

## 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 seize 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 Today gunships have been replaced by international tribunals, and so even those who have no might may have the right to seize international jurisdictions to question the conduct of courts in the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.

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| <i>Case of the 'Ada' (US v. Mexico)</i> , Moore, <i>Arbitrations</i> 3143  | 101   |
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| AJIL           | <i>American Journal of International Law</i>  |
| <i>Amco II</i> | <i>Amco Asia Corp., Pan American Development, Ltd. and PT Amco Indonesia v. Republic of Indonesia</i> , award in the resubmitted case, 5 June 1990, 1 <i>ICSID Reports</i> 569 (Lalonde, Magid, Higgins (presiding))  |
| BYIL           | <i>British Yearbook of International Law</i>  |
| de Visscher    | Charles de Visscher, 'Le déni de justice en droit international' (1935) 54 <i>Recueil des cours</i> 370   |
| ECHR           | European Court of Human Rights  |
| EHRJ           | <i>European Human Rights Reports</i>  |
| Fitzmaurice    | Sir Gerald Fitzmaurice, 'The Meaning of the Term 'Denial of Justice'' (1932) 13 BYIL 93   |
| Freeman        | A. V. Freeman, <i>The International Responsibility of States for Denial of Justice</i> (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   | <i>ICSID Review – Foreign Investment Law Journal</i>  |
| ILC            | International Law Commission  |
| ILM            | <i>International Legal Materials</i>  |
| <i>Loewen</i>  | <i>The Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i> , decision on jurisdiction, 5 January 2001, 7 <i>ICSID Reports</i> 434 (Fortier, Mivka, Mason (presiding)), award, 26 June 2003, 7 <i>ICSID Reports</i> 451 (Mustill, Mikva, Mason (presiding)) |



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| Moore, <i>Arbitrations</i> | J. B. Moore, <i>History and Digest of International Arbitrations to which the United States Has Been a Party</i> (6 vols., Washington, DC: US Government Printing Office, 1898)   |
| NAFTA                      | North American Free Trade Agreement   |
| <i>Oppenheim</i>           | Sir Robert Jennings and Sir Arthur Watt (eds.), <i>Oppenheim's International Law</i> (9th edn, 2 vols., Harlow: Longman, 1992)  |
| PCIJ                       | Permanent Court of International Justice  |
| <i>Recueil des cours</i>   | <i>Recueil des cours de l'académie de droit international</i>   |
| RIAA                       | <i>Reports of International Arbitral Awards</i> (United Nations)  |
| UN                         | United Nations  |
| Vattel                     | Emer (or Emmerich) de Vattel, <i>The Law of Nations or the Principles of Natural Law (Le droit des gens, ou principes de la loi naturelle)</i> , trans. Charles G. Fenwick (1916), <i>Classics of International Law</i> (3 vols., Buffalo, NY: William S. Hein & Co., 1995) |