·The Loewen Group, tnc. and Raymond L. Loewen

v

United States of America

(tCSID Case No. ARB(AF)/98J3) Decision on hearing of Respondent's objection to competen ce and jurisdiction

1. INTRQDUCTION

1. This dispute arises out of litigation brought against the 1irst Claimant, the Loewen Group, Inc ('TLGI') and Loewen Group International, Inc ('LGII'), its principal Unlted States subsidiary, .n Mississippi State Court by Jeremiah O'Keefe Sr., his son and various companies owned by the O'Keefe family (collectively called 'O'Keefe'). The litigation arose out 01 a commercial dispute between O'Keefe and the Loewen companies which are competitors in the funeral home and funeral insurance business in Mlssissippi. The dispute concerned three contracts between O'Keefe and the Loewen companies said to be valued by O'Keefe at $980,000 and an exchange 01 two O'Keefe funeral homes said to be worth $2.5 milllon for a Loewen insurance company worth $4 million approximately.

2. The Mississippi jury awarded O'Keefe $500 mlllion damages, including

$75 miIlion damages for emotional distress and $400 million punitlve damages: The verdlct was the outcome of a seven-week trial in which, according to the Claimants. the trial judge repeatedly allowed O'Keefe's attorneys to make extensive irrelevant and highly prejudicial references (i) to the Claimants' foreign nationality (which was contrasted to O'Keefe's Mississlppi roots); (11)race-based distinctlons belween O'Keefe and the Loewen companies; and (iii) class-based distinctions between the Loewen companies (which were portrayed as large wealthy corporations) and O'Keefe (who was portrayed as runnlng famlly-owned businesses). Further, according to the Cfaimants, after permftting tnose references, the trlal judge retused to give an instructlon to the jury stating clearly that nationality-based, racial and class-based discrimination was Impermissible.

3. The Loewen companles sought to appeal the $500 mUlion verdict and judgment but were confronted with the application of an appellate bond requirement. Mississlppl law requlres an appeal bond for 125% of the

judgment. but allows the bond to be reduced or dispensed with for 'good cause'.

4. Despite the Claimants' claim that there was good cause to reduce the appeal bond, the Mississlppi Supreme Court refused to reduce the appeal bond at all and required the Loewen eompanies to post a $625 miliion bond within seven days In order to pursue its appeat without facing immediate execution 01 the judgment. According to the Claimants, that decisión effeetivelyforeclosedthe Loewencompanies'appeal rlghts.

5. The Claimants allege that the loewen companies were then forced to settle the case 'under extreme duress'. Other alternatives to settlement were said to be catastrophic *and/or* unavailable. On January 29, 1996, with exeeution against their Misslssippi assets seheduledto start the next day, the Loewen companies entered into a settlement with O'Keefe under which they agreed to pay $175 milfion.

6. In this claim the Claimants seek compensation for damage inflieted upon TlGI and lGII and tor damage to the seeond Claimanl's interests as a dlrect result of alleged violations 01 Chapter Eleven 01 the North American Free Trade Agreement ('NAFTA') eommitted primarily by the State of Mississippi in the eourseof the litigation.

11. THE PABIIES

7. The first Claimant TLGI Is a Canadian corporation whieh carries on business in Canada and the United 5tates. The seeondCtaimantis Raymond Loewen, a Canadian cltizen who was the founder of TLGI and Its principal shareholder and chlet executiveofficer.

8. Raymond Loewen submits his ctaim as 'the Investor of a party' on behalf of TLGI under NAFTA, Article 1117.

9. In these proceedings. until June 1, 1999 the Clalmants were representedand trom that date the first Claimant has been representedby:

Mr ChristopherF. Dugan Jones, Day, Reavis& Pague

Mr James A. Wilderotter Jones, Day, Aeavís& Pogue

Mr GregoryA. Castaoias Jones, Day, Reavis& Pogue

From June 21, 1999 the secondClaimant has been representedby:

Mr John H. lew;s, Jr. Montgomery,McCracken,Watker& Rhoads

10. The Respondentis the Government01 the United States of America. It has been representedby:

Mr KennethL. Ooroshow U.S. Departmentof Justice

Mr Mark A. Clodfelter U.S. Departmentof State

Mr Barton Legum U.S. Departmentof State

11. The Government *ot* Ganada on September 7, 2000 and the Government of Mexico on September 7, 2000 gave written notice 01 their intentionto attend the hearíngon competenceand jurisdíction.

12. Canada has been representedby:

Mr Fulvio Fracassi,Departmentof ForeignAffairs and

InternationalTrade, Ottawa, Canada

13. Mexico has been representedby:

Mr Hugo PerezcanoDíaz, Secretaríade Commercioy

Fomento Industrial(SECOFI),Mexico City, Mexico

111. PROCEOURALHISTORY

14. On July 29, 1998 the Claímants delivered to the Respondenta Notice of Intent to Submit a Claim to Arbitration in accordance with NAFTA, Article

1119. On October 30, 1999 the Claimants delivered to the Respondent a *written* consent and waiver in complíancewith NAFTA, Article 1121 (2)(a) and (b).

15. On July 29, 1998, and pursuant to NAFTA, Article 1120, the Claimants filed their Notice of Claim with the International Centre for Settlement 01

Investment Disputes ('leSID') and requested the Secretary-Generalof tCSIO to approve and register its application and to permit access to the leSIO Additional FaciJity.

16. On November 19. 1998, the Secretary-Generalof ICSIO informed the partíes that the requirements of Article 4(2) of the ICSID Additíonal FacUity Rules had been fulfiUed and that the Claímants' access to Ihe Additíonal Facility was approved. The Secretary-Generalof leSIO issued a Certificate of Registration*01* the Notice of Claim on the same day.

17. On March 17, 1999 the Tribunal was constituted. The Secretary­ General of ICSID informed tne parties that the Tribunal was 'deemed to have been constitutedand the proceedingsto have begun' on March 17, 1999, and that Ms Margrete Stevens, ICSID, would serve as Secretary of the Tribunal. AII subsequent wrnten communicatíonsbetween the Tribunal and the parties were made through the ICSID Secretariat.

18. On April 6, 1999, the Respondentfiled an objection that the dispute is no! within the competence ot tne Tribunal. The Respondent requested that the objection be dealt with by the Tribunal as a preliminary question and that the parties be given an opportunity to brief the issue in accordance with a separateschedule pursuantto Article 38 of the Additional Facility Rules.

19. The first session ot the Tribunal was held, with the partíes' agreement, in Washington D.C. on May 18, 1999. In accordance with Article 21 of the ICSID Arbitration (Additional Facility) Rules ('the Rules'), the Tribunal determined, wíth the agreement of the partías, that the place of arbitration would be Washington D.C.

20. The President noted the parnes' agreementthat the quorum for sittings of the Tribunal would be constituted by all three of its members. It was also noted that the Tribunal could take decísions by correspondence among its members, or by any other appropriatemeans of communication,provided that all members were consulted. Decisionsof the Tribunalwould be taken by the majorityof its members.

21. The Tribunal mada the followingorders:

(1) The Clalmants to file their memorialby Monday,July 19, 1999. (2) Respondentto file its memorialon competenceand jurisdiction,

If any, stating the grounds of its objection, by Wednesday,

August 18, 1999.

(3) Following receipt of the Aespondent's memorial on competence and jurisdiction, if any, the Tribunal will rule whether the objection to jurisdiction and competencewill be determined as a preliminary matter or joined to the merits of the dispute. The Tribunal reserves the right to call for a written responsefrom the Claimants before giving its decision on the question whether competence and jurisdiction will be determined as a preliminary matter or otherwise.

(4) The Respondent to file its counter-memorial on the merits withln

60 days after either the Respondent's not filing a memorial on competence and jurísdiction within the *time* limited or the Tribunal's determination that the objection to jurisdiction and competence shall be joined to the merits.

(5) Having regard to the statement made by the Claímants' counsel the Respondent shall be entitled to reasonable discovery within the time limit for the, fiUng of its counter-memorial but that entitlement shall be exercised only for the purpose of the Respondent formulating its memorial on jurísdiction and competence and its counter-memorial.

22. On July 6, 1999 the Tribunal confirmed that, by subsequent agreement

*ot* the partíes,

(1) the Claímants were to file their memorial by Monday, October 18, 1999;

and

(2) the Respondent was to file its memorial on Jurisdiction and competence, if any, by Friday, December 18, 1999.

23. Each Claímant through its attomeys has filed its own memorial, written submission and final submission on competence and jurisdictíon, and has made its own submissions.

24. On May 26, 1999, the Respondent requested that aU filings in this matter, not excluding the minutes of proceedings, be treated as open and available to the publico The Claimants agreed that the minutes and other filings should be publicly available but only after the matter is concluded.

25. On September 28: 1999, the Tribunal delivered its Decision on the Respondent's request for a ruling on disclosure. By íts Decision the Tribunal noted thal Article 44(2) of the ICSID Additional Facility Arbitration Rules provtdes that the minutes kept of all hearings pursuant to Article 44( 1) 'shall not be published without the consent of the partíes'. The Tribunal pointed out that this prohibition is primarily directed to the Tríbunal but was understood in the *Meta/cIad* Arbitration (leSIO Case AAB(AF)/97/1) Decision as being directed to the parties as well. The Tribunal went on to deny the Respondent's request 10 the extent that it sought to bring about a situation in which the Tribunal or the Secretariat makes available to the public all fltlngs in this case.

26. In its Decision the Tribunal rejected the Claimants' submission that each party is under a general obligation of confidentiality in relation to the proceedings. The Tribunal stated that in an arbitration under NAFTA, jt is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obfigation on the partíes, the effect of which would be to preclude a Govemment (or the other party) from discussing the case in pUblic, thereby depriving the public of knowledge and information concerning government and pubtic affairs. The Decision concluded by repeating the comment made by the *MetalcJadTribunal.* namely that it would be of advantage to the orderly unfolding of the arbitral process jf duríng the proceedings the partíes were lo timit public díscussion to what is considered necessary.

27. On November 1, 1999, the Respondent requested a further extension of time until February 18, 2000, within which to file íts memorial on competence and jurisdiction. The request, which was opposed by the Claimants, was granted by the Tribunal on December 9, 1999. At the same time the Tribunal dealt with an application by the Respondent for further and better discovery. While rejectíng the Respondent's submission that there had been a waiver by the Claimants 01 attorney-client privilege, the Tribunal *ordered* that the Respondent was entitled to discovery of the attorney-client communications of the Claimants or either of them relating oirectly to the issue 01duress.

28. On February 14, 2000, the first Claimant sought clarification of the Tribunal's Decisíon of September 28, 1999, relating to confidentiatity. The request foUowed the release by toe Bespondent on January 10. 2000 of

materíals relating to the arbitration, including 'the minutes 01 the May 18, 1999 hearing before the Tribunal as well as the audio recording of that hearing'. The Respondent interpreted the Decision as merely limiting the right 01 the Tribuna! or the Secretariat to release information, not the right of the parties themselves to reJease information. On the otner hand, the tirst Claimant interpreted the Decision as restricting the right of the partíes to disclose minutes and related material. By its Decision on June 2, 2000 the Tribunal affirmed the correctness of the first Claimant's interpretation 01 the Decision on September 28, 1999, stating that the Convention and the Aules prohibit publication by toe TribunaJ and the partías of the minutes and a full *record* of the hearing and any order made by the Tribunal. However, the Decision of

June 2, 2000 stated that neither It nor the earlier Deeision was intended to affeet or quali1y,or eould affect or quallty, any statute-imposed obligation 01 disclosureby whích any party to the arbitration might be bound.

29. By lts Deelsion of June 2, 2000, the Tribunal atso dealt with an appllcation by the Respondent for further and better discovery, In particular relating to documentsand informatlonreflectingthe advice and conclusions 01 the Claimants and their advísers during the Mississippi proceedings conceming altemativesto settlementof the Mississlppilitigation. The Tribunal ordered the Claimants to produce all information in the possession 01 the Claimants, thelr counsel or others who aeted on their behalf that relates directly to the question whether Loewen had alternatives to enterlng into the Mississippi settlement. The Tribunal stated that information ordered to be pro.ducedshould íncíude commltmentsfrom lenders for financlng the Loewen Group's on90ln9 operations in anticipationof the posslble reorganizatlonflling and draft petitions for the purpose of seeking possible rellef trom the Mississippi Supreme Court's bonding decision in the US federal courts and the Supreme Court. The documents were to be produced within twenty-one (21) days of June 2, 2000.

IV, IHE NATUREOF IHE CL.AIMANIS' CLAIM

30. The Claimants'case Is that

(i) 1hetrial court, by admi1tingextensive anti-Canadianand pro-American testimony and prejudiclal counsel comment, violated Article 1102 of NAFTA which bars discrimination against foreign investors and their ínvestments;

(11) the discriminationtaintad the inexplicablylarge verdict;

(111) the trial court, by permltting extensive natlonality-based, racial and class-basedtesUmonyand counsel comments. vlolated Article 1105 of NAFTA which imposes a minimum standard of treatment for investments01foreign investors;

(Iv) the exeessive verdlct and judgment (even apart from the dlscrlmlnation)violated Article 1105;

(v) the Mlsslsslppl courts' arbitrary appllcation of the bonding requlrement

violated Artlcle 1105; and

(vi) the discriminatory conduet, the excessíve verdíet, the denial of the

Loewencompanies'right 10 appeal and the coerced settlementviolated Article 1110 o, NAFTA,which bars the uncompensatedappropriation*ot* investments01foreigninvestOTS.

31. The Claimants allege that the Respondent is liable íor Mississippi's NAFTA breaches under Article 105, which requlres that the Partles 10 NAFTA shaU ensure that all necessary measures are taken to give effect to the provisions of the Agreement, Includlng their observance by State and provincial governments. The Clairnants also allege that, by toleratlnq the mlsconduct which occuned during the O'Keefe IItlgatlon, the Respondent directly breached Article 1105, which imposes affirmative dutíes on the Respondentto provide 'full protection and securlty' to ínvesíments of foreign investors, including 'full protectlon and security' against third-party misconduct.

V. THE RESPONOENT'S QBJECTlON ID COMPETENCE ANO JUBISQICTION

32. By lts Memorial on Competenee and Jurisdiction, the Respondent

objected to the competence and jurlsdictíon 01 this Tribunal on the following grounds:

(1) the clalm is not arbitrable because the judgments01 domestieeourts in

purely private disputes are not 'measures adopted or malntained by a

Party' withln the scope 01 NAFTA Chapter 11;

(11) the Mlsslssippi court judgments complained of are not 'measures adopted or malntalned by a Party' and eannot give rlse to a breach of Chapter Eleven as a matter of law beeause they were not final aets 01 the United States Judicialsystem;

(iii) a prívate agreement to settle a IItigatlon matter out of court is not a government'measure'within the scope of NAFTA Chapter 11;

(iv) the Mlsslssippi trial court's alleged 1ailureto protect against the alíen­ based, racial and class-based references cannot be a 'measure' because Loewen never objeeted to such references during the trial; and

'(v) Raymond Loewen's Article 1117 claims should be dismissed because he does not 'own or control' the enterpríse at Issue.

33. Each of the Clalmantsflled submissionsin answerto the Respondent's objectlons contestlng each of the grounds of objeetion advanced by the Respondent. The Respondent flled its final submissions in reply. The Claimants then filed submissionsin response.

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34. The hearing on the Respondent's objeetion to competence and

[urísdtctíon too k place in Washington D.C. on September 20,21 and 22, 2000.

35. After the conelusion of the oral hearing, pursuant to an order made by the Tribunal, the Government of Mexico filed, on Oetober 16, 2000, submissions concerntnq certaln matters of interpretation of NAFTA which addressed the efteet 01 Artícle 1121, the meaning of the word 'measure', the

rights of an ínvestor ro advance a clalrn under Article 1117 and the decisions

in *Azinian v Uniled Mexican $t8tes* Case No. ARB(AF)/97/2; 14 ICSID Aeview-FILJ 538 and *Meta/ciad v United Mexican States* Case No. ARB(AF)

97/1 which were referred to in oral argument by 1he dlsputing parties.

36. The disputing parties responded to Mexico's submission by filing written submissions pursuant to the order made by the Tribunal at the conclusion of the oral hearing on September 22, 2000. It wUl be conveníent to refer to Mexico's submissions when we eonsider the Aespondent's grounds of objection.

37. In determining the Aespondent's .object ion, It is proper to look at the Claimants' notice of claim for it is by the Notice 01Ctaim jtself and the request for arbltration that the Claimants submit their claim to arbitration under Articles

1116 and 1117 of NAFTA. It has not been suggested that there is in this case

any material difference between the nature 01 the claim formulated in the

Notice of Claim and that formulated in the Memorials filed by the Claimants.

38. No dlstlnction has been drawn in the sub miss Ions 01 the disputíng parties between the concepts of competence and jurlsdiction. The ICSID Arbítration (Additional Facility) Rules make speclfic provlsion for objections to

'competence' (Article 46) but make no such provision for objections to

'jurisdiction'. Article 46 has been applied on the footíng that it extends to objections which 90 to jurisdiction as well as ·objections going to the constitution and composition of the Tribunal.

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| VI, | IHE RESPONDENT'S FIAST GROUND OE QWECTION: |  |
|  | WHETHER JUDICIAL ACTS IN LlTIGATlON eElWEEN | PRIVATE |
| 39. | PARIIES ARE 'MEASUAES' BEGUlATED BY NAFTA?  Articre 1101(1) of NAFTA provides: |  |

'This Chapter [Eleven)applies to measuresadopted or maintained by 8

party' relatínglo:

(a) investors01another Party;

(b) investments of investors 01 another Party in the territory 01 the

Party; .. .'

40. Arficle 201 defines *'measure'* as including 'any law, *regulation,* procedure. requiremenl *or* practice'. The breadth of this inclusive definition, notably lhe references 10 'Iaw, procedure, requirement or practice', is ínconsístent wlth the notion that judicial acllon is an exclusion from the generality of the expression 'measures'. 'Law' comprehends judge-made as well as statute-based rules. 'Procedure' is apl to mclude judicial as well as legislativa procedure. 'Requirement' Is capable of covering a court order which requiresa party lo do an act or to paya sum 01money, while 'practice' is capabte of denoting the practice of courts as well as the practice of olher bodíes.

41. Article 1019(1), which requires each party to promptty publish any law, regulation, precedentiat judicial decision, adminlstrative ruling of general application and any procedure ... regarding government procurement' diHers from the definition of 'measure' In Article 201, which contains no explicit reference 10 judicial decisions. While Article 1019(1) is direcled only to the imposilion of an obligation to publish rules of general applicatlon, it does not follow that this obligation should be regarded as co-extensive with the inclusive definition of 'measure' or as confining what lhe definition comprehends. Although Article 1019 clearly indicales that a precedentlal judicial declslon Is not only a 'measure' but also a measure 'adopted or maintained by a Partv', the Artlcle Is consistenl with the Respondent's submlsslon that 'measures' does not extend to every judicial acUon.

42. Other NAFTA provisions indicate that judicial acnon is not beyond the reach of the word 'measures'. Article 1716, in requiring a NAFTA Party to provide 'that Its judicial authortUesshall have the aulhority to order prompt and effective provisional measures' to prevent infringemenl 01intellectualproperty rights, recogniseslhat judicial orders may constitute 'measures'. Article 1715 requires a Party to provide specified 'civil judicial procedures' for the enforcement of lntellectual property rights. These 'procedures' extend to the making 01 a varlety of judicial orders, including tinal judgments (Article

1715(2)). Article 1701(1) ls concerned to ensure that 'measures to entorce

intellectual property rights do not themselves become barriers to legitimate trade'. Plainly 'measures' there includes the judicial procedures in ArticJe

1715 Le. judicial orders. See also Article 1715(2)(1) (where the reference to

'measures ... taken' must be understood as referring to [udlclal aets, including injunetionsand other entorcementprocedures).

43. The Respondentconcedes tnat when a government entity is involved in a domestic court proceeding, it may be that, in appropriate circumstances, a resulting court judgment eonstitutesa 'measure adopted or maintained by a Party'. This concession is at odds with the argument that the failure to mention 'judicial order' or 'judgment' in Article 201 signifies an intentíon to confine 'measures' to legislativeand executive actions. In general, where the meaning of 'measures' is so confined, the restricted meaning arises from an express limUationor an implied lirnitation arising trom the context. No such limitation is to be found in Article 201.

44. Nor can 'measures'be confined to provisionalor interimjudicial acts as distinct trom final judicial acts. Such a distinction finds support neither in Article 1701 nor Chapter 1001 NAFTA (which applies to 'measuresadopted or maíntained by a Party relating to procurement'). The reference in Article

1019(1) to 'precedentialjudicial decislon' which is one instance of a measure

'adopted or maintained by a Party', is to a final decision as well as a provisional decision. See also Annex 1010.1B paras 2 and 3.

45. The approach which thís Tribunal takes to the interpretation of

'measures' accords with the interpretatíon given to the express ion in intemational Jawwhere it has been understood to lnclude judicial aets. In *Regina v Pierre Bouchereau,* Case 30 77 [1977] ECR 1999, the European Court of Justice rejected the argument that "measure' excludes actions of the judiciary, holding that the word embraces 'any action which affects the rights of persons' coming within 'he application of the relevant treaty provision (at

11). In the *ñsnenee Jurisdiction Gase (Spain v Ganada),* No. 96 (ICJ 4

December 1998), the InternationalCourt of Justice stated that 'in its ordinary sense the word {'measure'] Is wlde enough to cover any acto step or proceedíng,and imposes no particular IImit on tneír materialcontent or on the aim pursued thereby' (at 66). See also *Oil Fields of Texas Inc v N/OG,* 12

Iran-US Cr Trib Aep 308 (1986) at 318-319 (where the judicial acts in question were held to be expropriations within the expression 'exproprlations

or other measures affecting property rights', thus amounting to 'measures affecting property rights'}.

46. The significance for this case 01 the interpretation 01 'measures' in the context of international law is that Article 102(2) of NAFTA requires the Partiesto interpretand apply its provisions 'in the light 01 its objectives set out in paragraph 1 and in accordance with applicable rules 01 international law'. Further, an interpretation 01 'measures' which extends to judicial aets contorms to the objectives 01 NAFTA as set out in Article 102( 1), more particularlyobjectives (b), (e) and (e), namely to

'(b) promoteconditions01 fair competitionin the free trace area;

(c) increase substantially investment opportunities in the territories

01 the Parties;

(e) create eUective procedures tor the implementation and appncationof this Agreement, for its joint administrationand for the resolution01disputes'.

47. Such an interpretation01 the word 'measures' accords with the general principie 01 State responsibility. The principie applies to the acts 01 jud¡cial as well as legislative and administrative organs. (See draft Article 4 on State Responsibility adopted by the International Law Commission and later provisionaUy adopted by the United Nations General Assembly Drafting Committeeon ils second reading, Geneva, May 1-June 9, July 10-August 18,

2000, NCNA/L.600, August 21, 2000.) In *Azinian v United Mexican Statss* Case No. ARB(AF)/97/2,14 lCSID Review-FILJ538, the Tribunal, in rejecting the claim that there were víolations of NAFTA, quoted (at 567) with approval the comments made by the former President 01 the International Court of Justice who, after acknowledging the reluctance in sorne arbitral awards of the tast century to admit that the State ls responsible tor judicial actions, stated:

'... in the present century State responsibility for judicial acts carne to

be recognized. Although independent of Government, the judiciary is not independentof Ihe Slate: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgatedby the legislatureor a decision taken by the executive.' (Eduardo Jimenez de Aréchaga, 'International Law in the Past Thírd of a Century', 159-1 Recueil des Cours (General Course in Public InternationalLaw, The Hague, 1978).

The former President went on to say that State responsíbility tor aets 01 judicial authorities may resuít trom three types of judicial deeision, the first of which is a decision of a municipal court clearly incompatible with a rule of internationallaw. The second type is what is known traditionally as a denial 01 justiee. The Claimants assert that the NAFTA violations of whieh they complain fall within these categories ot judicial decision.

48. The *Azinian* Tribunal pointed out (at 568) thal State responsibility for judicial decisions does nol entitle a claimant to a review of national court decisions as though the internationaljurisdiction seised has plenary appellale jurisdiction. This ls nei1hertrue generally nor for NAFTA. As the Tribunal

saíd,

'What must be shown is that the court decision itself constitutes a violation of the treaty' (al 568).

49. The views expressed by the *Azínian* Tribunal were not necessary tor the decision in that case because it involved no challenge 10 the deeisions 01 the Mexican eourts. Subject to our later consideration of the rule 01 exhaustion ot local remedies and the rule 01 judicial finality, the views are nonetheless persuasive and support our view 1hat 'measures' in Chapter Eleven,accordingto its true interpretation,does not exclude judicial aets.

50. A Tribunal establishedpursuantto NAFTA Chapter Eleven, Seetíon B, must decide the issues in accordance with the provisions 01 NAFTA ano applicable rules 01 international law (Article 1131(1)). Further, as already noted, Article 102(2) provides fhat the Agreement must be interpreted in the IIght ot Its stated objectives and in accordance with applicable rules of internatlonallaw. These objectives ¡neludethe promotíon01conditions of lair competition In the free 1radearea, the increase of ínvestment opportunities and the creation of etfective proceduresfor the resolution 01disputes (Article

102(1)(b). (e) and (e».

51. Guided by these objectives and principies, we do not accepl the Respondent'ssubmissionthat NAFTA is to be understood In accordance with the principIe that treaties are to be interpretedin delerence to the sovereignty

01states. In *AMCO Asia Corp v Republíc of Indonesia* 1 ICSIO Aeports 377 (1983) the Tribunal rejectedthe suggested principie (at 394, 397). Whatever the status of this suggested principie may have been in earlier times, the

Vienna Convention on the Law of Treatles is the primary guide 10 the interpretatlonof the provlsions01NAFTA *(Ethyl Corporation v Canada,* Award on Jurlsdietion, June 24, 1998, at 55-56, 38 ILM 708 (where a NAFTA Tribunalexpressly rejeetadthe argumentthat Seetíon8 of Chapter 11 is to be construed strlctly). Sea also *Pope* & *Ta/bot v Ganada,* Interim Award, June

26, 2000 (where a NAFTA Tribunal adopted a broad Interpretation ot the expression 'investment' in Artiele 111O). NAFTA Is to be interpreted in good falth in aceordancewith the ordínary. meaning to be given to its terms in their context and In the light of Its objeet and purpose (Vienna Convention, Artlcle

31(1». The context includes the preamble and annexes (Vienna Convention,

Article 31(2».

52. We agree with the Respondentthat not every judicial aet on the part of the courts of a Party constitutes a measure 'adopted or maintainad by a Party'. Mexleo submits that, In order to constitute a 'measure', the judicial action under consideratíon must have a general applieation. Thus a judicial affirmation 01 a general principie might well constitute a measure, whereas a specitic order requiring a defendant to paya sum of money would not. The definitlon of 'measure' in Article 201 (which íncíudes 'requirement') is by no meansconsistent wlth thls argument.

53. The questlon then arises whether-the words 'measures adopted or maintained by a Party' should be understood, as the Respondentargues, to exclude judicial acts being the judgments ot domestlc courts in purely prívate matters. The purpose of Chapter Eleven, 'SecUonB - Settlementof Disputes between a Party and an Investor of Another Party' is to establish 'a mechanismfor the settlement of investmentdisputes that assures both equal treatment among investors of the Partles In aceordance wlth the principie 01

Internationalreciprocltyand due processbefore an arbitral tribunal'. The text,

context and purpose of Chapter Eleven combine to support a liberal rather than a restrlcted Interpretatlon01the words 'measures adopted or malntalned by a Party', that is, an interpretationwhich provides protection and security for

'he foreign investor and its Investment: see *Ethyl Corporation v Canada,*

Award on Jurisdiction, June 24, 1998, 38 ILM 708, (where the NAFTA Tribunaleoncludedthat the object and purpose of Chapter Eleven Is to 'create affactive procedures ... for the resolution of disputes' and to 'increase substantiallyinvestmentopportunities'(at 83».

54. Neither in the text or context of NAFTA nor in international law ls there to be found support for the Respondent'ssubmission that measures adopted or maintained by a Party', in its application to judicial aets, excludes the judgments of domestic courts in purely private disputes. Neither the definition

01 'measure' in Article 201 nor the provisions01 Chapters 10 and 17 relating to

'measures' and 'procedures' contain any indication that, in its application to judicial acts, the existence of a measure depends upon the identity 01 the fitigants or the eharacterisation oí the dispute as publie or private. An adequate mechanism for the settlement 01 disputes as contemplated by Chapter Eleven must extend to disputes, whether pubUcor private, so long as the State Party is responsible 10r the judicial aet which constitutes the

'measure' complained 01, and that act constitutes a breach 01 a NAFTA obligation, as for example a discriminatoryprecedentialjudicial decision. The principiethat a State is responsiblefor the decisions 01its municipal courts (or

.al least ns highest court) supports the wider interpretation *01* the expression

'measure adopted or maintained by a party' rather than the restricted interpretationadvancedby the Respondent.

55. Generally speaking, litigation between private parties is less likely to generate a 'measure adopted or maintained by a Party' but, in sorne cireumstances,private litigation may do so. In this respeet,we do not regard the discussion 01 private titigation in *Retail, Wholesale and Depanment Store Union, Loca/S80 v Dolphin Delivery Ltd* r1986) 2 SCR 572, upon which the Respondent renes, as influential in the present context. The discussion relates to s. 32(1) of the Canadian Charter 01 Rights and Freedoms which applies Charter provisions to the legislative, executive *and* administrative branches (but not the judicial branch) of govemment.

56. As the Claimants submit,the Mississippitrial court's judgment ordering Loewen to pay O'Keefe $500 mUlion and the Mississippi Supreme Court requirementthat Loewenpost a $625 million bond were 'requirements' within the meaning of the definition 01 'measure' in Article 201, subjeet to consideration of Article 1121, the principie of finality of judicial aets and the rule 01 exhaustlon01local remedies.

57. The Responden1argues that the words 'adopted or maintained' in ATticle1101 are Indicativeof an intent to limit Chapter 11 to those actions that involve ratlflcation by government. This limitation, so the Respondent

submits. ecoords wlth 'he '8C\ 01state' doctrine. That doctrine is a doctrine of

municipal rather than international law. See *W.S. Kirkpatrick* & *Co Inc v Envíronmental Tectonics Corporation Internationa/493* US 400 (1990) at 404 (where the Court acknowledged that it had 'once viewed the doctrine as an expression 01 international law' but had more recently described it 'as a consequence of domestic separation of powers, reflecting the strong sensa 01 the Judicial Branch that íts engagement in the task of passing on the validity of foreign acts of sta te may hinder the conduct of foreign affairs *(Banco Nacional de Cuba v Sabbatino* 376 US 398, 423 (1964))'. No authority and no materials have been placed before us which justlíy the conclusíon that the acl of State doctrine has been adopted by sufficient countries to be considered as a rule 01 international law pursuant to Article 38 of the Statute of the International Court 01 Justice. In any event, the act 01 State doctrine ls now

expressed in terms of 'acts of a governmentaf character done by a foreign

state within its own territory and applicable there' (Aestatement (Third) of Foreign Aelations Laws of the United States §443(1 )), viithoul differentiating between 'public' and 'prívate' litigation.

58. Whatever the effeet of the act 01 State doctrine may be, Article 1105, in requiring a Party to provide 'full protection and securlty' to investments of investors. must extend to the protection 01 foreign ínvestors from prívate partíes when they aet through the judicial organs of the State.

59. Further, Ihe award of punitive damages would satisfy the public element of the Respondent's public/private díchotomy. It is generally accepted that punitive damages awards are íntended to serve the public ínterest (O.B. Dobbs, Dobbs Law of Remedies §3.11(1) at 457 (2d ed 1993).

60. We reject therefore the Respondent's objection that the Mississippi

Court judgments are not 'measures adopted or maintained by a Party' because they resolved a dispute between ptivate partíes.

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VII. THE BESPONDENT'$ SECaNO GROUND DE OBJECTION:

IHE MISSISSIPPI eQUA! JUDGMENTS ARE NOT 'MEASURES ADOPTED OA MAINTAINED BY A PABTY' ANO CANNOT GIVE

BISE TO A BREACH *DE* CHAPlEA 11 BECAUSE IHEY WEAE NOI

fiNAL ACTS OF THE UNITED STATES JUDICIAL SYSTEM

61. The Respondent argues that the expression 'measures adoptad or maintalned by a party' must be understood in the light of the principie of customary internationallaw that, when a claim of injury is basad upon judicial,

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action In a particular case, State responslbility only arises when there Is final action by the State's judicial system as a whole. This proposition is basad on the notion that judicial action is a single action from beginnlng 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 declsion has not been appealed 10the court 01 last resort. The Respondent distingulshesthis substantiverequlrement01customaryintemational law for a final non-appealablejudicial actlon, .whenan internationalclaim is brought to challenge judicial action, from Inlernational law's procedural requirement of exhaustion01 local remedies('the local remediesrule').

62. The Respondent submlts that there is nothing to show that in Chapter Eleven the Parties intended to derogate from this substantive rule 01 international law when judicial action ls the basis of the claim for violatlon of NAFTA. To the contrary, the Respondent argues that the terms .of Article

1101, 'adopted or malntained by a Party', incorporate the substantive rule *01*

International lawand requlre finality 01actlon. Only those judicial decislons 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 descrlptlon 'adopted or

malntained.'

63. The Claimants' response to this argument is that Article 1121(1)(b) of NAFTA requires an arbitral clalmant to ~ Its local remedies, not exhaust them. This Article authorizesthe filing of a Chapter 11 claim only if

'the ínvestor and the enterprise walve the!r right to indicale or continue

before any administrativatribunal or eourt under the law 01any Party. or other dispute settlement procedures, any proceedings wlth respeet to the measure 01 the disputing Party fhat is alleged to be a breach referredto in Artlcle 1116 ... '.

The Clalmants submlt, flrst, that 'the Article eliminates the necesslty to exhaust local remedies provlded by the host country's administrative or judicial courts'. (9. Sepulveda Amor, *IntemationaJ Law and Internatlonal Sovereignty: The NAFTA and the elalms of Mexican Jurisdictlon,* 19 Houston Journal of International Law 565 at 574 (1997)). The Claimants submit, secondly.that the sc-caaed substantiveprincipie 01flnallty 15 no dlfferent from the local remedies rule and that international tribunals have revlewed the

decísions 0# inferior municipal courts where lhe exhaustion requirement has

been waived or is otherwise inappUcable.

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64. The 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.rule of judicial finatity. The Re.spondentacknowledges,however,that the Article relaxes the local remedies rule to a partial but limited extent, without de#iningor otherwise indícatingwhat that extent is or may be.

65. Observations0#the NAFTA Tribunals in both *Meta/cIad Corporation v United Mexican Sta* tes ICSID Case No. ARB/AF/97/1 (#ootnote4) and in the *Azinian Case,* to which we have referred, support the Claimanls' case to the extent that it is based on Article 1121(2)(b). But Mexico, in its written submissions to this Tribunal, points out that the *Meta/ciad* Tribunal which, in the relevantpassage, purportedto state Mexico'spositíon in that case, did not do so aecurately. Mextco also points out that, in the *Azinian Case,* as there was no complaint of any violation of NAFTA based on a judicial act, lhe Tribunal's observations were not necessary tor its decision. Other cases

refied upon by the Claimants inelude G.*W. MeNear Inc v United Mexican*

*States.* Docket No. 211, Opinions 01the Commissioners 68 al 71, 72 (1928)

and *The Texas Company CJaim,* Dectsion 32-B, American-Mexican CI Aep

142 (1948), but in these cases the relevanttreaty waived exhaustion.

66. There is support for the view that no distinction should be drawn betweenthe principie of finality and the local remediesrule. Indeed,Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad 198 (1915), upon which the Respondentrelies, stated:

'lt ís a fundamentalprincipie that the acts of inferior judges or courts do

not render the state ínternattonaUyHablewhen the claimant has failed to exhaust his local means of redress by judicial appeal or otherwise, for only the highest court to which a case is appealable may be consideredan authority involvingthe responsibilityof the state'.

In the *Finnísh Ships Arbitratíon* 3 RIAA 1497 (1937) it was pointed out that

exhaustion of local remedies meant that there must be a final decision 0# a court which is the highest in a hierarchy of courts to which the claimant can resort in the host State. Borchard is not the only commentator who regards the principie of finality and lhe local remedies rule as different sides 01 the same coin {see C.F. Amerasinghe. Local Remedies in National Law 181 (1990»). And in the *Interhandel* Case (1959) ICJ 6, the ctaim was dismissed

expressly on the ground that Sw\tzerland 'has not exhausted the loca' remedies available to i1' (at 11, 19, 26-27). Although the case was taken by Interhandel to the United States Supreme Court, the Supreme Court remanded the case to the Distriet Court and proceedings were still pending in thateourt.

67. While the content of the two ruJes is similar, if not the same, the rules were thought to serve different purposes. The local remedies ruJe (described as 'procedural') was designed to ensure that the State where violation of international law oecurred should have the opportunity to address *it* by its own means, within the framework of its own domestic legal system *(/nterhandel Case* (1959) ICJ Aeports 6 al 27). Most, if not alllegal systems, have a self­ correcting eapacity. In other words, the claimant was bound to take steps to ensure that the self-correcting mechanism of the State's judicial system is fully engaged as a condition precedent to recognition of the State's responsibility for breach of its international obligation. See the Report 01 the International Law Commission to the United Nations General Assembly, Yearbook of the Intemational Law Cornmission, 1975, Vol. 11,62. Now, compliance with the local remedies rule is seen as a condition precedent to invoking the

responsibility 01 a State for breach oi an ínternational obligation. (See Article

45 of the draft articles on State responsibility, provisionally adopted by tMe Drafting Committee of the United Nations General Assembly on second reading, based on the draft previously adopted by the International Law Commission (A1CN.A1L.600,August 21,2000».

68. On the other hand, the rule of judicial finality (often described as

'substantive') was thought ío be directed to the responsibility of the State for judicial acts. As the statement by Borchard, already quoted, makes elear, it was considered that the State was not responsibte for the aets of lower courts.

69. Although it has been said that the responsibility of the State for a breach of international law constttuted by an alleged judicial action arises only when there is final action by the State's judicial system considered as a whole, it ís now recognised that the judiciary is an organ of the State and that judicial aetion which violates a rule 01 international Jaw is attributable to the State (A.V. Freeman, *The Intemational Responsibility* of *States for Denial of Justice,* 31-33 (1970». The rule of judicial ftnality was influenced by the principies of separation, independenee 01 the Íudiciary and respeet for the finality 01 judicial oecisions. However, the judiciary, though ¡ndependent of

Government, is not independent of the State and the judgment of a court proceeds from an organ of the State as does a decision of the executive.

70. The modern view is that conduc1 of an organ 01 the State shall be consldered as an act 01 the State under internatlonallaw, whether the organ be legislative, executive or judicial, whatever position It holds In the organisation of the State. That, in effect, is the principie expressed in draft Article 4 on State Responsibility" provisionally adopted by the Dratting Commiltee of the United Nations General Assembly, based on the draft previously adopted by the International Law Commission (AlCN.AlL.60Q, August 21, 2000). Although the draft has not been finally approved, it is a highly persuasive statement of the law on State Responsibility as lt presently stands. Draft Article 4 accords with the view expressed by Eduardo Jlmenez de Arechaga, the former President 01 the International Court ('Internatlonal Law in the Past Third ot a Century', 159·1 Aecueil des Cours, (General Course In Public International Law, The Hague. 1978).1

71. Viewed in this light, the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the víolation occurred should have an opportunlty to redress It by its own means, within the framework of Its own domestlc legal system.

72. Just as it was said that the function of the local remedies rule was to establish whether the point had been reached at which the home State may ralse the issue on the international level (G. Schwarzenberger, *Intemational Law.* 604, (1957», now it is the function of the rule to establlsh that State responsibility tor a breach of an intemational obligation may be invoked.

73. We accept that an important principie of international law should not be held to have been tacitly dispensed with by an internatlonal agreement, in the absence of words maklng clear an ínteníion to do so *(Elettronica Sícula SpA (E/si) (United States v Ita/y)* (1989) ICJ 15 at 42). Such an intention may, however, be exhibited by express provisions which are at varíence with the continuad operation o, the relevant principie of intemationallaw.

1 Citad in *Azlnlan v UnitecJMexican States* Case No. ARB/(AF)/97/2, 14 ICSIO Review-FILJ at

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74. Having reached this point in our consideration of the arguments, we

'. have concluded that this ground ot objection should be dealt with al the hearing on the merits. Our reasons for reachlng this concJuslon relate partly to the arguments based on Article 1121(2)(b) and Chapter Eleven and partly

to other arguments advanced by the Claimants in response to the Respondent's objection. We have already mentioned the lack of specificity in the Respondent's acknowledgment that the Article partially relaxes the local remedies rule. Conslderatlon might be given by the Respondent to the possibility of presenting an argument that Articla 1121(2)(b) does no more than curtan or restrict rights that a claimant would otherwise have but for the exlstence of Artlcle 1121 (2)(b). Tne remarks ot the International Court of Justice in *Headquarters Agreement* (Advisory Opinlon) ICJ Reports 12 at 29,

42-43, a decision not cited in argumento may have a bearing on the operation

of Article 1121(2)(b) and also on the Claimants' submission that an agreement to arbitrate dispenses with any obligation to have recourse to municipal courts. Another argument of the CJaimants, namely that the local remedies rule has no application to denial of justlce cases, is one that can conveniently be dealt wlth at the heartng on the merits where the argument can be considered in the context of the particular allegations by the Claimants of denlal of justice on which findings can then be made, Similarly put over is

consideration 01 the Respondent's submissions that the Loewen companies

falled to pursue various local remedies which, according the Respondent, were open to them and would, It successful, have resulted in an effective

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remedy under municipallaw. The hearing of this ground of objection should

therefore stand over to the hearing on the merits.

¡ VIII. THE RESPONDENT'S THIAD GRDUNp DE QBJECTIQN:

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75. !his ground of objection was not strongly pressed. In this case much turns on the circumstances *in* whlch the Mississippi proceedings carne to be settled and that is a matter which must be dealt with at a hearing on the merits.

IX. THE AESPONDENT'SFOURTH GROUNOOE OBJECTION:

THAT THE MISSISSIPPI TRIAL COUAT'S AlLEGEp FAILURE ID PROTECT AGAINST THE ALlEN·BASED, RACIAL ANO CLASS· BASED BEFERENCES CANNOT BE A 'MEASUBE' BECAUSE LOEWEN NEVEA OBJECTED TO SUCH BEFERENCES OURING IHETRIAL

76. This ground of objection does not, in our view, go to competence or jurisdíction. If the Aespondent's case on this pomt is made out, it could result in a dismissal of the claim. fI is an issue which appropriately and conveniently

should be heard and determined at a hearing on the merits.

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x. THE FIFTH GBOUNODE OBJECTION:

AAYMOND LOEWEN'S AATICLE 1117 CLAIM SHOUlP BE OISMISSED BECAUSE HE ODES NOT OWN OR CONTROL THE ENTERPAISEAl ISSUE

The objection on this ground, jf upheld, would not be dispositive of the second Claimant's entíre claim whieh is partly based on ArticJe 1116. Further, jt is far from elear that the objection goes to jurisdiction and, in any event, it is an objec1ion which can be dealt with at the heanng on the rneríts. For this reason we do not consider lt appropriate to decide this question on an objection to competence and jurísdiction.

ORDERS

In the result we make the following orders:

1. Dismiss the Respondent's objection to competence and jurisdiction so far as ít relates to the first ground of objection.

2. Adjourn the further hearing ot the Respondent's other grounds of objection to competen ce and jurisdiction and jo;n that further hearing to the hearing on the merits.

3. The Respondent to file its counter-memorial on the merits within 60

days 01 the date of this Decision.

4. The Claimants to file their replies within 60 days of the time limited for the filing of the Respondent's counter-memorial on the merits.

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5. The Respondent te file its rejolnder within 60 days 01 the time limited for the tiljng of the Claimants' replies.

6. Fix October 15, 2()01as the date of the hearing on the merits.

Sir Anthony Mason, President

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Judge Abn~r J. Mikva

DATED the fifth day of January 2001.