Denial of Justice in International Law

Since the last comprehensive work devoted to denial of justice in international law was published in 1938, the possibilities for prosecuting this offence have evolved in fundamental ways. It is now settled law that States cannot disavow international responsibility by arguing that their courts are independent of the government. Even more importantly, the doors of international tribunals have swung wide open to admit claimants other than states: non-governmental organisations, corporations and individuals.

A vast number of new treaties for the protection of investment allow private foreign investors to seise international tribunals to claim denial of justice. This has given rise to intense controversy. There are those who consider that the very prospect of an international tribunal passing judgment on the workings of national courts constitutes an intolerable affront to sovereignty. Others believe that such must precisely be the role of international tribunals if the rule of law is to prosper.

The proponents of imperial might once found it convenient to drape the exercise of power in virtuous shrouds, as in the Don Pacifico affair in 1850, when Palmerston justified the seizure of all ships in the harbour of Piraeus (in retribution for the failure of the Greek government to grant redress to a British subject) by his Civis Romanus Sum oration in the House of Commons. Today gunships have been replaced by international tribunals, and so even those who have no might may have the right to seise international jurisdictions to question the conduct of courts in the most powerful countries. The tables may therefore be turned, as when the US in 2002 found itself taken to task on account of alleged denials of justice suffered by two Canadian investors at the hands of the courts of Massachusetts and Mississippi.

This book examines the modern understanding of denial of justice.
Denial of Justice in International Law

Jan Paulsson
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resolution A/RES/48/137, adopted 20 December 1993 66
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resolution A/RES/58/183, adopted 18 March 2004 66
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resolution 2003/43, UN Doc. E/CN.4/2003/L.11/Add.4,
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Abbreviations

AJIL                    American Journal of International Law
Amco II                Amco Asia Corp., Pan American Development, Ltd. and PT
Amco Indonesia v. Republic of Indonesia, award in the
resubmitted case, 5 June 1990, 1 ICSID Reports 569
(Lalonde, Magid, Higgins (presiding))
BYIL                   British Yearbook of International Law
de Visscher             Charles de Visscher, ‘Le déni de justice en droit
                        international’ (1935) 54 Recueil des cours 370
ECHRR                  European Court of Human Rights
EHRR                   European Human Rights Reports
Fitzmaurice            Sir Gerald Fitzmaurice, ‘The Meaning of the Term
                        ‘Denial of Justice’’ (1932) 13 BYIL 93
Freeman                A. V. Freeman, The International Responsibility of States
                        for Denial of Justice (Longman, London/New York,
                        1938)
ICC                    International Chamber of Commerce
ICJ                    International Court of Justice
ICSID                  International Centre for Settlement of Investment
                        Disputes
ICSID Review           ICSID Review – Foreign Investment Law Journal
ILC                    International Law Commission
ILM                    International Legal Materials
Loewen                 The Loewen Group, Inc. and Raymond L. Loewen v. United
                        States of America, decision on jurisdiction, 5 January
                        2001, 7 ICSID Reports 434 (Fortier, Mivka, Mason
                        (presiding)); award, 26 June 2003, 7 ICSID Reports
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Mondev International Ltd v. United States of America, award, 11 October 2002, 6 ICSID Reports 192 (Crawford, Schwebel, Stephen (presiding))

Moore, Arbitrations

NAFTA
North American Free Trade Agreement

Oppenheim

PCIJ
Permanent Court of International Justice

Recueil des cours
Recueil des cours de l'académie de droit international

RIAA
Reports of International Arbitral Awards (United Nations)

UN
United Nations

Vattel