# EXCESSIVE DAMAGE AWARDS AGAINST HOST STATES IN INTERNATIONAL INVESTMENT ARBITRATION: ACHIEVING THE NEEDED EQUILIBRIUM THROUGH JUSTICE*


## ABSTRACT

The concept of state sovereignty and the unwillingness of governments to submit to judicial authorities outside their states made arbitration a common means of settling investment disputes. International investment arbitration enabled the delocalisation of investment disputes and avoidance of diplomatic protection. However, the issue of high damage awards capable of wiping off a substantial part of a respondent country's foreign reserve in the guise of investment protection is making states rethink the good in international investment arbitration. If this situation continues unchecked, there are indications that more and more states would revert to diplomatic protection or insistence on local remedies only in resolving international investment disputes, both of which have serious drawbacks. In the light of the above, it is apposite to find a balance between the protection of foreign investments, on the one hand, and the survival of respondent states' economies, on the other hand. The work adopted the doctrinal approach of qualitative research methodology. This methodology helped with interrogating previous literature that deals with the role equity and justice-rooted principles should play in international arbitration, resulting in the finding that applying such principles would help arbitral tribunals arrive at more appropriate damage awards.



**Keywords*:*** Equity, Excessive damage awards, International investment arbitration, ISDS reform, Justice-rooted principles


## INTRODUCTION

International investment arbitration is essentially a mechanism for achieving two goals: it targets protecting the investments of foreigners, on the one hand, and enhancing the inflow of foreign direct investments (FDIs) into developing economies, on the other hand. In the 1960s, many developing countries, including the newly independent African nations, were at the forefront, canvassing an arbitration regime for international investment disputes. The campaign began with

their role during the negotiation of the Convention for the Settlement of Investment Disputes between States and Nationals of other States in 1964[1] to the enactment of municipal laws devoted to promoting and protecting foreign investments.

However, some of these nations have rather, unwittingly, fallen prey to the 'creature' they helped to fashion into existence[2]and have had to contend with damage awards that threaten to erode significant portions of their foreign reserves in a swoop. With the introduction of the BIT system in the 1980s, high arbitral awards - favouring foreign investors against host states - have been recorded.[3]This situation poses a serious challenge and, if unchecked, threatens the future of international investment arbitration.

The trend of prohibitive damage awards and other costs in international investment arbitration has significantly contributed to its diminishing influence. Excessive damage awards in international investment arbitration have become an issue of great concern for losing respondent states, civil society, local communities, and some scholars of international investment law.[4] This topic, therefore, is apt for discussing the concept of the application of equity and justice-rooted principles in the decision-making process in international investment arbitration, especially the ongoing conversation on the reform to address the lack of consistency, coherence, predictability, and correctness of arbitral decisions by investor-State dispute settlement (ISDS) tribunals.[5]Although different perceptions persist, the work relies on international instruments, decisions of international tribunals and municipal courts, as well as scholarly works, to validate the claim that equity and

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[1]Paul-Jean Le Cannu, 'Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System' (2018) 33(2) ICSID Rev 456.

[2] This was due, in large part, to the miscalculated and ill-fated nationalisation policies of developing countries in the 1970s, backed by the Charter of Economic Rights and Duties of States, U.N. Doc. A/5217 (14 December 1974) but contrary to the general consensual Resolution 1803(XVII) of 14 December 1962, which provided a balanced way to codify the principle of permanent sovereignty over natural resources (see Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 Harv Intl LJ 491, 499-501).

[3] Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 Harv Intl LJ 491, 499-501

[4]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.

[5] Doug Jones, 'Investor-State Arbitration in Times of Crisis' (2013) 25 Nat'l L Sch Indian Rev 27, 57-58; see IIED, CCSI and IISD (n 5) para 1.

justice-rooted principles have, and should always have, a role to play in international investment arbitration.

This work attempts to provide new insights into the relevance of applying equity and justice-rooted principles in international investment arbitration, especially as it touches on the award of damages. The ultimate aim of this work is to help reduce the incidence of excessive damage awards and their adverse impact on the economies of host states and the integrity of international investment arbitration. After this introductory section, the work proceeds with section 2, which examines the vexed issue of excessive damages in international investment arbitration. While section 3 addresses the crossroads at which international investment arbitration has found itself, section 4 discusses the ISDS reform agenda. And section 5 concludes the work with some vital recommendations.

## THE VEXED ISSUE OF EXCESSIVE DAMAGES IN INTERNATIONAL INVESTMENT ARBITRATION

One of the reasons international investment arbitration evolved was to protect foreign investments. However, there appears to be too much emphasis on legal rights in international investment arbitration, which hinders international investment arbitration 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 the claim.[6] Some of the time, 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.[7] Equity, which has since become part of municipal and international law, seems often abandoned by international tribunals in determining the quantum of damages. The imbalance created by excessive damage awards has sparked a wave of reform proposals and programmes 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

[6] See UNCTAD, 'Investor-State Disputes Arising from Investment Treaties: A Review' (UNCTAD Series on International Investment Policies for Development 2005) 10; 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 & Tech LJ18.

[7] 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.

merely tangential. They omit or fail to address the normative role of equity and justice-rooted principles in international arbitration, a gap which this work addresses.

Another problem is that, in many instances, arbitral tribunals tend to apply the most optimistic assessment of an investment and its return in determining the quantum of damages,[8] thereby giving winning claimants windfall profits, which are way beyond the actual investment costs. These excessive damages, some of which are analysed in this work, completely miss the mark of justice and cannot be the just measure of compensation for the wrongs complained about by the claimants.[9]Some commentators on this vexed issue have over stretched 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.[10]

It has been observed, and, correctly so, that awarding exorbitant damages against host states can hurt their economies and fetter their discretionary powers even when exercised for overriding public interest. [11]If this is left unchecked, the trend may make international investment arbitration fall into complete abandonment, despite its overwhelming advantages. This work, therefore, seeks to explore the option of applying equity and justice-rooted principles in international investment arbitration against the backdrop of the norm that, where the parties did not provide specifically for a situation in their agreement, the arbitral tribunal shall have regard to the circumstances of the

[8]cf *Yukos*Final Award, *RosInvestCo UK Ltd. v The Russian Federation* [SCC Arbitration V (079/2005)] para 670.
[9]See Stephen Waddams, 'The Price of Excessive Damage Awards' (2005) 27 Sydney L Rev 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.
[10] See *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award on Merits, where the tribunal refused to apply a DCF calculation; see also *Cadbury Schweppes vFBI 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,'
[11]See Productivity Commission (Australia), *Trade and Assistance Review 2013-14*, Annual Report Series (Productivity Commission 2015) 77.

case before it in its determination.In the case of determining the quantum of damages, one of the circumstances a tribunal should consider is the actual amount invested.

This work focuses on ascertaining and evaluating the legal framework for applying principles based on justice, equity, fairness, and reasonableness in international investment arbitration. The evaluation would help to substantiate the thesis that there can be a balance between adequate compensation of a foreign investor when a host state breaches its obligations and the right of such a state to economic survival. Based on the doctrinal research method, the work appraises some arbitral awards and international instruments that border around international investment arbitration. It also appraises municipal government policies, court decisions, and the current agitation for ISDS reforms by states and other entities.

While existing literature is replete with discourses on the need to balance foreign investor rights and the right of states to regulate,[12] little study has been undertaken in the two key areas that this work seeks to examine: these areas are the link between excessive damage awards in international investment arbitration and states' dissatisfaction with it, on the one hand, and the need to apply equity and justice-rooted principles to strike a balance between damage awards in international investment arbitration and the economic survival of host states, on the other hand. From the analysis in this work, other researchers may wish to explore further the relevance of using equity and justice-rooted principles in international investment arbitration as against the norm that equity has no role in arbitration.

## INTERNATIONAL INVESTMENT ARBITRATION AT THE CROSSROADS

Arbitration has proved to be an extremely effective mechanism for resolving disputes because, in comparison to litigation, it usually brings about a quick and relatively inexpensive means of resolving commercial and related disputes.[13] This advantage of arbitration has significantly increased its use for different types of disputes all around the globe. For example, as far back as

[12] Nicolás M Perrone, 'An interview with Nicolás Perrone on Investment Treaties and the Legal Imagination: How Foreign Investors Play by their own Rules' (2021) 12(2) Online J on Investment L and Policy 8-9 <https://www.iisd.org/system/files/2021-06/iisd-itn-june-2021-english.pdf> accessed 2 August 2021.
[13] Jackson Williams, 'What the Growing Use of Pre-Dispute Binding Arbitration Means for the Judiciary' (2002) 85 (6) Judicature 266.

2002, there were already court-annexed mandatory arbitration programmes in the United States; and at least 50 percent of the cases referred to them resulted in a resolution.[14] Much earlier, in 1968, Nigeria introduced mandatory arbitration into its legal system when it promulgated the Trade Disputes (Emergency Provisions) Decree No 21 for resolving labour disputes.[15] The emergency decree was extended from time to time until 1976 when the then military government enacted a permanent law (the Trade Disputes Decree).[16] Presently, in Nigeria, there is mandatory arbitration for resolving labour disputes,[17] disputes relating to cooperative societies,[18] health insurance disputes,[19] and disputes relating to the privatisation and commercialisation of public enterprises.[20] The importance of arbitration shows in its use in resolving several other types of disputes, such as petroleum, maritime, construction, medical, sports and investment disputes. Of particular importance is that international investment disputes are amenable to arbitration. This is especially so because it allows disputes to be delocalised and prevents diplomatic protection. Until recently, arbitration was not only preferred over litigation in the resolution of international investment disputes but also over non-adjudicatory processes, such as mediation and conciliation. Available data verify the above assertion: although the Convention for the Settlement of Investment Disputes between States and Nationals of other States 1966[21] (ICSID Convention) was specifically designed to provide arbitration and conciliation facilities for resolving international investment disputes,[22] the 1966 to 2020 ICSID Statistics show that arbitration accounted for 98.4 percent of the total caseload for those 54 years, while conciliation accounted for only 1.6 percent.[23]

However, the trend is gradually changing: many states are now seeking alternatives to arbitration because of what they consider as inequitable quantification of damages by international arbitral

[14] ibid.
[15]Tayo Fashoyin, 'Arbitration in Nigeria' (1977) 13(2) Indian J of Industrial Relations 153, 156.
[16]ibid.
[17] Trade Disputes Act, Cap. T8, LFN 2004, s 9.
[18] Nigerian Co-operatives Societies Act, Cap. N98, LFN 2004, s 49.
[19] National Health Insurance Scheme Act, Cap. N42, LFN 2004, s 26.
[20] Public Enterprises (Privatisation and Commercialisation) Act, Cap. P38, LFN 2004, s 27.
[21]ICSID Convention, 575 UNTS 159.
[22]Le Cannu (n 1) 457.
[23]ICSID, *The ICSID Caseload – Statistics* (Issue 2020-2) 9.

tribunals.[24]As we shall see, the agitation by states for ISDS reform is closely related to their dissatisfaction with, among other things, excessive arbitral awards against respondent states in investment disputes.[25] The issue of excessive awards finds illustration in some arbitration matters, such as *Aguas del Turani S.A v Republic of Bolivia*,[26]*Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*[27] (*Chevron v Ecuador (1)*), *The Renco Group Inc. v The Republic of Peru I (Renco v Peru I)*[28]and *Process and Industrial Developments Limited v Ministry of Petroleum Resources of the Federal Republic of Nigeria (P&ID v Nigeria)*.[29]

Commentators have classified *Aguas del Turani* as one of the worst examples of international investment arbitration.[30] In that case, the execution of the investment contract resulted in an excessive hike in the price of water, which reduced the money available to the affected indigenes to buy food, clothes, and other necessaries for their children.[31] As a result, people protested heavily for their right to an affordable water supply. When the protests turned violent, and the Bolivian government could no longer suppress them, it had no other choice than to repudiate the concession given to Aguas del Turani. In response, Aguas del Turani brought a claim against Bolivia at ICSID. Regardless of the circumstances that warranted the repudiation of the concession, the ICSID tribunal awarded the claimant US$50million though it invested US$1million. Situations such as the Bolivian government's, described above, have made some scholars wonder whether some countries with the presence of transnational corporations (TNCs) are not in reality 'hostage' (instead of host) states – held hostage by these powerful corporations.[32]

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[24]See John Sabet, 'Investor-State Arbitration Meets Mediation: Is Mediation the Future of Investor-State Dispute Settlement in Africa?' (*Kluwer Arbitration Blog*, October 2020)<http://arbitrationblog.kluwerarbitration.com/2020/10/02/investor-state-arbitration-meets-mediation-is-mediation-the-future-of-investor-state-dispute-settlement-in-africa/> accessed 7 December 2020; Boeglin (n 4); 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.

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

[26]*Aguas del Turani,* ICSID Case No. RB/02/3.

[27]*Chevron v Ecuador (I),* PCA Case No 2007-02/AA277; 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.

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

[29]*P&ID v Nigeria*, Case No 1:18-cv-00594 (ad hoc arbitration).

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

[31] ibid.

[32]Nsongurua Udombana, 'Shifting Institutional Paradigms to Advance Socio-Economic Rights in Africa' (LLD Thesis, University of South Africa 2007)245 <https://www.researchgate.net/publication/330337569_SHIFTING_INSTITUTIONAL_PARADIGMS_TO_ADVA

*Chevron v Ecuador (I)* also presents another reason to look at international investment arbitration as practiced presently. In this arbitration, the activities of the predecessor of Chevron, Texaco Petroleum Company, had led to severe pollution and complete degradation of the Ecuadorian Amazon. Since Ecuador could not, for some legal constraints,[33] sue Chevron for the damage done, the inhabitants of the Amazon brought a group action in the *Lago Agrio* claim against Chevron for US$18billion in damages. The court decided the case in favour of the plaintiffs and awarded them the sum of US$9.5 billion as compensation.[34] Despite the palpable damages caused by its predecessor, Chevron responded by suing Ecuador based on the US-Ecuador BIT[35] and prayed the arbitral tribunal to override the Ecuadorian Constitution and its obligations under human rights treaties in favour of the BIT, which the tribunal regrettably did.[36] And, though the judgment of the trial court has been upheld by Ecuador's Supreme Court, Chevron has refused to pay the judgment sum.[37]

*Renco v Peru I*[38] provides another pertinent case for discussing damage awards. In 2006 and 2007, La Oroya, the centre of Peruvian mining activities where, in 1997, the US Company Doe Run Peru bought a metallurgical complex, was reported to be one of the ten most polluted areas of the world, with 70 percent of the children in the area having severe health challenges.[39] Environmental cleanup was part of the contract between Doe Run Peru (a subsidiary of the Renco Group Inc.)

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NCE_SOCIO-ECONOMIC_RIGHTS_IN_AFRICA> accessed 12 March 2021; see also Perrone (n 12) 11, where the author alerts on norm entrepreneurs who are attempting to createinternational investment arbitration as revolving around only foreign investor rights.

[33]Sara Randazzo, 'Litigation without End: Chevron Battles on in 28-Year-old Ecuador Lawsuit' (2 May 2021) Wall Street J <https://www.wsj.com/articles/litigation-without-end-chevron-battles-on-in-28-year-old-ecuador-lawsuit-11619975500> accessed 17 November 2021, where the author refers to Chevron's allegation that Ecuador in the 1990s granted its predecessor a release from liability after a cleanup, and the fact that Petroecuador, an Ecuadorian government's entity, was in partnership with Chevron's predecessor when the pollution took place and that they were jointly liable.

[34]'Investor-State Dispute Settlement' (n 30).

[35] US-Ecuador BIT signed in 1997. This BIT provides only for investor rights, with no corresponding investor obligations.

[36]'Investor-State Dispute Settlement' (n 30); see, generally, Fola Adeleke, 'Human Rights and International Investment Arbitration' (2016) 32(1) South Africa J on Human Rights 48-70.

[37] 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; Randazzo (n 42).

[38]*Renco v Peru I* (n 30).

[39]'Investor-State Dispute Settlement' (n 30).

and the government of Peru, but the company failed woefully to implement any of the environmental specifications in the contract, leading to the revocation of its operating licence by the Peruvian government.[40] As a result, Renco Group Inc. instituted an ICSID investment arbitration against Peru for US$800 in damages, which it lost; but rather than accept the ICSID's verdict, it instituted another arbitration, at the PCA, on the same facts[41] in *The Renco Group Inc. v The Republic of Peru II* (*Renco v Peru II*)[42] based on the Peru-United States Trade Promotion Agreement.

The *Renco* arbitrations and *Chevron v Ecuador (I)* award seem to give credence to the argument that bilateral investment treaties (BITs) enable investors to commit corporate misdeeds in host states that they do not do in their home states; and that they do so without repercussions.[43] Rather than being held accountable for their misdeeds, these investors are sometimes rewarded with excessive damages against the host states when these states decide to regulate their actions.[44] This state of affairs is why some scholars believe that international investment arbitration is skewed towards investors,[45] citing violations of indigenous peoples' human rights in host communities where oil exploitation and other mining activities take place, without regard for how these activities affect the indigenes.[46] It is against this backdrop that Resolution 26/9 of the United Nations Human Rights Council (UNHRC),[47] which established a new intergovernmental Working Group (IGWG) to develop an international legally binding instrument to regulate TNCs and other businesses concerning human rights,[48] is a welcome development.

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[40]ibid.

[41] Business & Human Rights Resource Centre, 'Peru: Govt. Wins Arbitration Brought by Renco over Doe Run Smelter-Company Claimed Govt. Cleanup Order to Protect Town's Health Was Excessive' (*Bloomberg*, 18 July 2016) <https://www.business-humanrights.org/en/latest-news/peru-govt-wins-arbitration-brought-by-renco-over-doe-run-smelter-company-claimed-govt-cleanup-order-to-protect-towns-health-was-excessive/> accessed 31 May 2021.

[42]*Renco v Peru II*, PCA Case No 2019-46.

[43]See Udombana (n 32) 242.

[44] SeeMas (n 46).

[45] 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.

[46] 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).

[47] UNHRC Resolution 26/9(A/HRC/RES/26/9).

[48] Friends of the Earth International, 'The UN Treaty on Transnational Corporations and Human Rights' (2019) <https://www.foei.org/un-treaty-tncs-human-rights> accessed on 20 January 2020.

Still on the issue of excessive damage awards, in the *P&ID v Nigeria* arbitration, the arbitral tribunal delivered an award against the respondent in 2018, which threatened to erode over 30 percent of the country's foreign reserve in a swoop.[49] In summary, under a Gas Supply and Processing Agreement (GSPA), the Nigerian government was to ensure that all necessary pipelines, and related infrastructure, were installed and arrangements made with agencies and third parties to deliver gas to P&ID's site for processing. However, the Nigerian government failed to meet its commitments, and this, allegedly, caused the project to fail.[50] Eventually, in 2012, P&ID commenced arbitration proceedings before an arbitral tribunal in London based on an arbitration clause in the said GSPA, claiming damages from the Nigerian government for breaching the agreement.[51] In 2017, the arbitral tribunal ordered the Nigerian government to pay P&ID US$6.6 billion in damages, plus interest that is accruing daily at the rate of over US$1million,[52] which now stands at well over US$3billion.

In response to the challenge of high arbitral awards made in favour of foreign investors against host states and how that may affect the future of international investment arbitration, if unchecked, this work proposes a balance between protecting foreign investments, on the one hand, and shielding the economies of host States from destruction as a result of the award of excessive damages, on the other hand. 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.[53]

Many states are already rethinking the relevance of international investment arbitration as a way of expressing their apparent displeasure with incessant claims against them and resultant exorbitant

[49] Kate Beioley and Neil Munshi, 'The $6bn Judgment Pitting Nigeria against a London Court' (*Financial Times*, 11 July 2020) <www.ft.com/content/91ddbd53-a754-4190-944e-d472921bb81e> accessed 13 July 2020.
[50]See First Witness Statement of Michael Quinn dated 10 February 2014, paras 142-144.
[51] See 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.
[52] See *P&ID v Nigeria* Final Awarddated 31 January 2017 (Case 1:18-cv-00594, ad hoc international arbitration)33-34. The tribunal ordered the Respondent 'to pay the Claimant the sum of $6,597,000,000 together with interest at the rate of 7% from 20 March 2013 until the date of this award and at the same rate thereafter until payment.'
[53] Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2020) L and Ethics of Human Rights 3.

damages.[54] Some Latin American countries (Bolivia, Ecuador, and Venezuela) have already denounced the ICSID Convention.[55] A few other states, such as South Africa,[56] China,[57] and India,[58] seem to detest international investment arbitration altogether or use it only for convenience.[59] The current feeling of dissatisfaction spans through the globe, as the European Union (EU) also seems bent on pushing to the global stage its philosophy of discarding international investment arbitration in favour of a judicialised Multilateral Investment Court (MIC).[60] From available data, there seems to be enough nexus between prohibitive damage awards (and other costs in international investment arbitration) and the diminishing influence of arbitration.[61] In tacitly acknowledging that fact, UNCITRAL notes thus:

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[54]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; Sanjeet 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; John Sabet, 'Investor-State Arbitration Meets Mediation: Is Mediation the Future of Investor-State Dispute Settlement in Africa?' (*Kluwer Arbitration Blog*, October 2020)<http://arbitrationblog.kluwerarbitration.com/2020/10/02/investor-state-arbitration-meets-mediation-is-mediation-the-future-of-investor-state-dispute-settlement-in-africa/> accessed 7 December 2020

[55]UNCTAD, 'Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims' 2 (IIA Issues Note 2010) 1 <https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf> accessed 11 August 2021; José Carlos Bernal Rivera and Mauricio Viscarra Azuga, 'Life after ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID' (*Kluwer Arbitration Blog*, 12 August 2017) <http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/> accessed 12 August 2021

[56]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.

[57] See generally Leon E. Trakman, Qiao Liu and Lei Chen, 'Investor-State Arbitration in China: A Comparative Perspective' in Lei Chen and André Janssen (eds), *Dispute Resolution in China, Europe and World* (Springer, Cham 2020) 231-261.

[58] 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.

[59]Schreuer (n 25) 9-10

[60] Hongling Ning and Tong Qi, 'Multilateral Investment Court: The Gap Between the EU and China' (2018) 4 Chinese J of Global Governance 154, 175.

[61]See Sonia E. Rolland, 'The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries' (2017) Loyola U Chicago L J 387, 388-90; see also Joshua Davis, 'Expected Value Arbitration' (2004) 57 Okla L Rev 47, where the author discusses the concept of expected value arbitration (EVA) by examining propositions by different scholars for partial recovery and 'proportionate damages' remedy, aimed at challenging the prevalent notion that an adjudicator must adopt a winner-take-it-all attitude to dispute resolution; of particular interest, see Letter with Reference No: OL ARM 1/2019, titled 'Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; the Special Rapporteur on the rights of indigenous peoples; the Independent Expert on the promotion of a democratic and equitable international order; and the Special Rapporteur on the human rights to safe drinking water and sanitation (7 March 2019) para 1, where the authors state that, 'The inherently asymmetric nature of the ISDS system, lack of

> Mediation is being increasingly used in dispute settlement practice in various parts of the world. In addition, the use of mediation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres.[62]

The view of UNCITRAL above is verifiable by the wave of policy changes around the globe. Nottage discusses Australia's new Policy on Treaty-Based international investment arbitration, a policy thrust aimed at eschewing any form of arbitration post-2011 investment treaties entered into by it.[63] The new policy provides alternatives to arbitration, such as local remedies only and individually negotiated investor-State contracts, as Nottage opines, ignoring or underestimating the benefits of international investment arbitration and overestimating its risks.[64] This work aligns with Nottage's position that what is required is not discarding international investment arbitration but 'adopting some more moderate and flexible approaches to addressing specific problems in the international investment arbitration system'.[65] In respect of Australia, however, it has had many policy changes since 2011[66] when Philip Morris Asia launched the first-ever claim against it under the Australia-Hong Kong BIT[67] (now terminated), in respect of its tobacco plain packaging legislation.

The position of Nottage, which this work agrees with, mirrors the recommendation of Australia's Senate Foreign Affairs, Defence and Trade Legislation Committee (SFADTLC). Although a majority of the members of the Australian Productivity Commission supported the bill before the Senate, which bill proposed that Australia should stop entering into agreements that include arbitration for resolving foreign investment disputes, the SFADTLC nonetheless accepted the

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investors' human rights obligations, exorbitant costs associated with the ISDS proceedings and extremely high amount of arbitral awards are some of the elements that lead to undue restrictions of States' fiscal space and undermine their ability to regulate economic activities and to realize economic, social, cultural and environmental rights'.

[62] UNCITRAL, 'Draft Guide to Enactment and Use of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018): Note by the Secretariat' UNCITRAL Fifty-third Session (New York, 6-17 July 2020)4.

[63]Nottage (n 54) 264.

[64]ibid.

[65]ibid.

[66]Luke Nottage, *Investor-State Arbitration Policy and Practice in Australia* (Centre for International Governance Innovation 2016) 2-3.

[67]Australia-Hong Kong BIT, Australian Treaty Series 1993 No 30, which came into force on 15 October 1993 and was terminated on 17 January 2020.

minority position on the ground that the proposed law would inhibit the negotiation of future international agreements 'including plurilateral agreements such as the TPF' and would put Australians investing in high sovereign risk countries at a disadvantage.[68] The SFADTLC accepted the minority opinion that existing safeguards were sufficient to protect the public interest and, thus, 'concluded that ISDS issues should be assessed on a case-by-case basis.'[69]

Contrary to the position of Nottage and the SFADTLC, in a momentous departure from current international investment arbitration practice, Tanzania enacted the Natural Wealth and Resources (Permanent Sovereignty) Act 2017[70] (Permanent Sovereignty Act), which provides that the natural wealth and resources of the country can no longer be subject to proceedings in any foreign court or tribunal.[71] To that end, disputes on the extraction, exploitation, or acquisition and use of Tanzania's natural wealth and resources must be adjudicated by judicial bodies or other organs established in Tanzania, and application of the laws of Tanzania shall be acknowledged and incorporated in all arrangements or agreements in that regard.[72] Furthermore, the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017[73] (Review and Renegotiation of Unconscionable Terms Act) requires the Tanzanian National Assembly to review and renegotiate all agreements that contain unconscionable terms.[74] 'Unconscionable term' is defined to mean any stipulation in an arrangement or agreement on natural wealth and resources which is contrary to good conscience and the enforceability of which jeopardises or is likely to jeopardise the interests of the citizens.[75]

Several other countries have also shifted their policy and legislation to favour alternatives to international investment arbitration. Some of these countries are: South Africa, which in 2015 legislatively abolished international investment arbitration and replaced it with two local remedies, namely, mediation under the auspices of its Department of Trade and Industry, and litigation or

[68]Productivity Commission (n 11) 78-79.
[69]ibid 79.
[70]Permanent Sovereignty Act, Act Supplement No 5 of 2017 in the Gazette of the United Republic of Tanzania No 27 Vol 98 dated 7 July 2017.
[71]ibid, s 11(1).
[72]ibid, s 11(2).
[73]Review and Renegotiation of Unconscionable Terms Act, Act Supplement No 6 of 2017 in the Gazette of the United Republic of Tanzania No 27 Vol 98 dated 7 July 2017.
[74]ibid, ss 4 and 5.
[75]ibid, s 3.

other forms of adjudication within South Africa;[76] Bolivia, Ecuador, and Venezuela, which all have denounced the ICSID Convention, with the first two terminating almost all their BITs;[77] EU countries, which are pushing to replace international investment arbitration with a judicialised MIC;[78] and the United States which, with its 2004 Model BIT, introduced significant limitations to investor protection.[79]

## THE ISDS REFORM AGENDA

ISDS has been regarded as a controversial method of resolving investment disputes and has become one of international law's most debated subjects.[80] Agitations for and actions towards reforming ISDS, in general, and international investment arbitration, in particular, are ongoing. ISDS reform agenda, as it stands, can 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;[81] (b) concerns about arbitrators and decision-makers;[82] (c) concerns about cost and duration of ISDS cases;[83] (d) the need for human right norms to be given adequate consideration in ISDS cases;[84] and (e) the perceived need to establish a MIC.[85] Each of the fore-going subsets has a direct or remote connection with the issue of award of excessive damages in international investment arbitration.

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[76]Protection of Investment Act 2015 (South Africa), s 13.

[77]UNCTAD, 'Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims' 2 (IIA Issues Note 2010) 1 <https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf> accessed 11 August 2021; José Carlos Bernal Rivera and Mauricio Viscarra Azuga, 'Life after ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID' (*Kluwer Arbitration Blog*, 12 August 2017) <http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/> accessed 12 August 2021

[78]Ning and Qi (n 60).

[79]Schreuer (n 25) 10 citing Stephen Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law* (3 Transnational Dispute Management No 2, April 2006).

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

[81]Jones (n 5).

[82] See IIED, CCSI and IISD (n 5) para 1.

[83] See ibid, Table 1.

[84]International Justice Resource Centre, '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 36), an arbitration matter that brings to the fore the human right abuses associated with foreign investments and the injustice ISDS tribunal may dispense if human rights norms are sacrificed for investor rights.

[85] 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.

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 emphasise its member states' interest in ensuring sustainable development,[86] 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, seeks to achieve an overall balance of the rights and obligations between the Member States and investors.[87] 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.[88]

The PAIC serves as a guiding instrument[89] and, as such, does not seek to abolish the existing rights and obligations of Member States deriving from any subsisting investment agreement.[90] A vital feature of the Code is that the Member States may agree to transform the Code into a binding instrument to replace the intra-African BITs or investment chapters in intra-African trade agreements. The period is to be determined by the Member States or after the termination period as set in the existing BITs and investment chapters in the various trade agreements.[91] The above provision is instructive because the Code recognises that as a regional instrument, it cannot bind a non-Member State (third country) and, so, cannot be extended to affect BITs involving a Member State and a third country. However, the Member States and Regional Economic Communities (RECs) are required to take into account, as far as possible, the provisions of the Code when entering into any new agreement with a third country to avoid any conflict between their present or future obligations under the Code and their obligations in other agreements.[92]

Similarly, the Latin American countries view the decisions emanating from international tribunals as 'unfavourable' and have concerted their efforts 'to find an alternative regional framework to

[86] Ignacio Torterola 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.
[87]See Draft Pan-African Investment Code, 2016, pmbl and art 2.
[88]Draft Pan-African Investment Code, 2016, pmbl.
[89]ibid.
[90]Draft Pan-African Investment Code, 2016, art 3.1
[91]ibid, art 3.2
[92]ibid, art 3.3

deal with state-foreign investors disputes'.[93]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,[94] which may lead to the eventual 'death' of international investment arbitration. However, UNCITRAL's reform agenda is not limited to the proposed MIC.

Literature reveals that scholars of international investment law and arbitration practitioners are up till now divided on the issue of the shape the ISDS reform should take and on international investment arbitration's continued relevance.[95] Within UNCITRAL itself, proposed reforms are multi-dimensional. Besides the proposed MIC, there is also a proposal for the establishment of an appellate mechanism, corresponding to recently concluded free trade agreements and rules of WTO Appellate Body that contain provisions on appellate mechanisms, which 'could enhance the correctness and consistency of decisions rendered by ISDS tribunals, and thereby increase the overall predictability and the efficiency of ISDS.'[96] However, ongoing deliberations in Working Group III (WGIII) have raised the alert on the need to ensure that an appellate mechanism would not result in a full rehearing on every aspect of the cases, nor lead to systematic or frivolous appeals.[97]

On the continued relevance of international investment arbitration, Glinavos, after enumerating some shortcomings of international investment arbitration (such as foreign corporate interests usurping democracy and placing a legal restriction around sovereign discretion), nonetheless supports the retention of international investment arbitration as presently constituted to act as a check on abuse of sovereign powers by states: he argues that states should pay for the cost of their discretion.[98] He argues further that restraining sovereign discretion to create a predictable

[93]Boeglin (n 4).
[94] 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.
[95]Puig and Strezhnev (n 80) 735.
[96]UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021)' (17 March 2021) United Nations Commission on International Trade Law Fifty-fourth session Vienna, 28 June–16 July 2021, para 58.
[97]ibid, para 59.
[98]Ioannis Glinavos, 'In Praise of Limiting Democracy: a Defense of ISDS' (27 June 2018) <https://verfassungsblog.de/in-praise-of-limiting-democracy-a-defense-of-isds/ > accessed 2 August 2019; see, also, Konstantin Volkov, 'The Necessity of Reforms within the Arbitration System under the ICSID Convention: Myth or Reality?'(2018) 6 (4)Global J of Politics and L Research 50, 51.

investment environment is done to attract foreign investments, which could end in the overall good of the state.[99] While Glinavos' argument is logically sound, the thesis of this work remains that, in making states pay for the cost of their discretion, an international arbitral tribunal should not unduly enrich the investor and other actors in the dispute.

At the opposite extreme of Glinavos' argument, Perrone argues that foreign investors' rights are not commodity rights but that they are embedded in social relations, suggesting that their enforcement should strike a balance between protecting the foreign investor and protecting local interests, which are not always well represented by state parties and politicians.[100] He recommends that international investment arbitration be made subject to the local justice system by reinstating the exhaustion of local remedies requirement,[101] opining that ISDS tribunals' work would be positively influenced if there was a final decision of the host state's judiciary.[102] He also recommends a subtle form of diplomatic protection,[103] which this work argues against. Also, subjecting international investment arbitration first to the local justice system, as suggested by Perrone, seems problematic because of the weakness and perceived inefficiency of some national judiciaries.[104]

Senator Warren of the United States' criticism of international investment arbitration, as 'a mechanism to challenge US government policies before a panel of private attorneys that sits outside of any domestic legal system',[105]aligns with Perrone's position stated above. Scholars who reason like Senator Warren and Perrone see the state as 'the underdog' in international investment arbitration and hold that instead of incentivising economic development through FDI inflows, international investment arbitration may be hampering the promotion of economic and institutional

[99]ibid.
[100]Perrone (n 12) 10.
[101]The requirement for the exhaustion of local remedies as a condition precedent for initiating arbitration is already entrenched in some BITs.
[102]Perrone (n 12) 12.
[103]ibid.
[104] See, for example, *Sümerli v Germany* (ECtHR Judgment, Case 75.529/1 of 8 June 2006), where the European Court of Human Rights held that the unreasonably long court proceedings in Germany amounted to ineffectiveness in providing for the protection of rights within the ECHR. There are certainly many more countries whose situations are worse today than Germany's situation in 2006. This goes further to underscore the preference of international investment arbitration over litigation as a local remedy.
[105]Puig and Strezhnev (n 80) 735 citing United States Trade Representative, 'Letter from Senator Warren to Ambassador Michael Froman' dated 17 December 2014.

growth within states.[106] The Writer's position is in tandem with the above reasoning only to the extent that the way international investment arbitration currently runs may be hampering the promotion of states' economic and institutional development,[107] especially the fact that excessive damage awards against host states have the potential of hampering losing respondent states' economic wellbeing.[108]

Many states have already started taking steps, through legislation and executive policies, to shield their economies from excessive damage awards. Some of these steps, however, are targeted at abolishing international investment arbitration. For example, as stated above, the South African Protection of Investment Act 2015, which creates the legal framework to resolve investment disputes in South Africa,[109]removes the resolution of investment 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 an investment dispute.[110]

Similarly, some countries are already excluding arbitration from their BITs. India is at the forefront of this movement,[111] and to date, it has not signed the ICSID Convention.[112] Former President Donald Trump of the US tacitly engaged in advocacy against the use of arbitration in investment disputes involving America in a way that suggests that the US government is wary of the exorbitant damages being awarded against it by international arbitral tribunals.[113]

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[106] ibid 738.
[107]Kaushal (n 3) 497.
[108]See Convention for the Pacific Settlement of International Disputes 1907 (Hague Convention I), 1 Bevans 577, pmbl, where the guiding opinion for enacting the international instrument was the expediency'to record in an International Agreement the principles of equity and right on which are based the security of States and the welfare of peoples'.
[109]Protection of Investment Act 2015 (South Africa), s 13.
[110] 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.
[111] Malik (n 54); Adiyat Goyal, 'Fixing the Broken Legs of Investor-State Arbitration' (2016) 1 HNLU Student Bar J17, 18.
[112]ICSID Convention (n 21).
[113]See James McBride and Andrew Chatzky, 'How are Trade Disputes Resolved?' (January 2020)<www.cfr.org/backgrounder/how-are-trade-disputes-resolved> accessed 17 March 2020; see also Schreuer (n 25) 5.

The new trend described above is rapidly gaining traction internationally.[114] In May 2021, Canada introduced a new model Foreign Investment Promotion and Protection Agreement (FIPA) which, among other things, redefines investment and the requirement for an enterprise.[115]Under the new FIPA, an investment must 'involve the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk';[116] and an enterprise is required to have 'substantial business activities in the territory' of the host state.[117] The requirement of 'substantial business activities' contrasts with what happened in *P&ID v Nigeria*,[118] where P&ID did not have any substantial investment in Nigeria related to the subject matter of the contract.

The different reforms proposed by scholars and pursued by countries and regional organisations would result in further fragmentation of investment dispute resolution mechanism, which was one of the ills international investment arbitration sought to avoid.[119] On this score, UNCITRAL has correctly noted thus:

> UNCITRAL should undertake work on investor-State dispute settlement reform as a matter of priority, as there was a need to identify issues in relation to the existing settlement mechanism, to discuss whether those issues needed to be addressed and, if so, to develop any relevant solutions. As a general point, it was stressed that the main objective of that work should be to restore confidence in the overall system. It was underlined that there was value in multilateral consideration of the issues so as to avoid further fragmentation of the investor-State dispute settlement regime.[120]

[114]See generally Nottage (n 54) 253.
[115] IISD, 'Canada publishes 2021 Model Foreign Investment Promotion and Protection Agreement' (2021) 12(2) Online J on Investment L and Policy 23 <https://www.iisd.org/system/files/2021-06/iisd-itn-june-2021-english.pdf> accessed 2 August 2021.
[116]2021 Model FIPA (Canada), art 1.
[117]ibid.
[118]*P&ID v Nigeria* (n 29).
[119]See Konstantin Volkov, 'T.he Necessity of Reforms within the Arbitration System under the ICSID Convention: Myth or Reality?'(2018) 6 (4) Global J of Politics and L Research 50, 53, where the author correctly argues that total fragmentation will result in many legal uncertainties within the system of rules.
[120] UNCITRAL (n 92) paras 243-250.

## CONCLUSION /RECOMMENDATIONS

The concept of justice is age-long but has been of particular interest since the birthing of the Rawlsian concept of justice in the 20th Century.[121] Justice entails striking a balance between the interests of a right-holder and a duty-bearer.[122] Doing justice to 'A' must not be overstretched to doing injustice to 'B'. There must be a balance or, what is known as, 'community of justice'.[123] Thus, justice, in its true essence, is fairness to both the 'victim' and the 'offender'; this can be arrived at by reflexive equilibrium,[124] which seeks a balance by adjusting legal principles in the case of litigation or arbitration.

The required justice equilibrium was long lost when BITs entered the international legal order; BITs traditionally make provisions for investor rights without counterbalancing them with investor obligations. The new trend heralded by the Norway model BIT and the PAIC, which make provisions for investor rights and investor obligations, is one way to bring about the needed justice equilibrium between foreign investors and host states. The older generation of BITs makes it impossible for states to bring claims under them against investors. This lack of obligation, on foreign investors' part, has encouraged them to easily violate the human rights of the indigenes of the communities where they carry out their investment activities[125] and to make claims they could not sustain under any other mechanism.[126]

An outcome of the lack of investor obligations in BITs is the unprecedented excessive damage awards handed down by international tribunals against respondent states.[127] In reaction, states have started devising ways to circumvent international investment arbitration, some of which may result in 'throwing out the baby with the bathwater'.[128]This work aimed at highlighting a workable option to the present diminishing influence of international investment arbitration, which is the

[121] Klara Helene Stumpf, Christian U. Becker and Stefan Baum, 'A Conceptual Structure of Justice - Providing a Tool to Analyse Conceptions of Justice' (2016) 19 Ethical Theory Moral Practice 1187, 1188. DOI 10.1007/s10677-016-9728-3.
[122] See Martijn Boot, 'The Aim of a Theory of Justice' (2012) 15(1) Ethical Theory and Moral Practice 7, 9.
[123]See Stumpf, Becker and Baum (n 539) 1189, 1192 and 1193.
[124]ibid 1191.
[125]See, for example, *Chevron v Ecuador (I)* (n 36), *Aguas del Turani* (n 35) and *Renco v Peru (I)* (n 37).
[126]*Santa Elena v CostaRica*Final Award (n 448); see also Kaushal (n 3) 497.
[127]This is so because in treaty-based international investment arbitration, there are no obligations regarding the claimant investor on which the respondent state may base a counter-claim or a defence.
[128]See Nottage (n 54).

application of equity and justice-rooted principles by ISDS tribunals, based on well-founded international law principles.

Given the above findings, the following recommendations are made hereunder for the consideration of states, ISDS tribunals, and the arbitration community:

1. States, across the board, should consider implementing well-thought-out arbitration policies that would safeguard their national interests and, in particular, follow the guidance provided by Norway Model BIT and the PAIC by ensuring that all international investment agreements entered into by them contain both investor rights and obligations.
2. States should consider adopting the practice of always clearly delimiting the quantum of damages in investment agreements and legislations in case of a breach 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.[129] In this regard, 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 that is proved.[130]
3. States should consider developing strategic plans, updated regularly, to keep them at the cutting edge in responding to international investment arbitration issues. This way, the repudiation of a contract by the government is well contemplated and the worst case-scenario is known to it ahead of time.
4. States should consider legislatively recognising the normativity of equity in arbitration and qualify the rule against *exaequo et bono*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.
5. When determining the quantum of damages, international arbitral tribunals should consider the need to take into account the actual amount of money invested or expended towards a

[129]ibid.
[130] Note that in the *P&ID v Nigeria* award, the general damages of $6.6billion awarded against the respondent state is 16,500 percent of the expenses of about $40million allegedly incurred by the claimant; also note that that amount is more than the anticipated profits of $5billion to $6billion estimated by the claimant's principal witness (see First Witness Statement (n 50) para 3).

project and endeavour not to cross the line of fair compensation, based on actual loss and /or reasonable general damages.

6. The arbitration community should support the current ISDS reform programmes of UNCITRAL and ICSID, with the intention of saving the international investment arbitration system from collapse.