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AND ARBITRATION:

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Bilateral Treaties and Customary
International Law

*Edited by
Todd Weiler*

Chapter 4:
Runaway Train: The 'Continuous Nationality' Rule
from the *Panavezys-Saldutiskis Railway* case to
Loewen

by Maurice Mendelson

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4. The Runaway Train: the 'Continuous Nationality Rule' From the *Panevezys-saldutiskis Railway* case to *Loewen*.

Maurice Mendelson Q.C.¹

Introduction

The arbitral award of 26 June 2003 in the *Loewen* case² is not a "leading case" in the sense of an enunciation of principles that either need to be, or in some respects should be, followed in subsequent cases. It does not need to be followed, because there is no doctrine of *stare decisis* in relation to the decisions of *ad hoc* international arbitral tribunals.³ Nor, in the opinion of many expert commentators (both professionals and academics), does it deserve to be followed. Consequently, it is perhaps more of a *cause célèbre* (or even *cause notoire*) than a "leading case". There are indeed several grounds upon which the award may be criticised, but the topic upon which I wish to concentrate is the application by the Tribunal of the principle of "continuous nationality" – the principle that the claim must have been continuously owned by a person of the same nationality from the date of the injury to (according to the Tribunal's interpretation) the date of judgment or award. I shall examine the history and scope of the principle and whether it was correctly applied in *Loewen*.⁴ But *Loewen* and the NAFTA are not the only, or even the main, *foci* of this discussion, which is about continuous nationality in relation to investment protection treaties more generally. For the purposes of this paper, it will be useful to bear in mind a possible distinction between diplomatic protection, on the one hand, and the making of claims by

¹ I wish to thank Ms. Tara Helfman, M.Phil. (Cantab.), M.A. (UCL) and currently JD student, Yale Law School, for research assistance.

² ICSID Additional Facility, Case No. ARB(AF)98/3; 42 ILM (2003), 811.

³ Some would say, fortunately, in the light of, e.g. the sequence of arbitral awards in the *Lauder* cases in 2001). See *Ronald S. Lauder (USA) v. Czech Republic*, Final Award of 3 Sept. 2001; and *CME Czech Republic BV (Netherlands) v. Czech Republic*, Partial Award of 13 Sept. 2001.

⁴ As of the date of writing, the almost nothing has been published on this aspect of the decision. fTwo exceptions are a short article by Paulsson, 'Continuous Nationality in *Loewen*', 20 *Arbitration International* (2004), 213, and a very brief discussion in Gaillard, 'Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI): Chronique des sentences arbitrales', (2004) *JDI* 213 at 230-33.

investors themselves under various IPTs on the other. Much of the existing law and doctrine emanates from the former area – diplomatic protection – but it is for consideration how far it should apply where we are not dealing with diplomatic protection.

Although it is not the subject of this essay, I should mention at the outset that what “really” is the nationality of the claimant can sometimes be problematic. In the first place, in certain circumstances the link can be held not to be a “genuine” one.⁵

Complications can also arise if the individual is a dual national, especially if one of the nationalities is that of the respondent State. Matters can become even more convoluted where the issue concerns the nationality, not of an individual, but of a corporation. Although, in the great majority of cases, a corporation will both be established under the laws of a particular country and have its place of business and its centre of operations there, there can be variations. For example, a company can be established under the laws of State A, have its main centre of control in country B, and do business mainly in country C. What is its nationality? Again, there could be a network of affiliated or associated companies, so that, for example, the company which does business in country C is locally incorporated, but a wholly-owned subsidiary of a company in country B, which is in turn an affiliate of a holding company in country A. In some circumstances it may be possible to lift the corporate veil by virtue of a treaty provision⁶ or rule of customary law; in others not. A related issue is the question whether shareholders in an injured company – or their national State – can bring claims, or only the company itself or its national State. The decision of the ICC in the *Barcelona Traction Company* case (*Second Phase*)⁷ answered that question in the negative, but accepted that there were exceptions. Where the continuous nationality rule applies, these are factors that can complicate matters considerably; but limited space does not permit discussion of these complications here.

⁵ The leading case on this subject is the *Nottebohm* case (*2nd Phase*), ICJ Reports 1955, p. 4.

⁶ See e.g. the second part of Article 25(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘the ICSID Convention’). This brings within the definition of ‘national of another Contracting State’, and hence within the jurisdiction of the Centre for the Settlement of Investment Disputes (ICSID) ‘any juridical person which had the nationality of the Contracting State party to the dispute ... and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention’.

⁷ ICJ Reports 1970, p. 3.

A. Continuous nationality and diplomatic protection

1. The *Panevezys-Saldutiskis Railway* case and some theoretical considerations.

It goes without saying that States have the right to bring claims (whether through the diplomatic channel or before whatever tribunal may have jurisdiction) in respect of illegal harm done directly to them. There are a number of ways in which this can materialise. There can be direct physical harm to the territory of the State or the people and property situated there – for instance, by an invasion. It can also arise if a wrong is done abroad to the property of the State (e.g. to a warship), to its agents (e.g. its diplomats) or its instrumentalities (e.g. the seizure of the assets in a foreign country of the claimant State's central bank). The harm need not be physical – breach of a treaty obligation will usually be a sufficient basis for an international claim. But what if the harm is not done to the State, its agents or instrumentalities, or its property? What if it is done to the person or property of a private person (or corporation) in one country who "merely" happens to be a *national* of another State? There is no direct harm here.

The classic answer was given in the Judgment of the PCIJ in the *Mavrommatis Palestine Concessions* case (*Jurisdiction*), where (drawing on an idea previously expressed by Vattel) it said:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.⁸

⁸ PCIJ Ser. A, No. 2 (1924), p. 12.

This formula was repeated, almost word-for-word, some fifteen years later in the *Panevezys-Saldutiskis Railway* case⁹ (which I shall shortly examine more closely), and cited with approval by the ICJ in the *Nottebohm* case (2nd Phase) in 1955.¹⁰

Commenting on the Permanent Court's formulation, Brierly observed that:

There is a certain artificiality in this way of looking at the question. No doubt a state has in general an interest in seeing that its nationals are fairly treated in a foreign country, but it is an exaggeration to say that whenever a national is injured in a foreign state, his state as a whole is necessarily injured too. In practice, as we shall see, the theory is not consistently adhered to; for instance, the logic of the theory would require that damages should be measured by reference to the injury suffered by the state, which is obviously not the same as that suffered by the individual, but in fact the law allows them to be assessed on the loss to the individual, as though it were the injury to him which was the cause of action.¹¹

The point about inconsistency is well-taken and often repeated. But we must be careful not to attribute to the Court ideas that it did not actually express. For the rationale given by the Court was not that material harm to a State's national is actually (and only) material harm to the State itself. The implication of such an approach could, if taken to extremes, mean that citizens and their possessions are simply part of the resources of the State, damage to which give rise to an international claim. International law has rarely, if ever, been so crudely materialist or statist,¹² and it is important to bear this in mind when we consider the authority for, and value of, the continuous nationality rule. What the Court actually said was that a State has a right to ensure that its nationals do not suffer an international wrong that is not redressed through the normal channels. To spell this out a little more fully, the idea seems to be as follows. There is a body of substantive international law that prohibits certain kinds of

⁹ PCIJ Ser. A/B, No. 76 (1939), pp. 16-17.

¹⁰ ICJ Reports 1955, p.4 at p. 24.

¹¹ *The Law of Nations* (5th ed., 1954), 218. The identical language was retained by Waldock in the 6th edition of 1963, pp. 276-77.

¹² Even if there were some tendencies in that direction, particularly in the late nineteenth century and the first half of the twentieth.

harm being done by States to foreigners (at any rate if not redressed by local remedies).¹³ States have a direct, but not necessarily material, interest in ensuring that these rules are complied with – at least so far as it is their nationals who are involved; and if they are not complied with, they have an international claim.¹⁴

The case which is usually cited as the leading authority on the continuous nationality rule is *Panevezys-Saldutiskis Railway*. The facts were somewhat complicated, but for present purposes can be summarised as follows. A company founded in Tsarist Russia constructed and operated a railway line, a branch of which, from Panevezys to Saldutiskis, crossed territory which, following World War I and the upheavals in Russia and the Baltic States, became Lithuanian. A company founded in Estonia in 1923 and purporting to be the successor to the Russian company, claimed compensation for the part of the railway that was in Lithuania, whose Government had seized it. The Estonian Government espoused this claim, and brought it before the PCIJ relying on *Optional Clause* declarations made by the two States. Lithuania raised two preliminary objections. One was based on the principle of the nationality of claims, and in particular on the fact that the Estonian company did not exist at the time of the taking. The other was based on the fact that local remedies had not been exhausted. Initially, in 1938, the Court joined these two objections to the merits;¹⁵ in 1939, however, it gave a further judgment confined to the objections themselves.¹⁶ It upheld the second Lithuanian objection, that local remedies had not been exhausted; and so the Estonian claim "[could] not be entertained".¹⁷ Applying principles of judicial economy, it was not necessary for the Court to deal with the other objection: the success of one was all that was needed to terminate proceedings, and they were in fact terminated. But although in the end the Court decided that the second objection – the nationality point – could not be decided without passing on the merits¹⁸ – a stage that now could never be reached

¹³ To avoid undue repetition, for the purposes of this essay I shall take for granted the local remedies rule – unless the context otherwise requires.

¹⁴ Leigh, 'Nationality and Diplomatic Protection', 20 *ICLQ* (1975), 453, 457-58, drawing on examples from van Panhuys, discusses some interesting questions about whether and in what circumstances more than one State might have an interest in the rules of State responsibility for injury to aliens being complied with.

¹⁵ PCIJ Ser. A/B, No. 75, pp. 53-57.

¹⁶ *Ibid.*, No. 76, p. 4.

¹⁷ *Ibid.*, pp. 18-22.

¹⁸ The decision on this point caused considerable dissent: the Joint Separate Opinion of Judges de Visscher and Rostroworski at pp. 24-29, with whom Judge *ad hoc* Römer's concurred (see p. 23); and the Dissenting Opinions of Judges van Eysinga (pp. 30-35) and Erich (at p. 50).

– it did make some animadversions on the matter, stating in particular that it was a “rule of international law that a claim must be national not only at the time of its presentation but also at the time of the injury”.¹⁹ This is not the place for a disquisition on the character of preliminary objections or the procedures for dealing with them; but before quoting what the Court said, it may be useful to note that the *dictum* was doubly *obiter*. First, it was not necessary for the disposal of the case: the decision on non-exhaustion of local remedies was sufficient for that purpose. Secondly, if the Court considered that the objection of discontinuity of nationality did not possess a purely preliminary character, it did not need to deal with it at the preliminary objections stage.

But be that as it may, the Court was clear in its view. It said:²⁰

In the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.

The Estonian Agent both in the written pleadings and in the oral arguments has endeavoured to discredit this rule of international law, if not to deny its existence. He cited a certain number of precedents, but when these

¹⁹ *Ibid.*, pp. 16-18.

²⁰ At pp. 16-17. The majority was 10-4. Judge van Eysinga (*loc. cit.*) doubted that there was a ‘hard and fast rule’ of continuous nationality.

precedents are examined it will be seen that they are cases where the governments concerned had agreed to waive the strict application of the rule, cases where the two governments had agreed to establish an international tribunal with jurisdiction to adjudicate on claims even if this condition as to nationality was not fulfilled. In the present case no grounds exist for holding that the Parties intended to exclude the application of the rule. The Lithuanian Agent is therefore right in maintaining that Estonia must prove that at the time when the injury occurred which is alleged to involve the international responsibility of Lithuania the company suffering the injury possessed Estonian nationality.

The Judges appeared to take it for granted that the individual concerned must possess the nationality of the claimant State at the time that the claim was brought. What it focuses on, and the sole area of contention in the case, is the additional requirement that the person concerned should also have possessed that nationality at the time of the injury.²¹

Let us pause here and consider some theoretical aspects of the topic. In doing so, it will be useful to distinguish two questions which are not always sharply differentiated. The first is whether the State whose citizen, the victim,²² was entitled to continue pursuing a claim at the time of the injury, even if the victim had ceased to be its national. The other is whether a State is entitled to pursue a claim even though the person concerned was not its national at the time of the injury but only acquired its nationality subsequently (a "late national").

So far as the rule that the original State of nationality is not entitled to continue with the claim once the link of nationality has been severed is concerned, Sinclair (like many others) is right to point out that there is a certain lack of logic involved here. If the original injury is regarded as

²¹ Although O'Connell, *International Law* (2nd ed., 2 vols. 1970), 1035, considered, with some justification, that 'The Court appears to have confused a discretionary practice with a substantive rule of law', and Verzijl, *VI International Law in Historical Perspective* (1973), 723 doubted whether the practice of making espousal depend on continuous nationality could be called a generally recognized rule of customary international law, the prestige of the PCIJ meant that it came to be accepted that there was a *rule* of continuous nationality in the context of diplomatic protection. What the decision does not establish, however, is that nationality has to be continued beyond the making of the claim.

²² For the purposes of this paper, 'victim' includes someone who alleges that he was a victim of an unlawful act.

having been caused to the State itself, as both the PCIJ and ICJ have said, why should it matter what changes in the individual victim's nationality subsequently occur?²³ A possible (although maybe only partial) answer might be as follows:²⁴ the theory that harm to a citizen is harm to the interests of the State, while true, is also a fiction designed to explain, in statist terms, a rule which in fact owes much to its natural law and *ius gentium* origins. International law has long required a minimum standard to be observed in relation to foreigners, *at least partly for their own sake and in their interest*. However, these individuals could not be given their own standing to vindicate that interest on the international plane, for international law was seen at the relevant time as a law between States.²⁵ The obvious vindicator of these rights was therefore the State of nationality, the more so since its own interests were also indirectly affected; hence the invention of the fiction that the State is (simply) asserting its own rights. The key is the concept that nationality imposes a two-way obligation: allegiance on the part of the subject, and a duty of protection (although not legally enforceable) on the part of his or her sovereign. The fiction is not taken so literally however, that when the bond of allegiance is broken, the original State keeps its right to make a claim (even though it did have a more remote interest of its own).

This approach, if correct, also explains why the new State of nationality does not entitle one to bring a claim for a "late national" (absent the appropriate treaty language). Although it does have a general interest in protecting all of its nationals, it cannot be plausibly argued that the State was harmed when the original injury occurred. Furthermore, under this theory, the State would have had no duty, nor interest, in protecting someone who was not its citizen at the time.

In short, the continuous nationality rule as enunciated by the PCIJ is a function of an attempt to reconcile two somewhat contradictory strands in international law. The one, based on its natural law and *ius naturale* origins, focuses on the interests of individuals harmed by the oppressive conduct of foreign States in whose territory they reside or possess interests or which they visit. The other is State-centred and focuses on States'

²³ 'Nationality of Claims: British Practice', 27 *British Year Book of International Law* (1950), 125, 126.

²⁴ Although I do not see it as my role to defend the continuous nationality rule, certainly in all of its ramifications or perceived ramifications: see below.

²⁵ When these rules evolved, there were no human rights treaties or investment protection treaties giving individuals their own right to institute international proceedings: States were the only subjects of international law.

interests. The buckle which holds them together is allegiance, and this is what has led to the continuous nationality rule.

It is important to appreciate that the effect of the rule is to whittle down considerably the opportunities for protection; for if there has been a change of nationality, for whatever reason, the claim cannot be espoused either by the original State or by the new one. I shall come to the inconveniences and injustices to which that can give rise in due course, but this may be a convenient point to mention a perceived *advantage* of the rule, not mentioned by the Permanent Court. The advantage is the avoidance of a sort of "nationality-shopping" (by analogy with "forum-shopping") – whereby the individual (or company) deliberately acquires the nationality of a State that is likely, for one reason or another, to have powerful leverage in any negotiations for redress. If the victim did nationality-shop, the second requirement of the continuous nationality rule would of course be satisfied: it would, *ex hypothesi*, have the nationality of the claimant State at the time of the claim. But what the victim could not (usually) do is to choose its nationality *at the time of the breach*; rendering nationality-shopping pointless. However, this is not a sufficiently strong justification for a continuous nationality rule, because practical considerations make the risk of nationality-shopping by individuals remote.²⁶ And in any case, it is irrelevant to cases where the change of nationality has been involuntary, as in cases of inheritance or State succession.

Because the issue in the *Panevezys-Saldutiskis Railway* case concerned the first limb of the continuous nationality rule – the moment when the injury is suffered – it understandably did not pay detailed attention to the second or any other possible limbs. We have already seen, though, that the Court's *dictum* provides the basis, albeit *obiter*, for saying that – absent different treaty language – nationality must be continuous up to the point of making a diplomatic claim. So far as concerns the new State of nationality, this is probably the right solution, at least on the level of abstract principle (once the fiction is accepted that it is the State that has suffered the injury). The reason is that if, as theory and the Court's pronouncement indicate, injury to an alien constitutes a wrong done to his State, then the new State of nationality, B, will not have suffered any

²⁶The position may be slightly different where companies are concerned: for the adoption of a corporate *persona* or *personae* can mean that a company - or even the individual who ultimately controls a company or group of companies - can occasionally pre-position itself or himself to have the most favourable tie of nationality, or even a variety of ties giving him or it multiple choices. Cf. the *Lauder* cases, above, note 3

injury. In other words, it will not have a cause of action.²⁷ *A fortiori* if it is only at some later stage in the proceedings that the new nationality was acquired.

So far as concerns the State of *original* nationality, however, it is not so immediately obvious why a change of nationality prior to a claim being brought should make a difference. It could be argued that if State A suffered a wrong at the time of the injury, it should be entitled to sue for it: the injury once done, a right has vested, and that is all that is necessary for a claim to be brought. There is something to be said for this approach, which seems more consistent with the treatment of the continuity of claims in law generally.²⁸ But because, as already indicated, the law of diplomatic protection is not purely about the rights of the State, but is justified by the concept of allegiance, a rupture of that bond has been held to disentitle the original State from pursuing the claim. On a more pragmatic level, as Sinclair rightly notes, "plaintiff States are loath to espouse the claims of those who were not its nationals at the time of injury, and defendant States are equally loath to grant compensation to those who are no longer the nationals of the State with which they entered into an arbitration agreement".²⁹ Furthermore, in the case of lump-sum settlements, the amount available may be insufficient to meet fully even the claims of those who do satisfy the continuous nationality rule, so the temptation is strong to refuse to espouse claims of late nationals or current non-nationals who would dilute the compensation even further.

There is a further theoretical argument in favour of requiring continuity of nationality up to the point of bringing the claim. For if – as will usually be the case – local remedies have to be exhausted, the right of the injured State to bring a claim arguably does not vest until that condition has been met. If, before that vesting occurs, the individual has changed his nationality, it might be argued (albeit somewhat artificially) that no injury has been done to the original State of nationality, because it has not yet acquired a right to pursue a claim.

²⁷ On this topic see Brownlie, 'Causes of Action in the Law of Nations', 50 *BYIL* (1979), 13.

²⁸ In municipal law, changes in the characteristics, or even identity, of a claimant in litigation do not usually result in the loss of the claim. This is largely the position in international law, too, outside the area of diplomatic protection. It has to be conceded, though, that there are relatively fewer instances of change of identity in international law, because States are longer-lived than individuals; and the doctrine of State succession has concentrated much more on the transmission of obligations than of rights.

²⁹ *Op. cit.*, at 130.

It should, however, be noted that this argument – for what it is worth – would not apply beyond the point of bringing a diplomatic claim. If at that stage, the right has vested, the original State has a cause of action. So from this perspective, a change of nationality *after the making of the diplomatic claim, but before the commencement of litigation before a court or arbitral tribunal*, should not make a difference to the cause of action.

If, as some authorities suggest, the original State nevertheless lacks the right to maintain the proceedings (i.e. the claim through the diplomatic channel or, if available, litigation) if nationality changes after the claim has been brought, it cannot be for lack of a cause of action, therefore, but *lack of standing*. But this lack of standing is not an ineluctable conclusion of logic; it arises only if one places more emphasis on the injury to the individual than on the injury to the State. A strong case could in fact be made for continuation of the original State's rights. *Ex hypothesi*, it has suffered a wrong; the procedures by which it seeks to vindicate its claim, and their duration, should not be allowed to affect this. If it had the legal standing to make a diplomatic claim, it should have the standing to continue with it and /or to bring an action.³⁰

If this view is accepted, then *a fortiori* a change in nationality after the inception of litigation, but before the close of oral argument, or before the award is given, should make no difference to the claim. If, on the other hand, the position is taken that a change of nationality before the commencement of litigation *is fatal*, it does not, conversely, follow ineluctably that a change which occurs only at a later stage is equally fatal. For it could be argued that, once proceedings are instituted before a competent tribunal, the right to whatever remedy the claimant is eventually held to be entitled to vests at the point of instituting proceedings, so that subsequent changes of nationality cease to be relevant. On the other hand, the political considerations to which I have

³⁰ According to this approach, State A would have legal standing, not just to seize the court or tribunal of the case, but to obtain a judgment on the merits.

In the *South West Africa case (2nd Phase)*, ICJ Reports 1966, p. 6, the International Court of Justice, by the narrowest of majorities, dismissed claims by Ethiopia and Liberia against South Africa on the ground that they lacked legal standing to obtain a judgment on the merits, notwithstanding an earlier finding, in a judgment on preliminary objections, that they had the requisite standing to bring the claim (*ibid.*, 1962, p. 319). The distinction is logically tenable: the British House of Lords reached a similar conclusion, some time afterwards and without referring to the ICJ case, in *R. v. Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses* [1982] AC 617. Whether the ICJ was compelled by logic or the facts to come to this conclusion, and whether it was wise, as a matter of judicial policy, to do so, is a very different matter.

already alluded make it tempting for States to say that a change subsequent to the institution of legal proceedings should be fatal. Furthermore, because it is generally accepted that nationality has to be continuous up to *some* point (at least up to the presentation of the diplomatic claim), it is easy to fall into the logical error of assuming that continuity *necessarily* has to continue throughout subsequent stages.³¹

What seems clear, at least, is that any change of nationality *after the judgment or award has been given* and becomes final cannot normally (absent treaty provision) affect the original State's rights – even if there are still questions of post-judgment/award interest and/or enforcement to be settled. Apart from anything else, the judgment or award has already vested a right to performance in the claimant State, and whatever happens later is irrelevant. This logic should also apply in principle even the decision is open to reversal by way of appeal, review, or revision³²; for the original decision is not, in such cases, conditionally valid, but rather, valid subject to a condition subsequent that it can be reversed or amended by the second tribunal.³³

Before proceeding to consider whether these theoretical conclusions are supported by the practice and by the opinions of the learned, and also whether the rule of continuous nationality is a just one, one other question should be mentioned, if only for the sake of completeness. It is whether the bond of nationality has to be literally continuous, or whether it is

³¹ In favour of requiring the continuity of nationality beyond the institution of proceedings, it could be argued that, if State A no longer has a connection with the victim, it might not pass the compensation or damages it receives on to him. That is true; but it is also true that, in international law and most or all municipal systems, the victim has no *right* to the compensation or damages received by his State even if he does *not* change his nationality. See e.g. *Barcelona Traction case (2nd Phase)*, ICJ Reports 1970, p. 4 at p. 44, paras. 78-79; *Civilian War Claimants Association v. R.* [1932] AC 14 (House of Lords); *Great Western Insurance v. US* (1884), 112 US 193 (US Supreme Court) 102-3. The position is similar in French law: Daillier & Pellet, *Droit international public* (7th ed., 2002), 814. So this possible objection does not seem strong.

Of course, State A may want to discontinue proceedings once the tie of nationality is broken, but that is a different question from whether it *automatically* loses its standing. (I should perhaps reiterate that the *new* State of nationality does not have the right to institute or maintain litigation: it has no cause of action.)

³² The question barely arises in international courts, whose decisions are not open to appeal or judicial review. But their rules often do make provision for revision of the judgment if facts are subsequently discovered which would have made a decisive difference to the original judgment: see e.g. Article 61 of the Statute of the International Court of Justice.

³³ In a special addendum on 'continuous nationality and the transferability of claims' written by Prof. Dugard, the International Law Commission's Rapporteur on diplomatic protection, a number of possible termini of continuous nationality besides those canvassed here were mentioned. They were: the date on which a claim is endorsed by a government; the date

Continues

sufficient that it is the same at key points. Suppose that a national of State A is harmed contrary to international law. Before his State can make a diplomatic claim, he dies. His heir is not a national of State A. But shortly afterwards the heir dies, and *his* heir is a national of State A. Can State A continue with its claim or not? As a matter of principle the answer should arguably be affirmative. Going back to the theory, the State was wronged when the injury occurred, and had a claim at that point – or at any rate when local remedies were unsuccessfully exhausted. True, State A could not have brought the claim when the direct heir of the victim was an alien, for reasons already discussed. But once the heir dies and his successor is, once again, a national of A, then the new heir has a legitimate interest in redress and his national State in obtaining that redress, coupled with the fact that it suffered a wrong when its original national was injured. So it can now bring the claim.³⁴ One could also easily imagine other fact situations in which the bond of nationality first disappears, and then reappears,³⁵ though in the nature of things such cases will not be very frequent.

If this reasoning is correct, then strictly speaking, and *pace* the editors of *Oppenheim*,³⁶ the rule is not one of *continuous* nationality, but rather of the nationality being the same at certain critical points in the process of seeking redress on the international plane – i.e. something more akin to a rule of “identical nationality”. In this context it is interesting to note that in the current (1985) version of the British “Rules Applying to International Claims”, the comment to Rule 1, while stating that

... of initial diplomatic negotiations; the date of signing a treaty referring the claim to some forum; the date of the treaty’s ratification; the date of its entry into force; and the date of closure of oral hearings. The Rapporteur’s analysis of the practice and his recommendations are discussed below.

³⁴ Somewhat similar reasoning would apply if the first death occurred after a diplomatic claim had been made but before litigation was commenced, or if it occurred during the course of the litigation. Of course, in such cases it would be open to the respondent State to argue, after the death of the victim himself, that the cause of action or *locus standi* had been lost. But if the second change of nationality takes place quickly enough, and the question of the break in citizenship has not been raised (or, perhaps, resolved), then it could perhaps be argued that it should, in principle, be too late for the respondent to raise the point after the event.

³⁵ For instance, suppose that, in the *Stevenson* case (1903), 9 UNRIAA 494, discussed below, the only British heir of Stevenson had been a posthumous one, born to Stevenson’s Venezuelan widow on British soil, it seems probable that the umpire would have allowed his claim, notwithstanding that there was a period of a few months where the only claimants were the widow and her Venezuelan-born children, who were ineligible.

³⁶ Jennings & Watts (eds), *Oppenheim’s International Law: Volume I, Peace* (9th ed., 1992), 512, who require nationality to be held ‘continuously and without interruption’ until the making of the award.

international law requires the link of nationality both at the time of injury "and continuously thereafter up to the date of formal presentation", adds that "In practice, however, it has hitherto been sufficient to prove nationality at the date of injury and of presentation of the claim".³⁷

2. Practice, case-law, and doctrine

The practice of States on continuous nationality needs to be treated with caution. Much of it has been treaty practice,³⁸ because many diplomatic claims for injuries to aliens have been dealt with by a process of negotiation and agreement. Sometimes this is an agreement to make reparation; sometimes it simply establishes a procedure for settling the matter – for instance, the establishment of a mixed claims commission or an arbitral tribunal. For all practical purposes, there are no rules of *ius cogens* in this area, and so the parties to these treaties are able to agree on whatever they want in relation to continuous nationality. Even if a consistent pattern could be detected, it would be wrong to deduce from it a rule of customary law, for there is no special reason to assume that the treaty practice is referable to such a rule.³⁹ In the *Barcelona Traction Co. case (2nd Phase)*, the ICJ, considering the rather similar question whether provisions on the lifting of the corporate veil, in agreements for compensation arising out of nationalisation, were of any assistance in establishing what was the rule in general international law, stated:

Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case.⁴⁰

³⁷ 37 ICLQ (1988), 1006.

³⁸ As already indicated, I shall treat IPTs in the latter part of this paper, because they may raise special considerations.

³⁹ See my 'The Formation of Customary International Law', 272 *Hague Academy of International Law, Collected Courses* (1998), 155, 294-346; and International Law Association, International Committee on the Formation of Customary (General) International Law, *Final Report of the Committee, including London Statement of Principles relating to the Formation of General Customary International Law*, in International Law Association, *Report of 69th Conference* (2000), 712, Propositions 20-27; http://www.ilahq.org/html/layout_committee.htm.

⁴⁰ ICJ Reports, 1970, p. 3 at 40 (para. 61) - though the Court also relied on the inconsistency of the practice. Cf. the decision of the arbitral tribunal in *Govt. of Kuwait v. American Oil Co. (AMINOIL)*, (1982), 66 ILR 518 at 606-7, rejecting Kuwait's argument that a series of agreements providing for compensation for nationalization of oil companies' assets based on a calculation of net book value represented customary law.

Equally, the decisions of international courts and tribunals, as well as of domestic courts or similar bodies charged with the settlement of claims, need to be treated with a degree of caution, because the decisions they take on continuous nationality may be governed by the terms of the treaty from which they derive their competence.⁴¹

Having said this, there is a fairly consistent practice both of international and of domestic tribunals, and of governments, of requiring a link of nationality to exist both at the time of the injury, and (at any rate) at the time of the presentation of the claim.⁴² Much of the debate has been about "late nationals", that is, people who became nationals of the claimant State only after the injury.⁴³ The requirement of a national link at the time of presentation of the claim has tended to be taken for granted.⁴⁴

But courts and tribunals have not, as a rule, required the link to exist continuously up to the time of *award*, and if occasionally words to this effect have been used, it was not because the period between institution of the claim and judgment (or award) was actually in issue. Indeed, in the nature of things this would be a relatively rare occurrence. This being said, a handful of decisions do address the point more or less squarely.

The first decision on the subject – though one of a domestic tribunal – seems to have been that of the American Commissioners appointed to adjudicate on claims under the 1831 Convention as to Claims and Duties on Wine and Cotton between France and the USA, by which the former was to pay 25 million francs to US citizens in settlement of their claims

⁴¹ See e.g. Sinclair, *op. cit.*, 128 for examples of this.

⁴² Moore's *Digest* cites a number of instances in the nineteenth century of the application of the rule both to the time of injury and the time of the claim (VI *Digest of International Law*, 628-32); and Whiteman's does likewise for the first two-thirds of the twentieth century (8 *Digest of International Law*, 1233-48). For British practice see Sinclair, *op. cit.*

The post-World War II Peace Treaties with Italy was unusual both in requiring the payment of compensation to 'United Nations nationals' regardless of which of the allies' citizenship they held, and also in applying a test of continuity of nationality only between the date of the relevant armistice and the date of entry into force of the treaty in question. However, these variations from the more usual pattern were due to special circumstances.

⁴³ For instance, from time to time unsuccessful attempts have been made in the United States Congress to amend US claims settlement legislation to bring within its ambit those who became citizens only after suffering the injury in question. See Leich, 'Contemporary Practice of the United States relating to International Law', 76 *AJIL* (1982), 836.

⁴⁴ See e.g. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), 664, 666; *id.*, 'The Protection of Citizens Abroad and Change of Original Nationality', 43 *Yale LJ* (1934), 359, 380-8; Ralston, *Law and Procedure of International Tribunals* (1926), 161-3.

for taking or destroying their ships, cargoes or other property.⁴⁵ The convention did not define the criteria of eligibility, but in their 1835 report the Commissioners said:

That the relief provided for under the Convention could be accorded only to American citizens, for injuries to American property, and where the right to indemnity had never been transferred to the subject of a foreign government; that, to constitute a valid claim, the owner of the property must have been entitled at the time of the spoliation to the protection and aid of the United States...

... and one Commissioner added a note stating in pertinent part that "The Commission required that the claim should be altogether American, that it should have originally belonged and have continued to belong to an American citizen".⁴⁶

In the *Stevenson* case before the British-Venezuelan Mixed Claims Commission in 1903, the Umpire (Plumley) said:

In all of the cases which have come under the notice of the umpire – and he has made diligent search for precedents – the tribunals have required a beneficiary of the nationality of the claimant nation lawfully entitled to be paid the ascertained charges or dues. They have required that this right should have vested in the beneficiary up to and at the time of the treaty authorising and providing for the international tribunal before which the claim is to appear.⁴⁷

⁴⁵ I Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776-1909* (1910), 523.

⁴⁶ 5 Moore, *International Adjudications, Modern Series* (1933) 351 & 354.

There was some debate in the *Loewen* case as to the meaning of the *Gribble* award by the British-American Claims Commission in 1872; report of Hale, [1873, Part II, Vol. III, *US Foreign Relations* (1874), 14. However, the United States seems to have been correct in its insistence that the change of nationality occurred after the claim had been originally presented, and so during the proceedings. Consequently, the unanimous decision of the Commission that *Gribble* lacked standing as a British subject counts as a precedent in favour of the US position in *Loewen*.

⁴⁷ 9 *UNRIAA* 494, 510. Umpire Plumley considered that his position was supported by the decision in the *Chopin* case, 3 Moore, *International Arbitrations* (1906), 2506-7. What exactly *Chopin* did decide was much contested in *Loewen*, but at best it can hardly be said to have provided clear-cut support for the US position.

This passage is often cited as providing support for the continuous nationality rule. This is correct, but commentators often overlook the next sentence, where the Umpire said “That it was then vested has been held as sufficient, and subsequent events have been held as not divesting this vested right.” This latter remark is arguably *obiter* as to the exact terminal date for the application of the rule, since it occurs in the course of repudiating a British argument that the basis of a claim is the injury to the *State* through its national, so that *any* subsequent changes of nationality are immaterial. However, the pronouncement exists; and it is also the case that, towards the end of his (rather prolix) award, the Umpire refused to place any weight on the reported death of one of the two British sons of Stevenson, notwithstanding that, if he had died intestate or with only non-British heirs, the share of the claim allowed should have been reduced from two-thirteenths to one-thirteenth, if the rule of continuous nationality had been applied right up to the time of the award.⁴⁸

In *Administrative Decision No. V* of 1924,⁴⁹ the award ultimately turned on the construction of the Treaty of Berlin of 1921. Nevertheless, before reaching that point the Umpire of the US-German Mixed Claims Commission (Parker) conducted a thorough analysis of the position in customary international law, because the interpretation of the Treaty could have been affected by the customary rule. While conceding that some pronouncements of tribunals and writers favoured continuous nationality from the date of the injury up to the time of judgment, others identified different terminal dates, and he concluded that “it may well be doubted whether the alleged rule has received such universal recognition as to justify the broad statement that it is an established rule of law”. We may leave aside his observations on whether the victim needed to have possessed the same State’s nationality at the time of the injury, because this point is now regarded as definitively settled since the *Panevezys-Saldutiskis Railway* case. But on the question of the continuity of nationality beyond the making of the claim, the doubts he expressed retain their force. He cited five arbitrations where later changes of nationality did not affect the claim,⁵⁰ as well as pointing to injustices to which the rule, and especially an extensive application of it, could give rise. He also distinguished a number of decisions that

⁴⁸ There were eleven ineligible Venezuelan claimants, the widow and ten of the twelve children of the deceased.

⁴⁹ 7 *UNRIAA* 119, 140ff.

⁵⁰ At pp. 141-42, note 4. It is fair to say that the circumstances of these cases were such that they are not strong precedents in Loewen’s favour, though they certainly do not support the Tribunal’s position either.

had been cited by the German Commissioner in support of denying jurisdiction.⁵¹

Two months later, however, Max Huber, acting as Rapporteur in respect of the *Spanish Zone of Morocco* claims, decided in the *Benchiton* case that where, subsequent to the original injury, the victim voluntarily renounced his status as a British protected person, there was no jurisdiction.⁵² He interpreted the rule that nationality has to be continuous up to the date of presentation of the claim under international law in such a way that "presentation" meant the totality of the acts by which the claim is maintained; hence, the claim had to remain national up to the time of the judgment, or at least up to the time of the termination of the argument relating to it. With all due regard for Huber's eminence, his interpretation of the concept of "presentation" seems very contrived.⁵³

At the same time as the continuous nationality rule was being consolidated, it was subjected to considerable criticism, not only for its underlying flaws of logic to which I have already referred, but also for its injustice.⁵⁴ As has already been noted, the effect of the rule, even in its minimal form (continuity from the time of injury to the time of presentation) excludes a significant number of potential claimants who arguably have a deserving case. The exclusion of "late nationals" excludes those who are currently under the protection of their new State. If, at the time of the injury, they were nationals of a third State,⁵⁵ and so entitled to the protection of international law, it seems somewhat unfortunate that a claim cannot be

⁵¹ For example, he pointed out that the decision of the United States Supreme Court in *Burthe v. Denis*, 133 US 514 (1890), holding that continuous nationality was required up to the date of judgment, turned on the terms of the particular treaty concerned.

⁵² *Annual Digest 1923-24* [2 ILR], 189.

⁵³ It is also worth noting, in any case, first, that renunciation of protection (it was not a case of protection of a national) had taken place four years before the UK had listed the claim amongst those to be submitted to arbitration under a special convention with Spain; secondly, that Huber placed emphasis on the fact that the change of nationality was voluntary; and thirdly, that he seemed to think it significant that he was acting as a rapporteur, rather than an arbitrator. See the notes to the report, *ibid.*, 190.

In the previous year, the Great Britain-Germany Mixed Arbitral Tribunal refused a claim where the original claim had been brought by a British subject, but after his death had been pursued by his executors, on the ground that the ultimate beneficiary was German: *Lederer case*, 3 *TAM* (1924), 765. However, the decision turned on the interpretation of the particular treaty.

⁵⁴ See e.g. the discussions at the Cambridge session of the Institute of International Law, 1931 *Annuaire de l'Institut de Droit International* 478 ff.

⁵⁵ According to classical principles of sovereignty, prior to the development of human rights law, harm done by a State to its *own* nationals did not entail any breach of international law.

made on their behalf either by their original State of nationality, or by the new one – and especially so if the change of nationality was involuntary. Turning to the position of those who were nationals of the claimant State at the time of injury, but who subsequently lost that nationality, we must bear in mind that considerable time can often elapse between the injury and the presentation of the claim. One reason is that Governments often like to assemble, and frequently pre-process, large numbers of claims before presentation. If we also take into consideration the period between presentation and the making of the final award, even more substantial periods are involved; the total time-lag can stretch to decades.

During this period claimants can die, and their rights pass to others (for instance, widows), of a different nationality. Under some legal systems, the (re)marriage of the widow or female heirs can have led, not only to the acquisition of the new husband's nationality, but the loss of her former nationality. Again, the widow in some cases has been of a different nationality from the deceased, but her children, who inherited the claim on her death, may have had the same nationality as their father: to insist on strictly *continuous* nationality might seem particularly harsh and, as I have already suggested, unnecessary as a matter of principle. Territorial upheavals can likewise lead to an involuntary change, or even complete loss, of nationality and home; the continuous nationality rule creates yet another problem for the unfortunate victim. Even where the change of nationality is voluntary, it could be argued, this is not something culpable and should not necessarily deprive the victim of the ability to make a claim through his new State. Suppose that a national of State A finds his property unlawfully taken, and perhaps his life threatened, by the Government of State B. He decides to move to State C to start a new life, and eventually seeks naturalization in his new country. Is it self-evident that neither A nor C should be able to claim for him? Assignment of a claim is another problem area. It was this sort of consideration that incited opposition to the rule, even in the first decades of the twentieth century. The enormous upheavals of the Second World War and its aftermath have considerably exacerbated the problem.⁵⁶

⁵⁶ See e.g. Friedberg, 'Unjust and Outmoded – The Doctrine of Continuous Nationality in International Claims', 4 *International Lawyer* (1969-70), 835. (The author was a member of the US Foreign Claims Settlement Commission.) As Brownlie puts it, citing some eminent examples, 'there is a respectable body of opinion that would reject the principle altogether': *Principles of Public International Law* (6th ed., 2003), 461.

On the other hand, certain measures can mitigate the harshness of the customary rule. Thus, where the claimant has become or ceased to be a UK national after the date of the injury, British practice allows the possibility of a joint claim by the UK in concert with the former or the new State of nationality: see the Rules Applying to International Claims, Rule II, 37 *ICLQ* (1988), 1006. And, as previously mentioned, treaty rules can diverge from the customary rules.

As I have attempted to show, the power of the doctrine of allegiance, coupled with political considerations, have nevertheless ensured that the doctrine of continuous nationality was well entrenched by the 1930s, so far as concerns the period *between the injury and the presentation of the claim*. Whether it applied *between presentation and the award* was far less clear, and in these circumstances it might have been expected that the injustices which I have mentioned would have militated against the extension of the doctrine. Indeed, this was one of the factors taken into account by Umpire Parker in *Administrative Decision No. V*. However, when it came to the (ultimately abortive) Hague Conference for the Codification of International Law in 1930, a majority of the (only) nineteen States that responded to a questionnaire supported the continuous nationality rule, of whom eight expressly took the view that it applied up to the moment that the claim was decided.⁵⁷

This was hardly a resounding affirmation of the continuous nationality rule, still less of an extensive interpretation of it. Nevertheless, it considerably influenced the British-Mexican Claims Commission in the case of *Minnie Stevens Eschauzier* in 1931.⁵⁸ The claimant had lost her British nationality, after the conclusion of oral argument but before the date of the award, on her marriage to an American citizen. The tribunal, by a majority decision, acknowledged the complications (not least evidential) that could arise if the continuance of the claim depended on the vagaries of the national link, which might even be lost involuntarily. But taking into account "recent developments", and specifically the position adopted by what it considered to be the majority of Governments (particularly the United Kingdom itself) in preparation for the Codification Conference, it went on to say that "On the other hand it cannot, however, be denied that when it is certain and known to the

⁵⁷ Basis of Discussion no. 28, League of Nations *Bases of Discussion* vol. III, doc. C.75.M.69.1929.V, 140-45. The United Kingdom and two of the Dominions of the British Empire were amongst the eight; on the other hand, the United States was one of the many countries that did not respond at all.

The UK had, shortly before, withdrawn claims against the USA where the claimants had in the meantime acquired the nationality of the respondent State: *Hawaiian Claims*, Nielsen, *American and British Claims Arbitration* (1926), 30. A little later, the United States similarly withdrew a claim where the claimant's widow had the nationality of the respondent State: *Barstow*, 5 Hackworth, *Digest of International Law* (1943), 805. But although relied upon in *Loewen* by the United States, it is by no means clear that these precedents are significant: as the American and the neutral arbitrator in *Administrative Decision No. V* (above) recognized, it is a matter of *discretion* whose claims a Government will espouse; consequently, their refusal to continue to pursue a claim does not prove that they were not entitled to pursue it if they chose.

⁵⁸ 5 UNRIIAA 207, 209.

tribunal, that a change of nationality has taken place prior to the date of the award, it would hardly be just to obligate the respondent Government to pay compensation to a citizen of a country other than that with which it entered into a convention". Feller⁵⁹ also cites an unreported decision of the French-Mexican Commission to similar effect.⁶⁰

Post-World War II practice and jurisprudence has very largely depended on the particular terms of specific treaties, and little additional enlightenment can be gained about the position in general international law, especially on the question whether the requirement of continuity applies beyond the presentation of the claim.⁶¹

In 1932 the IIL had refused, by a narrow majority, to endorse the traditional formulation of the rule.⁶² However, in 1965 it endorsed the rule, but with significant modifications and clarifications.⁶³ The *terminus ad quem* (the terminal point of the rule) was now specified as the "date of presentation" – defined as the date of formal presentation through the diplomatic channel and, in the case of resort to an international tribunal, to the date of filing. Moreover, the requirement was now possession of the same nationality *both* at the date of the injury and at the date of presentation, not *continuous* nationality between these dates.

⁵⁹ *The Mexican Claims Commissions, 1923-1934* (1935), 97.

⁶⁰ Case of *Maria Guadalupe A. Vve. Markassuza*. Here the change of nationality occurred not only after the presentation of the claim, but after the specific claim had been listed as receivable under a Supplementary Convention.

⁶¹ Both the British and the American rules on presentation of claims identify the terminal point as the date of presentation of the claim, without further elaboration: 37 *ICLQ* (1988), 1006 and 76 *AJIL* (1982), 836, respectively. It is fair to add, though, that this does not prove that they would not feel free to withdraw claims, in the exercise of their discretion to espouse, where the nationality of the claim changed after presentation.

The decision of the US International Claims Commission in the *Kren* case (20 *ILR* 233) was cited by the US in *Loewen* as supporting its position (Memorial ... on Matters of Jurisdiction and Competence, <http://www.state.gov/documents/organization/9947.pdf>, 15); and it is true that the decision was based in part on the Commission's understanding of the position in general international law. However, it was also based in part on the policy of the United States. And in the ultimate analysis, the claim was probably ineligible due to the actual language of the treaty with Yugoslavia. Another case cited on the same page of the Memorial (*American Security and Trust Company* case (1957), 26 *ILR* 322, US Foreign Claims Settlement Commission) seems barely pertinent. The case concerned the construction of a particular piece of domestic legislation; furthermore, the issue was whether a claim could be made by an American trust company where the beneficiaries were not and apparently had never been American. Not surprisingly, the answer was negative.

⁶² 1931 *Annuaire de l'Institut de Droit International* 277 ff.

⁶³ 51 *ibid.* (1965-I), 55-56.

Garcia-Amador's Third Report to the ILC State Responsibility took the same position as Basis of Discussion No. 28 on continuous nationality, though his discussion of the matter was not particularly profound.⁶⁴ In the event, after many fits and starts, the ILC decided to exclude diplomatic claims as such from its attempt to codify the law on State responsibility, and so the *2001 Draft Articles on State Responsibility* do not deal with that topic. Instead, it was decided to treat diplomatic protection as a separate subject.

In 2000 the Commission's replacement Special Rapporteur on Diplomatic Protection, Professor John Dugard, produced some draft articles on the subject, including (as a 16-page addendum) a draft Article (Article 9) and commentary specifically devoted to the subject of continuous nationality and the transferability of claims.⁶⁵ He expressed doubts as to the status of the rule in customary international law, and he pointed out that this uncertainty was compounded by uncertainties as to its content, and specifically regarding the meaning of the "date of the injury", nationality, continuity, and the *dies ad quem*. So far as concerns the date of the injury, the usual view is that it is the date of the act or omission that caused harm to the alien. However, it has been suggested that, strictly, it should be the date of the failure to pay compensation or of the denial of justice; this is when the *international* wrong occurs. In practice, tribunals and treaties have not drawn a distinction, since the difference is rarely significant; the IIL, however, opted for the former interpretation.⁶⁶ So far as concerns the meaning of "nationality", there are indeed many uncertainties, though, as already mentioned, they are beyond the scope of this essay.⁶⁷ So far as concerns uncertainty about continuity, this has already been discussed above; although a substantial number of authors and *obiter dicta* support the requirement of true continuity, I have suggested above that there are respectable reasons of theory and policy why it should be sufficient that the nationality should be the same only at the crucial points – the *dies a quo* (the starting point) and the *dies ad*

⁶⁴ *Yearbook of the ILC*, 1958-II, p. 61-7.

⁶⁵ UN doc. A/CN.4/506/Add. 1 (20 April 2000). This report drew to some extent on concurrent work undertaken for a Committee of the International Law Association by its Chairman, Professor Orrego Vicuña, on 'The Changing Law of Nationality of Claims', ; ILA, *Report of the 69th Conference (2000)*, 631; http://www.ila-hq.org/html/layout_committee.htm.

⁶⁶ See Joseph, *Nationality & Diplomatic Protection – The Commonwealth of Nations* (1969), 25.

⁶⁷ The uncertainty focussed on by the Special Rapporteur was much more narrow, concerning the question whether a declaration to acquire the nationality of the claimant State filed at the time of the injury would be sufficient.

quem. Likewise, the discussion above about the identity of the terminal date confirms the Special Rapporteur's view that this, too, is unsettled.

The Special Rapporteur therefore considered that the continuous nationality rule should be abandoned. He considered the option, supported by Wyler in a recent in-depth study,⁶⁸ of retaining the requirement, consistent with the Vattel principle, that the victim should at any rate have had the nationality of the claimant State at the time of the injury. However, he considered that this gave insufficient weight to "the new role of the individual in the international legal order". Even if the individual was not a subject of international law as such, his basic rights were recognised in both conventional and customary law. Consequently, he favoured total abolition of the rule, with the claim following the changing circumstances of the individual.⁶⁹ There was no real danger of fraudulent changes of nationality: States made it harder and harder to acquire their nationality, and in any case the doctrine of the "genuine and effective link" enunciated in the *Nottebohm* case⁷⁰ would provide a sufficient safeguard for respondent States. Draft Article 9(1), therefore, allowed a State to bring a claim on behalf of someone who had acquired its nationality *bona fide* subsequent to the injury, provided that the original State of nationality had not exercised or was not exercising the right of diplomatic protection itself. This proviso both respected the Vattel principle and prevented nationality-shopping, since which State made the claim would not be within the claimant's control. Paragraph 2 extended these principles to claims transferred *bona fide* to nationals of other States. Paragraph 3 maintained the right of the original State of nationality to claim where its own national interest had been affected by the injury to its national. Finally, paragraph 4 preserved the rule that a new State of nationality cannot bring a claim against the State causing the injury if the latter was, at the time of the injury, the national State of the victim.

Professor Dugard's proposals led to lively debate in the Commission.⁷¹ While a minority of members supported them, others thought that they

⁶⁸ *La règle dite de la continuité de nationalité dans le contentieux international* (1990), 264.

⁶⁹ *Loc. cit.*, p. 12, paras. 21-22. He did not favour confining the change to involuntary changes of nationality, such as arise in cases of State succession; although these could cause particular hardship, there were other acts, such as marriage, which though voluntary could also result in the unfair loss of a claim. (The text describes marriage as 'involuntary', but this is presumably a misprint rather than a cryptic comment on the *mores* of some societies.)

⁷⁰ ICJ Reports 1955, p. 23.

⁷¹ *Report of the ILC, 53rd session (2001)*, General Assembly Official Records, 56th Session, Supp. No. 10 (doc. A/56/10), 509-15.

were too innovative and thought that there was still value in the rule, which they considered did represent customary law. Members were unanimous, however, that it needed, at the least, modification where different nationalities were the result of State succession, marriage and adoption, and perhaps also in cases like inheritance and subrogation. Special provision might also have to be made for cases of statelessness. The whole Article was referred to the drafting committee, and subsequently to an open-ended informal consultation; the Special Rapporteur acknowledged that (amongst other things) further thought would have to be given to the *dies a quo* and the *dies ad quem*.

By the time the Article emerged from this process as new draft Article 4 (now 5), it had been significantly modified.⁷² The rule of continuous nationality was reinstated in paragraph 1 as follows: "A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim."⁷³ However, it is of interest to note, in the context of what *Loewen* decided, that the *dies ad quem* is the date of official presentation of the claim, not the date of the award. Paragraphs 4 and 5 of the Commission's commentary to this draft article read as follows (footnotes omitted).

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim. The phrase "presentation of the claim" is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or *dies ad quem* required for the exercise of diplomatic protection. The Commission has added the word "official" to this formulation to indicate that the date of the presentation of the claim is that on which the first

⁷² Report of the ILC 56th Session (2004), GA Official Records, 59th Session, Supp. No. 10 (doc. A/59/10), Chapter IV, 34-37.

⁷³ Paragraph 2 introduced an exception allowing diplomatic protection of late nationals, provided that they had lost their former nationality and had acquired their new nationality for reasons unconnected with the bringing of the claim and in a manner consistent with international law. Paragraph 3 precluded a claim by the new State of nationality against the original national State.

official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The entitlement of the State to exercise diplomatic protection begins at the date of the official presentation of the claim. [It is doubtful, in my view, that this is correct.] There was, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection. According to this view the continuous nationality rule requires the bond of nationality “from the time of the occurrence of the injury until the making of the award”. In the light of the paucity of such cases in practice the Commission preferred to maintain the position reflected in draft article 5.

It should also be noted that the language of the draft Article does not require nationality to be strictly *continuous*: its possession at both terminal points seems to suffice.

The Special Rapporteur had begun his work by considering the diplomatic protection of individuals. In due course he branched out to cover corporations too. Much of the discussion concerned the nature of the requisite connection with the corporation and the circumstances in which a State could intervene on behalf of shareholders – the issue in *Barcelona Traction*. This is of no particular relevance in the context of the present essay. So far as concerned continuous nationality, drawing on what had already been agreed in relation to individuals, preliminary draft Article 20 provided in 2003 that “A state is entitled to exercise diplomatic protection in respect of a corporation which was incorporated under its laws both at the time of the injury and at the date of the official presentation of the claim; [provided that, where the corporation ceases to exist as a result of the injury, the State of incorporation of the defunct company may continue to present a claim in respect of the corporation]”.⁷⁴ The Special Rapporteur noted that:

State practice on the subject was mainly concerned with natural persons. . . The principle [of continuous

⁷⁴ Report of the ILC, 55th Session (2003), GA Official Records, 59th Session, Supp. No. 10 (doc. A/58/10), Chapter V, 68-70. Square brackets in original.

nationality] was important in respect of natural persons in that they changed nationality more frequently and more easily than corporations. A corporation could change its nationality only by reincorporation in another State, in which case it changed its nationality completely, thus creating a break in the continuity of its nationality. It therefore seemed reasonable to require that a State should be entitled to exercise diplomatic protection in respect of a corporation only when it had been incorporated under its laws both at the time of injury and at the date of the official presentation of the claim.

In contrast to the rest of this preliminary draft article, there was considerable debate over the proviso in square brackets, which impinged on more general issues. Hence, the text was referred to the Drafting Committee.

When the Commission returned to the subject in 2004, preliminary draft Article 20 had become draft Article 10, as follows:

1. A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.
2. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.⁷⁵

The controversy about the proviso had apparently been resolved in favour of retaining it. It is consistent with *obiter dicta* in *Barcelona Traction* and with other precedents and authority. It is also noteworthy that, even in normal cases, where the proviso does not apply, the *dies ad quem* is the date of official presentation of the claim, and not later. Some members of the Commission apparently favoured continuous nationality up to the date of the award, and it is clear from the Commentary that members of the commission were aware of *Loewen*. However, "in the light of the paucity of such cases in practice" the Commission preferred not to follow it, but to maintain the position set out in the text.

⁷⁵ Report of the ILC 56th Session (2004), GA Official Records, 59th Session, Supp. No. 10 (doc. A/59/10), Chapter IV, 52-55.

Continues

Despite the disagreements in the Commission, it can hardly be gainsaid that its work on continuous nationality has been serious and thorough. For the *Loewen* Tribunal to dismiss it in two sentences,⁷⁶ saying that it has been controversial and that the ILC was far from approving any “recodification” (*sic*) based on it, hardly does it justice, especially in view of the fact that – as we shall see shortly – the Tribunal’s own analysis on this point was, with respect, far from thorough.

To recapitulate, very briefly, the current status of the continuous nationality rule in the context of diplomatic protection, the position seems to be as follows (focusing particularly on those aspects that were applied in *Loewen*). There is substantial support for a rule requiring the claimant State to have been the State of nationality at the time of the injury (though some would like to mitigate its harsher features). There is less, but still significant, support for a requirement that the victim should possess the same nationality up to the point of the formal presentation of the claim.⁷⁷ It is, on the other hand, by no means settled that the victim needs to possess the claimant State’s nationality at any later stage in the proceedings. The practice, the case-law and the opinions of the most highly qualified specialists are insufficiently consistent to require such an extension of the time period; and there are good reasons of theory and policy as to why it should not be extended. Finally, it is by no means clear that the same nationality has to be held continuously, rather than just at the key points, the *dies a quo* and the *dies ad quem*.

Against this background, we can now turn our attention to the question of how far the existence of treaty arrangements giving foreign investors their own access to an international court or tribunal may make a difference, before going on to consider the handling of this matter by the *Loewen* Tribunal.

... It is also interesting to observe that (as the Commentary notes), in the *Orinoco Steamship Company* case, 9 UNRIAA, 180, 192 (US-Venezuela Claims Commission), a company incorporated in the United Kingdom assigned its claim against the Venezuelan Government to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim in respect of claims ‘owned by’ its nationals, and as the surrounding circumstances showed that this was one of the claims that the States parties had in mind, the claim was allowed. However, Umpire Barge made it clear that, but for the treaty, this would not have been the case.

⁷⁶ At para. 236. It is, however, fair to point out that, at the time that the ‘final’ award was despatched to the parties on 26 June 2003, the work of the Commission had not yet reached its current stage.

⁷⁷ This will normally be through the diplomatic channel rather than directly to a court or tribunal. If there is an agreement to refer the dispute to such a body, the date of the treaty (signature, ratification or entry into force, according to the treaty’s terms) may be substituted.

B. Continuous nationality and investment protection treaties.

1. Considerations of principle

For those who wish to invest overseas, diplomatic protection is a rather primitive system for safeguarding their interests, compared to modern arrangements. Over the past few decades, a host of treaties have been concluded, some multilateral but many more bilateral, which give investors the power to pursue claims against host States before international tribunals in their own right and of their own volition.⁷⁸ Amongst the most notable instruments are the *ICSID Convention*, NAFTA Chapter 11, Part III of the *ECT*, and the hundreds of BITs existing today. What, if anything, is the relevance and import of the continuous nationality rule in this context?

In a sense, this is a question that neither could nor should be answered in the abstract: each treaty is unique and must be construed according to its own terms. Still, a consideration of some theoretical aspects of the question may help in finding answers in specific cases.

Fundamentally, the traditional continuous nationality rule can have no application here. The claim is not the State's, and the fiction that the injury was done to the State has no application once it is recognised that the investor has his⁷⁹ own rights that he is entitled to vindicate without the assistance of his national State. Moreover, the correlative duties of protection and allegiance have no place here.

This is not to say, however, that nationality is completely irrelevant to investor claims, for the following reason. Unlike human rights treaties, Governments do not conclude IPTs for the benefit of everyone within the territories covered, without distinction. Rather, they are designed to promote the interests of the national investors of the particular States parties to the particular treaty;⁸⁰ consequently the procedural capacity to vindicate them is also confined to the nationals of the parties. True, the treaties may contain provisions enabling claims to be made by or on behalf of corporations which have the nationality of the host State, Article 25(2)(b) of the *ICSID Convention* being a case

⁷⁸ Some of these treaties also give the host State the right to sue the investor, but in most cases they do not and anyway, they are of little significance in a discussion of the application of the continuous nationality rule.

⁷⁹ Or (throughout this essay) her or its.

⁸⁰ As well as those of the host country in attracting investment.

in point:⁸¹ but even this exception is due to the existence of a controlling interest on the part of investors from one of the other States party. Possession of the nationality of a State party to the treaty in question is thus a *criterion of eligibility* to bring a claim.

Consequently, the question does arise: at what point or points does the claimant need to possess this nationality? This is *similar* to the question that gave rise to the continuous nationality rule in the context of diplomatic protection; but it is important to realise that it is not simply another ramification of that rule (as the *Loewen* tribunal seemed to think). The context is different, and the answer is to be found in the express provisions of the particular IPT or, if there are none, is to be deduced by the application of general principles of treaty interpretation. There is, consequently, no basis for applying a presumption that the continuous nationality rule applies in the context of such treaties.

Indeed, as a general proposition it is arguable that the contrary is the case. First, States have a generalised interest in their nationals being able to invest in foreign countries.⁸² Secondly, States have an interest in appropriate level of treatment being accorded to their own investors (and their investments) *as a class*. They have less interest in whether, subsequent to the making of the investment, there has been a change in any *particular* investor's nationality, especially since they will not be called upon to present or conduct that investor's claim.⁸³ In theory, it might be argued, on the other hand, that emphasis on the nationality of the claimant is in the *host* State's interest. After all, it has agreed to afford protection (of a higher standard than customary law requires, in some respects) to the nationals of State X, not some other State. However, the more numerous BITs (or similar agreements) become, the weaker this argument becomes. For if there is a treaty with the new State of nationality too, the argument does not really hold up. The more so when one takes into account the fact that MFN clauses tend to spread the benefit of particular treaties more widely and more evenly. Thus, if the person concerned changes his nationality

⁸¹ Above, note 6.

⁸² It is often overlooked that the right to invest (i.e. a right of access) is an important aspect of many such treaties. By definition, the link of nationality will exist at the point that the investment is made.

⁸³ They are unlikely to be worried about 'free riders': changes of nationality will be relatively rare and often involuntary. Moreover, the more time that elapses after the bringing of the claim before nationality changes, the less the person concerned can be said to be a 'free rider'. (In other words, if the victim is the national of State X when he makes the investment, when the injury occurs, and when he makes his claim, and only loses that nationality at some point during the proceedings, he can hardly, if at all, be said to have had a 'free ride'.)

from that of State X to that of State Y, towards whom the host State has similar treaty obligations, the host State is not really in a worse position.⁸⁴ Of course, the host State does have an interest in having as few cases decided against it as possible, and an extensive (i.e. exclusionary) continuous nationality rule would be one way of furthering this goal. But this is not to say that it should be entitled to evade obligations that it undertook, simply because of an event which is of no direct concern to it⁸⁵ and which may well have been involuntary. Furthermore, it is something of an over-simplification to divide countries into hosts on the one hand, and investment-exporters on the other: any given State may be both.

The above considerations militate *against* a continuous nationality rule in the context of IPTs, in general, and certainly against any extensive application of it. We must, however, consider a possible exception to this proposition. The benefits of investment protection treaties are not intended to extend to the host State's own nationals, except where expressly agreed (because of foreign control). If the victim, originally foreign, is a national of the host State *at the time of the injury*, the treaty should not, in principle, apply to him: he is outside its scope. It is probably likewise if he becomes a national of the host State after the injury, but before making the claim: the dispute-settlement mechanism is designed to be invoked by *foreign* nationals. It is, on the other hand, less clear that a change of nationality should be fatal if it occurs only after the claim has been brought, but before the final award; but it is at least arguable, it must be conceded, that a State should not have to pay damages or make other reparation to its own national (outside of any human rights obligations it may have in this regard).

This is a convenient point to consider the specific provisions of particular treaties, or types of treaty.

2. Particular Treaty Provisions

The *ICSID Convention* does not so much provide a set of substantive rules to govern foreign investment⁸⁶ as a framework for the conduct of arbitration (or conciliation). To this end, Article 25 provides in pertinent part as follows:

⁸⁴ There may still be a question of which treaty governs the claim, if there is a difference; but this is more relevant to the merits than to standing.

⁸⁵ Leaving aside, for the moment, a change of nationality to that of the host State itself.

⁸⁶ Though Article 42 contains provisions on the applicable law.

⁸⁷ This interpretation is confirmed by the unanimous award of an ICSID tribunal dated 7 July 2004, where the nationality of the claimant at the relevant times (though not the continuous nationality rule as such) was the only issue: Case ARB/02/7, *Hussein Nuaman Soufraki v. United Arab Emirates*, para. 84: <http://ita.law.uvic.ca/documents/Soufraki.pdf>.

Continues

- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
- (2) "National of another Contracting State" means:
 - (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
 - (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

It will be noted *first* that, in the case of natural persons, there are two critical dates: the date of consent to arbitration, and the date of registration of the request for arbitration or conciliation.⁸⁷ As to the former date, when this date occurs will depend upon how the consent is given. If it is consent *ad hoc*, then the date is obviously the date of the written agreement. If the

... In practice, it is relatively rare for international investments to be made by individuals, as opposed to companies.

⁸⁸ As opposed to other members of its group. Schreuer, *The ICSID Convention: a Commentary* (2001), 286 says that "Multiple nationalities of juridical persons are not unlikely and may arise where the criteria of incorporation, seat and control do not coincide". With respect, this seems to confuse difficulties in determining what *is* the nationality of a company with the possibility of its holding multiple nationalities. In principle, it should not be possible for a company to hold more than one nationality or, at any rate, for a court or tribunal so to find in respect of any given matter. (The fact that Article 25(2)(b) envisages the possibility of agreement that a company which has the nationality of the host State shall be treated as if it were a national of another Contracting State does not, of course, affect this point: this is a case of deemed, not dual, nationality.)

parties to the dispute agreed in advance, e.g. in a concession agreement, it will be that date. But in the law and practice of ICSID, a State can also give its consent in advance, either in a treaty - e.g. in either a BIT or in legislation. In that event, if the investor has not previously consented to jurisdiction, she can give his consent when she brings the dispute to the Centre. In such a case, of course, the *dies a quo* and the *dies ad quem* more or less coalesce. In other cases, there could be a substantial gap between the date of written consent to the Centre's jurisdiction and the date of filing. *Second*, and very importantly, there is no requirement for the individual to continue to hold the same nationality *after* instituting proceedings. *Third*, there is no requirement of literally *continuous* nationality: it needs to be possessed, according to the language of Article 25, only on the two critical dates. *Fourth*, there is an express exclusion from the Centre's jurisdiction of individuals who, on either date, hold dual nationality, one of which is that of the State party to the dispute. This is in line with fairly extensive treaty practice in the field of diplomatic protection, and although some would favour allowing a suit against a State other than the one of effective nationality, the parties to the Convention were of course free to decide what they wanted in this regard. *Fifth*, this proviso about dual nationals does not apply to juridical persons, because a given company⁸⁸ can of course have only one nationality (even though on rare occasions this may be difficult to determine). That nationality must not, however, be that of the host State. *Sixth*, there are not two critical dates for companies, but only one: the date of consent to the Centre's jurisdiction. The reason appears to be that, whereas the drafters wished to make provision for a possible change of nationality by natural persons, it was thought unlikely that a juridical person could change its nationality without first being dissolved.⁸⁹ *Seventh*, it follows that there is no rule of continuous nationality for juridical persons (subject to the next point).⁹⁰

Finally, as we have already seen, the second part of Article 25(2)(b) also makes provision for the parties to agree to treat an entity that is subject to foreign control that has the nationality of the Contracting State party to the dispute as the national of another Contracting State for the purposes of the *Convention*. Here, it is clear from the language that the critical date for determining whether the entity is a national of the host State is that of consent to the jurisdiction of the Centre. What the terms of this provision do not cover expressly is what is the critical date for determining whether there is in fact *foreign control* (for this condition is not waivable by

⁸⁸ Schreuer, *op. cit.*, 289 and references there cited.

⁹⁰ *Accord* Schreuer, *op. cit.*, 289-90.

⁹¹ *Ibid.*, 324-32.

agreement). It must exist at the same date as the agreement to deem the company to have some other nationality, because of the words “because of foreign control”. But what if foreign control disappears after the date of such agreement? Adherence simply to the date of consent, whilst warranted by the principle *expressio unius exclusio alterius*, might possibly be regarded as contrary to the intention of the drafters to restrict claims by national companies of the host State. The dispute settlement provisions of some BITs do in fact require foreign control immediately before the dispute arises also, which is permissible under the *ICSID Convention*. Schreuer, on the other hand, prefers the date of registration of the request.⁹¹ What seems reasonably clear, in any event, though, is that a change of nationality is only relevant (if at all) under Article 25(2)(b), second part, if control falls into the hands of nationals of the host State, not if it simply changes into the control of nationals of some different Contracting State other than the host country. In other words, if control passes out of the hands of nationals of State A into that of nationals of State B, that should make no difference, provided at any rate that State B is not the host State. So the scope for a “continuous” (though not literally) nationality rule is, even here, very limited. And in any event, there is not room for applying such a rule beyond the date of registration of the claim, at the latest.

To summarize, continuous nationality is *not* generally required under ICSID. There is a limited exception in the case of natural persons (who are not often, as such, investors) and, possibly, in the case of foreign-controlled juridical persons possessing the nationality of the host State where (and only where) control falls into the hands of nationals of the host State at some time prior to registration of the request (again, not a frequent event). But even these very limited exceptions do not extend the criterion of eligibility beyond the date of registration of the request. A change of nationality subsequent to registration but prior to the handing down of the award would therefore seem, in all cases, to be immaterial.

Subsequent to the adoption of the *ICSID Convention*, it was decided to plug some gaps in its coverage. Article 2 of the ICSID Additional Facility enables the Secretariat to administer proceedings in three types of case between a State and a national of another State:

⁹² Since neither Canada nor Mexico are parties to the ICSID Convention, NAFTA proceedings between the USA and its nationals, on the one hand, and either Canada or Mexico or their nationals on the other, are outside the scope of ICSID, but fall within the Additional Facility, as we shall see. Disputes involving only Canadian and Mexican parties, on the other hand, fall outside the Additional Facility, too.

- (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;⁹²
- (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and
- (c) fact-finding proceedings.

We are not here concerned with (c). Article 1(6) defines “national of another State” as “a person who is not, or whom the parties to the proceeding in question have agreed not to treat as, a national of the State party to that proceeding”.

It is arguable, at least at first sight, that the language used does allow for a continuous nationality rule. For when Article 2(a) and (b) use such language as “is not [or, respectively, is] a Contracting State”, “is” is not tied to any particular point or points of time. Likewise for Article 1(6), where a “national of another State” is defined as someone who is not (or is agreed is not to be treated as) a national of the State party to the proceedings. In all of these cases, the position can change: a State may become, or cease to be, a party to the *ICSID Convention* at any time, and the nationality of a person can change. However, change of nationality is not very likely: as has already been mentioned, most investors are companies, not natural persons, and companies can probably not change their nationality without being dissolved. And so far as concerns a change in a State’s status in relation to ICSID, this is not, strictly speaking, an issue of continuous nationality: nationality is unchanged, it is just the treaty status of the country concerned that has altered. In any case, Article 4 of the Facility Rules has to some extent anticipated these questions. Agreements (whether in advance or *ad hoc*) for recourse to the Facility need the approval of the Secretary-General of ICSID, and this approval must be sought prior to the institution of proceedings. Where an application is made under Article 2(a), he will only give his approval if he is satisfied that the requirements of that provision are satisfied “*at the time*” [*scil.* of his approval] and the

⁹³ Though access by nationals of the respondent State might, admittedly, be an exception.

parties consent in advance to the jurisdiction of ICSID proper under Article 25 of the Convention if, at the time of the institution of the proceedings, the jurisdictional provisions of that Article *ratione personae* turn out to be met. *Mutatis mutandis*, Article 4(2) and (3) of the Facility Rules similarly provide as such, in relation to the issues with which we are concerned here, for cases falling within Article 2(b) of the Rules (cases where the dispute does not arise directly out of an investment). Though it is not totally clear, therefore, it could be reasonably argued that the critical date so far as the bond of nationality is concerned is the date of approval by the Secretary-General of the agreement to use the Additional Facility, or at the latest the date of institution of proceedings or the registration of the request. It would, furthermore, be odd if the Additional Facility were subject to more extensive (i.e. more exclusionary) rules on the continuity of nationality than ICSID itself, bearing in mind both the Facility's parentage and the fact that its object is to *widen* access.⁹³

But what is perhaps the strongest argument turns on the exact language of the introductory words of Article 2 of the Additional Facility Rules. It says that "The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State ... and a national of another State, falling within the following categories ...". This is the only place (apart from the definition) where the expression "national of another State" is used, and it is in the context of an authority to the Secretariat to *administer* the proceedings. Now, it is clear that the administrative role of the Secretariat is confined to pre-approval of consent to use the Facility, verification that the required conditions have been fulfilled at the time of the institution of proceedings, registration, assisting in the constitution of the tribunal, and related services. It is *not* within the Secretariat's administrative functions to strike out the proceedings because of a change in the nationality of the claimant, and no provision is made, expressly or impliedly, for the Tribunal to perform that function either.⁹⁴ For these reasons, it is preferable to take the view that any change of nationality after registration of the claim does not take the matter outside the scope of the Facility, although the matter is not beyond dispute.

⁹⁴ Article 45 of the Arbitration (Additional Facility) Rules naturally provides that the tribunal will be the judge of its own competence, and sets out procedures for dealing with preliminary objections in that regard. But my point is, rather, that the provision specifically dealing with nationality is expressly tied to the functions of the Secretariat, not the tribunal.

⁹⁵ See <http://ita.law.uvic.ca/documents/2004-USModelBIT.doc>. The first treaty concluded on the basis of this model was the U.S.-Uruguay Bilateral Investment Treaty that was executed on October 25, 2004, the text of which is at www.ustr.gov.

Turning now to BITs, each one is of course unique. Even where a State works from a model, it is often obliged to modify it in the course of negotiations with its counterpart. Nevertheless, it may be of interest to consider a few examples. The US Model BIT, the current version of which dates from 2004, appears to contain no temporal provisions requiring the application of a continuous nationality rule.⁹⁵ Under Article 1, "national" means a natural person who is a national of the country concerned under specified nationality legislation, while "enterprise" means "any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise". There is no reference to a critical date or dates here. Likewise, "investor of a Party" simply means "a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality". A "covered investment" means, with respect to a Party, "an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter." "Disputing party" means "either the claimant or the respondent", while "claimant" is defined as "an investor of a Party that is a party to an investment dispute with the other Party".

Under the US model BIT, the substantive obligations of the host State are generally defined in relation to "covered investments" or "investors of the other party", with no temporal criteria in relation to nationality. Likewise, in the jurisdictional clauses, there are no express temporal criteria of the kind found in the context of the law of diplomatic protection. There may, however, be an implicit continuous nationality rule, to a limited extent. The substantive obligations are, as explained, owed to an "investor of a Party" or in respect of its "covered investments". This entails the investor being, in effect, a national of his or its State at the time of injury, since otherwise there will have been no breach of the BIT in respect of the investor. But when we come to the dispute settlement provisions, rights of access to tribunals are given to a "disputing party" or "parties", and particularly to a "claimant", who is defined as "an investor of a Party". It could therefore be argued that he or it also has to

⁹⁶ And, of course, the rules of the tribunal given jurisdiction (e.g. ICSID) will also apply.

be a national of the same State Party at the time of bringing the claim, the more so since, by definition, there are only two parties to BITs.⁹⁶ But in any event, there is nothing in the language to suggest that the same nationality has to be held *continuously* between these two points, and still less that a change of nationality subsequent to the institution of proceedings will affect standing.

Though the drafting differs in detail, this also seems to be the case for the 2004 Canadian Model BIT,⁹⁷ as well as the rather more succinct United Kingdom Agreements for the Promotion and Protection of Investments⁹⁸ and their French equivalents.⁹⁹ Likewise, Part III of the ECT, setting out the substantive obligations of the States parties with regard to investment, contains no relevant express temporal criteria, and neither does Article I (7), which defines who or what is an "investor" along familiar lines. The same is true of Article 26, which governs the settlement of disputes between an investor and a Contracting Party. As usual, there is one, very limited, qualification to this statement. Paragraph 7 enables juridical entity investors that have the nationality of one Contracting Party to be treated, because of control by investors of another Contracting Party, as a national of that other. The critical date for determining whether the company was a national of the first State is the date of consent in writing to arbitration, and the critical date for foreign control is "before a dispute between it and that Contracting Party arises". Lastly, and more generally, as with the BITs it is arguable that there are two implicit temporal criteria for all claims under Part III and Article 26: the claimant must have been an "investor", and thus a national of a Contracting Party, at the time of the injury; and he (or his predecessor in title to the claim arising from the breach) must be an investor (and hence a national) of a Contracting Party at the time of bringing suit. But that is all.

Finally, in this survey of IPTs, we come to Chapter 11 of the NAFTA. As with the US and Canadian BITs, there is nothing in the definitions of such concepts as "investor of a Party", "national", "enterprise of a Party"

⁹⁷ www.naftaclaims.com/Other/Canada-ModelFIPA.pdf.

⁹⁸ E.g. the Agreement with Uganda of 24 April 1998, 7 ICSID *Investment Promotion and Protection Treaties* (1999). Note Article 8(2), which provides that a company incorporated or constituted under the law of one country and in which, *before the dispute arises*, nationals or companies of the other State hold a majority of the shares, shall be treated, for the purposes of ICSID, as a company of the other, in accordance with Article 25(2)(b).

⁹⁹ E.g. the agreement with Mexico of 12 November 1998, *ibid*.

¹⁰⁰ Article 1138 and the general definitions in Article 201.

etc. that contains a temporal criterion relevant to the present topic.¹⁰⁰ However, there are probably two implicit ones. First, a number of the substantive obligations are set out in Sub-Chapter A (Articles 1101 to 1114). These typically require a certain standard of treatment to be accorded to “investors of another Party” (or their investments), which implies that they must possess that quality at the time of the breach. Likewise, although express temporal criteria are not specified in Sub-Chapter B on dispute settlement (Articles 1115-1136), the claim must be made by “an investor of a Party”, and presumably the claimant accordingly needs to possess that quality at the time of the claim.¹⁰¹ What is not specified in the NAFTA, even by necessary implication, is whether the nationality must be the *same* on both of these dates. If in *Loewen* the individual and/or corporate claimants had changed their nationality from Canadian to Mexican between the date of the injury and the date of the claim, should this have made a difference? Arguably, not. For if the purpose of the Agreement is to encourage trade and investment between the three countries, and substantial rights are conferred on individuals and corporations in pursuit of that goal, why should it make a difference what their nationality is? At best (though it is unclear), for reasons already discussed it could make a difference if the new State of nationality is the respondent, but not otherwise.

In any case, even if these criteria are implicit, there is nothing in the NAFTA itself to support the extension of the *dies ad quem* beyond the date of registration of the claim. Unless, therefore, such a requirement can be found in the applicable rules of the dispute-settlement mechanisms, it does not exist. As we have seen from the analysis above, of the rules of ICSID and its Additional Facility, there is no such requirement in the case of the former, and probably not in the case of the latter either.¹⁰²

To summarise the position regarding IPTs, in some cases there is a continuous nationality rule, and in other cases not. But even where continuous nationality is required, in no case is there any basis in the treaty for holding that it needs to continue beyond the date of instituting proceedings.

¹⁰¹ Likewise, if a claim is made by an investor on behalf of an enterprise that he or it owns or controls (Article 1117), it is arguable that the investor must own or control it at the date of the claim.

¹⁰² It is unnecessary here to examine the Arbitration Rules of UNCITRAL, which is another possibility envisaged by Chapter XI of NAFTA.

¹⁰³ Indeed, there were also prejudicial remarks about the alleged backing of *Loewen* by Chinese and Japanese banks, and references to Jerry O’Keefe’s war record against the Japanese.

It is against this background that the award in *Loewen* should be considered.

C. The *Loewen* case

Raymond Loewen, a Canadian citizen, was the founder and chief executive officer of, and principal shareholder in, the Loewen Group, Inc., a Canadian corporation ("TLGI"). Its principal United States subsidiary was Loewen Group International, Inc. ("LGII"; both companies were collectively entitled "Loewen" in the arbitration). A suit was commenced in the Mississippi courts against Loewen by Jerry O'Keefe and his son and companies owned by them ("O'Keefe"). It arose out of a commercial dispute between the plaintiffs and the defendants, who were competitors in the funeral home and funeral insurance business in Mississippi. The total value of the contracts in dispute was under US\$ 5 million. The action was heard before Judge Graves (an African-American judge) and a jury, two-thirds of whom were also African-Americans. According to Loewen, the judge repeatedly allowed O'Keefe's attorneys to make extensive irrelevant and highly prejudicial references (i) to Loewen's foreign nationality, which was contrasted to O'Keefe's Mississippi roots;¹⁰³ (ii) to race-based distinctions between the two parties, the suggestion being that whereas O'Keefe did business with both black and white people alike, Loewen's business was with white people only and; (iii) to class-based prejudice, with Jerry O'Keefe being depicted as a small local family businessman whilst Loewen was a foreign plutocrat exploiting poor local people. As a result of a seven-week trial, O'Keefe was awarded \$500 million, including \$75 million damages for emotional distress and \$400 million punitive damages.

The defendants sought to appeal to the Mississippi Supreme Court. However, Mississippi law at the time required an appeal bond for 125 per cent of the judgment as a condition of staying execution on it pending the appeal. Although the bond could be reduced or dispensed with for "good cause", both the trial court and the Supreme Court refused to reduce or dispense with the bond and required Loewen to post a \$625 million bond within seven days in order to pursue an appeal without facing immediate execution of the judgment. According to Loewen, this effectively foreclosed its appeal rights, and it was forced to settle the claim (for \$175 million) "under extreme duress", the day before execution was scheduled to begin.

¹⁰⁴ Para. 54.

Loewen commenced the NAFTA proceedings against the USA under the ICSID Additional Facility, as Canada was not a party to the *ICSID Convention*, though the United States was. The Tribunal comprised Lord Mustill (replacing Mr. Yves Fortier, who resigned in 2001); Judge Abner J. Mikva; and, as Chairman, Sir Anthony Mason. Each of these is a senior and very distinguished former judge who has engaged in arbitration since retirement. Sir Anthony Mason is a former Chief Justice of the High Court (Supreme Court) of Australia. Judge Mikva was Chief Judge on the United States Court of Appeals for the District of Columbia Circuit before becoming White House Counsel from 1994 to 1995. Lord Mustill is a former member of the Appellate Committee of the House of Lords. It is fair to point out, however, that none of them is a specialist public international lawyer, although they will have encountered international law issues from time to time in their work. This is perhaps unfortunate, given that the key issues turned out to concern that discipline. The Final Award was handed down on 26 June 2003, but for reasons which I will indicate in due course, a Supplementary Decision had to be rendered on 13 September 2004.

Although most features of the Award are beyond the scope of the present essay, it will be helpful to outline the salient features briefly so as to put the findings on continuous nationality in context. The great bulk of the 71-page unanimous award is taken up with an account and analysis of the proceedings before Judge Graves. Although (perhaps curiously) the Tribunal did not find that bias on the part of the judge or jury had been established, it "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 similarly for the part of the proceedings concerning the assessment of punitive damages.¹⁰⁴ Indeed, it went so far as to say 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. ... [T]he whole trial and its resultant verdict were clearly improper and discreditable and cannot be square with minimum standards of international law and fair and equitable treatment.¹⁰⁵

¹⁰⁵ Paras. 119 and 137.

The Tribunal's position on the exhaustion of local remedies is one of the features of the decision that has caused the greatest disquiet. It is certainly the case that, in the general international law of diplomatic protection, a State normally must be given the opportunity to put matters right, and the pursuit of local remedies is the way that this can be done. But what is more questionable is whether this is the right position under the NAFTA, which expressly provides a so-called "fork in the road" waiver provision (Article 1121). If the Tribunal was correct, the investor would be forced to unsuccessfully exhaust all of his local remedies *before* he goes to arbitration. But in that case, the waiver of the right to pursue local remedies seems without object. The Tribunal seems to have thought that judicial proceedings are special, and that as such, a State should not be held responsible for the deficiencies of the lower judiciary until it has been given an opportunity to put things right and has failed to do so. Hence, it is only when all available possibilities of recourse to higher courts have been exhausted that a breach of the treaty can be said to have occurred. But the courts are a branch of the State as much as the legislature or the executive; and so, if one adopts the Tribunal's reasoning, it would equally be the case that the United States should not be responsible for the acts of an subordinate *government* official of the State of Mississippi (or of the federal Government) unless higher officials, or a court, failed to put matters right. This outcome would surprise many commentators on the NAFTA, not to mention North American investors. A deeper exploration of these issues by the Tribunal would have been desirable, especially in view of the fact that it was now taking the opposite line from that which it had provisionally taken in 2001.

Of course, Loewen *had* had recourse to the Supreme Court of Mississippi, but after some interlocutory proceedings there had abandoned its appeal and settled the claim, largely (it claimed) due to the refusal of Judge Graves and (ultimately) the State Supreme Court itself to reduce the bonding requirement from \$625 million to \$125 million or to remove it. The Supreme Court had, on a temporary basis, reduced the bond to that amount, but on 24 January 1996 it held that since there had been no abuse of discretion by Judge Graves, it reinstated the requirement of a \$625 million bond with effect from 31 January. The Tribunal doubted the correctness of these decisions, but held that they did not transgress the international law minimum standard of treatment referred to in Article 1105.

¹⁰⁶ Paras. 211-12.

Be that as it may, Loewen was in an extremely difficult position. O'Keefe was threatening execution on all of its assets within seven days, and eventually Loewen, after considering various options, settled the lawsuit. The Tribunal accepted that international law only requires local remedies to be exhausted if they are *effective*. The question therefore boiled down to whether Loewen had any reasonable prospects of a satisfactory outcome if it proceeded further. One possibility canvassed was seeking protection under Chapter 11 of the *US Bankruptcy Code*. Another possibility, at least in theory, was recourse to the federal courts, seeking *certiorari* in the US Supreme Court on the grounds of breach of due process, or collateral review in the district court. The Tribunal noted that, even on the Respondent's constitutional law expert's view, there was at best a reasonable chance or a possibility of success in the federal system; and it also accepted that the mere pursuit of federal remedies could have worsened Loewen's position and reinforced market perceptions about it.¹⁰⁶ But in the end, the Tribunal avoided having to make a decision on these difficult questions of fact and US law. It held that the Claimant had failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to the other options, and in particular the "Supreme Court option."¹⁰⁷ The onus, it held, was on the Claimant to show why it was not practicable to pursue its judicial remedies rather than settle; it had not discharged that burden, and so in those circumstances there had been a failure to exhaust local remedies. Consequently, there had been no violation of customary international law or of NAFTA Article 1105.

One does not need to be an expert in United States law to suggest that the prospects of obtaining a remedy in the seven days before O'Keefe started to execute were rather too remote, as well as commercially hazardous to have been considered reasonable by any tribunal. More to the point, this seems to be the view of a large number of people who are expert in that area. Specifically, it does not seem very likely that the US Supreme Court would have been interested in intervening within such a short period, if at all; furthermore recourse to it, the company was advised, would have prejudiced attempts in Mississippi to get the amount of the bond reduced; bankruptcy reorganisation was obviously not a commercially attractive option; and Loewen had in fact explained in its

¹⁰⁷ Para. 215. It seems that, by 'Supreme Court', the Tribunal was referring to that of the United States rather than that of Mississippi.

¹⁰⁸ As to the affidavits, see e.g. Raymond Loewen's Submission on the US Government's Request for a Supplementary Decision, <http://www.state.gov/documents/organization/24382.pdf>.

pleadings and accompanying witness declarations, as well through as very weighty expert testimony, why settlement had been the only feasible option.¹⁰⁸ And of course, if the Tribunal felt uncertain on this key issue, it could always have asked for more evidence.

What also seems rather unusual is that the Tribunal should have gone out of its way to examine in such detail, and to condemn, the malfeasances of Judge Graves and his jury, if it was going to hold that they were at the end of the day irrelevant to the outcome. The arbitrators were understandably outraged by what had happened (perhaps the more so as former appellate judges), and they went out of their way, at the end of the Award, to explain to the reader why it was that such grossly unfair conduct did not lead to a remedy.¹⁰⁹ One might possibly detect some embarrassment here. It would be tempting, to say that an outcome which so obviously offends one's sense of justice is one that requires especially careful analysis of a sort that was arguably lacking here.

The Tribunal's findings on the exhaustion of local remedies, right or wrong, were sufficient to dispose of the claims, so it is curious that it should have also decided to deal with another objection to competence and jurisdiction. It was one that was only raised in early 2002. TLGI had, in the event, found itself obliged to submit a voluntary petition for relief under Chapter XI of the *US Bankruptcy Code*, and a reorganization plan was approved by the courts of the USA and Canada. Under that plan, TLGI (the parent company) ceased to exist as a business entity. All of its business operations were reorganized as a US corporation (Alderwoods) save that, in the hope of preserving the NAFTA claim, TLGI, immediately prior to going out of business, assigned all of its rights, title and interest to that claim to a newly created Canadian corporation called Nafcanco. The USA filed a supplementary objection, asserting that claimants could not, under the NAFTA, claim against their own State of nationality. In other words, it argued that the rule of continuous nationality applied, and that it applied right through till the final award. The Tribunal agreed.

The Tribunal began by observing that the purpose of NAFTA is to protect *foreign* investors, not a State's own citizens. It perhaps went too far in stating that "it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents."¹¹⁰ Human rights treaties, which IPTs resemble to *some* degree, do just that, as do provisions like Article 25(2)(b) of the *ICSID Convention*, for instance. It is

¹⁰⁹ Paras. 241-42.

¹¹⁰ Para. 223.

certainly true, though, that the drafters of the NAFTA anticipated that claimants would be foreign nationals. However, this begs the question. First of all, the NAFTA Chapter 11, as with all comparable treaties, is not primarily about remedies, but about substantive obligations towards foreigners. All the victims of the alleged denial of justice were foreign nationals. Secondly, though the NAFTA requires the claimant to be a foreign investor at the time of the claim, again the Claimants fitted this description. The question was, therefore, whether, notwithstanding the absence of any express or implied provisions, it was necessary for that nationality to be held continuously.

Now, it is of course possible that, if the proverbial "officious bystander" had asked the parties negotiating the NAFTA whether they were willing to be respondents in arbitral proceedings brought by foreigners who subsequently became their nationals, they would have said "No". However, the answer is not self-evident, for in answering they would have had to take into account the possibility that their own nationals or their assigns would lose their claims on a change of nationality, even though it might be involuntary. Furthermore, even if the States parties *had* been prepared to say that a claimant should not have a claim against his own new State of nationality; that is just one aspect of the alleged rule. Suppose that TLGI had become a Mexican, rather than a US, company. In that case, the motive imputed by the Tribunal to the drafters would not have applied, for that motive concerned only each State's *own* nationals. Yet its pronouncements about the continuous nationality rule and the *dies ad quem* were not confined to late nationals of the respondent State.

The Tribunal rejected Loewen's argument that Articles 1116 and 1117 only required nationality at the date of submission, holding that "those articles deal only with nationality requirements at the *dies a quo*, the beginning date of the claim", and that the Agreement was silent on the *dies ad quem*.¹¹¹ This appears to be a misunderstanding. The *dies a quo* must be the date of the injury. The date of the submission is therefore the *dies ad quem*. That does not, as a matter of logic (and leaving aside interpretation), wholly exclude the possibility that nationality has to continue unchanged beyond that date, but if a *dies ad quem* is (by necessary implication) provided for by the treaty, then there is no lacuna that needs to be filled from (alleged)

¹¹¹ Para. 226.

¹¹² The Tribunal was right, on the other hand, in holding that the recent decision in the *Mondev* case did not help the Claimants. That was a case where the *investment*, not the investor, had ceased to exist, but it was held that this would not be a bar to a NAFTA claim. Case ARB(AF)/99/2; <http://www.state.gov/documents/organization/14442.pdf>; 42 ILM (2003), 85.

customary law, and the onus must be on those who argue that the eligibility criterion continues beyond submission of the claim.¹¹²

In support of *Loewen*, it had been argued that the *ICSID Convention* and the many BITs represented customary international law, and that they did not require continuous nationality. The foregoing analysis suggests that (though one cannot over-generalise about BITs) the *latter* proposition was true, at least to the extent that it was not necessary for the national link to continue beyond the registration of the claim. As to the former proposition, Canada and Mexico intervened in the proceedings mainly to combat the argument that the *ICSID Convention* (not to mention the hundreds of BITs) represented customary law.¹¹³ In this they were probably right,¹¹⁴ at any rate as a *general* proposition: the content of the norms (and particularly the substantive provisions) of the world's 2200 BITs is in many respects too inconsistent to represent a settled practice, and anyway there is no reason to assume without more that a treaty either declares or helps create customary law.¹¹⁵ What the argument misses, however, is that these instruments do show that there is no reason to think that the customary continuous nationality rule (whatever it may be) necessarily carries over to IPTs, still less that (whatever may or may not be the position in customary law) it need be subject to an extensive interpretation prolonging the *dies ad quem* to the date of the award. The Tribunal's attempt to use these and other treaties as the basis for an *a contrario* argument to the effect that, because the NAFTA does not contain specific provisions modifying the continuous nationality rule, the (supposed) customary rule must apply, might have been more convincing if it had satisfactorily established that the extended version of the rule *was* an established principle of customary law – which, for the reasons provided above, it could not and in any event did not convincingly do. Nor did it explain why a rule developed in one context (diplomatic protection) necessarily carried over into another area (investor claims). It did not even cite a single authority in support of any of its propositions.

The Tribunal conceded that a reader of the award might find it very surprising that a valid claim, vested in a claimant and for which

¹¹³ Their interest in maintaining this position, and in particular in not finding themselves bound by the content of the *ICSID Convention*, to which neither is a party, obviously transcended the particular issues in the instant case.

¹¹⁴ *Pace* Gaillard, 2004 JDI 232. He does, however, tellingly underline the anomaly that, in most *ICSID* arbitrations the extensive version of continuous nationality rule (as understood by this Tribunal) would not apply, but in others it would – if *Loewen* is followed.

¹¹⁵ See above, note 38 and accompanying text.

proceedings had validly been instituted, could suddenly disappear. "The private lawyer might well exclaim that the uncovenanted benefit to the defendant would produce a result so unjust that it could be sustained only by irrefutable logic or compelling precedent, and none exists. The spontaneous disappearance of a vested cause of action must be the rarest of incidents, and no warrant has been shown for it in the present context."¹¹⁹ It went on, however, to reject the supposed analogy: public international law is different from private law and the rights in question, and the processes by which they are vindicated, are very different. With respect, to say that international law is different is simply a statement of the obvious; the argument about justice is left untouched. It is true that in the ultimate analysis "the words of Chapter Eleven, read in the context of the Treaty as a whole, and of the purpose which it sets out to achieve," is where the answer should be sought. If the Treaty, interpreted according to this method (which is that stipulated in Article 31 of the *Vienna Convention on the Law of Treaties*), led to the conclusion that the Tribunal reached, then one can agree that this would have been the end of the matter; but if it was silent, as the arbitrators had already held it was,¹¹⁶ then the argument from justice was arguably very relevant. Moreover, the provisions of the NAFTA did actually provide some guidance. Its provisions (by their language or necessary implication) specify both a *dies a quo* (that of the injury) and a *dies ad quem* (that of registration of the claim). The object and purpose of the Agreement as a whole is to increase trade and investment between the three States, and that of Chapter 11 is to encourage investment by providing investors with a more effective system of protection than the old State-to-State system afforded. There was no warrant for simply assuming without further exploration that it was part of the object and purpose of Chapter 11 that late nationals could not continue to sue their State of nationality. And be that as it may, it is very hard to see what object and purpose of the NAFTA would prohibit the continuation of a suit already commenced if the new State of nationality was not the respondent but another State; yet the Tribunal's extensive (i.e. exclusionary) interpretation of the eligibility criterion was expressed in terms that would apply to such cases too.

¹¹⁹ Para. 233.

¹¹⁶ At para. 232. Both parties had made substantial efforts to interpret Chapter 11 in a way that supported their case. The Tribunal did not really do justice to these arguments. It has to be said, though, that the United States' argument, that customary law had in any event to be applied by virtue of Article 1131(1) (which enjoins tribunals to apply "this Agreement and applicable rules of international law") begged the question whether the rules of customary international law *were* applicable. Plainly, they would have to give way to any provisions (express or implied) of the Agreement itself.

When Article 31(3)(c) of the *Vienna Convention* provides for account to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties", this is simply an additional means of interpretation, and not the only or the principal one. Moreover, for this sub-paragraph to be applicable, first, the rules have to exist; secondly, they must be relevant; and thirdly, any such relevant rules can emanate from treaties as well as from custom, since we are talking about *background*. As argued above, it was far from clear that the content of the customary rule was what the Tribunal held it to be; it was far from clear why the customary rule should carry over into IPTs; and finally, a study of the comparable treaties suggests that there is nothing in the content or nature of IPTs (of which the NAFTA is one) that necessitates an extended form of the continuous nationality rule.

Apparently still troubled by the injustice of the outcome, the Tribunal alluded to the fact that the bankruptcy and change of nationality had been the result of the Mississippi litigation.¹¹⁷ It conceded that a domestic court would certainly take such circumstances into account in assessing damages. "But this is an international tribunal whose jurisdiction stems from and is limited to the words of the NAFTA treaty". True, but there are no words there (even on the Tribunal's own analysis) that mandated the solution it arrived at.

Regardless of whether the Tribunal was right in its conclusion as to the applicability of an extended version of the continuous nationality rule to the claims of TLGI, it was still confronted with the fact that the NAFTA claim had been assigned to Nafcanco, a Canadian company. The Claimant was wrong to rely on Article 1109 of the Agreement; which concerns the free transferability of things related to the investment, such as profits, and not to the transferability of the claim itself. As far as the Tribunal should have been concerned, the Agreement is silent on this subject.¹¹⁸ Arguably, in such cases, the object of the Agreement in protecting investors against unfair and illegal treatment, and in providing them with a remedy of their own, should have militated in favour of respecting the assignment. And the instinctive reaction of the private lawyer, to which allusion had already been made, might have also come in here: assignment of claims is certainly known to domestic law, and also to international law. If this was a way of avoiding a great injustice, what was wrong with it? The arbitrators, however, thought

¹¹⁷ Para. 234.

that this was merely a transparent device, and seemingly irritated by it, observed tartly:

All of the assets and business of TLGI have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation. Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding.¹¹⁹

It was also unimpressed by the fact that TLGI formally continued to exist, since its charter survived: this would be to place form above substance. It denied that it was piercing the corporate veil by so finding. It is interesting to note that in a subsequent ICSID case, *Tokios Tokelés v. Ukraine*, another arbitral tribunal said that:

Although the *Loewen* tribunal denied that it pierced the claimant's corporate veil, the tribunal did exactly that. Indeed, the tribunal could not have concluded that the nationality of the claimant had changed from Canadian to US origin without piercing the claimant's corporate veil. Although one may debate whether veil piercing was justified in that case, the *Loewen* decision does not clarify the jurisprudence of veil piercing because the tribunal did not admit to, much less explain its reasons for, piercing the claimant's corporate veil.¹²⁰

Even this finding did not wholly dispose of the matter, however, because Raymond Loewen, who was also a claimant, had retained his Canadian nationality. The United States had objected that he no longer had control over his stock at the commencement of the proceedings. The Tribunal

¹¹⁸ Article 1136(2) prohibits the respondent from relying on the fact that the claimant has already been compensated under a contract of insurance or guarantee; but this is not even subrogation, let alone assignment.

Moreover, Article 1113(2) provides a mechanism for the NAFTA Parties themselves to deny the benefits of the Chapter to "to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized." There is no evidence, however, that the United States evoked its rights under this provision to deny benefits to Loewen/Alderwoods flowing from the transfer of the claim to Nafcanco.

¹¹⁹ Para. 237.

had allowed him to continue in the proceedings in order to determine whether he in fact continued to hold any stock. It now found that "No evidence was adduced to establish his interests and he certainly was not a party in interest at the time of the reorganization of TLGI".¹²¹ It accordingly found that it lacked jurisdiction over his claim, too.

Without going into evidentiary questions, this seems an extraordinary piece of reasoning, with respect. Loewen had started off as the controlling shareholder in TLGI. As a result of the misdemeanours of the Mississippi court, he had lost control of his stock at some point, possibly as early as the beginning of proceedings, and in any case by the time of the corporate reorganization. Suppose that, instead of judicial malfeasance, he had lost his stock following illegitimate governmental interference with his business, contrary to the substantive provisions of the Agreement. Can there be any doubt that he would have retained his right to bring proceedings to redress this wrong? Is this not especially so given that Article 1138 defines an "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, makes *or has made* an investment"? The result could be explained only on the assumption that the Tribunal's unexpressed reasoning was that, if he did not have control of the enterprise concerned at relevant time, he was not eligible to bring a claim on its behalf under Article 1117 of the NAFTA. If that was indeed the reason, then it should have been necessary to establish what was the "relevant time" for determining control, which the Tribunal certainly did not do. And in any case, what of Mr. Loewen's claims as an investor in his own right, under Article 1116?

The dismissal of the claims "in their entirety" might have seemed the end of the matter, but some six weeks later the Respondent itself found itself compelled to make a rather embarrassing request for a Supplementary Decision.¹²² Raymond Loewen had not only claimed as "an investor of a Party" with a controlling interest in LGII under Article 1117 of the NAFTA; he had also claimed on his own behalf under Article 1116. But the Tribunal, both in reciting the parties in paragraph 9 of its Award, and in the final *dispositif* in paragraph 241, neglected to mention

¹²⁰ Case ARB/02/18, Decision on Jurisdiction of 29 April 2004, para. 65. But cf. also the decision of another ICSID tribunal that the Centre could not acquire jurisdiction over a claim by the national of a non-party to the Convention by means of an assignment of the claim to the national of a State which was a party: Case ARB/00/2, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*.

¹²¹ Para. 239.

his Article 1116 claims. Hence, although the United States asserted that the logic of the Award extended to those claims too, it felt compelled to request clarification. It does not seem entirely unreasonable to surmise that the Tribunal may have overlooked Mr. Loewen's Article 1116 claims, not only because they were not mentioned, but also because, if they were covered, it was an extraordinary result that a person could lose his property by means of a gross miscarriage of justice without obtaining redress under the NAFTA.

The parties having been authorized to present arguments on this matter, Raymond Loewen submitted that the finding in paragraphs 215-217 of the Award (that it had not been proved that further judicial recourse was unlikely to be effective and that settlement of the O'Keefe claim was the only practical option open) was *obiter* and plainly wrong. Why it was *obiter* was not clearly explained; perhaps he took the decision on continuous nationality as the *ratio decidendi*, and the decision on local remedies as *obiter*. But the reverse might equally have been the case; or both elements might be regarded as alternative or cumulative *rationes decidendi*. So far as concerned the substantive point, he claimed that the Tribunal had not only overlooked his Article 1116 claim; it had also plainly overlooked the affidavit evidence as to why the Claimants had been advised that further judicial recourse was pointless. At first sight this looks like a tactical error. The Tribunal had shown that it was aware of the issue of fact, and had itself referred to some of the expert evidence, if not the affidavits. It might, therefore, have simply considered the evidence insufficiently convincing. And even if it had overlooked some important pieces of evidence, experience has shown that, human nature being what it is, arbitrators tend to resist admitting that they made a mistake, and will likely deny or rationalise it. However, his advisors may have judged that this was the only course that offered any prospects, however remote, of success. Even if he could not fall foul of the continuous nationality rule in respect of his Article 1116 claim, and even if he could show that he had sufficient interest to bring such a claim, he would still be defeated by the exhaustion of local remedies finding, unless he could get it reversed. And since the rules of the Additional Facility do not allow for revision (save for clerical, arithmetical or similar errors), this was his only chance.

The United States of course did not fail to point out that what Loewen was seeking was not within the rules.¹²³ Furthermore, even if the Tribunal

¹²² <http://www.state.gov/documents/organization/23325.pdf>.

had failed expressly to deal with his Article 1116 claim, it was covered by the logic of the Award, it said.

In its Decision of 13 September 2004 on the Request for a Supplementary Decision the Tribunal noted that, although it had not mentioned Mr. Loewen's Article 1116 claim explicitly, it was necessarily implied in the dismissal of the claims "in their entirety"¹²⁴. It did not accept that its pronouncements were *obiter*, and agreed with the United States that reconsideration was not permissible under the rules. There was no logical basis for distinguishing the rejection of the other claims for non-exhaustion of local remedies from this one. This was a sufficient basis for refusing the Request, but the panel did not abstain from one further observation (which in the context of the Request must have been itself *obiter*). The Tribunal had not overlooked the evidence as to the reasons for not exhausting local remedies, it said; it had simply held it insufficient, and so the Claimant had not satisfied his burden of proof.

D. Conclusion

On any view, *Loewen* presents a sorry tale. Gross judicial misfeasance, admitted and indeed stressed by all three arbitrators, went without redress. The reason given was that the claimants had not exhausted local remedies; but the legal justification for requiring such exhaustion in the context of the NAFTA needed, perhaps, to have been more thoroughly and cogently reasoned than it was. There is also a significant question mark hanging over the Tribunal's conclusion that, on the facts, the claimants had failed to establish that it was not reasonably practicable for them to take further legal steps in the courts. Be that as it may, the decision upholding this objection to jurisdiction was dispositive of the case, and it was therefore inconsistent with the principle of judicial economy for the Tribunal to have gone on to consider other objections based on the continuous nationality rule. And having entered into this domain, it has to be said, with respect, that the panel did not make a particularly impressive job of it. No authority was cited, and unsupported assertions were made.

The assertion that there is a rule of customary international law requiring continuous nationality up to the time of the award or judgment is in fact unsupported by sufficient authority, and there is authority, as well as

¹²³ <http://www.state.gov/documents/organization/27764.pdf>.

¹²⁴ <http://www.state.gov/documents/organization/36260.pdf>

arguments of principle, against it. Furthermore, the argument that, because the NAFTA contained no express provisions on the subject, the alleged customary rule had to be imported, was contrary to well-established principles of treaty interpretation. The correct application of those principles would not have led to the conclusion that continuous nationality up to the date of award was required by the NAFTA or the ICSID Additional Facility. Whilst it might perhaps have been possible to construct a persuasive argument that, whatever the general position, suits were not allowed under the NAFTA by late nationals against their new country of nationality, even if the change occurred after proceedings had been commenced, this would have required much more detailed justification than the Tribunal thought it appropriate to provide.

The dismissal of the Canadian assignee of the Canadian company's claims, Nafcanco, was perhaps rather too summary. Another Canadian claimant whose nationality had remained unchanged, and who could not be dismissed in this way, was Raymond Loewen himself. The Tribunal's rejection of his claims on the ground that he had not proved that he still had a controlling interest in his company may or may not have been warranted on the facts; but again, more detailed justification would have been appropriate. In particular, given that he had possessed a controlling interest when the injury occurred, the arbitrators should have specified until what point he had to retain that control, and why. Furthermore, its omission to deal in any express manner with the claims he had brought in his own name under Article 1116 (as opposed to Article 1117) necessitated a further round of argument and decision, no doubt embarrassing both for the Respondent and for the Tribunal.

Turning from the fate of an individual and his companies to the decision's effect on the law, and specifically on the question of continuous nationality, it has to be said that the contribution has not been helpful. Customary law on this question, despite the confident tone of *Oppenheim*, has never been entirely settled on the question of whether nationality has to continue right up to the date of the award or judgment. The more so in recent times. And the creation of a large network of IPTs has introduced a new factor into the equation, even if each treaty has to be construed in its own terms. Through its unsatisfactory handling of these questions, it seems to me, with great respect, that the Tribunal has muddied the waters still further. If this were an average tribunal, it might not matter so much. But the very eminence of these arbitrators threatens to exacerbate the problem and impede the clarification and development of this branch of the law.

What effects the decision may have on confidence in international arbitration generally, and the NAFTA arbitration in particular, are matters which, happily, are beyond the scope of this paper.

