INTERNATIONAL INVESTMENT ARBITRATION

Substantive Principles

SECOND EDITION

CAMPBELL MCLACHLAN QC
LL.B. (Well.), Ph.D. (London),
Dip.(c. l.) (Hag. Acad. Int'l. Law)
Professor of Law, Victoria University of Wellington
Quondam Visiting Fellow, All Souls College Oxford
Arthur Goodhart Visiting Professor in Legal Science Elect (Cambridge)
Barrister (N.Z.), Associate Member, Bankside Chambers (Auckland & Singapore),
Essex Court Chambers (London)
Associé, Institut de Droit International

LAURENCE SHORE
B.A. (North Carolina), M.A., Ph.D. (Johns Hopkins), J.D. (Emory)
Attorney (Wash., D.C., Virginia), Solicitor (England and Wales),
Partner, Herbert Smith Freehills LLP

MATTHEW WEINIGER QC
M.A. (Cantab)
Solicitor, Partner, Linklaters LLP

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2007
Second Edition published in 2017

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2016960622

ISBN 978–0–19–967679–8

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

whether such statements are properly to be regarded as *travaux préparatoires*, referred to both the Canadian transmittal statement for NAFTA and US transmittal statements for BITs as confirming that the parties had intended art 1105 of NAFTA to encapsulate a customary international law standard (and as providing evidence of *opinio juris* for such a standard, at least among the three State parties).[162]

2. Modern Application in Investment Arbitral Awards

7.99 It is now possible to analyse the way in which these basic provisions have been applied in the practice of investment arbitration since the millennium. The systemic limitations inherent in the structure of investment arbitration have a particularly acute effect in the context of the treatment provisions, where (in contrast to expropriation) there had been very little accretion of case law in the second half of the twentieth century. Each case turns in part on the specific language of the treaty under which it is conducted. There may be important differences in the formulations adopted for investor protection. The claims are litigated in various fora, depending on the dispute resolution provisions of the treaty, and the election of the parties. In the case of ICSID arbitration, there is an internal system to review arbitral awards under the annulment procedure, the grounds for which are strictly limited.[163] Outside ICSID, the only method of recourse is to national courts by review at the seat.[164] There is no strict doctrine of precedent that binds tribunals to apply the law as stated in prior awards.[165]

7.100 These systemic limitations have been counterbalanced by a number of aspects of the practice to date. The majority of investment arbitral awards have been published with the consent of the parties. Arbitral tribunals deciding investor protection cases have, with some notable exceptions, shown a high degree of willingness to draw upon prior awards. The ongoing conversation among arbitrators has resulted in progressively more nuanced formulations of investor treatment rights. The present second edition is written in the light of two generations of awards and developments in treaty language. As a result the jurisprudence has developed considerably more sophistication on a number of key issues. But the scale of development of the law should not be overstated. The fact patterns submitted to international arbitration continue to present new legal issues for decision. The first response of a particular tribunal can produce a line of concurring opinions that may or may not be fully consistent with the overall structure of investment protection in international law. It is important to analyse particular cases not simply for their dicta on the formulation of the contested rights, but also to put these dicta in context—both as to their functional response to the subject-matter of the claim, and as to their consistency with the overall development of the law in this area.

---

[162] *Mondev* paras 109–114.

[163] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 52(1).

[164] eg *Occidental Exploration and Production Co v Ecuador* [2005] EWCA Civ 1116, [2006] 2 WLR 70, [2005] 2 Lloyd's Rep 707. This also applies to NAFTA claims since, Canada (until 1 November 2013) and Mexico not being parties to the ICSID Convention, these are conducted under the ICSID Additional Facility (or UNCITRAL), which does not provide for the annulment procedure. For examples of review by the courts at the seat, see *Mexico v Metalclad Corp* 2001 BCSC 664; 5 ICSID Rep 236 (S Ct BC); *Mexico v Karpa* (2005) 248 DLR (4th) 443 (Ont CA).

[165] See the discussion at paras 3.157 *et seq* above.

7.101 This Section will review the case law on the four main rights which have been the subject of dispute: (a) fair and equitable treatment; (b) full protection and security; (c) national treatment; and (d) MFN.[166]

A. Fair and Equitable Treatment

7.102 The cases on fair and equitable treatment may be conveniently divided into three broad categories that measure the compliance of each of the three major functions of government: judicial, legislative, and executive. International responsibility may be attributed to the State 'whether the organ exercises legislative, executive, judicial or any other functions'.[167] The general legal standard of fair and equitable treatment applicable to the conduct of the State is the same irrespective of the organ carrying out the conduct. The application of the standard is nevertheless affected by the nature of the action or omission. In this respect, it is material to consider separately the particular factors that come into play in the context of each of the organs of government.

The judicial function: denial of justice

7.103 Mistreatment of foreign nationals by municipal courts was historically a primary focus of the minimum standard of the protection of aliens, encapsulated in the concept of denial of justice.[168] The focus of customary international law on the judicial organs of the State is strongly reinforced by the requirement that the affected person exhaust local remedies before his home State may espouse the claim by way of diplomatic protection at international law. In such a system, judicial treatment becomes the focus of the international adjudication. If the local remedy has effectively redressed the wrong done to the individual, there will be no ground for an international claim. Conversely, a denial of justice in the national courts will, if not redressed within the national judicial system, itself constitute the breach of a primary rule of international law, which will be the gravamen of the international claim.

7.104 A core structural change wrought to this system by the advent of investment arbitration is the general abrogation of the requirement of exhaustion of local remedies as a requirement for the admissibility of the international claim (save where the State expressly requires its continuation).[169] As a consequence, the investor may pursue a claim for breach of the treaty standards that is based directly upon allegations of administrative misconduct, irrespective of whether he has sought redress before the local courts. The claim cannot be impugned, either as a matter of jurisdiction or substance, solely on the ground of a failure to resort to national judicial remedies.[170] As a result, many claims for breach of the fair and equitable treatment standard do not involve consideration of the judiciary.

---

[166] The interpretation of the 'umbrella clause', providing treaty protection for contractual claims, is analysed at paras 4.127 *et seq* above.

[167] ILC 'Draft Articles on State Responsibility' [2001] 2(2) YB ILC 26, art 4.

[168] The classic study is Freeman (1938). For important contemporary analyses see: Paulsson (2005); Paparinskis (2013) chap 8; Z Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014) 63 ICLQ 867.

[169] ICSID Convention art 26; ILC 'Preliminary Report on Diplomatic Protection' (Bennouna, Special Rapporteur) (4 February 1998) UN Doc A/CN 4/ 484, 12; Douglas (2009) paras 56–9.

[170] *Helnan International Hotels AS v Egypt* (Decision on Annulment) ICSID Case No ARB/05/19, IIC 440 (2010, Schwebel P, Ajibola & McLachlan) para 45.

7.105 Nevertheless, allegations that the State has breached its obligation of fair and equitable treatment through the conduct of the judiciary have proved to be a continuing source of arbitral claims under investment treaties. The link between fair and equitable treatment and judicial conduct is made express in the US model BIT (and the free trade agreements concluded under its influence). This provides that fair and equitable treatment 'includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.'[171] Irrespective of an express provision of this kind, 'the fair and equitable treatment standard encompasses the notion of denial of justice.'[172]

7.106 The previous 1994 US model BIT had dealt with the matter differently, providing a separate protection standard requiring each State party to 'provide effective means of asserting claims and enforcing rights with respect to covered investments'.[173] This separate provision was omitted from the 2004 and 2012 revisions on the ground that it did not add anything to the treaty's more general standards, in view of the inclusion of denial of justice within the fair and equitable treatment standard.[174] The provision continues to be found in a number of concluded bilateral investment treaties and has been the focus of two recent significant awards on the conduct of the judiciary.[175] A provision in almost identical terms was also included in the Energy Charter Treaty.[176]

7.107 The contemporary cases applying a non-contingent standard to the judicial function may conveniently be considered under four heads. These are also the categories within which the customary international law concept of denial of justice had developed:

(1) Denial of access to court
(2) Delay
(3) Due process, and
(4) Content of the judgment.[177]

Once these different types of judicial treatment have been considered, it will be necessary to return to two overarching issues arising under this head:

(5) whether there is a requirement of finality; and
(6) the relationship with other causes of action.

---

[171] cf art 7(k) Final Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens in L Sohn & R Baxter 'Responsibilities of States for Economic Injuries to Aliens' (1961) 55 AJIL 545, 551, which refers to procedural rights 'recognized by the principal legal systems of the world.'

[172] *Jan de Nul NV v Egypt* (Award) ICSID Case No ARB/04/13, 15 ICSID Rep 437, IIC 356 (2008, Kaufmann-Kohler P, Mayer & Stern) para 188.

[173] 1994 US model BIT (Appendix 5 below), art II(4); cf the provision in art XV of the Anglo-Greek Treaty of 1886 providing for 'free access to the Courts of Justice for the prosecution and defence of their rights' at issue in *Ambatielos (Greece v United Kingdom)* (1956) XII RIAA 83.

[174] KJ Vandevelde, *U S International Investment Agreements* (2009) 415.

[175] *Chevron Corp v Ecuador* (Partial Award) PCA Case No 34877, IIC 421 (UNCITRAL/PCA, 2010, Böckstiegel C, Brower & van den Berg); *White Industries Australia Ltd v India* (Award) IIC 529 (2011, Rowley P, Brower & Lau).

[176] ECT art 10(12).

[177] *Azinian v Mexico* (Award) ICSID Case No ARB(AF)/97/2, 5 ICSID Rep 269, IIC 22 (NAFTA, 1999, Paulsson P, Civiletti & von Wobeser) paras 99–103.

7.108 Although these categories are convenient for the purpose of exposition and analysis, it must be emphasised that they each constitute elements of a general concept. The Tribunal in *ADC v Hungary* usefully described the concept of 'due process of law' as requiring:

> ... an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of such a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.[178]

7.109 The concept of denial of justice is above all a procedural standard. As Paulsson observes robustly opening his monograph study of the subject: 'In international law, denial of justice is about due process, nothing else—and that is plenty'.[179] The reason for this has been illuminatingly explained as international law's recognition of the special deference due to an adjudicatory process as the determination of claims through reasoned argument and decision.[180] The result is that international law is not concerned to adjudicate the correctness of the judgment per se. It protects the institution of adjudication and only intervenes when the process itself fails to afford the basic qualities that justify its existence. In this way, the protection from denial of justice is linked to the underlying concept of the rule of law, which it was submitted at the outset best explains the overall rationale for the fair and equitable treatment standard.

7.110 The concept of denial of justice has also found more concrete expression in international human rights law. Article 8 of the Universal Declaration of Human Rights 1948 provides: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'[181] Article 10 adds: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations.' Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides: 'All persons shall be equal before the courts and tribunals. In the determination . . . of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'[182]

7.111 The elaboration of such standards of universal acceptation provides a valuable tool to which, pursuant to art 31(3)(c) of the Vienna Convention, investment tribunals may refer in the interpretation of the treaty standard. The human rights standards provide a concrete manifestation of general principles of law accepted by the principal legal systems of the world. Jurisprudence under the human rights treaties may (with careful regard for differences in context) also illuminate by analogy.[183] So, for example, in *Toto v*

---

[178] *ADC Affiliate Ltd v Hungary* (Award) ICSID Case No ARB/03/16, 15 ICSID Rep 534, IIC 1 (2006, Kaplan P, Brower & van den Berg) para 435.

[179] Paulsson 7.

[180] Z Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' 877–8, citing L Fuller and K Winston 'The Forms and Limits of Adjudication' (1978) 92 Harv LR 353, 367.

[181] Universal Declaration of Human Rights (10 December 1948) GA Res UN Doc A/811.

[182] International Covenant on Civil and Political Rights (ICCPR) (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[183] *Mondev* paras 138–44; and see generally P M Dupuy, E U Petersmann and F Francioni, *Human Rights in International Investment Law and Arbitration* (2009).

Lebanon,[184] the Tribunal, interpreting an investment treaty standard of fair and equitable treatment, referred to decisions of the ICCPR Commission on the circumstances in which court delays may amount to a breach of the right to a fair hearing.

Access The first and most elementary protection that denial of justice affords is that of *access* to a court. This is a consistently accepted part of the customary international law standard.[185] It is the threshold requirement in the human right to a fair trial and in the specific treaty standard of 'effective means of asserting claims and enforcing rights.' **7.112**

In *Ambatielos,* an international tribunal, considering a treaty that specifically protected 'free access to the Courts', described this in the following terms: **7.113**

> [T]he essence of 'free access' is adherence to and effectiveness of the principle of nondiscrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights. Thus, when 'free access to the Courts' is covenanted by a State in favour of the subjects or citizens of another State, the covenant is that the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.[186]

A straightforward case illustrating the continuing importance of the requirement of access within a treaty standard of fair and equitable treatment is provided by *Dan Cake v Hungary.*[187] The claimant had invested in a Hungarian company Danesita that subsequently faced financial difficulties, leading to an application from its creditors for liquidation. Danesita applied to the Bankruptcy Court for a composition hearing with its creditors. It was entitled to such a hearing under Hungarian law, but the Court refused to grant one—a decision from which there was no effective appeal. Instead the Court ordered the liquidator to proceed directly to a sale of the company's assets. The Tribunal held this to be a violation of the fair and equitable treaty standard as a denial of justice. **7.114**

Access in this context is not satisfied simply by a judicial consideration of, and decision on, the claimant's request for relief. Dan Cake received such a decision. But the consequence was to deny it an effective determination on the merits of the relief that it sought (and which Hungarian law provided). The Tribunal's determination of the treaty claim required an appraisal of the Court's substantive decision. The purpose of the appraisal was to determine whether access had been unjustly denied. **7.115**

---

[184] *Toto Costruzioni Generali SpA v Lebanon* (Decision on Jurisdiction) ICSID Case No ARB/07/12, IIC 391 (2009, van Houtte P, Feliciani & Moghaizel) paras 158–60.

[185] Harvard Draft on the Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners (1929) 23 AJIL Special Supp 173, art 9: 'Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts'; Paparinskis 210–11.

[186] *Ambatielos (Greece v United Kingdom)* (1956) XII RIAA 83, 111.

[187] *Dan Cake (Portugal) SA v Hungary* (Decision on Jurisdiction and Liability) ICSID Case No ARB/12/9 (2015, Mayer P, Landau & Paulsson).

7.116 A similar point, arising on more difficult facts, may be made about the important decision in *Mondev,* which has proved to be a foundational authority in this area.[188] In that case, Canadian investors claimed under NAFTA art 1105 that they had been treated unfairly by the United States as a result of decisions of the State courts of Massachusetts.[189] They complained inter alia that their claim had been definitively barred as the Massachusetts Supreme Court had upheld a local planning authority's statutory immunity from suit for intentional torts. In the first edition of this work, this case was framed and analysed as a decision on the scope of merits review for denial of justice—a matter on which the Tribunal makes important findings. Since, however, one of the rules of law in question was a rule of immunity, that key part of the case can equally be seen as one concerning access to the court.[190]

7.117 The Tribunal considered the rationale for the particular immunity. It found that there was no uniformity of practice among the major legal systems as to the existence of immunities from suit for public authorities.[191] It held that a blanket immunity from suit, even for tortious claims against public authorities, may well breach art 1105. But the narrow immunity from suit for tortious interference with contract served a rational purpose, which was reasonably commensurate with the authority's regulatory purpose, and did not breach the provision.

7.118 **Delay** The second well-recognised way in which justice may be denied is through unreasonable delay in the judicial process.[192] That delay constitutes a separate basis on which the standard may be breached and is underlined in customary international law by the fact that undue delay in the remedial process attributable to the responsible State provides an exception to the requirement to exhaust local remedies.[193] The same point has been made in the context of treaty claims. Where the gravamen of the claimant's claim is delay, an insistence on exhaustion of local remedies 'might constitute a denial of justice in and of itself'.[194]

7.119 What constitutes an unreasonable delay sufficient to rise to the level of an international delict is a matter of appreciation in light of all the circumstances, including the complexity of the matter, the need for celerity and the diligence of the claimant in prosecuting its claim.[195] The Tribunal may also take into account the circumstances affecting the court docket in the particular country.[196]

---

[188] *Mondev* cited with approval inter alia in *Ah-Bahloul v Tajikistan* (Partial Award on Jurisdiction and Liability) IIC 474 (SCC, 2009, Hertzfeld C, Happ & Zykin) para 221; *Rumeli Telekom AS v Kazakhstan* (Award) ICSID Case No ARB/05/16, IIC 344 (2008, Hanotiau P, LaLonde & Boyd) para 653; *Jan de Nul NV v Egypt* (Award) paras 192–3.

[189] *Mondev* (Award).

[190] 1st edition (2007) para 7.82; cf Paparinskis, 210-11 and *Al-Adsani v United Kingdom* (App No 35763/97, 21 November 2001) 34 EHRR 11, 123 ILR 24 (ECtHR GC), where the Court considered the rule of state immunity in the context of a claim that its application barred access to a court in breach of art 6 European Convention on Human Rights.

[191] *Mondev* paras 149–50.

[192] *Fabiani (France v Venezuela)* (1905) X RIAA 83; *El Oro Mining (Great Britain) v Mexico* (1931) V RIAA 191; Freeman chap X; Harvard Draft on the Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners, art 9; Paparinskis 211–22.

[193] ILC 'Draft Articles on Diplomatic Protection' [2006] 2(2) YB ILC 22, art 15(b).

[194] *Jan de Nul NV v Egypt* (Award) para 256.

[195] *Toto Costruzioni Generali SpA v Lebanon* (Decision on Jurisdiction) para 163.

[196] ibid para 165.

7.120 The question whether a different and lesser standard applies in the context of an obligation to provide 'effective means' than in a denial of justice claim has been considered in two major awards: *Chevron v Ecuador* and *White Industries v India.*[197]

7.121 In *Chevron,* the claimants' complaint concerned delays in the Ecuadorian judicial system in the determination of claims that they had brought against the State. These claims had been pending for at least thirteen years at the time of the notice of arbitration. No judgment had been entered in any of the pending cases. Following the institution of the arbitration, some, but not all, of the cases resulted in final judgments.

7.122 The Tribunal approached the question as one of failure to provide effective means of enforcing rights under a specific provision of the investment treaty to that effect.[198] It accepted that the effective means provision 'seeks to implement and form part of the more general guarantee against denial of justice',[199] and that therefore 'the interpretation and application of [the effective means standard] is informed by the law on denial of justice.'[200] It nevertheless insisted that the treaty standard 'constitutes a *lex specialis* and not a mere restatement of the law on denial of justice.'[201] From this premise, the Tribunal held that the standard is not as exacting as denial of justice under customary international law. It insisted that the effective means provision requires a 'measure of deference' to the domestic justice system, since the Tribunal 'is not empowered to act as a court of appeal reviewing every alleged failure of the local judicial system *de novo*'.[202] The factors that it discussed as relevant to a determination of whether delay amounts to a breach of the treaty standard are also those relevant to denial of justice.[203] By the same token, the Tribunal rejected the application of the customary standard of finality or exhaustion, yet applied substantially the same considerations in deciding that the Ecuadorian legal system had in fact placed effective means of redress at claimants' disposal.[204]

7.123 The evidence showed that, in all but one of the cases, the Ecuadorian courts had had over nine years since the completion of the evidentiary phase to render a first instance judgment and had not done so. In the remaining case, no date had even been set for a judicial inspection. In these circumstances, the Tribunal's finding of breach of the standard on the facts is unsurprising. But its finding of law decoupling effective means from denial of justice in customary international law requires further reflection in view of its implications for subsequent cases—implications that were to be realised in *White Industries v India,* decided the following year.[205]

---

[197] *Chevron Corp v Ecuador* (Partial Award); *White Industries Australia Ltd v India* (Award) IIC 529 (2011, Rowley P, Brower & Lau); as to which see: M Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct' (2012) ICLQ 223; A Karrema and K Dharmananda, 'Time to Reassess Remedies for Delays Breaching "Effective Means" ' (2015) 30 ICSID Rev–FILJ 118; J Wirth, ' "Effective Means" Means?: The Legacy of *Chevron v Ecuador*' (2013) 52 Colum J Transnat'l L 325; Z Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' (2014).

[198] *Chevron* paras 241–75.

[199] ibid para 242, citing *Duke Energy Electroquil Partners v Ecuador* (Award) ICSID Case No ARB/04/19, IIC 333 (2008, Kaufmann-Kohler P, Gómez-Pinzón & van den Berg) para 391.

[200] ibid para 244.

[201] ibid para 242.

[202] ibid para 247.

[203] ibid para 250.

[204] ibid paras 321–9.

[205] One may also question the Tribunal's decision (for which no authority other than an expert opinion in the case is cited) to disregard any subsequent judgments of the Ecuadorian courts on the claims in its

7.124 *White Industries*[206] presented a fact pattern that differed from *Chevron* in a number of material respects. The claim pursued in the Indian courts in that case was not directly against the Republic of India. It was a claim for the enforcement of an ICC commercial arbitration award, rendered in 2002, against a state-owned corporation, Coal India. The Indian courts were not inactive. On the contrary, the record disclosed numerous applications and appeals, including a pending appeal to the Supreme Court. But the process had not resulted in a decision on the enforcement of the award by the time the investment arbitration case was filed in 2010.

7.125 The Tribunal considered White's claims under both the customary standard of denial of justice (which it treated as an implied element in the treaty standard of fair and equitable treatment) and under an effective means standard.[207] It held the first standard to be stringent. Taking account of the conduct of the parties, and assessing the conduct of the courts themselves in light of the overall position of the judiciary in India, a developing country with huge population, it found that there had been no denial of justice.[208] However, applying the *Chevron* test of effective means, the Tribunal held that a delay of over five years in the pending jurisdictional appeal to the Supreme Court did amount to a breach of the effective means standard.[209]

7.126 In this way, the separation drawn in *Chevron* between denial of justice and effective means became the dispositive issue in *White Industries.* The Tribunals' approach requires critical examination. The conclusion in *Chevron* that the treaty language is different to the customary standard and that the Parties must therefore have intended to provide a *lex specialis* was a deduction that it need not have made. The *Chevron* Tribunal references United States concerns, but these appear to have been to provide certainty of content to denial of justice, not to create a separate and different substantive standard. Despite the possible ambiguity, there is no reference to supplementary means of interpretation that could establish a meaning common to both Contracting States. The factors applied to a determination of whether there had been a failure to provide effective means were drawn from the law on denial of justice. If there were a concern to avoid the customary standard on the ground of its excessive rigidity, this appears misplaced. In either case, the tribunal must still ensure a measure of deference to the domestic courts, lest it set itself up as a court of appeal from the domestic process. The requirement of exhaustion of local remedies cannot, by definition, apply to a case of delay, since otherwise the very insistence on exhaustion could itself produce a denial of justice.

7.127 It is particularly difficult to understand the division of standards applied in *White Industries.* Denial of justice was not relied upon in that case as a cause of action in customary international law. Rather it was invoked as a specific application of fair and equitable treatment. Since fair and equitable treatment is itself concerned with the application of the rule of law to judicial and administrative decision-making generally, the requirement to provide effective

---

determination of whether the Claimants held valuable rights that had been lost by the delay or on the quantum of recovery: ibid 272, 377; see Z Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed'; A Karrema and K Dharmananda, 'Time to Reassess Remedies for Delays Breaching "Effective Means" '.

[206] *White Industries Australia Ltd v India* (Award) IIC 529 (2011, Rowley P, Brower & Lau).

[207] It held the latter to have been incorporated into the BIT from another Indian BIT by means of the MFN clause: ibid paras 11.2.1–11.2.9.

[208] ibid paras 10.4.10–10.4.24.

[209] ibid paras 11.4.16–11.4.20.

means to vindicate rights is just one application of the more general treaty standard. It does not follow that separate express provision must necessarily imply a different standard, when the allegation is one of breach in a particular case. The *positive* duty on the host State to put in place effective means may well have wider systemic implications for the provision of remedies through legislation, rules of court and judicial structures. In circumstances such as those in both *Chevron* and *White Industries* where it was undisputed that such remedies did exist and what was in issue was the operation of the system in a particular case, there would not appear to be a good ground for a difference in standard. The result is to create a significant level of uncertainty as to exactly what the standard of effective means does require in particular cases, an uncertainty that has not yet been resolved.[210]

Due process The third category of claims of denial of justice is that of a fundamental failure in due process in the litigation procedure itself. The assurance of due process lies at the heart of the fair and equitable treatment standard as a whole. It has long also been a central concern of denial of justice. The Tribunal in *Loewen* put it this way: **7.128**

> '[W]e take it to be the responsibility of the State under international law ... to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice'.[211]

The burden is on the claimant to make good such a claim. Bad faith or malicious intention is not required. Rather what must be shown is: 'Manifest injustice *in the sense of a lack of due process* leading to an outcome which offends a sense of judicial propriety is enough ...'[212] **7.129**

The claim in *Loewen* was concerned with a very serious breakdown in a judicial system. Raymond Loewen, and his company Loewen Group Inc (together 'Loewen') were Canadian nationals, who had become involved in a dispute with an American competitor in the funeral home business, one O'Keefe. A jury trial was held in the Mississippi State Court in which Loewen alleged that the trial judge allowed O'Keefe's lawyers to make 'extensive, irrelevant and highly prejudicial' discriminatory references to Loewen's nationality, class, and race. The jury awarded O'Keefe US$500 million in damages (of which US$400 million were punitive damages). Loewen complained that he was unable to appeal, because local procedural rules required him to post a bond of 125 per cent of the amount of the judgment in order to secure a stay of execution pending appeal, and an application to relax that requirement was refused by the Court. **7.130**

Loewen's NAFTA claim made complaint about the trial court procedure, the excessive verdict and the arbitrary application of the bond requirement. The Tribunal found on the facts that: 'By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace ... By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.'[213] **7.131**

---

[210] Ecuador instituted inter-State arbitration under the BIT against the United States seeking a determination of the meaning of 'effective means', but the claim was dismissed on jurisdictional grounds: *Ecuador v United States of America* PCA Case No 2012-5 <http://www.italaw.com/cases/1494> (last accessed 27 July 2016).

[211] *Loewen Group Inc v United States of America* (Award) ICSID Case No ARB(AF)/98/3, 7 ICSID Rep 421, IIC 254 (NAFTA/ICSID (AF), 2003, Mason P, Mikva & Mustill) para 123.

[212] ibid para 132 [emphasis added].

[213] ibid para 119.