

The Standard of Proof of Moral Damages in International Investment Arbitration: A Call from Human Rights?

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Abstract

The concept of moral damages is an important issue in international investment arbitration. However, its intangible and non-financial nature has created many challenges for the arbitral tribunal in setting the appropriate standard of proof. One is the difficulty in establishing the causation between the host state's actions and the investors' moral harm, the other is the difficulty for the claimant to provide sufficient evidence due to the non-quantifiable nature of moral damages. The existing balance of probabilities standard cannot solve these problems. Against this background, international human rights law jurisprudence has adopted a presumptive rule regarding the standard of proof of moral damages. This presumptive rule does not require investors to provide specific evidence of their moral injury, instead, it turns to an objective assessment of the host state's actions. This approach offers a better solution to the evidential challenges encountered by the arbitral tribunals. Thus, the arbitral tribunals can resort to this presumptive rule in international human rights jurisprudence. This cross-fertilization can find ample support in international law and history. Also, this approach has gradually gained momentum in arbitral practices.

1. Introduction

The concept of moral damages is special for being the intersection of international investment law jurisprudence and international human rights law jurisprudence. Moral damages seek to compensate for the harm to individuals' personality and reputation,² including harm to their moral integrity and dignity.³ A typical example would be

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individual investors who are detained and threatened by the host state, seeking to recover for their psychological and physical pain as well as their reputation. However, tribunals' jurisdiction is limited to claims related to investment and they are reluctant to decide claims purely based on human rights violations.⁴ Thus, investors would generally claim that their moral injuries are closely related to their investment.⁵

In recent years, as more and more arbitral tribunals have begun to award moral damages, one of the difficulties encountered by arbitral tribunals is the standard of proof of moral damages. The Standard of proof establishes how much a party needs to prove to win the case.⁶ In the context of moral damages, the standard of proof reflects the amount of evidence investors shall provide to demonstrate they indeed suffering moral injuries to an extent for a tribunal to award compensation. Arbitral tribunals often rely on the balance of probabilities standard,⁷ which requires investors to prove that they are more likely than not to suffer moral injury.⁸ However, in practice, moral injury is hard to prove and quantify for its nature of being not "financially assessable".⁹ Although psychological tests or witness statements can be useful for tribunals to identify moral injury,¹⁰ tribunals still face challenges to set out the proper evidential standard as how much psychological evidence is needed. Moral injury is hard to quantify and thus might be "impossible to clearly evidence in an absolute manner".¹¹

Against this backdrop, this article proposes a new proving standard to address the evidential challenges regarding the standard of proof of moral damages in international investment arbitration. This article argues that arbitral tribunals can resort to the practice adopted in the international human rights jurisprudence that would presume the existence of moral damages once the host states exercise physical force. In other words, investors do not need to provide specific evidence of their moral injury because there is a presumption that aggressive host state actions would result in moral harm.¹² This would substantially alleviate the evidential problem that moral injury is hard to prove and quantify.

² Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC on the work of its fifty-third session, *Yearbook of the International Law Commission*, Vol. II, Article 31, para. 5, (2001).

³ Since this article suggests the tribunal take a leaf out of the practice in international human rights jurisprudence, it would only touch upon the damage to individuals' (i.e., individual investors and employees in a corporation) personality and reputation as a cause of action of moral damages. As for a judicial person, it is disputable whether damage to a judicial person's reputation can also be awarded moral damages. Tribunals are inconsistent with the conclusion that the damage to a judicial person's reputation can also qualify as moral damages. The tribunal in *Desert Line* awarded moral damages to a judicial person for its reputational damage, however, the tribunal in *Romp petrol* found that damage to a judicial person's reputation would still be a material loss. *Desert Line Projects L.L.C. v. Yemen*, ICSID Case No. ARB/05/17, Award, 2008, para. 290; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 2013, para. 289.

⁴ Eric De Brabandere, Human Rights and International Investment Law, in Markus Krajewski & Rhea Hoffmann (eds.), *Research Handbook on Foreign Direct Investment*, Edward Elgar Publishing, (2018), p. 627.

⁵ See generally Section IV. A below.

⁶ *The Rompetrol Group N.V. v. Romania*, *supra* note 3, para. 178.

⁷ See Riottot Luiza, Moral Damages, at <https://jusmundi.com/en/document/publication/en-moral-damages>, (Apr. 22, 2024); see also Dogan Gültutan, *Moral Damages under International Investment Law: The Path Towards Convergence*, Kluwer, (2021), p. 161.

⁸ This standard is the same as the preponderance of the evidence standard. M. Aghahosseini, *Evidence before the Iran-United States Claims Tribunal*, International Law FORUM du Droit International, 1999(04), p. 213.

⁹ Simon Weber, *Demystifying Moral Damages in International Investment Arbitration*, The Law and Practice of International Courts and Tribunals, 2020(03), p. 420.

¹⁰ Juan Pablo Moyano Garca, *Moral Damages in Investment Arbitration: Diverging Trends*, J. INT'L DISP. SETTLEMENT, 2015(03), p. 504.

¹¹ *Id*

¹² See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea, I. C. J. Reports 2012, para 20; see also Aloboetoe et al. v. Suriname, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, IHR 1396 (IACHR 1993), para 52.

This article is structured into three main sections. The first section tries to evidence that moral damages originate from compensation for human rights violations and are subsequently confirmed as part of the full reparation doctrine in international law. The second section illustrates that the balance of probabilities standard adopted by arbitral tribunals is untenable to moral damages. The third section then considers the possibility of a more lenient standard by seeking a potential dialogue between international investment law jurisprudence and international human rights law jurisprudence.¹³

2. The Concept of Moral Damages and Its Origin in International Law

2.1 The Concept of Moral Damages

Moral damages aim to repair investors' non-material harm. The International Law Commission has specified a widely accepted definition in its commentary of Responsibility of States for Internationally Wrongful Acts, stating that "individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life"¹⁴ shall be harm reparable by moral damages. Therefore, moral damages include damage to individuals' personality rights and damage to individuals' reputations. Despite the debate about judicial persons' reputational damages,¹⁵ moral damages meant to compensate for damages are not "financially assessable" and shall clearly be differentiated from damages to the alleged victim's assets.

2.2 The History of Moral Damages in International Law

Moral damages derive from the legal term "*prejudice morale*" or "*le dommage moral*" in French law.¹⁷ This concept gradually took shape in international law and was accepted as "a broad view of compensable injury"¹⁸ as evidenced by case law as well as other influential instrument(s). As history has reflected, the concept of moral damages originated from human rights issues and gradually took shape in the 20th century.

2.2.1 The Lusitania Case - One of the First Cases to Award Moral Damages in International Law

In the very early days, the Lusitania case, which involved the loss of hundreds of casualties, was one of the first decisions to confirm that moral damages can be awarded in international law.¹⁹ Although the concept of human rights was only beginning to take shape in the early 20th century,²⁰ this would not affect the recognition of moral damages under international law. In the *Lusitania* case, moral damages are sought as compensation for American's loss and personal injury resulting from the death in this disaster.²¹ When awarding damages, the sole arbitrator Umpire Parker ("Arbitrator Parker")²² made a clear reference to the French legal term "*prejudice morale*" and

¹³ Conway Blake, *Moral Damages in Investment Arbitration: A Role for Human Rights?*, Journal of International Dispute Settlement, 2012(02), p. 373.

¹⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 2.

¹⁵ See discussion on *supra* note 3 above.

¹⁶ Simon Weber, *supra* note 9.

¹⁷ Stephen Jagusch & Thomas Sebastian, *Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?*, Arbitration International, 2013(01), p. 53-54, cited from W.V. Horton Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective*, Springer, (2001), p. 46.

¹⁸ *Id*

¹⁹ Opinion in the Lusitania Case, United States-Germany Mixed Claims Commission, Reports of International Arbitral Awards, 1923, VII U.N.R.I.A.A., p. 36.

²⁰ See Amnesty International, A brief history of human rights, at <https://www.amnesty.nl/a-brief-history-of-human-rights>, (Apr. 6, 2024).

²¹ Opinion in the Lusitania Case, *supra* note 19, p. 33.

²² The sole arbitrator Umpire Parker delivered the opinion of the Lusitania Case, with the American and German Commissioners concurring in the conclusion.

stated that mental suffering is a proper element to be considered because it was "as real as physical suffering".²³ Although Arbitrator Parker realized that it was hard to measure moral injury, he did not hesitate in awarding damages because "such injuries are very real and call for compensation as actual damages are, nevertheless, universally considered in awarding compensatory damages."²⁴

Thus, Arbitrator Parker confirmed that moral damages can be awarded in international law by providing damages to "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"²⁵. Moreover, the opinion in paragraph 44 stated, "compensation must be full, adequate, and complete"²⁶, indicating that the Arbitrator Parker took a broad view concerning the range of damages awarded. Under this formulation, moral damages shall also be considered as part of the compensation for it to be full and complete. The latter case *Factory at Chorzów* as well as *Responsibility of States for Internationally Wrongful Acts* ("ARSIWA") firmly evidence this broad formulation of compensation.

2.2.2 *Factory at Chorzów (Germany v. Poland)* - Establish the Full Reparation Principle as a General Principle

The contentious issue stemmed from an alleged illegal transfer of the Chorzow factory.²⁷ For the claims seeking compensation, the Permanent Court of International Justice ("PCIJ") in 1928 stated that it is a general principle of law for states to provide reparation for their internationally wrongful acts.²⁸ Specifically, it stated that "[t]he existence of the principle establishing the obligation to make reparation as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzow factory."²⁹ Further, the court explained the effect of the compensation by stating that reparation must "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."³⁰

Although the PCIJ did not distinguish between material damages and moral damages,³¹ the Chorzów case established that full reparation is a general principle under international law.³² The International Law Commission later codified this principle into Article 31 of ARSIWA, which also provides that "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."³³ Therefore, moral damages are gradually accepted as part of the compensation for the State's internationally wrongful acts.³⁴

²³ *Id.*, p. 36.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*, p. 44..

²⁷ Case concerning the factory at Chorzów (Claim for indemnity) (Germany v. Poland), 13 September 1928, Merits, P.C.I.J., Series A, No. 17, at Legal Authorities No. 83, p. 19-21.

²⁸ *Id.*, p. 29.

²⁹ *Id.*

³⁰ *Id.*, p. 47.

³¹ *Id.*, p. 29.

³² See e.g., *Waguih Elie George Siag and Clorinda Vecchi v. the Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 2009, para 545.

³³ Articles on Responsibility of States for Internationally Wrongful Acts, Annex of the General Assembly resolution 56/83, corrected by A/56/49(Vol. I)/Corr.4, Article 31, (2001).

³⁴ For the purpose of the thesis argument, this article would not touch upon the State's counterclaim for moral damages.

2.2.3 *Benvenuti & Bonfant S.r.l. v. Congo* - The Starting Point to Award Moral Damages in International Investment Arbitration

Although *Benvenuti & Bonfant S.r.l. v. Congo* is alleged to be the first case in investment arbitration to award moral damages,³⁵ it has limited probative value because the tribunal awarded moral damages with no intention to compensate for moral injury directly.³⁶ Specifically, while the tribunal in *Benvenuti & Bonfant S.r.l. v. Congo* finally decided in favor of the investor for its claim seeking intangible loss, it pointed out that it "does not have any evidence capable of establishing the truth of B&B's claims under this head."³⁷ Nevertheless, the tribunal still awarded damages for the claims of intangible loss because the People's Republic of the Congo's actions "certainly disturbed B&B's activities."³⁸

Therefore, this decision has been criticized by scholars for its poor reasoning. Scholars explicitly suggest that this decision has less probative value because "the object of the compensation was not to effectively repair the moral damage suffered but rather to compensate the practical consequences of the damage."³⁹ In other words, damages were awarded due to the disturbance to the B&B's business, rather than a result of moral suffering. In any event, a possible way to reconcile this confused conclusion is to consider the early era in deciding this decision. This case was decided in the 1980s and the tribunal was ambivalent about accepting the concept of moral damages because it was the first investment arbitral tribunal to do so. Later arbitral decisions clearly demonstrate reasoning against this contradictory conclusion for awarding moral damages merely resulting from the disturbance of business.⁴⁰

3. The Current Practice on the Standard of Proof of Moral Damages in International Investment Arbitration and Its Deficiencies

3.1 The Current practice -The Balance of Probabilities Standard

3.1.1 *Rompetrol v. Romania* - Eventually Lack Probative Value

Rompetrol v. Romania is a classic example of a tribunal specifying the balance of probabilities standard as a normal standard. The tribunal explicitly rejected a higher standard, the "clear and convincing standard", proposed by the host state and insisted on adopting the balance of probabilities standards.⁴¹ Furthermore, while confirming the balance of probabilities as the appropriate standard, the tribunal stated that it shall be cautious when evaluating the evidence presented, and it shall adopt a nuanced approach in each circumstance when necessary.⁴²

Nevertheless, this decision has been criticized for having less probative value because the tribunal did not award moral damages. One of the reasons that the tribunal resisted moral damages is that it did not give enough weight to

³⁵ Simon Weber, *supra* note 9, p. 419.

³⁶ Although it was the corporate claimant alleging moral damages in this case, this case was still selected because it marked the first time the arbitral tribunal dealt with moral damages. This case was specifically presented to illustrate that, in the early days, the arbitral tribunal was uncertain about the nature and origin of moral damages, as they are closely connected to human rights. Therefore, the tribunal was entangled by its uncertainty and awarded moral damages to a corporate claimant, with no intention to compensate for moral injury directly.

³⁷ S.A.R.L. Benvenuti & Bonfant v. People's Republic of Congo, ICSID Case No. ARB/77/2, Award, 1980, para 4.96.

³⁸ *Id.*

³⁹ Simon Weber, *supra* note 9, p. 419, cited from P. Dumberry, *Compensation for Moral Damages in Investor-State Arbitration Disputes*, *Journal of International Arbitration*, 2010(03), p. 255.

⁴⁰ *E.g.*, *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*, Case 1:22-cv-00170, Final Award, 2021, para. 177.

⁴¹ *The Rompetrol Group N.V. v. Romania*, *supra* note 3, paras. 180-181.

⁴² *Id.*, para . 183.

the fact that Mr. Patriciu, who was previously the controller of the claimant had been detained for 24 hours.⁴³ One wonders if the tribunal gave enough credit to the detention of Mr. Patriciu, the tribunal would adjust the standard of proof. The tribunal itself admitted that those prosecutors who applied for a pre-trial detention had "patently thin grounds advanced by them to justify the need for pretrial detention"⁴⁴, it nevertheless treated such detention as meaningless. However, as it will be illustrated in the next section, the use of force by the government is essential for tribunals to presume that there is moral injury. In other words, the sign of physical force can lower the standard for the claimant to prove their moral injury. Therefore, such detention might constitute enough evidence for the tribunal to award moral damages. Yet, the tribunal did not give enough credit to the detention of Mr. Patriciu, rather, it only focused on the corporate investor's reputational damages and dismissed the claim due to lack of concrete evidence.⁴⁵

3.1.2 *Bernhard von Pezold and others v. Zimbabwe* - Over-reliance on Oral Evidence

Similar to *Rompetrol v. Romania*, the tribunal in *Bernhard von Pezold and others v. Zimbabwe* also confirmed that the balance of probabilities standard shall be the usual standard in international arbitration.⁴⁶ When it turned to moral damages, the tribunal found that one of the claimants, Mr. Heinrich's comprehensive oral evidence is sufficient proof of his moral injury, even though such evidence was challenged by the respondent.⁴⁷ The tribunal reasoned that for Mr. Heinrich's "own moral damages claim, it seems difficult to think of evidence more appropriate than his own account of his experiences."⁴⁸

However, despite the reasoning the tribunal has laid out for its exclusive reliance on oral evidence from the victims, this decision has been criticized because of the general concern over the credibility of oral evidence. Oral evidence, especially from the one claiming relief has far less probative value than documentary evidence. This is because "[w]itnesses are sometimes deliberately untruthfully, truthful witnesses are sometimes mistaken in their recollection of facts, and even truthful witnesses who accurately recall the facts are sometimes discredited by adroit cross-examination so as to obscure the truth."⁴⁹ Thus, one might argue that by relying on evidence that has far less probative value to satisfy the balance of probabilities standard, the tribunal in *Bernhard von Pezold and others v. Zimbabwe* alleviated the standard of proof for awarding moral damages.

3.2 The Deficiencies of Applying the Current Standard of Proof

3.2.1 Causation Between the Moral Harm and the Host State's Unlawful Act Is Difficult to Establish

Proving the causation between the host state's unlawful act and investors' moral harm is a complex issue. Causation is crucial to establishing a state's responsibility to provide reparation. Article 31 of the ARSIWA specifically entails that "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."⁵⁰ However, it is difficult for the tribunal to determine whether the claimants' mental distress is genuinely attributable to the respondent's wrongful actions. The claimants' moral harm might

⁴³ See *id.*, paras. 249-251.

⁴⁴ *Id.*, para. 251.

⁴⁵ *Id.*, para. 293..

⁴⁶ *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 2015, para. 177.

⁴⁷ *Id.*, para. 919.

⁴⁸ *Id.*

⁴⁹ Robert Pietrowski, *Evidence in International Arbitration*, Arbitration International, 2006(03), p. 391.

⁵⁰ Articles on Responsibility of States for Internationally Wrongful Acts, Article 31, *supra* note 33.

stem from their existing mental conditions which make them more vulnerable to physical duress.⁵¹ Additionally, the claimants' moral harm might be incurred by harassment or influenced by actions of a third party other than the host state.⁵² Emotional distress and anxiety can also occur in normal business activities due to a lot of factors other than the host state's actions, especially when investors are investing abroad.⁵³ It's hard to differentiate between these general accumulative concerns influenced by third parties and the specific psychological trauma attributable to the host state. Only the latter is justifiable for the tribunal to award moral damages.

In practice, several tribunals rejected the moral damages as the claimant failed to demonstrate the link between their moral harm and the host state's actions. For example, in *Caratube v. Kazakhstan*, although the tribunal accepted that the claimants and their relatives were subject to harassment, the tribunal still rejected the claim of moral damages.⁵⁴ Specifically, the tribunal stated that the claimants did not prove the "Respondent's alleged involvement in any acts of harassment against the Claimants."⁵⁵ Similar situations also happened in *Pey Casado v. Chile* as the tribunal emphasized that the claimants have not provided convincing proof to demonstrate that moral damages are caused by Chile's actions within the tribunal's jurisdiction.⁵⁶

3.2.2 It is Challenging for Arbitral Tribunal to Determine the Sufficiency of the Evidence Provided

The concept of moral damages is inherently challenging to quantify, especially in an accumulative context, making it difficult for the tribunal to determine an appropriate standard of proof. Moral damages seek to repair harm that is not financially assessable. On the one hand, while psychological evaluations and reports can help the tribunal in identifying such non-material harm, determining the extent of this harm remains challenging due to its non-quantifiable nature. On the other hand, the direct evidence of moral injury often comes from the individual claimant's testimony,⁵⁷ so there is an inherent possibility that the victims would always have the incentive to at least exaggerate their moral injury. Thus, if the tribunal gives too much credit to the individual claimant's oral evidence, it will jeopardize the legitimacy of the arbitral decision.

This difficulty has been well reflected in practice. In *Quiborax v. Bolivia*, the tribunal explicitly stated that it would, in any event, deny the claim of moral damages due to "lack of evidence of any specific moral injury".⁵⁸ Similarly, in *Pey Casado v. Chile*, the tribunal also rejected moral damages and emphasized that Mr. Pey Casado had failed to meet the burden to provide sufficient evidence of moral injury since "a mere likelihood that damage might have been suffered does not suffice".⁵⁹ Therefore, the tribunal suggested that "a claim to damages of a moral character"⁶⁰ would not alleviate the claimant's burden to provide sufficient evidence of moral harm.

⁵¹ M. Lawry-White, *Are moral damages an exceptional case?*, International Arbitration Law Review, 2012(06), p. 236-246.

⁵² *Id.*

⁵³ Simon Weber, *supra* note 9, p. 438.

⁵⁴ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (II), ICSID Case No. ARB/13/13, Award, 2017, paras. 1200-1203.

⁵⁵ *Id.*

⁵⁶ *Victor Pey Casado & President Allende Foundation v. Chile* (I), ICSID Case No. ARB/98/2, Award, 2016, para. 689.

⁵⁷ See e.g., *Bernhard von Pezold and others v. Republic of Zimbabwe*, *supra* note 46, para. 919.

⁵⁸ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 2015, para. 618.

⁵⁹ *Id.*

⁶⁰ *Id.*

4. A Possibility for the More Lenient Standard: A Call from Human Rights?

The concept of moral damages has been a controversial issue in international investment law jurisprudence for its implication on the dignity of human experience while the arbitral tribunal's power is generally considered to be limited to disputes directly related to investments. Thus, Arbitral tribunals are usually hesitant to consider non-investment claims, reflecting their general reluctance to engage with claims that are beyond the scope of investment disputes.⁶¹ However, the following discussion will illustrate that moral damages are not independent of "investments" and then try to engage in the discourse between international investment law jurisprudence and international human rights law jurisprudence.

4.1 Moral Damages Claim's Proximity to Investments

Although moral damages originate from human rights violations, the nature of moral damage claims still belongs to part of the investment disputes and the tribunals' jurisdiction would not be affected. Generally, investors seeking moral damages encounter violence when operating their investments. The claimant (or its staff) often suffer moral injury from the violence and threat and that would directly affect the claimant's ability to continue with investment, and thus result in loss of economic value of investment.⁶² Therefore, the tribunal would have jurisdiction over the claim of moral damages because of its proximity to investment.

A good example is *Desert Line v. Yemen*, in which a construction company in Yemen sought moral damages for the anxiety and distress that its executives had suffered.⁶³ When addressing the moral damages claim, the tribunal in *Desert Line v. Yemen* confirmed the connection between moral damages and investments by stating that the use of physical duress against the claimant's executives was part of the violation of the BIT.⁶⁴ BIT only protects investments, and the use of physical duress would result in moral injury. Thus, after finding the proximity between the moral damages claim and investments, the tribunal did not restrain itself from awarding moral damages since the prejudice suffered by the claimant substantially affected the health of the claimant's executives.⁶⁵

4.2 International Human Rights Law as Part of the Applicable Law

In addition to the close connection between moral damages and investments, the tribunal can also resort to international human rights law as part of the applicable law.⁶⁶ The broad language of the investment treaties and international instruments serve as useful guidance for the tribunal to consider international human rights law when deciding international investment disputes. Specifically, their applicable law clause and the compromissory clause are usually drafted broadly to at least include a reference to international law. Thus, when the parties fail to designate specific applicable law, the tribunal has the power to apply international law, which certainly includes

⁶¹ Eric De Brabandere, *supra* note 4, p. 627.

⁶² B. Sabahi, Moral Damages in International Investment Law: Some Preliminary Thoughts in the Aftermath of *Desert Line v Yemen*, in: j Werner & A. H.Ali (eds.), *A Liber Amicorum: Thomas Wälde, Law Beyond Conventional Thought*, CMP Publishing, (2012), p. 256.

⁶³ *Desert Line Projects L.L.C. v. Yemen*, *supra* note 3, para. 286. Again, although the tribunal also awarded moral damages for the harm to the claimant's (i.e., as a corporation) credit and reputation, for the purpose of the thesis argument, this article would not touch upon that part.

⁶⁴ *Id.*, para. 290.

⁶⁵ *Id.*

⁶⁶ Eric De Brabandere, *supra* note 4, p. 638; Clara Reiner and Christoph Schreuer, Human Rights and International Investment Arbitration, in P-M. Dupuy, F. Francioni, & E-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, (2009), p. 84.

international human rights law. Prominent examples include Article 42 of the ICSID Convention,⁶⁷ Article 9.25 of the CPTPP,⁶⁸ Article 26(6) of the ECT,⁶⁹ Article 1131 of the NAFTA,⁷⁰ Article 30 of the United States Model BIT,⁷¹ etc.

Moreover, it is also possible for the tribunal to consider international human rights law by virtue of article 31(3) of the VCLT.⁷² Article 31(3) of the VCLT provides that "any relevant rules of international law applicable in the relations between the parties"⁷³ shall be taken into account, along with the context in treaty interpretation. International human rights law are relevant rules of international law specified in Article 31(3) of the VCLT. Thus, tribunals shall also take into account the doctrines in international human rights law when they are interpreting the investment treaties.⁷⁴

4.3 The More Lenient Standard of Proof Provided by the Practice of the International Court of Justice and International Human Rights Courts

4.3.1 The International Court of Justice's Practice on the Standard of Proof of Moral Damages (Ahmadou Sadio Diallo)

In 2012, the International Court of Justice ("ICJ") rendered a decision in the *Diallo* case, substantially lowering the burden for the individual claimant to prove their moral harm since a presumption is created.⁷⁵ In the *Diallo* case, Mr. Ahmadou Sadio *Diallo* had been arrested, unjustly imprisoned and further been expelled.⁷⁶ The court found that such arrest, detention, and expulsion violated the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights; the Democratic Republic of the Congo is under obligation to make appropriate reparation.⁷⁷ When assessing evidence, the court found that it shall become more flexible for the evidence presented because the expulsion of Mr. *Diallo* may affect him and the Republic of Guinea to provide evidence.⁷⁸ The court solved this plight by creating a presumption that if the state's actions are severe enough, then there is no need to show moral injury for reparation because it is inevitable that such actions would cause the

⁶⁷ Article 42 of the ICSID Convention states: "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. ICSID Convention, supra note 109, Article 42, (1966).

⁶⁸ Article 9.25 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) states: "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 9.25, (2018).

⁶⁹ Article 26 (6) of the Energy Charter Treaty (ECT) states: "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." Energy Charter Treaty, Article 26 (6), (1998).

⁷⁰ Article 1131 of the North American Free Trade Agreement (NAFTA) states: "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." North American Free Trade Agreement, Article 1131, (1994).

⁷¹ 2012 United States Model Bilateral Investment Treaty, Article 30, (2012).

⁷² See Eric De Brabandere, supra note 4, p. 639.

⁷³ Vienna Convention on the Law of Treaties (VCLT), Article 31(3), (1969).

⁷⁴ Scholars suggest that Article 31(3) of the VCLT expresses the principle of *systemic integration* in international law. Article 31(3) of the VCLT is mainly used to solve the conflicts between different international law principles and fill in the gap when existing international law rules are inconsistent. See Eric De Brabandere, supra note 4, p. 639; see also Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, International and Comparative Law Quarterly, 2005(02), p. 311.

⁷⁵ Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), supra note 12, para 20.

⁷⁶ Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I. C. J. Reports 2010, paras. 16-19.

⁷⁷ *Id.*, para. 165.

⁷⁸ *Id.*, para. 16.

investors serious moral harm.⁷⁹ Therefore, the court suggested a more lenient evidential standard for Mr. *Diallo* to prove his psychological suffering by creating such a presumption.⁸⁰

Although there is concern over the precise point of whether the *Diallo* case, a non-international investment law case can directly be cited in international investment jurisprudence,⁸¹ both the subsequent investment case practices and the Statute of the International Court of Justice have fruitful evidence against this misgiving. First, the tribunal in *Bernhard von Pezold and others v. Zimbabwe* in footnote 95 cited the *Diallo* case's reasoning when analyzing the conditions and difficulties for awarding moral damages.⁸² The tribunal intended to draw experience from other tribunals and courts because at that time, "[m]oral damages are relatively new to investment treaty arbitration".⁸³ One of the supporting examples that they resort to is exactly the point in the *Diallo* case that "non-material injury can be established even without specific evidence".⁸⁴ Therefore, the tribunal is much more confident with the legitimacy of moral damages in international investment law jurisprudence with the supporting position from the ICJ. Second, according to Article 38 1(d) of the Statute of the International Court of Justice, the decision from the International Court of Justice would be considered a source of international law.⁸⁵ Thus, although the *Diallo* case is not an international investment law case, it still has great probative value and would heavily affect the arbitral tribunal's analysis of the standard of proof regarding moral damages.

4.3.2 The Human Rights Courts' Practice on the Standard of Proof of Moral Damages

International Human rights law jurisprudence has followed the approach set by the *Diallo* case. For moral damages, both the Inter-American Court of Human Rights and the European Court of Human Rights do not require strict evidence to prove moral injury.

The Inter-American Court of Human Rights stated in *Aloeboetoe* that the arrest and eventual murder of an indigenous group of people already constitute sufficient evidence for awarding moral damages.⁸⁶ Specifically, the court created a presumption that the victims would suffer moral injury because "it is characteristic of human nature that anybody subjected to the aggression and abuse described above will experience moral suffering."⁸⁷ In addition, The European Court of Human Rights also aligns with this approach of losing the evidentiary requirement for proving moral injury. For example, in *GRIDIN v. RUSSIA*, the court indicated that "[n]or is there a requirement that an applicant furnish any proof of the non-pecuniary damage he or she sustained".⁸⁸ Although the non-pecuniary damages claim in this case arised from the prolonged non-enforcement of a local court judgment in Russia rather than Russia's physical actions,⁸⁹ one can consider that this case shall justify *a fortiori* the adoption

⁷⁹ *Id.*, para. 20.

⁸⁰ Apart from individual investors, it must be noted that even if there are contentions regarding whether a judicial person's reputational damages' can be treated as moral damages, such contentions would not affect the argument here. The host state can only use physical force against individuals, no matter such individuals are employees of a corporate investor or standing on their own feet.

⁸¹ Dogan Gültutan, *supra* note 7, p. 162.

⁸² *Bernhard von Pezold and others v. Republic of Zimbabwe*, *supra* note 46, footnote 95.

⁸³ *Id.*, para. 909.

⁸⁴ Ahmadou Sadio Diallo, *supra* note 12, para. 20.

⁸⁵ The Statute of the International Court of Justice, Article 38 1(d): "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." The Statute of the International Court of Justice, Article 38 1(d), (1945).

⁸⁶ *Aloeboetoe et al. v. Suriname*, *supra* note 12.

⁸⁷ *Id.*

⁸⁸ *Gridin v. Russia*, Application no. 4171/04, Judgment (Merits and Just Satisfaction), 2006, para. 20.

⁸⁹ *Id.*, para. 13.

of a more lenient standard since the court did not require specific evidence for moral injury even without violence confronted. Thus, for the state's physical actions that will lead to a more serious violation of individuals' rights, it is only more appropriate for courts and tribunals to apply a more lenient standard of proof.

4.3.3 The Advantages of Applying the More Lenient Standard

4.3.3.1 The Causation Between the Host State's Physical Actions and the Investor's Moral Harm Would Be Presumed

Under this more lenient standard, investors' moral harm will be presumed if the host state's actions have implied some level of physical threat and violence. In other words, investors do not need to provide specific evidence to prove the causal link between their moral harm and the host state's violent actions. Such moral harm would be an inevitable consequence of the host state's fierce physical actions. Therefore, arbitral tribunals would not be troubled by the difficulties of excluding other factors that potentially contribute to the investors' moral harm when assessing the claims of moral damages. Furthermore, this presumption can lead to more equitable outcomes. It places a greater emphasis on the host states to justify their actions, especially when their actions have clearly violated the investors' rights. Therefore, the host states shall be more accountable for their actions in cases involving their egregious conduct, ensuring that the claimant's rights are rightly protected.

4.3.3.2 This Standard Is More Objective and can Alleviate the Claimant's Difficulty in Providing Sufficient Evidence of Their Moral Harm

This more lenient standard offers a more objective approach. The arbitral tribunals can avoid directly assessing the oral evidence regarding moral injury when applying this standard. Consequently, the arbitral tribunals can focus on an objective examination of the host state's violent actions since the evidence of the host state's physical force is usually more concrete and straightforward, compared with the evidence related to moral harm. Therefore, this objective approach can enhance the integrity of the arbitral decision. In addition, this standard can mitigate the concerns over the claimant's ability to provide adequate evidence of moral harm. In the context of claiming compensation for moral harm, this more lenient standard would be more appropriate for investors since they are in a more vulnerable position to provide evidence. There are rights asymmetry between investors and the host state, especially when the host state's actions imply some level of physical duress and violence. It is even harder for investors to provide evidence regarding their moral harm in an absolute manner because of its intangible and non-financial assessable nature. Thus, this more lenient standard can enhance the individual investors' right to be heard, particularly when the nature of the harm presents a disadvantage in meeting the traditional evidential requirement.

4.4 An Emerging Practice for Arbitral Tribunals to Follow the More Lenient Standard

It has been an emerging trend for arbitral tribunals to identify the host state's aggressive physical actions to satisfy the standard of proof when confronting moral damages claims. Several tribunals have rejected the claim of moral damages when such threatening actions are missing. For example, in 2013, the tribunal in *Arif v. Moldova* dismissed the claim for moral damages because the individual investor could not demonstrate any physical violence against him, his relatives, or his employees.⁹⁰ On the contrary, the arbitral tribunal in a very recent decision emphasized the possibility of proving moral injury with a showing of the host state's physical force. In 2021, the tribunal in *Zhongshan Fucheng v. Nigeria* awarded moral damages because the claimant's CFO was detained, deprived of food and water, and physically beaten for ten days.⁹¹ Additionally, the tribunal noted that

⁹⁰ Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 2013, para. 607.

⁹¹ *Id.*, para. 39.

Nigeria's representative had imposed threats towards other claimant's employees.⁹² The tribunal emphasized that Nigeria's treatment of Mr. Zhao constituted an indefensible and serious violation of his human rights, resulting in humiliation and fright.⁹³ Furthermore, the threats made by Nigeria against other employees also substantiated the tribunal's decision to grant moral damages.⁹⁴

5. Conclusion

The concept of moral damages is unique for its nature of lying at the crossroads of international investment law jurisprudence and international human rights law jurisprudence. It originated from non-investment incidents regarding the loss of casualties in international law, indicating its proximity to human rights. At the same time, it is also closely related to investments because investors usually confront violence during their operation of investments.

Due to its unique nature, the non-financial aspect of moral damages has created a great challenge to the current evidential standard, especially the standard of proof. This article suggests that the evidential standard in international human rights law jurisprudence can assist arbitral tribunals when they confront moral damages claims. International human rights law jurisprudence creates the presumption that if the state uses some level of physical force, such physical force will lead to moral injury. This approach can substantially alleviate the evidential problems the tribunal has encountered under the general evidential standard. Arbitral tribunals would not be bothered with the credibility of oral evidence and the sufficiency of psychological reports, as well as the causation issue involved. Instead, arbitral tribunals can focus on the objective assessment of the host state's actions.

⁹² *Id.*, para. 177.

⁹³ *Id.*

⁹⁴ *Id.*