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Damages Awards in International Investment Arbitration and the Question of Fair Compensation

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Abstract
When an arbitral agreement freely entered into between a host nation and a financially stronger multilateral foreign organization breaks down, arbitration is the acceptable mode of settlement of the disagreement. This is in line with the Nigerian Arbitration and Conciliation Act, which makes applicable the convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) on awards made in Nigeria arising out of international commercial arbitration. The objective of this paper is to seek a balance between protecting foreign investments and shielding the economies of host States from destruction through award of excessive damages. The doctrinal approach of qualitative research methodology was adopted, which enabled the interrogation of previous literature that deals with the issue of fair compensation and the role equity should play in international investment arbitration. This library-based research focused on analysing primary data such as cases, statutes and conventions and secondary data in text form. The research methodology adopted helped describe and contributed to the understanding of the concept of damages awards in international investment arbitration and the place of equity in awarding damages. The paper concludes that applying equitable principles will help arbitral tribunals arrive at more appropriate equitable damages based on fair compensation. The implication of the study is that international investment arbitration tribunals may intentionally take into account the actual amount of money invested or expended towards a project in quantifying damages thereby endeavouring not to cross the line of fair compensation.
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1. Introduction

The damages award in *Process and Industrial Developments Limited v Ministry of Petroleum Resources of the Federal Republic of Nigeria* (*P&ID v Nigeria*)[1] has, once again, provoked the debate on the need for international investment tribunals to award only fair compensation as damages in favour of a winning party. There appears to be too much emphasis on legal rights in international investment arbitration, which hinders investor-State dispute settlement (ISDS) tribunals from doing substantial justice. While it is within the jurisdiction of an arbitral tribunal to compensate the investor for damages suffered, such compensations should follow loss – not necessarily claim.[2] Sometimes, the strict application of legal principles may produce a harsh effect on a party to a dispute. This possibility, in part, necessitated the evolution of equity, which aims at mitigating such harshness.[3] Equity, which has since become part of municipal and international law, seems often abandoned by ISDS tribunals in determining quantum of damages. The imbalance created by excessive damages awards has sparked a wave of reform proposals across the globe. Some of these proposals include judicialising the ISDS system, resorting to local remedies, and returning to diplomatic protection of foreign investors, which are problematic or merely tangential.

A noticeable gap in the existing literature is that there is hardly any study on the need to apply equity and justice-based principles to strike a balance between damages awards in international arbitration and the economic survival of host states. Although some treaties and national laws do not permit an arbitral tribunal to

[1] *P& ID v Nigeria* (Case 1:18-cv-00594), an ad hoc arbitration, is one of the most recent of several cases that have made countries begin to rethink the usefulness of international investment arbitration. Other examples are *Aguas del Turani,* ICSID Case No. RB/02/3, *Chevron v Ecuador (I),* PCA Case No 2007-02/AA277, and *The Renco Group Inc. v The Republic of Peru* (ICSID Case No. UNCT/13/1).
[2] See UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (New York and Geneva: United Nations, 2005) 10 <https://unctad.org/system/files/official-document/iteiit20054_en.pdf> accessed 2 February 2022; see also Reena R. Bajowala and Martha Kohlstrand, 'Plaintiff Sent Back to District Court for $660 Million (or More) Reduction in Damages Award in Trade Secrets Case' (2020) 32(10) *Intellectual Property & Technology Law Journal* 18.
[3] Boluwatife Ehimony, 'Maxims of Equity: Everything You Need to Know' <https://djetlawyer.com/maxims-of-equity-everything-you-need-to-know/> accessed 20 August 2021.

decide matters *ex aequo et bono*,[1] the rule against *ex aequo et bono*[2] does not defeat the principle of fair compensation. Neither does it defeat the application of equity and justice-based principles by an arbitral tribunal when based on the general principles of law.[3] The argument, therefore, is that there is still, and must always be, a normative role for equitable principles in international investment law.[4] International courts and arbitral tribunals have confirmed the normativity of equity in international law.[5] Some relevant cases are *The Orinoco Steamship Company Case* (1910),[6] *Norwegian Shipowners Claims* (*Norway v United States*),[7] and *Cayuga Indians* case 1926.[8]

After this introduction, the paper begins, in section 2.0, with an attempt to locate theories for the support of applying equity in international investment arbitration. While section 3.0 discusses the convergence between law and equity, section 4.0 examines the ISDS reform agenda and the issue of fair compensation. Section 5.0 concludes the paper.

2. Locating Theories for Fair Compensation in International Investment Arbitration

Based on the different opinions and decisions of municipal courts and developments of municipal laws on arbitration, four main theories have evolved concerning the nature of arbitration.[9] These theories, contractual theory,[10] jurisdictional theory,[11] hybrid (or mixed) theory,[12] and autonomous theory,[13] essentially focus on international commercial arbitration. However, these theories may relate to international investment arbitration for the following reasons. Firstly, the issue of delocalisation relates to international investment arbitration as it does international commercial arbitration. Secondly, both types of arbitration are based essentially on contract – for, even when international investment arbitration is based purely on municipal investment law, such investment law acts as a standing offer to prospective foreign investors. Thirdly, parties in international investment arbitration are at liberty to adopt international commercial arbitration laws and rules for the conduct of their investment arbitration. On the last point, several international investment arbitration proceedings are based on the United Nations Commission on International Trade Law (UNCITRAL) model law and rules, which were originally developed for international commercial arbitration.[14] Similarly, some international investment arbitrations, such as *P&ID v Nigeria*, have been based on municipal laws and rules enacted originally for commercial arbitration.

The four theories mentioned above attempt to address the relationship arbitration should have with municipal courts.[15] They evolved as a result of the description of arbitration from the perspective of public authorities,[16] especially municipal courts. However, the thesis of this work transcends the description of arbitration as a concept or its relationship with municipal courts: its focus is to seek ways by which arbitral tribunals would arrive at fair compensation for the winning party. Thus, the four theories above seem inadequate

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[1] ICJ Statute, 33 UNTS 993, art 38.2; see Louis B. Sohn, 'Equity in International Law' (1988) 82 *American Society of International Law* 277-278.

[2] This rule stipulates that an arbitral tribunal shall not depart from pure legal considerations to decide according to what is just and proper unless the parties so agree.

[3] ICJ Statute, art 38.1; Michael Akehurst, 'Equity and General Principles of Law' (1976) 25(4) *ICLQ* 801; Sohn (n 4) 277.

[4] Anastasios Gourgourinis, 'Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)' (2009) 103 *American Society of International Law* 79-80.

[5] Gourgourinis (n 7) 80.

[6] *The Orinoco Steamship Company Case* 1910, United Nations, *Reports of International Arbitral Awards*, vol XI, 227

[7] *Norwegian Shipowners' claims* Award dated 13 October 1922 (United Nations, *Reports of International Arbitral Awards*, vol I, 307-346).

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

[9] Alexander J. Belohlavek, 'Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdictional Theory' (17 October 2013).47 <https://ssrn.com/abstract=2344701> accessed 21 July 2021.

[10] Contractual theory presumes that the jurisdiction of arbitrators to sit and resolve disputes rest majorly on the contractual agreement between the parties – Belohlavek (n 12) 47-77.

[11] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) *Contemporary Asia Arbitration J* 255-56 <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.555.2751&rep=rep1&type=pdf> accessed 10 September 2022.

[12] The hybrid or mixed theory is a combination of mediation and arbitration in procedural arbitration, William H. Ross and Donald E. Conlon,' Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration', *The Academy of Management Review,* Vol. 25, No. 2 (Apr., 2000), pp. 416-427, https://www.jstor.org/stable/259022 (accessed 10 September 2022).

[13] Yu (n 14) 257. Autonomous theory of arbitration is arbitration that is free from State interference as stated by Julian Lew in 2005, Sneha Vijayan (resolutio)/March 11, 2022, 'Autonomous Arbitration in the Era of Metaverse' <http://arbitrationblog.kluwerarbitration.com/2022/03/11/autonomous-arbitration-in-the-era-of-the-metaverse/> accessed 10 September 2022.

[14] It should be understood that while the Model laws are directed at States, on the other hand, the Arbitration Rules are directed at the actual or potential parties to a dispute. The UNCITRAL was established by the UN General Assembly in 1966 via Resolution 2205(XXI) of 17 December 1966- <https://uncitral.un.org/en/about#:~:text=The%20United%20Nations%20Commission%20on%20International%20Trade%20Law%20(UNCITRAL)%20was,)%20of%2017%20December%201966)> accessed 11 September 2022.

[15] Belohlavek (n 12).

[16] Yu (n 14) 257.

for the thrust of this paper. Therefore, two other theories, deciphered from previous literature, are employed as the basis of the analysis in this article. These other theories are equity theory and justice theory.

2.1 Equity Theory

Equity theory is a theory about fairness.[1] APA Dictionary of Psychology describes it as a theory of justice regarding what individuals are likely to view as fair.[2] It is a proposition that outcomes are equitable only when people receive benefits that are proportional to their inputs. It, therefore, seeks to strike a balance between two opposing parties in such a way as to arrive at a fair decision; it denotes the spirit and the habit of fairness, justness, and right dealing.[3] It provides the preliminary theme for any theoretical debate on the issue of excessive damages awards and investor-State dispute settlement (ISDS) reform. By the Middle Age, equity had become a term in common use to justify a new legislation, a guide to a general principle of interpretation, or, as in England, at a later time, to signify a special jurisdiction.[4]

The modern history of equity is traceable to the 13th century when the law courts in England had reduced the types of causes they would entertain, resulting in plaintiffs with meritorious claims not within the approved cause list of the courts being denied relief.[5] Those shut out of judicial remedies, as a result of the narrow scope of the existing writ of the English courts, began to petition the King, as holder of residual judicial powers, to hear their claims and, with time, the King delegated that responsibility to the Chancellor.[6] The Statute of Uses 1535 gave the Court of Chancery in England the jurisdiction to enforce *uses*, a role that the rigid framework of land law could not accommodate. This 1535 Statute began the distinguishing between legal and equitable interests in the English legal system; a similar bifurcation had been practiced earlier under Roman law. Although, it seems doubtful if there was a definite body of law in the Roman system known as equity.[7]

Equity, therefore, is a departure from undue legality and technicalities, to serve the end of justice, although the concepts of equity and justice are not always synonymous.[8] The concept of justice is wider than that of equity and the latter is subsumed in the former. Whereas justice is open-ended, equity follows the doctrine of precedents, and litigants asserting equitable rights or remedies must show that their claims are founded in already articulated equitable principles.[9] Thus, though the principles of justice and good conscience are the foundation of equity, equity jurisdiction is already well defined and not subject to wide discretion[10] as may be implied in the case of justice.

Equity was used repeatedly in international law during the 19th century but at the beginning of the 20th century it began to be used less often,[11] and norm entrepreneurs began to deemphasise its relevance in international law and international arbitration. As Sohn points out, the Permanent Court of International Justice and its successor, the International Court of Justice, applied equitable principles in quite a number of older cases, although often without express reference to the term 'equity'; the court would, for instance, declare that it was well known that a particular principle existed as a general principle of international law accepted by most nations and then would apply it, without expressly referring to equity.[12]

Based on the general principles of law, equity cuts across its three theoretical types; namely: (i) equity *intra legem*; (ii) equity *praeter legem*; and (iii) equity *contra legem*.[13] Equity *intra legem* refers to equity within the law; that is, the power of the court or tribunal to choose from one of several possible interpretations of the law, to achieve the most equitable result. Equity *praeter legem* refers to the use of equity to fill a lacuna in the law; and equity *contra legem* is the use of equity in derogation from the law, where an exception to the law is needed, given the circumstances of the case, to achieve an equitable and just result.[14]

The dissenting opinion in the *P&ID v Nigeria* arbitration raises some issues that bother on equity and fair compensation. Firstly, the dissenting arbitrator considered the issue of mitigation, which influenced him to arrive at the reasonable damages of US$250million in favour of the claimant[15] as against the $6.6billion general

[1] 'Equity' (2018) <www.encyclopedia.com/social-sciences-and-law/law/law-divisions-and-codes/equity> accessed 12 September 2022.
[2] APA Dictionary of Psychology, 'Equity Theory' <https://dictionary.apa.org/equity-theory> accessed 12 September 2022
[3] See Douglas M. Johnston, 'The new Equity in the Law of the Sea' (1975/76) 31(1) *International Journal* 79.
[4] Hessel E. Yntema, 'Equity in the Civil Law and the Common Law' (1966/67) 15(1/2) *American Journal of Comparative Law* 73.
[5] Robert Pearce and John Stevens, *The Law of Trusts and Equitable Obligations* (2nd edn, Butterworths 1998) 4-7; T. Cockburn, W. Harris and M Shirley, *Equity and Trusts* (Butterworth 2005) 27.
[6] Yntema (n 23) 83-84.
[7] Lester Bernhardt Orfield, 'Equity as a Concept of International Law' (1929) 18(1) *Kentucky Law Journal* 43
[8] Jill E. Martin, *Modern Equity* (17th edn, Sweet & Maxwell 2005) 3..
[9] ibid 3
[10] ibid 4.
[11] Orfield (n 26) 33-35; Sohn (n 4) 277.
[12] Orfield (n 26) 33-35.
[13] For a detailed discussion of the three theoretical types of equity, see Sohn (n 4) 278ff. See also Akehurst (n 6) 801-803.
[14] Sohn (n 4) 278.
[15] *P&ID v Nigeria* Dissenting Final Award of Chief Bayo Ojo, SAN dated 31 January 2017 (*P&ID v Nigeria* Dissenting Final Award) paras 8, 9, 10, 12, 14, 16 and 46.

damages awarded by the majority.[1] The dissenting arbitrator referred to the claimant's concession of its duty to mitigate its loss when its witness 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.'[2] In addition, it is in evidence that the claimant had every reason, as early as June 2010, not to have allowed 'other opportunities' or 'various substantial opportunities' slip because of the Calabar project as it alleged through its first witness.[3] The surrounding circumstances leading to the eventual repudiation of the GSPA had put the claimant on notice not to overlook other opportunities.[4]

Secondly, the dissenting arbitrator 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.[5] This equitable consideration was not reflected by the majority arbitrators and they made no order for subrogation in their award.

The *PI&D v Nigeria* majority award is almost four times bigger than the largest ICSID award (2012 ICSID award of US$1.77billion[6] in *Occidental Petroleum Corporation v the Republic of Ecuador*)[7] in the history of the new era of mega cases in international arbitration related to the oil industry.[8] 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 arbitrators to arrive at their decision.[9]

The position of the dissenting arbitrator in *P&ID v Nigeria*, tailored towards equitable consideration, finds corroboration in the decision in *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* [10] (*SPP v Egypt*). In the latter 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 to generate the data necessary for a meaningful DCF calculation.[11] 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 little history on which to base projected revenues.[12]

A similar case to *SPP v Egypt* is the Iran-US Claims Tribunal (IUSCT) case of *William J. Levitt v Islamic Republic of Iran*[13] (*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).[14] 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.[15] Though the tribunal awarded damages to the claimant for the expenses it had incurred, it refused to grant recovery of lost profits[16] 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 the project had therefore reached only a 'very early stage.'[17]

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[18] (ISS v NICICO) and Queens Office Tower Associates v Iran National Airlines Corp.[19] (QUOTA v Iran Air). In the said two cases, the tribunals determined that the governing rule as to the liabilities and rights of the parties is that the loss must 'lie

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[1] *P&ID v Nigeria* Final Award dated 31 January 2017 (Case 1:18-cv-00594, ad hoc international arbitration) para 112.
[2] Claimant's Written Submission in Reply, in *P&ID v Nigeria*, para 28; see also *P&ID v Nigeria* Dissenting Final Award (n 34) 2.
[3] First Witness Statement of Michael Quinn dated 10 February 2014, paras 135-36.
[4] See First Witness Statement (n 37) para 141, where evidence shows that the claimant reduced its technical staff on the project to 'a minimum team of engineers and other specialists'.
[5] *P&ID v Nigeria* Dissenting Final Award (n 34) para 4.
[6] This figure is without the interest awarded.
[7] Occidental v Ecuador (ICSID Case No. ARB/06/11)
[8] See Julian Cardenas Garcia, 'The Era of Petroleum Arbitration Mega Cases' (2013) 35 *Hous Journal of International Law* 537-8, citing George Kahale III, 'Is Investor-State Arbitration Broken?' (2012) 9 *Transnat'l Disp.Mgmt.* 28 and 31.
[9] *P&ID v Nigeria* Dissenting Final Award (n 34) para 7.
[10] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award on Merits (*SPP v Egypt* Award on Merits).
[11] ibid, paras 187-188.
[12] ibid, para 188.
[13] *Levitt v Iran*, IUSCT Case No 210.
[14] *Levitt v Iran* Award (No 520-210-3 dated 29 August 1991), para 65, reported in ME MacGlashan and E Lauterpacht (eds), *Iran-United States Claims Tribunal Reports*, vol 14 (Grotius Publications Limited Cambridge 1988) 211 para 1.
[15] Michael Pryles, 'Lost Profit and Capital Investment' 7-8 <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012223892171920damages_in_the_international_arbitration_paper.pdf.> accessed July 30, 2021.
[16] *Levitt v Iran* Award (n 48) para 56.
[17] Pryles (n 49) 7-8.
[18] *ISS v NICICO,* IUSCT Case No 111.
[19] *QUOTA v Iran Air* Award, (No 37-172-1 dated 15 April 1983), IUSCT Case No 172.

where it falls', pointing out that the 'apportionment of the loss is subject generally to the Tribunal's equitable discretion, using the contract as a framework and reference point'.[1] Similarly, Yntema discusses the doctrine of equitable interpretation of statutes, including contract law, and points out that statutory interpretation should accord with the sense and reason of the law, rather than the letter.[2]

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 international investment arbitration. In the apportionment of loss in international investment arbitration, therefore, a tribunal must bring equitable considerations to bear.

Although there is an ongoing controversy as to whether equity has any role to play in international law and international arbitrations, the argument is a recent development: equity was used repeatedly in international law in the 19th century. Many international arbitrations, at that time, provided for decisions to be made following international law and equity.[3]

At the municipal level, the Federal Arbitration Act 1925 (US) acknowledges the role of equity in arbitration when 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.[4] Similarly, in the English legal system, equity takes precedence over law.[5] What is true of the English legal system is also generally true of all common law jurisdictions,[6] including Nigeria.

As Subrin points out, in the United States, in the mid-nineteenth and twentieth Centuries, the rules of equity prevailed over common law procedure.[7] Subrin further notes that some contemporary American scholars, such as Professor Abraham Chayes and Professor Owen Fiss, have also acknowledged the dominance of equity over the law, the latter having expressed a defence to the obligation of judges to use historical equity power to breathe life into the law as a means of making society become more humane.[8]

Furthermore, the *Spadafora Case*[9] provides evidence that equity was, in time past, taken into account in considering the compensation which would, normally, have been applicable vis-à-vis the poverty of the defendant state. On this score, this paper proposes a general rule for arbitral tribunals to consider equity and justice-rooted principles in arriving at any damages award and consciously refrain from overcompensating the claimant. To achieve this, tribunals should always consider the actual amount invested as the basis for awarding damages. In practical terms, an investment of US$1m should not yield damages of US$50million to the claimant, as seen in *Aguas del Turani*. And, an alleged investment of 'an estimated amount in excess of US$40million'[10] should not yield damages of US$6.6billion in addition to pre-award interest, as seen in *P&ID v Nigeria*. The lack of specificity of the stated invested sum in the last-mentioned arbitration matter should undermine a claimant's claim and not advance it.[11]

The absence of express authorisation of the parties to the tribunal to apply equity does not necessarily forbid an international tribunal from doing so, especially when used as a reason for refusing to apply unjust laws (equity *contra legem*). [12] However, this does not suggest that the *P&ID v Nigeria* tribunal was wrong in awarding damages against the respondent, but that damages are not to be awarded to a claimant just because it asked for them or because a respondent made a poor showing before the tribunal. .[13] Should that be the case, arbitration will become, as one commentator once said, '[f]lying on a trapeze without a safety net'.[14]

In conclusion, the concept of equity and fairness is not new to international investment arbitration.[15] The

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[1] See *ISS v NICICO* Award (No 194-111-1 dated 10 October 1985), IUSCT Case No 111, para 35 and *QUOTA v Iran Air* Award (n 53) para 27.
[2] Yntema (n 23) 82.
[3] Sohn (n 4) 277.
[4] Federal Arbitration Act 1925 9 U.S.C. § 2 (2006) (US).
[5] UK Senior Courts Act 1981, s 49 (1).
[6] Akehurst (n 6) 818-819.
[7] Stephen N. Subrin, 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135(4) *University of Pennsylvania Law Review* 912.
[8] ibid 912-13.
[9] (1904) 11 R.I.A.A. 9-10, cited in Akehurst (n 6) 801.
[10] See First Witness Statement (n 37) para 47.
[11] See *Levitt v Iran* Award (n 48) para 65, reported in ME MacGlashan and E Lauterpacht (eds), *Iran-United States Claims Tribunal Reports*, vol 14 (Grotius Publications Limited Cambridge 1988) 211, where the claimant requested for the award of costs of legal fees of 'more than $100,000' and other expenses connected with the proceeding 'in excess of $10,000', the tribunal awarded $10,000 in total on the basis of, inter alia, 'lack of specificity of the claim for costs'.
[12] Akehurst (n 6) 801.
[13] See the *P&ID v Nigeria* Dissenting Final Award (n 34) para 5, where the dissenting arbitral tribunal member said that 'The purpose of damages under Nigerian law is not to give the innocent party a windfall, but to put the party in the position he would have been had the breach not occurred…While not denying the fact that the Claimant is entitled to be compensated, to demand general damages of $8.6billion … is like asking for a reward for services not rendered.'
[14] Stephen Wills Murphy, 'Judicial Review of Arbitration Awards under State Law' (2010) 96(4) *Virginia Law Review* 889.
[15] Orfield (n 26) 33; see also the *P&ID v Nigeria* Dissenting Final Award (n 34) para 44, where the tribunal member alludes to justice and fairness when he says, 'In summary, I am of the considered view that justice and fairness in this reference dictates that I hold as follows…'

well-touted principle of fair and equitable treatment (FET) runs through the fabric of treaty-based investment arbitration.[1] There is also a plethora of international arbitration cases, some already discussed above, which validate the use of equitable principles by international arbitral tribunals.

2.2 Justice Theory

The traditional theory of justice is the ideology of giving everyone what he deserves, whether in terms of compensation for loss or retribution for wrong.[2] Socrates postulates that justice implies superior character and intelligence while injustice means deficiency in both respects.[3] Thus, while 'law' has been described as officially promulgated rules of conduct, backed by state-enforced penalties for their transgression, justice has been described as rendering to each person what he or she deserves.[4] There has been a long-drawn argument among legal and political theorists as to whether justice is part of the law or simply a moral judgment about the law.[5] This paper is located within the framework of the school of thought which postulates that: justice is an integral part of the law; justice is what lawyers should do; justice is what judges should render; and that law is nothing but a set of tools which merely facilitates the solution to a given problem.[6] Law, as a set of tools, must be used to achieve its purpose; which is, justice. Mustapher aptly posits that law will not achieve its purpose of modulating human relations unless its application leads to justice.[7]

The idea of justice is discernible in the demand that a person shall, under given circumstances, act in a given way; that is, that he shall act reasonably and fairly.[8] Conforming to the law does not necessarily mean one is acting justly. Since not all human laws are just, legality is not identical to justice.[9] To act justly is to act as a just man; the just act springs from an inner attitude of mind.[10] An act is considered just if it bears the stamp of equality, which is the criterion of justice.[11] The adjudicatory mechanism of arbitration (and even litigation) does not shut out the adjudicator from doing justice. As Oliyide points out, adjudication is also an important subject concerning law because the former enlivens the latter through interpretation and propels it into doing justice.[12]

Applying justice-based considerations in deciding an arbitration matter is neither new nor is there a taboo against it. As Garcia aptly notes, in petroleum arbitration mega cases, the trend is that arbitrators are trying to strike a balance between the expectations of foreign investors and host governments 'by using the law in a way that tries to favor both parties'.[13] Importantly, in the Preamble to the Vienna Convention on the Law of Treaties (VCLT),[14] there is a clarion call that international disputes should be resolved 'in conformity with the principles of justice'. The recommended balancing act is necessary because we live in an unjust world,[15] which is the creation of unjust laws – laws that are at variance with what is equitable and just. Such an act of balancing would usually provide the required flexibility that allows a dispute resolver to adjust decisions to facts and work out equitable outcomes that reduce the losses of the losing party as much as possible.[16]

Nothing works more hardship to a person or a nation than enforcement of unjust laws, especially when they have the stamp of judicial approval. Unjust laws have produced inequalities that are obvious all around the world. Pekelharing notes that inequalities 'haven't always been as sharp' as it has been since the 1980s.[17] To buttress this point, as powerful as states are, they are complaining about the harsh implementation of international investment arbitration. It is interesting to note that international investment arbitration is based, in most cases, on

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[1] The principle of 'fair and equitable treatment' is found in BITs. See, for example: Nigeria-UK BIT [Treaty Series No 66(1991)] made in Abuja on 11 December 1990, art 2(2); Netherlands-Venezuela BIT (1991), art 3(1); Morocco-Nigeria BIT dated 3 December 2016, art 7(1) and 2; and China-Ghana BIT (1989) dated 12 October 1989, art 3(1), which mentions only 'equitable treatment'.

[2] See DR Bhandari and JNV University, 'Plato's Concept of Justice: An Analysis' <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm#:~:text=Plato%20says%20that%20justice%20is,individual%20as%20well%20as%20social>.accessed 12 September 2022

[3] ibid.

[4] Antony D'Amato, "On the Connection between Law and Justice" (2011) Faculty Working Papers, vol. 2, no. 4 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1001&context=facultyworkingpaper> accessed 30 October 2019.

[5] ibid 2.

[6] ibid.

[7] Dahiru Mustapher, *The Nigerian Judiciary: Towards the Reform of the Bastion of Constitutional Democracy* (NIALS 2011) 1 cited in Olusesan Oliyide, 'The Intersection between Christian Faith and Justice' in Dorcas A. Odunaike and Olubukola Olugasa (eds), *Biblical Foundation of Law and Diplomacy* (Princeton & Associates 2020) 198.

[8] Gerhart Husserl, 'Justice' (1937) 47(3) *International Journal of Ethics* 271.

[9] ibid 273.

[10] ibid 237.

[11] ibid 274.

[12] Oliyide (n 67) 199.

[13] Garcia (n 36) 538-39.

[14] Vienna Convention on the Law of Treaties (VCLT) 23 May 1969, 1155 U.N.T.S. 331.

[15] Pieter Pekelharing, 'Global Justice and the State' in Monique Kremer, Peter van Lieshout, Robert Went (eds) *Doing Good or Doing Better: Development Policies in a Globalising World* (Amsterdam University Press. 2009) 341.

[16] Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2020) *Law and Ethics of Human Rights* 3.

[17] ibid.

treaties that these states themselves negotiated. However, due to sacrificing justice on the altar of legal principles over the years resulting in high damages awards against host states, including the most powerful nations of the world, most states are now kicking against international investment arbitration.[1]

As has been rightly pointed out, justice is the antithesis of injustice,[2] and the objective of the former is the promotion of utmost fairness, which, in essence, is 'the removal of ill-feelings, rancor, perils, violence, poverty, stagnation, anarchy and other ills.'[3] To achieve that objective, compensation should follow loss, not necessarily claim. The principles of equity, being general principles of municipal laws all over the globe, should apply to international arbitration to ameliorate the harsh legal principles of contract, where they still exist. The failure of international arbitral tribunals to apply equitable principles has led to several of these tribunals awarding excessive damages capable of irreparably hurting national economies. One municipal court case that may help give direction to arbitral tribunals concerning the need to make awards compensatory and not punitive or capable of unjustly enriching a party is the US Supreme Court decision in *State Farm Mutual Automobile Insurance Company v. Campbell*.[4] In that case, the court decided that giving unfettered discretion to juries to set punitive damages constitutes a violation of the USA Constitution by taking property without due process of law. This reasoning, which aligns with the thesis of this work, is more so in the case of taxpayers' money or the commonwealth of a country.

Similarly, the *Yukos* tribunal applied the tenets of justice when it determined that 'any award of damages that rewards the speculation by Claimant with an amount based on an *ex post* analysis would be unjust' and that the 'Tribunal cannot apply the most optimistic assessment of an investment and its return',[5] as the *P&ID v Nigeria* tribunal did in reality, though using *ex ante* analysis. In essence, the *Yukos* tribunal accepted Russia's argument that arbitration is not intended to give a claimant 'windfall profits'[6] and then, using its 'best reflection of the damages',[7] arrived at a proportionate principal amount of damages of US$3.5million.[8]

As the international investment framework is witnessing increased scrutiny by national policymakers and the general public, Jansen, Pauwelyn, and Carpenter express the view that the more effective use of economics (rather than only legal considerations) could contribute to the legitimacy of the ISDS system and increase 'the acceptance of rulings by affected parties and the general public'.[9] And, as it relates specifically to quantum of damages, Waddams states that 'the just measure of compensation for a particular wrong that constitutes a breach of contract must generally [be] viewed strictly as a matter of compensation' and nothing more.[10]

3. Convergence of Law and Equity

From time immemorial, the connection that law and equity should have in bringing about substantial justice has been a topical issue, with which each jurisdiction must come to terms.[11] Lapidoth refers to two kinds of equity relevant to present-day international law, namely: distributive justice, which consists of distribution proportionate 'to the deserts of each among several parties'; and commutative justice, which is based on equality and reciprocity 'since no one can require from others more than he gives himself'.[12] These two types of equity constitute what Mark Janis refers to as 'measured justice'.[13]

As pointed out already, there are divergent opinions on the role of equity in international law and international arbitration. Some scholars believe that equity has no place in international law[14] and that an international arbitrator, whose jurisdiction depends, entirely, upon the agreement of the parties, may apply equitable principles only if the parties authorise him so to do. However, other scholars think that the general nature in which international law is drafted allows the international judge or arbitrator to apply equitable

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[1] See Adiyat Goyal, 'Fixing the Broken Legs of Investor-State Arbitration' (2016) 1 *HNLU Student Bar Journal* 18.
[2] JAK Thompson (trans), *Aristotle: The Nicomachean Ethics* (Penguin Classics 1955) cited in JD Ogundare, *The Nigerian Judge and His Court* (Ibadan University Press 1994) 103.
[3] PK Nwokedi, 'Enforcement of Court Orders and Stability of Government and Society' in 1992 Judicial Lectures: Continuing Education for the Judiciary (MIJ Professional Publications 1992) 109 cited in Olusesan Oliyide, 'The Intersection between Christian Faith and Justice' in Dorcas A. Odunaike and Olubukola Olugasa (eds), *Biblical Foundation of Law and Diplomacy* (Princeton & Associates 2020) 198..
[4] 538 U.S. 408 (2003); see also *Tsokwa Motors (Nig.) Ltd* v *U. A. A Plc.* (2008) 2 N W L R (Pt 1071) 347 at 350, paras B-C.
[5] *RosInvestCo UK Ltd. v The Russian Federation* [SCC Arbitration V (079/2005)] Final Award (*Yukos* Final Award), para 670.
[6] ibid, paras 357 and 659.
[7] ibid, para 675.
[8] ibid, para 676.
[9] Marion Jansen, Joost Pauwelyn and Theresa Carpenter, 'Trade and Investment Disputes: The Role of Economists' (31 January 2018) <https://voxeu.org/article/trade-and-investment-disputes-role-economists> accessed 5 August 2021.
[10] Stephen Waddams, 'The Price of Excessive Damage Awards' (2005) 27 *Sydney Law Review* 546-7.
[11] Ruth Lapidoth, 'Equity in International Law' (1987) 81 *American Society of International Law* 138.
[12] ibid 138-9. The way BITs are traditionally drafted allows investors to require from states more than they are required to give: investors enjoy all the rights, and states bear all the obligations under the present BIT regime.
[13] Lapidoth (n 96) 139.
[14] This first set of scholars base their argument largely on the fact that article 38 of the ICJ Statute, which makes provision for the sources of international law, does not refer to equity as a source. However, this argument can easily be countered by the fact that the sources referred to under article 38 do contain equitable principles.

principles in the exercise of his discretionary powers in determining a matter before him.[1]

This article aligns with scholars who think that equity has a role to play in international law.[2] This, partly, is against the backdrop of the recognition of 'governing law' in arbitration. Usually, parties to an international arbitration would have chosen a governing law[3] or, where this was omitted, the arbitral tribunal would have to determine the governing law, one way or the other.[4] Once a governing law has been ascertained, the whole corpus of the relevant national law becomes binding on the parties and should be applied by the arbitral tribunal. Interestingly, the bodies of laws of most countries include the application of equity. For example, in *P&ID v Nigeria*,[5] Nigerian law was the governing law. Equity is an integral part of the Nigerian legal system[6] and, so in the determination of that arbitration matter, due consideration should have been given to it. Viewed from this angle of governing law, there is no limit to the application of equitable principles in international investment arbitration, where the applicable national law recognises it.

In addition, in the past, in many instances, international tribunals were empowered to determine matters before them according to equity. For example, under the 1794 Jay Treaty, the Commissioners were to 'decide the claims in question according to the merits of the several cases, and to justice, equity and the laws of nations'.[7] In *The Orinoco Steamship Company Case,*[8] an arbitration matter 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'. Other interesting cases are: the *Norwegian Shipowners Claims*,[9] where the Special Agreement between the State Parties requested the arbitral tribunal to decide claims 'in accordance with the principles of law and equity';[10] and the *Cayuga Indians* case,[11] where 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. . . '[12]

The *Cayuga Indians* tribunal went on to construe article 73 of the Convention for the Pacific Settlement of International Disputes 1907 (Hague Convention I)[13] 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*,[14] 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.[15] 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[16] thus: '[t]he 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'.

The *Cayuga Indians* tribunal also referred to three general claims arbitration treaties between the UK and the US, which contain provisions for decisions to be made following 'equity' or 'justice'. These treaties are: the Claims Convention of 1853,[17] which used the words 'according to justice and equity'; the Claims Convention of 1896,[18] article II, which called for 'a just decision'; and the Agreement for Pecuniary Claims Arbitration of 1910,[19] which prescribed that decisions should be 'in accordance with treaty rights, and with the principles of international law and of equity.'[20]

The above-enumerated instances go to show that there has always been a convergence between law and

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[1] Lapidoth (n 96) 139.
[2] See Akehurst (n 6) 808.
[3] See Arbitration Rules, contained in the First Schedule to the Nigerian Arbitration and Conciliation Act, art 33.
[4] Nigerian Arbitration and Conciliation Act, s 47(1)-(3).
[5] *P&ID v Nigeria*, Case No 1:18-cv-00594 (ad hoc arbitration).
[6] MI Jegede, '"Equity" and Nigerian Law' (1969) 3 *Nigerian Law Journal* 57.
[7] Lapidoth (n 96) 140.
[8] *The Orinoco Steamship Company Case* (n 9) 232.
[9] *Norwegian Shipowners' claims* Award (n 10).
[10] Special Agreement between the United States and Norway dated 30 June 1921, art 1, reproduced in *Norwegian Shipowners' claims* Award (n 10) 310.
[11] *Cayuga Indians (Great Britain) v. United States* (22 January 1926) United Nations Reports of International Arbitral Awards, vol VI, 173-190 (*Cayuga Indians* Award).
[12] ibid 174.
[13] See Convention for the Pacific Settlement of International Disputes 1907 (Hague Convention I), 1 Bevans 577.
[14] The Conventions were written originally in French.
[15] *Cayuga Indians* Award (n 110) 183.
[16] Special Agreement between the United States and Norway dated 30 June 1921, art 1, reproduced in *Norwegian Shipowners' claims* Award (n 10) 310.
[17] British-American Diplomacy Convention of 1853 between Great Britain and the United States, art 1.
[18] Claims Convention of 1896, 1 Malloy-Treaties 766.
[19] Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding between the United States and Great Britain, art VII.
[20] *Cayuga Indians* Award (n 110) 180.

equity in the determination of 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 the legal philosophy parlance, the ideal or just law is found where both positive law and morality overlap.

The process of importing the legal principles of domestic laws into international law is well-acknowledged under article 38(1) of the ICJ Statute in the form of 'the general principles of law recognized by civilized nations'.[1] As Sweet and Cananea observe, international judges and arbitrators make law while carrying out their function of resolving disputes, through interpreting norms found in treaties and other recognised sources of law, including general principles of law.[2]

Another dimension to the issue of equity in arbitral awards is when the award given by an arbitral tribunal is alleged to be against public policy. In the Nigerian case of *Okusanmi vs. AG, Lagos State* decided in the Court of Appeal, Pemu JCA held that 'where even Government Policy is carried out inequitably this court shall upset the decision that travests equity'.[3] This case adds a new dimension to the enforcement or non-enforcement of an arbitral award where a party (e.g., a host state) alleges a breach of public policy. The case suggests that where a host nation alleges breach of public policy which the court considers would work inequity, it will overrule the alleged public policy. This is an area of law that is yet recondite.

4. The ISDS Reform Agenda and the Issue of Fair Compensation

Some scholars regard ISDS as a controversial method of resolving investment disputes; it has become one of international law's most debated subjects.[4] Agitations for the reform of ISDS are ongoing. The reform agenda includes concerns about the lack of consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals,[5] concerns about arbitrators and decision-makers,[6] and concerns about cost and duration of ISDS cases.[7] Each subset has a direct or indirect connection to the issue of the award of excessive damages in international investment arbitration.

At the regional level, there are moves to jettison international investment arbitration. The African Union (AU), on its part, adopted the Pan-African Investment Code (PAIC), intending to emphasis its member states' interest in ensuring sustainable development,[8] which the current legalistic approach to international investment arbitration seems unable to assure to its members. The PAIC is a regional model investment treaty negotiated under the auspices of the AU, which, like the Norway Model BIT 2015,[9] seeks to achieve an overall balance of the rights and obligations between the Member States and investors.[10] The AU Member States desire to ensure national and continental coherence in investment policymaking, taking into account the various regional arrangements on investment across the continent.[11]

Similarly, the Latin American countries view the decisions emanating from ISDS tribunals as 'unfavourable' and have concerted their efforts 'to find an alternative regional framework to deal with state-foreign investors disputes'.[12] In addition, as part of the ISDS reform efforts, UNCITRAL, based on the proposal of the European Union (EU), is presently in the process of judicialising ISDS by setting up MIC,[13] which may lead to the eventual 'death' of international investment arbitration. However, UNCITRAL's reform agenda is not limited to the proposed MIC.

The concern about the lack of consistency, coherence, predictability, and correctness of arbitral decisions by international arbitral tribunals is foreboding,[14] which has been demonstrated several times by economy-wrecking

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[1] Aniruddha Rajput, 'Advent of Investment Arbitration and Evolution of International Administrative Law' (2012) 54(2) *Journal of the Indian Law Institute* 232.
[2] Alec Stone Sweet and Giacinto Della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2013) 46 *Journal of International Law and Politics* 911.
[3] (2015) 4 NWLR (Pt 1449) Pages 220
[4] Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28(3) *EJIL*28 321.
[5] Jones (n 133) 57-58.
[6] See IIED, CCSI and IISD (n 133) para 1.
[7] See ibid, Table 1.
[8] Ignacio Torterola and Bethel Kassa, 'Investor-State Disputes in Africa' (7 August 2019) *African Law and Business* <https://iclg.com/alb/9936-investor-state-disputes-in-africa> accessed 2 January 2021.
[9] Norway Model BIT 2015 ("Agreement between The Kingdom of Norway and …") <https://edit.wti.org/document/show/3b8bd5cf-2a4e-438c-a8cf-21ebdc1cce91> accessed February 12, 2022
[10] See Draft Pan-African Investment Code, 2016, pmbl and art 2.
[11] Draft Pan-African Investment Code, pmbl.
[12] 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,
[13] Garrigues, 'The Multilateral Investment Court Project: The 'Judicialization' of Arbitration?' (*Newsletter News*, 24 July 2019), <www.garrigues.com/en_GB/new/multilateral-investment-court-project-judicialization-arbitration> accessed 2 January 2021.
[14] Doug Jones, 'Investor-State Arbitration in Times of Crisis' (2013) 25 *National Law School Indian Review* 57-58; see also IIED, CCSI and IISD, "Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Issues." Submission to UNCITRAL Working Group III on ISDS Reform, contributed by International Institute for Environment and Development (IIED), Columbia Center on Sustainable Investment (CCSI),

and sovereignty-curtailing awards against respondent states since the emergence of the BIT system in the 1980s. The imbalance created thereby has sparked a wave of reform proposals and programmes across the globe. Some of these endeavours look problematic or are merely tangential, omitting or failing to address the normative role of equity and justice-rooted principles in international arbitration. Gourgourinis has noted well that there is and should always be a normative role for equitable principles in international law.[1] For example, the VCLT makes preambular provisions for applying equity and justice-rooted principles in international law[2] and, by extension, international arbitration.

Some scholars have proceeded further to opine that in assessing compensation to be awarded to a winning foreign investor, a tribunal should take into account factors that would enable it to achieve a result that strikes a balance between the interests of the investor, on the one hand, and those of the host state, on the other hand.[3] This balance is the context within which this paper is located. The link between excessive damages awards and agitations for ISDS reform is deciphered easily from states' reactions after a verdict of a substantial damages award has been made against them by an ISDS tribunal.[4]

Australia is one of several countries that have had to seek far-reaching solutions to international investment arbitration because of the fear of excessive damages awards, although it does not yet have a settled international investment arbitration policy[5] and discussions on the subject, in that jurisdiction, are still vexed. Economists in Australia's Productivity Commission maintain their objections to ISDS (and FTAs more broadly).[6] One of the concerns raised by the Commission is the increase in international investment arbitration claims in other parts of the world and excessive damages awards (including the *Yukos case* outcome and the potential outcome of and cost of defending the *Philip Morris Asian* claim against Australia).[7] The above concern of Australia validates the thesis of this work that there is a correlation between excessive damages awards against respondent states in international investment arbitration and their agitation for ISDS reform.

The issue of fair (or just) compensation was considered by the United States Supreme Court in *United States v 564.54 Acres of Land*.[8] The Court observed that it is difficult to give the principle its full and literal force because of the serious practical difficulties in assessing the worth an individual places on a particular property at a given time.[9] The Court, however, held that the principle entails putting the injured party 'in as good a position pecuniarily as if his property had not been taken.'[10]

Although, under national private law, the idea of fair compensation bothers on adequate or inadequate compensation by governmental authorities for takings of properties,[11] what is true in ensuring the adequacy of compensation for takings under national private law is true equally, *mutatis muntandi*, regarding guaranteeing the just measure of compensation in international investment arbitration.[12] Just as an award that falls short of full compensation potentially wrongs the injured party,[13] so does an award that excessively compensates the injured works injustice against the other party. In other words, just as undercompensation is both unfair and inefficient,[14] so is overcompensation that makes losing respondent States use taxpayers money to provide a windfall to winning claimant investors.[15]

Under customary international law, the principle of fair compensation seems to require that payment for an expropriated property be prompt, adequate, and effective.[16] This requirement reflects the notion that expropriation without prompt compensation would deprive investors of the opportunity of profitably reinvesting their resources.[17] Unlike under customary international law where argument existed[18] as to the standard of "prompt, adequate, and effective" compensation, most BITs adopt the standard.[19]

As Nikièma notes, the standard of "prompt, adequate and effective" compensation, or the Hull formula,

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and International Institute for Sustainable Development (IISD), 15 July 2019) para 1.
[1] Gourgourinis (n 7) 79-80.
[2] VCLT, pmbl.
[3] Suzy H. Nikièma, *Compensation for Expropriation: Best Practices Series* (International Institute for Sustainable Development, 2013), 7.
[4] For example, on 16 May 2017, in reacting to the US$2.3billion damages and interest awarded against it in favour of a US oil company, Occidental, Ecuador became the fifth country to terminate all its BITs.
[5] Luke Nottage, *Investor-State Arbitration Policy and Practice in Australia* (Centre for International Governance Innovation, 2016) 2-3.
[6] Nottage (n 138) 20.
[7] Productivity Commission (Australia), *Trade and Assistance Review 2013-14*, Annual Report Series (Productivity Commission 2015) 77-79.
[8] *United States v 564.54 Acres of Land*, 441 U.S. 506, 510 (1979).
[9] See Abraham Bell and Gideon Parchomosky, 'Taking Compensation Private' (2007) 59(4) *Stanford Law Review* 871.
[10] *United States v 564.54 Acres of Land*, 510 cited in Su Wanling, 'What is Just Compensation?' (2019) 105(8) *Virginia Law Review* 1486.
[11] See Bell and Parchomosky (n 142) 873.
[12] See Waddams (n 95) 546-7.
[13] Bell and Parchomosky (n 142) 873.
[14] ibid.
[15] ibid; see *Yukos* Final Award (n 90) para 670.
[16] See M. H. Mendelson, 'Compensation for Expropriation: The Case Law' (1985) 79(2) *American Journal of International Law* 414.
[17] Nikièma (n 136) 6.
[18] Mendelson (n 149) 414.
[19] Nikièma (n 136) 9.

means that the investor should be granted, as soon as the investment is expropriated (prompt), an amount equal to the total value of its expropriated investment (adequate) in a freely transferable and exchangeable currency (effective).[1] Contrariwise, some scholars posit that the Hull formula refers to full compensation for losses suffered and for lost profits. The position relating to lost profit seems untenable unless the judgment debtor will be subrogated to any fees or other remuneration the judgment creditor might subsequently earn within the period of the awarded profit.[2]

Excessive damages completely miss the mark of justice and may not be the just measure of compensation for the wrongs complained about by the judgment creditor.[3] Some commentators on this vexed issue have overstretched legal obligations to mean that since parties have submitted to arbitration, the principle of *pacta sunt servanda* applies to the effect that they must accept whatever quantum of damages awarded against them. This logic seems faulty because the agreement between the parties did not fix how much a losing respondent shall pay. What happens, usually, is that the arbitral tribunal is called upon to apply a method of calculation to arrive at the quantum of damages. While doing this, a tribunal should consider the principles of justice that will achieve fair compensation and not debilitating damage awards against the losing party.[4]

5. Conclusion

The real problem of the indemnification phenomenon in international investment arbitration is that award of immoderate damages cross the line of fair compensation into the realm of unjust enrichment of the winning party. Therefore, there is a need to build a concerted bulwark against this encroachment before nations begin to go bankrupt in the name of investment protection. Although evidence shows, still, that developing countries bear most of the brunt of investment claims, the old capital importer /capital exporter narrative has changed.[5] Many developed countries are now being hit hard by investment claims. States must, as comity, begin to address those factors that have weakened their position, especially the lopsidedness of the outmoded BIT system.

This paper reiterates the need for international arbitral tribunals to be mindful of equitable principles in determining damages. Primarily, this position is premised on the fact that as a result of the unrestrained manner in which these tribunals award huge damages against host states, some countries, like Bolivia, Ecuador, Venezuela, and South Africa, are already discarding the use of arbitration in investment disputes:[6] they are returning to adopting local remedies,[7] based on Calvo doctrine,[8] which, in the first place, has proved to be unattractive to foreign investors and unsuitable for the settlement of international disputes.[9]

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[1] ibid.
[2] See *P&ID v Nigeria* Dissenting Final Award (n 34) para 4.
[3] See Waddams (n 95) 543, 544, where the author refers to the case of *Titrczinski v Dupont Heating & Air Conditioning Ltd* (2004) 246 DER (4th) 95. In that case, 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.
[4] See *SPP v Egypt* Award on Merits, where the tribunal refused to apply a discounted cash flow (DCF) calculation; see also *Cadbury Schweppes v FBI Foods* [1999] 1 S.C.R 142, 181-182, where the Canadian Supreme Court held that [m]oral indignation is not a factor that is to be used to inflate the calculation of a compensatory award,'
[5] For example, China, which once was a capital importer is now the world's leading capital exporter.
[6] 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 Rudolf Dolzer and Christoph Schreuer. *Principles of International Law* (Oxford University Press 2008), 52.
[7] See, for example, South African Protection of Investment Act 2015, s 13.
[8] See The Editors of Encyclopaedia Britannica, 'Calvo Doctrine', *Encyclopedia Britannica* (27 August 2007), <https://www.britannica.com/topic/Calvo-Doctrine> accessed 30 July 2021,
[9] Leon E. Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46(1) *Journal of World Trade* 91.