

[Dear Berkeley conference participants:

I am grateful to Andrew and John for the opportunity to present this still-unfinished work, and I welcome your comments/suggestions/criticisms. Please forgive the state of the paper – it is still very much in draft form. One thing with which I am struggling in particular is whether to keep Part V in the paper at all, or whether I should not at least pare down some of the examples.

Regards,

Andrea K. Bjorklund]

The Costs of Deference: State Sovereignty and International Denials of Justice

Andrea K. Bjorklund*

This paper examines the indeterminate standards traditionally employed by international tribunals to ascertain whether a State's judicial and quasi-judicial practices with respect to aliens have resulted in a "denial of justice" under international law. This area of the law attracted little interest for most of the last 50 years, but is squarely in front of the international community as more individuals and corporations are submitting claims against governments under the auspices of bilateral investment treaties (BITs) and similar agreements, including the North American Free Trade Agreement (NAFTA). While confined to disputes concerning investments, these tribunals may touch on other government functions as they decide individual cases. Of immediate interest to the United States are cases that have challenged the procedures of state courts in the areas of punitive damages and sovereign immunity.

International law proscribes countries from denying justice to aliens. Exactly what, however, does securing justice entail? Whether fair treatment has been given to an alien in a particular case raises broader questions of what forms court practices and procedures can and should take in order to maximize justice in a society. International law has not, however, been concerned with such ideals, but rather with "minimum standards of treatment" accorded to aliens below which a country's practices cannot fall and still comply with the standards expected of civilized society. This minimalist standard stems from concerns about encroaching on a State's sovereign prerogative to organize its judicial system as it sees fit. Accordingly, under international law a State is deemed to "deny justice" only in extreme cases -- mere errors will not implicate international responsibility. This article argues that concerns about intrusions into sovereignty are often overstated, and that there is no good reason to treat courts differently from the other branches of government, despite the conventional wisdom dictating that arbitral tribunals show extra deference to acts of the judiciary out of respect for the special position courts occupy within a State's system of government. The vague denial of justice standards, while ostensibly offering great deference to domestic judicial acts, actually disserve both the domestic and international communities' interest in ensuring fair, impartial court procedures, without in fact guaranteeing respect for State sovereignty. A more objective and reasoned approach to alleged wrongs occurring within the judicial system--denials of justice--is possible and desirable.

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My hypothesis is that more rigorous review by international tribunals of individual domestic judicial decisions poses less danger to sovereign privileges than a notoriously indeterminate standard that can result in a sweeping but unreasoned critique of a State's judicial processes. Developments in NAFTA jurisprudence, as well as cases decided under the auspices of the European Court of Human Rights in cases challenging local judicial procedures, support the institution of a more searching inquiry. Moreover, such a result would be consistent with the goal of expanding cross-border investments that underlies the treaties establishing such extra-judicial dispute resolution.

Introduction

International investment arbitration is an arcane field with a long pedigree that is just now coming to the attention of at least a segment of the general public. Newspapers and television reporters visit the field periodically to warn of the danger to democracy and popular sovereignty supposedly inherent in an international tribunal's purporting to pass judgment on a U.S. court decision or government regulation.¹ The applicability of international law to investment disputes, and indeed to the general treatment that nations accord aliens resident in or doing business inside their borders is not new. The first heyday of investment arbitration was in the post-colonial era of the nineteenth and early twentieth centuries. What might be termed the second heyday has now arrived with an increased volume of investor-state arbitral dispute resolution both under bilateral investment treaties ("BITs") and the trilateral North American Free Trade Agreements's trilateral Chapter Eleven.

The parties to a BIT have negotiated with each other to extend rights to their respective nationals. Thus, an alien who is a national of one of the parties to a treaty, and who makes an investment in the other treaty party, may commence an arbitration with the latter claiming a violation of one of the treaty obligations. The activities of a State most likely to be alleged to violate international law are discrimination; expropriation without payment of "prompt, adequate" and effective" compensation; and "denial of justice," which may either be a failure by

¹ See, e.g. Adam Liptak, *Review of U.S. Rulings by Nafta Tribunals Stirs Worries*, THE NEW YORK TIMES 20 (April 18, 2004); Bill Moyers, NOW on public television [fix this cite]; the Nation piece; (other old New York Times article); but see Sebastian Mallaby [fill in rest].

the judicial system to correct a wrong done by another part of government, or flaws within the judicial system itself. The cases that fall under the rubric of denial of justice are especially interesting because they raise the broad question of what forms court practices and procedures can and should take in order to maximize justice in a society. Such questions affect not only aliens resident in a country, but also the citizens of those countries.

The new era of investment arbitration is different in some important respects from those earlier tribunals. Prior to the 1980s, most investment dispute settlement was backwards-looking; mixed claims commissions were formed to assess claims of violations that had already occurred. The new BITs are forward looking; they are designed to establish a more favorable climate for investment by assuring potential investors of an unbiased, (relatively) efficient venue in which to have any claim heard.

Aliens claiming that their interests have been adversely affected by government action have sought redress from some dozens of arbitral panels in the last two hundred years, but most of these have attracted little public attention.² But there has been an explosion in the number of bilateral investment treaties – there are now more than 2,100³ – which has drastically expanded both the number of potential claimants and the number of fora in which claims of denial of justice, or other alleged breaches of international law, can be heard. The consequence is a growing body of case law that has no formal precedential value but is often of significant persuasive value.

Earlier mechanisms for dispute settlement dealt mainly with disputes between colonial powers (e.g. France and Great Britain) and newly independent nations that were often former colonies (e.g. Venezuela, Panama, Mexico and the United States).⁴ The United States and Britain had several commissions to settle disputes in the aftermath of the Revolution and the War

² Bart Legum, Harvard In'tl L. J. Article; Freeman, Lillich.

³ [insert latest cite--UNCTAD website (see Susan's article for quotes re rise in numbers--Noah's chapter) .

⁴ Put in cites

of 1812.⁵ Now, most bilateral investment treaties are between developed and developing countries. While the treaty obligations are reciprocal, most claims of treaty violations have been brought by developed-country investors seeking recompense from developing countries. That dynamic may be changing slowly; an Argentine company recently brought and won[?] a claim against Spain.⁶ The North American Free Trade Agreement contains a dispute settlement mechanism borrowed from the bilateral investment treaties. Canada and the United States have an enormous volume of cross-border investments, and each has found itself defending its actions in claims brought by foreign investors.

Earlier claims commissions were technically government-to-government dispute settlement. An aggrieved alien was represented by his country of origin, rather than representing himself. Now, the United States and other countries have entered into treaties permitting foreign investors to bring claims directly against the government in whose territory they are investing. This change accords with the purpose of the treaties: to increase the certainty and predictability of dispute resolution should anything go wrong with the investment that is the fault of the government and a violation of international law. It means, however, that an important filtering mechanism is no longer in place; aliens are not required to convince their own countries to espouse their claims but may themselves commence arbitration.⁷

The immediate goal of bilateral investment treaties is to encourage the flow of capital across national borders, and particularly investment into developing countries, by providing investors with recourse to predictable and impartial dispute settlement in the event of adverse governmental action in violation of international law.

The law of state responsibility has not, however, been concerned with the ideal of

⁵ Cite to Jay Treaty and to American -British Claims Commission book. [Cayuga Indians case as example?]

⁶ Maffezini v. Spain [fill in cite];[new case from ILIB of August 13]

⁷ Note exception with respect to taxation measures.

maximizing justice, but rather with establishing only “minimum standards of treatment” that must be accorded to aliens if a country’s practices are to conform with the expectations of civilized society. In part this minimalist approach stems from the principle that States retain the right to organize their judicial systems and laws as they see fit, which makes imposing any kind of uniform standards difficult. In part it stems from concerns about encroaching on the sovereign prerogative once the process a state has chosen to establish is functioning. The more international law mandates that countries legislate, prosecute, and judge according to non-national standards, the more it encroaches on sovereign prerogative. Accordingly, under international law a State is deemed to “deny justice” only in fairly extreme cases--mere errors of judgment will not implicate international responsibility.

Thus, a denial of justice exists only when there has been a “manifest injustice” that would “shock the conscience” of reasonable people or when an alien has been denied access to the judicial system entirely.⁸ Of course, the dividing line between what constitutes a mere error and what constitutes an egregiously unfair practice is not always clear. Moreover, the “shock the conscience” or “manifest injustice” standard is often unsatisfactory for the same reason that review based on equitable, rather than legal, principles has been suspect.⁹ Different judges or arbitrators have different susceptibilities and may come to vastly different conclusions on the same facts. This standard may also result in vague, poorly reasoned decisions whose reach is more excessive than a narrowly crafted decision based on more definite criteria. The “extra” deference towards judicial decisions purportedly inherent in deferential standards may in some instances backfire; careful scrutiny, under an appropriately deferential standard of review, will often lead to narrower and less “intrusive” arbitral decisions. More pragmatically, in a world in

⁸ Cite to Chattin

⁹ Parties to arbitrations have to decide whether the arbitral tribunal deciding their case has the authority to decide a case *ex aequo et bono* (“in justice and fairness”) (Blacks Law Dictionary 557 (6th ed. 1990)) rather than by reference only to the governing law. Decisions made *ex aequo et bono* are sometimes given less deference in proceedings to enforce or set aside proceedings than would be given to a decision based on law. [cite for this?] See further discussion of this issue in part ____, *infra*.

which these cases exist and are likely to multiply, formulating coherent approaches to the international law standards against which municipal acts are to be measured is essential to orderly and persuasive decision-making. This article suggests that a more objective and reasoned approach to alleged wrongs occurring within the judicial system--denials of justice--is possible and desirable.

Twenty years ago, even ten, the concept of denial of justice resided almost exclusively in articles dating from the early part of the century and claims commission decisions of similar vintage.¹⁰ Establishing a coherent approach to denials of justice is especially desirable now as the United States has faced two NAFTA Chapter Eleven cases challenging state judicial decisions. The U.S. Constitution, despite its guarantees of due process, does not immunize the United States judicial system from potential violations of international law. Rather than recoiling from any arbitral tribunal finding that might cast doubt on the integrity of U.S. judicial procedures or decisions, the United States might consider those findings instructive. The requirements imposed by international law with respect to procedural and substantive denials of justice are not exceptionally rigorous; justice could well be furthered by embracing the opportunity to correct the mistakes made by a court.

Critics of investor-State arbitration frequently style it an unwise abdication of sovereignty that confers special rights on multinational corporations in the context of an unstoppable and unwise movement to globalization.¹¹ This article is not meant to be an apologia for the existence of investor-State dispute resolution, though it suggests that the interest governments have in ensuring that their citizens are fairly treated when residing in or doing business in other countries remains as important as it has ever been. Further, it suggests that concerns about intrusions into

¹⁰ The last International Court of Justice to address, albeit tangentially, denial of justice was *Elletronica Sicula (ELSI)*, decided in 1989. In fact, *ELSI* is the only case to have addressed the issue on the merits. In his separate opinion in *Barcelona Traction*, Judge Tanaka set forth the standards he would have employed had he been judging the merits of the case. [add cite + cross reference]

¹¹ [cites]

sovereignty are often overstated. Moreover, there is no reason to treat courts differently from other branches of government, despite the conventional wisdom dictating that arbitral tribunals show extra deference to acts of the judiciary out of respect for the special position courts occupy within a state's system of government.

Part I of this article examines the development of the law of state responsibility for injuries to aliens, and situates the doctrine of denial of justice in that context. Part II examines the doctrine of denial of justice. Part III examines the greater effectiveness of introducing a "hard look" doctrine in place of the traditional, extremely deferential standard. It suggests that more rigorous review of individual domestic judicial decisions by international tribunals poses less danger to sovereign privileges than a notoriously indeterminate standard that can result in a sweeping but unreasoned critique of a State's judicial processes. Part IV examines the idea of "sovereignty," explains why concerns about sovereignty are often overstated and misconceived, and may draw attention away from more immediate problems with investor-State dispute settlement. Finally, Part V applies my proposed sequential, "hard-look" analysis to selected U.S. legal practices to illustrate the benefits of such an approach.

I. State Responsibility for Injuries to Aliens

International investment protections, including the doctrine of denial of justice, developed within the ambit of the law of "state responsibility for injuries to aliens." The law of state responsibility has a long pedigree. It reached its apogee in the latter 19th and early 20th centuries, although the underpinnings date back to Vattel and Grotius.¹² The demise of colonialism and the concomitant rise of newly independent states meant that the rights attendant on both persons and property in those states were subject to new governmental regimes. Those aliens left behind, and those who entered the territory after, were, generally speaking, subject to the laws promulgated by the new regimes. This was not in itself controversial:

¹² CHITTHARANJAN F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1 (1967).

A stranger who, in the guise of a friend, enters a state whose policy has been the friendly reception of foreigners, even without giving any expression of his fealty, is understood to have expressed tacitly, by his act of entering the country, his willingness to conduct himself by the laws of that state, in accordance with his station, so soon as he has found out that such a general law was promulgated for all who desire to sojourn within the limits of that State. And, on the same ground, he has tacitly stipulated from the state for a temporary defence of his person and the securing of justice.¹³

The basic premise was that an alien entering a State must subject himself to that state's law during his sojourn, but that in return the state promised to defend his person and to secure justice for the alien.

The "security of justice" required by international law encompassed a number of obligations. Primary among them were providing certain protections of property and the person, and a fair and functioning judicial system in which to vindicate those rights.

Collectively, the duties owed by a state to aliens within its jurisdiction, including Pufendorf's "security of justice," fall within the international law of "state responsibility for injuries to aliens." Defense of the person is now largely the domain of international human rights law.¹⁴ To the extent that the human rights of investors are at stake, however, the legal regimes of investment protection and human rights protection could eventually re-intersect.¹⁵ Even now, some human rights jurisprudence may be instructive in interpreting the international law obligations, such as according aliens a minimum standard of treatment, that States have undertaken in investment treaties. Protections for property remain within the realm of state responsibility law.

In the past, aliens injured by a State had two obstacles to overcome before they could

¹³ SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM, Vol. II, at 403 (C.H. & W.A. Oldfather, trans., Oceana Pubs.1964) (1688).

¹⁴ Human rights instruments ratified after the Second World War have created a specialized realm of international law, and accompanying jurisprudence. [CITE TO THISB larger development of theme later on?]See also F.D. Berman, Legal Theories on International Dispute Prevention and Settlement, supra n. ___? at 453.

¹⁵ Section ___ below discusses the possible re-intersection of the two disciplines in immigration law. See also Chip Brower [legitimacy paper]

obtain redress for their injuries. First, they had to establish that the wrong done them was one contrary to international law, whether that law was a treaty undertaking, a violation of customary international law, or some other obligation undertaken by the state. Second, they had to find a forum before which their claim could be heard, or find some other way to assert their claim, such as securing the espousal, or diplomatic protection, of their rights by their own government. Various mechanisms were established through the years to deal with the latter problem. The section below describes experiments the international community has undertaken to establish fora for the resolution of disputes and also the law that has developed within those fora.

A. A forum for redress

Finding a forum was a significant hurdle. Usually the “security of justice” was left to the good offices of the State in question. An alien would have very little recourse against a State’s failure to abide by its international obligations. States usually had sovereign immunity to suits in local courts.¹⁶ The independence of the judiciary would also have a strong effect on whether an alien’s claim against a government would get a fair hearing. States also had, and in many cases continue to have, foreign sovereign immunity from suit in non-local courts.¹⁷ As for allegations of international wrongs, individuals had no standing to bring a claim; only a government could do that on the alien’s behalf through “espousal,” or diplomatic dispute settlement. For reasons explained below, espousal was and is an often unsatisfactory method of settling disputes. The drawbacks of espousal have led to the establishment of various fora, including temporary claims

¹⁶ The assumption that a state has sovereign immunity derives from the maxim “the king can do no wrong.” [cite] Most states have abrogated sovereign immunity to some extent in the last 75 to 100 years [cite to international encyclopaedia of tort law]. Whether a failure to abrogate sovereign immunity comports with international law has already been the subject of one NAFTA claim. In *Mondev Corp. v. United States of America*, a Canadian developer questioned the fact that the Massachusetts Tort Claims Act gave immunity to state actors for intentional torts and thereby foreclosed the developer’s ability to obtain redress, notwithstanding the fact that the jury had found the Boston Redevelopment Authority, a Massachusetts state agency, guilty of having intentionally interfered with a contractual relationship between the Canadian developer and the City of Boston. *Mondev Int’l Ltd. v. United States*, ICSID (W. Bank) ARB(AF)/99/2 (Award) (11 Oct. 2002) . The Tribunal dismissed the claim on the grounds that Mondev had not proved that failure to provide redress against a government body that committed an intentional tort violated international law. For a fuller discussion of the Mondev case, see section xxx infra.

¹⁷ [insert info re foreign sovereign immunities act and commercial activities exception]B also throw in terror victim protection exceptions and Flatow? [note political clout that resulted in these being viable options?]

commissions, permanent international judicial bodies, and mechanisms for the establishment of ad hoc arbitral bodies, which have provided a framework for the development of the law of state responsibility for injuries to aliens. Many of the principles of interest today, including denial of justice, developed in those tribunals.

1. Diplomatic protection

Under traditional public international law theory and practice, individuals had no status.¹⁸ International law applied only to relationships between States whose sovereign equality was considered absolute, regardless of differences in size or power.¹⁹ Because aliens had no rights under international law, the fiction was created that an injury to an alien was also an injury to the alien's country of origin.²⁰ This fiction made possible the elevation of a dispute to the State-to-State level recognized by international law.

Solving disputes through diplomatic protection was an advance over so-called "gunboat diplomacy," but it could be unsatisfactory for many reasons. Espousal of a claim was not automatic. Thus, in the event of an alleged international wrong such as an expropriation of property or a failure to obtain redress for an injury through the courts--a "denial of justice"--an alien suffering injury still had to prevail upon his government to espouse a claim against the other State in an attempt at diplomatic settlement.²¹ Actually securing diplomatic protection

¹⁸ This is true of the last few hundred years. At one time, under the law of nations, individuals also had rights and duties. See Mark W. Janis, *An Introduction to International Law* 227-29 (1993) [check this cite and rewrite].

¹⁹ F.D. Berman, *Legal Theories on International Dispute Prevention and Dispute Settlement: Lessons for the Transatlantic Partnership*, in *TRANSATLANTIC ECONOMIC DISPUTES: THE E.U., THE U.S. AND THE WTO* (E. Petersmann and F. Pollack, eds., 2003). In practice, of course, some sovereigns were more equal than others. [cite] The law of state responsibility developed amidst a determination on the part of all States, regardless of size, that their sovereignty be respected and that they not be deemed to have succumbed to the pressure exerted by States of greater military, economic, or political influence. See Part XX *infra*.

²⁰ *Mavromattis Palestine Concessions Case*, 1924 P.C.I.J. Rep., Ser. A. No. 2, at 12 [check this]; *Panevezys-Salutiskis Railway (Est. v. Latvia)*, 1939 P.C.I.J. 16 (Ser A/B) No. 76 (Judgment of 29 February) [check these cites].

²¹ [statistics on espousal? The presumption is against espousal: "Under international law and practice the United States does not formally espouse claims on behalf of U.S. nationals unless the claimant can provide persuasive evidence demonstrating that certain prerequisites have been met."]

from a home state was difficult for many reasons.

First, espousal was optional at the discretion of the protecting State. International relations can be complex, and a protecting State might not want to jeopardize the negotiations with a State over some long-sought concession by espousing a claim against that State for the alleged injury.²² “[T]he Department [of State]’s decision with respect to espousal is likely to be influenced, not only by the merits of the case, but by the Department’s concern for offending a foreign state and creating a potential irritant in its dealings with that state.”²³ Indeed, the reason the Foreign Sovereign Immunities Act was passed in 1976 was to lift sovereign immunity for claims arising from a foreign state’s commercial activities because of the difficulty of obtaining diplomatic protection.²⁴ Thus, even if a claimant met all other criteria set forth below, a State could still decide not to espouse the claim.

Second, a claimant would have to convince his government that the offending government had actually violated international law--that he had a good case to make. Given the difficulty of establishing a breach of international law, see Section __ infra, this hurdle should not be underestimated.

Third, only the government of which the injured party is a citizen can advocate a claim on the party’s behalf. While this seems straightforward, injured parties are sometimes corporations, and the question of corporate nationality under international law is not altogether

<http://www.state.gov/s/l/c7344.htm> (visited Aug. 10, 2004).

²² See, e.g., David. J. Bederman, *International Law Advocacy and its Discontents*, 2 CHI. J. INT’L L. 475, 483-84 (2001) (“Individual grievances have tended to be subordinated to the greater good of the nation in its pursuit of common foreign policy objectives.”)

²³ Testimony of Abraham D. Sofaer, former Legal Adviser to the Department of State, before the Senate Judiciary Committee, Subcommittee on Courts and Administrative Practice, June 21, 1994. Sofaer also referred to the case of Scott Nelson, who at that time had waited over nine years for a decision as to espousing his claim of torture against Saudi Arabia. *Id.*

²⁴ Cite to Foreign Sovereign Immunities Act (“FSIA”). The FSIA also lifted immunity for certain gross abuses of human rights. See, e.g. *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

settled.²⁵ Moreover, nationality can change during the course of a claim's conduct, or a controlling or minority shareholder may be a citizen of a jurisdiction different from that of the corporation's citizenship.²⁶

Fourth, the principle of exhaustion of local remedies served to limit the claims a State would be asked to espouse. A State could not intervene diplomatically until its injured citizen had attempted to gain redress locally.²⁷ This principle respected the sovereign right of a state to control matters within its borders by allowing it the opportunity to grant redress for wrongs committed within its territory. While an alien did not have to exhaust local remedies in the event they prove to be futile,²⁸ waiting for futility to become manifest could be very frustrating, and proving futility is not necessarily straightforward.²⁹

Finally, if the government did espouse the claim, the individual claimant lost all control over it. Thus, the government may waive or settle the claim without the agreement of individual.³⁰ The settlement, if any, would usually be paid to the government rather than to the injured individual because of the fiction that the wrong was actually against the protecting government.³¹ This formal requirement could be waived at the discretion of the espousing state, which could pass any recovery on to the aggrieved citizen, but the citizen seeking espousal was

²⁵ Steiner, Vagts and Koh [cite]

²⁶ The Barcelona Traction, Light & Power Company (Belg. v. Spain), 1970 I.C.J. 3. In *Barcelona Traction*, the International Court of Justice refused to honor the claims of Belgium on behalf of Belgian shareholders in a Canadian company incorporated under Canadian law and with headquarters in Canada, but which was operating in Spain and had been effectively expropriated by the Spanish government. Reasoning that municipal law placed great weight on the distinction between the shareholders of a company and the company itself, the court determined that only Canada could espouse a claim on behalf of the Canadian company. *Id.* ¶¶ 41-97.

²⁷ cite to amerasinghe

²⁸ cite to ambatielos.

²⁹ Cite to Interhandel; exhaustion treatises

³⁰ RICHARD B. LILICH & GORDON A. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION 94-95 (1962).

³¹ LILICH & CHRISTENSON, *supra* n. ____, at 103.

dependent on the government's goodwill.³²

Diplomatic protection is not merely a relic; parties still seek the protection of their governments.³³ Yet in many cases they have been relieved of the need to find their way through the maze of espousal because bilateral investment treaties and certain free trade agreements, including the NAFTA, have granted individual rights to alien investors from countries covered by the relevant agreement.

2. Mixed Claims Commissions

Diplomatic protection was sometimes most effective when it was imposed on a grand scale. In certain cases revolutions or other unsettled conditions could lead to large numbers of claims arising from the same set of circumstances, such as the nationalization of property on a country-wide or sector-wide basis or the unavailability of national remedies for injurious conduct due to domestic unrest, resulting in a denial of justice of the purest form.³⁴ In those cases, the protecting government could negotiate the settlement of a large number of cases at once, often through the establishment, usually by means of a treaty, of a "mixed claims commission."³⁵ The commission was "mixed" because it contained arbitrators from each country, who would hear the claims submitted to it and allocate funds when the claims were valid. Funds were often provided in a lump-sum, which could then be doled out by the commission. Some commissions were established to hear claims submitted against only one country, while others heard claim submitted by citizens of both countries. Some commissions were established by "lump sum

³² In the United States, "as a matter of practice claimants generally receive their proportionate share of any settlement fund." LILlich & CHRISTENSON, *supra* n. ___, at 95. Such a decision is within the discretion of the Secretary of State. *Id.* at 103.

³³ Scott Nelson sought diplomatic protection in 1985. *See supra* n.____. *See also* the requirements for seeking espousal detailed on the State Department website. <http://www.state.gov/s/l/c7344.htm> (visited Aug. 10, 2004).

³⁴ Cite to League of Nations codification; Freeman.

³⁵ *See generally* RICHARD B. LILlich & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, PART I: THE COMMENTARY (1975); WESTON ET AL., INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995 (1999).

agreements” and had a fixed amount of money to distribute. [add discussion re why governments would accept such commissions]

The first mixed claims commission is often held to have been established between the United States and Great Britain by the Jay Treaty of 1794.³⁶ By that treaty, the two countries agreed to settle claims stemming from the Revolutionary War.³⁷ From that time until the onset of the Second World War, adjudicatory settlement, usually by means of mixed claims commission arbitration, was used in at least 249 cases.³⁸ Such commissions were rarer in the post-War era [insert numbers]. They have remained an important part of peaceful dispute settlement. [elaborate further]

The United Nations Compensation Commission (UNCC), set up in the aftermath of the First Gulf War, was established to hear millions of claims of individuals and States arising from Iraq’s invasion of and subsequent withdrawal from Kuwait.³⁹ The UNCC was set up under the aegis of the United Nations Security Council, and is truly an international claims commission in that it is adjudicating claims filed by nearly 100 States.⁴⁰

Perhaps the most influential mixed claims commission is the Iran-U.S. Claims Tribunal, established in The Hague by the Algiers Accords in 1979 following the Iranian Revolution, and still extant today.⁴¹ The high quality of the judges on the Tribunal, the fact that all of their

³⁶ A. STUYT, *SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1970*, at ix (1972). Previous commissions had settled government-to-government claims in ancient Greece and Rome. *See*, LILICH & WESTON, *supra* n. ____, nn. 24-26 & accompanying text.

³⁷ Agreement with Great Britain, Nov. 19, 1794, 8 Stat. 116, T.S. No. 105 (effective Feb. 29, 1796)

³⁸ LILICH & WESTON, *supra* n. ____, at 26. Of those 249 instances, Lillich and Weston list the 26 instances in which lump-sum settlements were used to settle disputes. *Id.* at 26-27 & n. 36. When lump sums were not used [fill in]

³⁹ *See generally*, MARCO FRIGESSI ET AL., *THE UNITED NATIONS COMPENSATION COMMISSION: A HANDBOOK* (1999).

⁴⁰ FRIGESSI, *supra* n. ____, at 35. *See*, U.N. Sec. Council Resolution 687.

⁴¹ Most of the claims have been adjudicated; the biggest remaining claim is “B-1,” which covers all military equipment and expertise supplied by the United States to Iran under the Shah’s regime. The claim totals well over \$1 billion and resolving it requires manipulating millions of documents. [explain more?]

decisions were published, and the Tribunal's longevity have all contributed to the important place the Tribunal holds in developing the law of state responsibility.⁴²

3. National Claims Commissions

National claims commissions are a close cousin of "mixed" commissions; the main difference is in the composition of the panel. Whereas mixed claims commissions have adjudicators from both parties involved, a national claims commission is a domestic body that happens to be charged with the hearing and settlement of claims that arose internationally. The jurisprudence of national claims commissions has often been overlooked, perhaps because they are not usually considered "international."⁴³ [add information on Foreign Claims Settlement Commission] [claims following Bolshevik revolution] [again, discussion about why governments would accept such commissions]

4. Permanent Court of International Arbitration and International Court of Justice

The International Court of Justice (ICJ) and the Permanent Court of International Arbitration, an underused body also located in The Hague, are permanent tribunals. Some diplomatic protection claims have been adjudicated by the ICJ--notable are the *Barcelona Traction* and *ELSI* cases⁴⁴--but the Court has not been a very frequent arbiter of such disputes. The relative paucity of investor-State cases before the ICJ is likely the result of several factors. First, all claims submitted to the International Court of Justice are State-to-State.⁴⁵ Thus, an investor must convince a State to espouse her claim, a cumbersome process for the reasons

⁴² See generally, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY (Richard B. Lillich & Daniel Barstow Magraw, eds.1998); CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1998).

⁴³ RICHARD B. LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 2 (1962)

⁴⁴ [Cite to Barcelona Traction and ELSI/ cross reference to discussions of those cases]

⁴⁵ The Statute of the International Court of Justice has no provision for private party participation, even in a role similar to that of an amicus curiae, before the Court. [cite to statute] In the 1990s the Court has begun to find some flexibility in the rule; in a case involving

outline in part IA, *supra*. Second, many States have not accepted the compulsory jurisdiction of the ICJ in all cases. Rather, they must agree to submit to the Court's jurisdiction in each case as it arises.⁴⁶ Sometimes States do this via a treaty, in which they agree that any dispute arising under the treaty will be referred to the Court.⁴⁷ Absent such a treaty or adherence to the optional clause, a State will have to agree to the Court's jurisdiction with respect to a particular case before the Court can hear the case. Third, litigating before the ICJ is a time-consuming process. The procedures of the court are very formal and have been described as "ponderous,"⁴⁸ with all oral pleadings read from written documents that are then submitted for detailed consideration by the Court. The procedures give each of the 15 judges ample time to consider their decisions and also accord great deference to the sovereign litigants, but they are not expeditious. Finally, the Court's decision in the Barcelona Traction case, although now 24 years old, was roundly criticized when issued in 1970 due to the rigid formalism with which the Court interpreted the law of diplomatic protection to the detriment of the investors in that case.⁴⁹

[add info re PCIA]

5. Investment Treaty Ad Hoc Arbitration

Most of the foregoing dispute settlement processes share one characteristic: they are retrospective. Mixed Claims commissions, national claims commissions, and pure espousal all become relevant after the disputed actions affecting the rights of aliens have already occurred. Ad hoc arbitration is prospective; it establishes mechanisms to settle disputes that can be invoked once the breach occurs. In effect, a State that agrees to investor-State disputes settlement in a bilateral investment treaty has made an offer to arbitrate a certain set of disputes (provided

⁴⁶ As of 1996, only 59 of the 187 parties to the Statute had accepted the Court's compulsory jurisdiction under the optional clause. Stephen Schwebel, FIFTY YEARS OF THE WORLD COURT: A CRITICAL APPRAISAL, 90 A.S.I.L. Proc. 339 (1996) [get pinc cite].

⁴⁷ Example of this.

⁴⁸ Schwebel, *supra* n. ____ at [get pin cite] ASIL Proceedings 1996)

⁴⁹ cite to Lillich ASIL article; other.

certain conditions are met), which an investor can accept should circumstances arise that make dispute settlement necessary.⁵⁰

In the 1960s, the world community, under the auspices of the World Bank, laid the groundwork for this prospective process. In order to encourage foreign direct investment in developing countries, the World Bank established the International Centre for Settlement of Investment Disputes (ICSID).⁵¹ ICSID provides for impartial arbitration of disputes arising from contracts between States and investors.⁵² The availability of impartial, binding dispute settlement reassured investors skittish about the potential for expropriations and the breaking of contractual commitments by sovereigns all-powerful in their own countries who often enjoyed immunity from court proceedings.⁵³ ICSID rules do not just cover disputes in which countries have undertaken a contractual obligation to submit to ICSID dispute resolution. Certain bilateral and multilateral investment treaties also refer disputes arising under them, which may or may not arise from a contractual breach, to arbitration under the ICSID rules.

Indeed, the complex web of bilateral investment treaty (BIT) dispute settlement by ad hoc tribunals is a fertile source of ICSID cases, both under the ICSID Convention and under the ICSID Additional Facility Rules.⁵⁴ ICSIDThe number of investor-State arbitrations, particularly those brought alleging violations of BITs and other similar agreements, has grown enormously in recent years.⁵⁵ Approximately 22 cases have been brought under Chapter Eleven of the North

⁵⁰ Andrea K. Bjorklund, *Contract without Privity: Sovereign Offer and Investor Acceptance*, 1 CHI. J. INT'L L. 183 (2001).

⁵¹ LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION 1-2* (2004). The ICSID Convention entered into force Oct. 1966. [insert official cite] For a description of the events leading to the negotiation of the convention, see Aron Broches, introduction to Schreuer book on the ICSID Convention.

⁵² REED, *supra* n. ___, at 7. The investor's State of origin and the contracting State both had to be parties to the Washington Convention for ICSID to have jurisdiction over the dispute. *Id.* [convention cite].

⁵³ Andrew Guzman, *Va J. In'tl L. article*

⁵⁴ Cite to ICSID numbers. The ICSID Additional Facility is available when one party, or the State of which one party is a national, is a signatory to the ICSID Convention but the other party is not. [cite]

⁵⁵ Insert citation to ICSID website; other evidence.

American Free Trade Agreement, the provision that provides for investor-State dispute settlement.⁵⁶ The first NAFTA case was not submitted to arbitration until 1997, although NAFTA entered into effect on January 1, 1994, but the rate of case filings has been increasing.

[summary about BITs' and NAFTA's effect on jurisprudence]

[European Energy Charter Treaty]

B. Legal Liability

Establishing that an injury violates an obligation explicitly set forth in a treaty may be relatively straightforward, but establishing that it violates customary international law may be much more difficult. The most widely accepted sources of international law are those set forth, in hierarchy, in Article 38 of the Statute of the International Court of Justice: (i) international conventions; (ii) international custom, as evidence of a general practice accepted as law; (iii) general principles of law recognized by civilized nations; and as a subsidiary means of determining the law, (iv) judicial decisions and the teachings of the most highly qualified publicists of the various nations.⁵⁷

There was and is no treaty establishing the general *content* of the law of state responsibility for injuries to aliens, although bilateral investment treaties are specific with respect to certain obligations, such as expropriation.⁵⁸ State responsibility was the subject of numerous codification attempts, commencing in the League of Nations in the 1920s and continuing through the 1960s. In the 1920s, the League of Nations started an ambitious, world-wide effort to codify international law which culminated in the 1930 Hague Conference for the Codification of

⁵⁶ See www.naftalaw.org (visited August 18, 2004) for a list of cases pending. The number of cases listed on the website can be misleading, because some claimants filed notices of intent to submit a claim to arbitration (a preliminary step designed to give rise to consultations between the investor and the defendant government), but never actively or successfully pursued the cases.

⁵⁷ Statute of the International Court of Justice, art. 38.

⁵⁸ See, e.g. NAFTA Article 1110, which defines expropriation, model BITS provision, Canada's model FIPA. Article 1105, however, requires that the NAFTA governments accord the international minimum standard of treatment as established by customary international law. See FTC Interpretation re Article 1105.

International law.⁵⁹ The delegates to the conference considered three subjects: Nationality, Territorial waters, and the Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners.⁶⁰ The delegates to the 1930 conference were not able to agree on fundamental issues and the effort subsided until after World War II. The iterations of the International Law Commission's (ILC) Draft Articles on State Responsibility as drafted in the 1960s are descendants of that League of Nations conference. [describe ILC] However, despite the efforts of gifted rapporteurs like Roberto Ago, the ILC failed to give final approval to those articles. Now, in slightly different form that focuses on primary obligations like the duty to intervene in time of war, the ILC Draft Articles remain a work in progress under the supervision of Professor James Crawford of Cambridge University.⁶¹ [update status of ILC]

The fact that the international community was close to codifying the law of state responsibility suggests some agreement on the existence of such law.⁶² Customary international law can be a slippery concept. It is usually described as legal principles that nations follow out of a sense of legal obligation, or *opinio iuris*.⁶³ [describe establishment of CIL]

Although the delegates did not agree on the details of the law, there was some agreement on general contours of responsibility. States were arguably responsible for a number of wrongs, including . . . [examples from ILC commission.]

The failure to provide an adequate judicial system was termed a “denial of justice” and was an international wrong by the offending government. Some nations argued that this was in

⁵⁹ See, e.g., Green H. Hackworth, *Responsibility of States For Damages Caused In Their Territory To the Person Or Property of Foreigners*, 24 AM. J. INT'L L. 500 (1930). From the middle of the nineteenth century certain nations had attempted to codify parts of international law, *id.* at 500, and publicists had suggested potential benefits from such a codification. See, e.g., PASQUAL FIORE, *INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION* (1918) trans. from 5th Italian edition by E.M. Barnhard.

⁶⁰ Hackworth 24 AM. J. INT'L L. at 500.

⁶¹ [cite to current status of State Responsibility articles]

⁶² [is this in lillich AM JIL article?]

⁶³ [cite]

fact their only obligation; international responsibility would attach only if the municipal system of dispensing justice had failed.⁶⁴ The drawback to this approach is that it would turn every international claim into an inquiry into the adequacies of the court system, and would prevent any development of international law governing the acts of other branches within the government.

1. Exhaustion of Local Remedies Rule

The concern to limit liability under international law was reflected in the longstanding legal principle of exhaustion of local remedies, which required a claimant to seek redress from the offending government, usually in local courts, before seeking diplomatic intervention--espousal--from his own government.⁶⁵ The first school of thought described above held that only the failure to provide redress from an underlying wrong, a “denial of justice” that was otherwise owed, could give rise to state responsibility. Regardless whether the wrong was done by a local or federal government official, no international responsibility would exhaust until local remedies had been exhausted. From this perspective the local remedies rule may be said to be substantive in that no wrong existed until after local remedies had been tried and found wanting. The initial wrong never form the basis for an international claim, which could rest only on the local court’s actions in denying relief.

The second school of thought argued that the local remedies rule was a procedural barrier merely – a gate-keeping mechanism designed to respect sovereignty while limiting the number of cases that a government would be asked to espouse. In other words, the initial wrong allegedly committed by a municipal government could in itself give rise to state responsibility, even though a claimant’s State would not intervene diplomatically until the claimant had tried, but failed, to gain relief through local means.

Remnants of this debate linger, although the consensus is that exhaustion of local

⁶⁴ League of Nations codification arguments.

⁶⁵ *See supra* nn. ___ & accompanying text.

remedies is a procedural issue linked to espousal.⁶⁶ The best reason for denominating it “procedural” is that it can be waived. If an actionable international wrong could only exist once local remedies were exhausted and found wanting, a State’s waiver of the rule would have no effect; an investor would still have no substantive basis on which to bring a claim. Whether or not the local remedies rule is procedural or substantive, the principle of exhaustion means that there is inevitably a link between national judicial processes and international tribunals, given that an international process commences only “once it ha[s] been demonstrated that the direct injury itself could not be properly remedied at the source.”⁶⁷

2. The International Minimum Standard

One of the motivating factors behind the establishment of state responsibility law was the perceived tendency of many states to discriminate, whether explicitly or implicitly, against aliens. Combating such discrimination in areas where international law prohibited it, such as the administration of justice, is a theme running through much of the law.⁶⁸ The concern that an outsider may have a hard time getting justice vis-à-vis a local resident in a local court is the same concern that underlay the establishment of diversity jurisdiction in the United States federal courts.⁶⁹ Discrimination is therefore a primary theme in many of the decided cases, and in the codification attempts that proliferated in the early twentieth century.

Developed states in particular were concerned, however, that states not be able to raise a defense of nondiscrimination in order to defeat responsibility. While state responsibility is

⁶⁶ As noted in part __ supra, exhaustion of local remedies was a useful mechanism to limit the number of cases a State would be asked to espouse. See generally Amerasinghe, Cancado Trindade.

⁶⁷ F. D. Berman, *supra* n. ____, at 454. This has caused some confusion and some interesting jurisprudence in the *Loewen* case, described in part ___ *infra*.

⁶⁸ [advert to law merchant when discussing discrimination--Law and Revolution: Formation of the Western Legal Tradition] --International law does not require that nationals and aliens be treated equally for all purposes. Roth at 156 (“A State may exercise a large control over the pursuits, occupations and modes of living of the inhabitants of its domain. In so doing, it may doubtless subject resident aliens to discrimination without necessarily violating any principles of international law.”)

⁶⁹ [Cite to Judiciary Act of 1789; law review articles]

predicated on a violation of international law, municipal law may be at issue in cases of alleged discrimination. In other words, certain states might assert in their defense that their own nationals were entitled to no better treatment, either in terms of substantive laws or in terms of judicial administration. For this reason, developed states in particular posited the “international minimum standard of treatment,” standards below which a nation could not fall without violating international law. The international minimum standard encompassed substantive rights that must be accorded aliens, as well as procedural remedies, including judicial procedures, for the vindication of those rights.

The international minimum standard and denial of justice are often conflated,⁷⁰ but the requirement not to deny justice should be viewed as a subset of the international minimum standard.⁷¹ The international minimum standard, as expressed through the doctrine of denial of justice, requires that aliens have access to impartial courts to vindicate certain fundamental rights. Access alone is not enough; the nation’s laws must give the alien some right of redress for certain wrongs. Thus, “the more numerous and extensive the rights to be respected the greater the potential margin of culpability that confronts a nation’s judiciary.”⁷² There is also a non-discrimination requirement. Even if international law would not have required that a nation provide a mechanism for a certain right to be vindicated, the alien must have the same access to justice as a citizen if such a right exists.⁷³ The international minimum standard also requires that aliens be treated fairly once they are within the judicial system, regardless of the case they are bringing or the right they are seeking to vindicate.

⁷⁰ Ian Brownlie, *State Responsibility* part I at 74 (1983).

⁷¹ Many of the requirements apply to governmental acts outside the judicial system. *See* ROTH at 185-186 for a summary of the minimum requirements of international law. [list them].

⁷² Freeman, at 497-98.

⁷³ “Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.” Elihu Root, *ASIL Proceedings of 1910*, at 20.

Latin American nations resisted the notion of the international minimum standard, following the maxim of the jurist Calvo and arguing that aliens deserved no better treatment, and no better recourse from alleged wrongs, than did their own nationals. By inserting Calvo clauses in contracts, they attempted to eliminate diplomatic recourse for aliens, which in their view gave the aliens an extra and unfair venue in which to pursue relief. Ironically, the United States has criticized the Calvo doctrine, yet recently Congress has apparently attempted to insert the equivalent of a Calvo clause in new investment treaties.⁷⁴

II. Denial of Justice – Past and Present

The recent cases brought under NAFTA Chapter Eleven, *Loewen v. United States* and *Mondev v. United States*, have triggered renewed interest in international review of domestic court proceedings, yet NAFTA is by no means the first international agreement to provide a forum for arbitral decisions on denials of justice. The mixed claims commissions that proliferated in the latter part of the nineteenth century and the early part of the twentieth as foreign investment and foreign travel increased provide many earlier examples. In particular, many of the newly independent countries of South and Latin America experienced upheavals in government that resulted in injuries to aliens who had investments there. The governments in question agreed to have claims, including those related to judicial processes, adjudicated before mixed claims commissions.⁷⁵

Denial of justice as a theoretical concept predated those claims commissions, though they are the most fertile source of decisions regarding it. The contribution of mixed claims commission jurisprudence to customary international law has been the subject of some debate. Arbitral decisions cannot be conveniently pigeonholed in the hierarchy established by Article 38 of the ICJ Statute. While such an eminent scholar as Philip Jessup stated in 1948 that “[t]he

⁷⁴ [cite to proposed Kerry amendment to fast-track legislation]; Baucus piece in BNA; TPA as passed

⁷⁵ Cite to Lillich and Weston--Lump Sum Settlements

international law governing the responsibility of states for injuries to aliens is one of the most highly developed branches of that law,”⁷⁶ the ICJ itself (Judge Jessup was on the ICJ from ? to ?) negated the status of arbitral decisions and even lump-sum settlement agreements as sources of international law.⁷⁷ The view of the ICJ was roundly criticized and the reasons for accepting the contribution of such decisions to constructing some predictable edifice within which states operate has been well established.⁷⁸ Moreover, the ICJ Statute’s rigid hierarchy and its failure to reflect international decision-making processes and norms has been trenchantly criticized.⁷⁹ As I argue in part ___ *infra*, decisions of international tribunals are necessary and useful tools in the development of international investment jurisprudence.

A. Historical View of Denial of Justice

For many years, a debate flourished over the contours of the principle of denial of justice. While it was always understood in the context of state responsibility for injury to aliens, international scholars diverged on the question of its breadth. One school of thought held that any delictual act (whether or not judicial in nature) implicating the responsibility of a state in international law was a denial of justice.⁸⁰ The second school of thought limited a “denial of justice” to wrongful acts in the administration of justice, whether that administration resided in the judicial branch itself or in offices performing necessary related functions, such as prosecuting criminals. Other acts committed by executive or legislative organs might in certain circumstances

⁷⁶ Philip Jessup, *A Modern Law of Nations* 94 (1948); [check Schwarzenberger].

⁷⁷ *Barcelona Traction, Light & Power Co.* 1970 ICJ 3, 40.

⁷⁸ See, e.g., Richard B. Lillich, *The Rigidity of Barcelona*, 65 *AM. J. INT’L L.* 522, 525 & n. 4 (1971); W. MICHAEL REISMAN, *NULLITY AND REVISION* 555 (1971).

⁷⁹ W. MICHAEL REISMAN, *NULLITY AND REVISION* 554-58 (1971). “In point of fact, the problem of priorities is artificial, since authoritative international policy does not present itself for application with a convenient label affixed, specifying its source. International prescription is an ongoing process. The purport of a convention cannot be grasped without consideration of prior and subsequent customary developments, their consonance with general principles, and the responses of quasi-authoritative doctrine.” *Id.* at 555.

⁸⁰ Cite to Freeman; Fitzmaurice

give rise to state responsibility under international law under different theories, but would not be “denials of justice” in and of themselves.”⁸¹

In many respects, the debate was largely semantic: “the determination of particular controversies has almost never depended upon the meanings attached to this term. In almost all cases the real question has always been whether or not a State was responsible internationally for a particular act or omission, and not whether such an act or omission can be called denial of justice.”⁸² The denial of justice debate was part of a larger concern about when states could or should be held accountable on the international front.

The distinction between acts affecting the administration of justice and other wrongful acts was especially important to several of the arbitrators in the Mexican Claims commission cases, who adopted the notion that acts involving the administration of justice should be given greater deference than acts of the legislative or executive branches. In early cases, however, the commission refused to draw any such distinction between the judicial and executive and legislative branches, holding in the *Neer* case, “(first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”⁸³ In *Neer*, the widow of a U.S. mine supervisor alleged that Mexican authorities failed to exercise sufficient diligence or investigative zeal in pursuing the murderers of her husband. Applying the above standard, the commission exonerated Mexico. The *Chattin* case limited the standard to acts of the judiciary, and posited that only cases involving bad faith or a wilful neglect of duty

⁸¹ Of course, within those two schools of thought were variations on the theme: [insert from the Lissitzyn book and Fitzmaurice]

⁸² Oliver J. Lissitzyn, *The Meaning of the Term Denial of Justice in International Law*, 30 AM. J. INT’L L. 632, 645 (1936).

⁸³ *Neer*, Opinions of Commissioners at 73.

could implicate responsibility for those acts.⁸⁴

Because states were soon to attempt to codify international law, and because arbitrators had indicated different, and more deferential, standards of review should be applied to decisions of courts, identifying with some precision what constituted denials of justice became important. Further, identifying precisely what conduct of a State is claimed to violate international law may affect the State's practice and may affect the remedy provided.⁸⁵

Once the contours of the doctrine were defined, the problem of giving them substance remained. The doctrine of denial of justice developed against a background of certain procedural safeguards and required deference to judicial decision-makers. But what exactly was the extent of that deference? And what exactly constituted a denial of justice?

When the League of Nations tried to codify international law in the 1920s, part of their effort was an attempt to define denials of justice and to identify what kinds of acts or omissions by the judiciary and related agencies would engender international responsibility. In preparation for the conference on codification that took place at the Hague in 1930, researchers at the Harvard Law School prepared an influential set of draft articles, which included the following definition of denial of justice:

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross

⁸⁴ Chatten, *Ops of Commissioners* at 427. “[The Chatten case’s] only bearing would be on the question of what standard ought to be applied in determining the wrongfulness of certain government acts. Its only effect then would be to make it more easy to establish the wrongfulness of the act in question in the case of executive and legislative, than in the case of judicial acts.” Jacobus Gijsbertus de Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico, Under the Convention of September 8, 1923* (1938).

⁸⁵ Tribunals convened under NAFTA Chapter Eleven lack the authority to order any change in domestic laws, see Article 1135 “Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.” Nevertheless, the award of significant damages due to a change in law or regulation deemed to constitute an expropriation might well lead to the repeal of the law for fear of further liability. In a case where the affected claimant attempted to obtain, but was denied, relief in municipal courts, the claims presented to the tribunal might well encompass both direct expropriation and a denial of justice. For future claimants, and for the State defendant, a tribunal decision that the law itself effected an expropriation would have potentially different consequences than a decision that a court erred in determining that no taking occurred in a particular case.

deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.⁸⁶

Those preparing the draft were not attempting to advance international law beyond its then-existing boundaries, but to “combine a restatement of the existing law with proposals for moderate changes which seem necessary to secure the acceptance of the convention by all countries.”⁸⁷ The Harvard Research draft has remained influential in subsequent codification attempts, although later drafters have attempted to formulate more precise standards.⁸⁸ By this time, the late 1920s, commentators concentrated on the acts of courts themselves, but related government agencies are also involved. Many early cases involved the failure of governments to investigate or prosecute with sufficient diligence the perpetrators of crimes against aliens.⁸⁹

In the 1930s, Alwyn Freeman made an exhaustive study of the subject in his seminal work, the *International Responsibility of States for a Denial of Justice*. Several other commentators were writing then, too, including Sir Gerald Fitzmaurice, Oliver Lissistyn, Judge Charles de Visscher, Clyde Eagleton, and [first name?] Steil.⁹⁰ In the early 1960s, in conjunction with the ILC’s still-ongoing codification attempts, professors at Harvard, this time Louis Sohn and Richard Baxter, again took a hand at drafting a convention, this time entitled *Convention on the International Responsibility of States for Injuries to Aliens*.⁹¹ Broadly speaking, these

⁸⁶ Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, art. 9, 23 Am. J. Int’l L. Sp. Supp. 131, 134 (1929)

⁸⁷ Harvard Research, Introductory Comment, 23 Am. J. Int’l L. Sp. Supp. at 140.

⁸⁸ See *infra* at . . .

⁸⁹ [cite to mob violence cases.]

⁹⁰ [Cite to all of them.]

⁹¹ Louis B. Sohn & R.R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens*, 133 [hereinafter *Harvard Draft Convention*], in F.V. GARCÍA-AMADOR, LOUIS B. SOHN, R.R. BAXTER, *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1974). Sohn and Baxter

publicists and arbitrators agree that denials of justice can be separated into two categories, procedural and substantive. Of course, as is the way with U.S. constitutional law, some issues cross the borders of procedure and substance. Nevertheless, for clarity of thought and analysis, I will discuss them separately.

1. Procedural Denials of Justice

Most of the misdoings of courts as conceived by international law fall under this category. At its most basic, a procedural denial of justice is a denial of access to a court.⁹² This definition commanded universal adherence during the codification attempts of the 1920s. Access may be denied by the courts themselves, or by what might be termed a failure of legislation--the legislative branch has either failed to pass a law that would permit redress or has passed a law that refuses access to the courts. A court's dismissal of a case for lack of jurisdiction would not automatically constitute the basis for an international claim (absent some bad faith or discrimination on the part of the tribunal), especially if another court or tribunal could provide redress.

The logical extension of this statement asks in what circumstances the state would be obliged ensure the existence of a law that could give redress against a particular act in some kind of local tribunal.⁹³ A claimant attempting to assert a cause of action or a case otherwise not prosecutable under municipal law would not necessarily have an international right for the court to hear her case, unless she could show that the State in question was obligated to provide redress

worked closely with the special rapporteur of the ILC, F.V. García-Amador, in the preparation of their draft and in the simultaneous preparation of the ILC draft articles.

⁹² Under customary international law, a government must "provide an opportunity to the private party to seek a remedy for an alleged breach through a competent independent tribunal." OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 312 (1991).

⁹³ "Ce qui importe, au point de vue du droit international, c'est qu'il se trouve au moins un tribunal compétent pour examiner la demande au fond. S'il ne s'en trouve aucun, la déclaration d'incompétence, même rendue conformément à la législation interne, fera apparaître les défauts de l'organisation judiciaire. de Visscher at 396. Along the same lines, a court dismissing a case because of an alleged conflict of jurisdiction could give rise to a denial of justice in the event that the supposed conflict was unfounded. *See, e.g.,* Fabiani [insert parenthetical]

for that particular wrong.⁹⁴ Freeman and de Visscher give the example of recourse against high officials of a State, which is often not permitted by municipal law.⁹⁵ Freeman concludes there is no customary international law requirement that States permit redress against high officials, and therefore there can be no denial of justice in a State's having failed to provide an avenue for such redress.⁹⁶ A claimant could, however, submit an international claim directly against the high official, assuming the act was wrongful.⁹⁷

The procedural obligations attendant on arrest or detention of aliens also fall under this heading. These obligations would usually be relevant in criminal matters, but might also come into play for civil or administrative detention of unlawful aliens.⁹⁸ These requirements are most often dealt with now in the realm of human rights law, as opposed to the law of state responsibility. While customary international law may not be settled on all of the obligations that a State must meet, certain fundamental responsibilities have been identified: arrests or detentions must satisfy the requirements of local law, which should include the obligation that the officer issuing the warrant had the authority to do so, that the warrant complies with municipal procedural requirements, and that it clearly states the offense punishable by law;⁹⁹ the imprisoning State must treat the alien humanely and give adequate nutrition;¹⁰⁰ the detention

⁹⁴ de Visscher at 395-96.

⁹⁵ FREEMAN at 228, de Visscher at 395-96.

⁹⁶ FREEMAN at 228.

⁹⁷ Freeman at 228-29.

⁹⁸ [Compare Sohn & Baxter and Freeman].

⁹⁹ Freeman at 196. Note that the seizure of goods must also be done in accordance with legal process. Freeman at 199 & n.3. The International Covenant on Civil and Political Rights, which applies equally to all individuals, whether citizens or foreigners, and which is now adhered to by ??? countries, contains a detailed list of obligations, including

¹⁰⁰ Freeman at 201-03.

must not be unduly prolonged;¹⁰¹ the State must investigate and substantiate the charges within a reasonable period of time;¹⁰² and the State must inform the accused of the charges against him and permit him to communicate with his attorney.¹⁰³

Certain obligations also accompany the conduct of the trial. Again, the alien must be allowed to prepare a defense (which includes knowing the charges against him, examining the evidence against him, consulting with an attorney, presenting evidence on his behalf, and being able to summon witnesses in court.¹⁰⁴ Furthermore, “no documents should be withheld, hidden or destroyed by authorities to the prejudice of the foreigner’s case.”¹⁰⁵

Undue delay in the proceedings may effect a denial of justice throughout the judicial process. Delay in coming to trial, delay during trial, delay in decision-making, and delay in appellate decision-making can all give rise to denials of justice. Most often delay is measured against the rules or practices prevailing in local courts; so long as the time in a particular case comports with the usual practices, delays will not be fatal. Consideration is also given to the complexity of the case and the reasons for the delay.

The procedural and substantive guarantees noted in the Harvard Research Draft are not limited to civil cases; much of the early case law had to do with the criminal incarceration of aliens whose treatment both before and after trial was found wanting. Nevertheless, the context in which these cases are mostly likely to arise is the bilateral investment treaty or Chapter Eleven

¹⁰¹ Freeman at 203-05. Freeman noted the difficulty in determining what constitutes an undue length of detention and the lack of international legal consensus on that point, and referred to local law requirements as the primary means against which to measure the permitted length of detention. *Id.* at 203-04.

¹⁰² Freeman at 205-06.

¹⁰³ Freeman at 206-08.

¹⁰⁴ Freeman and Roth.

¹⁰⁵ A. H. ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 192 (1949).

of the NAFTA, and those are far more likely to involve civil actions.¹⁰⁶ Although eclipsed by these private rights of action, espousal, the traditional method by which a state brings a claim on behalf of its nationals, is still a viable legal doctrine and could result in action against the United States, as was the case in recent controversies involving alleged U.S. derelictions of duty under the Consular Notification Convention.¹⁰⁷

2. Substantive Denials of Justice

Protecting aliens from procedural injustice is not enough to ensure that they receive adequate justice. Free access to the courts means nothing if judges are corrupt or decisions do not comport with the law. Otherwise a State's tribunals could effectively insulate themselves from any culpability on the international sphere simply by permitting an alien into court to state his case, thereby satisfying procedural requirements, and then denying the claim on the merits, without giving reasons for the judgment. A substantive denial of justice is one in which the court gives a "manifestly unjust judgment."¹⁰⁸ A manifestly unjust decision may affect the merits of the case, or it may be a decision on a matter of procedure that unfairly prevents an alien from defending or from prosecuting his case.

As noted above, one of the most frequently cited explanations of what constitutes a manifestly unjust judgment was written by Arbitrator Van Vollenhoven in *Chattin v. United*

¹⁰⁶ Technically speaking, the BITs and NAFTA are limited to "investment disputes." At least some cases indicate that tribunals will undertake a preliminary enquiry to satisfy themselves that the issue before them is indeed an "investment dispute." [Cite to case in article for ABA. Pope & Talbot, also.] Nevertheless, besides that definition, the NAFTA protections in some articles extends to "investors of another Party," without explicitly requiring that a case be brought because of damage to the investor as related to his investment. Thus, theoretically speaking, a NAFTA investor who is jailed for a crime could conceivably claim before an international tribunal that details of his charging or his incarceration or his trial denied him justice. The Iran-US. Claims Tribunal explored a similar issue in Grimm and Iran, in which Mrs. Grimm alleged that Iran had failed to protect her husband from assassination. Though declining to go that far in the case, the tribunal noted "[i]t would perhaps be possible' that a failure to act could be a 'measure' affecting property." THE IRAN-U.S. CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 305 (Richard B. Lillich & Daniel Barstow Magraw, eds. 1998), citing Grimm and Iran, 2 C.T.R.78, 79 (1983)).

¹⁰⁷ [Cite to Breard and LaGrand]

¹⁰⁸ Research in International Law, Harvard Law School, 23 A.J.I.L. spec. suppl. at 173 (1929).

Mexican States, a case decided under the Mexican-American Claims Commission of 1923. He said “Acts of the judiciary, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.”¹⁰⁹ This is essentially the same standard that had been put forth in *Neer*, although that case involved a failure to prosecute, rather than a judicial deficiency. The *Chattin* tribunal offered no reason for limiting the *Neer* standard to cases involving the judiciary (and indirect liability of the executive), but greater deference to judicial proceedings was accepted as the norm in the Harvard Research Draft and in the Bases for Discussion at the League of Nations Codification Conference.¹¹⁰

Explicit in the position that judicial decisions are semi-sacrosanct is the notion that any reviewing tribunal accord them great deference. In the *Putnam* case, decided before *Chattin*, the tribunal noted that “A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.”¹¹¹

Early suggestions that claimants prove ill will or bad faith by a judge before international fault could lie have been rejected because of the difficulty, and perhaps impossibility, of divining a judge’s intentions. Thus, the consensus is that the written decision has to stand by itself, yet the element of bad faith still exists in that tribunals reviewing the decision are to determine whether it is so outrageous that nothing could explain it except bad faith on the part of the judge or jury.

¹⁰⁹ *Chattin*, 1 Opinions of Commissioners 427 (1927). Van Vollenhoven, however, extended the same deference to those acts of the executive or the legislature that would give rise to “indirect liability,” e.g. a failure to take governmental action in response to a wrong committed by a private person.

¹¹⁰ [quotes from country submissions re judiciary]

¹¹¹ *Putnam*, opinions of commissioners at 225.

However, because international tribunals are not intended to sit as courts of appeal deciding questions of municipal law,¹¹² they may have difficulty deciding whether something besides bad faith explains a decision that seems facially troubling.

This method of review, however is not the best way to respect the integrity of a nation's courts or to ensure that their sovereignty is respected. The *Chattin* standard is more similar to an equitable principle than a legal standard. The flexibility inherent in equitable standards explains the rise of courts of equity in the fifteenth and sixteenth centuries [doublecheck time period], but the lack of predictability inherent in such flexibility also explains their decline in favor of courts of law.¹¹³ As I explain in part ___ *infra*, this deferential approach may lead to unreasoned decisions that are potentially more sweeping indictments of a nation's administration of justice than a more focused and searching review would produce. Thus, contrary to intuition, engaging in a deferential, "shock the conscience" analysis recommended by the *Chattin* tribunal may actually increase the likelihood of finding a denial of justice and may result in a more serious incursion into sovereignty than an appellate-court-like review.

B. Post-War Denial of Justice Jurisprudence

Recent tribunals convened to consider denials of justice have generally agreed that the *Chattin* standard is too low, but they have not raised the bar by an appreciable amount. Instead, they look for "arbitrariness" or acts that shock or surprise "judicial propriety." These standards are not appreciably better than those set forth by the *Chattin* tribunal. Arbitral tribunals have not turned to the guidance that might be provided by the European Court of Human Rights or the Inter-American Court of Human Rights, a regrettable failure to use all available resources and to commence a dialogue among the bodies that make important decisions about the standards for a

¹¹² Louis B. Sohn and R.R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens, art. 8 at 197 [hereinafter Harvard Draft Convention], in F.V. GARCÍA-AMADOR, LOUIS B. SOHN, R.R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974).

¹¹³ [check history of the common law papers for cites to this]

functioning judicial system. I will first review the recent arbitral tribunal decisions on denial of justice, and then review decisions made by other international decision-making bodies that may affect the doctrine.

1. NAFTA Chapter Eleven and BIT cases

NAFTA tribunals have not accepted the arguments of the United States, Canada, and Mexico that the denial of justice jurisprudence stopped when the last U.S.-Mexican Claims Commission disbanded itself.¹¹⁴ However, the tribunals have not entirely agreed on what progress has been made in the intervening 75 or so years.

a. *The Loewen Group, Inc. v. United States of America*

In *Loewen*, a Canadian funeral home company challenged the acts of the Mississippi judiciary on several grounds. The Canadian company claimed that the Mississippi trial court proceedings in which it had been a defendant had been infused with prejudice against the company by virtue of its Canadian pedigree and that the judge had impermissibly allowed racial issues to be brought into play.¹¹⁵ It also claimed that the trial was riddled with errors that resulted in a jury award of compensatory and punitive damages so disproportionate to the amount sought as to result in a denial of justice under international law.¹¹⁶ The award, which totaled \$500 million, formed the basis for the supersedeas bond (125 percent of the award) required under Mississippi law to stay execution of the judgment pending appeal (a supersedeas bond differs from an appeal bond in that it stays execution of a judgment pending appeal, thus enabling a defendant to avoid losing its assets during any appeal, but is not a prerequisite for the filing of an appeal). Both the intermediate appellate court and the state supreme court declined to reduce the supersedeas bond of \$625 million, although Mississippi law provided that they could have done

¹¹⁴ Cite to briefs of the three NAFTA governments re DOJ jurisprudence

¹¹⁵ *Loewen*, Decision on Competence ¶ 2.

¹¹⁶ *Loewen Award* ¶ 39.

so for “good cause shown.”¹¹⁷ Thus, no Mississippi appellate court ever heard the merits of the appeal. The Loewen Group settled with the local funeral company to whom it had lost, in what it described as a coerced settlement due to the fact that the bond requirement effectively denied it access to courts that could have corrected the errors.¹¹⁸ Although the company considered petitioning for *certiorari* to the United States Supreme Court prior to the settlement, it did not do so.¹¹⁹

The United States filed objections on competence and jurisdiction. One of the arguments it raised was that the Mississippi trial court’s acts could not form the basis of a violation of Article 1105 of NAFTA, which requires that Parties accord investments of investors “treatment in accordance with international law” because they were not final acts of the Mississippi court system.¹²⁰ The United States was not arguing for a return to the local remedies rule; rather, it distinguished international wrongs based on the acts of courts from those based on the acts of other government agencies.¹²¹ Citing publicists and cases from the mixed claims commissions of the early part of the last century, the United States noted that the acts of courts have always been subject to special deference; moreover, because the judiciary acts as a whole, and inherent in the nature of a system with appellate review is the use of that review, a judicial act cannot give rise to a NAFTA claim unless and until it is the final act of a court of last resort.¹²² The United States did not argue that a requirement of judicial finality would always require petitioning for *certiorari* to the Supreme Court in the U.S. system; it did provide expert testimony, however, that such review would likely have been forthcoming in *Loewen*, based on the due process issues

¹¹⁷ *Id.* at ¶¶ 6, 183.

¹¹⁸ *Loewen*, Decision on Competence ¶ 5; *Loewen Award*. ¶ 48-50.

¹¹⁹ *Loewen*, Memorial of the United States of America on Matters of Competence and Jurisdiction (15 February 2000) at 62-65 [hereinafter U.S. Memorial on Jurisdiction]; *Loewen Award* ¶¶ 200, 210-17.

¹²⁰ *Loewen*, U.S. Memorial on Jurisdiction, at 49-56.

¹²¹ *Id.* at 51 n.30.

¹²² *Id.* at 49-56.

that Loewen could have raised in its petition, and based on the remarkable similarity of the *Loewen* case to the *Pennzoil-Texaco* case, which had seemed to capture the interest of the Court.¹²³

The *Loewen* tribunal issued a decision on competence and jurisdiction that joined most of the United States' objections to the decision on the merits. The tribunal did not entirely dismiss the U.S. government's position, but it would be hard to not read its initial words on the subject as skeptical. The first reaction seemed to be that the United States was simply trying to resurrect the local remedies rule, but to apply it only when the subject of the claim was a court act. "There is support for the view that no distinction should be drawn between the principle of finality and the local remedies rule."¹²⁴ The tribunal characterized the rule of judicial finality as "substantive" and "directed to the responsibility of the State for judicial acts."¹²⁵ The tribunal noted that the modern view was that the conduct of any organ of the State could be considered an act of that State for purposes of liability under international law, and continued: "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 violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."¹²⁶

Nevertheless, the tribunal did not altogether dismiss the idea. It noted that the United States' position with respect to the exact extent of the local remedies rule was unclear, and also suggested that Article 1121(2)(b) did no more than "curtail or restrict rights that a claimant would otherwise have,"¹²⁷ suggesting that without the provision, the claimants would be able to pursue remedies simultaneously. The decision also suggested that the affirmative defense to

¹²³ *Id.* at 54-67; Expert Testimony of Drew S. Days, III. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 16 n. 15 (1987)

¹²⁴ *Loewen*, Decision on Competence ¶ 66.

¹²⁵ *Id.* at ¶ 68.

¹²⁶ *Id.* at ¶¶ 70-71.

¹²⁷ *Id.* at ¶ 74.

waiver -- that no remedies were available because of the supersedeas bond requirement -- be dealt with at the merits and that whether any other remedy was available also wait for resolution at that time.¹²⁸

The United States continued to press its claim with respect to finality of court decisions during the case on the merits.¹²⁹ Given the skepticism with which the *Loewen* tribunal treated the distinction between the local remedies rule and the principle of judicial finality argued by the United States, the decision on the merits was somewhat surprising. The tribunal upheld the U.S. position with respect to finality.¹³⁰ Acknowledging that the question was to some extent intertwined with the local remedies rule, the tribunal nevertheless found that “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.”¹³¹ In a manner reminiscent of the substance/procedure distinction inherent in local remedies rule debates, the tribunal distinguished court acts from internationally wrongful acts of other branches of government, which latter acts might be attributable to the State before a claimant had recourse to a court, or when such recourse proved unavailing.¹³² In the latter case, should a claimant want to base an international claim on the court’s act in failing to provide redress, he would have to appeal the court’s decision

¹²⁸ *Id.*

¹²⁹ *Loewen*, U.S. Counter-Memorial at 107-117, *Loewen*, Rejoinder of the United States of America (27 August 2001) at 86-96.

¹³⁰ *Loewen Award* at ¶¶ 142-56. Though the decision on the point may have been, strictly speaking, *obiter dicta*, it is likely to be of interest to scholars and international decisionmakers. See note XX *infra*. The tribunal disposed of the case by finding that when Loewen filed for corporate reorganization under Chapter Eleven of the U.S. Bankruptcy Code, some years after bringing the NAFTA claim, it had failed to preserve the Canadian nationality of the claim. The tribunal held that this failure violated the continuous nationality rule, which it found requires a claim to be held by an entity of the same nationality at the time of the injury, at the time the claim is filed, and throughout the pendency of the claim. *Id.* at 225. This jurisdictional objection did not dispose of Ray Loewen’s claim; the United States has asked for clarification of its status.

¹³¹ *Id.* at ¶156.

¹³² *Id.* at ¶148.

to the court of last resort before international responsibility for the judicial act would attach. The Loewen Group had argued that it had no avenue for appeal because the bond requirement foreclosed access to the Mississippi courts and because the U.S. Supreme Court would have been unlikely to grant *certiorari* to hear the fact-laden issues on which the case rested.¹³³ The tribunal did not question the assumption that futility or unavailability of remedy, exceptions to the exhaustion of local remedies rule, applied to the doctrine of judicial finality. However, it determined that the Loewen Group had not carried its burden to demonstrate that it had no recourse, with particular reference to the possibility of filing for *certiorari* in the U.S. Supreme Court.¹³⁴

The results of the *Loewen* decision could be far-reaching, even though NAFTA explicitly states that decisions do not have precedential effect for other cases.¹³⁵ In the short time NAFTA panels have been convened, NAFTA tribunals have consistently looked to other panels' treatments of the issues. They have not always followed the decisions of the other tribunals, but panels have made some effort to explain why they have rejected prior panel reasoning, or found it inapplicable.¹³⁶

For lawyers especially, it may be intuitively appealing to require that a litigant avail itself

¹³³ *Id.* at ¶¶ 207-210. The United States had also argued that Loewen should have filed to reorganize the company under Chapter Eleven of the U.S. Bankruptcy Code when the appeal was pending, which would have stayed execution of the Mississippi jury award. The tribunal did not question that in some circumstances requiring a company to file for bankruptcy would be an available local remedy, and suggested that Loewen had failed to convince the tribunal that corporate reorganization was not an adequate remedy in this case.

¹³⁴ *Id.* at ¶ 215.

¹³⁵ NAFTA art. 1136(1). "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case."

¹³⁶ *See, e.g., Feldman Award* ¶ 96 (tribunal noted consistency of its ruling to *S.D. Myers Award* on a similar issue), ¶ 107 (tribunal acknowledged that it sought guidance from other Chapter Eleven awards because of the parties' reliance on them); *Loewen Award* ¶ 227 (tribunal distinguished *Mondev* tribunal's treatment of continuous nationality rule); cf. Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999) (discussing the *de facto* precedential value accorded to GATT panels and WTO panel and appellate body decisions); Jiaxiang Hu, *The Role of International Law in the Development of WTO Law*, 7 J. INT'L ECON. L. 143 (2004); Dana T. Blackmore, *Eradicating the Longstanding Existence of a No-Precedent Rule in International Trade Law -- Looking Toward Stare Decisis in WTO Dispute Settlement*, 29 N.C. J. INT'L L. & COMM. REG. 487 (2004).[put in pin cites here]

of all avenues of redress before bringing a claim based on a violation of international law. Trial court judges make mistakes as they decide complex issues in short order, as do the lawyers before them. Appellate courts are certainly not free from error, nor are appellate attorneys. However, by the time an issue reaches an appellate court, it is normally more crystallized and the chances of it being decided correctly are greater. More people, judges and attorneys alike, will have had a chance to evaluate the issue, to make more and different and better arguments. Errors may be corrected, juries may be reined in, and justice may be done.

From a policy perspective, however, it is difficult to distinguish the desirability of requiring a decision of the highest body within a court system from requiring a final decision from the highest official in an administrative system. Thus, if a lower-level official denies a request for a permit, why not require an applicant to appeal to the official's superiors for a different decision, or to an administrative body with supervisory or appellate oversight? If the *Loewen* tribunal finds that only a final act of a judicial system may give rise to a NAFTA claim, the logical extension of that concept to requiring "appeals" within different hierarchical structures may lead to claims by State Parties that eviscerate any waiver of the local remedies rule.

Despite its decision on finality, the Loewen tribunal also opined on the acts of the Mississippi judicial system, and found that they constituted a denial of justice under international law.¹³⁷ The Loewen tribunal adopted the standard set forth in *Mondev* and cited approvingly the International Court of Justice decision in *ELSI*: Manifest injustice in the sense of a lack of due process leading to an outcome that offends a sense of judicial propriety is enough [to constitute a denial of justice].¹³⁸

¹³⁷ Whether the Loewen tribunal's decision on this point is obiter dicta is not entirely clear at present. Its decision clearly disposed on other grounds of the case brought by The Loewen Group, Inc. However, it was not entirely clear from the decision whether Raymond Loewen's claim was disposed of in its entirety. See, Request for a Supplemental Decision of the United States, August 2003.

¹³⁸ Loewen Award, paras. 131 ¶132.

b. *Mondev, Ltd. v. United States of America*

[need to fill in here]

c. *Waste Management Inc. v. United Mexican States*

In *Waste Management II*, another case brought under NAFTA Chapter Eleven, the tribunal was reviewing primarily the acts of local government officials who terminated a concession agreement between the municipality of Acapulco and a local subsidiary of a U.S. company. After reviewing the recent cases addressing Article 1105, the Tribunal determined that the minimum standard of treatment is violated “if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”¹³⁹ Because the company sought relief in local courts, the tribunal did review the two decisions of Mexican federal courts, but did not find a denial of justice. In both cases *Acaverde* lost on what the Tribunal termed “rather technical grounds,”¹⁴⁰ but the decisions did not suggest unusual requirements or conclusions that were “evidently arbitrary, unjust or idiosyncratic.”¹⁴¹

d. ICSID cases

[*Occidental v. Ecuador re fair & equitable*] [*AAPL v. Sri Lanka?*] etc. There are few BIT cases because many BITs take a “fork-in-the-road” approach to dispute settlement; an investor may challenge the acts of local officials either in local courts or in arbitration, but not in both.¹⁴² Theoretically an investor could challenge the local court proceedings themselves as a “denial of

¹³⁹ *Waste Management II Award* ¶ 98.

¹⁴⁰ *Waste Management II Award* ¶ 129.

¹⁴¹ *Waste Management II Award* ¶ 130.

¹⁴² Cite to *Dolzer & Stevens; Vandeveld*.

justice” if the decision or the procedure was inadequate, but that has not happened often.¹⁴³

2. International Court of Justice

[describe facts of ELSI] In ELSI, a case decided under the Treaty of Friendship, Commerce, and Navigation that the United States had concluded with Italy, the International Court of Justice was addressing the international minimum standard generally. While the ELSI court was not reviewing Italian court actions, it was measuring whether Italian government acts were arbitrary or capricious, a similar inquiry. In that context, the ICJ defined arbitrariness as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”¹⁴⁴

[Barcelona Traction sep. opinion J. Tanaka]

3. European Court of Human Rights

The European Convention of Human Rights, in article 6, requires that “in the determination of his civil rights and obligation or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁴⁵

The European Court’s decisions interpreting the Convention are useful to demonstrate how a non-national court has interpreted its mandate to ensure that constituent nations abide by their treaty obligations with respect to this sometimes sensitive area. Given the similarity between the Convention’s language and the customary international law views of denial of justice, the Court’s decisions may also help to illuminate the modern content of denial of justice.

¹⁴³ Many bilateral investment treaty cases are not published, so it is not possible to know what cases there may have been in which investors challenged court decisions. The trend towards “transparency” is relatively new.

¹⁴⁴ ELSI, 73-77 esp. para 128.

¹⁴⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), 213 U.N.T.S. 221(entered into force Sept. 3, 1953).

Most of the European Court's decisions have dealt with process, and often with the issue of delays in coming to trial. In *Ruiz-Mateos v. Spain*, the Court determined that proceedings related to the restitution of expropriated property, which had lasted nearly seven years and nine months, violated article 6(1).¹⁴⁶ The European Court applied a three-part fact-specific substantive test to determine whether the length of the proceedings exceeded the Convention's norms. The three criteria used by the European Court were: (i) The complexity of the case, (ii) The conduct of the applicants, (iii) The conduct of the competent authorities. Based on its review of the facts of the case, the Court found that the proceedings had exceeded a reasonable time limit .

The Court has also concerned itself with the right to a remedy provided by the judicial system for alleged inappropriate government conduct. In *Sporrong and Lönnroth v. Sweden*, the European Court addressed the effects of long-term expropriation permits issued by the Swedish government which had deprived the owners of the use of their property for 23 years and eight years, respectively.¹⁴⁷ Though not claiming that they had been formally and definitively deprived of their possessions, the applicants alleged that the permits and prohibitions at issue excessively limited their enjoyment and power to dispose of their properties to limitations that were excessive and did not give rise to any compensation. The European Court addressed the question, whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The Court found that the prolonged extension of the expropriation permits and prohibition on construction upset this balance and imposed an excessive burden on the applicants which could only be rendered legitimate had Swedish law permitted the applicants to seek a reduction of the

¹⁴⁶ 16 E.H.R.R. 505 (1993). The applicants owned 100 percent of the shares in the RUMASA group companies. By legislative decree, the Spanish Government ordered the expropriation of the applicants' shares. By 27 May 1983, the applicants had instituted civil proceedings for the restitution of the expropriated property. The claims were dismissed both at first instance and on appeal after questions as to the constitutionality of the impugned measure had been referred to the Spanish Constitutional Court. The final appeal was dismissed on 25 February 1991. [in cites throughout paragraph]

¹⁴⁷ 5 E.H.R.R. 35 (1983) [in cites throughout paragraph].

time limits for expropriation or to claim compensation. Since no such remedies existed or were available, this was a violation of Article 1 of Protocol No. 1. Moreover, the Court also found that the possibility of judicial review by the Supreme Administrative Court of the Government's decision to issue expropriation permits was an extraordinary remedy, exercisable only on limited grounds. Because the review structure would not allow examination of the merits of the case or a full review, the Court held that the review structure does not meet the requirements of Article 6(1).

In *Osman v. UK*, a teenage student, O, was seriously injured and his father called after the student was shot by P, his former teacher.¹⁴⁸ Prior to the shooting, a number of disturbing incidents had occurred, for which P had been interviewed by the school authorities and the police. P, who had also shot and injured a deputy headmaster and killed his son, was convicted of manslaughter. O and his mother, M, brought an action for negligence against the police in respect of their conduct of the investigation into P's activities. The Court of Appeal ordered the action to be struck out as disclosing no reasonable cause of action on the ground that no action in negligence could lie against the police in respect of the investigation and suppression of crime. This rule followed a House of Lords ruling that had foreclosed such relief for reasons of public policy.

The European Court concluded that the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule. The right of access to the courts, however, is not absolute. The Court pointed out that a government may limit the rights of access to the courts but in so doing must meet two criteria: i) the limitation on access must pursue a legitimate aim and ii) there must be a reasonable relationship of proportionality between the means employed and the aim sought to be

¹⁴⁸ 29 E.H.R.R. 245 (2000) [put in pin cites throughout paragraph]

achieved. The Court stated that these issues must be examined on the merits and not automatically excluded by the application of a rule which amounts to an absolute grant of an immunity to the police. Because the application of the exclusionary rule in *Osman* constituted a disproportionate restriction on the applicants' right of access to a court, the Court found a violation of Article 6(1) of the Convention.

The Court has reviewed far fewer cases involving the actual decision of a national court. In *Brumarescu v. Romania*, however, the Court addressed a Romanian court's decision on the taking of property, and found the decision invalid on substantive grounds.¹⁴⁹ The government seized property in 1950. The applicant sued, and the court of first instance ordered property returned to him. The Procurator-General of Romania applied to have the judgment quashed under power given him by Code of Civil Procedure. This power was not subject to a time limitation. The Supreme Court of Justice quashed the lower court's decision and returned the property to the state. The European Court held that this was a violation of applicant's "right to legal certainty." Moreover, the Court held that the taking of property was invalid on substantive grounds. Neither the Supreme Court nor the Government showed that the taking was in the public interest. The ECHR went on to note that any taking must be proportional. There must be a balance between the general interest to the community and the protection of the individual's fundamental rights. The balance, according to the ECHR, will not be met where the person concerned bears an individual and excessive burden. The ECHR found that the applicant bore and continues to bear an excessive burden, and pointed to the lack of a public interest ground and the lack of compensation for four years and evidence of this dis-proportionality.

[conclusions from this section]

4. Inter-American Court (and Commission) of Human Rights

The jurisprudence of the Inter-American Court of Human Rights and of its affiliate, the

¹⁴⁹ Judgment on merits, No. 0028342/95 [pin cites throughout paragraph].

Inter-American Commission on Human Rights, is of less value in developing denial of justice standards in civil cases because many of the cases brought before it have tended to challenge the judicial system's failure to give recourse in criminal cases and, in particular, the passage of amnesty laws in the wake of violence or unrest that make criminal charges against government officials or military personnel unactionable.¹⁵⁰ Those cases tend to hinge on whether the amnesty decree was promulgated by a legitimate national government. If so, the deprivation of the right to redress on the part of those injured is a reasonable exercise of sovereignty and does not amount to a denial of justice. [need to look at these cases more closely]

A few of the cases deal with allegedly unfair delays in the judicial system or the availability of judicial recourse and are instructive with respect to those aspects of denial of justice. The fair trial provision of the American Convention on Human Rights is Article 8(1), which provides that "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."¹⁵¹

In the Garrido and Baigorria Case, two men disappeared after they had been seen talking to Argentine police officials.¹⁵² When their families' inquiries on their behalf elicited little or no response from the authorities, they sought redress through the judicial system. Initially both families' petitions for habeas corpus relief were dismissed. Senor Garrido filed a civil complaint with the Public Prosecutor, alleging the forced disappearance of the victims. That complaint was never acted upon. Argentina admitted its responsibility in the case, so the finding of a denial of justice did not entail analysis on the part of the Court.¹⁵³

¹⁵⁰ See, e.g. Valasquez Rodriguez, *Reyes v. Chile* [get full cites]

¹⁵¹ American Convention on Human Rights, 9 I.L.M. 101 (1970), entered into force July 18, 1978.

¹⁵² Garrido and Baigorria, Judgement on the Merits of Feb. 2, 1996 (Inter-Am. Ct. H.R.)

¹⁵³ Garrido and Baigorria, Judgement on the Merits of Feb. 2, 1996 (Inter-Am. Ct. H.R.) ¶ 27.

5. Conventions as Sources of Law

[discuss International Covenant on Civil and Political Rights] – refer to ILC State Responsibility Process]

[Conclusions – policy science implications of dialogue among decision-makers]
Seeking precedent in areas of law traditionally cordoned off from each other is becoming more common. The WTO Appellate body is increasingly playing a larger role in developing international legal principles beyond the strict confines of trade law itself.¹⁵⁴

III. The value of the “hard-look”

Decades of practice, treaty-making, and the opinions of publicists have established that a state’s administration of justice must meet certain minimum procedural and substantive standards in order to conform to international law. Despite numerous treatises on the subject, however, the content of those standards is opaque and the level of imprecision in the standards means decision-making is left largely to the conscience of an arbitrator in a particular case. Whether that concern is styled as a decision that “shocks the conscience” of an arbitrator or “offends a sense of judicial propriety,” the outcome depends on the subjective view of the arbitrator in a given case.

The reasons for this are usually attributable to concerns about sovereignty. First, because nations are permitted to organize their judicial systems as they see fit within very broad boundaries, more precise standards risk favoring some legal systems over others. Second, publicists, national decision-makers, and tribunal members have believed that rigorous review maximize deference to national sovereignty. While the first concern requires standards fluid enough to encompass different legal systems, the second justification rests on often erroneous assumptions about the actual decisions that arise from a very deferential standard of review. Moreover, if the standard were in fact adhered to rigorously, it would undercut the very real need for national legal systems to be held to international standards.

While there is no easy solution to this problem, one way to ensure that arbitrators make

¹⁵⁴ See, e.g., James Bacchus, *Groping Toward Grotius*, 44 *Harv. Int’l L. J.* 533, 540 (2003) “As we said in the very first ruling of the WTO Appellate Body, WTO rules cannot be viewed in ‘clinical isolation’ from the broader corpus of international law.” (internal citation omitted).

decisions on the basis of the law, insofar as it exists, as opposed to on the more abstract basis of equity or the conscience of an individual arbitrator, is to require them to inject process and some predictability in the decisionmaking.¹⁵⁵

The solution, albeit imperfect, is to inject more procedure into the review process, thereby ensuring that tribunals engage in rigorous analysis without necessarily attempting to substitute their judgment for that of municipal courts. Requiring that tribunals give a reasoned account of their decisionmaking is crucial to the integrity of the arbitral process.¹⁵⁶ Tribunals do not always give a full account of their reasoning, a frustrating result for claimants who have spent a fair amount of money and expended a good deal of time and effort to get a full and fair result. A full accounting of the decision may also give the parties grounds on which to challenge the decision by revealing logical flaws in the reasoning process.¹⁵⁷ That does not mean, however, that the standard of review should not be somewhat deferential. Indeed, to the extent international jurisprudence may be said to have opined on the subject, it has concluded that court

¹⁵⁵ Thomas M. Franck, *Fairness in International Law and Institutions* 7 (1995) “The fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants’ expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.” He goes on to note “These two aspects of fairness B the substantive (distributive justice) and the procedural (right process) B may not always pull in the same direction, because the former favors change and the latter stability and order.”

¹⁵⁶ In recognition of that, Article x of the ICSID Convention requires that arbitrators address every claim in front of them. This has not been interpreted to be an especially rigorous requirement. [cite to BC Supreme Court in *Metalclad*] [check for UNCITRAL analogue], although it has given rise to the annulment of a decision in at least one case. *Amco Asia* [full cite]. See also Franck, *Fairness* 317 “The final decisions of the Court are not its most important contribution. More significant is the rigorous and principled *reasoning* by which those decisions are reached. Through that reasoning the Court exercises a vital influence over the evolution of the international systems’ normative foundations.” (emphasis in original; internal citation omitted) (discussing reasons the decisions of the International Court of Justice have garnered respect).

¹⁵⁷ *Amco Asia* [full cite] For example, in a NAFTA Chapter Eleven case, *S.D. Myers v. government of Canada*, the tribunal concluded that Article 1105 of the NAFTA, which requires that NAFTA Parties treat investments of other parties “in accordance with international law, including fair and equitable treatment and full protection and security, referred to the international minimum standard of treatment under customary international law (which includes denial of justice, though court action was not at issue in *S.D. Myers*). After reaching that conclusion, however, the tribunal concluded that the treatment at issue did not accord with [general equitable principles--need to fix this], a basis not comprehended by the international minimum standard. Canada has requested the federal court in Ottawa to set aside the judgment, on the ground that the tribunal applied the inappropriate standard [doublecheck], inter alia. [cite to *S.D. Myers set-aside*]

judgments should not be second guessed for merely having made a mistake.¹⁵⁸ Yet too much deference would eviscerate a tribunal's power and nullify any reason for having review. A middle ground, akin to the deference granted to the hard-look doctrine, would better meet the case.

A. The Potential for Doing Too Much

As noted earlier, the Harvard Research Draft's definition provided that:

A State is responsible if an injury to an alien results from a denial of justice. Denial of Justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or manifestly unjust judgments. An error of a national court which does not produce a manifest injustice is not a denial of justice.¹⁵⁹

Nowhere does the Harvard Draft Convention define what would constitute a "gross deficiency" in process, precisely which guarantees are "indispensable to the proper administration of justice, or what would render a judgment "manifestly unjust." In fact, in their commentary, the authors wrote "An exact definition seems neither possible nor advisable."¹⁶⁰ Even the *Chattin* standard, which measures a delict in reference to whether or not it shocks the arbitrator's conscience, is more akin to an equity principle than a legal standard, and does not offer any more specific guidance to aid in decisionmaking.¹⁶¹

Despite its inherent lack of meaning, because of the purported deference it offers to sovereign nations, the *Chattin* standard is often cited with approval as an appropriate means

¹⁵⁸ Quote to "not mere error" language. This jurisprudence developed when primary concern was discrimination, whether de facto or de jure. So there was notion that error without more not enough, yet certainly some "errors" were substantial enough to require reversal.

¹⁵⁹ Research in International Law, Harvard Law School, 23 A.J.I.L. spec. suppl. at 173 (1929).

¹⁶⁰ Harvard Research, art. 9 cmt., 23 Am. J. Int'l L. Sp. Supp. at 173. In 1910, John Bassett Moore stated that he did "not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined." AJIL 1910 p. 787 (cited in the Neer case). *See also* Lapradelle and Politis, the evasive and complex character (le caractere fuyant et complexe) of a denial of justice seems to defy any definition".

¹⁶¹ [find cite to 18c case]

against which to measure judicial and quasi-judicial acts.¹⁶² Even if one goes with the ostensibly less deferential “surprising a sense of judicial propriety,” the results are largely the same. Though frustrating to those desirous of constructing a predictable international legal structure, there are indeed good reasons for the flexibility in the definitions, regardless of whether the wrong in question is denominated procedural or substantive. However, notwithstanding such surface appeal, in application such an amorphous standard is often not in the best interests of the nation whose acts are in question--a tribunal faced with a facially disturbing judicial or quasi-judicial decision can find the act in question to be wrongful without thoroughly exploring the justifications the municipal decisionmaker might be able to offer to support the decision and without explaining how international law supports such a conclusion. In other words, such flexibility may well encourage a tribunal to act in equity rather than in law.¹⁶³ States are often skeptical of “judicial departures from black-letter law; it accords entirely with the history of equity in England, where its introduction into a legal dispute was cast in strictly remedial terms, with the avoided purpose not of laying down broad legal principles but merely remedying the effects of the law in exceptional instances of injustice.”¹⁶⁴

“Equity plays the same role in international law as in domestic jurisprudence, and seeks similarly to protect itself from direct confrontation with expectations of legitimacy by adopting many of the appurtenances of normativity.”¹⁶⁵ Even when deciding on the basis of “equity,” the International Court of Justice has noted that : “The justice of which equity is an emanation is not abstract justice but justice according to the rule of law: which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the

¹⁶² cites

¹⁶³ “The doctrine of equitable result . . . if allowed its head, leads straight into pure judicial discretion and a decision based upon nothing more than the court’s subjective appreciation of what appears to be a >fair’ compromise of the claims of either side.” Sir Robert Jennings, *Equity and Equidistance Principles*, *Annuaire Suisse de Droit International* 27, 31 (1986)

¹⁶⁴ Thomas M. Franck, *Fairness*, 64.

¹⁶⁵ Thomas M. Franck, *Fairness in International Law and Institutions* 49 (1995)

more peculiar circumstances in an instant case, it also looks beyond it to principles of more general application. This is precisely why courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms.”¹⁶⁶

The best way to avoid resort to equitable principles that may lack grounding in the law this is to require tribunals to engage in a systematic review of a decision, and to make clear the bases on which they are deciding. Andreas Roth, writing several decades ago, clearly set forth the intellectual process a tribunal should go through in considering whether there has been a denial of justice. “The first test to be applied is, therefore, whether, according to national justice, the alien’s judicial treatment was correct and lawful. Then, in the second place, it must be ascertained whether the State’s judicial organization measures up to the standard instituted by international law.”¹⁶⁷ At the end of this process, the tribunal should have clearly identified the evidence on which it based its decision. This latter step is crucial to giving effect to one of the goals of permitting such review; a nation whose court procedures are found wanting will have no way of fixing them (assuming it is willing to do so) if the tribunal fails to specify the reasons for its decision. Such decisions still intrude on a nation’s sovereignty insofar as they criticize a nation’s judicial practices, even if the decision addresses only the judicial practices in a particular case, but do not further the goal of having nations conform their practices to the requirements of international law.

B. The Potential for Doing Too Little

¹⁶⁶ Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment of June 3, 1985, 1985 I.C.J. Rep. 39 (para. 45) [doublecheck]

¹⁶⁷ Roth at 184. Sohn & Baxter, in their Draft Convention of 1961, attempted to inject more objectivity into the standards by setting forth multipart tests for both procedural and substantive denials of justice. Thus, for substantive denials of justice, they suggest a disjunctive three-part inquiry into whether a violation is wrongful: “(a) if it is a clear and discriminatory violation of the law of the State concerned; (b) if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world; or (c) if it otherwise involves a violation by the State of a treaty.” Sohn & Baxter at 196 art. 8. If a state’s judgment should fall short of any one of the above criteria, it would present a denial of justice. This approach, similar to that suggested by Roth, is a marked improvement on the Harvard Research Draft and the *Chattin* standard.

[honest application of the standard would result in virtually never finding a denial of justice. missed opportunity to help judicial systems develop.

C. The Hard-Look Doctrine

[Describe hard-look doctrine]

To implement this process, a tribunal should generally engage in a sequential analysis, first comparing a decision against the municipal law of a country applying a standard of review akin to that employed in the hard-look doctrine.¹⁶⁸ Only then should the tribunal undertake to measure a nation's laws and procedures against customary international law, which is where an adverse judgment would be most intrusive to another nation's sovereignty.

1. Evaluating Municipal Law Decisions

The first analytical step effectively requires the tribunal to measure the decision in question against the requirements of municipal law. This review would take into account both determinations on questions of procedure and on substance. At this stage of review, the tribunal would not be opining on the underlying validity of the municipal laws in question, but would review alleged errors in the application of those laws. In other words, the tribunal would effectively be reviewing the merits of the case, not engaging in collateral review (based on international rather than constitutional law) of the judicial procedures followed.

While counterintuitive to those who determinedly resist the notion that arbitral courts act in any way as "appellate courts,"¹⁶⁹ this review is, in fact, much less intrusive than the review process that actually measures the validity of a nation's laws against the international legal system.

¹⁶⁸ The ICJ did something very similar in the ELSI case, although it was considering the acts of local government officials rather than those of an Italian court. After finding that the acts in question were legal under the laws of Italy, the Court went on to consider whether those acts conformed to Italy's international legal obligations under the Friendship, Commerce, and Navigation Treaty. [get full case]

¹⁶⁹ [cite to U.S. brief in Loewen? (get cites from there)]

One potential area of confusion in conducting this analysis is that, as described in Part II above, denial of justice scholars have historically divided the wrongs at issue into “procedural” or “substantive” rubrics.¹⁷⁰ It is tempting, therefore, for a tribunal to engage in the same analysis when examining various municipal practices. Those distinctions are not, however, necessarily helpful to a reviewing tribunal attempting to determine whether or not a particular decision comports with international law. Aside from what might be termed “pure” questions of procedure--e.g., how many days must a person have to respond to a summons, how soon must an incarcerated person have a “probable cause” hearing (or the equivalent)--judges or administrative tribunals must make substantive decisions on discretionary items that affect procedural rights. Finally, of course, a judge or administrative official may make a decision on the substantive merits of the case. Because “procedural” decisions may have significant effects on the substantive outcome of a case, the classic, the substance/procedure distinction as such is not terribly relevant for purposes of international tribunal review. The tribunal is reviewing the merits of the decisions the judge has made, regardless of whether they might be deemed procedural or substantive.

The international tribunal should employ a deferential standard of review--something akin to the hard look doctrine employed by the D.C. Circuit when it is reviewing agency decisions. In most instances, the presumption must be that a national court is best suited to interpret national laws. Indeed, inherent in concerns about sovereignty is the notion that a State’s courts are best suited to interpret and apply its laws. In fact, in common-law countries, courts make law--the decisions of many courts are precedential authority in subsequent cases. Any review would have to take into account both the incremental development in the common law and the interpretive process in which courts engage.

One potential complication is whether the decision of a court of the first instance should

¹⁷⁰ [Cite to Freeman, others. These distinctions are, of course, useful when trying to categorize the causes of action in a particular case.]

be subject to less deferential review. Because the signatories to the BITs and the NAFTA have generally waived the requirement of exhaustion of local remedies, they have increased the likelihood that international tribunals will be reviewing lower court decisions.¹⁷¹ . For practical reasons, these lower court decisions should also be deferentially reviewed. First, such a court should still be well qualified to apply or interpret its own municipal laws. Second, subjecting such courts to less deferential review would increase the incentive to refer the case to an international tribunal. Generally speaking, the most attractive option is still to let a nation's court system correct its own errors. Granting less protection to lower court decisions might well provoke fewer appeals and more international arbitrations.

Part of the inquiry will be whether there is evidence of discrimination against aliens, or some other invidious motive. While such proof may be difficult to obtain, the inquiry should still be made.¹⁷² Even an act that seems discriminatory may be able to be explained. For example, in *Aminoil*, an expropriation affected only one foreign-owned enterprise, but the tribunal "found that this did not prove that the government had acted out of hostility to foreign capital when there was evidence that the authorities had long pursued a coherent, phased plan to establish control over the nations principal resource."¹⁷³

If a decision did not meet those requirements, the reviewing tribunal would find that there had been a denial of justice in international law. The inquiry could end there; once a claimant received relief because of deficiencies in a court's decision, the tribunal would not have to

¹⁷¹ It is true that the decision on finality in *Loewen*, which says that lower court decisions can usually not be the subject of judicial review, may limit the number of times such review is contemplated. See *supra* nn. ___ & accompanying text.

¹⁷² In fact, *Sohn & Baxter*, when suggesting that a discriminatory violation of the law of the state concerned might be a denial of justice, use the term "discriminatory" not in the sense of invidious discrimination; rather, they suggest that the appropriate inquiry is to the law as applied, as opposed to as on the books. Thus, if a State's constitution confers certain rights, but no persons in the State are allowed to assert those rights, the failure on the part of a court to grant an alien redress for a violation of that right would not effect a denial of justice. *Sohn & Baxter* at 182 art. 5 (referred to by art. 8 for explanation of discrimination).

¹⁷³ *Franck, Fairness*, 471 (*Aminoil, Kuwait v. American Independence Oil Co.*, 21 ILM 976 para 91 (1982); see also *ELSI* at 72-72).

proceed to the second part of the inquiry--whether a state's laws were consistent with the requirements of international law. This latter inquiry is where an effectively greater intrusion into sovereignty would come into play, should a tribunal find that a country's laws are somehow deficient by international law standards. An international tribunal passing judgment on the propriety of a State's laws has potentially much farther reaching implications than passing judgment over a single act.

2. Evaluating Laws vis-à-vis International Standards

If the tribunal determines that a decision does comport with municipal law, the next question is whether, notwithstanding that compliance, the municipal law itself falls short of international standards. This is the stage at which a much greater intrusion into sovereignty conceivably comes into play. Correspondingly, tribunals should be more deferential to a nation's practices. A decision that a nation's law, rather than its application in one instance, falls short of international standards is much more problematic.

The fact that a tribunal is making this judgment--measuring a state's municipal laws against international law, should not be problematic in itself--members of a competent tribunal should be expert in international law. But determining whether the nation's laws measure up is likely to be extremely complicated. As a tribunal is assessing the validity of a judgment, however, it needs to remember that he is ultimately measuring it against international law, not against domestic law.¹⁷⁴

For many specific governmental functions, no international law standards exist; indeed, precisely in order to respect sovereignty the organization of a judicial systems and indeed the laws of the territory are left to individual states. Thus, it would theoretically be impossible for some unsatisfactory domestic acts to violate the law of nations. However, tribunals should be

¹⁷⁴ cite to Orinoco steamship 5. AJIL 233 ((1911) [sidelight to potential constitutional problems--if too much authority ceded to these tribunals--compare to WTO disputes resolution]

required to do a rigorous analysis, explaining their conclusions. Otherwise, tribunals are likely to grant relief, albeit on unspecified grounds. This neither advances justice in a particular case nor develops the international law of state responsibility in a way beneficial to states or claimants.

The European Court of Human Rights offers guidance for measuring a nation's practices against the standards contained in an international treaty that requires courts of states party to the treaty to meet certain standards but nevertheless recognizes the right to maintain individually structured judicial systems. [to be completed]

IV. Sovereignty Concerns

One of the primary concerns underlying the debate about the appropriate scope of the denial of justice doctrine was the concern to protect national sovereignty, a concern animating both investor-State cases and State-State controversies. Classically, "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."¹⁷⁵ This absolutist, territorially based definition is under increasing attack as global interdependence and multilateral actions become more frequent.¹⁷⁶ In fact, however, sovereignty presents a nicely amorphous objection to whatever one does not like.¹⁷⁷

The idea of an intrusion into sovereignty, and its effect on international relations, is subjective and difficult to measure. In a discussion of the extraterritorial reach of U.S. anti-bribery laws, Philip Nichols points to the lack of empirical evidence of any negative effect on "global harmony" resulting from implementation of those laws.¹⁷⁸ The Foreign Corrupt

¹⁷⁵ Island of Palmas Arbitration, II R.I.A.A. 838 (Judge Max Huber).

¹⁷⁶ Thomas M. Franck, *Fairness in International Law and Institutions* 4 (1995) (noting impossibility of reconciling notions of sovereignty prevailing fifty or sixty years ago with the "contemporary state of global interdependence").

¹⁷⁷ Cite to Louis Sohn piece in ASIL Proceedings.

¹⁷⁸ Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L. J. 627, 646 (2000).

Practices Act permits the Department of Justice to investigate and prosecute U.S. citizens who violate its provisions by making improper payments to obtain or retain business anywhere in the world; despite scores of prosecutions under the law, no one has documented any meaningful diplomatic breach resulting from those alleged intrusions into the sovereign territory of another State.¹⁷⁹

Not all intrusions into sovereignty are alike; those stemming from the assertion of more controversial jurisdictional bases, like the effects principle used in U.S. (and increasingly in the European Union) antitrust law, or the passive personality principle, are more controversial, raise more hackles, and have had more demonstrable effects.¹⁸⁰

What was to become the North-South divide in the 1960s discussions of a New International Economic Order lay at the roots of the distaste for review of judicial acts. The vicissitudes of sovereignty concerns are intimately tied to accountability. In the early part of the twentieth century the most vehement attacks on expansions of international law as violative of sovereignty came from the Latin American and South American States, whose actions were most likely to be the subject of international law claims. At that time, developed countries, including the United States, argued hard for increased obligations, and downplayed the sovereignty concerns expressed by nations from the developing world.

In an ironic twist, much of the concern about sovereignty now comes instead from the developed countries. As the negotiation of BITs exploded in the latter part of the century, developed countries sought, and obtained, dispute settlement provisions permitting investors, wary of expropriations or other deprivations on their investments, to submit claims directly against the developing state, without having to exhaust local remedies.¹⁸¹ Those obligations were,

¹⁷⁹ Nichols, *supra* n. ____, at 646.

¹⁸⁰ See, e.g. Helms Burton case at the WTO. The exercise of extra-territorial jurisdiction is a potential source of many denial of justices cases.

¹⁸¹ [Cite to number of BITs and BIPAs--over 700. Most of these agreements waive the exhaustion of local remedies, although seem require an initial application to a local tribunal. [see case from ABA paper]

of course, reciprocal, though the risk that the developed states would be defending their actions seemed remote. The drafters of the NAFTA included a similar provision, Chapter Eleven, primarily to ensure Canadian and U.S. investors would have recourse against Mexico.¹⁸² However, given the volume of trade between Canada and the United States, U.S. and Canadian investors have availed themselves of those provisions in numerous cases. As a result, the claims of infringements on sovereignty now are common in the North American countries, Canada and the United States.¹⁸³

Concerns about sovereignty are often poorly identified, overstated, and obscure real problems with the growth of a de facto network of tribunal deciding international disputes.

1. States exercise their sovereignty in choosing to abrogate it

The simplest response to criticisms of abrogation of sovereignty is that through treaty ratification or fast-track legislation the political branches have voluntarily agreed to such a waiver. [Describe S.S. Wimbledon case here] Giving consent to a regime in which an international tribunal, be it the WTO Dispute Settlement Understanding, the Iran-U.S. Claims Tribunal, or an ad hoc tribunal convened under the procedures outlined in a BIT, has the power to impose a solution on the State or States involved in the settlement process – even if that solution consists only of the payment of damages and no obligation to change the governmental act giving rise to the damages claim--necessarily involves some abrogation of sovereignty.¹⁸⁴

While modern international law has given more rights to individuals, including the ability, in some instances, to press their own claims,¹⁸⁵ it has done so because States have

¹⁸² [Cite to Dan Price article.]

¹⁸³ [Cite to Public Citizen, the Nation, Council of Canadians.]

¹⁸⁴ F. D. Berman, *supra* n. ___ at 453.

¹⁸⁵ As early as the 1900s, M. Fiore called for giving rights to people as individuals, not just to states as sovereigns. To enlarge the enlightened concept of juridical freedom and equality, acknowledging the fact that the latter are not territorial rights, but properly international rights.” Fiore, *International Law Codified* at 30-31 (Edwin Barnhard, trans. [DATE]).

consented to the change. Investment treaties in particular have removed the traditional barriers that had prevented state actions from review in the international sphere. They constitute waivers of sovereign immunity in the context of investment disputes. Exhaustion of local remedies is not at issue in most cases because the treaties themselves have waived the exhaustion requirement.¹⁸⁶ The ICSID Convention reverses the presumption of exhaustion of local remedies, requiring Parties to take a reservation or include such a provision in any contract. Chapter Eleven of NAFTA also apparently waives the exhaustion requirement, though it does not do so explicitly.¹⁸⁷ The consequences of this are that claimants are not required to seek judicial redress for wrongs committed by other branches of government, which gives States less opportunity to correct wrongs themselves. Moreover, decisions of lower courts may be at issue; litigants do not have to appeal those decisions but instead can claim deficiencies in those lower court decisions.¹⁸⁸ While this may prove to have been an unwise decision in the negotiation of the BITs and their successors, it is currently the case that lower court decisions are subject to review.

For many years, individuals were deemed to have no standing in international law, only States were recognized actors in the international arena. From this notion developed the procedure whereby an injury to an individual was deemed an injury to the State of which that individual was a citizen. Again, the ICSID Convention, the BITs and NAFTA Chapter 11, and the European Energy Charter Treaty remove that hurdle--investors can present claims on their own behalf, and gain any recovery.¹⁸⁹ The deference shown to sovereign States inherent in requiring that claimants go through their own governments, and providing that only those governments have standing to bring a claim against another sovereign entity, has thus

¹⁸⁶ [Cite to BIT case from ABA article; Dolzer & Stevens.]

¹⁸⁷ [Cite to Article 1121/Loewen/Azinian.] Andrea K. Bjorklund, *NAFTA Jurisprudence etc.* (T. Weiler, ed. 2004)

¹⁸⁸ Such is the case with Loewen.

¹⁸⁹ One of curious results of espousal is that the State recovered from the State, and a private individual might never see any of the recovery. [cite]

disappeared.

Members of Congress have put forth the refreshingly frank assertion that they did not understand what they were doing when they passed bilateral investment treaties, NAFTA Chapter Eleven and recent free trade agreements, all of which contain ad hoc investor-State dispute settlement.¹⁹⁰ The recent legislation granting the President “Trade Promotion Authority” (formerly fast-track negotiating authority) states Congress’s understanding the administration will not negotiate agreements that give aliens greater rights than U.S. citizens.¹⁹¹ Since the passage of Trade Promotion Authority (TPA), however, the President has negotiated, and Congress has approved, five agreements that contain investor-State dispute settlement provisions giving foreign investors the right to submit arbitral claims against the U.S. government.¹⁹²

An outstanding question, then, is whether the President acted outside the bounds of his authority by negotiating and agreeing to provisions allowing arbitral claims to be brought by foreign investors. However, the fact that Congress approved those agreements, notwithstanding their departure from the directions encompassed in the TPA legislation, likely insulates them from such claims. Still, one can imagine seeing a challenge to the agreements in U.S. courts.¹⁹³ One can also imagine that the scope of the obligations undertaken by the defendant governments may be at issue in the arbitrations themselves, and that those seeking to limit liability may point to the TPA language.

2. Gives effect to goal of treaty

[Insert Vienna Convention analysis]

[discuss also the dynamic inconsistency problem]

¹⁹⁰ Cite to Baucus statement, etc.

¹⁹¹ TPA [cite provision]

¹⁹² U.S. -Chile, FTA, U.S. - Morocco FTA, CAFTA, U.S.-Singapore FTA, U.S.- Jordan FTA [doublecheck numbers; insert formal cites.]

¹⁹³ [cite to Ackerman Golove article; challenge to NAFTA in 10th Circuit]

In the state-to-state context, ad hoc or institutional arbitration is often seen as a “middle ground” in which neither state submits itself to the jurisdiction of the other state’s courts.¹⁹⁴ This conception accepts the inevitability that in an interactive world there will be inevitably be disputes and a need to resolve them. Some acceptance of extra-national authority is an inevitable consequence. In the United States the President, acting under his authority to conduct foreign affairs, may make decisions that have the effect of establishing a national or international regime that effectively preempts control that previously had been in the hands of the local governments.¹⁹⁵ This doesn’t mean that the ratification of a treaty is per se constitutional, but the President, particularly when his acts are ratified by the Senate or by the Congress as a whole, has substantial authority to conduct matters relating to foreign affairs.¹⁹⁶

Appointments clause – encroachment on article 3 powers?¹⁹⁷

3. Reasons for having greater deference no longer exist

[Address fact that restrictive interpretation is no longer accepted.]

Essentially, immunity, exhaustion, and espousal were sentries at the gate that limited the number of cases that could or would be brought under international law. In many instances in the modern regime, those safeguards no longer exist, yet the doctrines and standards that have

¹⁹⁴ See David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104, 116 (1990).

¹⁹⁵ Thomas M. Franck, *Can the United States Delegate Aspects of Sovereignty to International Regimes* 4-5, in *DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY* (Thomas M. Franck, ed. 2000). The Supreme Court’s decision in *Missouri v. Holland* upheld the United States’ adherence to the Migratory Bird Treaty of 1918, which established certain standards for the protection of migratory birds. *Missouri v. Holland*, 252 U.S. 416 (1920).

¹⁹⁶ The Supreme Court struck down a local Massachusetts law that restricted the State’s purchases of goods or services from individuals doing business with the military dictatorship in Burma (a.k.a. Myanmar) on the grounds that it interfered with the federal government’s conduct of foreign relations. *National Foreign Trade Council v. Natsios* [get supreme court decision] [elaborate on?]

¹⁹⁷ For a description of how various international commercial regimes interact with U.S. constitutional law, see generally Eschrat Rahimi-Laridjani, *The Instance of Commercial Regimes*, in *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* 61-93 (Thomas M. Franck, ed. 2000); John Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 Const. Comment. 87 (1998) [check this cite;

grown up in some cases presuppose that those mechanisms will be in place. The early codification efforts presumed that only the decisions of courts of last resort would be subject to international review because of the operation of the local remedies rule.

4. Similar to enforcement of judgments in the conflict of laws context

Another issue raising the question of appropriate amounts of deference is the fact that a nation's courts are not always deciding questions of municipal law in which they may be said to have special expertise and perhaps rightfully expect deference. Many courts apply laws from other countries. Choice of law clauses frequently provide that a contract or other commercial transaction will be governed by one country's law, but the choice of forum clause, or circumstances, dictate that courts of a different country actually apply the law.¹⁹⁸ Even within the United States, judges from one state may be called upon to apply the law of another state. In diversity cases, federal judges frequently apply the law of one of the states, as in their best judgment, that court itself would have applied it.¹⁹⁹ If a U.S. court were applying Czech [make sure we have a BIT] law under a contractual choice-of-law clause, and a Czech citizen were unhappy with that court's decision and challenged it under the U.S.-Czechoslovakian BIT, would the U.S. court's interpretation of Czech law be entitled to any special deference? [manifest injustice problems in FAA]

[elaborate more on conflict-of-laws analogies]

5. Assertions about sovereignty are often inchoate

[examples of assertions that are vague and fail to identify specific concerns]

Intrusions into sovereignty should be no more ignominious as against the judiciary than

¹⁹⁸ [insert cases on choice of law from U.S. courts and or Canada and Britain?]

¹⁹⁹ [cite to diversity cases] Most states have a procedure that permits federal courts to certify to the state supreme court questions on an area in which state law is unsettled, though the state court's consideration of the issue[rewrite] is discretionary and the court may decline to provide assistance to the federal court, leaving it to make its best guess. [cite to seventh circuit case DW mentioned?]

as against the legislative or executive branches of government.²⁰⁰ Many nation's courts and justice having been measured against international law principles and found wanting. Even decisions of the U.S. Supreme Court have been subject to oversight by international tribunals. In 1871, the United States and Great Britain entered into a treaty whereby a tribunal would consider [decisions relating to ____] The tribunal disagreed with six U.S. Supreme Court decisions.²⁰¹

CONCLUSION

The oft-cited standard that tribunals should be especially reluctant to second-guess court decisions is in effect no more than a truism. Of course a tribunal would be reluctant to question the pronouncement of a high court as to the state of the law of a particular country. Yet questioning what a court has decided to be the law of the state (especially in a common law country) is no different from measuring the legislature's enactment of a particular law against international standards. In more narrow terms the judicial pronouncement in applying the law to a case may be subject to more scrutiny. The difference comes in the application of the law to a particular case.

In one sense, in cases that have done away with espousal, the intrusion into sovereignty is arguably greater. Instead of the tribunal adjudicating a dispute between equal nation states, the dispute is unquestionably between an individual and a state. Yet, in point of fact, the primary injury was always done to the individual. Requiring espousal meant that fewer claims would be

²⁰⁰ [Cite to Beus] In the context of the local remedies rule debate, certain countries suggested that the mere provision of judicial remedies satisfied all obligations under international law, and moreover that the municipal authority was actually performing an international law function in hearing the case. Any review by an international tribunal would only be redundant, or a "dedoublement fonctionnel." See, THOMAS HAESLER, THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS 126-27 (1968). Haesler debunks this argument: "Domestic tribunals are not less fallible than domestic administrative or legislative authorities just because there is a special oath of office." *Id.* at 127.

²⁰¹ Robert C. Morris, *International Arbitration and Procedure* (1911) At 164-65--discusses a prize court, with appeals to be taken from the court of the second instance (in the U.S. it would be the Supreme Court) and this was suggested by the U.S. negotiator of the court n.b. find out what happened to this prize court. He also refers to the Treaty of 1871 that submitted to a mixed claims commissions claims that had been decided adversely to G.B. by the Supreme Court--he says in six instances the commission found in favor of GB and U.S. had to pay compensation.

presented, and likely guaranteed that only well-connected injured parties would be able to bring sufficient pressure on their government to have their claim presented. Generally, only in cases where injuries to large groups of investors resulted in settlements under the aegis of mixed claims commissions or the like would smaller investors have the opportunity to put their claims forward.

On the whole, concerns about intrusions into sovereignty are overblown. In many instances, review of judicial decisions can be less intrusive than review of legislative and executive decisions. It is arguably a much greater intrusion into sovereignty to review a law or administrative regulation of general application than to decide whether one court in one case decided a matter incorrectly.

It certainly seems that investor-States dispute settlement is here to stay, given that it or a version of it is likely to be included in the FTAA. But I do have some questions about the dispute settlement process of chapter eleven and the BITs, and those questions are not limited to cases involving alleged denials of justice. The exaggerated focus on sovereignty has obscured more troublesome problems in investor-State dispute settlement.

A. Discrimination

Other criticisms that have been levied against investor state dispute settlement concern the alleged unfairness of giving more remedies to aliens than are available to nationals. The concern about giving different rights is exaggerated--providing redress under international law ordinarily involves giving a different kind of access to having a problem fixed.²⁰² Even the differences in access may be overstated, however. The true claimant in many NAFTA cases, though ostensibly a foreign national, may in fact be a U.S. national. Article 1105 permits claims to be brought on behalf of "investments of investors;" the investor may not bring a claim on

²⁰² This is a slightly different emphasis than the oft-stated view that it gives rights to multinational corporations. While it is often true that the cost of arbitration putting it out of reach of ordinary people, nothing inherent in Chapter Eleven or similar mechanisms reserves it to multinationals, and indeed some of the claimants are relatively small businesses or groups of individuals. *See, e.g.* [Metalclad, Azinian, condo owners against Mexico, Feldman.]

behalf of itself under that article (although it may bring a claim for itself under Article 1102, which provides for national treatment). Many investments will be U.S. subsidiaries -- U.S. persons under corporate law doctrines. Thus, the effective claimants are U.S. companies. Unless they are discriminated against because of their foreign parents -- which was alleged to have been the case with Loewen and Mondev -- they are unlikely to be discriminated against because of their nationality. This puts them squarely in the realm of the international minimum standard, designed to protect aliens when treatment accorded to nationals falls below the minimum requirements of customary international law whether or not there is discrimination. So NAFTA Chapter 11 is not always providing an additional forum exclusively for foreign companies; it may effectively provide an extra forum for U.S. companies as well.²⁰³ In many cases, however, it is doing just that.

B. Federalism

International dispute settlement raises federalism concerns. In a federal system, an adverse decision by an international tribunal can effect two (or even more) intrusions into sovereignty -- on the federal and on the state level when a state law or judicial decision is at issue. Thus, an adverse decision by the Loewen tribunal would at least in part affect not only the United States but also Mississippi. This is not a new issue. Under international law, the federal government is responsible for the acts of its constituent states. Furthermore, it is axiomatic that a nation cannot avoid its international obligations by pleading inconsistent local laws. The response must be that concomitant with the right to order an international political structure however a nation chooses, including, for example, the right of Mississippi to have punitive damage laws, comes the obligation to be responsible for those acts on the international plane.

A more subtle, and potentially more problematic, effect is practical result of such a decision. A federal government may be prohibited from intervening in a state court proceeding

²⁰³ If an investor brings a claim "on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly," Article 1117 (1), any award is paid or restitution is made to the enterprise. Article 1135 (2).

out of federalism and comity concerns, and U.S. federal courts might refuse to entertain similar claims on the basis of abstention doctrines such as Rooker-Feldman. An adverse international tribunal decision could assist a federal government desirous of making an end-run around those prohibitions. Moreover, at least in the United States, the question of who would pay a losing judgment is not altogether clear. Presumably any settlement would be paid out of the judgment fund. Yet the NAFTA implementing legislation and the BIT treaties and their legislation are silent as to whether a state might be asked to indemnify the federal government should a state regulation or decision be overturned.

C. Effect on Foreign Direct Investment

One question that has been underanalyzed is whether extrajudicial dispute settlement that includes review of court decisions--or for that matter of other government acts--is necessarily the right solution to the problem it purports to address. Most critiques have been based on an unrealized parade of horrors that governments will not be able to regulate for environmental safety because of this option, etc. Sovereignty concerns are somewhat insubstantial and often exaggerated. But there are legitimate criticisms, two of which I raise below, in addition to potential constitutional difficulties that are beyond the scope of this paper.

The first concern relates to the one of the primary reasons for having BITS that include extra-judicial dispute resolution clauses-- to encourage investment in developing countries by giving assurance to investors otherwise fearful of facing risks in gaining redress in underdeveloped or unfamiliar legal systems. There are now more than 2000 BITS, but it is not clear that foreign direct investment has increased significantly because of them--a recent study by a World Bank economist suggests not.²⁰⁴ While anecdotal evidence belies this conclusion, more work could be done on the efficacy of including extrajudicial dispute settlement in BITs. Can or should companies engage in risk assessment before investing in a country and insure themselves accordingly--and would that be as effective as the dispute settlement system that seems to be

²⁰⁴ Footnote re World Bank study.

growing? Project finance mechanisms are growing and increasingly competitive as private firms enter a marketplace hitherto dominated by the Overseas Private Investment Corporation and the Multilateral Investment Guarantee Agency.

D. Effect on Municipal Courts

Second, another benefit of having a growing number of arbitral decisions is the development of international law with respect to minimum standards that legal systems in all countries should meet. However, while this strengthening of international law may be true in the abstract, to be effective it must constrain conduct in nation states, and here there could be a real disconnect between theory and practice, particularly given that tribunal decisions are not binding on municipal courts. Is it possible that having an alternative dispute resolution system actually *discourages* the formation of functioning legal regimes in developing countries? If influential foreign investors do not have to navigate the municipal system might there be less incentive to put into place a functioning system that would benefit all people in the society-- including nationals that did not happen to be corporations owned by a foreign entity.

Establishing standards that create a strong international jurisprudence, which can then be referred to by national courts, is the best way to ensure that the goals of establishing supra-national dispute settlement are met. Well-reasoned decisions based on transparent criteria should enhance respect for international dispute settlement and allay fears of impermissible, unexplained intrusions into a core area of “sovereign” authority. To the extent that decisions are well reasoned, too, they are more likely to be perceived as persuasive and important arbiters of what constitutes “justice,” even if technically they are not binding precedent on further international tribunals or on national courts.

V. Some Potentially Troublesome Issues in the United States

In many individual cases U.S. Constitutional guarantees of due process, along with guarantees found in most state constitutions, would presumably satisfy any procedural process

required by international standards. The treatment of an alien in a particular case may not measure up to those guarantees. A tribunal practicing the sequential analysis suggested above would likely vindicate the rights of an alien in a particular case without needing to address the underlying law or practice of the courts. This analysis could protect some potentially problematic U.S. practices in the administration of justice from scrutiny. To illustrate this principle, I have selected several U.S. practices to examine how they compare to international standards. Below I examine (1) jury trials (2) prolonged detention in immigration cases; (3) courts' refusal to exercise jurisdiction on various abstention grounds, such as act of state or political question; (4) sovereign immunity; and (5) the U.S. courts' exercise of what is arguably extraterritorial jurisdiction. prosecutorial discretion?--new orleans/italy

A. Jury Trials

A Mississippi state jury verdict, and subsequent acts of the Mississippi appellate court system, are the focus of the *Loewen* case. Given that, and given the attention generally given to juries perceived as uncontrolled in their award of outrageous, extravagant verdicts, jury trials are likely subjects of review. Following the sequential review spelled out above, the tribunal would review the conduct of the Mississippi courts and jury in *Loewen*. Such a limited review is, in fact, all that the *Loewen* claimants have requested. the claimants have carefully tailored their claim to challenge the particular verdict handed down in Mississippi trial court. The claimants do not suggest that the punitive damages system itself is flawed.²⁰⁵ Only if the tribunal determined that the Mississippi courts' conduct passed muster would it proceed to consider whether some flaws inherent in the U.S. jury system violated international law.

²⁰⁵ Similarly, their challenge to Mississippi's 125 percent supersedeas bond requirement is only to it *as applied* in their case. Many countries have supersedeas bonds, and some even have appellate bonds, but there is no evidence to suggest that either violates international law. In fact, there is even some evidence that States may require higher deposits for security for costs (or bonds? check) for aliens who do not have assets in the territory without violating international law, despite the obvious discriminatory nature of such a requirement.

The system of trial by jury in the United States, while inherited from English law and similar in some respects to those of other countries that took their legal system from the English model, has developed in a unique manner. In criminal cases, the Fifth Amendment to the U.S. Constitution provides that all persons should be tried by a jury of their peers. Since jury trials, along with concomitant doctrines such as the hearsay rule, are generally viewed as providing more protection to individual defendants than a trial without a jury, no one has yet suggested that jury trials in criminal cases violate international law. It would also be far too much to say that such a system violates “principles in the principal legal systems of the world,”²⁰⁶ since many other legal systems also have jury trials. The United States is one of the few common-law countries in the world still to have jury trials for civil cases. Most states still have civil jury trials, and for trials in federal courts, this right is enshrined in the Seventh Amendment to the Constitution.²⁰⁷

Thus, the fears that NAFTA Chapter Eleven or similar treaty provisions could cause the United States to change the fundamental structure of its court system are overblown. There is no evidence that jury verdicts in punitive damage cases violate international law; indeed many countries permit recovery of exemplary damages, a rough analogue. That is not to say that grossly inflated damages awards in certain cases could not be found violative of international law, but such narrow review is a far cry from an effective overthrow of the U.S. judicial system.²⁰⁸ Britain abolished the use of juries in civil cases not because it believed it had to do so in order to comply with international law, but to provide for what Britain considered to be the orderly administration of justice.²⁰⁹

²⁰⁶ Sohn & Baxter.

²⁰⁷ U.S. Const. amend. VII. “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

²⁰⁸ Refer to pending Hague convention on recognition and enforcement and the difficulty the European nations express with giving effect to punitive damages verdicts.

²⁰⁹ Britain has retained civil juries for defamation cases.

In a recent article, one scholar, giving credence to the suggestion, raised by *Loewen*, that state court may be biased against aliens, suggested that one appropriate response would be to change the law to permit aliens to remove cases to federal court even when there is not complete diversity among parties.²¹⁰ This solution cannot work, however, because of the structure of the NAFTA itself. Articles 1102 and 1105 (national treatment and minimum standard of treatment, respectively) permit foreign investors to bring a claim on behalf of their investments in the United States. Those investments will often be U.S. subsidiaries of the foreign parent. Unless the parent were also named in a particular state court case, the case could proceed through the federal courts without an alien as a party, and with no basis for removal.²¹¹ Until the U.S. subsidiary lost the case, the Canadian or Mexican claimant itself would have no basis for a NAFTA claim. Short of permitting removal of all cases involving a U.S. subsidiary with a foreign parent, which would erode the distinction carefully preserved between corporate entities, changing diversity law would not remove all such cases from the purview of the state courts. Furthermore, the benefits from removal, even if it were permitted, may not be that extensive. Litigants have a right to a jury trial even in federal court. While judges may temper a hypothetical discriminatory animus on the part of juries, often the jury in a federal court will be drawn from the same pool it would have been drawn from in state court. Moreover, the federal court decision itself would be subject to review under denial of justice standards.

In national due process terms, punitive damages are problematic when they are not subject to procedural constraints. [*Gore v. BMW*, factors considered to determine whether punitives are fair -- multiplier, etc.]

²¹⁰ Renee Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 B.Y.U. L. REV. 229, 297-303.

²¹¹ The *Loewen Group International*, *Loewen Group International Inc.* (the U.S. subsidiary) and Raymond L. Loewen were all defendants in the Mississippi court case.

B. Detention of Aliens

Prolonged detention of aliens is a live issue in the United States, particularly after the September 11 terrorist attacks. It was, however, at issue even before then. Under the Antidiscrimination and Effective Death Penalty Act of 1996, Congress authorized the Attorney General to detain deportable aliens for 90 days pending their actual deportation. In several cases the Attorney General was unable to find countries willing to accept the deportees for during the 90-day period, but nevertheless kept the aliens detained indefinitely. The Supreme Court found that the Attorney General could not indefinitely detain the aliens in the cases at issue because Congress had not authorized indefinite detention. In its narrowly crafted opinion, the Court essentially sidestepped any constitutional finding by focusing attention on the statutory language. The Court also noted that each case would have to be judged on its merits, and that an alien could “be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.”²¹² The Court noted that while the statute called for deportation within 90 days and detention during that time, the previous statute had permitted detention up to six months. Reasoning that Congress could not have expected that all deportations could take place within 90 days, the Court placed six months as the length of time a deportee could be held before, on his showing of no significant likelihood of removal in the “reasonably foreseeable future,” the United States would have to respond with sufficient evidence to rebut that showing.²¹³

United States law distinguishes between aliens who are in the United States, legally or illegally, and those who are not deemed admitted (though they may be physically in the

²¹² Zadvydas, 150 L.Ed.2d at 674.

²¹³ Zadvydas, 150 L.Ed.2d at 674.

territory).²¹⁴ The former are entitled to the due process guarantees found in the U.S. Constitution, while the latter are not. Therefore, an alien who attempted to enter the United States without the appropriate documentation was detained on Ellis Island indefinitely, but because that alien had no rights under the Constitution that prolonged detention could not be deemed unconstitutional.²¹⁵

Under international law, the fact that aliens are deemed to be outside the territory of the United States, and therefore not technically “entered” into the country would make little difference in a determination of whether indefinite detention would be permissible under international law standards. Indeed, such prolonged detention would probably not be permissible. Although States alone decide who to admit into their territory, indefinite U.S. detention of an alien, either technically within or without the territory, would contravene international law. This does not suggest that some period of detention would not be permissible; each case would have to be examined on its merits to determine whether such prolonged detention violated international standards.²¹⁶

The Patriot Act, signed into law in October, 2001, amended the immigration law, giving the Attorney General the authority to certify any alien he reasonably believes to be a terrorist or to have engaged in any other activity that endangers the national security of the United States, and mandates the detention of persons so certified.²¹⁷ Apparently mindful of the Court’s decision

²¹⁴ “The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law,” *Zadvydas*, 533 U.S. 678, 150 L.Ed.2d 653, 669 (2001), noting treatment of an “excluded” alien and an alien “paroled” into the United States pending an admissibility determination and citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) and *Leng May Ma v. Barber*, 357 U.S. 185, 188-190 (1958).

²¹⁵ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215-16 (1953).

²¹⁶ The Supreme Court avoided the other potential violation of international law raised in *Zadvydas* by holding that the deportees had the right to bring a habeas corpus claim under 28 U.S.C. 2241. *Id.* at 664-65.

²¹⁷ Patriot Act section 412.

in *Zadvydas*, the statute provides for review of the detention by the Attorney General every six months. However, U.S. courts are already beginning to address whether these requirements satisfy international legal standards. [Add Padilla, etc. to discussion – note exceptions for national security – may not be ov any help on that front]

The peacetime detentions of many aliens are unlikely to be raised on the international front because those same countries that refuse to accept the aliens back into their territory are not likely to espouse claims on their behalf. In the case of a broad sweep bringing aliens into detention, as happened after September 11, some of the aliens may well have countries who would be willing to intervene on their behalf.

C. Sovereign Immunity

One of the primary concerns in denial of justice jurisprudence is denial of access to courts, which is essentially a denial of access to redress for an underlying wrong. Court decisions implementing laws that limit liability for certain acts are thus likely targets of denial of justice claims. The Federal Tort Claims Act (“FTCA”) exempts the government from liability for intentional torts; many state tort claims acts mirror the FTCA²¹⁸ In the NAFTA Chapter Eleven case *Mondev Ltd. v. United States of America*, one of the issues was whether the Massachusetts Tort Claims Act improperly shields government actors from liability for intentional tort.²¹⁹

The facts in that case present several overlapping issues. One question is whether the Massachusetts Supreme Judicial Court’s determination that the Boston Redevelopment Authority (the entity that allegedly failed to give proper due process to the Canadian business entity seeking

²¹⁸ [Insert cites.]

²¹⁹ Cite to Notice of Claim/brief.

to do business with it) was a governmental actor was consistent with Massachusetts law. Second, assuming that the decision passes muster, is whether sovereign immunity from tort is consistent with international law. Most nations have waived immunity from liability for intentional torts. However, even if a tribunal were to decide that customary international law requires states to provide redress for such wrongs, such redress does not necessarily have to come by way of federal or tort claims acts. Countries are permitted to order their legal systems as they choose, and the Mondeve claimant may have had other recourse for the wrongs allegedly done by the government agency by filing a Bivens action under section 1983 of the U.S. Constitution.²²⁰

[finish]

D. Failure to exercise jurisdiction

[Address whether a court's refusal to exercise jurisdiction on the grounds of political question could be a denial of justice because of failure to give access to court] --

[Issue of prosecutorial discretion--could well come up in a national treatment context--too zealous a prosecution of alleged fraud on part of a "foreign-owned" company--failure to prosecute zealously a U.S. firm that would then lost market share to nonnational firm.

E. Exercise of extraterritorial jurisdiction.

Conversely, it may also be a denial of justice for a country to exercise jurisdiction when it is not entitled to do so. The United States is often criticized for the broad construction its courts take with respect to the exercise of extraterritorial jurisdiction. The outer limits on permissible

²²⁰ Finally, if all of the above claims fail, the claimant could argue that the acts of the agency in question present direct wrongs for which it has a right of recovery. "[I]n the case of contractual claims the active notice taken by the state of the wrong done its citizen is deferred until he has exhausted his local judicial remedies and a denial of justice is established, whereas in claims arising out of tort, if chargeable to a government authority, interposition is generally immediate; and in the further fact that wider discretion is exercised by the protection state in the enforcement of contractual claims than of those purely tortious in origin." Edwin M. Barnhard, *International Contractual Claims and Their Settlement*, in *American Society for the Judicial Settlement of International Disputes* Nos. 11-28 (Aug. 1913). at 5.

exercises of jurisdiction under international law are not entirely clear. Furthermore, those parameters could change, depending on whether a State exercises jurisdiction to prescribe--effectively to make laws-- or jurisdiction to execute those laws.

The best-known exercise of extraterritorial jurisdiction is in the antitrust arena. The United States exercises jurisdiction over combinations and conspiracies in restraint of trade that are intended to have effects in the United States.²²¹ Other forms of fairly far-reaching jurisdiction include the anti-boycott laws, that clearly have an extraterritorial reach. The anti-boycott laws are in effect a tertiary boycott, which prohibit companies from doing business with companies (usually in the Arab-speaking world) that comply with the Arab League's boycott on doing business with Israel. This prescription, however, is not limited to U.S. companies, but purports to extend to their subsidiaries as well. The President (first Clinton, then Bush) has suspended enactment of the extraterritorial provisions of the Helms-Burton Act, which would penalize those doing business with Cuba.

[lillich weston book--that expro claims don't usually cover ET results--fit that in]?

[TO BE COMPLETED]

CONCLUSION

can i say my plan is really acknowledging what is often done?
problem with standards of review is that they are subject to manipulation.
why different from Bush v. Gore
habeas reference--Robert Ahdieh--Dialogic Globalization?
[per adrien vermeule -- is it a sovereignty concern? rather apples and oranges -- should be

²²¹ U.S. courts do themselves recognize the principle that States are allowed to structure their judicial systems and their laws as they wish, and may defer to other countries' laws on certain occasions. See *Hartford Fire Ins. Co.*--examining how U.K. regs and U.S. antitrust law interact--in that case no difference. *Timberlane*--rule of reason test

constitutional avoidance - deferring in the same way that fed courts treat state court decisions on state law] -- it isn't constitutional avoidance

For some time, international law scholars and arbitrators were at odds over whether acts of a judiciary could ever to be attributed to a State under international law.²²² This deference to judicial acts presupposes an independent, fully functioning judiciary. Nevertheless, that notion of deference persisted even after there was a more or less general consensus that acts of the judiciary were equally attributable to the State as were the acts of other parts of a government.²²³

Thus, in the wake of complete insulation of judicial acts from review lingered the belief that acts of independent judiciaries deserve greater deference and respect than those of the more evidently political branches.²²⁴ The notion that a non-corrupt, independent judiciary is free from political pressures in a way that other branches of government are not is the best argument for extending greater deference to the judiciary. While a few earlier commentators could see no apparent reason for giving more deference to the judiciary, most, perhaps due to the fact that, as lawyers, they have an instinctive respect for courts and a visceral reaction to international oversight of them, did not. This notion persists; the United States has argued recently that judicial acts deserve greater deference than acts of the legislative or judicial branches.²²⁵

Vienna convention analysis--designed to give investor more opportunities for dispute settlement--to fix investment problems. Not designed to be making wholesale changes in system. but hope that domestic environment will get better--Susan Rose Ack paper?

Argentina court article

For example, in Argentina La Corte Supreme de Justicia de la Nación has been “wholly or partially restructured on seven different occasions,” notwithstanding ostensible guarantees of lifetime tenancy during good behavior.²²⁶

Footnote somewhere: Courts will interpret laws very differently depending on whether they are grounded in a civil law tradition or in a common-law tradition. Matters become more complicated when the systems are mixed. For a brief description of some of the vicissitudes in judicial behavior exhibited by courts interpreting a U.S.-style constitution in a legal regime premised on civil-law principles, see Becky L. Jacobs, *Pesification (etc)*, 343 *Inter-Am. L. Rev.* 408-414 (2003)

Another international tribunal with the potential to issue interesting case law is the International

²²² See supra at _____.

²²³ See, e.g., *Différand concernant l'interprétation de l'Article 79*, 13 R.I.A.A. 422, 438 (1955) (“Although it is true that in certain arbitral awards handed down in the twentieth century the opinion is expressed that the independence of the courts, in accordance with the principle of separation of powers generally recognized in civilized countries, excludes the international responsibility of States for acts of the Judiciary which are contrary to law, that theory now appears to be universally and rightly repudiated by writers on and courts administering international law. The judgment or order of a court is something issuing from an organ of the State, just like a law promulgated by the Legislature or a decision taken by the executive authorities.”)[check this cite].

²²⁴ Chaitin, *Opinions of Commissioners*. [get others as well]

²²⁵ [cite to Loewen and Mondev briefs]

²²⁶ Becky L. Jacobs, *Pesification and Economic Crisis in Argentina: The Moral Hazard Posed by a Politicized Supreme Court*, 34 *Inter-Am. L. Rev.* 391, 407 (2003).

Tribunal For the Law of the Sea (ITLOS). See generally John Shamsey, *ITLOS v. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute*, 12 *Transnat'l L. & Contemp. Probs.* 513 (2002)