

**Fair and Equitable Treatment and Denial of Justice:
*Loewen v US and Chattin v Mexico****

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I. Introduction

This chapter will deal principally with the *Loewen* case¹ and the denial of justice. *Chattin v Mexico*² will be touched on as it frequently figures in the literature on denial of justice.³ NAFTA Article 1105⁴ and fair and equitable treatment provided for in that article will be dealt with briefly. Denial of justice is thought to be incorporated in Article 1105.⁵ The interpretation of 1105 is an issue which has figured in *Loewen* and other NAFTA chapter 11 cases.

* This chapter was originally published in 'International Investment Law and Arbitration', edited by Todd Weiler © Cameron May 2005).

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¹ *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award (June 26 2003), available at http://www.naftaclaims.com/disputes_us/disputes_us_5.htm, visited on September 28, 2004. Also available at 42 ILM 811(2003) [Loewen].

² *B. E. Chattin(United States) v. United Mexican States*, 4 RIAA 282 (1927). Also available at <http://www.dal.ca/~wwwlaw/kindred.intllaw/CHATTIN.htm>, visited on July 16, 2004 [Chattin].

³ Alwyn V., Freeman, AInternational Responsibility of States for Denial of Justice," Longmans Green and Co. London, New York, Toronto 1938; Clyde Eagleton, ADenial of Justice in International Law," 22 AJIL 538 (1928); Hans W. Spiegel, AOrigin and Development of Denial of Justice," 32 AJIL 63 (1938); G. G. Fitzmaurice, AThe Meaning of the Term ADenial of Justice," 13 BYIL 93 (1932); A.O. Adede, AA Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law," 14 The Can. Y. B. Int'l L. 72 (1976); Charles De Visscher, ALe Deni de Justice en Droit International," 52 RCADI 367 (1935); David R. Mummery, AThe Content of the Duty to Exhaust Local Judicial Remedies," 58 AJIL 389 (1964); Art. 9 of Harvard Draft and its Commentary, Responsibility of States for Damages Done in their Territory to the Person or Property of Foreigners, 23 AJIL Special Supp. 133, 173 (1929) [hereinafter Harvard Draft].

⁴ Article 1105, NAFTA Chapter 11, Part 1, available at <http://www.sice.oas.org/trade/nafta/chap-111.asp>, visited on July 16, 2004.

⁵ And specifically within "fair and equitable treatment"; see First Memorial of Loewen Group Inc. (October 18, 1999), available at http://www.naftaclaims.com/disputes_us/disputes_us_5.htm, para. 176[hereinafter First Memorial]; see also the discussions that follows on denial of justice, *Id.* at pp. 74-97. Presumably this is why our editor assigned to this chapter the title that he did.

I shall try to get to the bottom of the notion of ‘denial of justice,’ albeit that it is both unsettled and protean. In this respect, our editor’s assignment of *Loewen* and *Chattin* as “leading cases” is appropriate, but also ironic.

The irony of *Chattin* is its refusal to designate its outcome a denial of justice: Mexico was held responsible for sentencing *Chattin* to jail for two years for the theft of four pesos, but that act was not called a denial of justice.

Designating *Loewen* as a leading case of denial of justice is ironic- given the failure of the Tribunal, formed under NAFTA’s investment chapter 11, to rule for the claimant or in the alternative to ultimately find an actionable denial of justice-notwithstanding that the United States (the courts of Mississippi) gave judgment against the Loewen Group funeral homes of \$500 million in a breach of contract case involving at most a few million dollars and possibly no damages at all.⁶ It is the author’s submission that the Tribunal’s failure to grant relief as well as the Tribunal’s insufficient doctrinal treatment of denial of justice represents a missed opportunity and makes *Loewen* the “misleading” case on the topic of denial of justice. Indeed it might be said⁷ that the Tribunal’s Award is itself a miscarriage and denial of justice (by an international entity, rather than the national ones who perpetrate the denials of justice which are the proper subject of this chapter). *Loewen* may nevertheless be seen as a leading case, in the light it sheds on the as yet unpenetrated relationship of a *judicial* denial of justice and the local remedies rule.

I will divide my discussion as follows:

- (i) I will try to give the protean jellyfish that is “denial of justice” some spine and at least a working definition for the purposes of this chapter.
- (ii) Possibly more crucially, I will attempt to relate denial of justice to the local remedies rule.
- (iii) I will review the facts and *ratio decidendi* of *Loewen*, and then its treatment of denial of justice and the local remedies rule.
- (iv) I will sketch the development of NAFTA Chapter 11 to date and deal with most of the *Loewen* legal issues other than denial of justice: Article 1105’s international law, fair and equitable treatment (and full protection and security), the July 31, 2001 interpretation of NAFTA’s Free Trade Commission, Article 1103’s MFN treatment, and the dismissal of *Loewen* for failure of continuous nationality (the actual holding of the Award).

⁶ See an in depth discussion of the facts of the case *infra* pp. 17 et seq. A further irony, given the attention that the Loewen Award has received, is that treatment of the judicial conduct in issue in the case is all obiter dicta. The holding of the case concerned Loewen’s nationality.

Ray Loewen, the founder and a shareholder of the Loewen Group, who remains a Canadian national, sought clarification of the Award alleging that the tribunal failed to deal with his claim on the merits, and that its substantive language is obiter dicta, Article 58 Submissions as to Raymond L Loewen’s Article 1116 Claim, Sept 19, 2003; Rejoinder of the Claimant, Raymond L. Loewen, January 9, 2004, *available at* <http://www.state.gov/s/l/c3755.htm>, visited on September 14, 2004. The tribunal rejected Mr. Loewen’s argument that the reasoning was obiter dicta. According to the tribunal, the “dismissal of the claim in its entirety” following the examination of the merits was necessarily a resolution of Art. 1116 claim. See Decision on Respondent’s Request for a Supplementary Decision rendered on September 13, 2004, *available at* <http://www.state.gov/documents/organization/36260.pdf>, para. 21-2. visited on September 14, 2004.

⁷ And it has in effect been so said: *see* Professor Thomas Walde’s tally of the votes of OGEMID’s listserv members which showed that 28 thought the award wrong and only 3 not, Email [dated October 28, 2003 to OGEMID@JISMAIL.AC.UK](mailto:OGEMID@JISMAIL.AC.UK) listserve.

(v) Finally I must deal with the Tribunal's questionable handling of NAFTA Article 1121- the provision which would appear to waive the local remedies rule.⁸

II Denial of Justice

A. I expect that our editor assigned this chapter to me, as he knew that I had advised the Loewen Group's lawyers that I believed we had a 'denial of justice' case under customary international law because of the judicial failures of the State of Mississippi.⁹

The words 'denial of justice' have been used in different ways over the years.¹⁰ Let us pin down the protean jellyfish, to make clear what the term means so that Loewen may indeed be deemed an exemplar, and what it does not or should not mean if the term is to have any practical utility for international lawyers.

Denial of justice should not be thought of as any of the following: any 'wrong' by a state; or any capricious or arbitrary act engaging the international responsibility of states; or indeed even as a synonym for state responsibility itself, whether for injuries to aliens or otherwise- it has however been used in all these diffuse ways.¹¹ Denial of justice means denial of judicial¹² justice. In the words of one recent writer:

⁸ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB/AF/99/2 (October 11, 2002), para 96 [Mondev]; *see also* William S. Dodge, "National Courts and International Arbitration: Exhaustion of Local Remedies and Res Judicata Under Chapter Eleven of NAFTA," 23 *Hast. Int'l & Comp. L. Rev.*, 357, 374 (2000).

⁹ *See supra* note 7. I had been acquainted with Alwyn Freeman, the doctrine's principal scholar in years past, and his work; *see Freeman supra* note 3.

¹⁰ *See, e.g.*, Fitzmaurice, *supra* note 3, at 108; cf. Freeman, *supra* note 3, at 145-6; Adede, *supra* note 3, at 91; Eagleton, *supra* note 3, at 558-9; De Visscher, *supra* note 3, at 390; F. V. Garcia-Amador, Art. 3 of Revised Draft on State Responsibility for Injuries to Aliens, YBILC (1961).

¹¹ *See* dissenting opinion of Nielsen in *Neer claim, L. F. H. Neer & Pauline Neer (U.S.A.) v. United Mexican States*, 4 UNRIAA 60 (1926); *see also* *Laura M. B. Janes (U.S.A.) v. United Mexican States*, 4 UNRIAA 82 (1926); cf. *Cotesworth and Powell Case, Great Britain v. Columbia*, 2 *Moore International Arbitration Reports* 2050 (1898). Strictu sensu, responsibility for injuries to aliens is more accurately responsibility for injuries to nationals of other states, for whom traditionally diplomatic protection may be exercised by that other state. *See* Art. 1 and the commentary in *First Report on Diplomatic Protection*, by John R. Dugard, Special Rapporteur, International Law Commission, A/CN.4/506 (2000), available at: <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/330/76/PDF/N0033076.pdf?OpenElement>, visited on August 2, 2004, pp. 11-4 [hereinafter Dugard Report]. It should also be noted that the term "denial of justice" has found its way into national statutes, where inevitably it may have a variety of peculiar meanings, and where such denial will constitute a violation of the particular national law. *See* Freeman, *supra* note 3, at 86-96. Such national law varieties are not the subject of this chapter. Our subject is the international law of denial of justice.

¹² Such judicial action was recognized by the Loewen Tribunal as a "measure" and hence covered by NAFTA and its chapter 11, and consequently within the jurisdiction of the Tribunal; *see* *Loewen Decision on Jurisdiction and Competence* (January 5, 2001), available at <http://www.state.gov/s/l/c3755.htm>, para. 39-45, visited on September 14, 2004 [hereinafter *Loewen Jurisdiction Decision*].

Denial of justice means improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions.¹³

B. A brief excursion into the history of the notion of denial of justice is in order if only to clear away the underbrush of confusion that underlies some of the previously diffuse uses of the term. It is unknown how the term was in use in Greek and Roman times, nor whether it was known within the realm of the Holy Roman Empire.¹⁴ Originally in the West, the term seems to have come into use where there was no central power, and where merchants or other individuals from one place or nation were badly treated in another and did not receive justice thereafter—that is, were denied justice.¹⁵ Apparently the earliest discovered instance of a law condemning denial of justice, is the law promulgated in 506 by the Visigoth king, Alaric II.¹⁶ This law makes clear that the Visigoths being outside the Holy Roman Empire and thus having no common suzerain to appeal to felt the need to take justice into their own hands. The Visigoths authorized by law their merchants and other subjects to resort to reprisals against the community which had denied them justice (e.g., not repaid debts owing to a Visigoth merchant). As similar laws of reprisal developed among other peoples and countries, they often showed common features: the merchant was not able to find a court in the place of its debtor to redress its grievance, either because a court did not exist or the merchant was denied access to the courts (in effect there were no suitable local remedies to which to have recourse and hence no satisfaction of rights and grievances), and the merchant had then appealed to his ‘prince’ (i.e. the authorities), who in turn had appealed to the ‘prince’ of the debtor without success; at that point the aggrieved merchant was authorized to take reprisal against the debtor’s community with a view to seizing property so as to compensate himself for his losses and injury.¹⁷ The institution of such special reprisals became increasingly regularized, especially during the seventeenth and eighteenth centuries. Thus the precise elements for a ‘denial of justice’ were established, and they became the exclusive and obligatory pre-conditions to such special reprisals being permitted.¹⁸ Apparently, there also developed over the centuries either related to or separate from the practice of such special reprisals, general reprisals that a

¹³ Adede, *supra* note 3, at 91. See also F. V. Garcia Amador, Louis Sohn & R. R. Baxter, A Recent Codification of the Law of State Responsibility for Injuries to Aliens,” Oceana Publications, Inc., Dobbs Ferry, New York (1974) p. 180 [hereinafter Recent Codification]; C. F. Amerasinghe, “Local Remedies in International Law,” Cambridge University Press, Second Ed. (2004) p. 98; Fitzmaurice, *supra* note 3, pp. 108-9. Freeman, *supra* note 3, at 113-4.

¹⁴ Spiegel, *supra* note 3, at 63-4; see also Freeman, *supra* note 3, at 54.

¹⁵ *Id.*

¹⁶ Spiegel, *supra* note 3, at 65. See also S. P. Scott, Visigothic Code, The Boston Book Company (1910), pp. xxiii-xxiv, 24, 27.

¹⁷ Spiegel, *supra* note 3, at 67; Freeman, *supra* note 3, at 58.

¹⁸ See also Freeman at 63. This evolution accompanied the rise of the Westphalian state system in Europe, with states no longer owing an effective loyalty to a suzerain or higher authority (notwithstanding the formal survival of the Holy Roman Empire until 1806).

prince or country might resort to, not only because of such denial of justice and the specific conditions attendant thereto, but any wrong of or grievance against another prince or state. And these latter complaints were sometimes also called denial of justice. So diffuse definitions and uses of the term arose. And so too the diffuse notion that denial of justice and all state responsibility were coextensive, surely an idea now in disuse.¹⁹ Reprisals, with their authorized use of force by state or private party,²⁰ evolved easily into gunboat diplomacy and similar practices to satisfy the grievances of merchants and other creditors and their governments.²¹ Out of this history there eventually developed, as institutions of customary international law, the more civilized practice of diplomatic protection and the attendant idea of an international minimum standard.²²

C. Let us now talk of denial of justice, *strictu sensu*, i.e. judicial denial of justice. To revert briefly to the image of the jellyfish, there were in fact two jelly fish that emerged in the past one or two centuries as customary international law: one, the principles of state responsibility for international wrongs,²³ the other the denial of justice, in the stricter sense

¹⁹ For a detailed account of the variegated history of the term and concept of denial of justice and the institution of reprisals see Spiegel, Freeman and De Visscher, *supra* note 3.

²⁰ Cf. US Constitution Art. I ' 8, cl. 11 which provides that A[The Congress shall have Power] ...[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;].” Such letters granted to privateers, distinguished them from pirates and entitled them to lawfully seize enemy ships, under the international law of prizes. See Ulrich Scheuner, *Privateering*, in R. Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. III (1992) p. 1120. See also D.H.N. Johnson, *Prize Law*, in *Id.* at 1122.

²¹ F. S. Dunn, *The Protection of Nationals*, The John Hopkins Press (1970- reprint of 1932 ed.) pp. 56-8. See also Richard B. Lillich, *Duties of States Regarding Civil Rights of Aliens*, in *Recueil des Cours*, The Hague Academy of International Law, Vol. III (1978), pp. 343-50; See *infra* Borchard, note 29.

²² See *Id.* In mid-Eighteenth century, Vattel uttered his famous dictum that injury to an alien is injury to his state. E. D. Vattel, *The Law of Nations* 161 ' 71 T & JW Johnson, Law Booksellers, Sixth American Edition (1844). This statement became the basis upon which the law of diplomatic protection subsequently developed. See Lillich, *Id.*, at 345-6. The celebrated case of Don Pacifico was something of a watershed. David Pacifico (known as Don Pacifico), who was Jewish, was a British subject living in Greece. In 1847 during an anti-Semitic riot his property was burned. He could not receive redress from the government of Greece; consequently he asked for the protection of the British government. Lord Palmerston, the Foreign Secretary, had the British navy dispatched to blockade Greek ports. This action brought criticism from other nations and some British citizens; but the House of Commons approved it. During his appearance before the House, Palmerston famously declared “As the Roman, in days of old, held himself free from indignity when he could say ‘Civis Romanus Sum’ [I am a Roman citizen], so also a British subject in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him against injustice and wrong.” For more on the Don Pacifico case see Sohn, L. & Buergenthal, T., *International Protection of Human Rights*, The Bobbs-Merrill Co. Inc (1973) 40-58. See also Ridley, J., *Lord Palmerston* pp. 370-88 (1970).

²³ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by International Law Commission at its 53rd session (2001), available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm, visited on August 2, 2004 [hereinafter ILC Articles].

of judicial failure.²⁴ Why this separation? Why single out denial of justice? Simply put, to make sure that a state would *at least* be held responsible for its *judicial* failures. For the fact is that the content of the overall law of state responsibility, of a minimum standard, is even today less than fully developed, incomplete, uncertain and unsettled.²⁵ Denial of justice at that time held states responsible for seriously inadequate courts and court action. Upon reflection, this is not really surprising given the long history of reprisals for denials of judicial justice and the accompanying doctrinal development.²⁶ There have been useful discussions of the strict or classic sense of denial of justice, in Freeman, Fitzmaurice, Adede²⁷ and Edward Borchard. A useful definition is Professor Borchard's submission that:

[s]ome misconduct or inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law. It involves, therefore, some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.²⁸

The Institut de Droit International, at Lausanne in 1927, provided the following definition:

Art. 5. The State is responsible on the score of denial of justice:

(1) When the tribunals necessary to assure protection to foreigners do not exist or do not function.

²⁴ Judicial failure may sometimes be accompanied or supported by auxiliary administrative, executive or legislative action- an example might the mixture of judicial and executive misfeasance seen in faulty arrests and prosecutions and the like, *see Chattin v Mexico*, *supra* note 2; R. E. Brown Claim, Report of Fred Nielsen, American and British Arbitration under the Special Agreement of August 18, 1910, Washington Government Printing Office (1926), pp. 198-9 [hereinafter Nielsen's Report]; *see also* Cotesworth & Powell, *supra* note 12. For the purposes of this chapter such auxiliary actions are included in judicial failure, and as such distinguished from purer legislative or executive failures. For general agreement with this definition of judicial failure *see* Freeman, *supra* note 3, at 113-4; Adede, *supra* note 3, at 91; Recent Codification, *supra* note 14, at 180.

²⁵ *See, e.g.*, ILC Articles, note 24 *supra*; Dugard Report, note 12 *supra*, at para. 10-32. States have in some treaties specified responsibility for "denial of justice" expressly using the term, although this is not a widespread practice. *See, e.g.*, Article 3 of the Treaty of Arbitration and Conciliation of December 3, 1921, between Germany and Switzerland, League of Nations Documents, Arbitration and Security, C.34.M.74.1926.V, p. 107; Art. 6 of Arbitration Treaty of 1919 between United Kingdom and Uruguay, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1919/8.html>, visited on September 18, 2004; *see also* Rule 1.43 of the Operational rules of MIGA, available at <http://www.miga.org/screens/about/regulations/Operations-Regulations.pdf>, visited on August 2, 2004. The NAFTA agreement does not use the term.

²⁶ We shall see that the precise content of such denial of justice, in its procedural and substantive detail, especially the latter, has itself been unsettled, *see, e.g.*, discussions in Adede, *supra* note 3, at 86-90. Loewen may itself be leading testimony to the latter.

²⁷ *See supra* note 3; *see* Adede, *supra* note 14.

²⁸ E. M., Borchard, *The Diplomatic Protection of Citizens Abroad*, William S. Heins & Co., Inc., Buffalo, New York (2003) (reprint of 1919 ed.) p. 330.

- (2) When the tribunals are not accessible to foreigners.
(3) When the tribunals do not offer the guarantees which are indispensable to the proper administration of justice.”²⁹

These definitions and the holdings of many arbitral tribunals insist that: whatever the precise definition of denial of justice, there must be a presumption of deference to the foreign court whose performance is being judged; such courts have a certain sovereign ‘majesty’; and contrariwise the reviewing international tribunal must not sit as a ‘court of appeal’ over the foreign court³⁰ - whether this clarifies the problem or merely restates it is something to which we will return.

One also sees that the quoted definitions of denial of justice encompass both inaccessibility of courts and defective court action- these separate failures have sometimes been called *déni de justice* and *défi de justice* respectively.³¹ Of course this is just a verbal distinction. Such terminological distinctions have been abundant. Preoccupation with them has often confounded the consideration and understanding of this subject.³²

Apart from the judicial failure which we have been discussing there may also be separate legislative failures, themselves possibly engaging the international responsibility of states, or making possible or inevitable a judicial failure which engages such responsibility. An example might be a statute which mandates or authorizes a death sentence for the theft of a chicken, or one which declares a nation’s courts closed to all foreigners, some foreigners or indeed just closes the courts to certain subject matters or cause of actions.³³ Is the Mississippi law of punitive damages, or its law with respect to the maximum amount of a supersedeas bond to stay execution- both determinative of the Loewen Group’s fate³⁴ - so different from such culpable or suspect legislation?

²⁹ 23 AJIL 1929, Supp., Appendix No. 3, p. 228, quoted in Freeman, note 3 *supra*, at 133; and *see* Adede, *supra* note 14.

³⁰ This may be a statement of the obvious or not; if two states have by treaty created a mixed claims commission, *viz* the Mexican Claims Commission deciding *Chattin*, *supra* note 2, and subjected their courts to review at the international level, why should there be such deference, as opposed to the lesser respect to be shown to a ‘sovereign’ nation’s monarch, president, its Congress or its parliament? Do arbitrators (and commissioners), especially if former judges, feel a certain guilt, a *chagrin* in judging their brethren in the courts of poorer, weaker nations, believing rightly, or wrongly, that the latter’s citizens will resent such judgment? But what bearing can such speculation have for NAFTA tribunals, or others, judging the performance of the courts of the powerful United States? We return to this when we consider *Loewen*, where the Tribunal expressly stated “we are not a court of appeals.” *Loewen*, *supra* note 1, at para. 134: “A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.”

³¹ Spiegel, *supra* note 3, at 73.

³² *See* *Chattin*, *supra* note 2; Eagelton, *supra* note 3, at 549-50.

³³ *See, e.g.*, R. E. Brown, *supra* note 25; *see also* *Ruden Case*, U.S. v. Peru (1870), II *Lapradelle-Politis*, *Recueil*, p. 589 cited in Freeman, *supra* note 3, at 230-1, where the respondent government had forbidden actions to be brought against its Treasury; *see also* *Recent Codification*, *supra* note 14, at 21-2. Such separate legislative failures should be distinguished from the auxiliary legislative action referred to in *supra* note 25.

³⁴ *Loewen*, *supra* note 1, at para. 48.

The classical concept of denial of justice as judicial failure, procedural and substantive, in the past has been challenged by (a) debtor and developing countries and, as already suggested, by (b) “intellectual confusions”, and a wholly operational and clearly predictable line between *denial* and *granting* of justice may still be elusive. Let us look at some of these challenges briefly. The challenge of Latin America’s Calvo doctrine to the concept of denial of justice was part of its assault on diplomatic protection by the powerful (e.g. the United States) and on the notion of a minimum standard (other than national treatment for foreigners equal to one’s nationals)-it led to a very narrow view of the concept: if a country’s courts were open to foreigners that would be sufficient, irrespective of any subsequent judicial failure and without the need to meet any international minimum standard.³⁵ In the 1960s and 1970s advocates of a New International Economic Order sought to expand the ideas of Calvo throughout the world in dealing with capital exporter and creditor nations; it is apparent that this attempt at establishing an NIEO has not succeeded.³⁶

*Chattin v. Mexico*³⁷ is a good place to begin with the intellectual challenge, more accurately some of the terminological confusion that has afflicted so much of the discussion of “denial of justice,” even in its strict sense of the narrower notion of judicial failure itself. The essential facts of *Chattin* are fairly straight forward. In 1910 Chattin, an American working as a conductor on the Southern Pacific Railroad Company of Mexico in the state of Sinaloa, Mexico, was arrested along with some Mexicans and other Americans in connection with a scheme to forge and sell tickets and embezzle the proceeds. There was some dispute about how promptly and with what crime Chattin was charged, and the length of time between arrest and his judicial conviction, as well as various questions about the adequacy of the evidence and other aspects of the proceedings. What was agreed was that Chattin was charged with stealing tickets worth 4 pesos and sentenced to 2 years in jail (in fact he was freed by local revolutionaries a few weeks after his sentencing; he had already been in jail awaiting trial having not been released on bail). The Mexican Mixed Claims Commission³⁸ in 1923 awarded Chattin \$5000, partly because of some of the procedural irregularities (while finding much of the proceedings acceptable, and

³⁵ Cf. Guerrero, Report of the Subcommittee of Experts, League of Nations Publication C.196.M.70.1927 V, p. 90.

³⁶ See Resolution on Permanent Sovereignty Over Natural Resources, UNGA Res. 1803 (1962), available at <http://www.un.org/documents/ga/res/17/ares17.htm>, visited on July 19, 2004; see also Charter of Economic Rights and Duties of States, UNGA Res. 3082 (1973), available at <http://www.un.org/documents/ga/res/28/ares28.htm> article, visited on July 19, 2004. See today’s network of BITs embodying a rather older economic order. See, e.g., *Mondev International Limited. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (October 11, 2002), available at http://www.naftaclaims.com/disputes_us/disputes_us_7.htm, para. 117, visited on August 4, 2004 [Mondev].

³⁷ See *supra* note 2.

³⁸ See Feller, A. H., *The Mexican Claims Commissions, 1923-1934, A Study in the Law and Procedure of International Tribunals* (New York: Macmillan, 1935).

suggesting that great deference must be shown to the courts of a sovereign nation)³⁹, but principally it would seem because of the great disparity between the amount of the theft charged (4 pesos) and punishment meted out (2 years). The Commission believed that the deficient judicial performance violated the minimum standard, and constituted an international wrong and engaged the responsibility of the Mexican state.⁴⁰ Commissioner van Vollenhoven wrote that while Mexico's judicial failure was a violation of international law this violation did not amount to a "denial of justice." Denial of justice could only arise if there had been a previous and initial "private [action]" or "government wrong"⁴¹ which the judiciary then failed to redress, with the outcome of that judicial failure falling short of the international minimum standard and consequently violating international law. Commissioner van Vollenhoven in *Chattin*, cited Commissioner Pound in the Cayuga Indians case who wrote: "First, there is an injustice antecedent to the denial, and then the denial after it."⁴²

Several aspects of Commissioner van Vollenhoven's opinion are notable. First is its mere verbalism; however the judicial failure is characterized, it is an international wrong; of that the Commission has no doubt. Why the appellation "denial of justice" is reserved for redress cases is puzzling; is it possible that this is a conscious or unconscious harkening back to the Visigoths and the initial failure of another party, private or public, for instance to pay a debt, with the 'subsequent' absence or failure of a court to do justice as the wrong? Some scholars in the past accepted the *Chattin* construction; however the case is passé today; indeed there are now those who believe that the case where the *original* wrong is judicial is the very essence of the modern understanding of denial of justice- such is the *Loewen* case, a characterization which the *Loewen* Tribunal appears to have accepted.⁴³ Further the reference in *Chattin* to prior private action⁴⁴ is problematic (indeed

³⁹ "[A]s far as acts of the *judiciary* are involved, 'it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country.'" *Chattin*, *supra* note 2, at para. 11 citing Garrison's case, Moore 3129.

⁴⁰ See opinion of Commissioner Van Vollenhoven in *Chattin*, *supra* note 2, at para. 29. The controlling language of the agreement between Mexico and the United States creating the Commission provided "each... [Commissioner] Y shall make... a solemn declaration... that he will carefully and impartially examine and decide Y in accordance with the principles of international law, justice and equity, all claims presented for decision..." Art. II, United States-Mexican General Claims Commission, Convention of September 8, 1923, in Feller, *supra* note 39, at 321, 324.

⁴¹ Presumably something like an expropriation by the executive branch. By contrast, in *Chattin*, the initial wrong was a judicial one.

⁴² Cayuga Indians Case, Nielsen Report, *supra* note 25, at 258; see also Eagleton, *supra* note 3, at 558-9.

⁴³ For the passé view: Eagleton, *supra* note 3, at 558-9. See also *Chattin*, *supra* note 2, at para. 8. For the more current view, which this chapter accepts as correct and which will be applied to *Loewen* and by which *Loewen* will be judged, see, e.g., Adede, *supra* note 3, at 91; Recent Codification, *supra* note 14, at 180.

⁴⁴ Was it a subliminal recollection of this (erroneous) aspect of the language in *Chattin* which led the United States government to initially argue, to be sure unsuccessfully, that the term "measure" in NAFTA article 1101, *supra* note 13, did not extend to litigation between private parties, *Loewen* Jurisdiction Decision, *supra* note 13, at para. 32. Of course the action of the Mississippi courts was not private, *supra* note 13.

it is wrong) except for possibly rare cases of a failure of the host state to provide full protection and security.⁴⁵

There are additional observations to be made about *Chattin*. First, the bottom line is that *Chattin* was a case of original judicial failure (involving a criminal defendant), and the state was held responsible. Secondly, as already suggested, *Chattin's* remarks about denial of justice being limited to the redress stage (that is after an initial legislative or executive wrong) of a matter can now be safely ignored. Also, again as already suggested, the remarks about an original private action: the organization of the modern, democratic state of limited government powers is such that it is hard to see how the state can be responsible and bound to prevent every civil breach of contract or private murder that might ultimately (because of defective redress) lead to state responsibility; as already suggested failure of its police to stop a mob might be a different matter.⁴⁶

Given the almost ritualistically pronounced deference to the 'autonomy' indeed the 'majesty' of the courts,⁴⁷ how *does* one tackle original judicial failure? International tribunals and authors seem to do so by suggesting that they will only condemn judicial failures that are flagrant, notorious, obvious, gross, odious, manifestly unjust or violative of due process or similarly offensive.⁴⁸

⁴⁵ The actions of private parties do not normally engage the international responsibility of the state, Commentary No. (13) on Art. 4, ILC Articles, *supra* note 24, pp. 91-2, visited on July 23, 2004; *see also* Freeman, *supra* note 3, at 27. Re 'full protection and security': it is true, in the rather infrequent case, that a state may be responsible for the consequences of the actions of private parties, for example the destruction wreaked by a mob (of private persons) because of a failure of its police, and indeed may have a duty to seek to prevent it. *See infra* text accompanying note 47.

⁴⁶ This is obviously an interesting matter for inquiry, especially on the facts of a case like the judicial failure in Loewen, and the antecedent 'legislative failure', *see supra* note 34, allowing for exorbitant punitive and other damages, and a grossly prohibitive indeed punitive supersedeas bond. Should the national government of the United States, to whom the deficiencies of Mississippi are attributed by international law, *see* Art. 4 of ILC Articles and its commentary, *supra* note 46, *see also* Loewen, *supra* note 1, at para. 52, similarly be obligated to prevent the operation of such a subordinate state system *ab initio* and in anticipation of a possible international wrong?

⁴⁷ *See supra* text accompanying note 31. There is a comparable deference shown by national courts to the courts of another country in the name of comity, reflected in the United States in the 'act of state doctrine' - our courts will not sit in judgment or examine or challenge the validity in its territory of the judgments of the courts of another country; other states reach results comparable to that of our act of state doctrine by means of other rules, *Banco Nacional de Cuba v. Sabbatino*, 84 S.Ct. 923, 934-5 (1964).

⁴⁸ *Salem case*, 2 UNRIAA 1188 (1932), *Bronner's case*, 3 Moore International Arbitration Reports 3134, *Solomon case*, American and Panamanian General Claims Arbitration, Reports of the Agents for the United States (1934), p. 476 [hereinafter Hunt's Report]; *see also* Eagleton, *supra* note 3, at 553; Fitzmaurice, *supra* note 3, at 110-1; Sir R. Jennings & Sir A. Watts, *Oppenheim's International Law*, Longman, 9th Ed., Vol. I (1992) 545 [hereinafter *Oppenheim*]; *see also* Art. 9 of Harvard Draft, *supra* note 3. One wonders whether it is thought that the term 'due process' may bring with it all the baggage of the due process clauses of the United States Constitution, both procedural and substantive; cf. the use of the term in NAFTA article 1110.

The modern view is that “denial of justice” may involve original judicial failure or judicial failure at the redress stage.⁴⁹ Cases of such notorious original failures, both substantive and procedural, include Martini, Bronner and Solomon.⁵⁰ Analysis of the facts and decisions of reported cases makes clear the manifest failures revealed need not only spring from bias, dishonesty or malice as is sometimes supposed, but may come from incompetence as well.⁵¹ Whether any of these elements is present will more often than not only be made evident by the result in the case (which provoked the claim to an international tribunal), say a grossly disproportionate criminal sentence.⁵² One is entitled to a court both honest and competent, or more accurately neither venal nor grossly incompetent.⁵³

Lawyers seek lines, even bright lines. Do the several cases just mentioned give enough meat and content to the words “manifest,” “notorious” and the like so that we know when the minimum international standard has not been met? Is it enough to say that we will know a “denial of justice” when we see it, and thus be able to surmount the deference owed to courts? The answer is no. Any line will be unstable. We will see shortly that the *Loewen* facts, egregious to be sure, gave the Tribunal a chance to place some solid content in the words and to draw lines. Regrettably, the Tribunal used the words, acknowledged the content, but shrunk ultimately from drawing the lines.

⁴⁹ Fitzmaurice, *supra* note 3, at 108-9; some modern authorities treat all judicial action at any stage as homogenous and do not even seem aware that there is any difference between original and later judicial action, Adede, *supra* note 3, at 91. It is notable that judicial action at the later redress stage need not always be “notorious” etc to engage international responsibility. Freeman, *supra* note 3, at 159; Eagleton, *supra* note 3, at 553.

⁵⁰ In Martini, a Venezuelan court cancelled the concession agreement of the Martini company contrary to an earlier arbitral award by commissioner Ralston of the Italo-Venezuelan Commission, which was formed to provide compensation for damages caused by the Venezuelan revolution. The tribunal held that the conduct of Venezuela amounted to manifest injustice. Martini Case, 25 AJIL 554 (1931). In the Bronner case, Bronner had imported certain goods into Mexico, which were confiscated by the customs authorities. The local tribunal held that the invoices provided by Bronner were not in due form and showed his intent to defraud. The umpire found that the decision was so unfair that it amounted to a denial of justice. Bronner’s Case, *supra* note 49. In the Solomon case, Wm. G. Chase employed Solomon in 1919 to protect his property in Chiriqui Province, Panama. In 1920, however, Solomon was sentenced to two years in prison as a result of temporary detention of a trespasser. The American-Panamanian Arbitration Commission found that the conviction and imprisonment amounted to palpable injustice (the laws of Panama allowed apprehension, by an employee, of a trespasser caught on unfenced property). Solomon claim, Hunt’s Report, *supra* note 49, at 479.

⁵¹ Freeman, *supra* note 3, at 328; Adede, *supra* note 3, at 89-90; cf. the Loewen tribunal at para. 132, “Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough...”

⁵² Chattin, *supra* note 2; cf. the enormous judgment in Loewen.

⁵³ Of course Loewen raises the question: “court” or “whole court system”? See *infra* text accompanying notes 97 and 98.

As if things were not difficult enough, we have yet to deal with the bearing of the local remedies rule to which we now turn.⁵⁴

D. We come now to the crux: the much vexed, understudied and unresolved, relationship of denial of judicial justice and the local remedies rule (the so-called requirement to exhaust local remedies).⁵⁵ Where a country's legislature or official of the executive commits a 'wrong' which the foreign individual victim believes violates international law, traditionally it must exhaust or at least seek to exhaust local remedies before its government will espouse its claim in the exercise of diplomatic protection. Upon espousal the claim is deemed to be the government's, which will then seek to establish the international responsibility of the respondent state. Various ambiguities and frailties lurk in this theoretical construct. I will not explore them all; but one or two are relevant to our subject.

When for example an official of the executive branch takes property (without compensation) when does his government's responsibility arise: then and there, or only after local remedies have been exhausted?⁵⁶ In the practice of diplomatic protection, it is said that the international level claim only arises when the espousing state takes up the claim, individuals not being subjects of international law.⁵⁷ And what of an original judicial failure?⁵⁸ Is there a duty to exhaust further local judicial remedies, as with an original executive or legislative failure? And, again, when does the responsibility of the respondent state arise? This seems under-analyzed (i.e. not thought through) non-adjudicated, therefore unsettled and unhappily an utter muddle. Freeman, who assumes that there is a duty to exhaust local remedies *after* an original judicial failure, nonetheless suggests that the respondent state's responsibility may kick in at the time of the original judicial failure, as would be the case were the original failure one of the legislature or the

⁵⁴ One instance of the denial of justice is said to be clear in this regard; a violation of a relevant treaty will constitute a denial of justice without further resort to local remedies. An example might be a treaty which exempts a particular foreign state enterprise from the jurisdiction of local courts; an exercise of such jurisdiction would be a denial of justice, Freeman, *supra* note 3, at 49. Presumably the treaty violation is deemed a direct claim of the state, rather than one inuring upon espousal, per diplomatic protection, which has reflexively included the exhaustion requirement for the injured private party.

⁵⁵ See generally Amerasinghe, *supra* note 14; Mummery, *supra* note 3.

⁵⁶ The answer to this question can have many practical consequences, for example a treaty's cut-off dates for disputes, periods of limitation, commencement of interest etc Freeman, *supra* note 3, 406-9; The local remedies to be exhausted are normally thought to be judicial ones, Amerasinghe, *supra* note 14, at 91 (although local requirements for amicable settlement might involve the executive, although usually not the legislature).

⁵⁷ Oppenheim, *supra* note 49, at 524. And espousal usually presupposes exhaustion of local remedies.

⁵⁸ The case of judicial failure at the redress stage seems no clearer, Freeman, *supra* note 3, at 156-8; Finnish Ships, *infra* note 64. See discussion of Loewen award in text *infra* notes 97 and 98: would there have to be "judicial finality" with respect to a redress stage, to be then followed by a further exhaustion of local remedies? An affirmative answer seems nonsensical.

executive branch.⁵⁹ Freeman continues that, logically, state responsibility can arise from the moment a local lower court does something which violates international law, say orders summary execution of a foreigner, just as an expropriation of a foreigner's property without compensation by a lower official would violate international law and trigger state responsibility.⁶⁰ This is the picture before one adds in the element of a BIT and ICSID, which clearly contemplate action by individual claimants without the need of further espousal by governments of their claims.⁶¹

There is no settled answer and indeed no answer at all in customary international law to the question of whether and if so when- 'when' signifying at what stage of an original judicial failure the local remedies rule kicks in- the full panoply of the local remedies rule applies and must be exhausted.⁶²

A different question was addressed in the *Finnish Ships* case.⁶³ *Finnish Ships* examined what exhaustion of local remedies consists of if the local remedies rule did apply. Would only ordinary remedies have to be pursued, or extraordinary ones? Non-judicial ones? In court, would every conceivable argument have to be made before remedies were deemed exhausted? Not all these questions are answered with respect to every fact situation. Justice Bagge sitting by designation in *Finnish Ships* did however, after thoroughly examining the facts of the matter, authoritatively⁶⁴ rule what the "exhaust" standard means. Yes, one had to do much and more; but the remedies to be pursued had to be adequate and effective; this is a "reasonable" rule, not a "rigid" one, not a rule of infinite pursuit by platonically ideal parties with bottomless wallets to pay for legal fees, or professors wishing to create new legal theories; the reasoned calculations of experienced

⁵⁹ Freeman, *supra* note 55.

⁶⁰ *Id.* at 159 & 445; incidentally such lower level executive actions would clearly seem to be "measures" under NAFTA, Loewen award, *supra* note 13.

⁶¹ Under BITs-and NAFTA- an individual claimant, whether a "subject" of international law or not, certainly has an autonomous role. Dugard Report, *supra* note 12, at para. 66. To push this point: if we remain wedded to the construct of diplomatic protection/espousal (in which is folded the exhaustion of remedies requirement), then surely the protecting government's entry into the BIT, or NAFTA, itself constitutes the espousal.

⁶² No cases have been found addressing the question, nor any consideration of the question by an author or other authority, either with respect to an original judicial failure or at the redress stage. Cf. Loewen award, p 149-54. Cf. *Finnish Vessels Case*, 3 Int. Arb. Awards 1475, 1505 in Mummery, *supra* note 3, p 399.

⁶³ *Finnish Vessels in Great Britain During the War, Finland v. Great Britain*, 7 ILR 231 (1934). This dispute arose as a result of the taking of thirteen Finnish ships by the British government during the World War I. The shipowners brought a claim against the Crown before the Admiralty Transport Arbitration Board of England, which dismissed it. Then the matter, with the recommendation of League of Nations, was referred to arbitration. The arbitrator, justice Bagge, in response to the British contention that every available remedy had to be exhausted, held that "it appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts, only to exhaust what to him-at least for the time being-must be only a very unsatisfactory remedy." At the end, Justice Bagge held that the Finnish owners had exhausted the local remedies.

⁶⁴ Freeman, *infra* note 130.

counsel of whether redress was likely was relevant, possibly controlling. The received wisdom that remedies must be “non-existent,” or “futile” because of judicial bias is not the only reason to stop. Another reason to stop, and not continue to butt your head against a wall, is “the existence of a uniform body of jurisprudence in the upper court which renders any modification of the lower court’s decision altogether improbable”⁶⁵ - it is objectively knowable by learned and competent counsel and bench that further pursuit would not succeed.⁶⁶

One can conclude that the historical deposit of international law is not sufficiently worked out: that denial of justice through original judicial failure (or for that matter, at the stage of redress) and the local remedies rule have not been knitted together either conceptually or temporally;⁶⁷ nor is it clear how many different judicial stages may be involved in the combination of the two.

⁶⁵ Freeman, *supra* note 3, at 434. A “jurisprudence constante” in the words of the tribunal in *S.S.Lisman (United States v Great Britain)*, 3 Int. Arb. Awards 1767(1937), in Mummery, *supra* note 3, p397; Borchard, *supra* note 29, at 823-4.

⁶⁶ *Id.* While surely not infinite, such pursuit especially in large cases, can take a long time. *E.g.* *Interhandel*, ICJ (more than ten years in US courts not deemed “unreasonable” or betokening “futility”). It is possible of course that the fact of such lengthy pursuits suggests that the exhaustion requirement is too rigorous; *see* Mummery, *id.*, generally. For remedies to be adequate and effective, there must be reparation, and at the right time: a “remedy available at the wrong time is no remedy”, *id.*, at p 402. Might it not also be said of the actions of the Mississippi courts that the consequences for the Loewen Group were virtually irreparable, especially the longer the time until a remedy became effective.

See also claim of George Salem, 2 UNRIAA 1165 (1932). In 1922, George Salem, a naturalized US citizen, instituted a claim against the Egyptian government in the Mixed Court at Cairo for damages suffered as a result of criminal proceedings brought against him in Egypt during the years 1915, 1917 and 1918, and for recovery of certain documents which established his innocence in those proceedings. The Mixed Court held his claim against the government inadmissible and the Mixed Court of Appeals of Cairo affirmed this judgment. In 1931, the government of Egypt and the United States submitted the case to a special arbitration tribunal. The special tribunal in response to Egypt’s contention that the case had to be dismissed because Salem had not exhausted the remedy of *recours en requête civile*, said that 1) the rule of exhaustion of local remedies is not an absolute rule; and 2) the *requête civile* is not a regular legal remedy but intended to reopen a process which had already been closed by a judgment of last resort. *Id.* at 1189.

Does exhaustion of local remedies require resort to collateral remedies or remedies other than those available in courts of place? What of the United States writ of *coram nobis*? (in exceptional circumstances an appropriate remedy by which a court can correct errors of a most fundamental character that result in miscarriage of justice in criminal convictions. *See* *Korematsu v. United States*, 584 F. Supp. 1406, 1419 (1984); executive clemency? Private members bill in UK? *See* *Ambatielos Arbitration*, 12 UNRIAA 83 (1956); Amerasinghe, *supra* note 14, at 187-8. Mummery, *supra* note 3, at 400-1; Freeman, *supra* note 3, at 418-20.

⁶⁷ The implicit reasoning of the Tribunal in the Loewen case reveals this with painful clarity: first the judicial system as a whole must be exhausted (“judicial finality”); in this construct, presumably only then has a ‘wrong’ occurred; but does this engage the responsibility of the state, or must recourse then still had to local remedies- after all the tribunal has told us that the rule of “judicial finality” and the local remedies rule are not the same, *See infra* note 98.

Now on top of this, what are the effects of the evolution from reprisals to diplomatic protection to the era of BITs and NAFTA Chapter 11. In the era of reprisals an effort at exhaustion might prevent violence, war and foreign occupation;⁶⁸ in the tamer era of diplomatic protection such effort might produce facts and resolution without diplomatic tension and foreign policy affront.⁶⁹ But why is it needed in the case of BITs?⁷⁰ And even if it is (a point not conceded), one wonders why one cannot ‘cut in’ on a judicial denial of justice at any number of stages (at which to begin the ‘exhaustion’ requirement)⁷¹ before the ‘final’ one which may be many years hence, and where the waiting may clearly compound the injustice.⁷² There seems no point of principle or doctrine or indeed any single case which holds why one may not so cut in.⁷³

III The *Loewen* Case and NAFTA Chapter 11

A. All briefs and their appendices, and all awards, decisions and procedural rulings by the NAFTA Tribunal in *Loewen v United States* may be found on www.naftaclaims.com.⁷⁴ *Loewen*⁷⁵ involved a Canadian funeral home and insurance company valued at \$3 billion,

⁶⁸ Spiegel, *supra* note 3, at 75 citing Vattel, *Droit des Gens*, 1758, Bk. II, Chap. XVIII § 350 translation by Fenwick, Scott (ed.) (1916); *see also id.* at 78.

⁶⁹ Amerasinghe, *supra* note 14, at 57; see Second Report on Diplomatic Protection, by John R. Dugard, available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/268/68/PDF/N0126868.pdf?OpenElement>, pp. 2-3, visited on September 19, 2004; Mummery, *supra* note 3, at 411; Dunn, *supra* note 22.

⁷⁰ Of course many, if not most, BITs explicitly waive the exhaustion requirement, see Dispute Settlement: International Center for the Settlement of Investment Disputes, UNCTAD, available at http://www.unctad.org/en/docs/edmmisc232add1_en.pdf, p. 9, visited on September 19, 2004; it would seem that NAFTA (article 1121) does, *see infra* text accompanying notes 135 to 137; cf. *Loewen*, *supra* note 1, at para. 150. The 1795 Jay Treaty, the US granddaddy of such treaties, settling claims with Britain, had no provision for exhaustion of local remedies, available at www.yale.edu/lawweb/avalon/diplomacy/britain/jay, visited on September 18, 2004.

⁷¹ A requirement seemingly waived by NAFTA 1121 for *Loewen*, *id.*

⁷² *See supra* note 67.

⁷³ *See* Freeman, *supra* note 3, pp 417-23. There is only the practical and difficult question of ‘when’.

⁷⁴ <http://www.state.gov/s/l/c3741.htm> also contains most of the documents related to this case. The subsequent filings in the abiding claim of Ray Loewen himself, *see supra* note 7, available at http://www.naftaclaims.com/disputes_us/disputes_us_5.htm.

⁷⁵ Apart from much learned comment, *see, e.g.*, Report of Marc Goldhaber available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1076428430123>; OGEMID *Loewen* vote, note 8 *supra*; Jacques Werner, Making Investment Arbitration More Certain-A Modest Proposal, *Journal of World Investment & Trade*, Vol. 4, No. 5 (2003); Rene Lettow Lerner, International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade, 229 *Brigham Young University Law Review* 229; Stefan Matiation, Arbitration with Two Twists: *Loewen v. United States* and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes, 24 *U. Pa. J. Int'l Econ. L.* 451 (2003); it has been the subject of CBS's 60 Minutes, on CBC, available at www.cbc.ca, and an article by Jonathan Harr in the November 1, 1999 issue of the *New Yorker* magazine, available at http://www.condenet.com/mags/newyorker/asme/categories/artwork/pdf/11_01_99_Harr_Well.pdf, visited on July 29, 2004; *see also* Bill Moyers Reports: Trading Democracy, broadcast on February 5, 2002 at PBS.

founded by Ray Loewen, the son of a Canadian Lutheran minister, and listed on the Toronto and New York stock exchanges. The company fell afoul of the courts of the State of Mississippi, in an action for breach of contract involving at most a few million dollars and whose damages might very well have been zero. A jury⁷⁶ handed down a 500 million dollar verdict against Loewen. The action was brought by Jerry O’Keefe because of a failed negotiation for the purchase by the Loewen Group (whose purchases of funeral homes and associated insurance companies in Canada and the United States had made it the second largest ‘consolidator’ of such enterprises in North America) of certain O’Keefe properties in Jackson, Mississippi. The net amount that would have changed hands had the deal gone through was approximately US\$2.5 million. The O’Keefe business was under investigation by the FBI and the Mississippi Superintendent of Insurance at the time, and the failed negotiation⁷⁷ led Mr O’Keefe to retain the services of Willy Gary, a colorful and high powered trial lawyer.⁷⁸ Gary tarted up what was a breach of contract action with several gaudy counts of unfair competition and the like; he was later to tell the jury that his case was based on “no contract theory, but on the yacht theory”- this because of Gary having made much of Ray Loewen negotiating with Jerry O’Keefe on Loewen’s yacht in Vancouver harbor (the failure of the judge to bar the blatant innuendo of Loewen’s wealth being just one of many such errors by the judge⁷⁹). The jury returned a verdict of \$500 million: approximately 26 million compensatory damages, 74 million pain and suffering/emotional distress, 400 million punitive damages. In fact Gary asked the jury for one billion, and the jury came within a few votes of giving it.⁸⁰ The verdict was an instant and catastrophic blow by a two headed hammer, enough to leave any one in an incredulous daze: Loewen’s market cap was instantaneously cut by half a billion dollars at the same moment that it was confronted with the need to raise 200 million dollars to pay the premium for a 625 million dollar supersedeas bond, as mandated by Mississippi courts, to stay execution to begin in seven days, in effect denying Loewen any right of appeal.⁸¹ Under this “duress” Loewen agreed to settle for \$175,000,000.⁸²

The transcript is available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/transcript.html>, visited on May 29, 2003.

⁷⁶ The involvement of a jury does not alter the judicial nature of a proceeding or its constituting a denial of justice, J.W.Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to a Denial of Justice*, 10 *Brit. Y.B. Int’l L.*181(1929).

⁷⁷ A previous, slightly earlier, breakdown in negotiations had led to a ‘settlement agreement’ whose implementation had in turn broken down, Loewen First Memorial, *supra* note 5, para 130.

⁷⁸ *See* New Yorker article, *supra* note 76.

⁷⁹ Loewen Group Inc. et al v. United States, Joint Reply of the Claimants, available at <http://www.state.gov/documents/organization/Toc516629333>, p. 42, visited on September 19, 2004.

⁸⁰ *Supra* note 79, at p. 92.

⁸¹ Loewen, *supra* note 1, at para. 185.

⁸² The Loewen Group, Notice of Arbitration: “[r]ather than incur over \$200 million in non-recoverable costs, Loewen was forced to settle the case under conditions of extreme duress.” See Loewen’s Notice of Arbitration, available at http://www.naftaclaims.com/disputes_us/disputes_us_5.htm, at para. 6, visited on

The Loewen award acknowledged, with breathtaking candor, that “By any standard of measurement, the trial involving O’Keefe and Loewen was a disgrace. By any standard of review, the tactics of O’Keefe’s lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.”⁸³

Among irregularities too numerous to list them all, one might cite: a *voire dire* in which prospective jurors were asked whether they could be impartial in a case between a “Canadian foreigner and Jerry O’Keefe who had fought the Japs[sic] at Pearl Harbor” (this after a billboard had been put up in downtown Jackson with a picture of Mr O’Keefe and flags on either side of him: those of the United States and Mississippi on one side of him, and of Canada and Japan⁸⁴ on the other!), much inflammatory anti-foreign and racist (e.g. allegations that Ray Loewen was one) language throughout the trial none of it excluded by the judge despite frequent objections, the admission of tendentious, frivolous pleadings and evidence and defective instructions to the jury over objection, including erroneous instructions to the jury about compensatory as opposed to punitive damages. If it is not already obvious to the reader, the *Loewen* Tribunal was aware of all this: “After all, we have...criticized the Mississippi proceedings in the strongest terms. There was unfairness here to the foreign investor.”⁸⁵

Given this ‘disgraceful’ situation, how did the United States escape its responsibility and liability? As we have already seen, the Tribunal did not dismiss the claim of the Loewen Group on the merits, but rather it did so because it believed that the Group had ceased to be Canadian and the Tribunal had therefore lost the jurisdiction it originally had.⁸⁶ Then why the long opinion on the merits? The Tribunal in paragraph 2 of its Award gives as its reason that “As our consideration of the merits of the case was well advanced when Respondent [the United States] filed this motion to dismiss [on the ground that Loewen

July 29, 2004; for a more extended discussion of this duress see Loewen’s Supplemental Memorial of June 8, 2001, *Id* at para. 336; cf. Loewen, *supra* note 1, para 215.

⁸³ Loewen, *supra* note 1, at para 119. Again at para. 137, “...the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.” One wonders whether the tribunal was aware that a violation of these standards and such treatment constitutes a “denial of justice”, *see supra* note 5. At times it does seem so; thus at para. 54, “...we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law.” And the tribunal surely thought the resulting verdict “excessive” and “grossly disproportionate”, *see* Loewen, *supra* note 1, at paras 105, 113 & 115.

⁸⁴ Gary made much of Loewen getting Japanese financing for some of its acquisitions and operations, *see* Joint Reply of the Claimants, *supra* note 80, at para. 44.

⁸⁵ Loewen, *supra* note 1, at para 241.

⁸⁶ *Id.* at para. 225; for original jurisdiction *see supra* note 13; NAFTA Chapter 11 jurisdiction like that of BITs, ICSID etc is only over international disputes, i.e., between parties of different nationalities, and the Loewen Group had become American and hence of the same nationality as the respondent United States; *see infra* text accompanying note 125 for a more detailed discussion of the continuing nationality issue.

Group had lost its Canadian nationality, which motion the tribunal granted] and as we reached the conclusion that Claimant's [Loewen Group] NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion." As already noted such claim as the Loewen case has to be a "leading case" on denial of justice thus rests on *obiter dicta*.

There seems little question that the excessive verdict was both a "substantive" denial of justice⁸⁷ and a "procedural" one: that the amount of the supersedeas bond effectively denied Loewen access to the full panoply of the court system of which the Tribunal makes so much:⁸⁸ *Loewen* was effectively barred from an appeal on the merits.⁸⁹ Apart from judicial failure, there was also legislative action⁹⁰ making possible the judicial denial of justice: the statutory and common law⁹¹ that permitted the level of punitive and other damages awarded, and the law and rules⁹² which permitted the \$625 million dollar supersedeas bond whose cost would have been ruinous to Loewen's finances.

So why would the Tribunal have dismissed the case on the merits, had it come to that? While it is always unwise to speculate, one may assume it relates to the discomfort felt, or was it reflexive deference to courts, by the Tribunal in having to deal with judicial action, rather than executive or legislative. Why this discomfort? Presumably not because the

⁸⁷ Adede, *supra* note 3, at 87; Freeman, *supra* note 3, at 363; *see also* Cotesworth and Powell, *supra* note 12.

⁸⁸ *See* discussion *infra* note 97 regarding the importance of final action by a judicial system as a whole.

⁸⁹ The tribunal does not really deny this, see *Loewen*, *supra* note 1, at paras 185 and 215; it says that international law does not require a right to appeal, *id.* at para. 188 (if this is so, presumably an exhaustion of remedies might end with a trial court). This observation of the tribunal does not seem to capture the *Loewen* situation correctly: an appeal system existed but *Loewen* was in practice barred from it, surely a denial of justice per se, Freeman, *supra* note 3, at 224; moreover, it was barred by a questionable exercise of discretion with respect to the bond amount by both the trial judge and the Mississippi Supreme Court, see final award paras 183 & 196. An excessive security to commence a court proceeding has been held a denial of justice, *id.*

Just as the tribunal did not frontally dispose of the verdict amount, see Final Award, note 1 *supra*, so it did not explicitly condemn the bond amount, *id.* at para. 189, although it certainly suggested that the combination of verdict amount and bond amount was troublesome, *Id.* at para. 185. Of course the combination of an absurdly inflated judgment and a ruinously expensive bond required in order to appeal from the absurd judgment, putting impossible pressure-7 days, and \$625 million, on dazed foreigners is scandalous. Sir Robert Jennings in his opinion, which was appended to the Notice of Arbitration, described the Mississippi judgment as "bizarre." Opinion of Sir Robert Jennings in *Loewen v. The United States* (October 30, 1998), available at http://www.naftaclaims.com/disputes_us/disputes_us_5.htm, para. 9.

⁹⁰ *See* discussion *supra* note 35 about such legislative enablement and denial of justice; Freeman, *supra* note 3, at 108-9.

⁹¹ Mississippi has since, and partly as a result of, the *Loewen* case put a limit of \$100 million on punitive damages. *See* Mississippi Supreme Court's Order No. 89-R-99021-SCT, April 26, 2001, available at <http://www.mssc.state.ms.us/news/raprul8.PDF>, visited on July 29, 2004.

⁹² *See* *Loewen*, *supra* note 1, at para. 180 suggesting that the 125% bond amount might have been applied only to the compensatory or at most the compensatory and emotional distress damages of \$100 million for a total of \$125 million rather the \$625 million actually imposed; the rule has also been changed largely as a result of the *Loewen* case, *see Id.* at para. 187; *see also supra* note 92.

arbitrators were all judges. Presumably also not because the respondent United States argued strenuously, although ultimately unsuccessfully, that the Tribunal was without jurisdiction in that court action could not constitute “measures” violative of international law.⁹³ The Tribunal did not finally overcome the strangeness of dealing with judicial action.⁹⁴ This strangeness is revealed not only by the US government’s initial arguments as to jurisdiction. Notwithstanding the text of over 700 pages by Alwyn Freeman and the articles and other authorities cited in this chapter (many it will be noted of a certain age), denial of justice, possibly because of its jelly fish like ambiguity-including especially how or whether it relates to judicial action- has not been a subject well known to bar or bench.⁹⁵ It is possible that the general unfamiliarity with this judicial aspect explains the Tribunal’s preliminary ruling, and then its change of mind, in the matter: that the US government’s attempt to separate (i) a rule that judicial action could only be examined after a “final” determination by the whole judicial system from (ii) the local remedies rule, was not sound. The “two were the same.”⁹⁶ However, the Tribunal changed its mind by the time of its Award, and in its obiter dicta (holding now declared: “the two rules are separate.”⁹⁷

Why this rather drastic swerve? Again, to speculate, fairly I believe: the Tribunal realized that it was not prepared to have Loewen prevail, notwithstanding its unequivocal acknowledgment that a “miscarriage of justice”⁹⁸ had been done to Loewen. Thus convinced of the obvious judicial failure, what was it to do and what was the way out: probably finding that local remedies had not been exhausted; but here NAFTA Article

⁹³ See *supra* text accompanying note 13.

⁹⁴ In a more political sphere, the NGO Public Citizen held a press conference on the day of the Loewen claim’s filing to denounce it as a “direct attack” on “democracy”, see statement by Lori Wallach, Director, Public Citizens Global Trade Watch, at November 24, 1998, available at <http://www.citizen.org/pressroom/release.cfm?ID=907>, visited on July 30, 2004; see also Bill Moyers Reports: Trading Democracy, broadcast on February 5, 2002 at PBS; transcript is available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/transcript.html>, visited on July 30, 2004, *spura* note 74.

⁹⁵ Dunn, *supra* note 22, at 147; see also De Visscher, *supra* note 3, at 369. The term denial of justice, let alone judicial failure, is not mentioned in NAFTA Chapter 11, see *supra* note 26.

⁹⁶ See also Loewen, *supra* note 1, at para. 158. In para. 71 of the Decision of January 5, 2001, the Tribunal expressed the view that “the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own judicial system.”

⁹⁷ *Id.* at para. 159, “[The statement in para. 158] requires qualification...The requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision means that this requirement and the local remedies rule, though they may be similar in content, serve two different purposes”. The tribunal did not specify what these different purposes might be. See Greenwood, State Responsibility for the Decisions of National Courts, in Issues of State Responsibility before the ICJ, ed M. Fitzmaurice and D. Sarooshi, The Clifford Chance Lectures, vol 7, 2004.

⁹⁸ Loewen, *supra* note 1, para. 242.

1121 may have been thought to loom with its evident waiver of the local remedies rule.⁹⁹ If this describes the Tribunal's thinking, the "judicial finality" rule was, to its mind, the way out. But this distinction between the rules appears to be somewhat of an invention of the Tribunal: no cases are cited, and the scholarly literature of the denial of justice not only does not establish the distinction- on the contrary it conflates the rules as being one and the same.¹⁰⁰ And except for the label "judicial finality" the Tribunal treats the issues as if exhaustion of remedies is the rule, and accordingly cites only local remedies cases.¹⁰¹

The issues *are* the same: was there an adequate and effective remedy for Loewen to pursue? As the Tribunal put it, "The question is whether the remedies in question were reasonably available and adequate."¹⁰² Did it have to and did it pursue every conceivable theory? Every ordinary, extraordinary and collateral remedy? Or was there a "uniform body of jurisprudence,"¹⁰³ of adverse precedent, which would make further pursuit unreasonable, futile?- these are the historic questions asked with respect to exhaustion of local remedies after judicial failure,¹⁰⁴ and these are the identical questions asked in Loewen.¹⁰⁵ At this point, having shrunk from the law,¹⁰⁶ the Tribunal shrunk from the facts. The Tribunal stated that "...the central difficulty in Loewen's case" was why it settled rather than pursuing "other options, in particular the Supreme Court option." This is disingenuously removed from reality, and also inaccurate.¹⁰⁷ For under, and notwithstanding, the shock of the grotesque trial court result and the seven day sword of

⁹⁹ See discussion *infra* notes 131-7.

¹⁰⁰ Freeman, *supra* note 34-6; but see Mummery, *supra* note 3, para. 412-4.

¹⁰¹ To put a finer point on this: although cited for "judicial finality" *all* these are local remedies cases.

¹⁰² *Id* at para. 214.

¹⁰³ Freeman, *supra* note 3, at 434.

¹⁰⁴ See *supra* text accompanying notes 64 to 67.

¹⁰⁵ Loewen, *supra* note 1, paras 165-8.

¹⁰⁶ See *supra* text accompanying note 101.

¹⁰⁷ The briefest look at Ray Loewen's submissions (re his effort to clarify and correct the Loewen award as to him individually), note 6 *supra*, shows that the Tribunal ignored, or possibly simply forgot and overlooked, *inter alia* affidavits from Loewen adviser Wayne Carville and John Turner, former Prime Minister of Canada, and independent director and member of the Loewen special committee active during the seven day period before execution would be levied, affidavits which were uncontested, unchallenged and never subject to cross-examination by the respondent US government. These made clear that Loewen's examination suggested that the prospects of successful appeal(i.e. certiorari) to the US Supreme Court were "extremely remote"("illusory" in the later words of Professors Tribe and Fried, *infra* note 110) and that collateral attack in the US federal courts was so utterly remote as possibly to be "sanctionable", in the light of *Pennzoil v Texaco*, 481 US 1(1987). Surely Loewen, its advisers and lawyers, did as much as Justice Bagge's standard requires, see *supra* text accompanying note 64 to 67. For a full discussion of all of Loewen's efforts, see the submissions at *supra* note 6 and the Loewen, *supra* note 1, and the evidence and documents to which they refer.

Damocles that hung over them, Loewen's lawyers did examine¹⁰⁸ all these routes but concluded, as reasonable counsel may, that they were futile, and Harvard Professors Charles Fried and Laurence Tribe in their expert testimony confirmed this.¹⁰⁹ The Tribunal merely and summarily concluded "...that Loewen failed to pursue its domestic remedies...."¹¹⁰

B. NAFTA Chapter 11

Although this chapter is about denial of justice, the *Loewen* case is also identified with NAFTA Chapter 11. Chapter 11, and the BITs of which it is a somewhat evolved example, represent an advance in the settlement of investment disputes. It succeeds to the primordial system of reprisals and its successor the system of diplomatic protection. Indeed it may have been the historic failure of the latter to harmoniously and effectively deal with problems such as the denial of justice which has brought on this new system. NAFTA was created to promote trade and investment, and Hugo Perezcano of SECOFI and the Mexican government's principal lawyer for Chapter 11 cases has said that even the loss of a few such cases is a small price to pay for the investment that has been stimulated, by the provision of a reliable dispute settlement mechanism as part of the investment climate.¹¹¹ Because of the relatively large number of NAFTA cases coming rapidly on each other's heels a new jurisprudence has been created.¹¹² This jurisprudence places a magnifying glass and a microscope to Chapter 11. The increase in the number of published NAFTA and other awards is accompanied by the growth of an increasingly sophisticated bar with its conferences and listserves. In the past published international arbitration awards were few and far between, often dealt with oil concessions, and typically sounded in expropriation.¹¹³ NAFTA cases, by contrast, do deal with expropriation (indeed varieties

¹⁰⁸ Again, the record details the consideration of every possible avenue by Loewen, its advisers and lawyers, all this under great time pressure, and while trying to appeal to the Mississippi Supreme court about the ruinously high supersedeas bond: certiorari to the Supreme Court, collateral attack in a federal district, even the possibility of voluntary bankruptcy of a three billion dollar enterprise as a way to stay execution while seeking to appeal in Mississippi- the latter bankruptcy enthusiastically supported by the US government in its NAFTA memorial, United States Counter Memorial on the Merits, March 30, 2001, *available at* http://www.naftaclaims.com/disputes_us/disputes_us_5.htm, pp. 83-5. One would be surprised if this is what scholars and arbitrators have in mind when they speak of a reasonable rule of local remedies.

¹⁰⁹ First Memorial, *supra* note 5, at para. 135 (visited on July 30, 2004).

¹¹⁰ Loewen, *supra* note 1, para. 217. *See supra* note 106.

¹¹¹ Cf. Statement by Hugo Prezcana Diaz, Transcript of Roundtable Discussion on Domestic Challenges if Multilateral Investment Treaties Are Interpreted to Expand The Compensation Requirement For Regulatory Expropriations Beyond Signatory State's Domestic Law, 11 N.Y. Env't. L. J. 208, 241(2002). SECOFI is Mexican Ministry of Commerce and Industrial Development. *See* ICSID July 29, 2004 survey, II B regarding role of ICSID in a country's investment climate, in author's possession.

¹¹² Growth in investment and the number of BITs has led to an increase in the number of investment disputes in many fora; thus the docket of ICSID has grown rapidly; and more awards are published.

¹¹³ *See, e.g.*, in 1950s and 60s Abu Dhabi, 18 ILR 144 (1951), Ruler of Qatar, 20 ILR 534 (1953), Aramco, 27 ILR 117 (1958), Sapphire, 35 I.L.R. 136 (1963); and then in the 1970s and 1980s BP, 53 ILR 297 (1973), TOPCO, 53 ILR 389 (1978) Liamco, 62 ILR 140 (1977), Aminoil, 66 ILR 518 (1982).

thereof, in Article 1110-direct, indirect, tantamount, regulatory), but also with denial of national treatment (Article 1102) and violation of the minimum standard (Article 1105-unfair and inequitable treatment, failure to protect).¹¹⁴ In particular, what is “fair and equitable” has been put under the microscope. What had been an unadjudicated, empty and windy generalization in treaties of amity, and friendship, commerce and navigation has become a font of new law and doctrine.¹¹⁵ Treaties are parsed for their alternate formulations-*inter alia*, international law including fair and equitable treatment, international law and fair and equitable, fair and equitable but not less than international law, customary international law including fair and equitable. The NAFTA parties by means of an Interpretation under NAFTA Article 1131 have sought to cabin “fair and equitable” within customary international law.¹¹⁶ In my view this is about ‘angels on a pin’: even taking the ‘narrowest’ approach, i.e. that “fair and equitable” is within customary international law, such law is in a constant state of evolution and development - that is the meaning of *lex ferenda*; and cannot be held to the year 1926 of the *Neer* case.¹¹⁷ All this bears on *Loewen* and denial of justice, since that doctrine is to be found

¹¹⁴ Don Wallace, Jr., Case Study Under NAFTA: Lessons for the Wise? *in* Arbitrating Foreign Investment Disputes: Substantive and Procedural Aspects, Horn (ed.), Kluwer (2004).

¹¹⁵ Ian A. Laird, Betrayal, Shock and Outrage- Recent Developments in NAFTA Article 1105, in Weiler (ed.), NAFTA Investment Law and Practice: Past Issues, Current Practice, Future Prospects, Transnational Publishers Inc., Ardsley, New York, 49.

¹¹⁶ Interpretation dated July 31, 2001 by the NAFTA Free Trade Commission, *available at* <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>, visited on July 31, 2004; see *Loewen*, *supra* note 1, para. 128; *see also* *Mondev*, *supra* note 9, at paras.120-2. In its later free trade area agreements the United States has sought to make the reference to customary international law explicit, *see, e.g.*, Art. 10.4(2) of U.S.-Chile Free Trade Agreement, *available at* <http://www.ustr.gov/new/fta/Chile/final/10.investment.PDF>, visited on July 31, 2004; *see also* Art. 10.5(2) of U.S.-Central American Free Trade Agreement (CAFTA), *available at* <http://www.ustr.gov/new/fta/Cafta/final/10-investment.pdf>, visited on July 31, 2004.

The propriety and effect of the Interpretation has been questioned. It has been condemned as an “amendment” which would require that formal treaty amendment procedures be followed, and it has also been ignored by arbitrators, *see* Pope & Talbot, Damages Award, <http://www.dfait-maeci.gc.ca/tna-nac/phases-en.asp#damage>, at para. 47 (May 31, 2002); *see also* Laird, note 116 *supra*, pp 66.

¹¹⁷ The United States has, with respect to the meaning of the “protection and security” portion of the minimum standard, argued that its meaning was fixed by such cases as *Neer*, decided by the Mexican Mixed Claims Commission in 1926. *See* Counter Memorial of the United States, March 30, 2001, *available at* <http://www.state.gov/s/l/c3755.htm>, p. 176, visited on September 20, 2004. With respect to “fair and equitable” the comparable position of the US is problematic if not disingenuous: presumably the US has in mind that “fair and equitable” may be devoid of content, *see supra* text accompanying note 116, but then why was it put into 1105 and all those BITs?

Customary international law, and if one wishes international law, has traditionally been conceived as including both *lex lata*-the fixed law- and *lex ferenda*- the emerging law, M. H. Mendelson, Formation of Customary International Law, *Recueil des Cours* (1998), The Hague Academy of International Law, Vol. 272, p. 344.

The United States Supreme Court has recognized that customary international evolves, *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761- 2764 (2004).

somewhere in the language of 1105(and its header): minimum standard, international law, fair and equitable, protection and security.¹¹⁸ As all of these evolve, and irrespective of which one or more of these elements in particular embraces and catches “denial of justice,” it is clear that denial of justice itself may and must evolve, that it is *de lege ferenda*. All this may have been moot in the minds of the *Loewen* Tribunal but it is to be borne in the minds in the development of the law of denial of justice.

Of course the many points, troublesome and problematic, that preceded are *obiter dicta*, lost in a holding which is also problematic. The Loewen Group lost on the ground that the company ceased to maintain the “continuous nationality”-its Canadian nationality-requisite to maintain an international claim under NAFTA. Not that the Tribunal was not troubled-otherwise how explain the forty paragraphs of the award,¹¹⁹ devoted to the matter particularly the effort to explain to the bar the difference between the private law rules of real parties in interest and applicable public law rules. Within these paragraphs¹²⁰ the Tribunal essays a similar distinction with respect to the equities, or rather the inequities, of the matter: “We have already rehearsed the inequities that befell ... [the Loewen Group] in ...[the Mississippi] litigation, and a chancery court would certainly take such claims into account in assessing damages. But this is an international tribunal...” It is not my remit to take on the matter of continuous nationality in this chapter, but a few points may be made: the rule is eroding,¹²¹ as Loewen argued in its memorial;¹²² the inequity of letting the respondent United States benefit from its own wrong is staggering;¹²³ and the Tribunal’s dismissal of the fact that Loewen’s NAFTA Chapter 11 claim continued to be held by a Canadian affiliate Nafcanco, with “[s]uch a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding,” seems to lack a certain gravitas.¹²⁴

¹¹⁸ See the connection between fair and equitable and protection, *see supra* text accompanying notes 46 and 47; for the argument that “international law” encompasses more than “customary international law” *see* Laird, *supra* note 111, at p. 51; whatever the relevance and effect of the Interpretation, *supra* note 117, on Loewen, NAFTA 1103 also gives Loewen “most favored nation” rights under all other US BITs, some of which have ‘broader’ versions of “fair and equitable” etc.

¹¹⁹ See Loewen, *supra* note 1, at paras. 220-239.

¹²⁰ *Id.* at para. 234.

¹²¹ First Report on Diplomatic Protection, Addendum, by John M. Dugard, Special Rapporteur, International Law Commission, A/CN.4/506/Add.1, available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/400/06/PDF/N0040006.pdf?OpenElement>, visited on August 1, 2004, paras. 21 & 24. And see Jan Paulsson, Continuous Nationality in Loewen, 20 Arb. Int’l 213 (2004).

¹²² Investor’s Memorial on Jurisdiction Concerning Loewen Corporate Restructuring, March 29, 2002, available at http://www.naftaclaims.com/disputes_us/disputes_us_5.htm, para. 50 [hereinafter Investor’s Memorial].

¹²³ The tribunal seems to acknowledge the proximateness between “the underlying Mississippi litigation” and “the need for...[the Loewen Group] to file [sic] bankruptcy...” *see* Loewen, *supra* note 1, at para. 234.

¹²⁴ *Id.* at para. 237. Putting to one side the frivolousness of tone about a matter affecting what the Tribunal itself calls “a miscarriage of justice”, *Id.* at para. 242, such a ‘naked entity’ seemed rather fully clothed and dispositive in Barcelona Traction, Separate Opinion of Fitzmaurice, ICJ 3, p. 101 at para. 63; *see also* Investor’s Memorial, *supra* note 117, at para. 162.

C. The Loewen Case and the Doctrine of Denial of Justice

Accepting the inchoateness of the combination and interrelationship of judicial failure and local remedies, and accepting the obsolescence of diplomatic protection, one is hard put to say that the Tribunal in *Loewen* spoke in such a way as to make it a “leading” case. *Loewen* had the opportunity to be such a case, to clarify for the first time the relationship of judicial failure and the local remedies rule, but instead first conflated, then separated but never coherently related them. Specifically, the Tribunal had the opportunity, extended by Professor Freeman in 1938¹²⁵ to clarify when state responsibility first ‘kicks in’ with respect to judicial action but instead effectively ignored the issue. The notion that it might have been right for Loewen voluntarily to file for bankruptcy to keep the merry-go-round going,¹²⁶ rather than for the Tribunal to face up to the possibility that a denial of justice—gross and disgraceful in the Tribunal’s own words¹²⁷—had occurred¹²⁸ suggests just how far afield the Tribunal was from this. Most importantly the Tribunal, although citing *Finnish Ships*, should have seized on, and applied to *Loewen*, Justice Bagge’s understanding of what is an effective and adequate remedy, as one not barred by “the existence of a uniform body of jurisprudence in the upper court which renders any modification of the lower court’s decision altogether improbable”¹²⁹—fits *Loewen* rather snugly doesn’t it?

D. NAFTA Article 1121

Having failed to grasp the nettle of the doctrine of denial of justice, it is not surprising that *Loewen* failed to grasp the function of Chapter 11 and its duties: NAFTA replaces not only the regime of reprisals, but also the regime of diplomatic protection, at least in this one central respect: NAFTA Chapter 11 is an exercise of diplomatic protection and in a sense ‘exhausts’¹³⁰ it—Canada ‘espoused’ all possible and covered claims in futuro.¹³¹ The old

The award also overlooked the continuing nationality of Mr Loewen himself, *see supra* note 6, and of a Canadian trust of Canadian holders of Loewen bonds, Investor’s Memorial, *supra* note 123, at para. 111. And as to the nationality of the Loewen Group itself the Tribunal seems to have overlooked the bearing of the most favored nation provision of NAFTA 1103, *see supra* note 116, and the fact that some possibly applicable BITs may be read to dispense with a continuing nationality requirement.

¹²⁵ *Supra* note 60.

¹²⁶ A notion, to be sure, put by the respondent US government.

¹²⁷ *See supra* text accompanying note 84.

¹²⁸ This engaging, in some way, the responsibility of the United States.

¹²⁹ Freeman, *supra* note 3, at 424, 432 & 434. Of Justice Bagge’s understanding, Professor Freeman has said, “no more admirable portrayal of this common-sense doctrine[of effective redress] is to be found”, speaking also of his “his scholarly treatment.” *Id.*

¹³⁰ To take an analogy from a wholly different body of law, much as a power of appointment created by a will or trust instrument is said to be exhausted’ by its full exercise; see generally L. W. Waggoner, G. S. Alexander, & M. L. Fellows, *Family Property Law*, 2nd ed., University Casebook Series(1997), p. 905.

¹³¹ Of course, in this instance, without any prior exhaustion of local remedies’. *See supra* note 62.

order of diplomatic protection is dead, a new order reigns- but this again was not a nettle to be seized, a duty to be undertaken.

Given that NAFTA Chapter 11- much like many BITs and the ICSID machinery- creates a new self-contained system of dispute settlement, Article 1121 is an almost inevitable part of it. If claimants are to benefit from and respondents to be subjected to, such a self-contained system, is it not inevitable the claimants must eschew resort to the local track outside that 'container', i.e. local remedies, at the same time?¹³² Other NAFTA and BITs awards have so understood.¹³³

Article 1121 seems plain enough: to use Chapter 11 you must give up the local route- therefore logically the claimant cannot exhaust, indeed it is *not allowed* to further pursue, local remedies. What is the Tribunal's answer to this conundrum- more accurately, this dictate: "...the precise purpose of NAFTA Article 1121 is not altogether clear..."¹³⁴ Then is Article 1121 a nullity, nonsense? Well, "Article 1121 may have consequences where a claimant complains of a violation of international law not constituted by a judicial act. That is not a matter that arises here."¹³⁵ Of "a violation...constituted by a judicial act" the Tribunal in the immediately previous paragraph of the Award had stated, "If Article 1121 were to have...[the] effect [of confronting a State 'with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted'], it would encourage resort to NAFTA tribunals rather than resort to [local courts]...an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties."¹³⁶ Of course such "sophisticated legal systems" are also available for non-"judicial act" cases (and probably less likely to be protective of executive or legislative acts, than of their fellow 'judicial actors'). This would seemingly obviate the need for 1121 in those cases as well. In which case Article 1121 is not 'needed' for anything. This does not appear to be a sound reading of the plain language of Article 1121.

IV. Conclusion

¹³² This is the presumption of many BITs and ICSID article 25; the fact that the presumption may be rebutted, which seems to undermine the integrity of the new system, may be no more than a hangover, a cultural lag, an obeisance to an unthinking recollection of an old order. Cf. *Elletronica Sicula case*, *United States v. Italy*, 28 ILM 1109, 1125 (1989).

¹³³ See, e.g., *Marvin Feldman v. United Mexican States*, Final Award of December 16, 2002, available at http://www.naftaclaims.com/disputes_mexico/disputes_mexico_karpa.htm, paras. 71-3, visited on September 20, 2004; although like *Loewen* involving judicial failure it has no mention of a rule of "judicial finality",- Cf. *CME Award*, www.cetv-net.com/arbitration.asp, para. 417, "A purpose of an international investment treaty is to grant arbitral recourse outside the host country's domestic legal system."

¹³⁴ *Loewen*, *supra* note 1, at para. 161; cf. *Id.* at para. 146.

¹³⁵ *Id.* at para. 163.

¹³⁶ *Id.* at para. 162. I doubt this outcome would be surprising to the NAFTA negotiators.

The conclusion of this chapter is as follows:

A. With respect to the *Loewen* case, I believe the Tribunal did not follow the inevitable logic of its fairly consistent invocation of denial of justice's 'chamber of horrors': gross, obvious, manifest, odious injustice and inequity. Why? And why the flip flop on the local remedies rule? Maurice Mendelson attributes the outcome "at least in part to inadequate understanding of public international law."¹³⁷ The better explanation is *fear*, exaggerated in my view, of reactions in the United States, from NGOs and others, that might jeopardize the very continuation of Chapter 11 and indeed NAFTA. In the Tribunal's words, "Too great a readiness ['on our part'] to step...into the domestic arena...will damage...the viability of NAFTA itself."¹³⁸

B. With respect to the doctrine of denial of justice because of judicial acts, it seems clear that the *Loewen* case does not shed much useful light, although bringing to the surface much of the terminology of the already muddled doctrine; nor does it shed light on whether denial of justice has become a constituent part of the emerging jurisprudence and doctrine of "fair and equitable treatment." *Finnish Ships* this is not. Does it hurt the doctrine? Who is to say? Of course the award is not rigorously scholarly, in the sense of taking up the terminological confusion sown by *Chattin* and similar cases,¹³⁹ or most crucially the strange shadow world inhabited by the relationship of judicial failure and the local remedies rule. The award fails in its treatment of NAFTA Article 1121.

Loewen is a case of unhappy outcomes.

¹³⁷ Maurice Mendelson, QC, Email [dated June 14, 2004 to OGEMID"JISCMAIL.AC.UK](mailto:dated%20June%2014,%202004%20to%20OGEMID%20JISCMAIL.AC.UK) listserve ; Mr. Mendelson, a noted barrister, also called the *Loewen* Award a "mess", *id.*

¹³⁸ *Loewen*, *supra* note 1, at para 242. As of the date of this writing, it is unclear what will happen in the rehearing brought on by the US government's request for clarification and Ray Loewen's cross-request for reversal, *supra* note 6.

Other arbitrators have also recently shrunk from imposing international procedures on local forums, cf. *SGS v Philippines*, ICSID Case No.ARB/02/6, www.worldbank.org/icsid (treaty "umbrella clause" upholding contract interpreted to require initial pursuit of local arbitration and other remedies specified by the contract).

¹³⁹ See *supra* text accompanying note 37 et. seq.