# LOEWEN GROUP AND ANOTHER *v.* UNITED STATES OF AMERICA

## SECOND OPINION OF CHRISTOPHER GREENWOOD, QC

## I. Introduction

1. I have been asked by the United States Department of Justice to prepare this Second Opinion in order to comment on issues of international law raised by Loewen [1] in its Reply, dated 8 June 2001, in the case of *Loewen Group Inc. and Raymond Loewen* v. *United States of America* (ICSID Case No. ARB (AF)/98/3) and, in particular, to comment on the Opinions of Sir Robert Jennings, QC, dated 29 May 2001, [2] and Sir Ian Sinclair, QC, dated 9 May 2001 [3] and 23 May 2001.[4] The present Opinion is a supplement to my First Opinion, dated 26 March 2001. [5] I confirm the views expressed in my earlier Opinion and have endeavoured not to repeat them here. I have instead concentrated on those points where I am not in agreement with Sir Robert and Sir Ian.

2. While there is much on which I agree with Sir Robert and Sir Ian (eg the importance of applying the principles of the Vienna Convention on the Law of Treaties, 1969, to the interpretation of NAFTA [6] and the fact that an award of punitive damages does not, in itself, violate any of the relevant provisions of NAFTA), I regret to say that we continue to disagree about a number of issues which arise in this case.

---

1 As in my earlier Opinion, I have referred to the Loewen Group and Mr Raymond Loewen as "Loewen".

2 *Loewen Reply*, Tab A ("Jennings Third Opinion").

3 *Loewen Reply*, Tab B ("Sinclair First Opinion").

4 *Loewen Reply*, Tab B ("Sinclair Second Opinion").

5 *United States Counter-Memorial*, Tab A ("Greenwood First Opinion").

6 Although we differ in the conclusions we draw from the application of the Vienna Convention principles to the interpretation of Article 1105; see below, paras. 75-77.

3. Perhaps the most important disagreement concerns:-

(a) whether the United States can, in principle, be held liable for a violation of NAFTA in respect of the decisions of state courts if there existed effective means by which those decisions could be challenged within the US judicial system (a term which I use for convenience to refer to both the state and federal court systems); and, if not,

(b) whether there were, in the particular circumstances of this case, effective means of challenging the decisions of the Mississippi courts in *O'Keefe* v. *Loewen* available to Loewen.

4. On these two questions the differences between us are fundamental. Not only do we return different answers to these questions, we view the questions in entirely different ways. To Sir Robert, the questions are relevant only as part of the rule of exhaustion of local remedies, are accordingly procedural questions,[7] and are of peripheral importance because he considers that the local remedies rule does not apply in the present case. Sir Robert is dismissive of what he characterises as attempts to "read into" the relevant rules of international law a doctrine of "judicial finality" (a term which, for reasons explained below, I deliberately did not use in my First Opinion) over and above the local remedies rule.

5. By contrast, I regard these two questions as central to the case and as going *both* to the substantive rules of international law which the United States is accused of having violated *and* to the procedural requirements for bringing a claim.

(a) On the question of procedure, I disagree with Sir Robert's opinion that the local remedies rule has no application to NAFTA Chapter 11 arbitrations.

(b) On the question of substance, I consider that none of the three provisions of NAFTA relied on by Loewen (Articles 1105, 1102 and 1110) imposes an obligation which can be violated by a decision of a lower court against which effective means of challenge exist under the law of the State concerned. This

---

[7] Sir Robert and I are in agreement that the local remedies rule is a procedural, not a substantive, rule, although it has not always been seen as such, a point considered in Part III, below.

point has nothing to do with the local remedies rule. That rule goes to when a claim may be brought for a violation of international law, whereas this argument concerns what constitutes a violation in the first place.

6. Sir Robert and I also differ over whether an effective means of challenging the decisions of the Mississippi courts was available to Loewen in this case. Both at the procedural and the substantive levels, this is, of course, a separate question, entirely distinct from whether liability can exist or a claim can be brought if such means of challenge were available to Loewen.

7. In addition, I differ from Sir Robert and Sir Ian with regard to the following issues (which arise only if I am wrong about the answers to the two questions set out above):-

(a) whether the decisions of the Mississippi courts constituted a violation of the standards in Article 1105 of NAFTA;

(b) whether the proceedings in Mississippi involved discrimination contrary to Article 1102 of NAFTA; and

(c) whether the award of damages against Loewen and the subsequent settlement between Loewen and O'Keefe amounted to an expropriation contrary to Article 1110 of NAFTA.

8. I have therefore set out my response to Sir Robert and Sir Ian as follows:-

*Part II* of this Opinion responds to Sir Robert's latest comments on the local remedies rule.

*Part III* examines the distinction between the local remedies rule and the substantive law doctrine set out in my First Opinion and considers the effect of the Tribunal's decision of 5 January 2001 ("the Jurisdiction Decision") on this issue.

*Part IV* considers whether there was an effective means open to Loewen by which it could have challenged the decisions of the Mississippi courts within the US judicial system.

*Part V* considers the allegations of violation of Article 1105 of NAFTA.

*Part VI* considers the allegations of violation of Article 1102 of NAFTA.

*Part VII* examines the allegations of an expropriation in breach of Article 1110 of NAFTA.

*Part VIII* sets out my conclusions.

9. Before turning to these issues, however, there are two matters on which brief comment is required. Both concern the precise identification of the "measures" of which Loewen is complaining.

10. First, it is plain that the United States can be held responsible only for acts which are imputable to it as a matter of international law. That includes the acts of the trial court and the Mississippi Supreme Court [8] but it does not include O'Keefe or his counsel. It is true that neither Loewen, nor its experts, expressly states otherwise but there are passages in the First Sinclair Opinion which appear to suggest that there is at least a possibility that the United States might be held liable for the actions of O'Keefe's counsel and several passages in the *Loewen Reply* which go much further.

11. Thus, in considering the Article 1102 claim, Sir Ian refers (at paragraph 9) to what he describes as "xenophobic" direct mail advertisements by O'Keefe, then says (in paragraph 10) that "it is to the transcript of the trial in 1995 ... that we must look *primarily* for evidence of the breaches of Article 1102" (emphasis added). In fact, there is nowhere but the transcript (and the other elements of the contemporaneous record of the *O'Keefe* v. *Loewen* litigation and, perhaps, the record of proceedings in the Mississippi Supreme Court) to which we can look. It cannot possibly be argued, for

---

[8] As provided in Article 4(1) of the International Law Commission Draft Articles on State Responsibility:-

"The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State." (Draft provisionally adopted on Second Reading, 31 May 2001; UN Doc. A/CN.4/L.602.)

As I stated in my First Opinion, para. 21, I believe that the views of older writers, noticeably Borchard, that decisions of lower courts are not imputable to the State no longer represent the law.

example, that the advertising campaign by O'Keefe was the act of an organ of the United States or was in any other way imputable to the United States.

12. Later (at paragraph 19), in the context of comments on the conduct of the 1995 litigation by counsel for O'Keefe, Sir Ian states:-

> "The Claimants/Investors in the present proceedings against the United States of America are not of course seeking to impute to the Respondent responsibility for *all* the discriminatory remarks made by counsel for O'Keefe (and Mr Gary in particular) during the course of the trial ... *That would be wholly inappropriate.*" (Emphasis added.)

With respect, it would not only be inappropriate, it would be wholly impossible, as a matter of international law, to impute to the United States *any* of the remarks made by counsel for O'Keefe. The counsel for a private party appearing in civil litigation in a court are not organs of the forum State and that State is not responsible for their conduct. I accept that the conduct of Judge Graves is imputable to the United States, so that Loewen is entitled to argue that responsibility arises for what Loewen characterises (wrongly, in my view) as his failure to control the counsel in his court but that is an entirely different matter from holding the United States responsible for the behaviour of counsel themselves. It is important that the two should not be confused.

13. Unfortunately, they are so confused in the *Loewen Reply*, which at times treats them as interchangeable. For example, Loewen states that "the United States offers no justification for so much of the rhetorical excess of the *O'Keefe* case" and then lists seven examples of allegedly discriminatory statements made by counsel for O'Keefe.[9] But the United States has no need to offer justifications for these statements, because they are in no sense imputable to the United States.

14. Secondly, it is important to see exactly what constituted the "measures" (within the meaning of Article 1101 of NAFTA) which give rise to the Loewen claim. It is clear that Loewen complains of the conduct of the trial by Judge Graves, the award of damages by the jury, the subsequent handling of the verdict by Judge Graves and the refusal of Judge Graves and the Mississippi Supreme Court to reduce or waive the supersedeas bond

---

9 *Loewen Reply*, para. 24.

requirement. However, it is not made clear whether Loewen maintains that each of these acts or omissions constituted a separate measure for Chapter 11 purposes or whether it is asserting that, taken together, they constitute a measure which contravened the relevant provisions of Chapter 11.

15. In his Second Opinion, Sir Robert Jennings offered a very broad interpretation of what constituted a "measure" in this sense, embracing a wide variety of isolated steps in the judicial process, such as the making of an interlocutory order. [10] This approach suggests that almost any isolated part of the proceedings in Mississippi, so long as it involved an act imputable to the United States, could constitute a measure. In his Third Opinion, Sir Robert described the events giving rise to the claim as "the assessment of damages by the jury and the frustrated attempt to appeal, and finally the coerced settlement of $175 million".[11]

16. In its Reply, Loewen refers to its claim being based on "the Mississippi litigation"[12] without initially indicating exactly which aspects of that litigation constitute the relevant measure or measures. At paragraph 193, however, Loewen states that:-

> "Claimants' contention is, was, and always has been that the verdict of the *O'Keefe* jury, infected as it was by base appeals to national, racial and class biases, constituted impermissible discrimination under Article 1102, and that the judges who refused to set aside that verdict, but instead entered an enforceable judgment on it and declined to reduce the onerous bond requirement in order to allow an appeal, made this injury complete."

17. Sir Ian Sinclair offers the most detailed analysis of this issue. He comments that:-

> "It is probably the better view to regard the 1995 trial itself, together with the resulting jury verdict and the refusal of the judicial system in the State of Mississippi to waive or reduce the bond requirement so as to enable the present Claimants/Investors to appeal against the verdict free from the immediate threat of execution against their assets, as constituting one single complex act giving rise to State responsibility on the part of the United States. But, to the extent that

---

10 Jennings Second Opinion, paras. 6-7.

11 Jennings Third Opinion, pp. 14-15.

12 *Loewen Reply*, Chapter III.

> it may be possible to view these as separate and distinct acts, it is clear that they must all be regarded as 'measures' within the meaning of Article 1101 of NAFTA. Of course, there is no doubt that there can be a denial of justice at any level of a judicial system and that there can be multiple denials of justice within the same judicial system."[13]

18. The distinction is an important one. If each step - Judge Graves' conduct of the trial (itself presumably a series of discrete rulings on such matters as jury selection, the admissibility of evidence, the permissibility of particular lines of questioning and the judge's own remarks in court), the verdict of the jury, the decisions taken by Judge Graves in the light of that verdict and the subsequent decision of the Mississippi Supreme Court regarding the supersedeas bond - is treated as a separate measure, then it follows from the views expressed by Sir Robert Jennings that each of these steps would be actionable under NAFTA, irrespective of whether the means to reverse that step existed within the US judicial system and were available to Loewen. This would have the effect of allowing an investor to substitute the NAFTA system for the local court system more or less at will. In my opinion, that is not the position under international law and it is wholly implausible that the NAFTA parties, each of which has a highly developed legal system including carefully designed mechanisms for challenging the decisions of lower courts, intended to commit themselves to anything of this kind.

19. If, on the other hand, the trial, verdict, judgment and decision of the Mississippi Supreme Court are to be seen as "a single complex act", as Sir Ian suggests (and as seems more logical), then it has to be asked why that act is to be seen as complete at the point when the Mississippi Supreme Court decided not to waive or reduce the bond requirement if Loewen still had other steps open to it within the US judicial system. If what is in issue, as Sir Ian suggests, is a single complex act, involving a number of actions by different parts of the judicial system, then there is no reason why that act should be treated as complete when other steps can still be taken within the judicial system the effect of which might be dramatically to alter the nature of that complex act. On the contrary, all considerations of principle and common sense suggest that the single complex act is complete only when the judicial system has completed all the steps open to it.

---

[13] Sinclair First Opinion, para. 22.

## II The Application of the Local Remedies Rule

20. In his Third Opinion, Sir Robert Jennings develops his thesis that the local remedies rule is not applicable to claims under Chapter 11 of NAFTA. As I shall explain in Part III of this Opinion, the main point in my First Opinion was not about the local remedies rule. It is nonetheless important that I briefly comment on Sir Robert's views about the local remedies rule. This is necessary for two reasons. First, there is an issue between the parties as to the applicability of the local remedies rule to the present arbitration. Secondly, Sir Robert's conclusion that the local remedies rule is inapplicable in Chapter 11 arbitrations is one of the principal reasons why he rejects my view that, as a matter of substantive law, the decisions of the Mississippi courts in the present case did not entail a violation by the United States of the standards laid down in NAFTA if those decisions were open to effective challenge within the United States judicial system. I do not accept that, even if Sir Robert were right about the local remedies rule, this would affect the substantive law issue. However, if he is wrong in suggesting that the local remedies rule is inapplicable, then much of his reasoning as regards the substantive issue falls away on its own terms.

21. In his latest Opinion, Sir Robert Jennings suggests that the local remedies rule is essentially applicable only to cases of diplomatic protection (ie cases in which the injured foreigner's claim is brought by his or her State of nationality, rather than by proceedings instituted directly by the foreign national), that it is largely the product of a bygone era and that it was, in any event, of doubtful application in a case of denial of justice (a point which is developed with particular enthusiasm by Loewen in its *Reply*). Sir Robert also maintains that the applicability of the local remedies rule is incompatible with the provisions made in NAFTA for arbitration.

22. There is no reason to think that the local remedies rule has ever been confined to cases of diplomatic protection. That need occasion no surprise. The entire concept of diplomatic protection rests on what is widely regarded as a fiction, namely that a wrong done to the national is a wrong done to that person's State. In reality, the claim which is asserted is that of the national, to whom the State concerned usually makes over any compensation received. It would therefore be surprising if claims in which that fiction was stripped away, and the standing of the individual to bring a claim in his own right was recognized, were subject to radically different rules on something as important as the requirement to exhaust local remedies.

23. In fact, schemes for permitting individuals and corporations to bring their own claims on the international plane have tended to proceed on the assumption that the local remedies rule was applicable unless specifically excluded (ie that the position was the same as it is in cases of diplomatic protection). For example, that was the position taken by Baxter and Sohn's 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 1 of which provided that:-

> "1. A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State and causes an injury to an alien. A State which is responsible for such an act or omission has a duty to make reparation therefor to the injured alien or to an alien claiming through him, or to the State entitled to present a claim on behalf of the individual claimant.
>
> 2. (a) An alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made.
>
> (b) A State is entitled to present a claim under this Convention only on behalf of a person who is its national, and only if the local remedies and any special international remedies provided by the State against which the claim is made have been exhausted." (Garcia-Amador, Sohn and Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), p. 143)

Later, in the Commentary to Article 22 which sets out the right of the alien to bring a claim, the authors state that:-

> "Allowing an individual to present his international law claim directly to the respondent State means no more than that the State against which the claim is asserted may not refuse to receive or consider a claim on the jurisdictional ground that the claim was not submitted by a State. If, consistently with the view taken in this draft Convention, the wrong is done to the alien rather than to the State of

which he is a national, there is no reason why he should not be allowed to present a claim directly to the foreign ministry of the State alleged to be responsible, *provided, of course, he has first exhausted his local remedies.*" (Ibid., p. 288; emphasis added).

24. The same was true of the Draft Articles on State responsibility prepared for the International Law Commission by Garcia-Amador in 1960. Article 21 of that Draft recognized that, alongside the concept of diplomatic protection, an alien might be entitled to bring an international claim against a State. Both types of claim were subject to the local remedies rule, as provided in Article 18 of the Draft (the Draft Articles are reproduced in Garcia-Amador, Sohn and Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974) at pages 129-132). In his commentary, Garcia-Amador stated that:-

> "Article 21 of the draft sets forth the basis of a procedure which would enable the alien himself, *once local remedies have been exhausted*, to submit an international claim to obtain reparation for the injury suffered by him." (Ibid., p. 79)

Similarly, the OECD Draft Convention on the Protection of Foreign Property, 1967, Article 7(b) provided for claims to be brought by an individual "without prejudice to any right or obligation he may have to resort to another tribunal, national or international". The Commentary to this provision noted that this provision implied that local remedies had to be exhausted before a claim was brought under the Convention (OECD Publication No. 23081 (1967), pp. 36 and 41).

25. The same approach was clearly present in the minds of those who drafted the ICSID Convention. Although, as noted in paragraph 39, below, Article 26 of the ICSID Convention reverses the normal application of the local remedies rule by providing that it does not apply unless the contracting State has stipulated that it should do so, the Convention is nevertheless clearly based on the assumption that the local remedies rule was in principle applicable to claims brought by individual investors. That is clear from the *Report of the Executive Directors on the Convention*, which states that:-

> "It may be presumed that when a State and an investor agree to have recourse to arbitration and do not reserve the right to have recourse to other remedies or

> require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies." (ICSID Document No. 2 (1965), para. 32; see also the statement by Mr Broches at ICSID, *Documents concerning the Origin and the Formulation of the Convention* (1968), vol. II, pp. 241 and 259.)

26. It is true that much of the discussion of local remedies has taken place in the context of claims brought between States, where both the jurisprudence and the scholarly literature make clear that the rule is applicable to cases in which a State acts on behalf of its nationals but not to cases in which it claims for a wrong done directly to itself. That distinction is, and has long been, a most important one and it is not surprising that it receives so much attention. However, the fact that numerous sources conclude that the local remedies rule applies to diplomatic protection cases brought by States does not imply that the rule does not apply to cases where the aggrieved foreign national has standing to present his own claim before an international tribunal. For example, in the chapter of his book, *Principles of Public International Law,* cited by Sir Robert, Professor Brownlie nowhere discusses the case of claims brought directly by individuals or corporations at all. In fact, the passage quoted appears in a chapter entitled "The Admissibility of *State* Claims".[14] Brownlie goes on, a few pages later, to note that the local remedies rule "has prominence" in the practice of the major human rights tribunals and that "this new affirmation of the rule is a strong indication that it still accords with the attitude of governments to international petitions and claims."[15] He concludes "some jurists claim to find evidence that international tribunals are tending to restrict the ambit of the rule. Instances to support this view certainly exist, but as a general perspective it is difficult to maintain."[16]

---

[14] Brownlie, *Principles of Public International Law* (5th ed 1998), pp. 496-7, quoted in Jennings Third Opinion at p. 9.

[15] Op. cit., p. 506.

[16] Op. cit., p. 506.

27. Moreover, it is noticeable that *Oppenheim's International Law* (edited by Sir Robert Jennings and Sir Arthur Watts) is very cautious in its treatment of this point. *Oppenheim* formulates the local remedies rule in terms similar to those used by Brownlie. After distinguishing between cases of diplomatic protection and cases where a State claims in respect of a wrong done directly to that State, *Oppenheim* adds:-

> "It *may* be that where a state, in a contract with an alien, provides for disputes relating to that contract to be settled exclusively by arbitration, there is no need for the alien to exhaust other remedies."[17]

This is very far from a suggestion that the rule will not normally apply where an alien brings an international claim in his own right rather than being the object of diplomatic protection. On the contrary, the fact that *Oppenheim* does no more than say that the rule *might not* apply in a case where the alien and the respondent State have agreed *in a contract between them* that disputes shall be settled *exclusively* by arbitration suggests that the application of the local remedies rule to other cases in which the alien claims in his own right is taken as the norm.

28. That conclusion seems to be accepted by Professor James Crawford SC, the current rapporteur on State responsibility of the International Law Commission ("ILC"), who has stated that "the exhaustion of local remedies rule is not limited to diplomatic protection".[18] The fact that the ILC has retained a provision on the local remedies rule in its draft articles on State responsibility rather than leaving the topic to be considered solely in the context of its parallel work on diplomatic protection confirms that the rule has an application outside the diplomatic protection context.

29. Nor is the local remedies rule in any way archaic. I agree with Sir Robert that there has been "a proliferation of international tribunals and arbitration bodies" [19] in recent years. But what is striking is the durability of the local remedies rule amongst these tribunals. In particular, all of the major human rights conventions, which between them have created much the largest scope for individuals to bring claims before international

---

17 *Oppenheim's International Law* (9th ed 1992), vol. I, p. 523, n.3 (emphasis added).

18 UN Doc. A/CN.4/517, p. 33.

19 Jennings Third Opinion, p. 16.

tribunals (dwarfing ICSID in this regard), have made exhaustion of domestic remedies a requirement for bringing such a claim. See, e.g.:-

- the European Convention on Human Rights, 1950, Article 35(1): "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law" (formerly Article 26 of the Convention);
- the International Covenant on Civil and Political Rights, 1966, First Optional Protocol, Article 5: "the Committee shall not consider any communication from an individual unless it has ascertained that ... the individual has exhausted all available domestic remedies";
- the American Convention on Human Rights, 1969, Article 46: "Admission by the Commission of a petition or communication ... shall be subject to the following requirements ... that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law";
- the Convention against Torture, 1984, Article 21(1)(c): "the Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law."

30. In this regard, Sir Robert comments:-

> "In general it may be said that those [treaty-established tribunals] concerned with human rights do still expect the prior exhaustion of local remedies; and this is so because the goal of human rights law is to have them respected in all local legal systems. Moreover, they are historically intimately connected with the former diplomatic protection of aliens."[20]

Yet the same, surely, could be said of NAFTA. One of the goals of NAFTA is undoubtedly to have the rules which it contains respected in the local legal systems of the

---

[20] Jennings Third Opinion, p. 16.

three parties. That is confirmed by the provisions of Article 105, which require the parties "to ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance ... by state and provincial governments". To the extent that NAFTA standards are met within the parties, Chapter 11 arbitration proceedings become unnecessary. Moreover, NAFTA Articles 1102, 1105 and 1110 - which are concerned with the treatment by one NAFTA party of nationals of another - are surely far more reminiscent of the norms enforced by diplomatic protection than are human rights treaties, whose primary concern is with the way in which States treat their own nationals.

31. Indeed, what the human rights treaties demonstrate is that the expansion of the jurisdiction of international tribunals so as to permit individuals to bring cases in their own right rather than having to rely upon the diplomatic protection of their State of nationality makes the local remedies rule more, not less, important. As the scope for bringing cases on the international plane increases, the importance of ensuring that national courts, which are invariably the first line of defence for the rights of the individual, are given the opportunity and the incentive to put right any apparently wrongful conduct within their jurisdiction and the practical need to prevent the international plane from being swamped by cases militate in favour of requiring the application of that rule. That is especially so in cases where what is at issue is alleged wrongdoing by a court from which an appeal could lie.

32. I also disagree with the suggestion by Sir Robert (which ripens into a full blown doctrine of law in the *Loewen Reply*) that the local remedies rule might not be applicable at all in cases of denial of justice.[21] Neither *Oppenheim*, nor Brownlie, nor Amerasinghe's detailed study of the rule, contain a statement in such sweeping terms and the older statements quoted by Loewen [22] are either misrepresented [23] or relate to cases in which

---

[21] Third Jennings Opinion, p. 22; *Loewen Reply*, paras. 344-9.

[22] *Loewen Reply*, para. 347.

[23] The quotation from Whiteman, *Digest of International Law*, vol. 8, p. 789, is a prime example. The passage quoted by Loewen states only that where the initial act is imputable to the State, it is not necessary to exhaust local remedies *in order to impute responsibility to the State*. Whiteman goes on to add that the application of the local remedies rule to such a case would be *procedural*. She does not suggest - as Loewen tries to contend - that the rule would not apply at all in a case of denial of justice.

the decisions of the lower courts were taken as proof that there would be no effective remedies in higher courts,[24] which is a different point altogether.[25]

33. It is also noticeable that Professor John Dugard, the ILC rapporteur on diplomatic protection, concludes that the local remedies rule is applicable to denial of justice cases:-

> "There remains one last issue to be considered: whether a denial of justice further necessitates the exhaustion of remaining local remedies, not only in the context of the situation described in paragraph 64 but also where denial of justice follows a violation of international law. Authors who have expressed an opinion on this issue in the works reviewed support the view that local remedies need to be exhausted in such cases. This is logical if one perceives a denial of justice as a violation of international law. This view is not contradicted by codification attempts, international decisions or State practice."[26]

Indeed, there is clear evidence of State practice to the effect that the local remedies rule is applicable. To take just one recent example, in June 1999, the United Kingdom Government responded to a request for diplomatic action in the case of some British nationals who were tried in Yemen by stating that:

> "All locally available legal or administrative remedies must be exhausted before [the UK Government] will normally consider making *formal* representations, on the basis of prima facie evidence that there has been a miscarriage or denial of justice." [27]

34. I therefore remain of the opinion that the local remedies rule applies in NAFTA Chapter 11 proceedings unless the provisions of NAFTA must be taken to have waived that rule in whole or in part. The fact that, as Professor Brownlie puts it, the rule is one "justified by practical and political considerations and not by any logical necessity deriving from

---

[24] That is the case with the two statements quoted in *Moore's Digest.*

[25] Similarly, where a denial of justice takes the form of a denial of *access* to the courts, as opposed to decisions of those courts, there will almost invariably be no effective local remedy available. Since denial of access to courts was traditionally the only form of denial of justice recognized by Latin American governments and jurists, statements from those sources that the local remedies rule was inapplicable to cases of denial of justice are also really about the absence of any effective remedy and are not authority for the broader proposition, advanced by Loewen, that the rule does not apply to denial of justice in the broader sense.

[26] Second Report, 28 February 2001; UN Doc. A/CN.4/514, para. 65. The situation considered in para. 64 of the Report is one in which the original injury to the alien is a violation of national law but not international law.

[27] Quoted by the High Court in *R.* v. *Secretary of State for Foreign and Commonwealth Affairs,* ex parte *Ferhut Butt*, 116 ILR 608 at 613 (original emphasis).

international law as a whole" [28] does not seem to me to suggest that it should not apply in the context of NAFTA (any more than it suggests that the rule should not apply to human rights claims). The practical considerations which weigh in favour of a rule which prevents an investor from switching from national proceedings with a private party to NAFTA proceedings against a State even though the national proceedings are unfinished is every bit as persuasive as the parallel considerations in diplomatic protection cases.

35. Turning, therefore, to the question whether there has been a waiver, Sir Robert Jennings argues that both the terms and the structure of Chapter 11 amount to an implied waiver (we agree that there is no express waiver). [29] In so far as I have not already discussed these matters in my First Opinion (paragraphs 40-50), I will now respond to them as briefly as possible.

36. The fact that NAFTA Chapter 11 makes provision for arbitration is not in itself a waiver of the local remedies rule. That much is clear from the decision of the International Court in the *ELSI* case.[30] The point is also well made by the late Judge Jimenez de Arechaga, a former President of the International Court of Justice, who said:-

> "In view of the *raison d'etre* of the [local remedies] rule it seems difficult to accept the thesis that arbitration treaties and agreements, in general, imply a waiver of the rule. Each situation ought to be examined individually, but the basic presumption should be against the tacit renunciation by a State of the jurisdiction of its national courts."[31]

37. The advisory opinion of the Court in the *Headquarters Agreement* case [32] does not alter this conclusion, since it deals with an entirely different issue. The *Headquarters Agreement* case was not an instance of a claim (of any kind) for damage done; it was a case in which the International Court was asked to give an opinion on whether a dispute

---

28 *Principles of Public International Law*, p. 497, quoted by Sir Robert Jennings at Jennings Third Opinion, p. 9.

29 See Jennings Second Opinion, para. 39.

30 ICJ Reports, 1989, p. 15, at para. 50.

31 "International Law in the Past Third of a Century", 159 Recueil des cours (1978) at p. 292.

32 ICJ Reports, 1988, p. 12.

regarding the interpretation or application of the Headquarters Agreement had come into being between the UN and the USA as the result of the enactment in the USA of legislation which would apparently have required the closure of the PLO office at the UN. The USA had contended that no such dispute had yet arisen, as the application of the legislation to the PLO office had not yet been determined by the US courts. The International Court, applying the traditional definition of a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests",[33] rejected the US argument. It did not, however, find that the USA had violated the Headquarters Agreement (it was not asked to do so and arguably could not have been asked to do so in advisory proceedings) but only that, a dispute having arisen, the USA was obliged to have recourse to arbitration under the terms of the Agreement.

38. The case thus tells us nothing about the local remedies rule. The sentence quoted by Sir Robert Jennings at page 17 of his Third Opinion ("a provision of a treaty (or contract) prescribing the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies") is in fact taken not from the Opinion of the Court but the separate opinion of Judge Schwebel. There is no indication that Judge Schwebel intended to say that the fact that a treaty (or contract) contained provision for arbitration meant that the local remedies rule was dispensed with in its entirety when a claim for an alleged violation was brought. Indeed, only a year later Judge Schwebel was one of the members of the Chamber of the International Court which decided the *ELSI* case and did not dissent from the decision that the local remedies rule did apply to a claim brought under a treaty provision essentially similar to that in the *Headquarters Agreement* case. [34]

39. Nor does the fact that Article 1120 of NAFTA refers to the possibility of arbitration under the ICSID Convention amount to a waiver of the local remedies rule. It is true that Article 26 of the ICSID Convention excludes the operation of the local remedies rule unless a State expressly requires that local remedies be exhausted prior to arbitration,

---

[33] *Mavrommatis Palestine Concessions* case, PCIJ Reports, Series A, No. 2, p. 11, quoted by the International Court at para. 35 of the Advisory Opinion.

[34] *ELSI*, ICJ Reports 1989, p. 15 at p. 94.

thus in effect reversing the normal presumption that the rule applies unless it is waived.[35] However, arbitration under the ICSID Convention is permissible under Article 1120 only if both the respondent State and the State of nationality of the investor are parties to the ICSID Convention. Although the United States is a party to ICSID, Canada is not. Contrary to what is said by Sir Robert Jennings, [36] therefore, the Tribunal in the present case does not exist under the ICSID Convention. The present Tribunal operates under the ICSID Additional Facility. Article 3 of the ICSID Additional Facility Rules provides that:-

> "Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards or reports that may be rendered therein."

It follows that Article 26 of the Convention has no application to the present proceedings. Like the UNCITRAL Rules (the third possibility for which Article 1120 provides), the Additional Facility says nothing about the local remedies rule and cannot be regarded as a waiver in any shape or form.[37] If Sir Robert is suggesting that the fact that arbitration under the ICSID Convention is listed as one of the possibilities in Article 1120 is sufficient to amount to a waiver of the local remedies rule, I respectfully disagree. Since Mexico, like Canada, is not at present a party to the ICSID Convention, no NAFTA Chapter 11 arbitration could take place under the ICSID Convention. [38] The fact that NAFTA Article 1120 provides that ICSID Convention arbitration *will* be possible *if* another NAFTA party should one day become party to the Convention and then only in cases where both the defendant State and the State of nationality of the investor are parties to the Convention is not, in my opinion, sufficient to indicate an intention to dispense with the local remedies rule now in cases where the ICSID Convention does not apply.

---

35 Schreuer, *The ICSID Convention: A Commentary* (2001), p. 388, para. 95.

36 Jennings Third Opinion, p. 16.

37 Thus, *Oppenheim* cites the decision in *ELSI*, above, as authority for the proposition that "waiver will not be implied from silence in a general disputes settlement provision in a treaty" (p. 526, n. 16).

38 Schreuer, *op. cit.*, p. 222, para. 311. As Schreuer points out, even the Additional Facility is not available in cases between Canadian investors and Mexico or Mexican investors and Canada.

40. Nor do I read the reference in Article 1115 of NAFTA to a mechanism that "assures" "due process before an impartial tribunal" as incompatible with a requirement to exhaust local remedies. With respect to Sir Robert, there is no reason to conclude that the reference to an impartial tribunal "can only have been introduced in this context in order to make a distinction between the local courts and tribunals (the local remedies in fact) ... and an international tribunal ..., which indeed is impartial precisely because it is not part of the legal system of one of the Parties."[39] Nothing in the text or the context suggests that the parties to the NAFTA intended to cast doubt on the impartiality of their own courts or were motivated by doubts about the impartiality of the courts of their partners. The critical word in this respect is "assures", which suggests that what Part B of Chapter 11 is designed to do is to provide a guarantee in case the normal processes of justice within the NAFTA States should fail to accord due process before an impartial tribunal, not to provide something which is a substitute for those processes. In the same way, Article 19 of the European Convention on Human Rights provides for the establishment of a European Court of Human Rights "to ensure observance" of the provisions of the Convention. Yet, as has already been seen, the local remedies rule applies under the Convention and the European Court is clearly seen as a "long stop", not a substitute for the national courts.

41. I also believe, for reasons given in paragraphs 46-50 of my First Opinion, that Article 1121 of NAFTA is not a complete waiver of the local remedies rule. In particular, I suggested there, and continue to maintain, that Article 1121 does not waive the procedural requirement of recourse to a higher court in a case where the only act of the respondent State which might amount to a violation of NAFTA Chapter 11 is a decision of a lower court.[40]

42. It is common ground between Sir Robert and myself that Article 1121 "is not about the local remedies rule".[41] It follows that any effect which it has upon that rule is by

---

39 Jennings Third Opinion, p. 13.

40 Nor does NAFTA Article 1121, which is a procedural provision, waive the substantive law requirements of denial of justice which are discussed below.

41 Jennings Third Opinion, p. 13.

implication only and, in the light of the decision in *ELSI*, a waiver of the local remedies rule requires a clear indication of an intention to that effect. In my opinion, Article 1121 does not manifest such a clear intention in respect of claims derived from a judicial decision which is open to appeal or other challenge.

43. The arguments against permitting an investor to drop proceedings in national courts and proceed to Chapter 11 arbitration on the basis of an allegedly discriminatory or unfair ruling given in interlocutory proceedings or by a jury, notwithstanding that there is scope for reversing that ruling through an appeal or other form of judicial challenge, are considerable. Such an approach would involve substituting NAFTA proceedings against the host State for civil litigation with a private party and would amount to an attack on the integrity of the judicial systems of the NAFTA States by allowing a party to civil litigation to elect to bring proceedings under Chapter 11 against a defendant with resources which, if not unlimited, nevertheless offer a very deep pocket indeed.

44. Whatever the position might be when an investor wishes to challenge the action of the executive or the legislature of a NAFTA State, it is surely not unreasonable to say that when an investor from one such State becomes embroiled in litigation with a private party before the courts of another and the only complaint is that those courts have behaved in a discriminatory or otherwise unjust fashion in the course of that litigation, the forum State cannot be held liable until all avenues of recourse available within its judicial system have been exhausted and there is no reason to believe that the parties to NAFTA had a contrary intention. As Sir Robert himself put it, more than thirty years ago:-

> "It would be an impossible situation if aliens present in a country were always entitled to an international remedy at the outset. It would amount to a latter-day system of capitulations. The local remedies rule therefore embodies a general interest in encouraging resort to local remedies in the first instance."[42]

---

[42] Jennings, "General Course on Principles of International Law", 121 Recueil des Cours (1967-II) 324 at 480.

## III. The Relationship between the Local Remedies Rule and the Substantive Law

45. As explained in Part I, above, there is a fundamental disagreement between Sir Robert and myself about the relationship between the local remedies rule and the substantive law requirements of denial of justice. That disagreement is bound up with the question of what the Tribunal decided in the Jurisdiction Decision.

46. It is, of course, for the Tribunal to determine the precise scope and effect of its earlier decision. I am concerned, however, that there is a disagreement (or possibly just a misunderstanding) between Sir Robert Jennings and myself regarding the effect of the decision which may complicate analysis of the issues at the next stage of the case. Two statements by Sir Robert require discussion in this context.

47. Sir Robert says in his Third Opinion [43] that the Tribunal rejected, in paragraph 60 of the decision, a US argument that the decisions of the Mississippi courts were not "measures" within Article 1101 of NAFTA, because they were not "final" acts (i.e. they were subject to challenge in courts in the USA). My understanding is that paragraph 60 deals with an entirely different argument, namely that the decisions of the Mississippi courts were not "measures" because they were taken in proceedings between private parties.[44] Finality was dealt with in the next section of the Jurisdiction Decision. Contrary to what Sir Robert suggests, the Tribunal left over for consideration on the merits the whole of the "finality" argument,[45] not just part of it.

48. Sir Robert also asserts that, at the hearing on jurisdiction -

> "...the question of the local remedies rule was complicated by the Respondent's reliance upon what it then contended was a distinct doctrine of 'finality' which was said to be different from the local remedies rule and even additional to it, so

---

[43] Jennings Third Opinion, p. 1.

[44] This was the first of the US jurisdictional objections; judicial finality was the second; see Jurisdiction Decision, para. 32.

[45] Jurisdiction Decision, para. 74.

> that a claimant seeking international redress might have not one procedural barrier to surmount but two barriers..." [46]

Sir Robert then goes on to assert that the Tribunal held that the "finality" and local remedies doctrines were one and the same and then comments that "the finality argument nevertheless now appears again, particularly in Professor Greenwood's Opinion".[47]

49. In fact, the thesis set out in my First Opinion is not quite the same as the submission on "finality" (a term which I deliberately refrained from using in the hope of avoiding precisely this confusion) made by the United States. The US "finality" submission at the jurisdiction phase was that:-

> "The Mississippi court judgments complained of are not 'measures adopted or maintained by a Party' and cannot give rise to a breach of Chapter 11 as a matter of law because they were not final acts of the United States judicial system."[48]

The reasoning in paras. 15-39 of my First Opinion was not addressed to the question whether the decisions of the Mississippi courts constituted 'measures' within the meaning of Article 1101 of NAFTA, but whether they were unlawful (taking the international law standards embodied in the relevant NAFTA provisions as the yardstick of legality for these purposes). [49] Nor was I seeking to put forward the argument (which the Tribunal had considered in the Jurisdiction Decision) that the decisions of lower courts are not acts of the State (or, to use the language of the international law of State responsibility, are not acts imputable to the State). I expressly accepted in my First Opinion (at paragraph 21) that Borchard's view that only the acts of final courts are imputable to the State is not good law today.

50. For the reasons given in my First Opinion, I believe that the question whether a decision of a lower court which is open to effective challenge within the judicial system of the country in question can amount to a violation of the international law standard contained

---

[46] Jennings Third Opinion, p. 1.

[47] Ibid.; see also *Loewen Reply* at para 268.

[48] Jurisdiction Decision, para. 38(ii).

[49] I consider in paras. 74-78, below what those standards are and whether NAFTA Article 1105 actually goes beyond existing international law in the obligations which it imposes.

in NAFTA is a fundamental question of substance and entirely distinct from the local remedies rule, which Sir Robert and I agree is procedural in character. This distinction between the procedural requirements of the local remedies rule and the substantive requirements of whichever rule of international law (whether derived from custom or treaty) the respondent State is accused of violating is clearly recognized by a Chamber of the International Court of Justice (composed of Judges Ruda, Oda, Ago, Schwebel and Sir Robert Jennings) in its decision in the *ELSI* case, where it distinguished between the local remedies rule and "the merits of the case". [50]

51. The procedural character of the local remedies rule and its distinction from the substantive requirements of different rules of international law is recognized in the most recent work of the ILC. As Article 44 of the latest ILC Draft Articles on State Responsibility makes clear, the local remedies rule concerns the admissibility of a claim, not whether that claim is well founded. [51] Unfortunately, that distinction was not recognized in the earlier ILC drafts of the 1970s, from which much of the confusion regarding this subject emanates. Article 22 of the earlier draft, entitled "Exhaustion of Local Remedies", provided that:-

> "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."[52]

52. The approach taken in that earlier draft was to treat the rule requiring exhaustion of local remedies as one of substance, rather than procedure, and thus to invite confusion between the local remedies rule and the requirements of specific rules of international law. Although the ILC provisionally adopted the earlier draft in 1996, the text of Article 22

---

50 ICJ Reports 1989, p. 15 at para. 63.

51 Text provisionally adopted on 31 May 2001, UN Doc. A/CN.4/L.602. Article 44 of this version is identical to Article 45 of the 2000 draft cited by Sir Robert, Jennings Third Opinion, pp. 3-4, and referred to by the Tribunal in the Jurisdiction Decision, para. 67.

52 UN Doc. A/51/10, p. 125 (1996).

had been prepared more than twenty years earlier and it is that text, and the substantive approach which it embodied, which was reflected in the ILC's 1975 Report to which the Tribunal made reference in paragraph 67 of the Jurisdiction Decision.

53. That approach was heavily criticised both by governments and by commentators and was not followed by the Chamber of the International Court in its decision in *ELSI*. The flaw in the ILC's earlier approach to local remedies is explained with particular clarity in the comments of the United Kingdom Government on the 1996 draft. These comments are so directly in point that it is worth quoting them in some detail. In relation to draft Article 22, the UK said:-

> "58. ... Draft Article 22 adopts the view that the duty to exhaust local remedies is not a 'merely procedural' rule. In the United Kingdom Government's view, however, the duty to exhaust domestic remedies is indeed merely a procedural rule. There are rules of international law which are, in the International Law Commission's terminology, 'obligations of conduct'. The rule forbidding physical mistreatment of aliens by persons whose acts are imputable to the State is an example. In such cases, the breach plainly arises at the time that the State fails to act in conformity with the rule. Where the alien initially seeks a remedy in the local courts, the claim before the local courts is a step in the exhaustion of the local remedies. It takes place after the violation has occurred and before a claim in respect of the violation may be pursued on the international plane.
>
> "59. There may appear to be exceptional cases in which unsuccessful recourse to the local courts is indeed necessary in order to 'complete' the violation of international law. Thus, some rules of international law permit what might at first appear to be 'mistreatment' of aliens and their property, provided that the alien is compensated. The rules permitting expropriation of alien property for a public purpose are an example. On a proper analysis of the precise nature of the obligation in these rules, however, it is clear that they do not constitute exceptions to the analysis applied above to 'obligations of conduct'. It is true that the breach does not arise until procedures have definitely failed to deliver proper compensation (or, more accurately in the case of expropriation, have so failed within the time limits implied by the requirement of promptness). But this is not because the breach arises only when local remedies have been exhausted. It is because the duty is, strictly, not to refrain from expropriation for public purposes, but to compensate (by whatever procedure the State might choose) if property is expropriated - or, to put it another way, to refrain from uncompensated expropriations.
>
> "60. The category of rules of this second kind, where the breach arises only after a definitive position is taken by the courts or other organs of the State, is approximately the same as the International Law Commission's 'obligations of result'. The International law Commission has drafted article 22 so as to make

plain that it applies only to such obligations. Draft article 22 states that there is a breach only if local remedies have been exhausted without redress. But this embodies, in the view of the United Kingdom Government, a fundamental conceptual confusion. The recourse to 'local remedies' is in this context not at all of the same nature as recourse to local remedies as a procedural precondition for the taking over of the individual's claim and its pursuit on the international plane by his national State. The United Kingdom Government do not accept the approach adopted by the International law Commission in draft article 22. ..."[53]

54. Two aspects of this carefully worded comment are particularly relevant to the present case:-

(a) the UK is strongly of the view that the local remedies rule is procedural, not substantive. That view was adopted by the new rapporteur of the ILC, Professor James Crawford SC, who drafted what is now Article 44 of the current draft articles [54] and by Professor Dugard in his report on diplomatic protection.[55] My understanding is that there is no controversy about this point in the present proceedings. I have therefore proceeded on the basis that it is common ground between Sir Robert and myself that the new ILC approach is correct and that the procedural view reflects existing international law.[56]

(b) the UK also recognizes that, once the local remedies rule is properly viewed as a procedural requirement, the requirement to exhaust domestic remedies which it imposes is entirely separate from the fact that, as a matter of substantive law, there are some obligations breach of which occurs only "after a definitive position is taken by the courts or other organs of the State." That is precisely what is at issue in the present case. The argument set out in my First Opinion is that the rule of international law which prohibits the denial of justice by the courts of a State is one of those rules which is breached only once such a definitive position has been taken. Whether I am right about denial of justice is

---

53 UK Materials on International Law, 69 BYIL (1998) 558-9.

54 See Crawford, *Second Report on State Responsibility* (UN Doc A/CN.4/498), paras. 141-7.

55 See Dugard, *Second Report on Diplomatic Protection* (UN Doc A/CN.4/514), para. 31.

56 The new approach was welcomed by the USA; see ILC, *State Responsibility: Comments and Observations received from Governments* (UN Doc A/CN.4/515), p. 67; 19 March 2001.

another matter and one which I revisit below but there can be no doubt that what is at issue is something juridically different from the local remedies rule.

55. I do not agree that the Jurisdiction Decision must be read as deciding that any argument based on whether there was a means by which the decisions of the Mississippi courts could be challenged within the judicial system in the USA (a term I use to refer to both the federal and state courts) is necessarily subsumed within the local remedies rule. There are several reasons why I believe it is a mistake to read so much into the Jurisdiction Decision.

56. First, the distinction between the two issues is well established in international law, as demonstrated above.

57. Secondly, in the Jurisdiction Decision the Tribunal was concerned with the extent of its competence, not with the merits of Loewen's claim. It is, therefore, intrinsically unlikely that it intended to take a decision on the merits - indeed, paragraph 74 of the Decision makes clear that, on the contrary, the Tribunal was standing over to the merits certain issues which did go to jurisdiction. Yet the question whether a decision of a lower court which was open to challenge within the US judicial system was capable of constituting a denial of justice (or some other breach of the substantive rules of NAFTA) is patently a question which goes to the merits, as the UK's perceptive comment quoted above makes clear. Had the Tribunal gone as far as Loewen asserts in its Reply, it would in effect have decided that the substance of the relevant rule of international law treated as irrelevant the possibility of a challenge to the decision of a lower court, such a possibility being of merely procedural significance. In doing so, it would have decided an important merits issue when only preliminary objections had been put to it. Moreover, the decision which Loewen asserts the Tribunal took would clearly have been wrong in international law.

58. Thirdly, the importance which the Tribunal attached - both in its Decision and in the hearings - to the question whether NAFTA tribunals could end up as a substitute for appeals in a wide range of investment disputes suggests that it did not intend to pre-empt discussion of precisely this question in the merits phase.

59. There are, of course, (as the Tribunal recognized) a number of similarities between the content of the local remedies rule and the question whether a judicial decision amounted to an unlawful measure when it was open to judicial challenge. I entirely agree with Sir Robert Jennings that the criteria for deciding whether an effective means of challenge is in fact available in a particular case is the same under the local remedies rule and the substantive principle I advanced.

60. I also accept that, as the Tribunal recognized, the two issues have often been confused in the past. [57] Sir Robert, in fact, gives a vivid illustration of the type of case in which that confusion frequently arose. At page 7 of his Third Opinion, he comments that in cases in which a foreign national was injured by the acts of private miscreants whose acts were not imputable to the State, it was necessary for the foreigner to have vain recourse to the local courts "so that the defendant state could then be held responsible for a secondary injury inflicted by its local courts, for 'denial of justice'." He then continues:-

> "So in this kind of case, where the original wrong was not attributable to the respondent government, and which kind of case belonged mainly to a long out-moded period of the development of international law, the requirements for denial of justice did not [58] indeed include resort to local remedies, for otherwise no responsibility could be pinned upon the defendant state. But even then these requirements were stated as those of a rule of the exhaustion of local remedies, and not as part of the substantive definition of a denial of justice."

Yet this is precisely the type of case where, on any analysis, the requirement of resort to the local courts is part of the substantive law, not an aspect of the procedural rule of exhaustion of local remedies (as Sir Robert recognized in his Second Opinion)[59]. A procedural rule concerning the conditions for bringing a claim cannot even begin to bite unless there is a substantive wrong and in the case postulated by Sir Robert there would have been no substantive wrong by the State unless the resort to the local courts had

---

57 See paras. 16-20 of my First Opinion.

58 The word "not" must have been inserted as an error in the typing up of Sir Robert's Opinion.

59 Jennings Second Opinion, para. 36.

culminated in a denial of justice.[60] That this issue was frequently discussed under the rubric of the local remedies rule (sometimes with the qualification that the rule was here used in a substantive form) merely illustrates the confusion of thought in the past and the fact that the local remedies rule, because it goes to the jurisdiction of most tribunals, tends to be dealt with before questions of merits. It certainly does not mean that, once the local remedies rule was recognized as procedural in character, the requirements of resort to the courts did not form part of the substantive definition of denial of justice.

61. It follows that I am not seeking, as Sir Robert suggests, to urge on the Tribunal "radical modification" of the local remedies rule, or, indeed, any modification of that rule at all. What I am saying is that, all considerations of the local remedies rule and its procedural requirements aside, it is necessary to determine what are the substantive requirements of the rule which the United States is accused of having violated.

62. Nor is there anything "purpose-built" or "novel" about the view that, where the act which is said to be a violation of the law is a decision of an inferior court, those requirements may include the absence of any effective means by which that decision can be challenged within the State's own judicial system. Just such a view of the substantive law, in a case where the decision of the lower court was held to be expropriatory, is reflected in the decision of the Iran-US Claims Tribunal in the *Oil Field of Texas* case,[61] which is quoted at paragraph 32 of my First Opinion. The Tribunal there held that the absence of any scope for challenging the court's order within the Iranian legal system was relevant to determining whether or not there had been a breach of the relevant norm of international law. The case has nothing to do with the local remedies rule, which does not apply in the Iran-US Claims Tribunal.[62] As will be seen,[63] there is other authority to similar effect.

---

[60] Similarly, if the local remedies rule is waived, there would still be no violation of international law in such a case. No-one has ever suggested that if two States conclude a treaty regarding the protection of aliens in which they establish a mechanism for arbitration and agree to waive the local remedies that they would become internationally responsible for ill-treatment of one another's nationals by "private miscreants."

[61] 12 Iran-US CTR 308 at 318-19.

[62] See para. 65 of the Jurisdiction Decision and Jennings Third Opinion at p. 16.

[63] See paras. 82-89, below.

63. I remain, therefore, of the opinion that, quite apart from the operation of the local remedies rule, the substantive rules of international law which the United States is accused of having breached are not violated by a decision of a court which is open to effective challenge within the national judicial system. I set out my analysis of the substantive law under each of the three NAFTA provisions invoked by Loewen in Parts V, VI and VII of this Opinion. Before doing so, however, it is first convenient to make clear that there were, in fact, methods available to Loewen within the US judicial system by which it could effectively have challenged the decisions of the Mississippi courts.

## IV. The Remedies available to Loewen within the US Judicial System

64. Once it is established that the United States cannot be held responsible for a violation of NAFTA Chapter 11 on the basis of the decisions of the Mississippi courts if there were effective means by which Loewen could have challenged the decisions of the Mississippi courts within the US judicial system, the next question which arises is whether such means existed. This question arises both under the local remedies rule (where the requirement that remedies be effective and available is long established) and under the substantive law of denial of justice (where it could not be - and is not - suggested that the existence of a wholly theoretical, ineffective remedy in a higher court prevents the decision of a lower court from constituting a denial of justice).

65. In approaching this question, it is essential to keep in mind the standard which international law sets. In my First Opinion, I quoted Sir Hersch Lauterpacht's separate opinion in the *Norwegian Loans* case, [64] in which he stated that the test was whether the legal position was "so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy". Similarly, Amerasinghe cited the *Finnish Ships* case as authority for the proposition that "the test is obvious futility or manifest ineffectiveness".[65] While these tests were formulated in the context of the local remedies

---

[64] ICJ Reports, 1957, p. 9 at p. 39.

[65] Amerasinghe, *Local Remedies in International Law* (1990), p. 195.

rule, the same test applies in respect of the substantive requirements of denial of justice. Neither Sir Robert Jennings nor Sir Ian Sinclair in their latest opinions has questioned the test as thus formulated or suggested that a different test applies either in respect of the local remedies rule or the substantive law.

66. In the present case, there is no doubt that a remedy existed, because Loewen could have appealed the decision of the trial court to the Mississippi Supreme Court. Loewen does not deny that such an appeal was possible and, indeed, argues strenuously that it would have succeeded. It maintains, however, that this remedy was not available to it, because the Mississippi Supreme Court had refused to reduce or waive the supersedeas bond requirement and Loewen could not have afforded either to post the bond or to pursue the appeal while O'Keefe enforced the damages award against it. This argument is supported by both Sir Robert [66] and Sir Ian.[67]

67. Neither Sir Robert nor Sir Ian comments, however, on the two means by which the United States has argued that this problem could have been overcome, namely by invoking Chapter 11 of the US Bankruptcy Code or by challenging the bond requirement in the US federal courts. The *Loewen Reply* pours scorn on both but, in my view, Loewen has misunderstood the position in international law.

68. With regard to the first suggestion, Loewen argues that "the United States ... offers *no* international law authority for the proposition that bankruptcy is a reasonable remedy".[68] This comment is misconceived in two respects. First, the United States has not suggested that bankruptcy is a remedy. The remedy was the appeal to the Mississippi Supreme Court from the judgment of the trial court.[69] Bankruptcy was the means by which Loewen could have taken advantage of this remedy without at the same time having O'Keefe enforce the judgment against its assets in the United States. Secondly, what is at issue is not bankruptcy as a general concept but the peculiar (possibly unique) form

---

[66] Jennings Third Opinion, pp. 27-28.

[67] Sinclair First Opinion, para. 45.

[68] *Loewen Reply*, para. 391.

[69] Not to be confused, of course, with the appeal from the decision of Judge Graves regarding the bond requirement.

of bankruptcy (sometimes referred to as "protection") which is available under Chapter 11 of the United States Bankruptcy Code. It is difficult to see how pursuing an appeal which Loewen was confident it would win, while using Chapter 11 bankruptcy to fend off enforcement of the judgment of the trial court can be regarded as a course of action which was, in Dr Amerasinghe's words, "obviously futile" or "manifestly ineffective", especially when Loewen was being advised at the time to take this course of action.

69. With regard to the possibility of challenging the bond requirement in the US federal courts, I have set out my views in paragraph 63 of my First Opinion. In its Reply, Loewen makes much of my remark that I was "not in a position to assess" whether the advice of one former Solicitor-General of the United States was to be preferred to that of another as a matter of United States law and argues that on this basis the Tribunal would be obliged to find in Loewen's favour. Alternatively, Loewen maintains that, in accordance with the decision in *ELSI*, the Tribunal has to take a decision regarding the issues of United States law.

70. I accept that the Tribunal has to form its own view, on the basis of the evidence before it, as to the prospects of success for Loewen before the US federal courts as a matter of United States law. That evidence consists of the opinions of Professor Drew Days (tendered by the United States) and Professors Fried and Tribe (tendered by Loewen). I cannot give expert evidence as to the content of United States law, because I am not a United States lawyer. My role is limited to giving evidence as to the standard set by international law for determining whether a particular remedy would be ineffective and how that standard would be applied by an international tribunal faced with conflicting evidence from distinguished expert witnesses.

71. I have already set out (at paragraph 65, above, and in my First Opinion) what I believe the international law standard to be and have not been contradicted on that point. The test which the Tribunal has to apply is whether recourse to the federal courts would have been obviously futile or manifestly ineffective. As Dr Amerasinghe expressly states, the test is not whether there was a reasonable prospect of success.[70] Accordingly, it is not a matter of an international tribunal weighing up whether the evidence of Professor Days

---

[70] Amerasinghe, op. cit. at p. 195.

is generally to be preferred to that of Professors Fried and Tribe (or vice versa) but whether, in the light of all the evidence, the prospects of success for Loewen were so poor that they could be dismissed as obviously futile or manifestly ineffective.

72. In my opinion, given that the evidence of a former Solicitor-General of the United States is that "(1) Loewen could have sought and had a reasonable opportunity to obtain United States Supreme Court review of the Mississippi bonding requirement or (2) Loewen could have obtained review and relief from a federal district court" [71] it cannot be said that, in international law, this remedy would be regarded as obviously futile or manifestly ineffective.

## V. Article 1105 of NAFTA

73. It is now necessary to turn to the three provisions of NAFTA Chapter 11, Section A, which Loewen maintains were violated by the decisions of the Mississippi courts. It is convenient to begin with Article 1105, because this is the provision on which Sir Robert Jennings places the greatest weight.[72]

74. The first task is to determine the content of Article 1105(1), as it is clear that there is a considerable difference between what Sir Robert and Sir Ian Sinclair read into that provision and the interpretation which I place on it.

75. It is common ground that NAFTA is to be interpreted in accordance with the principles of customary international law codified in the Vienna Convention on the Law of Treaties, 1969 ("the Vienna Convention"), Articles 31-33. Indeed, that principle has been affirmed by NAFTA Tribunals established under both Chapter 20 (*Tariffs applied by Canada to certain US-Origin Agricultural Products*, 110 ILR 542 at paras. 118-124) and Chapter 11 (*Ethyl Corporation* v. *Canada* 38 ILM 708 (1999) at paragraphs 51-53). We

---

[71] Reply Statement of Drew Days, p. 27; *US Response concerning Matters of Jurisdiction and Competence*, Tab B.

[72] See, e.g., Jennings Third Opinion, p. 17, and Jennings First Opinion, paras. 18 and 30.

differ, however, over how those principles are to be applied in interpreting Article 1105. In particular, I believe that the reference in Article 1105 to "fair and equitable treatment and full protection and security" was not intended to embody a standard going beyond the requirements of customary international law. That follows, in my opinion, from the text of the provision, which requires parties to accord to investments of investors of another NAFTA party "treatment in accordance with international law, *including* fair and equitable treatment and full protection and security" (emphasis added). The use of the word "including" is incompatible with the interpretation advanced by Sir Ian, based upon the decision of the arbitration tribunal in *Pope and Talbot* v. *Canada* (unreported, 10 April 2001), paras. 105-118, that the reference to fair and equitable treatment etc. incorporates a standard which goes beyond international law. The interpretation adopted in *Pope and Talbot* is also difficult to reconcile with the title of the article, "Minimum Standard of Treatment", which strongly suggests a reference to customary international law, where the term "minimum standard" is well established, and by the subsequent practice of the parties, detailed at pages 175-6 of the *United States Counter-Memorial*. Nor do I agree with Sir Robert's analysis that the reference to "international law" goes beyond customary international law and embraces standards taken from bilateral treaties. Even if one accepts the interpretation of the bilateral investment treaties suggested by Sir Robert and Sir Ian, those treaties are not binding on Mexico which has not accepted the standards which they lay down.

76. In the end, however, it seems that nothing turns on this disagreement, because the interpretation of Article 1105(1) has been definitively settled by the NAFTA parties. On 31 July 2001, the Free Trade Commission adopted the following interpretation of Article 1105(1):

> **"Minimum Standard of Treatment in Accordance with International Law**
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

77. This interpretation is binding on the Tribunal by virtue of Article 1131(2) of NAFTA. Even if this were not the case, the decision of the Free Trade Commission, composed as it is of representatives of the three NAFTA parties, constitutes a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (Vienna Convention on the Law of Treaties, 1969, Article 31(3)(a)) which is authoritative under the ordinary principles of treaty interpretation. Indeed, subsequent agreements between the parties to a treaty, and the subsequent practice of those parties which establishes an agreement even where there is no formal text to record it, have always been of great importance in determining the proper interpretation of a treaty.[73]

78. Given, therefore, that the standard required by Article 1105 is the same as that required by customary international law, it is then necessary to determine what that law requires of a State as regards the provision of justice in litigation between private parties. There is no doubt that customary international law has long contained rules relating to denial of justice, which Sir Robert Jennings described in his First Opinion as "historically one of the oldest and most respected parts of the system".[74] He nevertheless makes the points that (a) different writers over the last two hundred years have used the term in different ways and (b) the older cases have to be approached with some care, since both international law and the legal systems of States have undergone considerable development. I agree with him on both of these points, although I draw somewhat different conclusions from them.

79. With regard to the first point, the term "denial of justice" has sometimes been used to denote denial of access to a court (and some writers have insisted that this is its only

---

[73] See the passage from *The Franciska*, quoted in McNair, *The Law of Treaties* (1961), p. 428. The *Loewen Reply*, para. 284 misrepresents the effect of the decision in *The Franciska*, and the views of Lord McNair, by quoting a part of the decision out of context and ignoring the remainder. It also gives the wrong date for Lord McNair's book, which was published in 1961, not 1986 (which was merely the date of a photographic reprint), and thus appeared before the adoption of the Vienna Convention in 1969.

[74] Jennings First Opinion, para. 18.

meaning) and at other times to refer to what might be termed denial of due process once the judicial process has been started. In my opinion, whatever the position might once have been, modern customary international law imposes duties on States in both respects. They are, however, different aspects of the same obligation, namely to maintain and make available to aliens, a fair and effective system of justice.

80. With regard to the second point, I agree that some (though by no means all) of the older cases deal with issues which are unlikely to arise today. A more important consideration, however, is that many of the nineteenth century cases concerned States which were politically unstable and were widely regarded (rightly or wrongly) by international lawyers from Europe and North America as lacking anything which resembled a "proper" court system. This factor is absent from contemporary international law [75] and would, in any case, be a wholly inappropriate approach to adopt when dealing with the three NAFTA parties, all of which have highly developed judicial systems. It is also material that in many countries the scope for challenging decisions by way of appeal, constitutional review and other mechanisms is far greater today than it was even fifty years ago.

81. I considered the nature and extent of the State's obligations in this regard in paragraphs 22-38 of my First Opinion and suggested there that it was only when the whole system of justice in a State, including its means for challenging the decisions of lower courts, had failed to meet the required standards of fairness and effectiveness that there was a violation of international law, a "denial of justice". In response to the comments of Sir Robert and Sir Ian, I would add the following remarks.

82. The approach which I outlined in my First Opinion reflects that taken by the United Kingdom in its comments to the International Law Commission regarding the earlier ILC Draft Articles on State Responsibility. That earlier draft included two articles (Draft Articles 20 and 21), the work of the late Judge Ago (then the rapporteur of the ILC on this topic), which divided the substantive obligations of States into "obligations of conduct" and "obligations of result". Draft Article 21 provided that:-

---

[75] I agree with Sir Robert that it is contemporary international law which has to be applied in the present case.

"1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation."[76]

83. In commenting on these provisions in 1998, the United Kingdom, after stating that it regarded Draft Article 21 as uncontroversial and emphasising that the issues which it raised were not to be confused with the application of the local remedies rule,[77] observed that:-

> "...in a case where international law requires only that a certain result be achieved, the situation falls under draft article 21(2). *The duty to provide a fair and efficient system of justice is an example. Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court.* In the case of such obligations, no breach occurs until the State has failed to take any of the opportunities available to it to produce the required result."[78]

The italicised passage is directly in point in the present case. It constitutes State practice, only three years old, which clearly indicates that the substantive obligation imposed upon the State is to provide a fair and efficient *system* of justice and that the decision of a lower court (even if it is not merely wrong but "corrupt") does not put the State in breach of that obligation if the State has provided the means within that system whereby that decision can be corrected.

84. This approach to the duty to provide a system of justice was accepted by the new ILC rapporteur, Professor James Crawford SC. After quoting the United Kingdom comments set out in the preceding paragraph, he observed that:-

> "There are also cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant

---

76 UN Doc. A/51/10, p. 125.

77 See paras. 53-54, above.

78 UN Doc. A/CN.4/488, p. 68 (emphasis added).

decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act." [79]

85. The ILC subsequently discarded the provisions on obligations of conduct and obligations of result. It did so because the distinction was not considered useful in a set of general articles dealing with the secondary rules of State responsibility (ie the legal framework of responsibility rather than the specific rules - the "primary rules" - for the breach of which the State would incur responsibility). The decision to drop the old draft articles 21 and 22 did not suggest that there was any doubt about the fact that certain obligations are plainly obligations of result, nor that there was any dissent regarding the statements quoted above.

86. The same approach to the State's duties to provide a fair and effective system of justice is taken by the late Judge Jimenez de Arechaga (who also carefully distinguishes between this issue and the local remedies rule, dealing with the latter in a different section of his work). Although he adopts a narrow definition of denial of justice, confining it to cases of denial of access to a court and distinguishing it from cases where a court perpetrates an injustice, he concludes that in the latter case:-

> "There have been cases ... in which a State was held responsible as a result of a judicial decision in breach of municipal law. Such exceptional findings have been justified on the basis of three cumulative requirements which must be satisfied for a State to be held responsible on this account:
>
> (a) the decision must constitute a flagrant and inexcusable violation of municipal law;
>
> (b) it must be a decision of a court of last resort, all remedies available having been exhausted;
>
> (c) a subjective factor of bad faith and discriminatory intention on the part of the court must have been present.
>
> ...
>
> The reason for the second requirement is that States provide in their judicial organization remedies designed to correct the natural fallibility of its judges. A corollary of this requirement is that a State cannot base the charges made before

---

[79] UN Doc. A/CN.4/498, para. 75 (original emphasis).

an international tribunal or organ on objections or grounds which were not previously raised before the municipal courts."[80]

87. The systemic nature of the obligation is also acknowledged in the human rights context. Thus, the European Court of Human Rights has held that the duty of a State under Article 6(1) of the European Convention on Human Rights, 1950, to provide a fair trial was not violated in a case where the trial had involved a significant violation of the right but those defects had been remedied by subsequent proceedings before the Court of Appeal. (*Edwards* v.*United Kingdom*, Series A No. 247-B, para. 39; the case involved a criminal charge but the same principle applies, arguably *a fortiori*, in a civil case.)

88. It is also relevant to note the broader principle enunciated by the arbitration tribunal in *S.D.Myers Inc.* v. *Canada* (unreported, 13 November 2000) in connection with Article 1105:-

> "When interpreting and applying the 'minimum standard', a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. ... The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections." (Paragraph 261)

This proposition is particularly true of judicial decisions, where appellate recourse is the norm.

89. Finally, I notice that neither Sir Robert nor Sir Ian has produced a single instance of an arbitral decision given by any international tribunal in which a State has been held responsible for the decision of a lower court when there was available within the legal system of that State a means by which that decision could effectively be challenged.

90. Accordingly, I stand by the view expressed in my earlier opinion that, quite apart from the requirements of the local remedies rule (and irrespective of whether those requirements are applicable in a Chapter 11 arbitration), the substantive law on the provision of justice by a State is such that a State does not violate international law when a decision of one of its lower courts involves a manifest injustice to an alien if there are effective means by which the alien can challenge that decision within the court system of that State.

---

[80] "International Law in the Past Third of a Century", 159 Recueil des Cours (1978) at p.282.

91. That conclusion is unaffected by the reference in Article 1105(1) to the requirements of "fair and equitable treatment" and "full protection and security". As part of the customary international law on the treatment of aliens, they form part of the general principle outlined above. There is no authority to require, or reason of policy to suggest, that the presence of those terms means that a tribunal should disregard the availability of an appeal or other means of judicial challenge and hold - for the first time - that a State is in breach of its treaty obligations as the result of a court decision which is open to challenge. In short, it is not a matter of my having to "read into" the terms of Article 1105 a "doctrine of finality". There is nothing in those terms to suggest a departure from a practice which was already firmly grounded both in authority and common sense.

92. I should add, however, that even if the decisions of the Mississippi courts had to be evaluated on their own, with no reference to the possibility that Loewen could have challenged them within the US judicial system, I still do not believe that Loewen has made out a case that it has been the victim of a denial of justice under the international law standard enshrined in that Article.

93. In its Reply, Loewen maintains that what constitutes a denial of justice today is radically different from what was once considered to do so.[81] In particular, Loewen contends that, in the context of cases brought by an individual investor directly against a State (presumably as opposed to cases of diplomatic protection), the standard is far lower than the United States suggests.[82] In my opinion, Loewen misunderstands the authorities on which it relies and misstates the position in contemporary international law. Where, as in the present case, the term denial of justice is used to describe the decision of a court, the authorities (old and modern) are clear that only where a decision is manifestly unjust or clearly incompatible with a specific international obligation of the State (such as the rule of diplomatic immunity) can that decision render the State responsible for a violation of international law.

---

81 *Loewen Reply*, paras. 196-206.

82 *United States Counter-Memorial*, pp. 130-2.

94. Since, as the Free Trade Commission made clear in its decision of 31 July 2001, [83] Article 1105 embodies the standard of customary international law, it is necessary for Loewen to establish that the decisions of the Mississippi courts constituted a manifest injustice. Contrary to what is said by Loewen, international law sets a high threshold in this respect, recognizing a considerable "margin of appreciation" on the part of national courts. Thus, the awards and texts make clear that error on the part of the national court is not enough, what is required is "manifest injustice" or "gross unfairness" (Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice", 10 BYIL (1929), p. 181 at 183), "flagrant and inexcusable violation" (Arechaga, quoted at para. 86, above) or "palpable violation" in which "bad faith not judicial error seems to be the heart of the matter" (O'Connell, *International Law* (2nd ed., 1970), p. 498). As Baxter and Sohn put it (in the Commentary to their Draft Convention on the International Responsibility of States for Injuries to Aliens) "the alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice."[84]

95. The authorities which Loewen cites do not in fact suggest a different standard. The tribunal in *Azinian* [85] certainly did not do so. The passage in paragraph 98 of the award, from which Loewen quotes, is in fact one in which the tribunal is quoting with approval the test laid down by Judge de Arechaga (which I have quoted at paragraph 86 of this Opinion). Loewen does not make clear that Arechaga (like most Latin American jurists) considered the term "denial of justice" to be confined to cases of denial of access to courts. Where what was in issue was a decision of a court he thought that there had to be either a clear violation of an international obligation or "a flagrant and inexcusable violation of municipal law." [86] Later, Loewen refers to paragraphs 102-103 of the award

---

[83] See para. 74, above.

[84] Garcia-Amador, Sohn and Baxter, *Recent Codification of the Law of State responsibility for Injury to Aliens* (1974), p. 198 (commentary to Article 8; the text was prepared in 1961).

[85] See *Loewen Reply*, para. 199, in which Loewen quotes (not entirely accurately) from the award in *Azinian* v. *United Mexican States*, 39 ILM (2000), p. 537.

[86] See above, para. 86.

but quotes them only in part. It is worth looking at the whole of those two paragraphs and at paragraph 105:-

> "102. A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case.
>
> "103. There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law. In the present case, not only has no such wrong-doing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the *bona fides* of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.
>
> ...
>
> 105. If the Claimants cannot convince the Arbitral Tribunal that the evidence for this finding was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious, they simply cannot prevail...."

96. Taken in their entirety, these passages show that the Tribunal in *Azinian* thought that the concept of denial of justice was more complicated than Loewen suggests and its findings also demonstrate that, on the facts, the Claimants in *Azinian* had come nowhere near making out a claim of denial of justice. It is, therefore, unsurprising that the Tribunal thought it unnecessary to go into the details of the test to be applied. Nevertheless, the passage quoted shows that the Tribunal clearly considered that the standard was a high one which was not easy to meet and that, in O'Connell's words, it was a matter of bad faith, not judicial error.

97. The same is true of the academic commentators cited by Loewen. Baxter and Sohn and Garner have already been quoted. Adede, "A Fresh Look at the Doctrine of Denial of Justice under International Law", 14 CYIL (1976), p. 73, does indeed speak of liability for "unjust decisions" (at p. 87), which he says "envisages cases in which an alien has been accorded access to local courts and has not suffered from any of the procedural denial of justice, yet receives a sentence which is unjust *and for which there is no local means of redress*" (emphasis added). He goes on, however, to make clear that the term

"unjust decision" is no more than shorthand and that what is required is bad faith, rather than an unreasonable decision (p. 89) and refers to a "gross misapplication" of the law.

98. Even Freeman, from the early part of whose book *The International Responsibility of States for Denial of Justice* (1938) Loewen gives a long quotation on which it places particular reliance, though he takes a somewhat different view from that of the majority of commentators and is critical of "manifest injustice" as a standard, goes on to make clear that what is required is:-

> "... clear proof of serious error plus additional factors in the nature of malice toward the alien - which may be evidenced by the court in 'consciously misapplying the law or in declaring the existence of a fact which it had previously recognized as non-existent, or the non-existence of a fact which obviously exists' - or, stated negatively, the absence of good faith..."

He continues:-

> "Where it is not possible to establish the influence of corruption, bias or malice upon the outcome of the proceedings ... the State's responsibility may still be engaged *where the decision is so erroneous that no court which was composed of competent jurists could honestly have arrived at such a decision*; or, as de Visscher has put it, 'where the judge's *défaillance* attains such a degree that one can no longer explain the sentence rendered by any factual consideration or by any valid legal reason.'"(pages 330-331, emphasis in the original).

It is clear from these passages that Freeman also thought that a claimant asserting that he has been the victim of a denial of justice had to meet a very high standard.

99. Finally, the testimony of Loewen's international law experts does not support the conclusions for which it is quoted at this part of the Reply. The passage at page 7 of the Third Jennings Opinion (quoted at paragraph 203 of the Reply) is concerned with the local remedies rule, which Sir Robert makes clear is a procedural matter. [87] Sir Robert is not there discussing the substantive law of denial of justice. Elsewhere in his Third Opinion, Sir Robert accepts that "it may ... readily be agreed that no court or tribunal will lightly or readily find the judicial acts of a respondent State in breach of the requirements of international law" and refers to the customary international law standard (which is all

---

[87] See Jennings Third Opinion, p. 1 .

that is in issue given the interpretation of Article 1105 set out above) as requiring "outrageous treatment".[88] Loewen also refers to page 30 of Sir Ian Sinclair's First Opinion. It is true that Sir Ian there draws a distinction between claims of diplomatic protection and claims brought directly by an investor. For reasons given in paragraphs 22-32, above, I doubt that this distinction has as much significance as Loewen and its expert witnesses have suggested. Nevertheless, even if one accepted that it was a fundamental distinction at the level of *procedure*, no reason is offered either by Sir Ian or by Loewen as to why it should bring about a fundamental alteration in the *substantive* law on denial of justice. The right of an investor to claim on its own behalf for a violation of international law frees it of dependence on the State of nationality/incorporation but it does not alter the law which that investor is entitled to demand should be applied to it. What constitutes a denial of justice to an alien is exactly the same irrespective of whether that alien complains of that denial itself or has a claim brought on its behalf and none of the authorities cited by Loewen even hints otherwise.

100. What those authorities make clear, as demonstrated above, is that international law necessarily leaves States considerable discretion in how they organize their judicial system and the rules of procedure which they apply. There is also a clear tendency to assume that a court has acted lawfully and in good faith. Although Loewen contends that there is no authority for that proposition, I set out a body of authority for it in paragraph 14 of my First Opinion and have added further authority above. The proposition is, if anything, more important in contemporary international law than it was at the time the older denial of justice cases were decided. At that time, as Sir Robert has explained, there was considerable mistrust of the judicial systems of many States, some of which were considered as devoid of any judicial qualities. That is not the case today, especially between States such as those party to NAFTA. Sir Robert's argument that, even if the proposition set out here is part of customary international law, there is nothing on which to base it in the terms of NAFTA, cannot stand in the light of the 31 July 2001 decision of the Free Trade Commission which makes clear that Article 1105 embodies the customary international law standard.

---

[88] Jennings Third Opinion, p. 27.

## VI. Article 1102 of NAFTA

101. To a large extent, the observations made in the preceding section are also applicable to Loewen's claim under Article 1102. It is important to be clear on what the claim of discrimination is really based. Even accepting, for the moment, Loewen's characterisation of their actions, the behaviour of O'Keefe, his counsel and the witnesses which they called cannot be imputed to the United States and cannot, therefore, give rise to a claim under Article 1102. Sir Ian Sinclair accepts that there are no "demonstrable and significant indications of judicial bias on the basis of nationality in this particular case".[89] The complaint of discrimination, therefore, really turns on the allegation that the jury was biased against Loewen and discriminated against it. The complaint against Judge Graves, that he should have done more to prevent the O'Keefe team's rhetoric before the jury, and against the Mississippi Supreme Court, that the Court should have recognized *before hearing the Loewen appeal* that the jury had delivered a discriminatory verdict and reduced or waived the bond requirement, are entirely dependent upon the complaint against the jury. In short, if the jury did not discriminate against Loewen there was no material discrimination and hence no violation of Article 1102.

102. I accept that a jury is a part of the court and that its actions are imputable to the State. However, it would be ludicrous to hold a State to be in breach of international law even if a jury verdict were tainted by discrimination, provided that the State makes available the machinery by which such a tainted verdict can be corrected. The jury is a rare, if not unique, institution in which a number of private citizens are entrusted for a limited period of time with exercising the power of the State. There is no suggestion that the institution as such contravenes international standards and it would be unrealistic to require that a State ensure that its citizens as a whole are free of any discriminatory tendencies or even to ensure that jurors with bias against one group or another are weeded out at the

---

[89] Sinclair First Opinion, para. 21.

selection stage.[90] The possibility of a discriminatory jury verdict is, therefore, always present. Provided that the State takes reasonable steps to guard against the possibility of consequent injustice, in particular by making it possible effectively to challenge the verdict on the basis of bias, I believe that the obligations of the State under the general international law duty of non-discrimination and the requirements of NAFTA Article 1102 (to the extent that they might differ) are met.

103. It follows that the views I have set out in Part V, to the effect that a decision of a lower court cannot involve a violation of Article 1105 if the possibility of an effective challenge exists, are also applicable to Article 1102 in this case. The contrary case can be tested in this way: would there have been a violation of Article 1102 if the evidence had shown that the jury verdict was tainted by discrimination even if an appellate tribunal had reversed the decision or ordered a retrial on the ground of bias ? The proposition is surely unarguable.

104. However, even if that were not so, I do not believe that Loewen has demonstrated that it was the victim of discrimination which is imputable to the United States. As the tribunal in *Pope and Talbot* has pointed out, any consideration of discrimination has to take full account of the legal and factual context of the case.[91] In the present case, an essential feature of that context was the fact that the case of *O'Keefe* v. *Loewen* was in part about allegations that Loewen was passing itself off as a local concern when it was not. This is important in two respects.

105. First, Loewen's pleadings ignore the fact that an essential element of the case brought by O'Keefe was that those purchasing funeral services in the Mississippi Gulf coast had a preference for dealing with "local" firms which had roots in the local communities. O'Keefe alleged that Loewen had misled consumers in the relevant part of Mississippi by the use of advertising which suggested that funeral businesses, in which it had purchased the controlling interest (indeed almost the entire shareholding), remained "local" concerns, whereas they were in fact run, and their pricing and other policies

---

90 Indeed, the United States does far more than most States which retain the jury system to weed out bias at the selection stage.

91 Merits Award on Phase II, 10 April 2001, para. 75.

dictated, by Loewen as the parent company. In such a case, the fact that Loewen was not a local, Mississippi concern was necessarily, and quite properly, a relevant - indeed, a central - factor in the case.

106. While O'Keefe and Loewen may have been in "like circumstances" for other purposes, they should not be so regarded for the purposes of this litigation. Loewen was a Canadian company accused of passing off its funeral homes in southern Mississippi as locally owned. O'Keefe could not be similarly accused as its funeral homes in southern Mississippi *were* locally owned. The question is not whether Loewen was treated differently from the way in which O'Keefe would have been treated if subject to the same accusations - O'Keefe simply could not have been subjected to those accusations in front of the same court. The question is whether Loewen was treated less favourably than a funeral service provider from another part of Mississippi or another state in the USA would have been treated if it had been accused of misrepresenting itself as a local concern in the relevant part of Mississippi.

107. Secondly, Loewen had chosen - quite deliberately it would seem - to adopt as a litigation tactic an attack on O'Keefe's credibility by representing him as dishonest and bigoted.[92] It was for that purpose that Loewen itself had introduced into the evidence the advertising campaign which O'Keefe had run. It was this tactic which obliged O'Keefe to defend his credibility by showing that the accusations he had made against Loewen were well founded and that Loewen was, in fact, representing its Gulf coast subsidiaries to be local concerns when any objective assessment showed that they were not. In this respect, it is important to keep in mind that the case was not being tried in the part of Mississippi to which these accusations related. The advertising campaign and most of the accusations about passing off concerned practice in the Gulf coast, whereas the case was tried in Jackson, the State capital which is more than one hundred miles inland.

108. An even more fundamental objection to Loewen's case under Article 1102 is that the evidence does not seem to me to sustain the allegation that the jury was biased against Loewen on account of Loewen's Canadian nationality. I am not sure that international

---

[92] The interview with one of the jurors, Ms Akida Emir, quoted in the First Sinclair opinion at para. 30, shows that O'Keefe could not take it for granted that the jury would treat him as a credible witness.

lawyers from the United Kingdom are the persons best placed to analyse the results of a survey of jurors in Mississippi. Such surveys are prohibited as contempt of court in the United Kingdom and we therefore have almost nothing against which to measure the findings of the survey in the present case. However, as Sir Ian Sinclair has given his impressions of the results of that survey, I shall briefly offer mine since they are somewhat different.

109. It is, of course, important, as Sir Ian recognizes, that the survey was conducted on behalf of Loewen and its findings must therefore be treated with some caution.[93] That is particularly true of the passages which record the authors' analysis of the jury's behaviour (i.e. those quoted at paragraphs 24-26 of the First Sinclair opinion).

110. However, even the passages from the interviews quoted by Sir Ian do not, in my view, sustain the conclusion that the jury verdict was tainted by bias and discrimination. To take just one example, the jury foreman, as a Canadian, is unlikely to have been biased against Canadians. The evidence that he "hated Canada and Canadians" consists almost entirely of Messrs Corlew and Robertson's description of the impression which another juror (who disagreed with the majority) had given them of Mr Millen's views. The record of his own comments hardly bears that out. His remark that a Canadian minister "meant nothing here" in Mississippi certainly does not prove anything of the kind. I would have thought it was unexceptional, and indeed trite, to point out that the impact on public opinion of the fact that a company has prominent people from public life on its board diminishes the further away from the epicentre of that public life one gets. I doubt that the US Agriculture Secretary or the United Kingdom Minister for Rural Affairs cuts much ice in Vancouver either.

111. The interview with Ms Chapman certainly reveals her view that the jury went on the impression which witnesses and counsel created and did not always pay attention to the evidence itself. But even if her impression is accurate, that comes nowhere near sustaining an allegation of discrimination. The extracts from the interviews with Mr Bruce (at paragraph 28 of the First Sinclair Opinion) and Ms Clincy (paragraph 29) say nothing at all about discrimination. The extract (paragraph 30) from the interview with

---

93 First Sinclair Opinion, para. 24.

Akida Emir (who came from Chicago) shows that she formed a critical view of Loewen but gives no hint that this was the result of Loewen being from outside Mississippi (indeed she is quoted as saying that she mistrusted Jerry O'Keefe because she knew about his activities in Mississippi).

112. The picture which emerges from these extracts from the jury interviews may, as Sir Ian says (at paragraph 33) give "a flavour of the atmosphere of the trial" but to me that flavour is not one of discrimination and if the jury did not behave in a discriminatory way, the case under Article 1102 falls flat.

113. Finally, I must respond to the comment in paragraph 35 of Sir Ian's First Opinion, in which he says that even if Loewen had not objected at the time, Judge Graves had a duty to intervene. I assume that Sir Ian considers this duty to have been one arising under international law (specifically under Articles 1102 and 1105 of NAFTA). Sir Ian cites no authority for the existence of such a duty of intervention. In fact, international tribunals have generally insisted that:-

> "...as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party."[94]

Moreover, Sir Ian's approach reads into a general non-discrimination provision a very considerable degree of intervention in the way in which a State determines its rules of procedure and evidence. I do not think it can be read into the terms of Article 1102 or Article 1105 without more to indicate that this was the intention of the parties.

## VII. Article 1110 of NAFTA

114. On Article 1110 I can be very brief as it is barely mentioned by Sir Robert or Sir Ian in the current round of opinions. I think it is common ground between us that even if a court decision can amount to an expropriation (and I think that the tribunal in *Pope and*

---

[94] Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia in *Prosecutor* v. *Delalic*, 40 ILM (2001) 630, para. 640.

*Talbot* was right in concluding that the words "act tantamount to an expropriation" add nothing), it can only do so if the decision is itself so tainted that it is contrary to either or both of Articles 1102 and 1105. In other words, as Sir Robert has said, the "expropriation is another aspect of the denial of justice".[95] It is plain that a court decision which is not flawed in this way cannot constitute an expropriation, since otherwise the imposition of a financial penalty or even an award of damages or costs by a court would give rise to a duty to pay compensation on the part of the State, which is not the position under international law and cannot have been intended here.

115. Since I believe, for the reasons set out above, that the decisions of the Mississippi courts were not otherwise contrary to international law or the provisions of NAFTA, I do not see how they can amount to an expropriation. If, on the other hand, the Tribunal were to find that those decisions did contravene Article 1102 or 1105, I do not see that a decision that they also contravened Article 1110 would make any difference to the outcome.

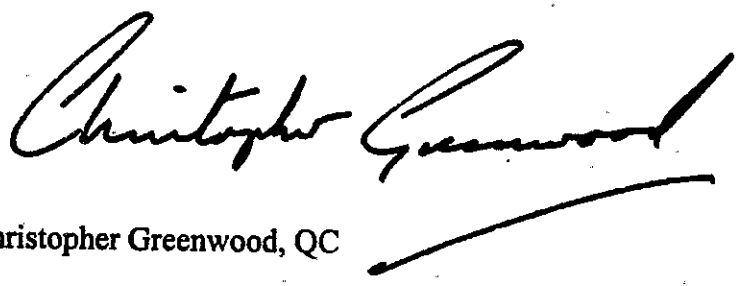
## VIII. Conclusions

116. In my opinion, Loewen's claim in the present proceedings is misconceived. Loewen had open to it means of challenging the decisions of the Mississippi courts which cannot be characterised as manifestly ineffective or obviously futile. It chose instead to abandon any challenge within the US judicial system and bring a NAFTA claim. In doing so it has failed to comply with the procedural requirements of the local remedies rule, which remains applicable in such a case as this. Even more fundamentally, as a matter of substantive law the USA committed no violation of Articles 1102, 1105 or 1110 since none of these provisions imposes responsibility on a State for a decision of a court which is open to challenge within the judicial system of that State.

---

95 Jennings First Opinion, para. 31.

117. In addition, the evidence in the present case does not disclose a violation of Articles 1102, 1105 or 1110 even if such a decision were capable in principle of amounting to such a violation.



Christopher Greenwood, QC

16 August 2001