

The Dissenting Opinion in *P&ID v Nigeria* and the Question of Awards of Excessive General Damages in Investor-State Arbitration

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Abstract

Dissents are useful in giving additional dimension to the issues involved in a case. In arbitration, especially, a dissenting opinion has the effect of: encouraging the majority to do a more careful analysis in its reasoning; and promoting parties' confidence in the arbitral process. More importantly, a dissenting opinion may also help in providing future tribunals and researchers alternative perspectives that may affect the reasoning of the former or be used by the latter to scrutinise the majority award and, ultimately, provide a better jurisprudence and a body of literature for the arbitration community. This paper used the dissenting opinion in *P&ID v Nigeria* to scrutinise the majority award in a bid to address the question of awards of excessive general damages in investor-State arbitration. Such exorbitant awards, among other things, have led to dissatisfaction against investor-State arbitration and a clamour for its reform; but some of the reform options being proposed are aimed at its complete abandonment, despite its overwhelming advantages. This paper, therefore, explored previous literature to establish the use of equity and justice-rooted principles in international law, especially in the past, and proposes their broad application today to investor-State arbitration as a means of saving the mechanism from collapse. The doctrinal approach of qualitative research methodology was adopted in this paper. This gave the basis for interrogating previous literature that deals with the role that equity and justice-rooted principles should play in international arbitration and to conclude that applying such principles would help arbitral tribunals arrive at more appropriate general damages.

Keywords: Dissenting opinion, Equity, General damages, Investor-State arbitration, Justice

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1. Introduction

This paper sets out to appraise the dissenting opinion in *Process and Industrial Developments Limited v Ministry of Petroleum Resources of the Federal Republic of Nigeria*¹ (*P&ID v Nigeria*) against the backdrop of the majority final award, with the aim of contributing to the ongoing conversation on the bandwagon effect of awards of excessive general damages in investor-State arbitration (ISA). Also, the difference between the quantum of damages awarded in the dissenting opinion (\$250million)² and the one awarded in the majority final award (\$6.6billion, besides pre-award interest)³ instigates some curiosity, especially in the light of the backlash the latter has received and in the light of the various interventions of the Nigerian, English and American municipal courts. These court interventions, however, are not part of what this paper will be discussing.

In litigation, dissents may be useful 'in the appeals process in that they contribute to give an additional dimension to the legal issues involved' in the case.⁴ In arbitration, the benign effects of dissenting opinions are underscored by three main arguments, namely: that they may incentivise the majority to a more careful analysis in its reasoning; promote party confidence in the arbitral process by giving parties the feeling that alternative arguments were considered, even if ultimately rejected;⁵ or providing future researchers alternative perspectives that may be used to scrutinise the majority final award and, ultimately, provide a better jurisprudence and a body of literature for the arbitration community.

A dissenting opinion, though also referred to as a dissenting award, is not part of the decision of the tribunal.⁶ In this work, the dissenting opinion in the *P&ID v Nigeria* will be used to scrutinise the majority final award, which is the recognised decision of the tribunal. The purpose of the scrutiny is to validate the thesis that awards of general damages should aim at the fair compensation of an aggrieved foreign investor and not to

¹ *P&ID v Nigeria*, Case 1:18-cv-00594 (ad hoc international arbitration).

² Dissenting Final Award of Chief Bayo Ojo, SAN, in *P&ID v Nigeria*, dated 31 January 2017, para 46.

³ *P&ID v Nigeria* Final Award dated 31 January 2017 (Case 1:18-cv-00594) 33-34.

⁴ Christer Söderlund, 'Dissenting Opinions and why they Should be Tolerated' (12 March 2019) Arbitration J <<https://journal.arbitration.ru/analytics/dissenting-opinions-and-why-they-should-be-tolerated>> accessed 17 July 2021.

⁵ *ibid.*

⁶ See *ibid.*

unjustly enrich him or compensate him beyond proportion, which has the effect of running aground a losing respondent state's economy. But before undertaking any further journey towards the appraisal, a brief summary of the facts of the case would be undertaken.

After the introduction, in section 2, the paper begins with a summary of the facts of the case. Section 3 examines the quantification of damages by the majority and dissenting arbitrators, while section 4 makes a case for the application of equitable and justice-rooted principles by international investment arbitration tribunals. Section 5 deals with states' reaction to excessive damages awards, and the ISDS reform agenda. The paper concludes with section 6.

2. Summary of the Facts of the Case

There was a Gas Supply and Processing Agreement (GSPA) dated 11 January 2010 between the parties,¹ which had a tenure of 20 years from the date of first supply of wet gas by the respondent² to the claimant to enable the latter execute the project, the subject-matter of the GSPA.³ The GSPA provided that: (a) the agreement shall be construed in accordance with the laws of Nigeria; (b) in the event of a dispute over the interpretation or performance of the agreement, which cannot be resolved amicably, either party may serve on the other a notice of arbitration; (c) the arbitral award shall be final and binding upon the parties; and (d) the venue of the arbitration shall be London, England or as otherwise agreed by the Parties.⁴ Two years later, that is, in 2012, a dispute arose between the parties and, as this could not be settled amicably, P&ID served a notice of arbitration on the Nigerian government, claiming damages for loss of profit and/or other relief arising out of the breach by the Ministry of Petroleum Resources of the Federal Republic of Nigeria,⁵ on the ground that the Ministry had failed to make wet gas available in accordance with the GSPA.⁶

P&ID alleged that it had expended an estimated amount in excess of \$40million in preliminary works, preparatory to the construction of the production facilities,⁷ but was awarded general damages in the sum of \$6.6billion (in addition to pre-award interest) as anticipated sum it would have earned during the 20-year lifespan of the contract had the Nigerian government performed the contract. The arbitral tribunal, in its Part Final Award on liability, had affirmed that Nigeria had indeed failed to perform its obligations under the GSPA and then unanimously decided that P&ID was entitled to damages with interest, for the former's breach of the agreement.⁸ The tribunal had bifurcated the proceedings and, therefore, left the issue of quantum of damages for a later date. Besides the part final award on liability, there was an earlier part final award by the arbitral tribunal on jurisdiction⁹ and subsequent procedural order on the seat of the arbitration.¹⁰ In respect of the former, the tribunal ruled that it had jurisdiction, while in respect of the latter the tribunal ruled that London, rather than Nigeria, was the juridical seat of the arbitration.

In 2017, the arbitral tribunal delivered its final award, which was on quantum of damages. It opined that P&ID would have played its own part in the contract if Nigeria had fulfilled its obligation under article 6(b) of the GSPA. It therefore ruled in favour of P&ID and ordered Nigeria to pay \$6,597, 000,000 being net present value of the profits which would have been earned by P&ID in twenty years. Nigeria was also asked to pay interest on the said award sum at 7 per cent (per annum) from March 2013,¹¹ thereby awarding the claimant pre-award interest as stated above. One of the arbitrators, however, dissented on the quantum of damages.¹²

The *P&ID v Nigeria* arbitration is one of the most recent of several cases that have made countries to begin to rethink the usefulness of ISA. Other examples are *Aguas del Turani S.A v Republic of Bolivia*¹³ (*Aguas del Turani*), *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*¹⁴ (*Chevron v Ecuador I*) and *The Renco Group Inc. v The Republic of Peru (I)*¹⁵ (*Renco v Peru I*). The P&ID majority award, beside the component of the pre-award interest, is almost four times bigger than the largest ICSID award (2012 ICSID

¹ See Procedural Order No. 10 in *P&ID v Nigeria*, dated 26 April 2016 and marked as Exhibit 12, para 4.

² See *P&ID v Nigeria* Part Final Award on Liability, dated 17 July 2015, para 62, where the tribunal explained the term 'Start Date'.

³ Reuben Abati, 'P&ID vs Nigeria: A Review', (*The Cable*, August 2019) <www.thecable.ng/pid-vs-nigeria-a-review> accessed 7 October 2019.

⁴ Gas Supply and Processing Agreement between Ministry of Petroleum Resources and Process and Industrial Development Limited (made on 11 January 2010) art 20.

⁵ First Witness Statement of Michael Quinn in *P&ID v Nigeria* filed on 16 March 2018 and marked as Exhibit 5, para 2.

⁶ See *ibid*, paras 134, 142-144.

⁷ *ibid*, para 47.

⁸ *P&ID v Nigeria* Part Final Award on Liability (n 8); see also Oluseyi Awojulugbe, 'British Court Gives P&ID Go-ahead to Seize Nigerian Assets Worth \$9bn', (*The Cable*, 16 August 2019) <www.thecable.ng/breaking-british-court-pid-seizenigerian-assets-worth-9bn> accessed 19 November 2019.

⁹ *P&ID v Nigeria* Part Final Award on jurisdiction dated 3 July 2015.

¹⁰ Procedural Order No. 12 dated 26 April 2016.

¹¹ Abati (n 9).

¹² Dissenting Final Award (n 2).

¹³ *Aguas del Turani*, ICSID Case No. RB/02/3.

¹⁴ *Chevron v Ecuador (I)*, PCA Case No. 2007-02/AA277.

¹⁵ *Renco v Peru (I)*, ICSID Case No. UNCT/13/1.

award of \$1.77 billion in *Occidental Petroleum Corporation v the Republic of Ecuador*¹) in the history of the new era of mega cases in international arbitration related to the oil industry.²

3. Quantification of Damages by the Majority and Dissenting Arbitrators

The main objective of this paper is to examine both the majority final award and the dissenting opinion in *P&ID v Nigeria* in respect of quantification of damages, with the aim of substantiating the thesis of this paper that employing equity and justice-rooted principles in ISA is both permissible and desirable. Also, under this section, beyond the evaluation of both decisions, the paper will attempt to compare and contrast the said decisions with the decisions of some previous international arbitral tribunals.

3.1 The Quantum of Damages Awarded by the Majority Arbitrators

It is trite law that damages are remedial and not meant to be punitive.³ In order to substantiate the reason for its award of damages as expected, the tribunal strenuously made reference to Nigeria's failure to keep its obligation under article 6(b) of the GSPA.⁴ However, it failed to balance that with the claimant's failure to even as much as pay for the land allocated to it by the government for the purpose of realising the terms of the GSPA⁵ or to mitigate its loss when it could.⁶ The issue of mitigation, which the dissenting arbitrator reasoned was treated in a dismissive manner by the majority,⁷ weighed on his mind and helped him arrive at what may be considered reasonable general damages of \$250million in favour of the claimant⁸ for an investment of \$40million. As the dissenting arbitrator pointed out, '[t]he majority opinion appeared to have set up a case better than, and different from that canvassed by the Claimant' for the majority to arrive at general damages of \$6.6billion, besides pre-award interest.⁹ An important reason why an ISA tribunal must always endeavour to arrive at reasonable damages in its award is brought to the fore by Garcia and Hough who posit that:

[T]he cost for states to defend claims and pay awards is ultimately borne by the public, who, as taxpayers, are the residual risk-bearers in the current system. Developing states are particularly vulnerable. Research suggests the vast majority (88 percent) of all claimant investors are from high income countries, and developing countries win only half as often as developed countries, factors which TPF funders have admitted enter into their preliminary evaluation of a potential claim/investment.¹⁰

The *Norwegian Shipowners claims (Norway v. United States)*¹¹ arbitration is comparable to *P&ID v Nigeria* arbitration in respect of award of damages but distinguishable from it on facts. The case has its setting on a World War I event. During the war, there were ships being constructed in American shipyards for Norway, and when the United States became involved in the war it took over these ships. After the war, Norway brought a claim before arbitration for the United States to pay it for the value of the ships and also for the value of the profits they would have made for the entire period. The arbitral tribunal accepted Norway's argument and awarded it both damages and the profits the ships would have made for the period.

The *Norwegian Shipowners claims* arbitration can easily be distinguished from the *P&ID v Nigeria* arbitration as the United States actually took over and enjoyed the benefit of the ships belonging to Norway, which would have made good profits during the war – profits based on the United States' enjoyment of the assets in the past. In the *P&ID v Nigeria* arbitration, the claimant did not have any assets in Nigeria that was taken over by the country. P&ID's claim was for imaginary profits the company would have made in twenty years had the Nigerian government performed its obligations under the contract – anticipated profits not based on any concrete investment. Meanwhile, Nigeria's argument that P&ID had not made any substantial investment at the time the contract was repudiated was not controverted by P&ID in its material essence, and yet the arbitral tribunal went ahead and gave an award of a whopping \$6.6 billion (beside pre-award interest for six years and daily interest of \$1million from the date of the award) in favour of P&ID.

¹ *Occidental v Ecuador*, ICSID Case No. ARB/06/11.

² See Julian Cardenas Garcia, 'The Era of Petroleum Arbitration Mega Cases' (2013) 35 Hous J Int'l L 537, 537-538, citing George Kahale III, 'Is Investor-State Arbitration Broken?' (2012) 9 Transnat'l Disp.Mgmt. 1, 28, 31.

³ See *Gamboruma v Borno State* (1997) 3 NWLR (Pt 495) 530, 547, paras D-E; *State Farm Mutual Automobile Insurance Company v Campbell* (2003) 538 U.S. 408; *Tsokwa Motors (Nig.) Ltd v U. A. A Plc.* (2008) 2 NWLR (Pt 1071) 347, 350, paras B-C; Gervase Macgregor and David Mitchell, 'Pre-award Interest, and the Difference between Interest and Investment Returns' (2019) Int'l Arbitration <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/2-pre-award-interest-and-the-difference-between-interest-and-investment-returns>> accessed 20 November 2019.

⁴ *P&ID v Nigeria* Final Award (n 3) paras 30, 32 and 36

⁵ *P&ID v Nigeria* Part Final Award on Liability (n 8) paras 63 and 65, where the tribunal referred to the respondent's submission in this regard.

⁶ See *P&ID v Nigeria* Final Award (n 3) para 109, where the tribunal considered the issue of mitigation raised by the respondent, but dismissed it.

⁷ Dissenting Final Award (n 2) 2.

⁸ *ibid*, paras 8, 9, 10, 12, 14, 16 and 46.

⁹ Dissenting Final Award (n 2) para 7

¹⁰ Garcia and Hough (n 23).

¹¹ *Norwegian Shipowners' claims* (United Nations, *Reports of International Arbitral Awards*, vol I, 307-346).

The outrage of the United States government over *Norwegian Shipowners claims* award mirrors the general feelings over the *P&ID v Nigeria* award. As Sohn points out in his commentary, the United States, through its Secretary of States, Hughes, wrote to the Norwegians, ‘You have won the case, but on wrong principles and we cannot accept the reasoning of the Court; it has abused its power’.¹ The feeling of the United States then, even under the circumstances painted above, can help gage the mood of Nigerians when they first heard about the *P&ID* award.² Globally, the award sparked questions about transparency in international investment arbitrations.³

3.2 The Quantum of Damages Awarded by the Dissenting Arbitrator

There was unanimity of decisions throughout the arbitral proceedings in *P&ID v Nigeria* until the final award, where the ‘measure of damages’ was to be decided.⁴ In a well-reasoned dissenting opinion, the minority found, awarded and declared as follows:

The Respondent shall pay the Claimant the sum of \$250million (250,000,000) US Dollars as damages for breach within ninety days from the date of this award.⁵

As it turned out, that proportionate award was not to be, as the majority awarded \$6.6 billion general damages, in addition to pre-award interest, to the claimant.⁶ The position of the minority finds corroboration in the decision in *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*⁷ (*SPP v Egypt*). In that case, the respondent argued that the discounted cash flow (DCF) method of calculating damages would lead to unjust enrichment of the claimants, which view the tribunal accepted on the ground that the DCF method is not appropriate for determining the fair compensation in the case because the project had not been in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation.⁸ The tribunal stated further that at the time the project was cancelled, only 386 lots (or about 6 percent of the total lots) had been sold and so all other lot sales underlying the revenue projections in the claimants’ DCF calculations are hypothetical and that since the project was in its infancy, there was very little history on which to base projected revenues.⁹

A similar case to *SPP v Egypt* is the Iran-US Claims Tribunal (IUSCT) case of *William J. Levitt v Islamic Republic of Iran*¹⁰ (*Levitt v Iran*), which concerned a contract between International Construction Company (Iran) Ltd (ICC), a Bahamian company owned and operated by a US national (Mr. Levitt), and the Housing Organisation of Iran (HO).¹¹ The contract was for a housing development project in Iran, with the following facts: work had advanced to the extent where the site had been cleared and graded for the building of 950 units of housing before the project broke down due to a failure by HO to gain approval for the construction of a water supply and provision of other services.¹² Though the tribunal awarded damages to the claimant for the expenses it had incurred, it refused to grant recovery of lost profits¹³ on the basis that the claim was highly speculative since, at the time the contract was repudiated by the respondent state, only the initial stages of clearing and grading had been completed, and project had therefore reached only a very early stage.¹⁴

The *Levitt v Iran* tribunal relied on the governing principles elucidated in two earlier IUSCT decisions in *International Schools Services Inc. v National Iranian Copper Industries Company*¹⁵ (*ISS v NICICO*) and *Queens Office Tower Associates v Iran National Airlines Corp.*¹⁶ (*QUOTA v Iran Air*), where both tribunals determined that the governing rule as to the liabilities and rights of the parties is that the loss must ‘lie where it falls’, pointing out that the ‘apportionment of the loss is subject generally to the Tribunal’s equitable discretion,

¹ Louis B. Sohn, ‘Equity in International Law’ (1988) 82 American Society of Intl L 277, 287.

² See Agency Report, ‘Nigeria: Why Nigeria Insists P&ID Contract Was Fraudulent - Lai Mohammed’ (*Premium Times*, 2 October 2019) <<https://www.premiumtimesng.com/news/top-news/355705-why-nigeria-insists-pid-contract-was-fraudulent-lai-mohammed.html>> accessed 17 October 2019.

³ Kate Beioley and Neil Munshi, ‘The \$6bn Judgment Pitting Nigeria against a London Court’ (*Financial Times*, 11 July 2020) <www.ft.com/content/91ddb53-a754-4190-944e-d472921bb81e> accessed 13 July 2020.

⁴ See Dissenting Final Award (n 2) 1.

⁵ *ibid*, para 46.

⁶ *P&ID v Nigeria* Final Award (n 3) paras 110 and 112.

⁷ *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award on Merits.

⁸ *ibid*, paras 187-188.

⁹ *ibid*, para 188.

¹⁰ IUSCT Case No. 210.

¹¹ Award (No. 520-210-3 dated 29 August 1991), IUSCT Case No. 210, para 1.

¹² Michael Pryles, ‘Lost Profit and Capital Investment’ <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012223892171920damages_in_the_international_arbitration_paper.pdf> 7-8 accessed 30 July 2021.

¹³ *Levitt v Iran* Award (No 520-210-3 dated 29 August 1991), reported in ME MacGlashan and E Lauterpacht (eds), *Iran-United States Claims Tribunal Reports*, vol 14 (Grotius Publications Limited Cambridge 1988) para 74.

¹⁴ Pryles (n 44).

¹⁵ IUSCT Case No. 111.

¹⁶ IUSCT Case No. 172.

using the contract as a framework and reference point'.¹

Although the three cases discussed above (*Levitt v Iran*, *ISS v NICICO* and *QUOTA v Iran Air*) are non-ISDS cases, the principles enunciated in them are sound international arbitration principles applicable to ISA. The cases show that in the apportionment of loss in ISA, a tribunal must bring equitable considerations to bear. This paper's position in respect of quantum of damages in *P&ID v Nigeria* is that equity and justice-rooted principles recognised under Nigerian law (the applicable law) and international law should have been called to aid by the arbitral tribunal. Generally, common-law jurisdictions, including Nigeria, require the award of damages to be reasonably calculated to make the claimant whole,² on the one hand, and caution that speculation by the decision-maker is impermissible, on the other hand.³ The cardinal point is "to make the claimant whole", and not to give the claimant in advance the income it has projected (rightly or wrongly) to earn for 20 years, together with interest, if the contract had not been determined. The injustice in applying the law that way becomes apparent in the light of the fact that the GSPA did not incapacitate the claimant from pursuing other investment ventures. Thus, a fair compensation that would make the claimant whole is all that it should be entitled to and not transferring 33 per cent of a nation's foreign reserve⁴ to a single company for doing nothing.⁵

Although some treaties and national laws do not permit an arbitral tribunal to decide matters *ex aequo et bono*, that is, departing from pure legal considerations to decide according to what is just and proper, unless the parties so agree,⁶ the rule against *ex aequo et bono* does not defeat the application of equity and justice-based principles when such is based on general principles of law.⁷ The thesis of this work, therefore, is that there is still, and must always be, a normative role for equity and justice-rooted principles in international law⁸ and all adjudicative processes. Such normative role has been confirmed time and again in international cases,⁹ some of which are *The Orinoco Steamship Company Case* (1910), *Norwegian Shipowners claims* (1922), and *Cayuga Indians* case (1926).

In *The Orinoco Steamship Company Case*, an arbitration between the United States and Venezuela, the parties, in their *Compromis* (submission agreement) executed on 13 February 1909, mandated the tribunal to 'determine, decide, and make its awards in accordance with justice and equity'.¹⁰ In the *Norwegian Shipowners claims*, the special Agreement between the State Parties requested the arbitral tribunal to decide claims 'in accordance with the principles of law and equity'.¹¹ Also, in the *Cayuga Indians* case,¹² the arbitral tribunal put into consideration 'general and universally recognized principles of justice and fair dealing' and referred to the special arbitration agreement between the State Parties that mandated it to decide 'in accordance with treaty rights, and with the principles of international law and of equity. . .'.¹³

The *Cayuga Indians* tribunal went on to construe article 73 of the Convention for the Pacific Settlement of International Disputes 1907 (Hague Convention) and article 37 of the Arbitration Convention with the United States and Norway 1908 in relation to the phrase, 'in accordance with the principles of law and equity', used by the *Norwegian Shipowners claims* tribunal, and stated that the word *droit*, as used in those articles, has a broader meaning than that of 'law' in English, in its restricted sense of an aggregate of rules of law.¹⁴ It concluded that the effect of the phrase was that the arbitrator should 'decide in accordance with equity, *ex aequo et bono*, when positive rules of law are lacking'. Finally, the tribunal then said of the words 'law and equity' used in article 1 of the Special Agreement between the United States and Norway thus:

¹ QUOTA v Iran Air Award (No. 194-111-1 dated 10 October 1985), IUSCT Case No. 111, para 35 and Award (No. 37-172-1 dated 15 April 1983), IUSCT Case No. 172, para 27.

² Dissenting Final Award (n 2) para 5.

³ See CPR International Committee on Arbitration, *Protocol on Determination of Damages in Arbitration* (International Institute for Conflict Prevention & Resolution 2010) 2 <https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-determination-of-damages-in-arbitration/_res/id=Attachments/index=0/CPR-Protocol-on-Determination-of-Damages-in-Arbitration-fnl.pdf> accessed 16th November 2019.

⁴ See Ngozi E. Nwachukwu, Abdulkadir I. Ali, Ismaila S. Abdullahi, Mohammed A. Shettima, Solomon S. Zirra, Bola S. Falade, and Michael J. Alenyi, 'Exchange Rate and External Reserves in Nigeria: A Threshold Cointegration Analysis' (2016) 7[1(b)] CBN J of Applied Statistics 233, 234, where the authors give statistics that the respondent country's external reserves stood at US\$26.9billion as at 2016, just about the time the award was made; see also Uzoma Chidoka Nnamaka, Odungweru Kingsley and Chukwuma-Ogbonna Joyce Adaku, 'Foreign Trade and External Reserves in Nigeria' (2021) 9(2) Intl J of Developing and Emerging Economies 1, 2.

⁵ See Dissenting Final Award (n 2) para 5.

⁶ ICJ Statute, art 38.2; see Sohn (n 33) 277-278.

⁷ ICJ Statute, art 38.1; Michael Akehurst, 'Equity and General Principles of Law' (1976) 25(4) ICLQ 801; Sohn (n 33) 277-278.

⁸ Anastasios Gourgourinis, 'Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)' (2009) 103 American Society of Intl L 79, 79-80.

⁹ *ibid* 80.

¹⁰ *The Orinoco Steamship Company Case*, United Nations, *Reports of International Arbitral Awards*, vol XI, 227, 232.

¹¹ Special Agreement between the United States and Norway dated 30 June 1921, art 1, reproduced in *Norwegian Shipowners' claims* (n 32) 310.

¹² *Cayuga Indians (Great Britain) v. United States* (22 January 1926), United Nations, *Reports of International Arbitral Awards*, vol VI, 173-190.

¹³ *ibid* 174.

¹⁴ *ibid* 183.

The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State.¹

The *Cayuga Indians* tribunal also referred to three general claims arbitration treaties between the United Kingdom and the United States, which contain provisions for decisions to be made in accordance with ‘equity’ or ‘justice’, namely: the Claims Convention of 1853,² using the words ‘according to justice and equity’; the Claims Convention of 1896,³ article II, calling for ‘a just decision’; and the Agreement for Pecuniary Claims Arbitration of 1910,⁴ prescribing decision ‘in accordance with treaty rights, and with the principles of international law and of equity.’⁵

The above enumerated instances go to show that there has always been a convergence between law and equity in the determination of international arbitration matters. However, where there is no specific agreement by the parties empowering the arbitral tribunal to decide the matter before it on the principles of equity, the tribunal is still bound to apply equitable considerations where the governing law incorporates equitable principles. In fact, in the legal philosophy parlance, the ideal or just law is found where both positive law and morality overlap.⁶

4. Application of Equity and Justice-rooted Principles in ISA

As a result of the importance of ISA to the development of world economy, the growing concept of third-party funding that has made it possible for third parties with purely commercial motivations to intervene in the process makes it a dynamic phenomenon that can neither be shielded away from equitable considerations⁷ nor overlooked in the current debate on reform of investor-State dispute settlement (ISDS).⁸ Specifically speaking, the concept of equity, justice and fairness is not new to ISA.⁹

The concept of justice is profoundly jurisprudential. Applying the law has not, in all cases, resulted in achieving justice.¹⁰ The gap between law and justice may become unreasonably wide, if law is not tempered. It was the notion of tempering the law where its application will lead to miscarriage of justice that brought about the introduction of equitable principles, such as the principle against unjust enrichment, which have now been embraced by all known legal systems of the world and formed part of the general principles of law,¹¹ by virtue of article 38.1(c) of the Statute of International Court of Justice, 18 April 1946¹² (ICJ Statute).

The concept of justice is intertwined with the concept of equity. Equity as a legal concept has been described as ‘a direct emanation of the idea of justice’ and as ‘a general principle directly applicable as law.’¹³ Although there is an ongoing controversy as to whether equity has any role to play in international law and international arbitrations, the controversy is a recent development as equity was repeatedly used in international law in the 19th century. As shown above, many international arbitration agreements, at that time, provided for decisions to be made in accordance with justice and equity.¹⁴

At the municipal level, the American Federal Arbitration Act 1925 (FAA) acknowledges the role of equity in arbitration: it provides that a contract evidencing a transaction involving commerce is enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁵ Similarly, in the English legal system, equity takes precedence over law.¹⁶ What is true of the English legal system is generally the same in all common law jurisdictions,¹⁷ including Nigeria.

The *Spadafora Case*¹⁸ provides evidence that equity was, in time past, taken into account in considering the

¹ Special Agreement between the United States and Norway (n 59).

² British-American Diplomacy Convention of 1853 between Great Britain and the United States, art 1.

³ 1 Malloy-Treaties 766.

⁴ Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding between the United States and Great Britain, art VII.

⁵ *Cayuga Indians* (n 60) 180.

⁶ See *State (Healy) v Donoghue* [1976] IR 325, 348, where the Irish Supreme Court held that ‘[n]o court under the Constitution has jurisdiction to act contrary to justice.’

⁷ See Ruth Lapidot, ‘Equity in International Law’ (1987) 81 American Society of Intl L 138, where the author stresses the fact that “to maintain a common approach in a world increasingly marked by gaps and instability requires that equity plays a role throughout the process.”

⁸ See CCSI, IIED and IISD, ‘Third Party Rights in Investor-State Dispute Settlement: Options for Reform’ (Submission to UNCITRAL Working Group III on ISDS Reform, 15 July 2019) 2 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_reformoptions_0.pdf> accessed 15 October 2021.

⁹ See the Dissenting Final Award (n 2) para 44, where the dissenting arbitrator made allusion to justice and fairness when he said, ‘In summary, I am of the considered view that justice and fairness in this reference dictates that I hold as follows...’

¹⁰ See *Gourgourinis* (n 56) 82.

¹¹ *ibid* 80.

¹² 33 UNTS 993.

¹³ *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 1982 ICJ Rep. 18, ¶ 71 (Feb. 24).

¹⁴ See Sohn (n 33) 277.

¹⁵ 9 U.S.C. § 2 (2006).

¹⁶ UK Senior Courts Act 1981, s 49 (1).

¹⁷ Michael Akehurst, ‘Equity and General Principles of Law’ (1976) 25(4) ICLQ 818-819.

¹⁸ (1904) 11 R.I.A.A. 9-10, cited in Akehurst (n 79).

compensation which would, normally, have been applicable vis-à-vis the poverty of the defendant state. On this score, this work is premised on the fact that, as a general rule, arbitral tribunals should consider equity and justice-rooted principles in arriving at any damages award and consciously refrain from overcompensating the claimant.¹ To achieve this, tribunals should always take into account the actual amount invested as the basic consideration for any award. In practical terms, an investment of \$1m should not yield damages of \$50million to the claimant, as seen in *Aguas del Turani*,² which has been regarded as one of the worst examples of ISA.³ And, an alleged (unproved) investment of \$40million should not yield damages of \$6.6billion, beside pre-award interest, as seen in *P&ID v Nigeria*.

Akehurst discusses the case of *Walt Wilhelm and others v. Bundeskartellamt*,⁴ where the Court of Justice of the European Communities, although arriving at the conclusion that there was nothing in the relevant European Economic Community (EEC) regulations which prevented the Commission from imposing a fine on an undertaking which had already been fined by national authorities, nevertheless, held that equity required the Commission to take into account the size of the national fine when calculating the amount of its own fine.⁵ Also, alluding to justice, the Court held that, 'a general requirement of natural justice demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.'⁶

The GSPA in *P&ID v Nigeria* had a tenure of 20 years from the date of first supply of wet gas by the respondent. The tenure of 20 years never commenced as nothing was in place and no wet gas had been supplied.⁷ The tribunal acknowledged a similar argument by the respondent's counsel in this regard but determined that the respondent's obligation to ensure that its 'agencies and third party' supported the project was not conditional on the claimant's construction of the facilities to receive the wet gas that the respondent was to supply. However, the tribunal failed to balance its position with the fact that, equally, the obligation of the claimant to construct those facilities was not, from the parties' agreement, made conditional on the respondent fulfilling its said obligation. Both obligations are mutually exclusive of each other. In any event, the claimant's remedy to special damages for actual expenses incurred towards the project, including building the facilities, was unfettered. More importantly, the claimant adduced evidence that the facilities would have cost it \$514.1million; it spent nothing in that direction, but made a claim of \$8.6billion as general damages for repudiation of contract.⁸

It would appear that the tenure of 20 years actually anticipated that the claimant would have expended money to the point that processing had been kick-started.⁹ Similarly, the dissenting arbitrator reasoned that there was no evidence before the tribunal of any attempt by the claimant to mitigate its loss and that the burden of mitigation, which was on the claimant, had to be taken into account throughout the 20-year period of the contract.¹⁰ He further reasoned that the implication of making award for anticipated profit for the 20-year lifespan of the contract was to make the respondent subrogated to any fees or other remuneration the claimant might subsequently earn,¹¹ and there was no order of subrogation in the majority award.

The dissenting arbitrator referred to the fact that the claimant conceded to its duty to mitigate its loss when the first claimant's counsel stated that 'it is accepted that P&ID was under a duty to mitigate its loss whether as a matter of Nigerian or English law.'¹² In addition, it is in evidence that the claimant had every reason as early as June, 2010 (as it alleged through its first witness) not to have allowed 'other opportunities' or 'various substantial opportunities' slip because of the Calabar project.¹³ The claimant's first witness stated thus:

I understand, from a copy of my letter endorsed in manuscript on 14 May 2010 by ... the then Group Managing Director of NNPC, that NNPC so instructed NAPIMS straight away... This was provided to us by the Group Managing Director himself, in order to assure us that NNPC were taking steps to implement the GSPA.

I was therefore surprised when an article in the edition of the "*This Day*" newspaper of 6 June 2010 ... stated that the Government were set to sign another gas supply agreement with Addax Petroleum in respect of the Calabar/Adanga pipeline gas. I wrote to the Minister on 21 July 2010 and copied in the

¹ See Dissenting Final Award (n 2) para 5, where the dissenting arbitrator stated that the purpose of damages is not to give the innocent party a windfall.

² *Aguas del Turani* (n 19).

³ 'Investor-State Dispute Settlement' <<https://www.elstel.org/ISDS.html.en>> accessed 28 May 2021.

⁴ Case 14-68 (13 February 1969).

⁵ Akehurst (n 79) 804.

⁶ *Wilhelm and others v Bundeskartellamt* (n 156) reported in EUR-Lex Case Summary, para 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61968CJ0014>> accessed 20 July 2021

⁷ See Part Final Award on Liability (n 8) para 59, where the tribunal referred to a similar argument by the respondent's counsel and dismissed it.

⁸ See Dissenting Final Award (n 2) para 18.

⁹ GSPA, art 5.

¹⁰ Dissenting Final Award (n 2) para 4.

¹¹ *ibid*.

¹² Claimant's Written Submission in Reply, para 28; see also *ibid* 2.

¹³ First Witness Statement (n 11) paras 135 and 136.

Special Adviser to the President on Petroleum Matters ... highlighting the media reports and seeking specific assurance in view of the confusion these reports were creating with our shareholders and suppliers.

5. States' Reaction to Excessive Damages Awards and the ISDS Reform Agenda

As a result of the unrestrained manner in which international arbitral tribunals award huge damages against host states, some countries, like Bolivia, Ecuador, Venezuela and South Africa, are already jettisoning the use of arbitration in investment disputes¹ and are going back to adopt local remedies² based on Calvo doctrine³ which, in the first place, have proved to be unattractive to foreign investors and unsuitable for the settlement of international disputes.⁴ For example, the South African Protection of Investment Act 2015, which creates the legal framework for the resolution of investment disputes in South Africa,⁵ removes the resolution of such disputes from international arbitral tribunals in favour of two domestic remedies. It provides that: 1) an aggrieved investor may submit a request to the Department of Trade and Industry for a mediator to be appointed for the resolution of an investment dispute with the government; and 2) alternatively, the investor may approach any competent court, independent tribunal or statutory body, within South Africa, for the resolution of such a dispute.⁶

Similarly, India appears to be championing the movement of excluding arbitration from BITs⁷ and, to date, it has not signed the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1966.⁸ Several other states are now seeking alternatives to ISA.⁹ This is precipitated by states' dissatisfaction with, among other things, excessive damages awards against them in investment disputes.¹⁰ Such excessive awards are exemplified by some arbitration matters, such as, *Aguas del Turani*,¹¹ *Chevron v Ecuador (I)*,¹² *Railroad Development Corporation v Republic of Guatemala*¹³ (*RDC v Guatemala*), *Renco v Peru (I)*,¹⁴ and *P&ID v Nigeria*.¹⁵ These cases seem to give credence to the argument that bilateral investment treaties (BITs) enable investors commit corporate misdeeds in host states that they do not commit in their own countries, and that they do so without repercussions.¹⁶ Rather than being held accountable for their misdeeds, these investors are sometimes rewarded with high damages against their host states when these states decide to regulate their actions.¹⁷ This state of affairs is the reason some scholars believe that ISA is skewed towards investors,¹⁸ citing violations of indigenous peoples' human rights in host communities where oil exploitation and

¹ Anna Joubin-Bret, 'UNCITRAL ISDS Reform: Mandate, Process and Reform Solutions' (27 April 2021) <<https://afaa.ngo/page-18097/10368672>> accessed 6 June 2021; see also Doug Jones, 'Investor-State Arbitration in Times of Crisis' (2013) 25 Nat'l L Sch of India Rev 51, 52.

² See, for example, South African Protection of Investment Act 2015, s 13.

³ See The Editors of Encyclopaedia Britannica, 'Calvo Doctrine', *Encyclopedia Britannica* (27 August 2007) <<https://www.britannica.com/topic/Calvo-Doctrine>> accessed 30 July 2021.

⁴ Leon E. Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46(1) J of World Trade 83, 91.

⁵ Protection of Investment Act 2015 (South Africa), s 13

⁶ Olisa Agbakoba Legal (OAL), 'A National Policy on Arbitration in Nigeria' [February 2020] <<https://oal.law/a-national-policy-on-arbitration-in-nigeria/>> accessed 17 March 2020.

⁷ Malik, 'BIT of Legal Bother' (*Business Today*, May 2012) <www.businesstoday.in/magazine/columns/india-planning-to-exclude-arbitration-clauses-from-bits/story/24684.html> accessed 17 March 2020; Goyal A, 'Fixing the Broken Legs of Investor-State Arbitration' (2016) 1 HNLU Student Bar J 17, 18.

⁸ 575 U.N.T.S. 159.

⁹ Luke Nottage, 'Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia' (2013) 37(2) *Asian Studies Rev* 253, 264; Mmiselo Freedom Qumba, 'South Africa's Move away from International Investor-state Dispute: A Breakthrough or bad Omen for Investment in the Developing World?' (2019) 52(1) *De Jure LJ* <<http://dx.doi.org/10.17159/2225-7160/2019/v52a19>> accessed 7 December 2020; see also Rohit Bhat, 'Will India do away with Investor State Arbitration?' (*Kluwer Arbitration Blog*, 23 August 2017)

<<http://arbitrationblog.kluwerarbitration.com/2017/08/23/will-india-away-investor-state-arbitration/>> accessed 7 December 2020; see also Rohit Bhat, 'Will India do away with Investor State Arbitration?' (*Kluwer Arbitration Blog*, 23 August 2017)

<<http://arbitrationblog.kluwerarbitration.com/2017/08/23/will-india-away-investor-state-arbitration/>> accessed 7 December 2020.

¹⁰ Christoph Schreuer, 'The Future of Investment Arbitration' <https://www.univie.ac.at/intlaw/pdf/98_futureinvestmentarbitr.pdf> 10 accessed 20 November 2019.

¹¹ *Aguas del Turani* (n 19).

¹² *Chevron v Ecuador* (n 20); see Global Justice Now, 'Investigating the Impact of Corporate Courts on the Ground - The Truth is out there' <https://waronwant.org/sites/default/files/ISDSFiles_Chevron_April2019.pdf> accessed 28 May 2021.

¹³ *RDC v Guatemala*, ICSID Case No. ARB/07/23.

¹⁴ *Renco v Peru (I)* (n 21).

¹⁵ *P&ID v Nigeria* (n 1).

¹⁶ See Nsongurua Udombana, 'Shifting Institutional Paradigms to Advance Socio-Economic Rights in Africa' (*Research Gate*, 2007) 242. DO - 10.13140/RG.2.2.12829.15846.

¹⁷ See Leer Mas, 'Prominent Organizations Publicly Condemn Chevron's Actions in Ecuador Case' (*Amazon Watch*, 18 December 2013) <www.business-humanrights.org/ultimas-noticias/prominent-organizations-publicly-condemn-chevron-actions-in-ecuador-case/> accessed 2 June 2021.

¹⁸ Karen L. Remmer, 'Investment Treaty Arbitration in Latin America' (2019) 54(4) *Latin American Research Rev* 795, 796; see also Anna Joubin-Bret, 'UNCITRAL ISDS Reform: Mandate, Process and Reform Solutions' (27 April 2021) <<https://afaa.ngo/page-18097/10368672>> accessed 6 June 2021.

other mining activities take place, without regard for how these activities affect the indigenes.¹

The link between excessive damages awards and the agitations for ISDS reform is easily deciphered from states' reactions after a verdict of a substantial damages award has been made against them by an ISDS tribunal. For example, on 16 May 2017, in reaction to the \$2.3 billion damages and awarded interest against it in favour of a US oil company, Occidental,² Ecuador became the fifth country to terminate all its BITs.³ That award, which shocked the world, represented 59 percent of the country's 2012 annual budget for education and 135 percent of the country's annual healthcare budget.⁴ Olivet reports that Ecuador's termination of the oil concession with Occidental, on which basis Occidental sued it, was based on the agreement of the parties, which stipulated that sale of Occidental's production rights without government pre-approval would terminate the contract.⁵ Without securing approval, in breach of the contract and in violation of Ecuadorian law,⁶ Occidental transferred 40 percent of its production rights to another investor. In spite of the foregoing, the tribunal decided in favour of Occidental, holding that Ecuador's cancellation of the contract was a disproportionate response,⁷ regrettably, rewarding the party that was in breach of contract and in violation of the law.

As a result of the foregoing, ISA has come to be regarded as a controversial method of resolving investment disputes and has become one of international law's most debated subjects,⁸ resulting in the clamour for and actions towards reforming ISDS in general and ISA in particular. ISDS reform agenda, as it stands, may be categorised into the following subsets; namely: (a) reform to address the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals;⁹ (b) concerns pertaining to arbitrators and decision-makers;¹⁰ (c) concerns pertaining to cost and duration of ISDS cases;¹¹ (d) the need for human right norms to be given adequate consideration in ISDS cases;¹² and (e) the perceived need to establish an MIC.¹³ It is important to note that each of these subsets has direct or remote connection with the issue of award of excessive damages in ISA.

At the regional level, there are moves to jettison ISA. The African Union (AU), on its part, adopted the Pan-African Investment Code (PAIC) with the aim of emphasising its member states' interest in ensuring sustainable development,¹⁴ which the present legalistic approach to ISA seems unable to assure to its members. Similarly, the Latin American countries view the decisions emanating from ISA tribunals as 'unfavourable' and have concerted their efforts 'to find an alternative regional framework to deal with state-foreign investors disputes'.¹⁵ In addition to the foregoing, as part of its ISDS reform efforts, UNCITRAL, based on the proposal of the European Union (EU), may succeed in judicialising ISDS by setting up MIC,¹⁶ which may lead to the eventual 'death' of ISA.

6. Conclusion

It would appear that the panacea to the clamour against ISA should transcend the tangential and divergent reforms that have been proposed so far to the broader consideration of re-enacting the normative role of equity and justice-rooted principles in international arbitration. This normative role may, in the immediate, be difficult

¹ See, for example, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (African Commission Communication 156/96) 9-10.

² *Occidental v Ecuador* (n 22).

³ Cecilia Olivet, 'Why Did Ecuador Terminate all its Bilateral Investment Treaties?' (25 May 2017) <<https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties>> accessed 13 August 2021.

⁴ *ibid.*

⁵ *ibid.*

⁶ Tai-Heng Cheng and Lucas Bento, 'ICSID's Largest Award in History: Overview of Occidental Petroleum Corporation v the Republic of Ecuador' (*Kluwer Arbitration Blog*, 19 December 2012) <<http://arbitrationblog.kluwerarbitration.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/>> accessed 24 August 2021.

⁷ Olivet (n 114).

⁸ Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28(3) EJIL321.

⁹ Doug Jones, 'Investor-State Arbitration in Times of Crisis' (2013) 25 Nat'l L Sch of India Rev 51, 52.

¹⁰ See CCSI, IIED and IISD, 'Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Issues' (Submission to UNCITRAL Working Group III on ISDS Reform, 15 July 2019) para 1 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_crosscuttingissues__0.pdf> accessed on 14 October 2021.

¹¹ See *ibid.*, Table 1.

¹² 'Mandates of the Working Group on the Issue of Human rights and Transnational Corporations and other Businesses' (7 March 2019) 4; see also *Chevron v Ecuador (I)* (n 20), an arbitration matter that brings to the fore the human right abuses associated with foreign investments and the injustice ISDS tribunals may dispense if human rights norms are sacrificed for investor rights.

¹³ See Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (European Yearbook of International Economic Law, Springer Open, Berlin 2020) 117.

¹⁴ Ignacio Tortorola and Bethel Kassa, 'Investor-State Disputes in Africa' (7 August 2019) African L and Business <<https://iclg.com/alb/9936-investor-state-disputes-in-africa>> accessed 2 January 2021.

¹⁵ Nicolas Boeglin, 'ICSID and Latin America: Criticisms, Withdrawals and Regional Alternatives' (June 2013) <<https://www.bilaterals.org/?icsid-and-latin-america-criticisms&lang=fr>> accessed 12 August 2021.

¹⁶ Garrigues, 'The Multilateral Investment Court Project: The "Judicialization" of Arbitration?' (*Newsletter News*, 24 July 2019) <https://www.garrigues.com/en_GB/new/multilateral-investment-court-project-judicialization-arbitration> accessed 2 January 2021.

to achieve through international legislative actions; but, it is immediately realisable by international tribunals' acceptance of their age-long norm-making role of dispensing 'measured justice',¹ as discussed in this paper. Also, states, being the singular recipient of the brunt of excessive damages awards must discard the 21st century norm entrepreneurs, who postulate that equity has no role in arbitration, and coalesce their efforts at forging a new investment arbitration order. This they should do (not by discarding ISA and its immense benefits) by making equity and fair compensation the bedrock of all their investment legislations and agreements. They should begin to: (i) legislatively recognise the normativity of equity in arbitration and qualify the rule against *aequo et bono* in order to make it clear that the rule does not defeat the application of equity and justice-rooted principles when such is based on general principles of law; (ii) develop an arbitration policy that recognises only fair compensation for loss; and (iii) adopt the practice of always clearly delimiting quantum of damages in investment agreements and legislations, so that a government will be well aware of the most it may have to pay in case of a necessary repudiation of contract or expropriation of investment.² In respect of the last point, a state may decide to place a ceiling on general damages that can be awarded in international investment arbitration or state in all its investment agreements that general damages shall not exceed, for instance, 100 percent of invested or expended amount, which is proved.³

Arbitrators should always be mindful of the counsel contained in the International Institute for Conflict Prevention & Resolution (CPR) Protocol on Determination of Damages in Arbitration, namely, that '[t]he determination of damages is important and should be done with considerable care by arbitrators. Therefore, arbitrators should, in their award of damages, apply a consistently reasoned approach and procedures that are fair, efficient and not overly costly'.⁴

Finally, the arbitral award in the case under review cannot be said, with all due respect, to have been based on reasoned approach and procedures that are fair, efficient and not overtly costly. A reasoned approach, in our opinion, is coming to the conclusion that, though the claimant led evidence to demonstrate what it might have earned in 20 years had the contract not be terminated, in the light of the fact that it expended only \$40million so far on the project (as alleged by it), it is entitled to be compensated for its loss based on its investment; and not to give it a fortune at the expense of 200 million people. Like the dissenting arbitrator pointed out, there is no question that the claimant was entitled to damages, but not to a windfall.⁵ In taking that position, the minority arbitrator acknowledged that there was a breach of contract by the respondent, but that that does not entitle the claimant to receive beyond a fair compensation, which he determined to be US\$250million.

¹ Lapidoth (n 69) 139.

² See Stephen Waddams, 'The Price of Excessive Damage Awards' (2005) 27 Sydney L Rev 543-545, where: the author states that it is in the interest of both contracting parties to be able to predict and to limit the probable costs of breach or expropriation; the author refers to the case of *Titrczinski v Dupont Heating & Air Conditioning Ltd* (2004) 246 DER (4th) 95, where the Ontario Court of Appeal set aside an award of \$35000 general damages partly because of the disproportion between the contract price, which was \$11000, and the general damages; and, finally, the author refers to Holmes' observation that there was never a legal duty to perform a contract, but only to perform it or to be prepared to pay damages for its breach.

³ Note that in the *P&ID v Nigeria* award, the general damages of \$6.6billion awarded against the respondent state is 16,500 per cent of the expenses of about \$40million allegedly incurred by the claimant; also note that that amount is more than the anticipated profits of \$5 to \$6 billion estimated by the claimant's principal witness (see First Witness Statement (n 11) para 3).

⁴ CPR International Committee on Arbitration (n 51) 1.

⁵ Dissenting Final Award (n 2) para 5.