

# LOEWEN GROUP AND ANOTHER v. UNITED STATES OF AMERICA

## OPINION OF CHRISTOPHER GREENWOOD, QC

### I. Introduction

1. My full name is Christopher John Greenwood. I am Professor of International Law in the Law Department at the London School of Economics, a post I have held since 1996. Prior to that date, I was a University Lecturer in Law at the University of Cambridge and a Fellow of Magdalene College, Cambridge. I hold degrees in Law and International Law from the University of Cambridge. I am a member of the English Bar and have practised in the field of public international law before English and international courts since 1985. I was appointed Queen's Counsel in 1999. I have also given expert evidence on international law in cases in England, Canada and New Zealand. My *curriculum vitae* is attached as Annex 1 to this Opinion.
2. I have been asked by the Department of Justice of the United States of America to give my opinion on questions of international law raised by the case of *Loewen Group Inc. and Raymond Loewen v. United States of America* (ICSID Case No. ARB (AF)/98/3) and, in particular, to comment on the expert opinions of Sir Robert Jennings, QC, dated 26 October 1998<sup>1</sup> and 24 May 2000.<sup>2</sup>

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<sup>1</sup> *Loewen Group Memorial*, Tab A.

<sup>2</sup> *Submission of the Loewen Group concerning the Jurisdictional Objections of the United States*, Tab A.

3. The Loewen Group's claim<sup>3</sup> turns on the allegation that the trial of the case of *O'Keefe v. Loewen* in a Mississippi state court (the Circuit Court for the First Judicial District of Hinds County, Mississippi) involved a denial of justice by the United States to a foreign investor. I have analysed this claim and briefly reviewed the material facts in Part II of this Opinion. In my opinion, the Loewen claim is not well-founded as a matter of international law for a number of reasons. I have set out the factors which lead me to this conclusion as follows:-

- (1) in international law, the decision of a trial court does not amount to a denial of justice where recourse is available to a higher court which can correct any deficiency in the administration of justice by the lower court (Part III of this Opinion);
- (2) the provisions of NAFTA Article 1121 do not alter this conclusion or dispense with the need for Loewen to challenge the decision by way of appeal in Mississippi or by other judicial proceedings in the courts of the United States (Part IV of this Opinion);
- (3) a challenge to the decision in the Mississippi Supreme Court or by proceedings in the United States federal courts cannot be dismissed as "obviously futile" or "manifestly ineffective" (Part V of this Opinion);
- (4) in any event, the proceedings in the Hinds County Circuit Court did not involve a denial of justice within the meaning of international law (Part VI of this Opinion);

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<sup>3</sup> I have referred to the Loewen Group Inc. and Raymond Loewen throughout this Opinion as "Loewen".

(5) the award of punitive damages by a national court is not in itself a violation of international law (Part VII of this Opinion);

(6) the award of punitive damages in the present case did not violate international law (Part VIII of this Opinion).

4. I do not claim any expertise in the law of the United States or the law of Mississippi. In so far as I have referred to those laws in this Opinion, it is purely in the context of applying what I consider to be the relevant tests in international law. I am not attempting to offer my own opinion on the questions of United States and Mississippi law as such.

## II The Claim and its Factual Background

5. The present claim arises out of proceedings in the Mississippi courts instituted by Jeremiah O'Keefe and others (collectively referred to as "O'Keefe") against Loewen for breach of contract, various tort claims connected with breach of contract, oppression, fraud, unfair competition and breach of the anti-monopoly laws of the State of Mississippi.<sup>4</sup> I have not attempted to set out the details of the various heads of claim here, not least because they are comprehensively discussed in the pleadings in the current arbitration.<sup>5</sup>

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<sup>4</sup> See the Second Amended Complaint in *O'Keefe v. Loewen*, dated 16 May 1994; *Loewen Group Memorial*, Appendix 4.

<sup>5</sup> See, in particular, *Loewen Group Memorial*, pp. 8-13; *Memorial of the USA on Matters of Competence and Jurisdiction*, pp. 17-24.

6. Nevertheless, I note that the claims were not confined to breach of the contracts and settlement agreement between O'Keefe and Loewen but included substantial claims in respect of fraud (both on O'Keefe and consumers of funeral services in Mississippi), intentional torts arising out of contracts and antitrust or anti-competitive practices based upon allegations that Loewen had abused a powerful position within the markets for burial and funeral services in Mississippi. This fact is significant for two reasons.
7. First, the competition claims raise issues of considerable importance, going beyond the specific contractual transactions between O'Keefe and Loewen, in a jurisdiction where there are very severe penalties for anti-competitive behaviour and fraudulent trading practices. It must have been apparent to all concerned in the litigation that if O'Keefe succeeded in making good its claims in this respect, the consequences for Loewen would be serious.
8. Secondly, the size and economic strength of Loewen and of O'Keefe were matters of relevance to the fraud and anti-competitive practice claims in that O'Keefe was alleging that Loewen had acquired a dominant position in the relevant markets and had abused that dominant position in order to harm O'Keefe and raise prices to the consumer. O'Keefe also alleged that Loewen had used its superior bargaining strength to dupe O'Keefe into entering into, and trusting in the completion of, an agreement which Loewen had no intention of carrying out. The fact that counsel for O'Keefe made reference to the wealth and economic power of the Loewen businesses is reasonably attributable to these factors.
9. I therefore disagree with Sir Robert Jennings' characterization of the claims in the Mississippi proceedings as "a relatively straight-forward, small-scale contract matter involving total sums of a few million dollars at the most."<sup>6</sup> This characterization disregards the competition and fraud claims in the case which involved allegations that

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<sup>6</sup> First Opinion, para. 8.

went beyond the contractual relationship between O'Keefe and Loewen and which entailed claims for punitive damages. The difference between us is important, because Sir Robert's analysis of what the Mississippi claims were about leads him to conclude, *inter alia*, that "the sums of damages awarded ... are so ludicrously disproportionate to the actual modest value of the invested interests involved as to speak for themselves in terms of an extreme example of denial of justice."<sup>7</sup> With respect, I consider that this conclusion is based upon a false premise. The claims asserted in the Mississippi proceedings were never confined to the contracts between O'Keefe and Loewen or the specific investments made by Loewen in the Wright and Ferguson and Reimann businesses but included far broader allegations of misconduct.

10. I am, however, in complete agreement with Sir Robert Jennings that Loewen's claim in the present arbitral proceedings turns on whether or not there has been a denial of justice entailing a violation of international law by the United States of America. That is the essence of Loewen's claims under Article 1102 and Article 1105 of NAFTA, since Loewen alleges that the proceedings before, and the decision of, the Mississippi court were discriminatory on ground of nationality (contrary to Article 1102) and fell below the international minimum standard (Article 1105). While Article 1102 extends beyond denial of justice, in the circumstances of the present case, where Loewen's claims arise out of a decision of a Mississippi court, its claims under both Article 1102 and 1105 assert – and depend upon Loewen establishing – that there was a denial of justice. Although the Loewen claim also alleges an expropriation in violation of Article 1110, an award of damages, including an award of punitive damages, can amount to an expropriation only if the court proceedings are so flawed as to amount to a denial of justice. As Sir Robert says, in the present case the expropriation claim "is another aspect of the denial of justice".<sup>8</sup>

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<sup>7</sup> First Opinion, para. 38.

<sup>8</sup> First Opinion, para. 31.

11. I think it is also common ground between Sir Robert and myself that the proceedings in the Mississippi court are capable of amounting to a violation of NAFTA only to the extent that they are imputable to the United States. The actions of O'Keefe and its counsel are, of course, the acts of a private party and are in no way imputable to the United States. They are relevant to the present proceedings only in so far as it is said that they influenced the jury to return an improper verdict. Whether or not O'Keefe or its representatives manifested prejudice against Canadians in general, or the Loewen Group and its shareholders in particular, is otherwise of no legal significance at all.
  
12. This distinction is not always made clear in Loewen's pleadings. For example, Loewen refers to an advertising campaign by O'Keefe which it describes as "xenophobic" and as linking Loewen's activities to the Japanese attack on Pearl harbour.<sup>9</sup> Irrespective of whether the advertisements in question bear the meaning attributed to them by Loewen, they have no bearing on the present proceedings. The advertising campaign is not attributable to the United States and it is difficult to see how complaint can be made of any effect which it might have had on the jury given that it was Loewen, not O'Keefe, who introduced this material in evidence and drew it to the attention of the jury.<sup>10</sup>
  
13. The question I have therefore considered in this Opinion is whether, either by the way in which the court conducted the proceedings or by the verdict and award of damages returned, the Mississippi proceedings constituted a denial of justice under international law.
  
14. In approaching this question, it is important to bear in mind that international tribunals are understandably cautious in concluding that the judicial system of a State has fallen so far short of international standards that it has perpetrated a denial of justice. Only if there is clear evidence of discrimination against a foreign litigant or an outrageous

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<sup>9</sup> *Loewen Group Memorial*, paras. 18-20.

<sup>10</sup> See, e.g., Transcript, pp. 96-99, 104-5.

failure of the judicial system is there a denial of justice in international law. The point is very clearly put by O'Connell, who states that -

When one comes to examine failure of the courts themselves "palpable deviations" from the accepted standards of judicial practice are not so readily ascertained. For one thing, there is a presumption in favour of the judicial process. For another, defects in procedure may be of significance only internally, and not work an international injustice. For a third, wide discretion must be allowed a court in the reception and rejection of evidence, in adjournment, and in admission of documents, and it cannot be said that deviations even from the municipal law rules of evidence are deviations from an international standard. The first thing that must be ascertained is whether as a result of court manoeuvrings substantial injustice has been done the claimant; the second is whether these manoeuvrings really amount to obstruction of the judicial process, and are extrinsic to the merits of his claim. Bad faith and not judicial error seems to be the heart of the matter, and bad faith may be indicated by an unreasonable departure from the rules of evidence and procedure. (*International Law* (2<sup>nd</sup> ed., 1970), p. 948)

(See also the authorities cited by O'Connell, in particular, *Chattin v. United Mexican States*, 4 UNRIAA 282 (1927) and *Garcia and Garza v. USA*, 4 UNRIAA 119 (1926), Brierly and Waldock, *The Law of Nations* (6<sup>th</sup> edition, 1963), p. 287 and Article 9 of the Harvard Research (1929) 23 AJIL Supp. P. 173.) The remarks of the Arbitration Tribunal in the NAFTA case of *SD Myers v. Canada* that "a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making" (para. 261) and its reference to "the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders" (para. 262) are particularly apposite where a case is based on an allegation of denial of justice by a municipal court.

**III In International Law, the Decision of a Trial Court does not amount to a Denial of Justice where Recourse is available to a Higher Court which can correct any Deficiency in the Administration of Justice by the Lower Court**

15. It is first necessary to consider whether the decision of a trial court is capable of constituting a denial of justice in international law if recourse is available to a higher court (whether by way of appeal or otherwise) which has jurisdiction to correct any deficiency in the administration of justice by the trial court. This is not a matter of the application of the local remedies rule. That rule concerns when (and whether) a claim may be brought on the international plane for conduct which violates international law. The issue in the present case is whether a decision of a trial court which is subject to appeal is capable of constituting a violation of international law in the first place.
  
16. Nevertheless, consideration of this question, both in arbitral jurisprudence and in the literature, has tended to be bound up with consideration of the local remedies rule and the imputability of acts to the State with confusing results. Properly analysed, where a national of one State invokes international law (or where the State of his nationality claims on his behalf) against another State, there are three separate issues to be considered:-
  - (a) whether there is an act which is imputable to the respondent State;
  - (b) whether that act is contrary to international law; and
  - (c) whether the respondent State can be held responsible for that act in international proceedings until local remedies have been exhausted.

17. Since the normal rule is that an alien must exhaust all available domestic remedies before his case can be taken up on the international plane, consideration of whether there is a remedy in the courts of the respondent State is usually necessary whatever was the original cause of harm to the alien. As a general rule, that is the case irrespective of whether the original cause of the harm is (1) an act which is plainly imputable to the State and contrary to international law – for example a discriminatory and uncompensated expropriation, either by legislative decree or executive action – or (2) the act of a private party which is not imputable to the State.
18. The significance of recourse to the courts of the respondent State, however, is different in these two cases. In the first case, it is the expropriation which is the violation of international law. The function of recourse to the local courts here is properly regarded as procedural; it gives the respondent State the opportunity to rectify the original wrong in its own courts before calling it to account at the international level.<sup>11</sup> In the second case, the original cause of harm is not imputable to the respondent State and cannot, therefore, constitute a cause of action against that State in international law. If there is to be a cause of action at all it can only be denial of justice, arising either because the respondent State denies the alien access to the courts or because those courts behave in a way which is discriminatory or manifestly contrary to international standards of behaviour. In this case it is only the action of the courts (or of those organs of the State who deny access to the courts) which is imputable to the respondent State.
19. The second case is not really an instance of the application of the local remedies rule at all. Unlike the first case, where the question is whether the respondent State's courts

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<sup>11</sup> Although some governments and commentators have sought to argue that it is the failure to provide a remedy, rather than the expropriation, which is the international wrong, this approach makes denial of justice the only cause of action in international law in cases of mistreatment of aliens. That is not the practice of most States and has not been the approach taken in the majority of judicial and arbitral decisions.

have provided a remedy for that State's wrongful act, in the second case it is the behaviour of those courts which is itself said to constitute the wrongful act.

20. This distinction is clearly established and I believe that it is not in dispute between the parties in the present proceedings. Nevertheless, discussion of it in the literature and the case law has often been confused and the second category of case has frequently been discussed as though it were an application of the local remedies rule, sometimes with the qualification that the local remedies rule is described in such a case as being "substantive", whereas in the first category of cases it is regarded as procedural. Unless there has been a waiver of the local remedies rule, this confusion matters little, since the practical effect of the local remedies rule and the principle at issue in the second category of case is the same. Nevertheless, there is an important difference of principle between the two and once there is an agreement waiving the local remedies rule the distinction becomes critical. A waiver of the local remedies rule will affect the first case but not the second. In the second case, until the alien attempts to secure redress in a local court, there is nothing which could form the substance of an international claim, because there is nothing which is imputable to the respondent State.
21. Once, however, a court of the respondent State has taken a decision, then there is an act imputable to that State. In so far as Borchard (*Diplomatic Protection of Citizens Abroad* (1915), p. 198) bases his views on the principle that acts of the lower courts are not imputable to the State, I believe that he is wrong and that his views have not been followed. Nevertheless, it is still necessary to ask whether the act imputable to the State constitutes a violation of international law. It is well established that a mistake on the part of a court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.
22. The term denial of justice has been given different meanings by different commentators. "Justice", however, refers to more than just the decision of an individual court. It is

clear, for example, that the term denial of justice embraces a denial of access to the courts. There can also be a denial of justice because of a systematic bias or other failing on the part of the courts which would make recourse to those courts for the alien pointless or ineffective, even though there may be no decision of a court in the particular case.

23. While allegations of a denial of justice may turn upon decisions of the courts, what constitutes a denial of justice is a failure of the *system* of justice within a State. To put it another way, the obligation which the State owes the foreign national in this context (whether under general international law or under the specific provisions of NAFTA) is to provide a system of justice which affords fair, equitable and non-discriminatory treatment. So long as the system itself provides a sufficient guarantee of such treatment, the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal. While legal systems strive for perfection at all levels, they also recognize that such a result is unlikely to be attainable. It is precisely for that reason that legal systems today make extensive provision for appeal and that many also contain other provisions for challenging decisions of the lower courts on grounds which violate constitutional safeguards which are frequently very similar to the standards of international law. The duty of a State towards foreign nationals is to provide a *system* of justice which ensures fairness and compliance with other standards of international law in all cases. That system includes the appellate and review procedures for which it provides.

24. It follows that the responsibility of the State for a denial of justice arises only if the system as a whole produces a denial of justice. Where there is a manifestly defective judgment by a lower court, this will not amount to a denial of justice – and thus will not constitute a violation of international law by the State – if there is available to the foreign national an effective means of challenging the judgment.

25. That consequence is not always made clear in discussion of denial of justice and, as explained above, is frequently and understandably confused with discussion of the local remedies rule. Nevertheless, it is recognized in a number of important texts. Thus, *Oppenheim's International Law* (9th ed., 1992, vol. I, edited by Sir Robert Jennings and Sir Arthur Watts) states that –

If the courts or other appropriate tribunals of a State refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings are subject to undue delay, or if there are serious inadequacies in the administration of justice, or if there occurs an obvious and malicious act of misapplication of the law by the courts which is injurious to a foreign State or its nationals, there will be a 'denial of justice' for which the State is responsible (quite apart from the effect which such circumstances might have for the application of the local remedies rule). *The State's responsibility will at least require it to take the necessary action to secure proper conduct on the part of the court...* (pp. 543-4; emphasis added)

This last sentence suggests a standard which would be met by the State ensuring that a manifestly deficient judgment was reversed on appeal or that judicial review were available to compel the lower court to adopt a proper decision. The ninth edition of *Oppenheim* continues –

Where, however, a court observes its own proper forms of justice and nevertheless pronounces a materially unjust judgment, it is controversial whether a denial of justice is thereby occasioned for which a State is internationally responsible. The judgment giving rise to the material injustice (itself a relative concept) may be the result of the proper application by the court of a law which provides for such a result (in which case it is the law which should properly be the object of complaint), or of an erroneous application by the court of a law which is itself unexceptional. In this latter case, *if the error is not remedied on appeal*, there is probably no international responsibility for a denial of justice unless the error led to a breach of a treaty obligation resting on the State or, possibly, the result is so manifestly unjust as to offend against the standards of justice recognized by civilized nations. (pp. 544-5; emphasis added)

It is axiomatic in this passage that if an error is remedied on appeal there can normally be no violation.

26. Freeman, *International Responsibility of States for Denial of Justice* (1938), comments that "responsibility [of a State] is engaged as the result of a definitive judicial decision *by a court of last resort* which violates an international obligation of the State" (pp. 311-12; emphasis added). Elsewhere, in discussing denial of justice resulting from manifest defects in the procedure followed by the national court, he states –

Ample protection against arbitrary violations of the local law will normally be afforded within the State itself by the conventional means of appeal to a superior court. Ruling improperly on evidence, erroneously charging a jury, exceeding the decorous limits of judicial restraint with prejudicial effects for one of the parties, (such as openly insulting the claimant's attorney before the jury), emotionally addressing the jurymen with the aim of kindling their hostility, and the like will usually find rectification in the wisdom of the reviewing bench. *Where this does not happen*, there is still left the question of whether these various deviations from regular judicial activity are sufficiently flagrant to embroil the State. (291-292; emphasis added)

27. It is true that, later in this work, Freeman refers to the principle that "no claim based upon a denial of justice may be predicated upon the decision of a lower court" (p. 415) as bound up with the local remedies rule. There is no doubt that the two concepts have always been bound up and, indeed, frequently confused. As the Tribunal pointed out in paragraphs 66-71 of its Preliminary Award in the present case, in many cases the effect of the two principles is the same and the test of whether there is in fact an effective recourse available to the alien is the same in each case.
28. Nevertheless, the difference between them is one of real practical importance. That becomes apparent when the local remedies rule is waived. If the principle that, in Freeman's words, "no claim based upon denial of justice may be predicated upon the decision of a lower court" is treated as nothing more than an application of the local

remedies rule, the effect of a general waiver of the rule would be that any judgment of a court at any level in the judicial hierarchy which was alleged to constitute a denial of justice could be the subject of a challenge in international proceedings (in this case through NAFTA Chapter 11 arbitration), notwithstanding that there was an avenue of appeal open to the foreign national. That would be the case even with interlocutory decisions. That is clear from Sir Robert Jennings' explanation of why he considered that the decision of a court constituted a "measure" within the scope of NAFTA Chapter 11. One of the examples which he gave of the use of the word "measures" in connection with decisions of a court in international law was the use of the term "provisional measures" in the Statute of the International Court of Justice, Article 41.<sup>12</sup> It follows that a decision granting interlocutory relief would presumably constitute a measure within Chapter 11 and could therefore be challenged in an arbitration.

29. In common law jurisdictions, many interlocutory decisions are given *ex parte*. For example, an English court issues freezing orders (formerly known as *Mareva* injunctions) on the basis of an *ex parte* application. The order can, of course, be challenged by the defendant at a subsequent *inter partes* hearing. Yet the act of granting the original *ex parte* order is an act imputable to the State and, if the local remedies rule has been waived by a provision in a general agreement equivalent to NAFTA, then a defendant could bring an international claim alleging that the granting of the order was a denial of justice, notwithstanding that he had not exercised his undoubted right to contest the order at the *inter partes* hearing.
30. It is inherently implausible that States would intend to produce such a result, the effect of which would be to give the foreign litigant the opportunity to engage in some quite extraordinary forum shopping and to set aside the entire system of checks and balances within the national judicial system. In my opinion, international law does not produce such a bizarre result. That is because what constitutes a denial of justice in international

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<sup>12</sup> Second Opinion, para. 7.

law is not the isolated decision to grant a freezing order on an *ex parte* application but only a failure of the system of justice if that system either does not correct that decision where the decision was manifestly unjust or does not offer any effective means of challenging the decision.

31. To say that a decision of a lower court cannot constitute a denial of justice if the means exists for an effective recourse to correct the deficiencies in that decision is not the same as saying that a foreign national must always challenge any act of government before the courts. In the case of denial of justice based on the actions of the courts, what is involved is not a challenge to one branch of government before another (as was the case, e.g., in the *Interhandel* case, ICJ Reports, 1959, p. 6) but the mechanisms which exist within the judicial system for correcting errors made within that same system. These methods generally exist as of right and recourse to them is largely in the hands of the parties to the proceedings.
  
32. There has been very little consideration by international tribunals of the distinction between the local remedies rule and the principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice. The lack of discussion is scarcely surprising in view of the similar effects of the two principles and the fact that, until recently, the local remedies rule was seldom waived. Nevertheless, the distinction is clearly recognized by the Iran-United States Claims Tribunal in its decision in *Oil Field of Texas*, 12 Iran-US CTR 308 at 318-319. As paragraph 45 of the Preliminary Award in the present case recognizes, the Iran-US Claims Tribunal there held that a judicial decision was capable of amounting to a measure of expropriation. The decision in question was that of the Islamic Court of Ahwaz, which appears to have been a lower court. The Tribunal held that –

The Court order did not only have temporary effect, but, as evidenced by NIOC's continued retention of the equipment, amounted to a permanent deprivation of its use. In these circumstances, *and taking into account the Claimant's impossibility to challenge the Court order in Iran*, there was a taking of the three blowout preventers for which the Government is responsible. (p. 319; emphasis added.)

Since the Iran-US Tribunal operates on the basis of a waiver of the local remedies rule (see Principle B of the General Declaration, G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996), pp. 129-131, and paragraph 65 of the Preliminary Award in the present case), this passage is not referring to the need to exhaust local remedies. It is clear, therefore, that the Tribunal considered that, if there had been a means by which the Claimant could have challenged the decision of the Islamic court within the Iranian judicial system, the decision of the Islamic court would not have amounted to a violation of international law.

33. Amongst older authorities, the decision of Umpire Thornton in *Jennings, Laughland and Co. v. Mexico* (Case No. 374, 3 Moore, *International Arbitrations* (1898), p. 3135 also takes this view –

The Umpire does not conceive that any government can thus be made responsible for the misconduct of an inferior judicial officer when no attempt has been made to obtain justice from a higher court. (p. 3136)

Umpire Thornton reached the same conclusion in *Green v. Mexico* (ibid., at 3139), *Burn v. Mexico* (ibid., at 3140), *The Ada* (ibid. at 3143), *Smith v. Mexico* (ibid., at 3146) and *Blumhardt v. Mexico* (ibid., at 3146). The decision of Umpire Little in *The Mechanic* (*Corwin v. Venezuela*) (ibid., 3210 at 3218) is to the same effect.

34. The Tribunal considered the relationship between the substantive principle examined above and the local remedies rule in paragraphs 65-71 of its Preliminary Award. In paragraph 66 it commented (although it expressed no final view on the point) that there

was support for the view "that no distinction should be drawn between the principle of finality and the local remedies rule". While I agree that, for the reasons already given, the two rules are closely connected and generally lead to the same result, I do not accept that they are in fact one and the same rule. Nor do I read the authorities cited by Loewen and referred to in paragraphs 65-7 of the Preliminary Award as requiring such a conclusion.

35. The two NAFTA decisions, *Azinian* and *Metalclad*, are not directly in point. In *Azinian*, the Tribunal pointed out that no claim for denial of justice based on the decisions of the courts had been made (paragraphs 102-3). Nor is there any discussion of whether *Azinian* could have taken the case further than it already had done within the Mexican courts. The claim in *Metalclad* concerned the acts of the State and local governments in the relevant part of Mexico; it was not based upon the decisions of the courts.
36. The *Interhandel* case (ICJ reports, 1959, p. 6) is a straightforward application of the local remedies rule. The claim of Switzerland was based not upon the decisions of the lower courts in the United States but on acts of the United States Government in blocking the assets of *Interhandel* in the United States (see pp. 16-17). The issue in the *Finnish Ships* case (3 UNRIAA 1497 (1937)) was specifically confined to whether or not local remedies had been exhausted; the arbitrator was not asked to address the merits of the shipowners' claim. Moreover, it was the original requisition of the ships, not the decision of the English tribunal, which had given rise to those claims.
37. Of the writers quoted, Borchard was writing nearly a century ago, at a time when waiver of the local remedies rule was rare. While his reasoning is open to criticism (his thesis that the acts of a lower court are not imputable to the State is no longer accepted), his conclusion that the responsibility of the State is not engaged by a decision of a lower court from which an appeal lies is entirely consistent with the views set out in this Opinion. Amerasinghe, *Local Remedies in International Law* (1990), p. 181, rightly

states that the exhaustion of local remedies requires recourse to the highest courts, so long as there is a possibility of obtaining redress there. He does not consider whether a decision of a lower court can itself amount to a violation of international law by the State if that decision can be challenged on appeal.

38. The various International Law Commission reports referred to must also be seen in their proper context. Since it embarked upon its present attempt to codify and develop the law of State Responsibility, the Commission has proceeded on the basis that it would deal only with the "secondary rules" of responsibility, i.e. the general principles regarding the basis on which States are held responsible and would not consider the substantive law, or primary rules, for the violation of which they might be held responsible (see, e.g., Report of Judge Ago, *Year Book of the ILC*, 1970, vol. II, p. 306, and First Report of Professor Crawford, UN Doc. A/CN.4/490, paragraphs 12-18). That approach meant that the ILC considered the questions of imputability and exhaustion of local remedies (questions (a) and (c) identified in paragraph 16 of this Opinion). The Commission did not, however, consider the question of substantive law, namely what constituted a denial of justice (question (b) in paragraph 16), because that concerned a primary, rather than a secondary, rule. The reaffirmation of the duty to exhaust any effective appellate procedures as part of the local remedies rule does not, therefore, detract from the distinct proposition that a decision of a lower court which is open to appeal does not in itself create responsibility because it does not involve a violation of international law.
39. I do not, therefore, accept that the United States is seeking to raise the local remedies argument "from the dead", as Sir Robert Jennings puts it (paragraph 37 of his Second Opinion). What is at issue here is an entirely different question, namely whether, all considerations of the local remedies rule aside, a judgment of a lower court which is open to effective challenge on appeal is capable of amounting to a denial of justice. In my view, it is not.

**IV The Provisions of NAFTA Article 1121 do not alter this Conclusion or dispense with the need for Loewen to challenge the Decision by way of Appeal in Mississippi or by other Judicial Proceedings in the Courts of the United States**

40. If I am right in the opinion set out in Part III, above, then the provisions of NAFTA Article 1121 will have no bearing on the issues in this case. While those provisions, which are clearly procedural in character, might constitute a waiver of the local remedies rule (a matter which I consider below), they cannot turn something which is not a violation of international law into something which is a violation. However, even if the principle that a State is not to be held responsible for a decision of a lower court is no more than an aspect of the local remedies rule, I consider that Article 1121 does not dispense with the need for Loewen to have challenged the decision of the Hinds County Court in the United States before invoking NAFTA arbitration.
41. There is no doubt that, unless NAFTA contains some provision which waives the local remedies rule, that rule applies to the Loewen claim. Loewen's argument (*Submission of the Loewen Group concerning the Jurisdictional Objections of the United States*, para. 53) that the local remedies rule is not applicable where there has been a denial of justice is based on a misunderstanding of the law. It is well established that local remedies do not have to be exhausted where there are no effective remedies to exhaust (a matter considered in the next section of this Opinion). That will be the case where the entire system of justice within a State is so biased against the claimant or against a particular group of foreigners that the courts are closed to them or there is no prospect of success on appeal. That does not mean that, if a decision of a lower court has the ingredients which, left uncorrected, would amount to a denial of justice, the local remedies rule does not apply and the claimant is relieved of any requirement to appeal from that decision, notwithstanding that an effective appeal is possible or even likely. Indeed, it is difficult to think of a type of case in which the strict application of the local remedies rule would be more appropriate. The authorities to which Loewen refers do

not support the conclusion suggested by Loewen (see, in particular, Amerasinghe at p. 200, which refers to "absence of due process in the legal *system* of the host or respondent State" and states that "not all forms of denial of justice may have the result of exempting the alien or claimant from exhausting remedies").

42. The question, therefore, is whether, and if so to what extent, Article 1121 operates to waive the local remedies rule.
43. As the International Court held in the *ELSI* case, ICJ Reports, 1989, p. 15, the local remedies rule is "an important principle of customary international law" which should not be held "to have been tacitly dispensed with, in the absence of words making clear an intention to do so" (para. 50 of the Judgment). Contrary to what is suggested by Loewen (*Submission of the Loewen Group concerning the Jurisdictional Objections of the United States*, para. 54), the fact that a treaty provides an alternative remedy does not in itself suffice to amount to a waiver of the rule. That submission is directly contrary to the approach taken by the International Court in *ELSI* (para. 50 of the Judgment).
44. Article 1121 provides that a claimant cannot, at one and the same time, carry on litigation in a national court in *any* of the NAFTA States and invoke Chapter 11 arbitration in respect of the same complaint, except that it may seek certain forms of non-monetary relief in the courts of the *respondent* State at the same time as invoking Chapter 11. Article 1121 does not expressly deal with the question whether the claimant must first go to the national courts of the respondent State before it invokes the arbitration provisions of Chapter 11.
45. It follows that (a) in so far as Article 1121 deals with the local remedies rule at all, it does so by implication, rather than by express statement and (b) the express terms of the provision make a distinction between different types of domestic court proceedings.

46. I agree with Sir Robert Jennings that Article 1121 is at least open to the interpretation that it implies some measure of waiver of the local remedies rule. Where I differ from Sir Robert is that I do not accept that this clause amounts to a waiver of the local remedies rule in its entirety.
47. There is no *a priori* reason why a waiver of the local remedies rule – especially where that is implicit rather than express – must necessarily take the form of a waiver of all aspects of the rule in all cases, nor is there any authority to that effect. Whether a particular treaty provision had such an effect would depend on the intention of the parties to that treaty. Moreover, the frequently quoted maxim of Sir Hersch Lauterpacht that the local remedies rule is “not a purely technical rule” but one which “international tribunals have applied with a considerable degree of elasticity” (*Norwegian Loans case*, ICJ Reports, 1957, p. 9 at p. 39) must apply to waiver of the rule as well as to other aspects of its application.
48. In my opinion, there is an important distinction between the operation of the local remedies rule where the claimant is complaining of the actions of the executive or legislature of a foreign State and a case in which it is an action of a court in the foreign State which gives rise to the claim. It is one thing to dispense with the local remedies rule in the first type of case and to agree that a claimant who asserts that it has been the victim of a violation of international law may proceed straight to the international plane without first commencing proceedings in a national court. It is quite another to provide that a foreign investor whose sole ground for complaining of a violation of international law is that it has been the subject of an adverse decision of a national court from which there is an appeal (or against which there are other means of challenge through the courts) may elect to dispense with further national proceedings and go straight to Chapter 11.

49. In the present case, the factors identified in paras. 28-31 of this Opinion strongly suggest that the parties to NAFTA never intended that Article 1121 should be read so as to allow an investor from one member State who, whether as plaintiff or defendant, became embroiled in litigation in another member State to disregard the appeals procedure in that country and go straight to the international plane to complain about the decision of one of the lower courts. Although Loewen expressly disclaims any intention of using the Tribunal as a surrogate court of appeal from the decision of the Mississippi court, (*Loewen Group Memorial*, para. 2), the effect of holding that a challenge under Chapter 11 can be brought against a decision, even an interlocutory decision, of a lower court, notwithstanding that there was an effective right of appeal under national law, would mean that the Chapter 11 procedure could in fact be used as an alternative to the normal appellate procedures in domestic courts.
50. Nothing in the text of Article 1121 requires the Tribunal to interpret it as having such a dramatic effect. Nor is such an interpretation a matter of necessary implication. The local remedies rule is not the prime target of Article 1121 which deals with it only by implication. It is perfectly possible without doing any violence to the text of Article 1121 or tampering with the purpose which underlies it to draw the line between the obligation to appeal in a case where the complaint relates to a decision of a court and the obligation to have recourse to the courts in respect of complaints about the behaviour of the executive or the legislature of one of the parties and to conclude that the parties to NAFTA intended to preserve the former even though they agreed to waive the latter. In my opinion, Article 1121 does exactly that.

**V. A Challenge to the Decision in the Mississippi Supreme Court or by Proceedings in the United States Federal Courts cannot be dismissed as “obviously futile” or “manifestly ineffective”**

51. It is common ground that, whether as an aspect of the local remedies rule or of a principle that there is no denial of justice until the appeals process has been exhausted, international law does not require a litigant to have recourse to an appeal or other legal proceedings if such recourse in fact offers no prospect of an effective remedy (see, e.g., the *Finnish Ships* case, 3 UNRIAA 1497 (1937) ). There is, however, a presumption that remedies which are provided by national courts are assumed to be effective. It is not enough that a litigant’s legal advisers consider that recourse to a particular remedy is more likely than not to fail. Only if it is clear that recourse to a particular court will obviously be futile is the foreign national no longer obliged to take such action. Moreover, an international tribunal is slow to brand the remedies of local courts as ineffective. As Amerasinghe puts it, in the context of the local remedies rule -

The *Finnish Ships* arbitration made it clear that the test is obvious futility or manifest ineffectiveness, not the absence of reasonable prospect of success or the improbability of success, which are both less strict tests. (*Local Remedies in International Law*, (1990), p. 195)

In his Separate Opinion in the *Norwegian Loans* case, Sir Hersch Lauterpacht insisted that local remedies must be exhausted “however contingent and theoretical these remedies may be” and concluded that, in that case, despite the considerable doubts about the prospects of an effective challenge in the Norwegian courts “the legal position on the subject cannot be regarded as so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy before Norwegian courts” (ICJ Reports, 1957, p. 9, at p. 39).

52. The present case is unusual in that the claimant, while admitting that it has failed to pursue any of the local remedies which might have been available to it for the purpose of challenging the decision of the Hinds County Court, has openly acknowledged that

its legal advisers told it that it had an excellent chance of success on appeal. Indeed, it advances that advice as a major plank in its argument that the decision of the Hinds County Court involved a denial of justice.

53. There is no doubt that an appeal to the Mississippi Supreme Court lay from a decision of the Hinds County Court and that on appeal Loewen could have raised the matters of which it now complains. If Loewen is right in what it says in its pleadings in the present proceedings, it seems that it would have had a good arguable case on appeal with a reasonable prospect of success. It is certainly not the case that an appeal would have been "obviously futile" or "manifestly ineffective".
  
54. Loewen would, of course, have been faced with the problem that it had failed to raise at the appropriate point in the trial many of the matters of which it now complains. The fact that Loewen's appeal might have been dismissed on this ground does not, however, mean that it was excused from the requirement to appeal (whether under the substantive law of denial of justice or under the local remedies rule) or that an appeal would have been obviously futile. It is well established that a remedy is not ineffective because the claimant, by failing to take some necessary step at trial, has harmed the prospects of a successful appeal, however serious the damage. In the *Ambatielos* case (23 ILR 308), the arbitral tribunal held that the failure of the claimant to call a crucial witness at trial meant that there had been a failure to exhaust local remedies (pp. 334-40). The fact that the decision not to call the witness may have been "dictated by reasons of expediency - quite understandable in themselves" was immaterial; the claimant had taken the decision at his own risk (p. 337).
  
55. The only reason why Loewen contends that the appeal was not in fact open to it is because Mississippi law required Loewen to post a bond in the sum of US\$625 million. That requirement was not a condition of pursuing an appeal; it was not the equivalent of the security for costs which some jurisdictions impose as a condition of lodging or

pursuing an appeal. The bond was required to prevent execution of judgment pending an appeal, not to permit the appeal itself. Nor was the bond requirement discriminatory – I understand that under Mississippi law the bond requirement applies to all appellants, irrespective of whether they are resident in (or otherwise have a substantial presence in) the State of Mississippi or the United States.

56. Loewen maintains that it could not afford to post the bond and was therefore compelled to settle out of court for a sum variously estimated at between \$85 million (taking account of deferred payment and tax relief) and \$175 million (Loewen's upper figure which disregards these considerations). Even assuming that Loewen had no choice in the matter, on a strict reading of the authorities the fact that a litigant cannot afford the cost of an appeal does not mean that that remedy is to be treated as ineffective in international law (see Amerasinghe, *Local Remedies in International Law* (1990), p. 212, citing the *David Adams* case, 6 UNRIAA 85). Moreover, the evidence shows that Loewen had suggested to the capital markets that it could afford to post the full bond (*Appendix to United States Memorial*, Tab 76). If that was indeed the case, then either Loewen could indeed have afforded to post the bond, in which case its argument that the appeal was not open to it is based on assertions of fact which are not true, or Loewen misinformed the capital markets and thus, indirectly, the Mississippi Supreme Court, in which case the decision of the latter not to reduce the bond required was neither surprising nor arbitrary and Loewen has no ground for complaint about that decision.
57. The United States argues, however, that there were appellate and other remedies which were open to Loewen as a matter of law even if it could not have afforded to post the full bond. Loewen could have filed for protection under Chapter 11 of the United States Bankruptcy Code and then pursued an appeal to the Mississippi court without posting bond and without the risk of seizure of its assets. Alternatively, Loewen could have challenged the bond requirement in the United States federal courts.

58. Sir Robert Jennings (Second Opinion, paragraphs 44-45) dismisses the first of these arguments on the grounds that (a) the decision to settle the case rather than apply for bankruptcy was a business decision for which Loewen could not be criticised and (b) the advice that it could have relied on Chapter 11 without serious harm was not available to it at the time and is an example of the United States encouraging Loewen to be wise after the event. I do not agree with either of these propositions.
59. It is, of course, the case that in deciding to settle rather than applying for bankruptcy Loewen took a business decision. The decision whether to settle a case rather than to pursue an appeal is always a business decision, based on a wide range of factors including advice as to the prospect of success, the effect of prolonged litigation on the share price and credit of a company, other corporate plans etc. A company is entitled to take whichever decision it pleases in these matters but if, in the exercise of its business judgement, it elects not to pursue an appeal, it cannot then be heard to say that no appeal was available to it. Whether in the context of the local remedies rule or the definition of what constitutes a denial of justice, it has never been suggested (nor, in my view can it be) that a remedy is available only if it makes business sense (taking account of all of the party's other business interests) to pursue it. To hold otherwise would mean that a party who chose not to appeal because he wished to use all available funds for other purposes could argue that an appeal was not a remedy available to him.
60. The *Finnish Ships* case (3 UNRIAA 1497 (1938)), to which Sir Robert refers, does not affect this conclusion. Local remedies were there held to have been exhausted notwithstanding that the shipowners had not appealed, because the finding of fact which had led to their defeat at first instance could not be challenged on appeal. By contrast, in *Ambatielos* (23 ILR 308) the fact that the plaintiff had failed to call a crucial witness at trial and had then been unable to call his evidence on appeal was held to amount to a failure to exhaust local remedies.

61. As for the contention that the advice about Chapter 11 bankruptcy was not available to Loewen at the time, it is simply untrue. The evidence about the efficacy and availability of the bankruptcy route put forward by the United States includes the advice which was given to Loewen at the time that Loewen decided to settle the case (see *Memorial of the United States of America on Matters of Competence and Jurisdiction*, Tabs C and D). It seems clear that the possibility of recourse to Chapter 11 of the Bankruptcy Code was considered and that advice to take that course was put by some of Loewen's advisers.
  
62. However, even if it had been the case that such advice had not actually been given, the fact that a litigant was poorly advised does not serve to relieve him of the consequences in international law any more than it does in domestic law.
  
63. With regard to the possibility of recourse to the federal United States courts, I am not in a position to assess whether, as a matter of United States law, the advice of one former Solicitor-General of the United States is to be preferred to that of another. Where one United States lawyer of that distinction testifies, however, that a remedy is available in the US Supreme Court and that there was a reasonable prospect of success, I find it impossible to say that there was no reasonable possibility that a remedy lay in that direction. In the words of Sir Hersch Lauterpacht in the *Norwegian Loans* case (paragraph 51, above), "the legal position on the subject cannot be regarded as so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy".

**VI. In any event, the proceedings in the Hinds County Circuit Court did not involve a Denial of Justice within the meaning of International Law**

64. International law understandably applies a very strict test of what constitutes a denial of justice. The international tribunal is not a court of appeal from the national court (as Loewen accepts), nor is its task to review the findings of the national court. In the absence of clear evidence of bad faith on the part of the relevant court (and I have seen no such evidence here), the claimant must demonstrate either that it was the victim of discrimination on account of its nationality or that the administration of justice was scandalously irregular. Defects in procedure or a judgment which is open to criticism on the basis of either rulings of law or findings of fact are not enough.
65. Moreover, as stated above, in applying this test international law allows a broad margin of discretion to each State in the way it organizes its legal system. The maxim of the arbitral tribunal in *SD Myers v. Canada* ( para. 262), that international law extends a high measure of deference to the right of domestic authorities to regulate matters within their borders, applies with particular force to the regulation of judicial procedures, which are of central importance where it is the actions of the national courts which give rise to the complaint. It is self-evident that the evaluation of a claim of denial of justice must take account of the legal procedures of the courts in question.
66. In the case of the Mississippi courts, these procedures are adversarial in nature. The burden is, therefore, on each party to the litigation to call the evidence which it needs to establish its case and to object to arguments and lines of questioning by the other party which it considers to be improper. Counsel who practise law in such a system are accustomed to the need to raise objections in a timely fashion. The extent to which the judge is entitled to intervene – or is accustomed to do so – in the absence of an objection is something which varies from one jurisdiction to another even within the

common law world. That is a matter in respect of which the State has a particularly broad discretion – international law does not prescribe any particular relationship between judge, jury (if any) and the parties in this respect.

67. In an adversarial system, the failure of a party to object to something when it has an opportunity to do so and when the local law requires a timely objection has two implications for any future claim under international law that it has been the victim of a denial of justice. First, the absence of objection is important at the factual level. If a party fails to object, for example, to the tendering of particular evidence or a particular line of questioning of a witness, that strongly suggests that that evidence or questioning was not objectionable and was not considered to be so at the time. (See, eg, the decision of the European Court of Human Rights in *Gregory v. United Kingdom* (1998) 25 European Human Rights Reports 577. In that case, where a juror in a criminal case had informed the judge that the jury was showing signs of racial bias, the European Court attached considerable significance to the fact that defence counsel had not urged a particular course of conduct (see paragraph 45 of the Judgment)).
68. Secondly, if the party fails to exercise its right to object to such conduct, the fact that the court did not intervene of its own volition to stop or to prevent such conduct cannot amount to a denial of justice.<sup>13</sup> In an adversarial system, a party which fails to make use of the procedures available to it at trial cannot complain that the result of that failure amounts to a denial of justice. The principle which the arbitral tribunal in *Ambatielos* (above, paragraph 54) stated in the context of exhaustion of local remedies is, in my view, also applicable here - tactical decisions by a party's counsel, however understandable in themselves, are taken at that party's own risk.

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<sup>13</sup> There may be a qualification to this general principle in a case where a foreign national is denied adequate legal representation but that is manifestly not the case here.

69. In the present case, Loewen's pleadings cite numerous passages in the transcript as examples of national and racial bias. In most of these passages the transcript reveals no objection by Loewen's counsel to the conduct which Loewen now maintains manifests a denial of justice. For example, at pages 1082-1110 of the Transcript, where Mike Espy, a former Congressman and Secretary of Agriculture, is giving evidence, there is no objection by Loewen's counsel to the questions which Loewen now cites in its Memorial (*Loewen Group Memorial*, pp. 23-25). What Loewen did object to was the use of leading questions, to which its counsel took exception; that objection was allowed by the judge. Indeed, some of the evidence to which Loewen now takes exception was elicited by questions from Loewen's own counsel. Similarly, when one examines the transcript of the punitive damages hearing, it appears that counsel for Loewen did not object to the proceedings being held in a single day, did not cross-examine Dr Parker, one of the expert witnesses for O'Keefe, despite his valuation of the company at between four and five times what Loewen told the court was its net worth, and did not object to the rhetoric of Mr Gary in his final address to the jury (see, especially Transcript, pp. 5769-70 and 5799-5800).
70. Having reviewed the evidence on which Loewen relies, I do not believe that the allegation of discrimination is made out. The evidence of jury attitudes does not suggest any bad faith or prejudice against Canadians. The jury foreman was himself a Canadian by birth and former Canadian serviceman, something which was known to everyone at the trial. The fact of his election by the other jurors is scarcely consistent with the existence of a bias against Canadians amongst the jury. The absence of objection by Loewen's counsel at the time to most of what is now said to demonstrate anti-Canadian bias and the fact that Loewen had thought it worthwhile to try to gain advantage at the trial by itself introducing evidence of anti-Canadian prejudice on the part of O'Keefe also strongly suggest that there was no instinct towards discrimination, nor was there perceived to be at the time.

71. Nor do I think the trial process otherwise fell below the standards required by international law. The fact that the case was tried by jury, whereas in most States today such cases are heard by judge alone, in no way offends international law but falls well within the discretion of a State to choose the form and procedure of trial. While Loewen complains of the fact that judges in the Mississippi courts are elected, that phenomenon is not confined to Mississippi but is a feature of the selection of State court judges in many of the United States of America (including West Virginia). There is no suggestion anywhere in the case law on denial of justice or the texts on the subject that international law requires any particular method of appointment of judges or that an elected judiciary is incapable of demonstrating the degree of independence which is required (any more than judges appointed by the executive are incapable of being sufficiently independent).
72. I have read the affidavits of Mr Neely on this subject. The picture of justice in the United States which he paints suggests that the "plundering" of foreign corporations is a major feature of litigation in state courts in the United States. I am not qualified to debate the issues of United States and Mississippi law which he raises but in so far as he is suggesting that there is a widespread practice of state courts violating international law in their treatment of foreign corporations (and that appears to be the theme of his testimony), I disagree. If that were indeed the case, I would expect to find a substantial body of protests from foreign governments; so far as I can tell, that is absent, despite the fact that foreign governments have been extremely critical of other aspects of the judicial process in the United States, in particular, the extraterritorial application of certain United States laws.
73. It does not seem to be suggested that the verdict of the jury (as opposed to the size of the award of damages, which I consider below) was one which no reasonable jury could have reached on the evidence before it.

74. It is my opinion, therefore, that even if the judgment of a lower court is capable by itself of constituting a denial of justice (which, for the reasons given in Part III of this Opinion I do not accept), the judgment in the present case was not flawed in that way.

**VII. An Award of Punitive Damages does not, in itself, violate International Law**

75. Although punitive damages play a more significant part and awards are generally higher in the United States than in other jurisdictions, they are by no means a uniquely American phenomenon. In the United Kingdom, for example, the courts have held that exemplary damages may be awarded in certain circumstances, including where the defendant's conduct was calculated to make him a profit which might well exceed the compensation payable to the plaintiff (see, e.g., the decisions of the House of Lords in *Rookes v. Barnard* [1964] AC 1129 and *Broome v. Cassell* [1972] AC 1027).

76. The fact that punitive damages involve the infliction of a punishment on one litigant to the benefit of another does not make them expropriatory. The compulsory transfer of property from one private party to another is capable of being an act in the public interest (see the decision of the European Court of Human Rights in *James v. United Kingdom* (1986) 8 European Human Rights Reports 123) provided that it serves a legitimate public purpose. In the case of punitive damages awards for anti-competitive practices and fraud, this has been part of United States law for over a century and is intended, as I understand it, to serve the purpose of enlisting private citizens in the enforcement of the law and deterring future violations.

77. It is true that awards of punitive damages in the courts of one State are not always enforceable in the courts of another State. That is not, however, because such awards are contrary to a rule of public international law but because of the principle of private international law that courts of one State do not normally assist in the enforcement of

punitive decisions of any kind (Dicey and Morris, *Conflict of Laws* (13<sup>th</sup> ed., 2000), pp. 89-93, 476-7 and 1558; *Oppenheim's International Law* (9<sup>th</sup> ed., 1992, vol. I, pp. 488-498). Even then, the position is not entirely clear and Lord Denning MR in *SA Consortium General Textiles v. Sun and Sand Agencies Ltd.* [1978] QB 279 at 299-300 held that an award of punitive damages in a foreign court could be enforced in England ("I see nothing contrary to English public policy in enforcing a claim for exemplary damages, which is still considered to be in accord with the public policy in the United States and many of the great countries of the Commonwealth" (p. 300)).

78. It is nowhere suggested, however, that the act of awarding punitive damages is a violation of public international law. If there was an international law prohibition on awarding punitive damages, it is extraordinary that that prohibition is not even mentioned in the lengthy disputes between the United States of America and Canada and the European Community States over antitrust. During those disputes, the United Kingdom, for example, has repeatedly contended that the United States violates international law by awarding punitive damages in respect of conduct outside its jurisdiction but it is the extraterritorial jurisdiction to which the United Kingdom objects; it has never suggested that the award of punitive damages is itself unlawful.
  
79. Moreover, while punitive damages awards in international tribunals have been rare, that often reflects no more than a limitation in the jurisdiction of the specific tribunal (see, e.g., the opinion of Umpire Parker in the *Lusitania* cases, Whiteman, *Damages in International Law*, (1937), vol. I, p. 715 at 719). There is a strong body of opinion that punitive damages can be awarded in international law, even if it is very rare that they are so awarded (see, e.g., *Oppenheim's International Law* (9<sup>th</sup> ed., 1992), vol. I, p. 533).

## **VIII. The Award of Punitive Damages in the present Case did not Violate International Law**

80. It is against the background of the considerations set out above that I approach the question whether the award in the present case was so large that it is itself a violation of international law. Sir Robert Jennings maintains that the award was so "ludicrously disproportionate" that it speaks for itself and is, in his view, self-evidently a violation of international law. With respect, I disagree with this view on a number of grounds. While the size of the award was certainly large and I am not aware of any other jurisdiction in which so large a punitive award would have been made, those facts do not make the award a violation of international law.
81. First, Sir Robert starts from the premise that the dispute in the Mississippi court was about a relatively small contract dispute, whereas, for the reasons given in Part II of this Opinion, I consider that the case was about a far wider range of issues and involved charges of fraud, economic torts and anti-competitive practices which were much more serious and which the jury found to have been proved.
82. Secondly, Loewen may itself have been to blame for the size of the award, because of the approach which it adopted at the punitive damages hearing. As provided in Mississippi law, the jury's award of punitive damages was based upon the evidence as to the value of the Loewen company. While Loewen maintains that estimates of its net worth by O'Keefe's witnesses were distorted, it presented no clear evidence of its own and did not adequately refute the evidence of the O'Keefe witnesses. At the hearing on punitive damages, Loewen made no attempt to counteract the impression - which it now claims Judge Graves had given the jury - that an award of US \$ 160 million was insufficient. Loewen's counsel told the jury that the evidence he would lead would show that the company's net worth was US \$ 411 million (Transcript, p. 5757) but the

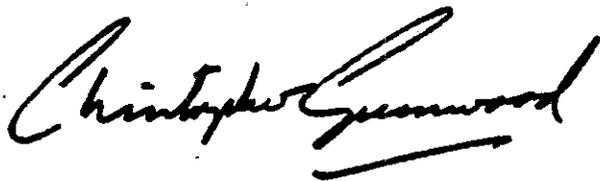
witness whom he called testified that the net worth of the company in the first half of 1995 was between \$ 600 million and \$ 700 million (Transcript, pp. 5772 and 5777). No further witness on this point was called by Loewen. Counsel for Loewen also accepted (Transcript, pp. 5763-4 and 5804) that the market value of the company, based on its share price, was US \$1.7 or 1.8 billion. Counsel for Loewen challenged the evidence of Dr Pettingill that the net worth of the company was US \$ 3.1 billion but then did not cross-examine O'Keefe's second witness, Mr Parker, when he testified that the company's net worth was \$ 3 billion.

83. Finally, if the size of the award was excessive, it could be challenged on appeal and Loewen's own submissions in the present proceedings suggest that, based upon the record of the Mississippi Supreme Court in reducing awards of punitive damages, there was a reasonable prospect that the award would at least be reduced on appeal. In my opinion, an award of punitive damages which can be challenged on appeal cannot be regarded as a violation of international law if there is an effective avenue of appeal open to the defendant.

## **IX Conclusions**

84. In my opinion, the decision of the Hinds County Court did not constitute a denial of justice within the meaning of international law, or otherwise violate international law, if there was available to Loewen under Mississippi law or United States federal law a means of challenging that decision which was not "obviously futile" or "manifestly ineffective". I reach this conclusion as a matter of substantive international law concerning the concept of a denial of justice and not by application of the local remedies rule. Article 1121 of NAFTA does not alter this conclusion as it is purely procedural in character.

85. Alternatively, if the decision of the Hinds County court is capable of constituting a denial of justice, then Loewen was required to exhaust local remedies before commencing NAFTA arbitration. Only if the remedies available in the United States and Mississippi courts were "obviously futile" or "manifestly ineffective" would Loewen have been relieved of that obligation. In my opinion, Article 1121 of NAFTA does not amount to a waiver of the local remedies rule where the claim is based exclusively upon decisions of national courts.
86. Having considered the evidence as to avenues of appeal and other legal recourse open to Loewen, I do not believe that the remedies available to it can be dismissed as "obviously futile" or "manifestly ineffective".
87. In any event, I do not consider that the proceedings in the Hinds County Court amounted to a denial of justice under international law.
88. Finally, it is my opinion that punitive damages are not, in themselves, a violation of international law and that the award of damages in the present case, taking account of all relevant circumstances, does not violate international law.



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26 March 2001

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Specialist in Public International Law.

Counsel before the International Court of Justice in *Libya v. United Kingdom (Aerial Incident at Lockerbie)* ICJ Reps., 1992, p. 3; ICJ Reps. 1998, p. 3 (continuing); *Advisory Opinions on Nuclear Weapons*, ICJ Reps. 1996, pp. 66 and 226; *Case concerning legality of Use of Force (Yugoslavia v. United Kingdom)*, ICJ Reps, 1999 (continuing). Counsel before United Nations Compensation Commission, European Court of Human Rights and other international tribunals.

Counsel before the English courts in *R. v. Bow Street Magistrate, ex parte Pinochet* (No. 1) [2000] 1 AC 147, [1998] 3 WLR 1456 and (No. 3) [2000] 1 AC 147, [1999] 2 WLR 827 (House of Lords); *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573 (House of Lords) and [1999] 1 WLR 188 (Court of Appeal), *Kuwait Airways Corporation v. Iraqi Airways Co.* [1999] CLC 31; [2001] 1 WLR 429 (continuing); *Re P* [1998] 1 Fam Law Reps 1027 (High Court and Court of Appeal), *Lonrho Exports Ltd. v. Export Credits Guarantee Department* [1999] Ch 158 (High Court), *Caglar v. Billingham* [1996] STC (SCD) 150 (Commissioners of Income Tax) and other cases.

Member Arbitration Tribunal of the Permanent Court of Arbitration, *Larsen v. Hawaiian Kingdom*. Member, Panel of Arbitrators, Law of the Sea Convention.

Expert witness on international law in arbitrations in the United Kingdom and proceedings in Canada, New Zealand and the United States.

**Former Positions:** Fellow, Magdalene College, Cambridge 1978-96  
Director of Studies in Law, Magdalene College, 1981-96  
Tutor, Magdalene College, 1989-96  
Dean, Magdalene College, 1981-87  
University Lecturer, University of Cambridge 1981-96  
Various visiting professorships

**Societies and Committees:** Member of the Editorial Committee of the *British Year Book of International Law* and the *Journal of Armed Conflict Law*; Member of the Council, British Branch, International Law Association; Member of the American Society of International Law since 1979, the British Institute of International and Comparative Law, the International Institute of Humanitarian Law, the Society of Public Teachers of Law.

### Publications

#### Books and Pamphlets

*The International Law Reports* (volumes 51-116 and continuing)  
Joint editor with Sir E. Lauterpacht QC since volume 82

*Command and the Laws of Armed Conflict* (1993)  
Pamphlet published by Strategic and Combat Studies Institute  
for the Ministry of Defence

*The Kuwait Crisis, Basic Documents*, vol.I (1991)  
Joint editor.

#### Forthcoming:

*The Modern Law of Armed Conflict* (Oxford University Press)

*Oppenheim's International Law*, vol.II (Longmans)

#### Articles

1. 'State Contracts in International Law' 58 *British Year Book of International Law* (1982) 27-81
2. 'The Relationship of *Ius ad Bellum* and *Ius in Bello*' 9 *Review of International Studies* (1983) 221-234
3. 'The Concept of War in Modern International Law' 36 *International and Comparative Law Quarterly* (1987) 283-306
4. 'International Law and the United States Air Operation against Libya; 89 *West Virginia Law Review* (1987) 933-960

5. 'Nationality and the Free Movement of Persons in Community Law' 7 *Year Book of European Law* (1987) 185-210
6. 'Reprisals and Reciprocity in the Modern Law of Armed Conflict' in M. Meyer (ed.) *Armed Conflict and the New Law* (British Institute of International and Comparative Law, 1989) 227-250
7. 'The Nuclear Weapons Issue in European Courts' in M. Cohen and E. Gouin (eds) *Lawyers and the Nuclear Debate* (University of Ottawa Press, 1988) 152-59
8. 'Self-Defence and the Conduct of International Armed Conflict' in Y. Dinstein (ed) *International Law at a Time of Perplexity* (Kluwer Academic Publishers, 1989) 273-288
9. 'Twilight of the Law of Belligerent Reprisals' 20 *Netherlands Year Book of International Law* (1989) 35-69
10. 'Terrorism and Protocol I' 19 *Israel Year Book of Human Rights* (1989) 187-208
11. 'The Administration of Occupied Territory in International Law' in E. Playfair (ed) *International Law and the Administration of Occupied Territories* (Oxford University Press, 1992) 241-266
12. 'Iraq's Invasion of Kuwait: Some Legal Issues' 47(3) *World Today* (March 1991) 39-43 (also published in German in *Neue Zeitschrift fur Wehrrecht*)
13. 'Military Manuals and the Development of International Humanitarian Law' in M. Bothe and T. Kurzidem (eds.) *National Implementation of International Humanitarian Law* (Nijhoff, Dordrecht, 1990) 193-202
14. 'Decisions of British Courts on Public International Law in 1989' 60 *British Year Book of International Law* (1989) 461-482. [This article is primarily a critique of the International Tin Council litigation in the English courts.]
15. 'The Customary Law Status of the 1977 Additional Protocols' in A. Delissen and G. Tanja (eds) *Humanitarian Law of Armed Conflicts* (Martinus Nijhoff, Dordrecht, 1991), 93-114
16. 'In Defence of the Laws of War' in R.M. Hinde (ed) *The Institution of War* (Longmans, London, 1991) 133-147
17. 'Neutrality at Sea' in I. Dekker and H. Post (eds.), *The Gulf War 1980-88* (Martinus Nijhoff, Dordrecht, 1991) 212-16
18. 'The New World Order or Old? The Invasion of Kuwait and the Rule of Law' 55 *Modern Law Review* (1992) 153-178
19. 'Is There a Right of Humanitarian Intervention?' 49(2) *World Today* (February 1993) 34-40 (also published in German in *Europarchiv*)

20. 'The International Tribunal for the Former Yugoslavia' 69 *International Affairs* (1993) 641-656
21. 'The War Crimes Act 1991' in H. Fox and M. Meyer (eds) *Effecting Compliance* (British Institute for International and Comparative Law, 1993) 215-231
22. 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict' in P. Rowe (ed) *The Gulf War 1990-91 in International and English Law* (Routledge, London, 1993) 63-88 and (notes) 368-375
23. Chapters 1 and 2 in D. Fleck (ed) *Handbuck des Humanitaren Volkerrechts in bewaffneten Konflikten* (1994) 1-55; published in English as D. Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford 1995), pp.1-64
24. 'Considerations of International Law' (with Hugh Mercer) in B. Eichengreen and R. Portes (eds), *Crisis? What Crisis? Orderly Workouts for Sovereign Debtors* (1995), 103-117
25. 'The United Nations as Guarantor of International Peace and Security 1945-95: A United Kingdom View' in C. Tomuschat (ed) *The United Nations at Age Fifty: A Legal Perspective* (1996) 59-76
26. 'The International Court and the Use of Force' in A.V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996) 373-388
27. 'International Humanitarian Law and the Tadic Case' 7 *European Journal of International Law* (1996) 265-283
28. 'Protection of Peacekeepers: The Legal Regime' 7 *Duke Journal of International Law* (1996) 185-207
29. 'The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law' 37 *Int.Rev. of the Red Cross* (1997) 65-75
30. 'State Responsibility and Civil Liability for Environmental Damage caused by Military Operations' in Grunawalt, King and McClain, *Protection of the Environment during Armed Conflict* (1997) pp.397-415 (US Naval War College Studies, vol.69)
31. 'Current Issues in the Law of Armed Conflict', (1997) 1 *Singapore Journal of International and Comparative Law* 441-467
32. 'Jus ad bellum and Jus in bello in the Advisory Opinion on Nuclear Weapons', in Sands and Boisson de Chazournes, *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press in Autumn 1999).

33. 'A Critique of the Protocols' (on the 1977 Additional Protocols to the Geneva Conventions) in Durham and McCormack (ed), *The Changing Face of Conflict and the Efficacy of International Law* (Kluwer, 1999), pp. 3-22.
34. 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia' 2 Year Book of United Nations Law (1998) 97-140.
35. 'International Humanitarian Law and United Nations Military Operations' 1, Year Book of International Humanitarian Law (1998) 3-34.
36. 'The Law of Weaponry at the Start of the New Millenium', in L.C. Green and M. Schmitt (eds), *Into the Millenium: The Law of Armed Conflict* (US Naval War College 1999), pp. 185-232.
37. 'Rights at the Frontier: Protecting the Individual in Time of War', in Rider (ed) *Law at the Centre* (1999); the 50th Anniversary Lectures of the Institute for Advanced Legal Studies.
38. Report on International Humanitarian Law published under commission from the Netherlands Government as part of the Centenary of the First Hague Peace Conference, published in F Kalshoven (ed) *The Centennial of the First International peace Conference* (Kluwer, 2000), pp. 161-259.

#### Case Notes and Shorter Articles

1. 'Conspiracy to do the Impossible' (*DPP v. Nock*) 37 *Cambridge Law Journal* (1978) 208
2. 'The US-France Air Services Arbitration' 38 *Cambridge Law Journal* (1979) 233
3. 'Intention to Steal' (*A-G's refs Nos 1 and 2 of 1979*) 39 *Cambridge Law Journal* (1980) 17
4. 'The Iranian Hostages Case' 39 *Cambridge Law Journal* (1980) 239
5. 'Causation and Credit Card Fraud' (*R. v. Lambie*) 40 *Cambridge Law Journal* (1981) 209
6. 'An Englishman's Castle Revisited' (*McLorie v. Oxford*) 42 *Cambridge Law Journal* (1983) 1
7. 'Free Movement of Workers in EEC Law and English Law' 133 *New Law Journal* (1983) 828 and 933
8. 'Long Term Contracts between States and Foreign Companies' 4 *Business Law Review* (1983) 128

9. 'Contracts with Foreign States: Sovereign Immunity and the Act of State Doctrine' 4 *Business Law Review*(1983) 265
10. 'European Community Law in 1983' *All England Annual Review* 1983 187-194
11. 'Freedom to Provide Services in EEC Law: Two New Cases' 5 *Business Law Review* (1984) 51
12. 'Procedural Problems of Litigation against a Foreign State' 6 *Business Law Review* (1985) 55
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15. 'International Law, Rules of Engagement and Air Warfare' *The Hawk* (Journal of the RAF Staff College) 1985
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19. 'Directives – Time to Retire' (*Marshall v. Southampton Area Health Authority*) 46 *Cambridge Law Journal* (1987) 9
20. 'Public International Law in 1987' *All England Annual Review* 1987 210 221
21. 'European Community Law in 1988' *All England Annual Review*1988 122-134
22. 'Public International Law in 1988' *All England Annual Review* 1988 241-252
23. 'The Royal Navy's Armilla Patrol' (1988) *Proceedings of the American Society of International Law* 158
24. 'European Community Law in 1989' *All England Annual Review* 1989 125-139
25. 'Put Not Your Trust in Princes – The Tin Council Appeals' (*JH Rayner v. DTI*) 49 *Cambridge Law Journal* (1990) 8
26. 'The Tin Council Litigation in the House of Lords' (*JH Rayner v. DTI*) 49 *Cambridge Law Journal* (1990) 8
27. 'European Community Law in 1990' *All England Annual Review* 1990 102-115
28. 'Is Britain at War in the Gulf' 135 *Solicitors' Journal* (1990) 74
29. 'European Community Law in 1991' *All England Annual Review* 1991 103-116

30. 'Effect of Directives in National Law' (*Marleasing* and *Francovich*) 51 *Cambridge Law Journal* (1992) 3
31. 'Recognition of States- Routine Acts' (the 'Cyprus potatoes case' in the CJEC) 54 *Cambridge Law Journal* (1995) 4 (with A.V. Lowe)

### **Miscellaneous**

Articles in the *Times*, *Independent* and other national newspapers and in *Strategic Comments* and *Strategic Survey* (published by the International Institute for Strategic Studies)

Expert witness in Channel 4 programme: 'Waldheim: A Case to Answer?' (1988)

Approximately 200 television and radio interviews on international law for the BBC World Service, BBC Radio, BBC Television, CNN, ITN, Channel 4 and other companies. Approximately 60 book reviews in various journals.

