, p. 17.
133 Trenor, p. 110-112.
134 *Gold Reserve*, para. 841.
135 *Ibidem.*
136 *Phillips Petroleum Company*, para. 1083.
137 Trenor, p. 110-112.

risk, tax and currency risk, banking sector risk, economic structure risk and other.[138] Means to combat awarding speculative damages that tribunal can use is amending the discount rate used in the DCF method's calculations. The DCF method is inherently speculative, however, the speculation can be dealt with by implementing the aforementioned measures. More on the bar of speculative damages below.

5.2. Market-based approach

The second widely used method to calculate damages is the market-based approach. The market-based approach works with a comparison of the valuated company with a similar business, business ownership interests, securities, or intangible assets that have been sold.[139] From these businesses, the tribunal compares either an equivalent item or an equivalent transaction. The market-based method also operates with share prices of publicly traded companies. These stock prices are a reliable and impartial guide, although some stock prices do not automatically reflect the real value of an asset and are subjected to volatility, that not only depends on economic circumstances.[140]

The tribunal in *Yukos v. Russia* established it had "*a measure of confidence*" on the grounds of accessible stock market indexes, hence it applied the market-based method instead of applying the DCF method based on less reliable facts of the case.[141] Some tribunals have contemplated, that comparing investments based on the very same basis is exceptionally convincing evidence of the fair market value of these assets.[142]

On the other hand, it has been perceived that the market-based approach works better as a method to evaluate the precision of other methods, rather than a principal method to calculate damages. The tribunal in *Tenaris v. Venezuela* noted the

[138] Country risk analysis.
[139] Kantor, p. 30-31.
[140] Denegri, p. 35.
[141] *Yukos*, para. 1785-1787.
[142] Abdala, p. 230.

difficulty to identify companies that are actually comparable and therefore rejected the use of the market-based approach.[143]

However, the tribunal in *Kardassopoulos v. Georgia* held that it is difficult to conceive more concrete evidence of the supposed value of expropriated assets than a sale operation relating the same asset 16 days after the date of the expropriation. Therefore, the tribunal applied the market-based method, considering the sale operation that involved the same asset to evaluate the fair market value. [144]

5.3. Asset-based approach

Thirdly, an asset-based method or else know as the cost approach is based on assessing value to the different constituents of the valued business. It operates with either a book value or a replacement value.[145] This actively demonstrates, that all these components are revalued to their current values. The difference between revalued assets and revalued liabilities then constitutes the final value of the business. Since the method is based on comparing assets and liabilities, it is considered to be less speculative and easier, and therefore is used in the circumstances that the part record or the future profit is too ambiguous.[146]

The tribunal in *South American Silver* stated that the Cost-based method is being used when the businesses are not going concerns, or when there is an insufficiently solid basis on which to calculate profits or growth (in this case the business plan), or when the estimation of future cash flows would be completely speculative.[147]

Moreover, the tribunal in *Copper Mesa Mining* decided to use the valuation method of proven expenditure, rather than seeking to value loss of chance.[148] The asset-based method has been also applied for example by the tribunal in *Oil Field of*

[143] *Tenaris v. Venezuela*, para. 529.
[144] *Kardassopoulos v. Georgia*, para. 599.
[145] Trenor, p. 104-107.
[146] Marboe, p. 44-51.
[147] *South American Silver,* para. 859.
[148] *Copper Mesa Mining*, para. 726.

Texas Inc v. Iran. Since that it has been criticized for disregarding that investments are often valued more than the bare value of their assets.[149]

5.4. Other approaches

In cases that the tribunal does not adhere to the three previously mentioned methods, it can choose another method particular to the case in question. The tribunal in *Saipem v. Bangladesh* based its calculations of damages on a previously assessed arbitration award.[150] The tribunal in *Occidental Exploration v. Ecuador* has valued damages on the base of tax refunds not reimbursed to the harmed party.[151]

Besides these particular methods, tribunals have occasionally applied a combination of the three principal methods. The mixture of asset-based method and the income-based method comes from the principles of *damnum emergens* and *lucrum cessans*, which applied to a case renders a tribunal the opportunity to assess fixed assets by their costs or substitute value and add an estimate of future profits.[152] The tribunal in *LIAMCO v Libya* has taken into evaluation not only the book value of the business but also added a valuation of risks taken by LIAMCO in their pioneer works and subsequent activities.[153] The issue with this approach is the fact, that the asset-based method and the income-based method view distinctively the value of an asset, and therefore are substitutes and should not be applied together.[154]

Another possible mixture of methods is to combine market-based approach and income-based approach. Such mixture has been presented to the tribunal in *Crystallex v Venezuela.* The tribunal in *Crystallex v Venezuela* has taken into consideration two distinctive approaches put forward by the Claimants, the stock market approach and the market multiples approach. In the tribunal's view, these two methods most reliably project Claimant's losses. [155]

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[149] Trenor, p. 104-107.
[150] *Saipem v. Bangladesh*, para. 202.
[151] *Occidental Exploration v. Ecuador*, para. 143.
[152] Marboe, p. 44-51.
[153] *LIAMCO v Libya*, para. 211-214.
[154] Kantor, p. 26-27.
[155] *Crystallex v Venezuela*, para. 887-916.

Similarly, the tribunal in *Rusoro Mining* has merged the market-based approach and the income-based approach. It stated, that due to Venezuela's policies distressing the gold sector, the best approach to valuating the damages Rusoro Mining suffered would be to combine a weighted combination of the remaining three valuations: it weighted the maximum market valuation at 25 %, the book valuation at 25 %, and the adjusted investment valuation at 50%.[156]

6. Principles of reduction of damages

Besides banning speculative damages, tribunals can rely on other methods to control the amount of damages awarded, such as causal link, foreseeability, mitigation, and ban of double recovery.[157]

6.1. Ban against speculative damages

The DCF method will always be to some degree speculative. However, experts note that there is always uncertainty associated with valuation and that it is unrealistic to expect or demand absolute certainty from such process. The party seeking damages has to prove, but not an absolute certainty, but a rather reasonable certainty, the existence of damages.[158] In such evidencing, the harmed party shall not be penalized for willful actions of the other party that might have resulted in lowering its probability to prove damages with more certainty. Tribunals in most cases have agreed that the requirement of reasonable certainty shall apply only on the fact of damages and not to its amount.[159]

Legal systems generally reject damages that are too speculative.[160] The tribunal in *BG Group v. Argentina* stated that *"an award of damages, which are speculative, would run afoul the full reparation principle."*[161] Moreover, the tribunal in *ADM v Mexico* noted that

[156] *Rusoro Mining*, para. 762-789.
[157] Trenor, p. 81-82
[158] *SPP v Egypt*, para. 84.
[159] Trenor, p. 86-89.
[160] Kantor, p. 70.
[161] *BG Group v Argentina*, para. 428.

"*the tribunal must avoid speculative benefits in its damage calculations."*[162] For example, the tribunal in *Amoco* affirmed the rule of the law of international responsibility of States that *"no reparation for speculative or uncertain damage can be awarded."* As far as lost profits are concerned, the tribunal in *Autopista* found that *"the existence and amount of lost profits must be established with a sufficient degree of certainty and thus cannot be remote, uncertain or speculative. "*[163]

Another technique of combating speculative damages is awarding compensation for lost opportunity accounting for the probability that the harmed party would have received profit from the lost opportunity in question. That means, that in case the tribunal concluded that the harmed party only had 60% chance of winning a bid, the harmed party would not be awarded with 100% of the lost profit, but only those 60%.[164] This practice has been applied for example by the tribunal in *Sapphire Petroleum.*[165]

The tribunal in *Bosca v. Lithuania* operated also with the concept of lost opportunity, however, established that the lost opportunity relates only to a right to recover direct damages, for example, the capital spent on the investment, and not to compensation of probability of the future investment.[166]

The degree of speculation and uncertainty can be dealt with by taking conservative estimates of cash flow projections and application of higher discount rate. Mr. Pryles writes that "*difficulty of assessment of damages is not a bar to recovery*".[167] Similarly, in the case of *SPP v Egypt*, the tribunal stated that the fact that damages cannot be assessed with absolute certainty does not preclude awarding damages when a loss has been incurred.[168] Generally, the underlying argument is that Respondent as the Party causing the breach, should not benefit from its violations by overly relying on the uncertainty argument. Professor Gotanda and Professor

[162] *ADM v Mexico*, para. 39.
[163] *Autopista,* para. 348.
[164] Trenor, p.86-89.
[165] *Sapphire Petroleum,* p. 1119.
[166] *Bosca v. Lithuania,* para. 296-301.
[167] Pryles, p. 6.
[168] *SPP v Egypt,* para. 215.

Ripinsky even asked that "*to what extent a claimant should be penalized by a legal standard when a breach has been found to have occurred.*"[169]

6.2. Causal link

Causation is a vital part of quantification of damages since solely damages caused can be recovered.[170] Besides factual causation, the tribunal needs to find that the harmful act influenced in some form the existence of damages. Therefore, a legal connection between a wrongful act and damages needs to be established.[171] The ILC Commentary explains that "tribunals have been reluctant to provide compensation for claims with inherent speculative elements."[172]

The tribunal in *Amoco* stated that "*one of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.*"[173] The tribunals in *RSM* and in *Flemingo* stated that a causal link between the breach and the loss is required.[174] Similarly, the tribunal in *Gavrilović* rejected the claim for lost business opportunities, because it found no causal link between the alleged BIT breaches and the claimed damages.[175]

Moreover, the tribunal in *S.D. Myers v Canada* ruled that "*damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor.*"[176] It stated that the causal link in other words means that "*the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.*"[177]

The tribunal, furthermore, overrode the term "*foreseeability*" as is used by contractual law to constraint the range of recoverability and it underlined that the

[169] Caron, p. 648.
[170] Marboe, p. 39.
[171] *Ibidem.*
[172] ILC Commentaries to Article n.36, para 27.
[173] *Amoco*, para. 238.
[174] *See for instance RSM*, para. 42, *Flemingo*, para. 924.
[175] *Gavrilović*, para. 1280.
[176] *S.D. Myers v Canada*, para. 140.
[177] *Ibidem.*

emphasis ought to be on causation instead of on foreseeability. The tribunal additionally debated the appropriation of the distinction between direct or indirect damages and concluded that in its place the tribunal should focus on the term remoteness.[178]

Lastly, the tribunal deliberated the evidence and burden of proof, on hand in relation to the existence of damages and on the other hand in connection to their value. The tribunal in *Lemire v Ukraine* stated the following*:*

> *"The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."*[179]

6.3. Foreseeability

The principle of foreseeability requires that the harmed party shall be compensated only for the damages it could have foreseen. Various legal systems oblige the foreseeability from different moments of time, French and English law look at the moment of execution of a contract, German law looks at the moment of breach of such contract.[180]

In international investment arbitrations, foreseeability represents that the harmed party "*cannot recover damages in respect of a loss that he ought to have avoided.*"[181] Hence, a failure to fulfill such duty could provoke consequences when assessing the

[178] *S.D. Myers v Canada*, para. 153-159.
[179] *Lemire v Ukraine,* para. 246.
[180] Trenor, p.90-91
[181] Derains, p. 37.

quantity damages.[182] According to the ILC commentaries, damages that are too "*remote*" or "*consequential to be subject of reparation*" shall not be awarded. The same should be applied for the criteria of "*directness*", "*foreseeability*" or "*proximity*".[183]

6.4. Mitigation

The duty to mitigate is generally recognized in international investment arbitration as a form of proximate causation. The duty to mitigate "*is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.*"[184] Even if, the duty to mitigate is not contained in BITs, the tribunal in *Middle East Cement* rendered that:

> „*this duty can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention.*"[185]

This principle is not a legal obligation, even though it is regularly articulated as a "*duty to mitigate*", and therefore, it does not give rise to responsibility by itself. It is more along the lines of a failure to mitigate by the harmed party might impede recovery to the extent the harmed party could have reasonably mitigated the consequences.[186] The tribunal shall consider the reasonableness of the duty to mitigate based on the information the harmed party had at a given time.[187]

6.5. Double recovery

It is a well-established principle that double recovery, also referred to as *enrichessement sans cause*, is prohibited.[188] The tribunal in *Sempra* articulated the problem of double recovery as "*on the one hand, the compensation which the investor would receive as a*

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[182] *Ibidem.*
[183] ILC commentaries to Article n.31, para. 10.
[184] *Gabčíkovo-Nagymaros Project,* para. 80.
[185] *Middle East Cement*, para. 167.
[186] ILC Articles, n. 31, para. 11.
[187] Trenor, p. 90-91.
[188] *Venezuela Holdings*, para. 378.

result of arbitration, and, on the other hand, the compensation which the company would receive in the context of a renegotiated adjustment of tariffs or some other mechanism."[189]

The tribunal in *Venezuela Holdings* noted, "*that it has the capacity to render an award tailored so as to minimize the risk of double recovery between the parties.*"[190] The tribunal in *Himpurna* stated that: *"Had there been no expropriation, past investment would have been recovered through subsequent revenues."*[191]

Tribunals have various resources that can avoid double recovery, as noted in *Sempra.*[192] Firstly, the tribunal in *Lauder* decided that since the Claimant, a Czech company CME, has brought up two cases, *Lauder v Czech Republic* and *CME v Czech Republic*, with the same factual background, it would leave the definitive decision on the amount of damages to the second tribunal.[193] Secondly, the solution would be to eliminate reflective loss claims of ITA system, in preventing multiple claims and controlling reflective losses.[194]

The last option, thou controversial, has been presented by the tribunal in *CMS v Argentina.* The tribunal there compelled the Government to gain the investor's stocks. This would benefit the Government as a stakeholder once the company regained the direct losses.[195] The issue, that the tribunal in *Gami v Mexico* latter had with such decision, is that the tribunal lacks jurisdiction to force a state into such approach. Additionally, the Tribunal rejected such approach since it would not allow for the genuine worth of the stocks supposedly reduced.[196]

7. Valuation date

The valuation date is of a great impact on the assessment of damages in a case. Theoretically, expropriation and compensation for such expropriation should

[189] *Sempra*, para. 395.
[190] *Venezuela Holdings*, para. 378.
[191] *Himpurna,* para. 432.
[192] *Sempra*, para. 102.
[193] *Lauder*, para. 172.
[194] Salgado, p.118.
[195] *CMS v* Argentina, para. 469.
[196] *Gami v Mexico,* para. 133.

happen at the same time. In reality that is merely impossible. There are various dates that the tribunal can take into consideration, such as the date of a relevant act of the state or the date of an award. When using the date of the relevant act, *ex ante* approach, the harmed party will be awarded the cost of the investment at the time of the seizure, amended by a suitable interest rate at the time of the final award.[197]

In expropriation cases, the tribunals are most likely to incline to pick the date when the expropriation occurred or when it has been known publicly.[198] These dates are encompassed in most BITs. For example, the tribunal in *South American Silver* has assessed the damages according to the Article n.5 of the Bolivia-United Kingdom BIT, which states that:

> "*Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impeding expropriation became publicly known, whichever is the earlier, …"*[199]

These standards apply to lawful expropriation, hence they at least have to apply to unlawful expropriation, since the standards shall not be lowered when a breach of law occurs. The tribunal in *Amoco* rationalized that unlawful expropriation permits the harmed party to:

> "*Damages equal to the greater of (i) the value of the undertaking at the date of loss (… including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, plus (in either alternative) any consequential damages."*[200]

Subsequently, the tribunal in *Phillips Petroleum* declared that the division between lawful and unlawful expropriations rendered in *Chorzów factory* shall be "*relevant only to two possible issues: whether restitution of the property can be awarded and whether*

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[197] Trenor, p.107-108.
[198] Ripinsky, p. 243-244.
[199] *See for instance* Bolivia-United Kingdom BIT, art.5.
[200] *Amoco*, para. 18.

compensation can be awarded for any increase in the value of the property between the date of the taking and the date of the judicial or arbitral decision awarding compensation."[201]

The issue arises when assessing indirect expropriation. In such cases "*the law of state responsibility provides that the breach occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.*"[202]

The BITs furthermore assess the payments of the compensation as prompt, without delay, effectively realizable, and freely transferable. It shall be paid promptly at the time of the expropriation in order to permit only the information available at the time of the expropriation to be taken into consideration.[203]

The ILC Articles, on the other hand, operate with the date of the award to assess the damages. In the *ex post* approach, the harmed party will be awarded the cost of the investment at a later date, mostly corresponds to the date of the award.[204] This is implied from Article n.36 and Article n.37. Article n.36 states that the total sum of compensation following a breach of international law shall encompass "*any financially assessable damage including loss of profits insofar as it is established*" and "*insofar as such damage is not made good by restitution*".[205] Article n.37 renders restitution as the primary remedy of satisfaction for the injury caused by an internationally wrongful act.[206]

Establishing the right date of valuation has real tangible consequences. The asset or business being valued can dramatically change its value after the date of the expropriation. Both parties to dispute hold, logically, interests in assessing the damages as low and as high as possible. Therefore, the tribunal needs to carefully consider which date it chooses as the base for valuation.

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[201] *Phillips Petroleum,* para. 110.
[202] Marboe, p.42-44.
[203] *See for instance* Bolivia-United Kingdom BIT, art.5.
[204] Trenor, p. 107-108.
[205] ILC Articles, n. 36.
[206] ILC Articles, n. 37.

The tribunals in *Amoco* and other Iran–US cases, where the value of the investment has drastically decreased or even disappeared, had to establish the valuation date as close to the date of the expropriation as possible.[207] However, there have been cases where the value of the investment has risen since the date of the expropriation. The tribunal in *ADC v Hungary* was the first that rendered that since the worth of the investment has increased since the date of the expropriation, the standard rising from the ILC Articles needs to be applied. Therefore, the tribunal awarded the Claimant damages valued to the date of the award.[208]

8. Moral damages

Moral damages are an elusive notion, that has been rejected for years by tribunals and only awarded in very few cases. One of the first cases involving moral damages was *Lusitania* in 1923. The case concerned a German submarine that was held responsible for sinking the British cruise liner Lusitania during WWII, causing the death of 1.198 people, including 128 American citizens.[209] The tribunal in *Lusitania* articulated as to moral damages the following:

> „*that one injured is, under the rules of international law, entitled to be compensated 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, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty.*"[210]

[207] Ripinsky, p. 254-255.
[208] *ADC v Hungary*, para. 497.
[209] *Lusitania*, para. 32.
[210] *Lusitania*, para. 40.

The breakthrough in arbitral decisions came much later when in 2008 and 2009 five tribunals awarded moral damages, most notably in *Desert Line Projects* the tribunal has awarded the Claimant with U.S.$1 million.[211]

8.1. Types of wrongful acts compensable in moral damages

There can be three types of wrongful acts that are recoverable by moral damages distinguished: (1) the denial of justice, (2) due process, and (3) arbitrary conduct.

Denial of justice is a part of the fair and equitable treatment, a minimum standard of treatment under the international customary law.[212] A host state is required to provide justice to the foreign investor. Denial of justice embodies a gross injustice and maladministration of justice.[213] A gross justice would include

> "*refusal of access to court to defend legal rights, refusal to decide, unreasonable day, politically dictated judgments, corruption, intimidation, fundamental breaches of due process and decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross impotence.*"[214]

Therefore, a requisite of gross justice would not be fulfilled in a case of a simple misunderstanding, error, or misapplication of the law.[215] In *Mondev* the tribunal noted that in its view a denial of justice must be "*clearly improper and discreditable.*"[216] The tribunal In *Pezold v. Zimbabwe* found the denial of justice as an additional reason for awarding moral damages.[217]

Due process is closely linked to denial of justice, as they both are elements of the fair and equitable treatment. Due process can be defined as "*course of legal*

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211 *Desert Line Projects,* para. 291.
212 McLachlan, p. 216.
213 Dumbery Wrong direction, p. 65.
214 Paulsson, p. 204-205.
215 *Chevron*, para. 244.
216 *Mondev*, para. 127.
217 *Pezold*, para. 915-916.

proceedings according to rules and principles that have been established in a system of jurisprudence for the enforcement and protection of private rights."[218]

A requirement of due process is a notice of an intended submission and a chance to contest such submission before an impartial tribunal.[219] An obligation to provide due process can found for example in Article n.1105 of the NAFTA treaty. This compels the host state to allow the foreign investor a hearing to discuss a permit submission and admits the investor to appear before a court or an administrative body to present evidence.[220]

Lastly, arbitrary conduct has been described in *ELSI* as "*a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."*[221] Arbitrary conduct occurs when there is no rational link between a measure or conduct and an alleged purpose or goal of such measure or conduct.[222] Thus, arbitrary conduct lack rationality and legitimacy. However, the tribunal in *Glamis Gold* found that a "*mere arbitrariness*" is not enough, and that "*something that is surprising, shocking, or exhibits a manifest lack of reasoning"* is needed.[223]

8.2. Definition of moral damages

The elusiveness of moral damages has long been related to the lack of a clear definition of the term. It has been merely referred to as the reverse of the so-called "*material damages*", till a clearer definition has been presented by the ILC commentaries.

According to the ILC Articles, material damages encompass "*damages to property or other interests of the State and its nationals which is assessable in financial terms.*"[224] Whereas they define the moral damages as "*generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home*

[218] Due process.
[219] Dumbery Wrong direction, p. 68.
[220] *Metalclad*, para. 91.
[221] *ELSI,* para. 128.
[222] *Siemens v Argentina*, para. 319.
[223] *Glamis Gold*, para. 22.
[224] ILC commentaries to Article n. 31, para. 5.

or private life."[225] Furthermore, Article n.31 sets the ground for moral damages. It says, that "*injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*"[226]

A more elaborate definition was brought by Professor Wittich. He defines non-material damages, the term he uses for moral damages, as follows:

> *(1) "It includes personal injury that does not produce loss of income or generate financial expenses.*
> *(2) It comprises the various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life.*
> *(3) Non-material damage of a "pathological" character, such as mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock.*
> (4) *Non-material damage would also cover minor consequences of a wrongful act, e.g., the affront associated with the mere fact of a breach or, as it is sometimes called, "legal injury."*[227]

Even though these definitions distinguish moral damages from material damages, the real difference is sometimes hasty, since "*non-material damage to the individual is the inevitable consequence of, and inseparably linked to, physical damage.*"[228] Even the ILC Articles provide, that both material and non-material damages that result from international wrongful act "*will be financially assessable and hence covered by the remedy of compensation.*"[229] That could indicate, that satisfaction might also be payable in money. Lastly, the ILC Articles deliver the notion that damages for financial losses are compensation, and therefore mandatory, as a minimum that such loss has not been remedied by restitution. On the other hand, with moral damages the ILC Articles associate discretion.[230]

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[225] ILC commentaries to Article n. 31, para. 5.
[226] ILC Articles, n. 31.
[227] Wittich, p. 329-330.
[228] Wittich, p. 330.
[229] ILC commentaries to Article n. 33, para. 3.
[230] Parish, p. 230.

8.3. Types of moral damages

Experts distinguish between three main types of moral damages[231] according to their nature. First, there is the moral or non-material harm done to the personality rights of individuals.[232] The ILC Articles provides examples, such as "*the loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.*"[233] These moral damages can in theory only suffer natural persons.[234] Second, there is the moral damage resulted from "*loss of reputation or credit as distinct from purely material loss.*"[235] And third, the legal damage as a result of a breach of legal obligations, regardless of any material harm that has been caused.[236]

As to the second type of moral damages, the loss of reputation is the most discussed type of moral damages in the context of investment arbitrations. The loss of reputation is viewed as "*a non-pecuniary loss that could only be redressed by way of moral damages.*"[237] There are two sorts of cases to be differentiated. Firstly, the loss of reputation as a standard consequential loss bared by an investor after an infringement of a treaty by a host State.[238] Secondly, the loss of reputation of a host State, that is harmed by malicious prosecution instigated by an investor.[239]

Moral damages can further be differentiated in regards to whom they can be claimed by. Firstly, moral damages may be requested by foreign investors. In *LAFICO v Burundi* an ad hoc tribunal held, that the actions of the Burundi government instigated severe harm to the "*reputation and honor of LAFICO*"[240] and therefore constituted an international unlawful act.[241] On such basis, the tribunal pronounced satisfaction for LAFICO as a legal body as the appropriate remedy.[242] Secondly, moral damages requested by States. The possibility of a State to request

[231] Sabahi, p. 136-137.
[232] Ehle, p. 294.
[233] ILC Articles, n. 31, para. 5 and n.36, para. 16.
[234] Marboe, p. 58-59.
[235] Ripinsky, p. 309.
[236] Ripinsky, p. 137.
[237] Schwenzer, p. 424.
[238] Weber, p. 419.
[239] Schwenzer, p. 424.
[240] *LAFICO v Burundi*, para. 289.
[241] *Ibidem.*
[242] *Ibidem.*

moral damages has been discussed in many cases, such as *Cementownia* or *Europe Cement*. More on this topic in the chapter on the evolution of cases involving moral damages.

8.4. Moral damages and punitive damages

Furthermore, a concept of punitive damages can be discussed in association with moral damages. In private law, there is a clear distinction between punitive damages and moral damages. Moral damages serve to grant compensation for non-pecuniary losses.[243] Punitive damages' primary function is to deter analogous behavior in the future.[244]

Punitive damages hence operate mainly as a punishment for wrongful actions and not as compensation to a harmed party. Or additionally to "*actual compensatory damages when the defendant acted with recklessness, malice, deceit, or other reprehensible conduct (e.g. violence, oppression, fraud . . .).*"[245]

In *Wilkes v Wood* the court rendered that:

> *"damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself."*[246]

Nevertheless, moral damages are usually not awarded to punish the offender, but rather to compensate the harmed party. Moral damages thus serve to recover damages to non-economic interests.[247]

Awarding punitive damages varies upon the different legal systems, whereas in Common Law jurisdictions they are usually granted, the Civil Law systems are less

[243] Schwenzer, p. 428.
[244] Weber, p. 440-441.
[245] Crawford, p. 667.
[246] *Wilkes v Wood,* para. 489, 498.
[247] Laird, p. 172.

willing to award them.[248] In international investment arbitrations, such clear differentiation as in civil law does not exist. There are no set rules on in which cases to award punitive damages or not. It is up to the tribunal to analyze the applicable investment treaty in every case. Some BITs unambiguously exclude the option of granting punitive damages[249] while other BITs are silent on such matters.[250] In such cases, where the BIT does not provide guidance in connection to punitive damages, tribunals shall give exceptional consideration to the national attitudes of the particular Contracting States.[251]

Tribunals are even less willing to award punitive damages than moral damages. The *CMS v. Argentina* tribunal denied the claim for punitive damages and moreover noted the categorical rejection of such damages in the ILC Articles n. 38.[252] In *Kardassopoulos v. Georgia* the tribunal cited *Amoco* decision that "*the damage sustained is the measure of the reparation, and there is no indication that punitive damages could be considered.*"[253]

8.5. Forms of reparation

The forms of reparation for moral damages differ from the general theory. The difference is due to their particular nature. The method of reparation for moral damages is contingent on whether the damage disturbed the state "*directly"* or through one of "*its nationals.*"[254] However, restitution is not appropriate for moral damages[255] and satisfaction is suitable only for moral damages suffered by a state, as stated by ILC Articles, "*those injuries, not financially assessable, which amount to an affront to the State.*"[256]

[248] Schwenzer, p. 428.
[249] *See for instance* Article n.34 of Model United States BIT.
[250] Schwenzer, p. 429.
[251] *Ibidem.*
[252] *CMS v. Argentina,* para. 404.
[253] *Kardassopoulos v. Georgia*, para. 197.
[254] Ripinsky, p. 308.
[255] Dumbery, p. 251.
[256] ILC commentaries to Article n.37, para. 3.

Satisfaction is not considered to be a standard form of reparation.[257] It is envisioned to guarantee a harmed State full reparation in conformity with international law.[258] It is still "*generally considered the remedy par excellence in cases of non-material damage*"[259] in a case in which an injured State cannot achieve restitution or compensation.[260] In those cases, moral damages serve primarily emblematic or legal character. They do not "*result in any material loss or injury but is limited to the non-material injury arising from the very fact of the breach of the international obligation itself.*"[261]

Examples of satisfaction can be found in the ILC Article n.37, and are namely: "*an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.*"[262] The most common type of satisfaction is a declaration of the wrongfulness of an act by a competent body of law.[263]

Besides satisfaction in a form of declaratory relief, satisfaction can be monetary as well. The ILC Articles note that "*monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation.*"[264] The ICJ in *Rainbow Warrior* awarded both satisfaction and monetary compensation for an injury suffered by the state itself.[265]

8.6. Evolution of cases involving moral damages

Awarding non-material damages is not that common as awarding material damages in international investment arbitrations. Since the *Lusitania* case in 1923, tribunals have dealt with claims for moral damages in various instances. Most tribunals facing such claims have not awarded moral damages, nonetheless, no tribunal has straight forward dismissed a case of compensation for moral damages,

[257] ILC commentaries to Article n.37, para. 1.
[258] *Ibidem.*
[259] *Rainbow Warrior,* p. 112.
[260] Weber, p. 430.
[261] Ehle, p. 297.
[262] ILC Articles n. 37.
[263] ILC commentaries to Article n. 37, para. 6.
[264] ILC commentaries to Article n. 36, para. 4.
[265] *Rainbow Warrior,* p. 275.

although in *Helnan v Egypt* the tribunal has chosen not to tackle the accusation brought by the Claimant.[266]

The tribunal in *Funnekotter v Zimbabwe* has dismissed the claim on the grounds of a late filing.[267] In *Zhinvali Development*[268] and in *Generation Ukraine* tribunals have rendered no jurisdiction over the disputes, stating that their jurisdictions *"were limited to BIT breaches*".[269] Similarly, in *Biloune* the tribunal held that it lacked jurisdiction over a case of "*human rights violations*" and found that the claim presented was outside of ICSID jurisdiction.[270]

Tribunals in *Pey Casado*[271], *Biwater*[272] and *Europe Cement*[273] have rendered that the claims presented before them lacked sufficient evidence and therefore they dismissed the cases. Similarly, in *Tecmed v Mexico* the tribunal rejected the case due to insufficient evidence, though it noted that moral damages could be awarded if they *"affected the Claimant's reputation and therefore caused the loss of business opportunities for the Claimant."*[274] Insufficient evidence has been found in *Benvenuti* as well, however, the tribunal has awarded a small amount of damages based on "*ex aequo et bono"* grounds (in accordance with Article n.42 para.3 of the ICSID Convention).[275]

In *Cementownia* the tribunal stated that Turkey's claim for moral damages could be compensated by satisfaction in the form of a "*declaration that the claimant's proceedings were fraudulent*".[276] This, in the views of the tribunal, would afford Turkey satisfaction for any damage to its reputation it had suffered.[277] However, the tribunal continued that it "*deems more appropriate to sanction the Claimant with respect to the allocation of costs.*"[278]

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[266] *Helnan v Egypt,* para. 100-109.
[267] *Funnekotter v. Zimbabwe,* para. 139-140.
[268] *Zhinvali Development,* para. 278-279.
[269] *Generation Ukraine,* para. 176.
[270] *Biloune,* para. 34.
[271] *Pey Casado,* para. 266.
[272] *Biwater,* para. 32.
[273] *Europe Cement,* para. 181.
[274] *Tecmed v Mexico,* para. 198.
[275] *Benvenuti,* para. 338, 342.
[276] *Cementownia*, para. 159.
[277] *Cementownia,* para. 162.
[278] *Cementownia,* para. 171.

The reasoning is that the Claimant's misbehavior took place during the proceedings and therefore:

> "*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. In investment treaty cases, compensation has been awarded where the injury was inflicted maliciously.*" [279]

Finally, the tribunal in *Desert Line Projects* allowed the claim for moral damages and awarded them, making this case very prominent.[280] The claim in *Desert Line Projects* involved a construction company, that built roads in Yemen for which it has not been properly paid.[281] In 2004 a construction site has been disturbed by 15 armed individuals demanding payments of unpaid invoices, threatening the company's employees, and even opening fire with automatic weapons. Some personnel also received personal threats.[282] The company brought a claim before a domestic court for unpaid contracts, which resulted in a settlement of U.S.$20 million.[283] Such settlement thou has been much lower than proposed by the tribunal and the Claimant had complained that it has been harassed into taking it. Later, the tribunal concluded that the settlement "*was imposed onto the Claimant under physical and financial duress*"[284] and was "*not the result of fair and sincere negotiation among the parties.*"[285]

The tribunal rendered Respondent's conduct as a violation of the duty to provide "*fair and equitable treatment*" under the BIT[286] and that the settlement breached the Respondent's responsibilities under the BIT.[287] Upon that, the tribunal first stated that the Respondent had "*not questioned the possibility for the Claimant to obtain moral damages in the context of ICSID procedure.*"[288] The tribunal recognized that the fact

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[279] *Cementownia,* para. 165.
[280] *Desert Line Projects,* p. 69.
[281] *Desert Line Projects,* para. 5-11.
[282] *Desert Line Projects,* para. 19-20.
[283] *Desert Line Projects,* p. 69.
[284] *Desert Line Projects,* para. 16
[285] *Desert Line Projects,* para 186.
[286] *Ibidem.*
[287] *Desert Line Projects,* para. 193.
[288] *Desert Line Projects,* para. 289.

that BIT's "*primarily aim at protecting property and economic values*"[289] does not *"exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages.*"[290]

The tribunal also noted that "*it is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages*"[291] and that "*it knows that it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award.*"[292] With regards to valuation moral damages, the tribunal rendered that it was "*generally recognized that a legal person (as opposed to a natural person) may be awarded moral damages, including loss of reputation, in specific circumstances only.*"[293]

On such basis, the tribunal established that Yemen has breached the BIT and stated that "*the physical duress exerted on the executives of the Claimant, was malicious and therefore constitutive of a fault-based liability.*"[294] It found Yemen liable and ordered Yemen to compensate for "*moral damages, including loss of reputation*" in the amount of U.S.$1 million.[295]

The noteworthy acknowledgment, in this case, has been the tribunal stating that the Claimant had "*suffered a significant injury to its credit and reputation and lost its prestige*"[296] and that the tribunal unambiguously accepted that an "*injury to a corporation's credit, reputation and prestige is a form of moral damage that can be compensated in an award.*"[297] But what has had an even bigger impact was that the tribunal awarded monetary compensation to the company to recover the harm *"physical persons"* have suffered.[298] Such decision has been centered on the fact that *"executives suffered the stress and anxiety of being harassed, threatened and detained.*"[299] The tribunal, therefore, held, that the psychological suffering of the officers has directly resulted from physical actions,

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289 *Ibidem.*
290 *Ibidem.*
291 *Desert Line Projects,* para. 289.
292 *Ibidem.*
293 *Ibidem.*
294 *Desert Line Projects,* para. 290.
295 *Desert Line Projects,* para. 291.
296 *Desert Line Projects,* para. 286.
297 *Ibidem.*
298 Ripinsky, p. 311.
299 *Desert Line Projects,* para. 286.

such as physical duress, coercion, interference, or intimidation conducted by armed forces.[300]

The issue in such statement is that the state's wrongful actions do not cause direct damages to the company itself, the legal entity, but only to physical persons. That would mean, that the physical persons, in this case, the executives, would need to claim their moral damages in distinct proceedings. However, for such proceedings, the tribunal would lack jurisdiction since it would not most likely fall under the term "*investment*" set out in the BIT.[301]

The tribunal in *Desert Line Projects* has therefore confirmed the principle established in ILC Articles, that compensation in comparison to satisfaction can be awarded to both natural and legal persons. A different view came from the tribunal in *Pey Casado*. The tribunal there rendered a somewhat contentious decision stating that "*monetary compensation for material damage awarded to a foreign investor for treaty breach and a declaration of liability could also be considered as sufficient satisfaction for an individual in the context of a moral damages claim*."[302] The tribunal there noted that it viewed the mere award as sufficient and substantial moral satisfaction.[303]

Since *Desert Line Projects* there were more than 15 cases that faced claims for moral damages.[304] Namely *Lemire v Ukraine, Arif v Moldova, Pezold v Zimbabwe* and *Al-Kharafi v Libya*. The tribunal in *Al-Kharafi v Libya* has awarded Claimants moral damages in an unparalleled amount of U.S.$ 30 million for a loss of reputation.[305]

Lemire v. Ukraine was the first case, where the tribunal has decisively set a definition of "*exceptional circumstances."* The case concerned a US national, Mr. Lemire, that invested in radio broadcasting in Ukraine and later accused radio broadcasting authorities in Ukraine of unfair rejections of his radio frequencies.[306] Mr. Lemire claimed that he had experienced two types of harms that were incited by Ukraine's

[300] *Desert Line Projects,* para. 290.
[301] Dumbery, p. 267.
[302] *Pey Casado*, p. 699-704.
[303] *Pey Casado*, p. 704.
[304] Crawford, p. 36.
[305] *Al-Kharafi v Libya*, p. 385.
[306] Crawford, p. 43.

procedures for awarding radio licenses: "*(1) the disproportionate and excessive efforts which Claimant had to incur in the preparation of applications and (2) the disrespect and humiliation caused by the constant rejections."*[307]

The tribunal, however, found that "*excessive or disproportionate efforts which an applicant may have incurred when requesting administrative licenses, by their nature, are most unlikely to give rise to moral damages, since the injury does not meet any of the three standards required for the existence of moral damages."*[308]

Following *Lemire v Ukraine* the tribunal in *Pezold v Zimbabwe* has used its test to assess the claim for moral damages. The claim for moral damages in this case related to threats, violence, stress, and anxiety inflicted by illegal settlers on their land.[309] Unfortunately, the tribunal misused the *Lemire v Ukraine* test and therefore granted wrongfully moral damages in a sum of U.S.$1 million.[310] The decision was later annulled.

8.7. Threshold for moral damages

There is no set threshold for awarding moral damages, which poses a risk of disproportion among various tribunals. A lack of an acknowledged threshold also actively demonstrates, that every tribunal requires a different level of proof of a grave action. In *Siag v Egypt* the tribunal held that awarding moral damages shall be reserved for "*extreme cases of egregious behavior.*"[311] It added that it rejects the claim for so-called "*enhanced damages*" and that in its view moral and punitive damages both demand proves of "*exceptional circumstances."*[312] The tribunal in *Europe Cement* stated that moral damages are intended for "*exceptional circumstances such as physical duress.*"[313]

The *Biwater dissent* stated that when a States *"deliberately conducts itself in a manner it knows at the time to be wrongful, disregarding the basic legal rights and protections of private*

[307] *Lemire v Ukraine,* para. 335.
[308] *Lemire v Ukraine,* para. 336.
[309] *Pezold v Zimbabwe*, para. 7.
[310] Weber, p. 448.
[311] *Siag v Egypt,* para. 545.
[312] *Ibidem.*
[313] *Europe Cement,* para. 181.

parties"[314] such behavior triggers moral damages. In *Desert Line Projects* the tribunal did not expressly set a threshold, but merely stated that "*party may, in exceptional circumstances, ask for compensation for moral damages.*"[315] It continued referring to *Lusitania*, which held that moral damages are "*no less very real and should be compensated.*"[316]

It is clear that the lack of set threshold poses real risks. Some believe that moral damages shall be only awarded in egregious or expectational circumstances. That would require an advanced standard for moral damages claims in comparison to claims for other types of compensatory damage. However, setting the standard that high might mean that actions that inflict mental sufferings to an individual in a form of humiliation, shame, loss of social position, or else, could simply slip away.[317] According to Professor Ripinsky, thou, egregious or expectational circumstances simply indicate the distinctiveness of moral damages and consequently give a specific nature to investment treaties.[318]

The tribunal in *Biwater* pronounced a requirement of causality in connection to moral damages. The tribunal there noted that in its view "*causing injury means more than simply the wrongful act itself*"[319] and that there needs to be a causal link between the BIT breach and the claim for moral damages, which it lacked to find.[320]

In contrast to the *Biwater* award, the dissenting opinion addressed the concept put forward in the ILC Articles that implies "*the no-fault nature of moral damages at customary international law."* The *Biwater dissent* stated that:

> *"[While the Claimant] did not demonstrate a quantifiable monetary loss, it did demonstrate an unacceptable breach of fundamental international rights and protections. In my view, that breach demands a remedy beyond merely declaring it a violation of the relevant BIT. The Republic's conduct caused moral damages."*

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[314] *Biwater dissent*, para. 32.
[315] *Desert Line Projects,* para. 289.
[316] *Luisitania*, para. 32.
[317] Dumbery, p. 269.
[318] Ripinsky, p. 310-311.
[319] *Biwater,* para. 803.
[320] *Biwater,* para. 805.

The tribunal in *Lemire v Ukraine* created a test that allowed to assess the causality. It noted that "*if it can be proven, that in the normal course of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists and that the first is the proximate cause of the other.*"[321] In addition, the tribunal noted that it requires a chain of causality to be proximate.[322]

The premise of *Europe Cement* and *Cementownia* is that "*the moral harm claimed by the State was the reputational damage of fraudulent claims, overlapping with abuse of process.*"[323] The tribunal in *Cementownia* dissented in opinion from *Desert Line Projects* when noted that it viewed the definition of abuse of process as presented in *Desert Line Projects* as overly general. It stated that it was hesitant that such a broad principle could constitute a sufficient legal base when granting compensation for moral damages.[324]

That can be observed when the tribunals transformed satisfaction into an allocation of costs. Additionally, in tribunals' understandings both awards were punitive for the Claimant and at the same time compensatory for the Respondent.[325] Such methods basically by-pass moral damages by choosing an alternate punitive course of the cost's allocation.[326] Therefore, such decisions essentially distorted the difference between moral and punitive damages, similarly as in *Generation Ukraine*, where the Claimant requested for "*moral (punitive) damages.*"[327] Similarly, in *Siag v Egypt* the tribunal failed to differentiate between moral and punitive damages.[328]

On contrary, the dissenting opinion in *Biwater* pursued to "*use allocation of costs as a compensatory measure of moral damages where quantum is difficult to ascertain."*[329] Following the rulings in *Lusitania,* that the struggle to determine the value of moral damages shall not lessen the right to compensation for a non-State Claimant.[330] The

[321] *Lemire v Ukraine,* para. 169.
[322] *Lemire v Ukraine,* para. 170.
[323] Cementownia, para. 171.
[324] Cementownia, para. 170.
[325] Laird, p. 179.
[326] *Ibidem.*
[327] *Generation Ukraine,* para. 5.1.
[328] *Siag v Egypt,* para. 226-230.
[329] *Biwater dissent*, para. 29.
[330] *Lusitania*, p. 35.

dissenting opinion further noted that "*the fact that an award of damages often involves a considerable discretionary element does not mean that it is punitive in character.*"[331]

In *Lemire v Ukraine* the tribunal asked the question if moral damages could be awarded in the case even without the Claimant making allegations of physical duress.[332] The tribunal there adopted the rulings from *Desert Line Projects* but noted that the tribunal in *Desert Line Projects* had proposed an insufficient definition of "*exceptional circumstances.*"[333]

Thus, the tribunal in *Lemire v Ukraine* proposed more elaborate steps in assessing whether or not to award moral damages. It added that the definition "*must be induced from existing case law.*"[334] It stated that moral damages shall be awarded in exceptional circumstances if:

(1) *"the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;*
(2) *the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and*
(3) *both cause and effect are grave or substantial."*[335]

Lemire v Ukraine tribunal thus put forward a notion that restricts moral damages to exceptional circumstances, when a cause is grave, and the effect is extensive. This test has been cited in various cases, such as *Tza Yap Shum v Peru.*[336] It put emphasis on the effect it had on a foreign investor. The tribunal in order to award moral damages has to demonstrate that State's actions had resulted in health deterioration, stress, anxiety, or other mental sufferings.[337] Such moral damages though have to be substantial, in the words of *Lemire v Ukraine* tribunal,

331 *Biwater* dissent, para. 30.
332 *Lemire v Ukraine,* para. 478.
333 *Lemire v Ukraine,* para. 326.
334 *Ibidem.*
335 *Lemire v Ukraine,* para. 333.
336 *Tza Yap Shum v Peru,* para. 281.
337 Crawford, p. 64.

extraordinary.[338] The issue with such wording is that the substantiality of the moral damage differs according to each case.

This test renders fundamentally moral damages as a notion connected to natural persons. That's due to the nature of the defined damages since physical threats or detentions appear to be impossible to be done against a legal person or capital.[339] The only type of moral damages that seems to enjoy a practical foundation for awarding moral damages to a legal entity is reputational harm.[340]

The tribunal in *Arif v Moldova* has picked up on the *Lemire v Ukraine* definition of exceptional circumstances and adhered to such a high threshold. According to the tribunal to award moral damages it has to "*determine whether in the case at hand the conduct of Respondent and the suffering of Claimant have been so grave and substantial, as to amount to such exceptional circumstances that necessitate a pecuniary compensation for moral damages.*"[341]

The tribunal held that "*the conduct of the Moldovan authorities provoked stress and anxiety to Claimant.*"[342] However, it noted, that "*the different actions did not reach a level of gravity and intensity which would allow it to conclude that there were exceptional circumstances which would entail the need for a pecuniary compensation for moral damages."*[343] Therefore, the tribunal dismissed the claim for moral damages.

The tribunal in *Arif v Moldova* has articulated a very interesting point on the case *Lemire v Ukraine.* It stated that *Lemire v Ukraine* decision has been centered on a partial debate of three cases, but it lacked broader deliberation upon underlying values.[344] It added that "*the statement might serve as a summary of the issues in these cases, but it should not be taken as a cumulative list of criteria that must be demonstrated for an award of moral damages."*[345] Specific circumstances of the *Desert Line Projects* case shall be taken into account and shall not be applied as a single definition of the accessibility of

[338] *Lemire v Ukraine,* para. 333.
[339] Laird, p. 181.
[340] Weber, p. 419.
[341] *Arif v Moldova*, para. 602.
[342] *Arif v Moldova*, para. 615.
[343] *Ibidem.*
[344] *Lemire v Ukraine,* para. 590.
[345] *Ibidem.*

moral damages as a remedy.[346] It followed that in its view, the *Lusitania* case properly expresses the criteria tribunals shall take into consideration.

It stressed that tribunals enjoy an element of discretion, nevertheless "*the element of exceptionality must be acknowledged and respected.*"[347] In such a position the tribunal rendered the following:

> "*A pecuniary premium for compensation for such sentiment, in addition to the compensation of economic damages, would have an enormous impact on the system of contractual and tortious relations. It would systematically create financial advantages for the victim which go beyond the traditional concept of compensation. The fundamental balance of the allocation of risks would be distorted."*[348]

The Tribunal has consequently associated itself with the preponderant opinion that compensation for moral damages shall only be awarded in exceptional cases, whilst the conduct of the perpetrator, as well as a prejudice of a victim, are grave and substantial.[349] The tribunal in *Lahoud v Congo* quoted the decision in *Arif v Moldova* when stating the need for expectational circumstances to be present.[350]

8.8. Valuation of moral damages

ILC Article n.31 puts forward a concept that there is "*an obligation to make full reparation for the injury caused by the internationally wrongful act.*"[351] The injury according to the ILC Articles includes *"any damage, whether material or moral, caused by the internationally wrongful act of a State.*"[352] In combination with ILC Article n.34, which requires a "*full reparation*", it sets the ground for valuating moral damages.

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[346] *Ibidem.*
[347] *Lemire v Ukraine,* para. 592.
[348] *Ibidem.*
[349] *Ibidem.*
[350] *Lahoud v Congo*, para. 620-624.
[351] ILC Article n.31, para. 1.
[352] ILC Article n.31, para. 2.

Moral damages offer a type of monetary compensation for intangible, thou still real damages, as far as they can be monetarily assessable.[353] The tribunal in Lusitania *held* that:

> "*the impossibility of computing damages with precision in such cases furnishes no reason the wrongdoer should escape repairing his wrong or why he who has suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise.*"[354]

The ILC Article n. 31 allows moral damages, as far as there is no doubt the harm comprises any material or moral damage caused by a breach.[355] There is no general obligation under international law for the harmed party to have suffered material loss or damage when seeking the reparation for a breach, thou a real loss or injury is of the highest prominence to conclude the form and amount of reparation.[356] Moral damages are evaluated whether or not they fall under the definition of financial assessability set in the ILC Article n.36. If they fulfill the criteria they shall be compensated in monetary standards as any other compensatory damages.[357]

Quantification of moral damages is rather challenging due to their vague and ambiguous nature and a lack of guidelines. The tribunal in *Lusitania* merely noted that moral damages can be granted as *"reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death."*[358]

The lack of standards could trigger very distinct valuations of one claim by various tribunals. For example, the tribunal in *Desert Line Projects* valued the claim to U.S.$ 1 million[359], thou another tribunal could easily assess the same claim only to

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353 Ehle, p. 293.
354 *Luisitania*, para. 36.
355 *Luisitania*, para. 40.
356 *Rainbow Warrior,* para 107-109.
357 ILC commentaries to Article n. 36, para. 4.
358 *Lusitania,* para. 35.
359 *Desert Line Projects,* para. 291.

U.S.$ 100.000. Therefore, tribunals have to carefully consider the fairness and reasonableness of the valued claim and their proposed compensation.[360]

In *Desert Line Projects* tribunal recognized that moral damages were "*difficult to measure or estimate by money standards*"[361] and even stated that the sum awarded was "*more than symbolic yet modest in proportion to the vastness of the project."*[362] Usually, tribunals enjoy a great deal of discretion and flexibility to decide the appropriate amount that the harmed investor shall be compensated with.[363] Tribunals in *Desert Line Projects* and in *Benvenuti* have both awarded moral damages without any real financial assessment, meaning the tribunals have not referenced any proven financial losses. Tribunals have not given much consideration to inflation as of the date of the award, either.[364] Similarly, in the tribunal *S.S. I'm Alone* ordered the United States to not only formally apologize to the Canadian Government, but also instructed to pay U.S.$ 25.000 "*as material amend in respect of the wrong it had committed."*[365]

Nevertheless, it is not that no guidelines exist. The United Nation Compensation Committee has proposed strict rules on compensating personal injuries and mental pains and anguishes. For example, the ceiling amount for a spouse, child, or parent of a deceased individual has been set to U.S.$15.000 per individual or U.S.$30.000 per family.[366]

Even without such specific guidelines, tribunals have means to help them assess moral damages. Some forms of "*mental injury*" are fairly straightforwardly assessable since the valuation can be based on real tangible medical expenses.[367] Tribunals in their discretion to assess damages can take into consideration the state's wrongful behavior. According to experts, it would be challenging to deem that "*fault in any degree could not be deemed to be—de lege lata or ferenda—of some relevance in the determination of the consequences of an internationally wrongful act."*[368] In case that fault is

[360] Dumbery, p. 272.
[361] *Desert Line Projects,* para. 290.
[362] *Desert Line Projects,* para. 290.
[363] Ripinsky, p. 312.
[364] Parish, p. 233.
[365] *S.S. I'm Alone,* p. 1618.
[366] U.N.C.C. Governing Council Decision n. 3.
[367] Cabresa, p. 4-6.
[368] Second Report on State Responsibility, para. 145.

present, *"the degree of willful 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."*[369]

Therefore, it can be concluded that the gravity of the offense that a state has committed, and its degree of responsibility can play a role in assessing the amount of damages the tribunal would award. In case of malicious conduct, the tribunal could consider such conduct "*as an aggravating circumstance increasing the amount of damages due.*"[370] An ad hoc Commission has in the case *Letelier and Moffitt* awarded more than U.S.$1 million in compensation for moral damages to three individuals and their inheritors.[371] The Commission held that "*in considering the compensation for moral damages it had taken into account the significant steps undertaken by the Chilean Government and Congress to remedy human rights problems as well as the efforts undertaken towards financial reparation at the domestic level for families of victims.*"[372]

8.9. Challenges facing moral damages

Tribunals when awarding moral damages face various challenges and obstacles. A lack of set rulings and discrepancies in arbitral decisions raises numerous questions, such as the question of jurisdiction. As mentioned above, few tribunals have dismissed cases on basis of a lack of jurisdiction. In these cases, where tribunals declared no jurisdiction, they denied the claims raised by states for monetary compensation for moral damage arising from deceitful proceedings instigated by foreign investors.[373] The reasoning behind these decisions is that BIT's provide legal protections for foreign investors against the actions of the host state and not for the host state against the actions of investors.[374]

The Article n.25 of the ICSID Convention pronounces the requirement that a claim must arise directly out of an investment. The tribunals in *Generation Ukraine*[375]

369 Second Report on State Responsibility, para. 180.
370 Ripinsky, p. 312.
371 *Letelier and Moffitt*, p. 40.
372 *Letelier and Moffitt*, p. 10.
373 Dumbery, p. 267.
374 Dumbery, p. 268.
375 *Generation Ukraine*, para. 5.1.

and *Biloune*[376] rejected moral damages claims because they found them outside of the scope of the definition of an investment in the relevant BIT. In *Amco Asia* the tribunal, similarly, found the issue in that Indonesia's tax fraud counterclaim has not arisen directly out of an investment as defined by the relevant BIT.[377] Conversely, the tribunal in *Desert Line Projects*[378] rendered jurisdiction.

Tribunals in *Cementownia*[379] and *Limited Liability* noted that they "*were not presented any basis in this applicable law*".[380] The *Cementownia* tribunal, although noted, that "*there is nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an arbitral tribunal from granting moral damages.*"[381] Thus, the question of jurisdiction remains open and it is up to each tribunal to consider whether it has jurisdiction in a particular case or not.

A burden of proof in claims for moral damages in arbitrations varies from what the ICJ adjudicated. In *Diallo* the court held that "*non-material injury can be established even without specific evidence*".[382] Nonetheless, tribunals dismissed cases on numerous instances for a lack of substantiated or proven evidence.[383] Tribunals when evaluating tend to rely on the "*balance of probabilities*" standard.[384]

Another issue raised by tribunals on *Desert Line Projects* and *Cementownia* is "*fault-based liability"*, meaning if fault or malice is a required condition for awarding moral damages. Tribunal in *Desert Line Projects* referred to "*physical duress exerted on the executives of the Claimant was malicious and therefore constitutive of a fault-based liability."*[385] Similarly, the tribunal in *Cementownia* contended that "*in investment treaty cases, compensation has been awarded where the injury was inflicted maliciously*."[386]

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376 *Biloune*, para. 34.
377 *Amco Asia,* para. 122-127.
378 *Desert Line Projects*, p. 69.
379 *Cementownia,* para. 170-171.
380 *Limited Liability,* para. 118.
381 *Cementownia,* para. 169
382 *Diallo*, para. 21.
383 *See for instance Pey Casado,* para. 266.
384 *See for instance Al Bahloul*, para. 79-99.
385 *Desert Line Projects,* para. 290.
386 *Cementownia,* para. 165.

Nonetheless, the general doctrine does not oblige an element of fault to be present in order to meet the threshold for moral damages. The ILC Articles do not intent to define moral damages through fault-based liability. On the contrary, they propose moral damages as no-fault based and compensatory.[387] It is commonly acknowledged that a state's intentions are not relevant in evaluations of allegations of BIT breaches.[388]

The tribunal in *Occidental Exploration* stated that "*this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.*"[389] Correspondingly, the tribunal in *CMS v Argentina* related the state's intentions as "*objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question.*"[390] The tribunal has further added that "*of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.*"[391]

Such rulings imply that intention and bad faith are not mandatory to be proven in order to meet the threshold. Nonetheless, it does not mean that the intent is not considered when evaluating the state's responsibility.[392] The bad faith yet could still most possibly play a role in awarding moral damages, since tribunals are more confident in awarding moral damages if the intent of deliberate reprehensible actions is proven.[393] Bad faith as well as in awarding moral damages could influence the amount of moral damages awarded.

Conclusion

The topic of damages and in particular moral damages entails numerous questions still unanswered. The value and valuation of damages remain a very dynamic issue, with more challenges to come in the future. At the beginning of the thesis I proposed two questions: 1) what the methods of reparation of damages are,

[387] ILC commentaries to Article n.2, para. 10.
[388] *Occidental Exploration,* para. 186.
[389] *Ibidem.*
[390] *CMS v Argentina*, para. 280.
[391] *Ibidem.*
[392] Dumbery, p. 271.
[393] *Ibidem.*

and (2) what moral damages are and how their methods of reparation differ from the general methods.

As for the first question, notwithstanding the sizeable advancement in accepting the legal standards and economic valuation methods, the discussion still remains open and, in many instances, heavily lays on the discretion of the tribunal. A valuation is not an exact science and will never produce perfect results and the absolutely objective true value of an object. However, that shall not prevent tribunals from applying the different methods of valuation. The value of investment simply lays further, not in a simple solution that suits all cases.

Nevertheless, tribunals shall not forget that law requires a certain degree of predictability and consistency. When assessing claims for damages, tribunals need to take into consideration standards and principles that have become broadly accepted. One such standard that has crystallized in the past few years is evaluating businesses that are going concern by using the DCF method. Another standard widely acknowledged is assessing an expropriated asset using fair market value at the time of the expropriation. All these standards purely allow foreign investors that have been harmed by the host state to receive fair and full reparation for their lost assets. It further benefits the investment arbitration itself, as it minimalizes discrepancies and discrimination between decisions on the same or similar merit.

The thesis has demonstrated the importance for the tribunal to evaluate the circumstance of the particular case in order to assess damages the harmed party has suffered. Each case with its distinctive specifications requires a different approach. Not all cases are suitable for the DCF method, even though it still remains the most used approach. A valuation entails a deep knowledge of facts and a professional judgment when it comes to evaluating those facts.

And as to the second question, moral damages, despite new progressive rulings of some tribunals, namely for example in *Desert Line Projects,* are still lacking in acceptance. The thesis has demonstrated, that unfortunately, the main view on moral damages remains restrictive. Setting the threshold for moral damages as high as the majority of tribunals does is dangerous. It is especially worrying in cases where the harmed party has prevailed on the merits.

Requiring fault-based liability sets a precarious precedent. A fault and intent shall only be taken into consideration when assessing the value of moral damages, they shall not be a requirement of liability. The very shattered jurisprudence on moral damages poses s real risk. Tribunals should by any means prevent the abuse of law when it comes to the refusal to award moral damages except in egregious circumstances.

A full reparation standard shall not be forgotten when it comes to moral damages. Tribunals find issues when it comes to awarding full reparation for moral damages for various reasons. Firstly, the problem lays with the fact, that moral damages can be repaired via satisfaction, such as a declaration, but also through monetary satisfaction. Secondly, the concern of many tribunals is whether or not a legal person can claim and can be awarded for moral damage that has been suffered by its agents. Moreover, there is the issue of whether states can claim reparation for moral damages that they have suffered on their reputation. And lastly, there is the dispute on the difference between moral and punitive damages.

When awarding moral damages tribunals should leave the restrictive approach in the past. The jurisprudence has shown that moral damages are real and shall be compensated. I hope that the thesis has been able to demonstrate the issues that moral damages faced in the past and are facing today and I hope that the jurisprudence will slowly but surely move towards a more open approach.

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Rusoro Mining	Rusoro Mining Limited v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/12/5, Award, of 22 August 2016.
Tecmed v Mexico	Técnicas Medioambientales Tecmed S.A. v The United Mexican States, ICSID Case. No. ARB(AF)/00/2, Award, 29 May 2003.
Tenaris v. Venezuela	Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal LDA v The Bolivarian Republic of Venezuela, ICSID Case no. ARB/12/23, Award, 12 November 2016.
Tidewater v. Venezuela	Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Award, 13 march 2015.
Total v. Argentina	Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Award of the Tribunal, 27 November 2013.
Venezuela Holdings	Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 9 October 2014.
Pey Casado	Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 13 September 2016.
Yukos	Yukos Universal Limited (Isle of Man) v Russian Federation, PCA Case No. AA 227, Final Award, 18 july 2014.
Siag v Egypt	Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 june 2009.
Zhinvali Development	Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/00/1, Award, 24 January 2003.

INTERNATIONAL COURT OF JUSTICE

CITATION	REFERENCES
Diallo	Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), ICJ, Jugment, 24 May 2007.
ELSI	Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, 20 July 1989.

Gabčíkovo-Nagymaros Project	Gabčíkovo-Nagymaros Project (Hungary v Slovakia), Judgment, Merits, ICJ GL No 92, (1997) ICJ Rep 7.
Rainbow Warrior	Rainbow Warrior (New Zealand v France), 82 I.L.R. 500 (1990).

PERMANENT COURT OF INTERNATIONAL JUSTICE

CITATION	REFERENCES
Chorzów factory	The Factory at Chorzów (Germany v Poland), Claim for Indemnity, Merits, (1928) PCIJ Rep, Series A No. 17. found on (http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm)

PERMANENT COURT OF ARBITRATION

CITATION	REFERENCES
Copper Mesa Mining	Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2, Award, 15 March 2016.
USA v Norway	Norwegian Shipowners' Claims (Norway v. United States of America), PCA 1921-01, Award, 13 October 1922.
South American Silver	South American Silver Limited v. Bolivia, PCA Case No. 2013-15, Award, 22 November 2018.

D. DECISIONS OF NATIONAL COURTS

CITATION	REFERENCES
Chevron	Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
Letelier and Moffitt	Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).
Tavakoli v Iran	Tavakoli and Another v Bantry Hills (Pty) Ltd (1251/2017) [2018] ZASCA 159; 2019 (3) SA 163 (SCA), 28 November 2018.
IIG Capital	Van der Merwe v IIG Capital LLC [2008] EWCA Civ 542, 22 May 2008.

E. INTERNATIONAL TREATIES

CITATION	REFERENCES
Bolivia-United Kingdom BIT	Bolivia, Plurinational State of - United Kingdom BIT (1988)

G. MISCELLANEOUS

CITATION	REFERENCES
BIT	Bilateral Investment Treaty (https://uk.practicallaw.thomsonreuters.com/4-502-2491?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_pageContainer)
Due process	Due process, Britannica dictionary (https://www.britannica.com/topic/due-process)
Price	Price, Britannica dictionary (https://www.britannica.com/topic/price-economics
ILC commentaries	Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session, November 2001, Report of the ILC on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 ((A/56/10), Ch. IV.E.2
Country risk analysis	Country risk analysis (http://countryriskanalysis.com/sites/default/files/EIU%20Credit%20Ratings%20explained.pdf)
ILC Articles	International Law Comission, Responsibility of a State for internationally wrongful acts, Agenda item 162, 28 January 2002.
Second Report on State Responsibility	Second Report on State Responsibility, [1970] 2 Y.B. Int'l L. Comm'n 177, 306, UN Doc. A/CN.4/SER.A/1970/Add.1
Model United States BIT	Treaty Between The Government Of The United States Of America And The Government Of [Country] Concerning The Encouragement And Reciprocal Protection Of Investment, 2004 Model BIT.

U.N.C.C. Governing Council Decision n. 3.	U.N.C.C. Governing Council Decision No. 3 on Personal Injury and Mental Pain and Anguish, S/AC.26/ 1991/3 (Oct. 23, 1991)
World Bank Guidelines	World Bank Guidelines on the Treatment of Direct Investment, 1992, Section 6.

ABBREVIATIONS

BIT	Bilateral Investment Treaty
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PCIJ	Permanent Court of International Justice
US	United States of America

Abstrakt v slovenskom jazyku

Medzinárodné investičné arbitráže sú novým a dynamickým faktorom súčasnej globálnej ekonómie a náhrada škody predstavuje jednu z ich hlavných charakteristík, peňažný aspekt. Medzinárodné investičné arbitráže prostredníctvom medzinárodných investičných dohôd chránia strany dohody, štát a investora druhého zmluvného štátu. Potreba náhrady škody poškodenej strane je bezprostredná, aj keď hodnota investície a ocenenie náhrady škody nie je zakotvené v dvojstranných investičných dohodách. Z toho dôvodu je dôležité stanoviť štandardy a princípy, ktorých by sa tribunál mohol pri rozhodovaní držať. Na druhú stranu, je však potrebné zachovať voľné uváženie tribunálu, pretože ocenenie škody závisí na okolnostiach jednotlivých prípadov.

Uznávané pravidlá sú základom predchádzania rozdielov a diskriminácie, a to hlavne z dôvodu častého udeľovania náhrady škody v miliónoch či miliardách amerických dolárov. Cieľom náhrady škody je zaistiť úplnú náhradu poškodenej strane. Predtým, však tribunál musí zistiť hodnotu investície a následne vypočítať náhradu škody použitím jednotlivých metód oceňovania.

Práca si kladie za cieľ skúmať jednotlivé metódy oceňovania investícií, a metódy oceňovania, ktoré využívajú tribunály pri oceňovaní poškodeného majetku. Každá z metód oceňovania je vhodná v odlišných okolnostiach, preto je potrebné, aby tribunál využil znalosti faktov prípadu a na tie aplikoval svoj najlepší úsudok. Cieľom každého tribunálu, by mala byť rovnocenná a úplná náhrada škody.

Práca sa bude zaoberať aj náhradou nemajetkovej ujmy, ako jedného z typov škôd. Nemajetková ujma je konceptom novším a v prevažnej miere stále odmietaným. Aj napriek progresívnej judikatúre niektorých tribunálov, zostáva prístup k nemajetkovej ujme reštriktívny. Tribunály podmieňujú naplnenie znakov ujmy prísnymi pravidlami, čo predstavuje reálne nebezpečenstvo. Práca priblíži roztrieštenú judikatúru a niektoré z hlavných problémov, ktoré sa s ujmou spájajú. Zodpovie otázky ako napríklad: čo je to nemajetková ujma, kto môže žiadať náhradu ujmy a ako môže byť ujma kompenzovaná. Cieľom práce je priblížiť problémy

prístupu k nemajetkovej ujme v minulosti a v súčasnosti v nádeji, že sa judikatúra pomaly ale isto zmení k lepšiemu.

Abstract in English language

International investment arbitrations are an upcoming and dynamic factor within the current global economy, and damages embody one of their main characteristics, the monetary aspect. International investment arbitrations through International Investment Agreements protect both parties involved, a state and an investor on another state, that is a party to such agreement. The need to award damages to harmed parties to a dispute is imminent, even though the value and valuation of damages are not articulated in Bilateral Investment Treaties. Therefore, it is vital to set standards and principles that tribunals could adhere to when awarding damages. On the other hand, it is important to allow discretion, since the valuation of damages depends on the particular circumstances of each case.

Acknowledged rules are fundamental to prevent discrepancies and discriminations, particularly when awards in international investment arbitrations can reach millions or even billions of U.S.$. The aim of damages is to provide full reparation standard when harm has been done to a party. In order to provide compensation to a harmed party, the tribunal first needs to assess the value of the affected investment and from that calculate the damages using a valuation method.

The thesis will examine the different methods to assess the value of an investment, as well as the valuation approaches that tribunals use to evaluate the harmed business or asset. Each of the valuation methods is suitable for distinctive circumstances. Hence the tribunals need to entail a deep knowledge of facts and a professional judgment when evaluating those facts. A goal of every tribunal should be to provide the harmed party with fair and full reparation.

The thesis will examine moral damages, as a particular type of damages. Moral damages are a more recent and still widely rejected concept. And despite new progressive rulings of some tribunals, the main view on moral damages remains

restrictive. Tribunals set the threshold for moral damages very high, which poses real risks to harmed parties. The thesis will observe the shattered jurisprudence and some of the main concerns the tribunals have when they are presented with a claim for moral damages. Questions such as: what moral damages are, who can claim moral damages, how moral damages are compensated, and others will be answered in the thesis. The aim of the thesis is to demonstrate the issues that moral damages faced in the past and are facing today in a hope that the jurisprudence will slowly but surely move towards a more open approach.

Kľúčové slová

Náhrada škody, náhrada nemajetkovej ujmy, metódy oceňovania investícií, metódy oceňovania škody

Key words

Damages, moral damages, value of investment, valuation methods