Fairness and the Final Word: State Responsibility for Court Action in Investment Arbitration

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ABSTRACT

State responsibility for the actions of national courts in international investment law is often interpreted within the framework of denial of justice. Indeed, denial of justice is widely perceived as the archetypal breach of international law by courts. However, this paradigm does not always align well with the reality of investment treaty jurisprudence. In many investment treaty arbitration cases, States have been found to have breached treaty standards such as protections against expropriation, those providing for fair and equitable treatment and an obligation to ensure ‘effective means of asserting claims and enforcing rights’ by court actions and omissions. Furthermore, investment treaty tribunals have frequently shown reluctance to make findings of a denial of justice — referring to its high threshold and circumscribed scope — and have rather preferred to find that State responsibility was engaged by court action which breached other treaty standards. This essay explores the dialectic — played out in investment treaty cases — between proponents of a denial of justice paradigm regarding State responsibility for court action, and proponents of a counterview that court action and inaction can give rise to direct breaches of other treaty standards.

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I. INTRODUCTION

Historically, denial of justice was frequently – and perhaps misleadingly – used as an umbrella term for a broad range of international delicts, including any that were attributed to a State through the actions or inactions of its courts.\(^1\) The nomenclature has since evolved and denial of justice has come to be understood as a deficiency in the administration of justice giving rise to State responsibility in international law. It is most frequently associated with courts, but its scope can potentially apply to the actions of other State organs and agencies as well.\(^2\)

The centrality of the standard of denial of justice to State responsibility for court action is attested to by the serious scholarship devoted to this subject (both contemporary and of earlier provenance),\(^3\) and the emphasis given by investors and arbitral tribunals in investment treaty cases where court action is impugned.\(^4\) However, the parameters of denial of justice, such as the exhaustion of local remedies (as a substantive requirement),\(^5\) extend beyond that of other treaty breaches and the threshold for its breach is high.\(^6\) As such, arbitral tribunals often afford a relatively high degree of deference to States where...

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1. Further compounding the inconsistency in terminology, some jurisprudence has suggested that denial of justice can only occur where courts have failed to remedy an earlier injustice, and not where the courts themselves perpetrated the injustice. See, for example, the decision of the U.S.-Mexico Claims Commission in *B.E. Chattin (United States) v. United Mexican States* in UN Reports of International Arbitral Awards (R.I.A.A.), vol. IV, 287; Regarding the historically narrow approach to denial of justice, see also, L. C. Delanoy and T. Portwood, ‘La Responsabilité de l’Etat pour déni de justice dans l’arbitrage d’investissement’ Revue de l’Arbitrage, (Comité Français de l’Arbitrage 2005), vol. 2005, Issue 3, 606 et seq.

2. In his treatise on denial of justice, Jan Paulsson provides hypothetical examples of an executive branch refusing to appoint judges to the only jurisdiction competent to hear a particular type of case, or adopting a decree that has the effect of invalidating the contractual terms of a single contract to the benefit of the government as denials of justice by the actions of a State’s executive or administrative agencies. See J. Paulsson, *Denial of Justice* (Cambridge: Cambridge University Press, 2005), 45.


4. See, for example, Robert Azinian et al. *v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999; *The Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003; *Montev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002; *Jan de Nul N.V. v. Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008; *Waguib Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009; *ATA Construction Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010.

5. *The Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, paras 165 et seq.; *Waste Management Inc. v. United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para. 97; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, footnote 122.

investors allege that they have suffered a denial of justice by the actions or inactions of courts in the host State.

Part of the reason for this is the view that it is not the role of investment arbitration tribunals to serve as appellate bodies on questions of national law. However, if the national system of justice has failed an investor, it may be put under scrutiny by international tribunals. In considering issues of State responsibility (including concerning court actions), arbitral tribunals can – and frequently do – consider issues of national law.

Moreover, it is international tribunals that will generally have the last word on issues of international law. Their conclusions may be affected by issues relating to and/or breaches of national law, but national law matters are not generally determinative in disputes concerning the scope of a State’s obligations under international law. Rather, as the International Law Commission Articles on State Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility) provide: ‘The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterisation of the same act as lawful by internal law.’

Notwithstanding the doctrinal centrality of denial of justice to State responsibility for court actions and omissions, numerous investment treaty tribunals have found that court action can also bring about State responsibility by way of directly breaching other investment treaty standards, even in circumstances where the same breach does not seem to enter the narrower scope of application and/or higher threshold of breach of denial of justice. This may appear unsurprising, not least since pre-investment treaty jurisprudence shows that State responsibility can be engaged by court action that does not constitute a denial of justice – through the breach of other treaty standards, for example. Moreover, the State is treated as a unitary entity in international law, with the actions of a State’s organs considered as actions of the State. Accordingly, on one view, once the State’s responsibility

7 Azinian v. Mexico, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para. 99.


9 Article 3 of the ILC Articles on State Responsibility. See also Article 1, which provides that ‘Every internationally wrongful act of a State entails the international responsibility of that State’.

10 See the Lotus Case, (France v. Turkey), Judgment No. 9, 7 September 1927, P.C.I.J Series A, No 10, 24, where the Permanent Court of International Justice held that ‘The fact that judicial authorities may have committed an error in their choice of the legal provision applicable...can only affect international law in so far as treaty provision enters into account, or the possibility of a denial of justice arises.’ More recently, see also the Arrest Warrant case, (Democratic Republic of the Congo v. Belgium), Judgment, 11 April 2000, I.C.J. Reports 2002, 33, where the International Court of Justice held that an arrest warrant issued by a Belgian judge against a Minister of the Democratic Republic of the Congo breached Belgium’s international law obligations.

11 Article 4 of the ILC Articles on State Responsibility provides that, with respect to ‘Conduct of organs of a State’, (i) the conduct of any State organ shall be considered an act of that State under international law,
is engaged (by whatever organs or agencies of the State for which the State is responsible under international law), all of the State's substantive obligations should apply.\(^\text{12}\)

Nevertheless, the variety of circumstances resulting in findings by arbitral tribunals of State responsibility for national court actions, and the variety of treaty standards that have thus been engaged, reflects a far more complex pattern than might be suggested by the particular, and often narrower, prism of denial of justice.

This essay considers the issue of State responsibility for court actions by reference to the denial of justice principle. It also compares the approach taken by arbitral tribunals to allegations of denial of justice to the findings by arbitral tribunals of breaches of other investment treaty standards by court action and inaction. Under the evolving investment arbitration jurisprudence, court actions and inactions have resulted in findings of State liability for breaches of treaty standards, such as the fair and equitable treatment (beyond the context of denial of justice), protection from expropriation and the obligation to ensure effective means of asserting claims and enforcing rights. In these circumstances, the actions of national courts did not necessarily meet the high threshold of denial of justice or fall within its scope of application, but nonetheless were found to have breached other applicable treaty standards.

The remainder of this essay: (i) summarises certain features of the denial of justice standard that emerge, in particular, from recent investment treaty jurisprudence considering the standard; (ii) considers investment treaty cases in which States have been found responsible for court action and inaction concerning breaches of treatment standards other than denial of justice; and (iii) concludes by considering whether the emerging jurisprudence of State responsibility for court actions is consonant with general principles of international law.

II. DENIAL OF JUSTICE

The obligation on States to accord foreign investors justice has a long provenance in customary international law, specifically as a component of the minimum standard of treatment under international law.\(^\text{13}\) The modern incarnation of the concept of denial of justice as a component of fair and equitable treatment in investment treaties\(^\text{14}\) therefore

\[\text{whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State; [and] (2) an organ includes any person or entity which has that status in accordance with the internal law of the State.}\]

\[\text{12 Despite that, particular considerations and sensitivities apply in the context of claims concerning breaches of international law by a State's national courts. Such sensitivities relate, at least in part, to a reluctance on the part of international tribunals' to be seen to act as international appellate courts for national courts on issues of domestic law.}\]


\[\text{14 The Loewen Group v. USA, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 132; Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/07/5, Award, 20 August 2007, para. 7.4.11; Rumeli Télékom AS and Télékom Telekomunikasyon Hizmetleri v. The Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award 29 July 2008, para. 651; Jan de Nul v. Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 188; Mohammad Ammar Al-Baboud v. Republic of Tajikistan, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, para. 221; Rupert Binder v. Czech}\]
has longstanding antecedents in international law. For example, failure to provide access to justice for aliens or failure to correct an unfairness within a national system of justice has for some time been considered an international delict.\(^\text{15}\)

The modern development of the denial of justice standard in investment arbitration jurisprudence can be traced back to the findings of the Arbitral Tribunal in the NAFTA case of *Robert Azinian v. United Mexican States*.\(^\text{16}\) In that decision, the Tribunal categorised potential denial of justice claims under four headings: 1) refusal to entertain a suit, 2) undue delay, 3) administration of justice in a seriously inadequate way, and 4) clear and malicious misapplication of the law. The Tribunal elaborated on the fourth category, noting that it overlapped with "the notion of "pretence of form" to mask a violation of international law."\(^\text{17}\)

Jan Paulsson in an opinion delivered a few years later in *Chevron v. Ecuador* explained that the basic premise of denial of justice is that a State incurs responsibility if it administers its laws to aliens in a fundamentally unfair manner.\(^\text{18}\)

Denial of justice can occur both in judicial proceedings as well as administrative proceedings.\(^\text{19}\) Denial of justice can also occur by actions of the legislative as well as the executive branches of the State.\(^\text{20}\) Furthermore, courts can be responsible for denial of justice claims by colluding with the executive.\(^\text{21}\)

There are three specific features of denial of justice that are particular to that standard and that do not necessarily apply to other treaty breaches by a State’s courts. These are: (1) the exhaustion of local remedies, as a substantive requirement, (2) the (generally) procedural nature of a denial of justice, and (3) the high threshold for the denial of justice standard to be breached. The remainder of this section addresses these three issues in turn, before finally considering the somewhat exceptional category of delay as a denial of justice.

### a) Exhaustion of Local Remedies

When considering claims of denial of justice, a State’s system is taken into consideration

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\(^{15}\) Paulsson, *Denial of Justice*, 1, 7 et seq.

\(^{16}\) *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999.

\(^{17}\) Ibid., paras 102 and 103.


\(^{19}\) *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, para. 197; *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, para. 4,742.

\(^{20}\) Paulsson, *Denial of Justice*, 44 et seq.; Opinion of Jan Paulsson in *Chevron v. Ecuador*, PCA Case No. 2007-2, UNCITRAL, Partial Award on the Merits, 30 March 2010, para 15; also see Siag & Vecchi v. Egypt ICSID Case No. ARB/05/15, Award, 1 June 2009, paras 454 et seq. where the State was found liable for a denial of justice by the actions of its executive in failing to comply with national court judgments.

\(^{21}\) See, for example, *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005 at para. VII.1.C.25, p. 28 where collusion between a senior member of the government and the court was held to be ‘a clear breach of the prohibition of denial of justice under international law’. 
as a whole. As a substantive matter, it is therefore considered appropriate that the system should be given a chance to deliver justice before findings of a breach of denial of justice are made. A corollary of this is that an investor must usually have first exhausted local remedies available to it within the relevant national legal system, giving the system a chance to ‘correct’ its own mistakes in the first instance.

In Loewen v. USA, for example, the Tribunal held:

No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State’s legal system.

The requirement of exhaustion of local remedies brought in the context of investor-State arbitration claims for denial of justice should be distinguished from other requirements of exhaustion of local remedies in international law, such as in the context of diplomatic protection or in the context of human rights claims.

By contrast to the procedural requirement of exhaustion of local remedies in other contexts, the requirement of exhaustion of local remedies in the context of investor-State arbitration is a substantial requirement relating to the scope of the denial of justice standard. The Tribunal in Waste Management v. Mexico, citing from the Loewen Tribunal, held:

What matters is the system of justice and not any individual decision in the course of proceedings. The system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim.

22 Oostergetel v. Slovak Republic, UNCITRAL, Final Award, 23 April 2012, footnote 122, para. 273; Paulsson, Denial of Justice, 7, 100, 111.

23 There are exceptions to this, where for example, it is apparent that there is no justice to exhaust. Robert E. Brown (United States) v. Great Britain, R.I.A.A., vol. VI, 23 November 1923, 129. See further below.

24 The Loewen Group v. USA, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 154; Oostergetel v. Slovak Republic, UNCITRAL, Final Award, 23 April 2012, footnote 122, para. 273.

25 In diplomatic protection claims, a State takes diplomatic or legal action on behalf of its national against another State, at the State-to-State level. There is a procedural requirement in this context, that claims must first be pursued by the national before the national courts of the host State up-until a final decision of the highest court. In other words, the national must exhaust all available national remedies as a procedural requirement before its home State can commence diplomatic protection on its behalf. A similar procedural requirement to exhaust local remedies exists in the context of human rights, subject to limited exceptions, such as where local remedies are unavailable, ineffective or unreasonably delayed.

26 The exhaustion of local remedies in relation to the admissibility of other investor-State claims is not a requirement in investment treaty arbitration, unless it is explicitly required under the applicable investment treaty. See also Article 26 of the ICSID Convention which provides that ‘a State may require the exhaustion of local administrative or judicial remedies as a condition of consent to ICSID arbitration.’ The clear inference is that absent any such specific requirements, there is no general procedural bar necessitating the exhaustion of local remedies as a pre-condition of either jurisdiction or admissibility in ICSID arbitration. This principle was referred to in Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.33. However, the relationship between exhaustion of local remedies as a procedural matter and as a substantive matter in the context of denial of justice has been noted. As observed by a prominent commentator: ‘The old rule of the exhaustion of local remedies has been largely dispensed with in the context of investment arbitration but it keeps haunting us in other legal disguises.’ C. Schreuer, ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’, 4 Law and Practice of International Courts and Tribunals (2009), 3.

27 Waste Management v. Mexico, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 97.
There is, however, a caveat to the substantive requirement of exhaustion of local remedies for denial of justice claims. If it is apparent that attempts to exhaust local remedies would be futile, the investor is not required to go down that route. Although it is beyond the ambit of this essay to examine the circumstances in which the exhaustion of local remedies is considered futile, it is notable that the futility caveat also exists in other areas of public international law, such as in the context of human rights claims. For example, in Kennedy v. United Kingdom, the European Court of Human Rights held:

The Court recalls that where the Government claims non-exhaustion they must satisfy the Court that the remedy proposed was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success.

Notably, the exhaustion of local remedies is not generally (absent specific treaty wording) a requirement for proving breaches of other investment treaty standards. The jurisprudence addressed further below suggests that this is the case even if claims of treaty breaches concern court actions, outside of the context of denial of justice claims.

b) Scope of the Denial (Procedural or Substantial)

It is well established that international tribunals are not appellate bodies regarding determinations by national courts of questions of national law. National law is generally considered as an issue of fact in the context of international law proceedings, although its role is not always so limited or so clear-cut. Accordingly, a mere misapplication of national law will not usually in itself qualify as a breach of international law. In some


29 Kennedy v. UK, App No. 26839/05, European Court of Human Rights, 18 August 2010, para. 109, also citing Akdivar and Others v. Turkey, 16 September 1996, para. 68, Reports of Judgments and Decisions 1996-IV; and Sejdovic v. Italy [GC], no. 56581/00, para. 46, ECHR 2006-II.


31 Aznian v. Mexico, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para. 99; Mondev v. USA, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, para. 126, citing Aznian v. Mexico; The Loewen Group v. USA, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 48; ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 190; Mobil Investments Canada Inc. et al. v. Government of Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 167; Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 159; Generation Ukrainie v. Ukraine, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.33; Jan de Nul v. Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 82; see also footnote 16.

32 See, for example, Article 42(i) of the ICSID Convention which provides that ‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’

33 The position may be different in certain circumstances, such as regarding a claimed breach of an umbrella clause, the scope of which was deemed to include a contract governed by national law which was breached. On the potential scope of umbrella clauses more generally, see SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/20, Award, 10 February 2012; SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003; and SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,
circumstances, however, the misapplication of national law may be so erroneous that it may implicate and even qualify as a breach of international law standards. 34

Some investment tribunals have drawn the distinction between procedural and substantive denials of justice. In *Vivendi v. Argentina*35, the Tribunal distinguished the two concepts, stating that the unfair treatment of investors in national courts could be a procedural denial of justice whereas if the judgments of the courts were substantively unfair, this could result in a substantial denial of justice.36

The Tribunal in *Jan de Nul v. Egypt* also distinguished the two types of denial of justice. In the schema of procedural denial of justice, the Tribunal included due process before national courts, the duration of the court proceedings and the fair conduct of the panel of judges. As regards substantive denial of justice, the Tribunal referred to an assessment of whether the national courts’ decision resulted in a clearly improper and discreditable judgment.37

In *Jan Oostergetel v. Slovak Republic*, the Tribunal similarly considered claims of breach of due process and delay of proceedings under the category of procedural denial of justice, and whether the outcome of the proceedings was discreditable and offensive to judicial propriety under the rubric of substantial denial of justice.38

Notwithstanding the approach taken in the jurisprudence distinguishing the notion of procedural denial of justice from that of substantive denial of justice, at least one learned commentator suggests that this distinction may be more apparent than real in the context of modern international law.39 Rather, he argues that denial of justice is essentially procedural and that substantive issues (i.e., errors of law) are relevant only in as far as they evidence a violation of procedural and due process rights:

Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state’s failure to provide a decent system of justice. They do not constitute an international appellate review of national law.40

Whether considered within a framework that delineates substantive denial of

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35 *Compañía de Aguas v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, partially annulled for reasons irrelevant for the purposes of this section.

36 ‘If the Claimants were treated unfairly in those courts (denial of procedural justice) or if the judgment of those courts were substantively unfair (denial of substantive justice)...’, *Compañía de Aguas v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 80.

37 *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 196 et seq. This assessment contains echoes of the decision rendered by the Arbitral Tribunal in the case of *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, para. 127: ‘In the end, the question is whether, at an international level and having regard to generally accepted standards of administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.’

38 *Oostergetel v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, footnote 122, para. 276 et seq.

39 Paulsson, *Denial of Justice*.

justice from procedural denial of justice or as different facets of one test, the procedural underpinnings of the denial of justice standard are salient. Even where a national court judgment is considered to constitute a denial of justice because it is ‘clearly improper and discreditable’ – a formulation that might be taken to imply a substantive denial of justice – the thwarting of an investor’s right to a fair hearing and a fair result has a characteristically procedural flavour.

c) The Threshold Test

Certain authorities support a view that the threshold for establishing a denial of justice is particularly exacting and may indeed be more demanding than that of other investment treaty standards. Some of the jurisprudence on denial of justice suggests that it will be found where there is ‘a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety’ or ‘manifest injustice in the sense of lack of due process leading to an outcome which offends a sense of judicial propriety.’

Thus, the applicable threshold test, at least as reflected in certain authorities, is whether an impartial tribunal is shocked or surprised and/or whether the impugned judicial result was clearly improper and discreditable. A mere error in the application of local law does not therefore necessarily result in a denial of justice. In certain circumstances, the wrongful application of the law may provide ‘elements of proof of a denial of justice’. However, for such circumstances to exist, jurisprudence suggests that the error must be of such a kind that ‘no competent judge could have made’ it. Notably, this high threshold does not necessarily apply in the context of breaches of other (non-denial of justice) treaty standards by national courts.

d) Delay as Denial of Justice

There is an important sub-category of denial of justice which has, to some extent, its own ambit: delay. The inclusion of delay as a denial of justice has a longstanding

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41 *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, para. 127

42 *Elettronica Sicula*, I.C.J. Reports 1989, para. 128, citing *Colombian-Peruvian Asylum case*, Judgment, 20 November 1950, I.C.J. Reports 1950, 284. This test of arbitrary State conduct has been frequently cited by investment treaty tribunals addressing denial of justice. See, for example, *The Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 127.

43 *The Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 132.

44 *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, para. 127.


46 *Pantechniki v. Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 94.

47 One commentator observes: ‘Quite obviously, this guarantee [referring to prohibition of denial of justice] implies a very limited scope of protection, fundamentally different from the scope of the rules of an investment agreement with its much wider rules in favour of the investor’, R. Dolzer ‘Local Remedies in International Treaties’ in *Practising Virtue* (eds.) David D. Caron et al., (New York: Oxford University Press, 2015), 290. There is jurisprudence where tribunals rejected alleged breaches of denial of justice but found breaches of other treaty standards. See, for example, *Chevron v. Ecuador*, PCA Case No. 2007-2, UNCITRAL, Partial Award on the Merits, 30 March 2010, para. 244 and *White Industries v. India*, UNCITRAL, Final Award, 30 November 2011, paras 11.3.2 to 11.3.3.

48 Although unquestionably part of the denial of justice standard, delay has its own particularities - such as the fact that it doesn’t, by definition, require there to be an exhaustion *sensu stricto* of local remedies. Rather,
history\textsuperscript{49} and an unimpeachable logic captured within the legal maxim that ‘justice delayed is justice denied’. It is axiomatic that it is not enough for a remedy merely to be theoretically available under a State’s justice system, but that it also has to be effective within a reasonable time frame. Nevertheless, the question remains: how long is too long?

Within the human rights context, extensive delay is capable of constituting a breach of international law within the framework of the ‘right to a fair trial.’ For example, the timeliness of proceedings before national courts is subject to requirements of ‘reasonable time’ under Article 6 of the European Convention on Human Rights.\textsuperscript{50} In cases before the European Court of Human Rights, the reasonableness of the length of domestic court proceedings is assessed in the light of the complexity of the case, conduct of the applicant and the relevant authorities and what was at stake for the applicant.\textsuperscript{51} Taking these criteria into account, proceedings that took nine years, eight years, and conduct amounting to thirty-four months of inaction by the authorities, have all been sanctioned.\textsuperscript{52}

In investment arbitration too, excessive delay in the rendering of justice is considered to constitute a denial of justice ‘in and of itself.’\textsuperscript{53} In its oft-cited articulation of four types of denial of justice the Tribunal in \emph{Robert Azinian v. United States of Mexico} also listed delay as one of them, as discussed above.\textsuperscript{54}

There is a high degree of fact specificity for claims of delay as a denial of justice, and no set period of the length of delay that would constitute a denial of justice. In \emph{Jan de Nul v. Egypt}, the Tribunal did not accept that ten years of waiting for a first instance judgment constituted a denial of justice, even though it was recognised that ten years was a long time for such a result. In doing so, the Tribunal took the complexity and technicality of the issues in those proceedings into account.\textsuperscript{55}

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\textsuperscript{50} See, for example, \emph{H. v. France}, para. 58 and Katte Klitsche de la Grange \emph{v. Italy}, para. 61: ‘In requiring cases to be heard within a “reasonable time”’, the Convention underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility.’ See also \textit{Scordino v. Italy}, (no. 1) [GC], para. 224: ‘The Court has repeatedly stressed the importance of administering justice without delays which might jeopardise its effectiveness and credibility.’ A failure to accord justice within a reasonable timeframe is also sanctioned within other human rights regimes such as the Inter-American Court of Human Rights; see for example, \textit{Case of Juan Humberto Sánchez}, Judgment of June 7, 2003. Series C No. 99, paras 127 and 132; \textit{Case of the Moiwana Community v. Suriname}, Judgment of 15 June 2006, para. 145.

\textsuperscript{51} European Court of Human Rights, Guide on Article 6, Right to a Fair Trial, <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf>. The same criteria were also used in \textit{Chevron v. Ecuador}, PCA Case No. 2007-2, UNCITRAL, Partial Award on the Merits, 30 March 2010, para. 250 and in \textit{White Industries v. India} UNCITRAL, Final Award, 30 November 2011, para. 10.4.10.

\textsuperscript{52} \textit{Bock v. Germany}, 1989, para. 49; \textit{Sürmeli v. Germany}, 2006, para. 132; \textit{Scordino v. Italy}, (no. 1) [GC], para. 227.

\textsuperscript{53} \textit{Jan de Nul v. Egypt}, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 256.

\textsuperscript{54} \textit{Azinian v. Mexico}, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para. 102.

\textsuperscript{55} \textit{Jan de Nul v. Egypt}, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 204.
In *White Industries v. India*, the Tribunal considered proceedings which had been pending for more than nine years. The nine years were considered as two separate periods of time: first, an initial period of three and a half years starting from the initiation of an enforcement action before the national courts to its stay after a Supreme Court decision. Thereafter, the six year period after the Supreme Court decision in which no resolution was reached, during which time the claimant chose not to appeal the stay of the enforcement order. Accordingly, the Tribunal held that the six year period could not be taken into account in its evaluation of delay due to the fact that the claimant did not appeal the stay order, and did not provide any suggestion or proof that such an appeal would have been futile. By contrast, India provided proof that such an appeal was available to the investor. Accordingly, India was not held responsible for a denial of justice for delay.56 The same Tribunal, however, found a breach of another treaty standard – that of ‘effective means of asserting claims and enforcing rights’.57 In doing so, the Tribunal illustrated how States can be found responsible in international law for the actions of their national courts under circumstances where the same actions of the national courts do not constitute a denial of justice.

### III. EFFECTIVE MEANS OF ASSERTING CLAIMS AND ENFORCING RIGHTS

This standard, also known as the ‘effective means clause’, was first included in the model negotiating text for the United States bilateral investment treaty program developed under the Reagan administration in the 1980s.58 Under such clauses, depending on their exact formulation, States undertake to provide investors with a system of effective means to assert their claims and enforce their rights arising out of investments.59 In *Duke Energy v. Ecuador*, the Tribunal held that this standard ‘guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments. As such, it seeks to implement and form part of the more general guarantee against denial of justice.’60 Yet this subsuming of the effective means standard within the umbrella of the notion of denial of justice is not the only approach that has been taken to it by investment arbitration tribunals.

For example, the Tribunal in *Chevron v. Ecuador* decided that ‘effective means of asserting claims and enforcing rights’ was an independent, specific treaty obligation. The Tribunal went as far as saying that this standard ‘constitutes a lex specialis and not a mere restatement of the law on denial of justice’ and ‘was created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice.’61 The *Chevron* Tribunal found in this context that the ‘effective means standard’

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56 *White Industries v. India*, UNCITRAL, Final Award, 30 November 2011, paras 11.3.2 to 11.3.3.
59 See for example, Article II (8) of the United States – Turkey Bilateral Investment Treaty, which provides that ‘Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorisations.’
was ‘distinct and potentially less demanding than the customary standard’ under which certain failures of courts may be accepted as a breach, although they would not necessarily qualify as a denial of justice under customary international law.62

The White Industries Tribunal, following the approach taken by the Chevron Tribunal, gave an exposition of the scope of ‘effective means standard’ and its requirements.63

This exposition illustrates that the ‘effective means standard’ is not coextensive with that of denial of justice, although the two standards overlap in certain respects. For example, exhaustion of local remedies was not deemed by the Chevron and White Industries Tribunals to be a necessary pre-condition to a finding of a breach of the ‘effective means standard’. Nor is it apparent that the same high threshold for a finding of denial of justice is required for there to be a breach of the ‘effective means standard’, provided that the other elements of the standard are made out.

IV. FAIR AND EQUITABLE TREATMENT

In Mondev v. USA, the Tribunal confirmed that the fair and equitable treatment standard encompasses denials of justice.64 Numerous other investment treaty tribunals have concurred.65 However, the fair and equitable treatment standard is broader than denial of justice (the scope of which is limited to the administration of justice) and encompasses other elements such as upholding the legitimate expectations of an investor, to take one of its more important aspects.66 For example, in Vivendi v. Argentina II, the Tribunal held that the fair and equitable treatment standard would be significantly diminished if it were limited to denial of justice.67

Furthermore, as discussed earlier in this essay, the denial of justice standard has a high threshold for its breach. An important question therefore is whether a State can be

62 Ibid., para. 244.

63 White Industries v. India, UNCITRAL, Final Award, 30 November 2011, paras 11.3.2 to 11.3.3.

64 Mondev v. USA, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, para. 127.

65 The Loewen Group v. USA, ICSID Case No. ARB(AF)/08/3, Award, 26 June 2003, para 132; Compañía de Aguas v. Argentina, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.11; Rumeli Telekom v. Kazakhstan, ICSID Case No. ARB/05/16, Award 29 July 2008; Jan de Nul v. Egypt, ICSID Case No. ARB/04/13 Award, para. 188; Mohammad Ammar v. Tajikistan, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, para. 221; Binder v. Czech Republic, UNCITRAL, Final Award (Redacted), 15 July 2011, para. 448; Siag & Vecchi v. Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009, paras 451-461.

66 The Tribunal in Rumeli Telekom v. Kazakhstan, ICSID Case No. ARB/05/16, Award 29 July 2008, at para. 609, held that ‘The fair and equitable treatment standard encompasses inter alia the following concrete principles: the State must act in a transparent manner; the State is obliged to act in good faith; the State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking in due process; [and] the State must respect procedural propriety and due process.’ The Tribunal in Brwater Guuff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, at para. 602 held that: ‘The general standard of “fair and equitable treatment” comprises a number of different components’ which included protection of legitimate expectations, good faith, transparency, consistency and non-discrimination. There is jurisprudence and commentary suggesting that the scope of the fair and equitable treatment standard is narrowed where it is formulated as coterminous with the minimum standard in customary international law. See for example, Cargill Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009; H. Haeri, A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law, Arbitration International, 2011, Vol.27, No.1; C. Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’ in Journal of World Investment and Trade (2005), 360; R. Kläger, Fair and Equitable Treatment in International Investment Law, (Cambridge: Cambridge University Press, 2011), 48 et seq.

67 Compañía de Aguas v. Argentina, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.11.
responsible for a breach of the fair and equitable treatment standard for the actions of its courts in circumstances where those court actions do not constitute a denial of justice.

In *Jan de Nul v. Egypt*, the Tribunal also held that the fair and equitable treatment standard encompasses denial of justice. The Tribunal further stated that the relevant standards to trigger State responsibility for the actions of a domestic court are the standards of denial of justice. In doing so, the Tribunal indicated that the application of more flexible standards would allow for the circumvention of the standards of denial of justice, including the requirement to exhaust local remedies.

However, there is precedent for an investment treaty tribunal making a finding of a breach of the fair and equitable treatment standard in circumstances where it did not find a denial of justice. In *ATA Construction v. Jordan*, the Tribunal held that an arbitration agreement qualified as an investment, being part of an ‘entire operation’ of an investment. The Tribunal further found that an unlawful interference by the Respondent State’s courts in the form of the retroactive extinguishment of the Claimant’s right to arbitrate breached the fair and equitable treatment standard. This finding is particularly notable as it followed the Tribunal’s determination that the Jordanian courts had not breached the denial of justice standard. Accordingly, it may be considered to support the proposition that court action can, in certain circumstances, be deemed to violate the fair and equitable treatment standard outside the purview of denial of justice.

V. EXPROPRIATION

There is a historic body of jurisprudence, including from the Iran-U.S. Claims Tribunal, to the effect that a State can expropriate an investor’s investments through the actions of its courts.

Recent investment treaty jurisprudence supports the proposition that a State can expropriate an investment through court action (irrespective of whether or not there has been a denial of justice). In *Saipem v. Bangladesh*, the Tribunal decided that the actions of the Bangladeshi courts interfering with a commercial arbitration proceeding constituted ‘measures having similar effects’ to expropriation. These actions resulted in the substantial deprivation of the Claimant of its investment, therefore amounting to expropriation. The Tribunal held that a ruling of the Bangladeshi courts ‘is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the Bilateral Investment Treaty.’

68 *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras 188 and 191.
70 *ATA v. Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paras 115 to 125.
72 *ATA v. Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, para. 123.
73 In *Oil Field of Texas Inc. v. Iran* et al., 12 Iran-US Claims Tribunal Reports (1986) at para. 42, the majority held that there is an ‘established rule of international law that the decision of a court depriving an owner of the use and benefit of his property may amount to an expropriation of such property.’
74 *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, para. 129.
That does not mean that the actions of a State’s courts will readily result in an expropriation finding in most cases. For example, in *Swisslion v. Macedonia*, the Tribunal clarified that a lawful termination of a contract between an investor and a State entity (upheld by a State’s courts) does not constitute an expropriation by the courts where an unlawful intervention or an illegal element in the court actions is not established.75

**VI. CONCLUSION**

Whether applied under customary international law or under investment treaties, the prohibition of denial of justice is often considered as the most salient standard where national courts are concerned. Although denial of justice is not necessarily limited to the actions of national courts, it is a centrally important standard for the fair administration of justice, and consequently courts are often at its centre.

Denial of justice has a specific ambit and requires a high threshold of breach. Moreover, international tribunals are not appellate bodies of national courts on matters of national law. Rather, international tribunals are the ‘guardians’ of international law. This is notable since it is under international law that international tribunals reach their determinative findings.

It can no longer be assumed today – if it ever could – that the actions of national courts can only give rise to a breach of international law through a denial of justice. As is reflected in various investment arbitration decisions, arbitral tribunals have found States liable for breaches of other treaty standards such as ‘effective means’, fair and equitable treatment (outside of the context of denial of justice) and expropriation by court action and inaction.76 It remains to be seen whether States will be held responsible for breaches of other treaty standards by the actions of courts.

Taken on one view, the possibility that court actions can breach treaty standards other than denial of justice is no more than a corollary of the principles of State responsibility in international law, as reflected for example in Article 4 of the ILC Articles on State Responsibility. If court actions could only trigger State responsibility in the form of denial of justice, then the application and ambit of a State’s treaty obligations would be considerably altered by the nature of the State entity whose actions engage its responsibility. Thus, States would be subject to far narrower and less exacting standards where the actions of its judiciary were concerned, as compared with that of its executive or legislative branches. While particular considerations and sensitivities apply to national court proceedings, including on issues of national law, the evolving jurisprudence regarding State responsibility for courts is not so narrow. Rather, it reflects the attempts of investment treaty tribunals considering the actions of national courts to balance fairness with the final word under international law.

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75 *Swisslion v. Macedonia*, ICSID Case no. ARB/09/16, Award, 6 July 2012, para. 314; see also *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award dated June 22, 2010 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006, paras 430 to 434.