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About the Author

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Doğan holds a PhD from City, University of London, an LLM from University College London, and an LLB from the University of Westminster (First Class).

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'List of Abbreviations', in Dogan Gultutar , Moral Damages under International Investment Law: The Path Towards Convergence, International Arbitration Law Library, Volume 62 (© Kluwer Law International; Kluwer Law International 2021) pp. xiii - xiv

List of Abbreviations

P xiv	American Convention on Human Rights
American Convention	Unified Agreement for the Investment of Arab Capital in the Arab States
Arab Investment Agreement	Bilateral Investment Treaty
BIT	EU-Canada Comprehensive Economic and Trade Agreement
CETA	Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights
ECHR	Energy Charter Treaty
ECT	European Court of Human Rights
ECtHR	European Union
EU	Inter-American Commission of Human Rights
IACHR	Inter-American Court of Human Rights
IACtHR	International Court of Justice
ICJ	Statute of the International Court of Justice
ICJ Statute	Investment Court System
ICS	International Centre for Settlement of Investment Disputes
ICSID	Convention on The Settlement of Investment Disputes Between States and Nationals of Other States
ICSID Convention	Investor-State Dispute Settlement
ISDS	International Law Commission
ILC	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
ILC Articles	EU-Singapore Investment Protection Agreement
IPA	Multilateral Investment Treaty
MIT	North American Free Trade Agreement
NAFTA	Permanent Court of International Justice
PCIJ	United Nations
UN	Charter of the United Nations
UN Charter	Agreement between the United States of America, the United Mexican States and Canada
USMCA	
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'Foreword', in Dogan Gultutar , *Moral Damages under International Investment Law: The Path Towards Convergence*, International Arbitration Law Library, Volume 62 (© Kluwer Law International; Kluwer Law International 2021) pp. xv - xvi

Foreword

A book dedicated to moral damages in international investment undoubtedly is both intriguing and challenging. The typical remedy for investors in investment arbitration is damages since specific performance would not be available or enforceable in most cases. Hence, establishing a claim for damages and quantifying the damages is not an easy task. Still, the key principles about damages were unequivocally established almost a century ago. In the *Lusitania Cases*, it was confirmed that, as a matter of international law, compensation is due in the event of an internationally wrongful act causing *moral* harm. ⁽¹⁾ A few years later, the PCIJ in the *Chorzów* case laid down the principle that 'reparation must ... wipe out all the consequences' of the illegal act and restore the parties in the situation they would have been had the illegal act not taken place. ⁽²⁾ This principle also constitutes the basis of Article 31 of the International Law Commission (ILC) Articles on State Responsibility. ⁽³⁾

About a century ago and indeed in the context of the ILC Articles, no distinction was made between material and moral damages. However, the right to and availability of moral damages under international investment law has been widely debated. It appears that interest in the topic was reignited by the award in the ICSID (International Centre for Settlement of Investment Disputes) case *Desert Line*. ⁽⁴⁾ This is the first known ICSID case where moral damages were awarded under an investment treaty and pursuant to customary international law. Other ICSID tribunals have followed this trend, but there has been no consistency in the development of clear principles. Therefore, the book argues that the apparent convergence of international investment awards with customary international law is rather misleading as there is also divergence in relation to applicable substantive law test used to determine moral damages.

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Certain recommendations are made to facilitate a full convergence and coherence of international law and investment law.

Dr Gultutan's book considers whether, as a matter of principle, moral damages should be available under international investment law. In this respect, he uses Aristotle's theory of corrective justice as the primary justification for the award of moral damages. I have also considered Aristotle's theory not only a justification for moral damages only but also a justification for the existing investment treaty arbitration structure (often referred to as ISDS). ⁽⁵⁾ It should not come as a surprise that I would also endorse such theoretical foundation also for the award of moral damages in investment arbitration. The book after the theoretical chapter explores categories of persons and whether, as a matter of law, they would have an entitlement for moral damages. The following two chapters seek to consider whether corrective justice is consistent with the applicable legal standards: in other words, Aristotle meeting current positivism. Chapter 5 clarifies the precise nature of compensation due where corrective justice would call for such compensation. The final chapter then summarises the output of the research and offers certain recommendations aimed at facilitating full convergence of international law and investment law.

I have met Dr Gultutan when he was appearing as junior counsel in his first arbitration about ten years ago and am delighted that he has pursued such an excellent topic as a PhD and now as a published book. This is an elegant and well-researched book which effectively blends theory and practice. He has analysed critically the body of jurisprudence, provided historical and theoretical insights, and has made a complex topic accessible to a wider audience. I warmly congratulate the author for his achievement and commend the book to everyone interested in investment arbitration and public international law.

Prof Loukas Mistelis

Clive M Schmitthoff Professor of Transnational Law and Arbitration

Queen Mary University of London

Virginia Water, 3 November 2021

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Opinion in the Lusitania Cases, United Nations Reports of the International Arbitral Awards, 1 November 1923, Vol. VII 32, 40.

2)

The Factory at Chorzów (Germany v. Poland), Decision on Indemnity, 1928 PCIJ (Ser A).

3)

See Article 31 ILC Articles on State Responsibility for Wrongful Acts, Commentaries (1)-(3), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed 2 April 2021.

4)

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

5)

See the report on my 2020 EFILA Lecture, 'Mistelis Calls for Aristotelean Approach to ISDS Reform', report published at Global Arbitration Review on 18 December 2020, available at <https://globalarbitrationreview.com/mistelis-calls-aristotelean-approach-isds-reform>.

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Preface

The availability of and entitlement to moral damages under international investment law has been a hotly debated topic of the past decade, an interest ignited principally by the ICSID tribunal's award in *Desert Line*,⁽¹⁾ the first publicly known ICSID case where an award for moral damages was made under a modern investment treaty and pursuant to customary international law.⁽²⁾ The tribunal considered that it possessed the requisite jurisdiction to award moral damages and granted the investor moral damages in the sum of USD 1 million. Other ICSID tribunals have since largely followed suit.

Until the *Desert Line* award, foreign investors (and their counsel) would not have generally considered that there was an entitlement to moral damages in connection with the host state's treaty (or other international law) violations, and therefore did not (seemingly) as vehemently seek such damages in investment arbitration cases. However, the position appears to have changed. There has been a steady increase of investment awards addressing the issue of moral damages since the seminal *Desert Line* award.

Notwithstanding the above, there is a lack of unanimity, amongst arbitrators and scholars, in particular amongst the latter camp, on the applicable rules and principles of international investment law as regards entitlement to moral damages. There is a difference of opinion on, *inter alia*, (i) who should be entitled to seek moral damages; (ii) the legal test to determining moral damages claims, in respect of both substantive and evidential issues; and (iii) the quantification of moral damages. The state of the law on moral damages is in its infancy and requires refinement and further development.

This book seeks to undertake a thorough review of the relevant case law and scholarly views on the issue of moral damages under international investment law, and critically analyse the current state of the law on the matter. In aid of the said exercise, this book performs a deep dive into the sources of and the fundamental rules and principles of customary international law. The research findings suggest that the *Desert*

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Line tribunal deviated off course, away from settled rules and principles of customary international law, by conditioning entitlement to moral damages to exceptional circumstances and/or grave international law violations, constituting further evidence of the fragmentation of (the various sub-disciplines of) international law.

This book advocates that though international investment (mainly ICSID) awards seemingly converge with the rules and principles of customary international law in terms of the general entitlement to moral damages, there is a clear divergence in respect of the substantive legal test applied to determine moral damages claims, signalling a degree of fragmentation of international law. This book, therefore, amplifies the call for greater convergence of various sub-disciplines of international law, especially in respect of the entitlement to moral damages by divorcing itself from the requirement to show 'exceptional' or 'grave' circumstances. The book makes certain suggestions and recommendations to facilitate international investment law taking the path towards convergence, so as to avoid risking the coherence, uniformity and stability of international law and of the international legal order.

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1)

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

2)

Unless otherwise stated, references in this book to 'customary international law', 'international law' and 'general international law' shall mean the same thing and will be used interchangeably.

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