"CONTINUOUS NATIONALITY IN CUSTOMARY INTERNATIONAL LAW"

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The leading case on this subject is the *Panevezys-Saldutiskis Ry. Case* in the Permanent Court of International Justice in 1939. But by way of background, I sould mention that the Court had previously decided, echoing Vattel, that when a State invokes the right of diplomatic protection of its nationals abroad, it is really asserting its own claim. This was in the *Mavrommatis Palestine Concessions (Jurisdiction) case.* There is obviously a degree of artificiality both in the concept and its application – for instance, damages are usually calculated on the basis of the injury to the victim, not the national State. But in a system of customary international law where individuals and companies were not – and still for the most part are not – subjects of international law, the fiction was often the only way of justifying the exercise of diplomatic protection, and the only way of getting redress for aliens for wrongs done to them. (For the purposes of the rest of this discussion, when I speak of an injury to an individual I also include an injury to a company, unless the context otherwise requires.)

Turning to the *Panevezys-Saldutiskis Ry. Case*, the facts are essentially as follows. A company in Tsarist Russia had built a railway, part of which ran through what was to become Lithuania following the First World War and the subsequent upheavals in Russia and the Baltic States. The Lithuanian Government had seized this part of the railway. But in 1923, a company was founded in Estonia that claimed to be the

successor of the Russian one. It claimed compensation for the taking by Lithuania, and the Estonian Government espoused the claim. The case ended up in the PCIJ. Lithuania raised two preliminary objections, which were originally joined to the merits but which it subsequently dealt with in an interlocutory, but in the event, definitive, judgment. First, it upheld an objection that local remedies had not been exhausted. That logically should have been the end of the matter. But though the Court once again adjudged that an objection based on the nationality of the company could not be decided without going into the merits – a phase that would now never be reached, because of the finding on non-exhaustion of local remedies - the Court nevertheless stated (obviously doubly *obiter)* that it was a "rule of international law that a claim must be national not only at the time of its presentation but also at the time of the injury". The reason was that "in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse."

You will notice that, although strictly speaking the issue with which the Court was concerned was the right of the *new* State to present the claim, what it said also applied to the old State of nationality: it had to be the same State both at the time of injury and at the time of presentation of the claim.

There is, of course, a degree of illogicality in the continuous nationality rule, if one takes seriously the doctrine that an injury to an individual is an injury to his State. For if that is so, then the harm is done at the moment of injury, and the cause of action accrues to the national State at that point. (For our purposes it makes no difference if the international cause of action accrues only after the unsuccessful exhaustion of local remedies.) This would not lead to a different conclusion on facts similar to *Panevezys-Saldutiskis*; Estonia was not the injured State and so had no claim. But it would not, logically, preclude the original State of nationality (Russia in that particular case) from claiming. However, as a matter of practice former States of nationality have not usually been very interested in seeking redress for those who are no longer their nationals, and when it comes to claims by the new State of nationality, respondents have found it easy to respond that the injury was not done to that State, invoking the Vattelian argument. Hence, the Court's decision in 1939 was not an innovation: previous arbitral decisions and State practice were consistent with that view. I shall return to them in another context shortly.

Staying, for the moment, with the general principle enunciated by the Court, three points need stressing.

1. The Court stressed that this was simply a rule of customary international law, which would have to yield if there was what it called a "special" (i.e. specific) agreement on the subject. Nowadays, there are many such agreements contained in, in particular, bilateral investment protection treaties ("BITs") and the North American Free Trade Agreement. But there have also been other types of claims settlement agreement – for instance, lump sum

agreements and post-War peace treaty arrangements. Treaties frequently contain variations on the normal customary rule.

Incidentally, this does not mean that the customary rule is irrelevant. Even with all the BITs that exist, the great bulk of relations between States in the area of diplomatic protection still depend on customary law. Very roughly, I calculate that it is only in about one-tenth of the total possible bilateral relationships that the subject is governed by a specific agreement. I shall come back to this.

2. Although the rule is frequently spoken of as the *continuous* nationality rule, this is not what the Court said. It simply held that the nationality had to be the same both at the moment of the injury and at the time the claim is brought. This leaves open the possibility, in theory, of changes of nationality in the intervening period, for instance through succession of individuals to the claims of the original victim.

3. This brings me to my third point about the basic rule. It has been much criticised for the injustice that it can cause. To take a simple example, it can easily happen – has happened – that the victim dies leaving a widow or children of another nationality. The claim is lost. Again, people can easily lose their nationality either through State succession, deprivation of citizenship for racial or other grounds (e.g. the Jews in Nazi Germany), or through mass displacement due to war, civil or international. This has, for at least the last half-century, led to very strong criticism of the rule, most recently in the International Law Commission's work on diplomatic

protection. This has had some effect, inasmuch as some special agreements have mitigated its rigours; but the critics have not succeeded in displacing the customary rule as such.

It is sometimes said that the continuous nationality rule prevents a sort of "nationality-shopping" (by analogy with forum-shopping), of claimants changing their nationality to that of a new State which they perceive to be more sympathetic to their claims or in a better position to press them. I doubt that this would in itself be a sufficient justification for the rule. So far as concerns individuals, at any rate, they are rarely in a position to shop around in this way. So far as concerns companies, they cannot change their nationality without being dissolved.

To return to the *Panevezys-Saldutiskis Railway case*, the starting point, the *terminus a quo,* for the nationality link is clear: it is the date of the injury. The pronouncements of the Permanent Court further suggest that the end point, the *terminus ad quem*, is the date of the presentation of the claim. It is not entirely clear from the language of the judgment whether what is meant is the date of presentation of the claim through the diplomatic channel, or the date of presentation to a judicial or arbitral tribunal. But in principle it ought to be the former date, for two reasons.

1. The right of diplomatic protection is essentially concerned with claims through the diplomatic channel. Judicial or arbitral procedures are simply ways of vindicating those claims.

2. It is largely a matter of chance whether such remedies happen to be available. Even today, with the International Centre for the Settlement of Investment Disputes and so on, the role of international courts and tribunals is, to borrow a phrase de Smith used in another context, *sporadic and peripheral.*

As a matter of theory and principle, I would argue, therefore, that a change of nationality after the bringing of the claim should not make any difference. The cause of action accrued when the injury was done. It is the national State's claim. If it also has the link of nationality when it seeks to vindicate the claim, it has the requisite standing. Any subsequent changes do not affect the position.

It is fair to say that, until the recent decision of an arbitral panel in *Loewen*, to which I shall return, little attention was given to this issue of the exact *terminus ad quem* in customary law. In that case, a claim in respect of a Canadian company was rejected because of a change of nationality after the institution of proceedings, but before the award was rendered. But before I look at that decision in more detail, I should say something about the previous State practice, case-law and *doctrine*.

There are two difficulties to be borne in mind when we consider the practice – over and above the usual difficulties, in any branch of the law, in collecting and evaluating instances of State practice from around the world. The first is that, in accordance with principles about the formation and identification of customary law which I need hardly rehearse here, but which have the imprimatur of the International Court of Justice, no less, it is not appropriate normally to take into account the *treaty* practice of States on this topic. The law in this area is a matter of *ius dispositivum,* and what

parties agree in specific treaties has no effect on the general law. Secondly, most of the State practice has been concerned with so-called "late nationals" – individuals (mostly) who acquired the nationality of the claimant State only after the injury.

One occasion on which States were able to indicate their views about the *terminus ad quem* was the ultimately abortive Hague Conference for the Codification of International Law of 1930. However, when asked in a questionnaire whether nationality had to be continuous up to the date of the award, only 19 States responded. Furthermore, only eight expressly took the view that the *terminus ad quem* was the date of the award, rather than the date of presentation of the claim. The eight included the United Kingdom and two of its Dominions, who at the time could be almost be said to be extra votes for the British Empire. The United States, on the other hand, was one of the many countries that did not respond at all.

So far as concerns the case-law, I have reviewed this at some length in the essay from the book on Investment Law and Arbitration that has been distributed to you. I think it is fair to say that though there have been some decisions which support a *terminus ad quem* later than the date of the bringing of the claim (notably *Benchiton* and *Eschauzier*), there are others, coming from equally respectable sources, which reject any extension beyond the date of the claim (notably *Admin. Decision no. 5* of the US-German Mixed Claims Commission, and *Stevenson*).

Turning to doctrine, though some authors, notably *Oppenheim*, have supported a rule of continuous nationality up to the date of the award, others are more uncertain. The prestigious Institute of International Law originally refused to endorse any continuous

nationality rule. In 1965 it did endorse it, but with substantial modifications and qualifications. Significantly, its *terminus ad quem* is the "date of presentation", meaning the date of formal presentation through the diplomatic channel and, in the case of resort to an international tribunal, the date of filing. So far as concerns the International Law Commission's work on Diplomatic Protection is concerned, this is still continuing. As I mentioned, an attempt by the Special Rapporteur (Prof. Dugard) to do away with the continuous nationality rule completely was defeated; but so far it has refused to extend the *terminus ad quem* beyond the date of the official presentation of the claim, and even this is subject to some exceptions which move the date *earlier*, not later.

To summarize so far, I think it fair to say that, at the time *Loewen* was decided in 2003, there were good reasons of logic and principle, and some authority, favouring drawing the line at the date of presentation of the claim. There was no clear rule of customary law requiring nationality to be continuous up to the date of the award; the most that could be said in favour of this approach was that the law was unsettled.

Treaty Law

Let me turn, briefly, to the modern treaty law. (I have dealt with it more fully in the paper that has been circulated at the conference organizers' request). It is difficult to give a simple account, because there are exceptions to the general rule in particular treaties, and for particular types of claim, especially companies with the nationality of the respondent, but which, because of foreign control, it has been agreed can be treated as the nationals of another State. I might interpolate at this point that States

have traditionally been reluctant to entertain claims by their *own* nationals, and special provision has had to be made for such cases.

Broadly speaking, though, the pattern that emerges is that the *terminus ad quem* is the date of consent to arbitration or the institution of proceedings by registration of the claim – dates which often coincide. This is broadly the position under ICSID and its Additional Facility. Each BIT is individual, but broadly speaking the pattern seems to be that the key is whether the claimant had the nationality of the relevant State at the date of the injury, and if continuous nationality *is* required (which is not necessarily the case), the *terminus ad quem* is no later than the institution of international proceedings. The person concerned had to be an "investor of a party" at both dates; but that is all. Similarly for the Energy Charter Treaty.

The NAFTA itself does not explicitly set out criteria for determining the *termini a quo* and *ad quem*. However, for reasons set out in my essay I think that the use made of the term "investor of a party" suggests that the former is the date of the injury, and the latter is the date of bringing the claim. There is nothing that suggests that nationality has to be *continuous* between these two dates. More to the point in the context of *Loewen*, there is nothing in NAFTA that I can see that requires nationality to continue beyond that date. Indeed, even the arbitral tribunal in that case could find none.

The *Loewen* case

For those of you unfamiliar with this case, I will try and summarize it quickly.

Raymond Loewen, a Canadian citizen, was the founder and chief executive officer of, and principal shareholder in, the Loewen Group, Inc., a Canadian corporation (”TLGI”). Its principal United States subsidiary was Loewen Group International, Inc. (”LGII”; both companies were collectively entitled ”Loewen” in the arbitration). A suit was commenced in the Mississippi courts against Loewen by Jerry O’Keefe and his son and companies owned by them (”O’Keefe”). It arose out of a commercial dispute between the plaintiffs and the defendants, who were competitors in the funeral home and funeral insurance business in Mississippi. The total value of the contracts in dispute was under US$ 5 million. As a result of a seven-week trial, O’Keefe was awarded ***$500 million***, including $75 million damages for emotional distress and $400 million punitive damages. Pausing there, the Arbitral Tribunal which considered Loewen’s complaint under NAFTA unanimously characterized the trial as (amongst other things) “a disgrace” and “clearly improper and discreditable”.

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

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

The Tribunal went out of its way to detail, at great length, the numerous scandalous defects in the conduct of the trial. It comes as something of a surprise, therefore, on reading on, to discover that it then went on to decide that the claim failed for non-exhaustion of local remedies. This decision has been much criticized, including by me, but an examination of that aspect of the case is outside the scope of this conference.

The non-suiting of the claimants for non-exhaustion of local remedies should have been enough to dispose of the case. However, curiously the Tribunal (perhaps lacking

confidence in its finding on this point) went on to deal also with another objection that had been raised only after the institution of proceedings. TLGI had, in the event, found itself obliged to submit a voluntary petition for relief under Chapter XI of the *US Bankruptcy Code*, and a reorganization plan had been approved by the courts of the USA and Canada. Under that plan, TLGI (the parent company) ceased to exist as a business entity. All of its business operations were reorganized as a *US* corporation (Alderwoods) save that, in the hope of preserving the NAFTA claim, TLGI, immediately prior to going out of business, assigned all of its rights, title and interest in that claim to a newly created Canadian corporation called Nafcanco. The USA filed a supplementary objection, asserting that claimants could not, under the NAFTA, claim against their own State of nationality. In other words, it argued that the rule of continuous nationality applied, and that it applied right through till the final award. The Tribunal agreed.

The arbitrators began by stating that the relevant articles of NAFTA specified only a *dies a quo*, but not a *dies ad quem*. As I have already indicated, this analysis is questionable, with respect. The definition and use made of phrases like "investor of a Party" justify the inference that the *terminus a quo* is the date of the injury, and the *terminus ad quem* is the date of the institution of proceedings. This, as I have also mentioned, is consistent with the provisions of the ICSID Additional Facility, which provided the framework for the proceedings. It is also consistent, as I have argued, with other investment protection treaties. I do not say that because I am in any way suggesting that they form a body of new customary law that will bind a NAFTA tribunal. But what I do suggest is that they form part of the general background of modern investment protection treaties which it is certainly legitimate to take into

consideration when interpreting the treaty which *does* apply, if there is an uncertainty as to its meaning.

The Tribunal having nevertheless found that there was a lacuna in NAFTA, sought to fill it by recourse to customary international law. It began by asserting that the purpose of Part 11 of NAFTA was to protect *foreign* nationals, not a State's own subjects. The protection of alien investors is undoubtedly its main purpose; however, substantive obligations designed to ensure that they are properly treated are not inconsistent with a right of redress continuing even after a change of nationality. A fortiori, if the change occurs only after the institution of proceedings. In short, the Tribunal begged the question. And in any case, the award is couched in such general terms that even if the claimant had changed nationality, not to that of the respondent State, but to that of some *third* State – in this instance, Mexico – the alleged rule would still apply.

Be that as it may, having found a lacuna in the treaty – in my submission questionably - the Tribunal had recourse to customary international law, which it held required nationality to be continuous up to the date of the award. Since it was not continuous, the claim failed. I have to say, with respect, that its analysis of the customary law was thin and perhaps even tendentious. For the reasons I have tried to explain, the customary law position was, at best unsettled, and the Tribunal owed the parties, not to mention the rest of the international law community, a far more thorough analysis of the law than it in fact engaged in. It indeed recognized that the outcome might seem unreasonable and unfair, but took refuge in the idea that hard cases do not make good law and that international law is not the same as domestic law (where, it

acknowledged, this would not be the outcome). All I want to say about that is if the outcome seems unfair, all the more reason to see whether the law really requires it.

Just to tie up a couple of loose ends, in conclusion.

First, as I mentioned, when the Loewen Group was wound up (in effect) and its assets transferred to an American company, a Canadian company, Nafcanco, was created in which was vested the NAFTA claim. The tribunal seems to have been rather offended by this stratagem, holding that "Such as naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding." Though it denied that it was piercing the corporate veil, a later ICSID tribunal considered that it had.

Secondly, there was the claim of Mr. Loewen himself, who remained Canadian and who claimed under Art. 1117 of the NAFTA as "an investor of a party" with a controlling interest in the Loewen Group. Although the Tribunal, at the beginning of its award, had described him as the "founder and chief executive officer and principal shareholder" of the Loewen Group, it now found that he had not proved that he had retained this controlling interest. This is also a rather odd way of disposing of the matter, especially bearing in mind that, if he had lost control, it was largely or entirely due to the events in Mississippi which the Tribunal had itself criticized.

Finally, although the Tribunal evidently thought that it had now disposed of the matter, in this "Final Award", the victorious USA had the embarrassing task of pointing out to the arbitrators that they had failed to deal with the claims of the Mr.

Loewen himself, as an "investor of a party" in his own right, under Article 1116. The Award had not made any provision in this regard. A Supplementary Opinion thus had to be issued, which (not surprisingly) held that the logic of the Final Award covered this claim too.

The saga is not over. Loewen has now filed a petition to vacate the award in the US federal court. So watch this space.

Thank you for your attention.