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RIVISTA DELL'ARBITRATO

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II) INTERNAZIONALE STRANIERA

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INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES — North American Free Trade Agreement (NAFTA); arbitri: Sir A. Mason Pres., Lord Mustill, Judge A. J. Mikva; lodo finale del 26 giugno 2003, caso n. ARB[AF]/98/3; nella controversia tra *Loewen Group, Inc. and Raymond L. Loewen c. Stati Uniti d'America*.

Capitolo 11 NAFTA - sentenza del giudice interno di condanna al risarcimento danni - Danni punitivi - Trattamento nazionale - Espropriazione senza indennizzo - Diversità di cittadinanza - Legittimazione ad avanzare richieste sulla base del NAFTA.

Una sentenza di condanna al risarcimento di danni esorbitanti può costituire una misura governativa discriminatoria nei confronti di un investitore privato. L'esperimento del procedimento arbitrale previsto dal NAFTA è condizionato al previo esaurimento dei ricorsi interni da parte dello straniero nello Stato ospitante l'investimento. La diversità di cittadinanza dell'investitore deve sussistere fino all'esaurimento del procedimento arbitrale internazionale.

CENNI DI FATTO. — La controversia in esame trae origine dal risultato di una precedente disputa tra la società Loewen, filiale operativa nello Stato del Mississippi di un gruppo di società con *holding* canadese, attivo in Nordamerica nel settore delle pompe funebri ed un imprenditore dello stesso ramo, il Sig. O'Keefe. Quest'ultimo, cittadino statunitense domiciliato in Mississippi, aveva citato dinanzi al giudice nazionale, la società Loewen per l'inadempimento di alcuni contratti e per l'aggressiva concorrenza sleale esercitata, da quest'ultima, nel mercato funerario. Il giudice del Mississippi aveva condannato la Loewen al risarcimento di 500 milioni di dollari statunitensi, dei quali 400 milioni costituivano danni punitivi (« *punitive damages* »). Per poter ricorrere in appello, secondo il diritto del Mississippi, la Loewen doveva depositare una cauzione (c.d. « *appeal bond* ») — suscettibile di riduzione giudiziale discrezionale — pari al 125% della somma risultante dalla condanna in primo grado (ossia 625 milioni di dollari) entro la settimana seguente alla pronuncia. Poiché una cauzione di tale entità avrebbe esposto la Loewen al rischio fallimentare, quest'ultima si era trovata costretta ad accettare una transazione del valore di 175 milioni di dollari. Successivamente, Loewen inizia il procedimento arbitrale contro il governo statunitense lamentando una violazione del Capitolo 11

del NAFTA. Il collegio arbitrale, costituito conformemente alle norme ICSID, in un lodo parziale, rigetta l'eccezione di incompetenza proposta dal governo statunitense e, tramite il lodo in commento, si pronuncia sul merito della controversia.

MOTIVI DELLA DECISIONE. — (*Omissis*).

VII. THE NATURE OF CLAIMANT'S CLAIM.

39. Claimants' case is that the verdict for \$500,000,000 and the decisions refusing to relax the bonding requirements are « measures adopted or maintained by a Party » relating to:

- a) investors of another Party;
- b) within the meaning of NAFTA, Article 1101.1.

Claimants argue that:

- 1) the trial court, by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, violated Article 1102 of NAFTA which bars discrimination against foreign investors and their investments;
- 2) the discrimination tainted the inexplicably large verdict;
- 3) the trial court, by the way in which it conducted the trial, in particular by its conduct of the *voir dire* and its irregular reformation of the initial jury verdict for \$260,000,000, by permitting extensive nationality-based, racial and class-based testimony and counsel comments, violated Article 1105 of NAFTA which imposes a minimum standard of treatment for investments of foreign investors, including a duty of « full protection and security » and a right to « fair and equitable treatment » of foreign investors;
- 4) the excessive verdict and judgment (even apart from the discrimination) violated Article 1105;
- 5) the Mississippi courts' arbitrary application of the bonding requirement violated Article 1105; and
- 6) the discriminatory conduct, the excessive verdict, the denial of Loewen's right to appeal and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated appropriation of investments of foreign investors.

Claimants allege that Respondent is liable for Mississippi's NAFTA breaches under Article 105, which requires that the Parties to NAFTA shall ensure that all necessary measures are taken to give effect to the provisions of the Agreement, including their observance by State and provincial governments. Claimants also allege that, by tolerating the misconduct which occurred during the O'Keefe litigation, Respondent directly breached Article 1105, which imposes affirmative duties on Respondent to provide « full protection and security » to investments of foreign investors, including « full protection and security » against third-party misconduct.

VIII. THE GROUNDS OF RESPONDENT'S OBJECTION TO COMPETENCE AND JURISDICTION.

41. By its Memorial on Competence and Jurisdiction, Respondent objected to the competence and jurisdiction of this Tribunal on the following grounds:

- 1) the claim is not arbitrable because the judgments of domestic courts in purely private disputes are not « measures adopted or maintained by a Party » within the scope of NAFTA Chapter Eleven;

2) the Mississippi court judgments complained of are not « measures adopted or maintained by a Party » and cannot give rise to a breach of Chapter Eleven as a matter of law because they were not final acts of the United States judicial system;

3) a private agreement to settle a litigation matter out of court is not a government « measure » within the scope of NAFTA Chapter Eleven;

4) the Mississippi trial court's alleged failure to protect against the alien-based, racial and class-based references cannot be a « measure » because Loewen never objected to such references during the trial; and

5) Raymond Loewen's Article 1117 claims should be dismissed because he does not « own or control » the enterprise at issue.

(Omissis).

X. THE TRIAL.

54. Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law. Whether this conclusion results in a violation of Article 1105 depends upon the resolution of Respondent's submissions still to be considered, in particular the submission that State responsibility arises only when final action is taken by the State's judicial system as a whole.

55. In the succeeding paragraphs we set out the reasons for the conclusion stated in para. 54 above as well as the reasons why we conclude that, in other respects, Claimants' case must be rejected.

(Omissis).

XVII. EVALUATION OF THE TRIAL.

119. 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.

120. The trial before Judge Graves lasted some 50 days. During such a protracted period of adversarial behavior, mistakes and errors will occur; even the most even-handed judge will not be able to entirely preclude appeals to the jury's passions. Appellate courts in the United States, and indeed, in most countries in the world, have recognized that « perfect trials » are not to be expected. Doctrines of harmless error, invited error, and waiver of the right to object to prejudicial conduct are commonly invoked to sustain the results of less than perfect trials. Clearly, an arbitral tribunal applying the provisions of a treaty and of international law is even more constrained to avoid nitpicking a trial record and the rulings of a trial judge. Even when all of those limitations are applied most rigorously, the trial and its \$500,000,000 verdict cannot be countenanced.

121. Respondent obviously could not defend some of the lawyer conduct and trial judge inadequacy previously referred to. Instead it argued that some of the appellate doctrines mentioned above precluded the tribunal from relying on specific flaws that were the most egregious. We need not resolve the domestic procedural

disputes which arose at the trial such as the question whether Loewen was entitled to the particular instruction which it sought as to bias. The question is whether the whole trial, and its resultant verdict, satisfied minimum standards of international law, or the « fair and equitable treatment and full protection and security » that the Contracting States pledged in Article 1105 of NAFTA. This question is addressed in paras. 124-137.

122. If a single instance of the unfair treatment that was accorded Loewen at the trial level need be cited, it would be the manner in which the large and excessive verdict was constructed by the judge and the jury. As has previously been detailed, the jury originally came in with a verdict of \$260,000,000, which the foreman indicated included compensatory damages of \$100,000,000 and punitive damages of \$160,000,000. Since Mississippi law required a separate prove up of punitive damages (which had not occurred), the judge accepted the \$100,000,000 compensatory damages portion of the verdict, but conducted a further, and minimal, hearing of evidence on the punitive damages question. The jury subsequently came back with the much enhanced punitive damages award of \$400,000,000, making the total verdict of \$500,000,000 the largest in Mississippi history. Whether the jury interpreted Judge Graves' procedure as an invitation to increase the verdict or not, the results compounded the excessiveness of the original verdict. The methods employed by the jury and countenanced by the judge were the antithesis of due process. But we repeat this is only one instance of many.

123. In reaching the conclusion stated in the previous paragraph, we take it to be the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice. In the United States and in other jurisdictions, advocacy which tends to create an atmosphere of hostility to a party because it appeals to sectional or local prejudice, has been consistently condemned and is a ground for holding that there has been a mistrial, at least where the conduct amounts to an irreparable injustice (*New York Central R.R. Co. v Johnson* 279 US 310, 319 (1929); *Le Blanc v American Honda Motor Co. Inc.* 688 A 2d 556, 559). In *Walt Disney World Co. v Blalock* 640 So 2d 1156, 1158, a new trial was ordered where closing argument was pervaded with inflammatory comment and personal opinion of counsel, although the offensive comments were not objected to. See also *Whitehead v. Food Max of Mississippi Inc.* 163 F 3d 265, 276-278 (where a new trial was ordered on the ground that plaintiffs' counsel repeatedly « reminded the jury that [defendant] Kmart is a national... corporation... [and] contrasted that with » his and his client's status as a Mississippi resident, despite the fact that most of the objectionable comments were not objected to); *Norma v Gloria Farms Inc.* 668 So 2d 1016, 1021, 1023 (new trial ordered where defense counsel in closing remarks appealed to jurors' self-interest, despite plaintiff's counsel's failure to object). In such circumstances the trial judge comes under an affirmative duty to prevent improper tactics which will result in an unfair trial (*Pappas v Middle Earth Condominium Association* 963 F 2d 534 539, 540; *Koufakis v Carvel* 425 F 2d 892, 900).

(Omissis).

XVIII. NAFTA ARTICLE 1105.

124. Article 1105 which is headed « Minimum Standard of Treatment » provides: « 1. Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security. » The precise content of this provision, particularly the meaning of the reference to « international law » and the effect of the inclusory clause has been the subject of controversy.

125. On July 31, 2001, the Free Trade Commission adopted an interpretation of Article 1105(1). The Commission's interpretation is in these terms:

« *Minimum Standard of Treatment in Accordance with International Law*

1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

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

126. An interpretation issued by the Commission is binding on the Tribunal by virtue of Article 1131(2).

127. Although Claimants, in their written materials, submitted that the Commission's interpretation adopted on July 31, 2001 went beyond interpretation and amounted to an unauthorized amendment to NAFTA, Claimants did not maintain that submission at the oral hearing. The oral argument presented by Mr Cowper QC on behalf of Claimants was consistent with the Commission's interpretation of Article 1105(1). Mr Cowper QC submitted that, accepting that Article 1105(1) prescribes the customary international law standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of an investor of another Party, the treatment of Loewen by the Mississippi courts violated that minimum standard.

128. The effect of the Commission's interpretation is that « fair and equitable treatment » and « full protection and security » are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in *Metalclad Corp v United Mexican States* ICSID Case No. ARB(AF)/97/1 (Aug 30, 2000), *S.D. Myers, Inc. v Government of Canada* (Nov 13, 2000) and *Pope & Talbot, Inc. v. Canada*, Award on the Merits, Phase 2, (Apr 10, 2001) may have expressed contrary views, those views must be disregarded.

129. It is not in dispute between the parties that customary international law is concerned with denials of justice in litigation between private parties. Indeed, Respondent's expert, Professor Greenwood QC, acknowledges that customary international law imposes on States an obligation « to maintain and make available to aliens, a fair and effective system of justice » (Second Opinion, para. 79).

130. Respondent submits that, in conformity with the accepted standards of customary international law, it is for Loewen to establish that the decisions of the

Mississippi courts constituted a manifest injustice. Professor Greenwood states in his Second Opinion: the awards and texts make clear that error on the part of the national court is not enough, what is required is « manifest injustice » or « gross unfairness » (Garner, « International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice », 10 BYIL (1929), p. 181 at p. 183), « flagrant and inexcusable violation » (Arechaga, [« International Law in the Past Third of a Century », 159 « Recueil des Cours » (1978) at p. 282]) or « palpable violation » in which « bad faith not judicial error seems to be the heart of the matter » (O'Connell, International Law, 2nd ed, 1970) p. 498). As Baxter and Sohn put it (in the Commentary to their Draft Convention on the Responsibility of States for Injuries to Aliens) « the alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice ».

131. In *Pope & Talbot Inc. v Canada*, Award in respect of damages, May 31, 2002 a NAFTA Tribunal considered the effect of the Interpretation of July 31, 2001. The Tribunal concluded (para. 62 of its Award) that the content of custom in international law is now represented by more than 1800 bilateral investment treaties which have been negotiated. Nevertheless the Tribunal did not find it necessary to go beyond the formulation by the International Court of Justice in *Eletronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 76: « Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety. »

132. Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.

133. In the words of the NAFTA Tribunal in *Mondev International Ltd v United States of America* ICSID Case No. ARB (AF)/99/2, Award dated October 11, 2002, « the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to “unfair and inequitable treatment” ».

134. If that question be answered in the affirmative, then a breach of Article 1105 is established. Whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.

135. International law does, however, attach special importance to discriminatory violations of municipal law (Harvard Law School, Research in International Law, Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners (« 1929 Draft Convention ») American Journal of International Law 133, 174 (Special Supp. 1929) (« a judgment [which] is manifestly unjust, especially if it has been inspired by ill-will towards foreigners as such or as citizens of a particular states »); Adede, A Fresh Look at the Meaning of Denial of Justice under International Law, XIV Can YB

International Law 91 (« a... decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant »). A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.

136. In the present case, the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.

137. In the light of the conclusions reached in paras. 119-123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. However, because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 is established. We address this question in paras. 142-157 (inclusive), 165-171 (inclusive) and 207-217 (inclusive).

(Omissis).

XX. NAFTA ARTICLE 1102.

139. Article 1102 bars discrimination against foreign investors and their investments. Article 1102(1) and (2) requires each Party to accord investors and investments of another Party « treatment no less favourable than it accords in like circumstances to its own investors » or their investments. With respect to a state or province Article 1102(3) requires « treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms part. » The effect of these provisions, as Respondent's expert Professor Bilder states, is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself. We agree also with Professor Bilder when he says that Article 1102 is direct only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial.

140. A critical problem in the application of Article 1102 to the facts of this case is that we do not have an example of « the most favourable treatment accorded, in like circumstances » by a Mississippi court to investors and investments of the United States. Claimants submit that the treatment accorded O'Keefe is an appropriate comparator, that Loewen and O'Keefe were « in like circumstances » because they were litigants in the same case. But their circumstances as litigants were very different and it is not possible to apply Article 1102(3) by reference to the treatment accorded to O'Keefe. What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made.

XXI. NAFTA ARTICLE 1110.

141. Claimants' reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in

violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.

XXII. THE NECESSITY FOR FINALITY OF ACTION ON THE PART OF THE STATE'S LEGAL SYSTEM.

142. Having reached the conclusion that the trial and the verdict were improper and cannot be squared with minimum standards of fair international law and fair and equitable treatment, we must now consider the question whether, in the light of subsequent proceedings, the trial and the verdict alone or in combination with the subsequent proceedings amounted to an international wrong. We take up at this point the Respondent's second ground of objection to competence and jurisdiction which covers much of the same ground and was not resolved in the Tribunal's Decision of January 5, 2001.

143. Respondent argues that the expression « measures adopted or maintained by a Party » must be understood in the light of the principle of customary international law that, when a claim of injury is based upon judicial action in a particular case, State responsibility only arises when there is final action by the State's judicial system as a whole. This proposition is based on the notion that judicial action is a single action from beginning to end so that the State has not spoken until all appeals have been exhausted. In other words, the State is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort. Respondent distinguishes this substantive requirement of customary international law for a final non-appealable judicial action, when an international claim is brought to challenge judicial action as a breach of international law, from international law's procedural requirement of exhaustion of local remedies (« the local remedies rule »).

144. Respondent submits that there is nothing to show that in Chapter Eleven the Parties intended to derogate from this substantive rule of international law when judicial action is the basis of the claim for violation of NAFTA. Respondent argues that the terms of Article 1101, « adopted or maintained by a Party », incorporate the substantive rule of international law and require finality of action. Only those judicial decisions that have been accepted or upheld by the judicial system as a whole, after all available appeals have been exhausted, so the argument runs, can be said to possess that degree of finality that justifies the description « adopted or maintained ».

145. Claimants' response to this argument is that Article 1121(1)(b) of NAFTA requires an arbitral claimant to waive its local remedies, not exhaust them. This Article authorizes the filing of a Chapter Eleven claim only if « the investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116... ». Claimants submit, first, that « the Article eliminates the necessity to exhaust local remedies provided by the host country's administrative or judicial courts ». (B. Sepulveda Amor, *International Law and International Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 *Houston Journal of International Law* 565 at 574 (1997)). Claimants submit, secondly, that the so-called substantive principle of finality is no different from the local remedies rule and that international tribunals have reviewed the decisions of

inferior municipal courts where the exhaustion requirement has been waived or is otherwise inapplicable.

146. Respondent argues that Article 1121(2)(b) is not a waiver provision and that it does not waive the local remedies rule or for that matter the requirement that the judicial process be pursued to the highest court where a judicial act constitutes the breach of international law. Respondent appears to acknowledge, however, that the Article relaxes the local remedies rule to a partial but limited extent, without defining or otherwise indicating what that extent is or may be.

147. As Professor Greenwood points out in his First Opinion, usually there are three separate issues to be considered:

- a) whether there is an act which is imputable to the respondent State;
- b) whether that act is contrary to international law; and
- c) whether the respondent State can be held responsible for that act in international proceedings until local remedies have been exhausted.

148. In this case, we are not concerned with the question whether there is an act which is imputable to Respondent. A decision of a court of a State is imputable to the State because the court is an organ of the State. This proposition was acknowledged in the Tribunal's Decision of January 5, 2001. We are, of course, concerned with the question whether the relevant decisions of the Mississippi courts constitute violations of international law because this is not a case where the alleged violation of international law is constituted by a non judicial act or decision.

149. The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission (ILC) Draft Articles on State Responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law (Text provisionally adopted on 31 May, 2001, UN Doc. A/CN.4/L.602. Article 44 is identical to Article 45 of the 2000 draft referred to in the Decision of January 5, 2001, para. 67). Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the United Kingdom) and was not followed in *Eletronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at para. 50. See Second Opinion of Professor Greenwood, paras. 52-54).

150. Although Loewen submits, in accordance with an Opinion of Sir Robert Jennings, that the local remedies rule is essentially confined to cases of diplomatic protection, that view does not coincide with that of other commentators. See Garcia-Amador, Sohn and Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974) pp. 143, 129-132; see also Garcia-Amador's Draft Articles on State Responsibility prepared in 1960 for the International Law Commission, noting his comment at p. 79: « Article 21 of the draft sets forth the basis of a procedure which would enable the alien himself, once local remedies have been exhausted, to submit an international claim to obtain reparation for injury suffered by him. » See also OECD Draft Convention on the Protection of Foreign Property, 1967, Article 7(b) and Commentary (OECD Publication No. 23081 (1967) pp. 36-41. Professor James Crawford SC, rapporteur on State Responsibil-

ity of the ILC has stated « the exhaustion of local remedies rule is not limited to diplomatic protection » (UN Doc. A/CN 4/517, p. 33).

151. Professor Greenwood in his First Opinion refers to « the principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice ». The principle is supported by a number of decisions of the United States-Mexican Claims Tribunal (*Jennings, Laughland & Co v Mexico* (Case No. 374, Moore, *International Arbitrations* (1898) p. 3135); *Green v Mexico* (*ibid*, at p. 3139); *Burn v Mexico* (*ibid*, at 3140); *The Ada* (*ibid*, at 3143); *Smith v Mexico* (*ibid* at 3146); *Blumhardt v Mexico* (*ibid* at 3146); *The Mechanic (Corwin v Venezuela)* (*ibid* 3210 at 3218). In the first of these decisions, Umpire Thornton observed (at p. 3136): « The Umpire does not conceive that any government can thus be made responsible for the conduct of a judicial officer when no attempt has been made to obtain justice from a higher court. »

152. Text writers also give support to the principle (Oppenheim's *International Law*, 9th ed, 1992, vol I, pp. 543-545; Freeman, *International Responsibility of States for Denial of Justice*, (1938) pp. 291-292, 311-312), although Freeman regards the rule as linked to the local remedies rule (at p. 415).

153. The principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice at the international level has been linked to the duty imposed upon a State by international law to provide a fair and efficient system of justice. Professor James Crawford SC, rapporteur to the ILC, has stated: « There are also cases where the obligation is to have a system of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act ». (UN Doc. A/CN 4/498, para. 75). Judge Jiménez de Aréchaga took the same view of the State's responsibility, stating that it was an essential condition of a State being held responsible for a judicial decision in breach of municipal law that the decision must be a decision of a court of last resort, all remedies having been exhausted (« *International Law in the Past Third of a Century* », 159 *Recueil des Cours* (1978) at p. 282, where the judge expressed the reason for the requirement as being that States provide remedies to correct the natural fallibility of their judges). He considered that a corollary of the requirement is that « a State cannot base the charges made before an international court or tribunal... on objections or grounds which were not previously raised before the municipal courts ».

154. No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system.

155. That there is a difference in the purposes served by this principle was recognized by the Iran-United States Claims Tribunal in *Oil Fields of Texas* 12 Iran-US CTR 308 at 318-319. The question there was whether a judicial decision could amount to a measure of appropriation. The decision was that of the Islamic Court of Ahwaz, which appears to have been a lower court. The Tribunal held that the order of the Court amounted to a permanent deprivation of use. The Tribunal said (at p. 319): « In these circumstances, and taking into account the Claimant's

impossibility to challenge the Court order in Iran, there was a taking of the three blowout preventers for which the Government is responsible » (p. 319).

156. The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105.

157. The questions whether there was an adequate and effective municipal remedy available to Loewen and whether Loewen took sufficient steps to pursue such a remedy are questions which remain to be considered. It is convenient, first, however, to deal with Article 1121 and the problem of waiver.

XXIII. ARTICLE 1121 AND WAIVER.

158. In para. 71 of the Decision of January 5, 2001, the Tribunal expressed the view that « the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own judicial system ».

159. This statement requires qualification in light of the preceding discussion of Article 1105, denial of justice and the local remedies rule. The requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision means that this requirement and the local remedies rule, though they may be similar in content, serve two different purposes.

160. An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so (*Eletronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 42). Such an intention may be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.

161. Although the precise purpose of NAFTA Article 1121 is not altogether clear, it requires a waiver of domestic proceedings as a condition of making a claim to a NAFTA tribunal. Professor Greenwood and Sir Robert Jennings agree that Article 1121 « is not about the local remedies rule ». One thing is, however, reasonably clear about Article 1121 and that is that it says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.

162. Nor is there any basis for implying any dispensation of that requirement. It would be strange indeed if sub silentio the international rule were to be swept away. And it would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the

effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law.

163. Article 1121 may have consequences where a claimant complains of a violation of international law not constituted by a judicial act. That is not a matter which arises here.

164. For the reasons given, Article 1121 involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act.

(*Omissis*).

XXVII. DID LOEWEN PURSUE AVAILABLE LOCAL REMEDIES?

207. In the light of the conclusions reached in para 156, the next question is whether the appeal to the Mississippi Supreme Court was an available remedy which Loewen should have pursued before it could establish that the verdict and judgment at trial constituted a measure « adopted or maintained » by Respondent amounting to a violation of Art. 1105. Respondent argues that confronted with the adverse bonding decision by the Mississippi Supreme Court, Loewen should have (i) pursued its appeal despite the risk of execution on its assets; or (ii) sought protection under Chapter Eleven of the Bankruptcy Code which would have resulted in a stay of execution against Loewen's assets; or (iii) filed a petition for *certiorari* and sought a stay of execution in the Supreme Court of the United States.

208. The first alternative suggested by Respondent raises the question whether the appeal is « a reasonably available remedy », having regard to the risk of execution against Loewen's assets if the bond was not posted. Here, the bonding requirement is attached, not to the right of appeal, but to the stay of execution. Granted the distinction, the practical impact of the requirement had severe consequences for Loewen's right of appeal. Without posting the bond, Loewen's right of appeal could be exercised only at the risk of sustaining immediate execution on Loewen's assets in Mississippi, to be followed by execution against Loewen's assets in other States, with the inevitable consequence that Loewen's share price would collapse. In this respect, we reject Respondent's contention that the risk of execution was remote and theoretical. It is possible that O'Keefe may have exercised some restraint in relation to execution lest it might ultimately lose the appeal and suffer financial consequences by reason of executions which could not be justified. But this possibility does not persuade us that the risk of immediate execution was other than real. In these circumstances, if exercising the right of appeal, at the risk of immediate execution on Loewen's Mississippi assets, was the only alternative available to Loewen, it would not have been, « a reasonably available remedy » to Loewen.

209. Filing under Chapter Eleven of the Bankruptcy Code would have resulted in a stay of execution. In this respect, Chapter Eleven would have enabled Loewen's appeal to proceed without generating all the consequences that would have flowed from execution. Chapter Eleven results in re-organization not in liqui-

dation, so that a company can continue to conduct its business under Court supervision. Although Court supervision would not necessarily bring to an end Loewen's acquisitions program, Court supervision could be expected to restrict and moderate the program. Quite apart from that consequence, a Chapter Eleven filing may have had an effect on the public market perception of Loewen with a detrimental impact on its share price. The question then is whether, in these circumstances, the need to pursue local remedies extends to requiring a claimant to file under Chapter Eleven in order to ensure that a right of appeal remains effective and reasonably available. No doubt there are some situations in which it would be reasonable to expect an impecunious claimant to file under Chapter Eleven in order to exercise an available right of appeal.

Whether it was reasonable to expect Loewen to file under Chapter Eleven depends at least in part on the reasons why Loewen elected to enter into the settlement agreement in preference to exercising other options, a matter examined in paras. 214-216 (inclusive).

210. The third alternative is the petition for certiorari coupled with the application for a stay. There is a conflict of opinion about the prospects of success of such an application between Professor Drew S. Days III (former United States Solicitor-General) and Professor Tribe. Professor Days is of the opinion that Loewen would have had « a reasonable opportunity » of obtaining review by the Supreme Court of the United States of the application of the Mississippi bonding requirement on the ground that it prevented, inconsistently with due process, appellate review of the Mississippi trial court judgment. Professor Tribe is of a contrary opinion. He bases his opinion on a number of grounds. First, the case was fact-intensive and the Court is very unlikely to review a fact-intensive case. Secondly, there was a dispute between the parties as to whether the bonding requirement precluded judicial review of the judgment. The Mississippi Supreme Court did not make such a finding and did not adopt Loewen's version of the facts. Thirdly, the presence of a substantial punitive damages award was irrelevant to the issues which the Supreme Court would have been called upon to decide.

211. This Tribunal is not in a position to decide whether the opinion of Professor Days or that of Professor Tribe is to be preferred. Nor is the Tribunal in a position to decide which of their conflicting opinions is to be preferred on a related question, namely whether collateral review was available in the Federal District Court. But the Tribunal notes that Professor Days does not assert that either the Supreme Court or the Federal Court would grant the relief suggested. It is fair to say that, on his view, there was a prospect, at most a reasonable prospect or possibility, of such relief being granted.

212. The decision not to relax the bonding requirement, an act for which Respondent is responsible in international law, generated the risk of immediate execution with its attendant detrimental consequences for Loewen. In this situation, was either the *certiorari* petition or the collateral review option a reasonably available and adequate remedy? The pursuit of either remedy, more particularly the Supreme Court remedy, if it resulted in a failure to obtain a stay, would worsen Loewen's position and reinforce adverse market perceptions about Loewen. So, the absence of any certainty about the outcome of either option is a significant consideration in deciding whether either option involved an adequate remedy which was reasonably available to Loewen.

213. Entry into the settlement agreement no doubt reflected a business judgment by Loewen that, of the various options then open, settlement was the most attractive, in all probability because it provided certainty. Other alternatives involved financial consequences which would not have been easy to predict.

214. Respondent argues that, because entry into the settlement agreement was a matter of business judgment, Loewen voluntarily decided not to pursue its local remedies. That submission does not dispose of the point. The question is whether the remedies in question were reasonably available and adequate. If they were not, it is not to the point that Loewen entered into the settlement, even as a matter of business judgment. It may be that the business judgment was inevitable or the natural outcome of adverse consequences generated by the impugned court decision.

215. Here we encounter the central difficulty in Loewen's case. Loewen failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached. It is a matter on which the onus of proof rested with Loewen. It is, however, not just a matter of onus of proof. If, in all the circumstances, entry into the settlement agreement was the only course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy.

216. Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options. It is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take.

217. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.

XXVIII. A PRIVATE AGREEMENT IS NOT A GOVERNMENT MEASURE WITHIN THE SCOPE OF NAFTA CHAPTER ELEVEN.

Respondent argues that a private agreement to settle litigation out of court is not a « government measure » within the scope of NAFTA Chapter Eleven (ground 3 of Respondent's objection to competence and jurisdiction). The argument may well be correct as a general proposition. But the Claimants' case rests on the judgment and judicial orders made by the Mississippi trial court and the Mississippi Supreme Court. Claimants' case is that these judicial acts are the relevant government measures within NAFTA Chapter Eleven, not that the settlement is such a measure. This ground of objection is overruled.

Orders

For the foregoing reasons the Tribunal unanimously decides:

1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment

of those claims to a Canadian corporation owned and controlled by a United States corporation.

2) That it lacks jurisdiction to determine Raymond L. Loewen's claims under NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.

3) TLGI's claims and Raymond L. Loewen's are hereby dismissed in their entirety.

4) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.

XXXI. CONCLUSION.

241. We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi proceedings in the strongest terms. There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

242. This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort.

The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.

Investimenti esteri, danni punitivi ed « espropriazioni striscianti » tra diritto interno e diritto internazionale: a proposito del *Chapter II* del NAFTA.

1. Il lodo in esame offre alcuni spunti di riflessione in occasione del compimento dei primi dieci anni dell'Accordo Nordamericano di libero scambio, meglio noto con l'acronimo inglese di NAFTA. Tali brevi considerazioni vanno articolate sotto un triplice profilo: quello dello standard minimo di tutela degli investimenti stranieri nel NAFTA; del previo esaurimento dei ricorsi interni e della diversità di cittadinanza quale elemento necessario per l'esperibilità dei meccanismi di soluzione delle controversie internazionali previsti in quell'ambito.

2. Le coordinate essenziali del caso di specie sono abbastanza semplici, nonostante il tono tragico — come osservano gli stessi arbitri ⁽¹⁾ — di una vicenda che spesso assume caratteri pirandelliani. La politica di espansione di un gruppo societario canadese, leader nel mercato delle pompe funebri, inclusa la gestione di cimiteri e di polizze assicurative, conduce alla costituzione di una filiale nel Mississippi ed all'acquisizione di ulteriori società quali *Riemann*, nella città di Gulfport e *Wright & Ferguson* nella capitale Jackson. Ben presto, il mercato si satura e *Loewen* entra in trattative con O'Keefe, un gigante locale del « funeral business » che, oltre ad essere un eroe di guerra, aveva ricoperto alte cariche pubbliche tra le quali quella di sindaco della città di Biloxi, città ove svolgeva la maggior parte dei suoi affari. I rapporti tra le parti comprendevano lo scambio di due case funerarie del valore di 2.5 milioni di dollari per una compagnia di assicurazioni mortuarie (*funeral insurance company*) del valore stimato di 4 milioni di dollari.

Nel 1995, il giudice del Mississippi, al termine di un tormentato *jury trial*, analiticamente descritto nel lodo ICSID che qui si commenta, riconosceva a O'Keefe un risarcimento d'armi esorbitante: 500 milioni di dollari statunitensi, di cui 400 a titolo di *punitive damages*. Per ricorrere in appello, secondo il diritto del Mississippi, si richiedeva a *Loewen* il deposito di una cauzione pari al 125% della somma da risarcire con il rischio, in caso di soccombenza, di ritrovarsi in situazione fallimentare e quindi di rientrare nel campo di applicazione di un altro *Chapter II*, quello del *Bankruptcy Code*.

Dinanzi a tale prospettiva, la *Loewen* accettava una transazione per 125 milioni di dollari e, successivamente, iniziava l'arbitrato ICSID contro il governo degli Stati Uniti. Ma, a volte, sembra impossibile sfuggire al

⁽¹⁾ Cfr. il par. 119 del lodo, ove con riferimento alla sentenza del giudice del Mississippi da cui il presente arbitrato trae origine, si osserva che « by any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace ».

proprio destino e, mentre l'arbitrato era in corso sulla base del *Chapter II* del NAFTA, le avversità del mercato fanno sì che la società divenga ben presto decotta, materializzando lo spettro del *Chapter II* del *Bankruptcy Code*. Per salvarsi dalla rovina, il gruppo Loewen costituiva una società di diritto statunitense, la *Alderwoods Group* e trasferiva i propri interessi ad una nuova società di diritto canadese. Quest'ultima società, tuttavia, risultava controllata al 100% dalla società statunitense, offrendo così il destro al governo statunitense per eccepire il sopravvenuto difetto di legittimazione attiva della parte attrice e vincere la causa (paras. 225 e 235-239). Il collegio arbitrale ha riconosciuto che la sentenza del giudice del Mississippi costituiva una « misura » ai sensi del Capitolo 11 del NAFTA (paras. 39-60) e che, nel caso di specie, si era avuta una violazione dello standard del « fair and equitable treatment » di cui all'art. 1105 NAFTA (par. 137). Tuttavia, gli arbitri rigettavano le istanze presentate da *Loewen* in quanto, *inter alia*, non aveva esaurito i ricorsi interni (paras. 215-217).

3. In linea generale, la disciplina degli investimenti internazionali contempera due opposti interessi, entrambi meritevoli di tutela: a) l'interesse dello Stato di destinazione dell'investimento (c.d. « Stato ospitante ») a salvaguardare la propria sovranità sul proprio territorio rispetto a centri stranieri di potere economico in grado di influenzare la gestione della cosa pubblica; b) l'esigenza dell'impresa transnazionale a ricevere tutela rispetto ai beni che si trovano nel territorio dello Stato ospitante (2).

Inoltre, va ricordato che, in materia di trattamento degli stranieri vi-

(2) Cfr. SANTA MARIA, *Il diritto internazionale dell'economia*, in CARBONE, LUZZATTO, SANTA MARIA (a cura di), *Istituzioni di diritto internazionale*, II ed., 2003, 455 s. Tra una letteratura vastissima v. KOJANEC, *Investimenti all'estero*, Padova, 1970, 87 s.; SACERDOTI, *I contratti tra Stati e stranieri nel diritto internazionale*, Milano, 1972, 1 s.; LUZZATTO, *Stati stranieri e giurisdizione nazionale*, Milano, 1972, 89 s.; TESAURO, *Nazionalizzazioni e diritto internazionale*, 1976, *passim*; GIARDINA, *State Contracts: National Versus International Law?* in *IYBIL*, 1983, 147-170; Id., *Diritto interno e diritto internazionale nella disciplina dei contratti fra Stati e privati stranieri*, in *Studi Sperduti*, 41 s.; Id., voce *Arbitrato fra Stati e privati stranieri*, in *Dig. disc. pubbl.*, Sez. IV, I, 1987, 360-367; SINAGRA, *L'arbitrato commerciale internazionale nel sistema del CIRDI ed i suoi recenti sviluppi*, Padova, 1984, 56 s.; PANICO, *Responsabilità internazionale degli Stati per violazione di obbligazioni assunte verso soggetti privati stranieri in contratti di investimento « denazionalizzati »*, in *Studi in onore di Ago*, 1987, 249-290; TESAURO, voce *Nazionalizzazione (nazionalizzazione e confische estere — dir. int. priv. proc.)*, in *Enc. giur.*, XX, 1988; SACERDOTI, voce *Contratti tra uno Stato e una persona straniera*, in *Enc. giur.*, IX, 1989; MIGLIORINO, *Gli accordi internazionali sugli investimenti*, Milano, 1989, *passim*; PADELLETTI, *Nazionalizzazioni nel diritto internazionale*, in *Dig. disc. pubbl.*, 1993; P. FOIS, *Il principio « pacta sunt servanda » e i contratti fra Stati e privati stranieri*, in *Riv. dir. internaz.*, 1993, 633-660; SANTOSUOSSO, *L'espropriazione di beni o diritti patrimoniali di cittadini stranieri e la determinazione dell'indennizzo secondo la giurisprudenza dell'ICSID*, in *Riv. dir. internaz. priv. proc.*, 1995, 195 ss.; SACERDOTI, *Bilateral Treaties and Multilateral Instruments on Investment protection*, in *RCADI*, 1998, v. 269, 251-460; FRIGO, *Le limitazioni dei diritti patrimoniali privati nel diritto internazionale*,

gono due principi di diritto internazionale consuetudinario. In base al primo principio, lo Stato territoriale non può richiedere al privato straniero « comportamenti che non si giustifichino con un sufficiente "attacco" dello straniero stesso (o dei suoi beni) con la comunità territoriale » (3). Il secondo principio attiene all'obbligo, a carico dello Stato territoriale, di prevenire e reprimere « le offese contro la persona o i beni dello straniero, l'idoneità essendo commisurata a quanto di solito si fa per tutti gli individui (sudditi quindi compresi) » (4).

Il *North American Free Trade Agreement* (NAFTA), firmato dal Canada, Messico e Stati Uniti d'America il 12 agosto 1992 ed entrato in vigore il 1° gennaio 1994, ha rafforzato il principio di non discriminazione nel trattamento degli investimenti stranieri prevedendo appositi meccanismi di soluzione delle controversie tra investitori privati e Stati destinatari degli investimenti (5).

4. Tra gli obiettivi del NAFTA vi sono l'eliminazione degli ostacoli al commercio di beni e servizi tra gli Stati contraenti, la promozione della concorrenza, la protezione della proprietà intellettuale, la promozione degli investimenti, lo sviluppo della cooperazione trilaterale e multilaterale e, appunto, l'istituzione di appositi meccanismi di soluzione delle controversie. La nozione di investimento ivi accolta è particolarmente ampia includendo tutte le forme di proprietà e partecipazione societaria (6). In caso di controversie, il NAFTA prevede un articolato sistema di risoluzione delle controversie, al Capitolo XI del trattato (artt. 1115-1139), orientato ad assicurare un « trattamento uguale tra gli investitori degli Stati contraenti in armonia col principio della reciprocità internazionale » al fine di garantire « un equo processo dinanzi ad un tribunale imparziale ». L'investitore di uno Stato contraente può, in base a tali norme, iniziare il procedimento arbitrale nei confronti di un altro Stato contraente in caso di violazione delle norme del trattato (1116-1117) entro un termine perentorio di tre anni da quando ha avuto conoscenza della violazione o ha subito un danno a causa del comportamento (commissivo od omissivo) statale. L'investitore può

Milano, 2000, 1 ss.; MARRELLA, *La nuova lex mercatoria. Principi Unidroit ed usi dei contratti del commercio internazionale*, in *Trattato Galgano*, Padova, 2003, 351 ss.

(3) CONFORTI, *Diritto internazionale*, VI ed., Napoli, 2002, 229, ove riferimenti.

(4) *Ibidem*.

(5) Disposizioni analoghe si trovano, al livello del MERCOSUR, nei Protocolli di Colonia e Buenos Aires del 1994, nonché nella Carta dell'energia. In argomento v. MARCHISIO, *Investimenti esteri nel diritto internazionale*, in *Dig. disc. pubbl.*, III, 1993, 567 ss.; TH. WALDE, R. LUBBERS, *The Energy Charter Treaty*, Boston, 1996; CARREAU, *Investissement*, in *Enc. Dalloz/Rep. Dir. Intern.*, 1998.

(6) Il testo del NAFTA si trova riprodotto in *ILM*, 1993, 289 ss. e 605 ss. In argomento v. MIGLIORINO, *La promozione e la protezione degli investimenti nell'Accordo Nord-Americano di libero commercio del 1992 (NAFTA)*, in *Dir. comm. int.*, 221-235.

scegliere di avvalersi: a) dell'arbitrato ICSID, in base alla convenzione di Washington del 18 marzo 1965 per il regolamento delle controversie tra Stati e soggetti di altri Stati, qualora ne ricorrano i presupposti di applicazione; b) le *Additional Facility Rules* dell'ICSID; c) del regolamento arbitrale dell'UNCITRAL. Il diritto applicabile, secondo quanto disposto all'art. 1131, all'arbitrato transnazionale condotto in uno dei tre modi in precedenza indicati, è costituito dall'accordo NAFTA e dalle « norme applicabili di diritto internazionale » (7). Il procedimento attivato da *Loewen* contro il governo statunitense è, conformemente al NAFTA, un arbitrato ICSID (8).

5. Esaminando la questione della violazione delle norme sul trattamento degli investimenti stranieri ad opera del giudice statunitense, il collegio arbitrale ha fatto riferimento al diritto internazionale generale ed all'art. 1105 del NAFTA che così recita:

« *Minimum Standard of Treatment*

1) Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2) Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

(7) L'art. 1131 così dispone quanto segue: « A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. 2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section. » Cfr. GIARDINA, *Clauses de stabilisation et clauses d'arbitrage; vers l'assouplissement de leur effet obligatoire?* in *Rev. arb.*, 2003, n. 3, 647 ss., spec. 656; ALVAREZ, PARK, *The new face of investment arbitration: NAFTA Chapter 11*, in *Yale J. Int. L.*, 2003, n. 3, 365 ss.; COE, *Taking stock of NAFTA Chapter 11 in its tenth year: an interim sketch of selected themes, issues, and methods*, in *Vand. J. Transnat'l L.*, 2003, n. 4, 1381-1460.

(8) V. il sito internet <http://www.worldbank.org/icsid.it>. Tra una vasta letteratura cfr. P. BERNARDINI, *Le prime esperienze arbitrali del Centro internazionale per il regolamento delle controversie relative ad investimenti*, in *Riv. dir. internaz. priv. proc.*, 1981, 34 ss., poi *Id.*, *L'arbitrato commerciale internazionale*, cit., 241 ss.; SACERDOTI, *La convenzione di Washington del 1965: bilancio di un ventennio dell'ICSID*, in *Riv. dir. internaz. priv. proc.*, 1987, 13 ss.; F. LATTANZI, *Convenzione di Washington sulle controversie relative agli investimenti ed invalidità delle sentenze arbitrali*, in *Riv. dir. internaz.*, 1987, 521 ss.; GIARDINA, TORTELLO, *Centro Internazionale per la soluzione delle controversie tra Stati e nazionali di altri Stati in materia di investimenti (CIRDI)*, in *Enc. giur. Treccani*, IV, 1988; PORRO, *Studi di diritto internazionale dell'economia*, Milano, 1999; NATHAN, *ICSID Convention: the law of the international Center for settlement of investment disputes*, New York, 2000; SCHREUER, *The ICSID Convention: a commentary*, Cambridge, 2001; ACCONCI, *Il collegamento tra società in materia di investimenti stranieri*, Padova, 2002.

3) Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b). »

Al termine di un'ampia rassegna della giurisprudenza arbitrale in materia e della dottrina, gli arbitri rilevano che espressioni quali quelle del « fair and equitable treatment » e della « full protection and security » vanno lette esclusivamente alla luce del diritto internazionale consuetudinario ⁽⁹⁾.

Va ricordato, in proposito, che l'origine del dibattito sul « trattamento giusto ed equo » risale ad epoca lontana e non può essere qui nemmeno ricordato per sommi capi ⁽¹⁰⁾.

Quello che può dirsi è che ancor oggi il « trattamento giusto ed equo » costituisce lo *standard* minimo di protezione dell'investimento straniero ⁽¹¹⁾ e la violazione di tale *standard*, previo esaurimento dei ricorsi interni, apre la strada alla protezione diplomatica dello Stato di cittadinanza dell'investitore nei confronti dello Stato destinatario dell'investimento.

Nella stessa direzione porta anche il parere fornito dal Prof. Greenwood al governo statunitense ove si aggiunge che il diritto internazionale generale impone agli Stati l'obbligo « to maintain and make available to aliens, a fair and effective system of justice » (par. 129 del lodo). Ciò detto, va tuttavia riconosciuto che, in ossequio all'antico brocardo, *onus probandi incumbit ei qui dicit non ei qui negat*, spetta al privato investitore straniero — e non allo Stato — dimostrare che ha subito un diniego di giustizia nello Stato territoriale e che, *ipso facto*, ha subito una espropriazione « strisciante », nella forma di una condanna al risarcimento di danni milionari.

Orbene, nel caso di specie, appare con evidenza che lo stile aggressivo degli avvocati delle parti, ed in particolare quelli di O'Keefe, le particolari circostanze ambientali ed un giudice poco capace abbiano portato ad una sentenza di primo grado aberrante. Ma una sentenza — sia pure aberrante — di primo grado non è sufficiente, a fare insorgere la responsabilità

⁽⁹⁾ Cfr. il par. 128 del lodo ove gli arbitri decidono di non seguire l'orientamento prevalente nella giurisprudenza « NAFTA » in *subiecta materia: Metalclad Corp v United Mexican States* ICSID Case No. ARB(AF)/97/1 (Aug 30, 2000), *S.D. Myers, Inc. v Government of Canada* (Nov 13, 2000) e *Pope & Talbot, Inc. v. Canada*, Award on the Merits, Phase 2, (Apr 10, 2001).

⁽¹⁰⁾ Si vedano per tutti: VASCIANNIE, *The Fair and Equitable Treatment Standard in International Investment Law*, in *BYIL*, 1999, 99 ss.; CARREAU, JUILLARD, *Droit international économique*, I ed., Dalloz, Paris, 2003, 359 ss.

⁽¹¹⁾ Va ricordata, a tale proposito, la celebre formula contenuta nella nota a firma del Segretario di Stato USA Cordell Hull, del 22 agosto 1938, nella quale si affermava che « nessuno Stato ha titolo per espropriare la proprietà privata, per qualunque fine, senza prevedere il pagamento di un indennizzo pronto, adeguato ed effettivo ». Cfr. *AJIL*, 1938, suppl., 32.

internazionale dello Stato di cui il giudice è organo sicché, diviene assai arduo per *Loewen* sostenere di avere subito un trattamento discriminatorio. Il punto è colto nitidamente nel lodo in esame (par. 154) dagli arbitri che osservano che, diversamente, si incoraggerebbe il ricorso ad arbitri NAFTA a scapito del giudice (statale) d'appello, un risultato sicuramente non voluto dai negoziatori dell'accordo.

Ai fini del « trasferimento » della controversia in esame al livello NAFTA occorre, infatti, anche nel vigore dell'art. 1121 NAFTA, la prova dell'esaurimento dei ricorsi interni⁽¹²⁾. Rispetto a tale profilo, opportunamente evidenziato dal governo statunitense, prima di ricorrere all'arbitrato, *Loewen* aveva tre scelte: a) ricorrere in appello in Mississippi sia pure rischiando di perdere nuovamente la causa⁽¹³⁾; b) chiedere l'applicazione del *Chapter 11* del *Bankruptcy Code* statunitense e dunque far sospendere l'azione esecutiva per il pagamento dei danni; c) presentare richiesta di *certiorari* — e dunque beneficiare di un provvedimento sospensivo dell'esecuzione coattiva — alla Corte Suprema degli Stati Uniti. Nella realtà

⁽¹²⁾ Ai sensi dell'art. 1121 NAFTA: « *Conditions Precedent to Submission of a Claim to Arbitration*. 1. A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise: (a) consent to arbitration in accordance with the procedures set out in this Agreement; and (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. 3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration. 4. Only where a disputing Party has deprived a disputing investor of control of an enterprise: (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and (b) Annex 1120.1(b) shall not apply ». In argomento cfr. STROZZI, *Interessi statali e interessi privati nell'ordinamento internazionale. La funzione del previo esaurimento dei ricorsi interni*, Milano, 1977; NASCIBENE, *Il trattamento dello straniero nel diritto internazionale ed europeo*, Milano, 1984; Id. (a cura di), *Diritto degli stranieri*, Padova, 2004; PISILLO MAZZESCHI, *Esaurimento dei ricorsi interni e diritti umani*, Torino, 2004, 97 ss. ove ampi riferimenti.

⁽¹³⁾ E, a tale riguardo, si precisa che il temibile « appeal bond » non costituiva condizione necessaria dell'esperibilità del diritto di ricorso bensì solo della sospensione dell'azione esecutiva risultante dalla pronuncia di primo grado (par. 208).

dei fatti, *Loewen*, non aveva adottato alcuna delle predette strategie processuali ma invece, aveva preferito transarre con O'Keefe. E, come tale, una transazione non equivale in nulla ad una misura governativa ai sensi del *Chapter II* del NAFTA, trattandosi, appunto di un modo stragiudiziale di composizione delle controversie non assimilabile ad un giudizio di appello e, *a fortiori*, insufficiente per esaurire i ricorsi interni.

Agli elementi appena individuati, si aggiunge poi l'ulteriore considerazione in base alla quale, l'esperibilità di procedimenti internazionali di soluzione delle controversie in materia di investimenti presuppone nel NAFTA — ma si tratta di una regola generale in materia — che l'investitore privato sia « straniero ». Diversamente, il cittadino che abbia subito un'espropriazione da parte del proprio Stato non potrà che tutelare la propria situazione giuridica in base al diritto interno. È quanto accade a *Loewen*, nel corso del procedimento arbitrale NAFTA in quanto, passando sotto il controllo di una società statunitense, finisce col perdere la legittimazione attiva. La tesi, sostenuta dalla società sulla scorta degli artt. 1116-1117 NAFTA, secondo la quale la « *diversity of nationality* » va apprezzata all'inizio del procedimento arbitrale, a prescindere dalle successive modifiche soggettive, viene rigettata dagli arbitri che, invece, ritengono tale condizione debba essere verificata nell'arco di tutto il procedimento ⁽¹⁴⁾.

Resta fermo, comunque, che gli arbitri hanno indicato la possibilità di configurare una sentenza del giudice interno di risarcimento di danni esorbitanti alla stregua di una misura governativa volta a realizzare un'espropriazione senza indennizzo. E, rispetto a tale punto, non mancheranno in futuro ulteriori applicazioni di tale tesi.

7. Il lodo arbitrale nel caso *Loewen* si aggiunge ad una serie di altre pronunce in base al NAFTA — tutte accessibili via *internet* — di cui alcune meritano di essere segnalate in quanto presentano caratteri di affinità col caso di specie e, più in generale, arricchiscono e precisano la materia del diritto internazionale degli investimenti ⁽¹⁵⁾.

Nel caso *Methanex*, una società canadese aveva impugnato un atto amministrativo del governatore della California sostenendo la violazione del *Chapter II* del NAFTA da parte degli Stati Uniti. La società sosteneva che l'imposizione di misure interdittive nei confronti di un additivo della benzina (il MTBE, Metilbutiletere) corrispondeva ad una espropriazione. Analogamente, nel caso *Ethyl*, il Canada è stato condannato a risarcire l'in-

⁽¹⁴⁾ Gli arbitri infatti rilevano che « If the submissions of the United States are right, the fatal objection to success by the Claimants is that a NAFTA claim cannot exist or cannot any longer exist, once the diversity of nationality has come to an end, so that the Tribunal cannot continue with the resolution of the original dispute, there being no dispute left to resolve » (par. 234).

⁽¹⁵⁾ Il testo dei lodi si reperisce al sito <http://www.naftalaw.org>.

vestitore privato con 13 milioni di dollari per aver vietato il trasporto oltre frontiera di un additivo tossico della benzina, il MMT. La società statunitense aveva sostenuto che le norme canadesi violavano la regola del trattamento nazionale e, a conclusione dell'arbitrato, il Canada ha pubblicamente ammesso che il divieto non era basato su dati scientifici. Va poi ricordato il caso *SD Myers*, a proposito del traffico di rifiuti tossici, vinta dall'omonima società attraverso un procedimento disciplinato dal regolamento arbitrale UNCITRAL.

Il caso più celebre è tuttavia, il caso *Metalclad*. Si trattava di un'azione di risarcimento danni intentata da una società statunitense nei confronti del Messico. Nel 1996, le autorità locali dello Stato messicano S. Luis Potosi negavano l'autorizzazione all'apertura di un impianto di trattamento rifiuti, alla società Metalclad, con sede legale nella California del Sud. Tale diniego si basava su motivi di ordine ambientale e si ricollegava al varo di un'apposita disciplina che rendeva inutilizzabile a fini di discarica una vasta area entro la quale erano ubicati i terreni della società. Quest'ultima obiettava che, in base ad un accordo col governo messicano, avrebbe potuto comunque svolgere la propria attività a condizione di eseguire opere di bonifica nei primi tre anni di attività. Avvalendosi delle norme di cui al *Chapter II*, la società aveva iniziato il procedimento arbitrale ICSID chiedendo la condanna del Messico al risarcimento danni pari a 90 milioni di dollari. Il collegio arbitrale riconosceva la fondatezza delle pretese della società e conseguentemente condannava il Messico ad un risarcimento di circa 17 milioni di dollari, riscontrando una violazione dell'art. 1105 e 1110 del NAFTA.

8. Va notato infine il dibattito discutibilmente accorato sviluppatosi in alcuni ambienti statunitensi, a partire dai casi sopra segnalati, in senso fortemente critico rispetto all'attivazione di procedimenti arbitrali internazionali che, in quanto tali, vengono additati quali meccanismi destinati a superare la protezione della giurisdizione statale (statunitense). Secondo esponenti di alcune ONG quali *Public Citizen*, il caso *Loewen* è in grado di « *completely undermine the American civil justice system* »⁽¹⁶⁾, ed essendo di fronte ad un « fallimento della democrazia », si è giunti ad affermare che « *if a corporation wins its case, it can be awarded unlimited amounts of taxpayer dollars from the treasury of the offending nation even though it has gone around the country's domestic court system and domestic laws to obtain such an award* »⁽¹⁷⁾. Ma questi commentatori sembrano dimenticare che, fino ad un recentissimo passato e nella maggior parte dei casi appena citati, le imprese multinazionali statunitensi (ed europee) hanno beneficiato

(16) <http://www.economicjustice.org/resource/media/>.

(17) <http://www.kworkbeat.org/Globalization/>.

di quegli stessi meccanismi di soluzione delle controversie di cui ora chiedono l'abolizione e che, quelle stesse critiche sono state per lungo tempo avanzate, ma senza risultato, dai Paesi del Sud del mondo. Questi Paesi, hanno concluso accordi con privati investitori dei Paesi industrializzati ed hanno accettato sia il ricorso all'arbitrato, derogando alla propria giurisdizione (ed al diritto applicabile in vigore in ciascuno di essi), sia le conseguenze di un'eventuale pronuncia sfavorevole, pagandone se necessario le conseguenze con il denaro dei propri contribuenti (e dunque subendo effetti economici proporzionalmente più devastanti dei Paesi ricchi). Indubbiamente, attraverso il NAFTA, il governo statunitense si troverà, per la prima volta, sempre più esposto all'azione di privati investitori canadesi e messicani. E, per ironia della sorte, quelle azioni saranno modellate su quelle condotte, per decenni, dalle multinazionali statunitensi nei confronti dei Governi dei Paesi meno sviluppati.

Non sarebbe certo prova di civiltà giuridica riscoprire, *pro domo sua*, la clausola Calvo o adottare misure restrittive rispetto all'arbitrato internazionale secondo il vetusto approccio — oggi abbandonato — della maggior parte dei Paesi latinoamericani. Gli Stati Uniti potranno imporre agli altri futuri *partners*, l'ambizioso progetto di un'area di libero scambio delle Americhe solo condividendo l'assunto secondo il quale i meccanismi di soluzione arbitrale delle controversie ivi previsti servono ugualmente a tutti gli investitori stranieri, anche a quelli che operano negli Stati Uniti.

Come è stato osservato con una certa ironia, la giurisdizione dei giudici USA non è oggi in pericolo più di quella degli altri Stati della Comunità internazionale piuttosto occorre prendere atto che « *this is just the globalized economy we've all been talking about* ».

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