

In the Matter of:

THE LOEWEN GROUP INC. and
RAYMOND L. LOEWEN, Claimants

v.

THE UNITED STATES OF AMERICA, Respondent

ICSID Case No. ARB (AF)/98/3

OPINION OF

RICHARD B. BILDER

FOLEY & LARDNER-BASCOM EMERITUS PROFESSOR OF LAW
UNIVERSITY OF WISCONSIN-MADISON

I. INTRODUCTION

1. My name is Richard B. Bilder. I am the Foley & Lardner-Bascom Emeritus Professor of Law at the University of Wisconsin Law School, having served as a member of that faculty since 1965. My teaching and research has been primarily in the areas of international law and U.S. foreign relations, and I have written and published extensively on these and other subjects. Among other positions, I have served as Vice-President, Honorary Vice-President, and currently Counselor of the American Society of International Law; on the Board of Editors of the American Journal of International Law, of which I am currently Book Review Editor; on the Advisory Board of the Institute on the Procedural Aspects of International Law; as Chair of the International Courts Committee of the Section on International and Comparative Law of the American Bar Association; as a member of the American Society of International Law's Panel on State Responsibility; and am currently Chair of the Committee on Diplomatic Protection of Persons and Property of the International Law Association. Before entering teaching, I served for a number of years in the Office of the Legal Adviser of the U.S. Department of State. My curriculum vitae is appended to this statement.

2. I have been asked by the United States of America for my opinion on some of the international law aspects of the claim of the Loewen Group and Raymond L. Loewen ("Loewen") against the United States ("U.S.") for damages for alleged breaches of the North American Free Trade Agreement (NAFTA), now before an Arbitral Tribunal ("the Tribunal") constituted pursuant to Chapter 11 of NAFTA (ICSID Case No. Arb (AF/98/3), and, in particular, certain questions concerning the general international law governing state responsibility for the lawful treatment of foreign investors as related to that case. In this connection, the United States

Government has provided me with copies of the following documents in this matter:

- The Trial Transcript in the case of O'Keefe v. The Loewen Group, Inc., Circuit Court for the First Judicial District of Hinds County, Mississippi (1995)
- "Memorial of The Loewen Group, Inc." dated October 18, 1999
- "Memorial of Raymond L. Loewen" dated October 18, 1999
- "Memorial of the United States of America on Matters of Competence and Jurisdiction" dated February 18, 2000
- "Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States" dated May 25, 2000
- "Submission of Raymond L. Loewen Regarding Competence and Jurisdiction" dated May 25, 2000
- "Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence" dated July 7, 2000
- Final Jurisdictional Submissions of Claimants, dated July 27, and 28, 2000
- Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdiction, dated January 5, 2001

3. The background, pertinent facts, issues in dispute and positions of the parties in this matter are fully set forth in the documents cited in the previous paragraph and will be referred to only as necessary in my statement which follows.

II. THE INTERPRETIVE STANDARD

4. Loewen's claim against the U.S. is based primarily upon its allegations that the U.S. has violated certain provisions of Chapter 11 (Investment) of NAFTA. In my opinion, the provisions of Chapter 11 should be interpreted in a reasonable and practical way in terms of the Agreement's purpose and context, with a view to its prospective workability and effectiveness, and consistently with existing customary international law regarding state responsibility for the treatment of foreign investment.

5. The Agreement contemplates, provides ample scope for, and arguably mandates, such a broadly-based interpretive standard. Article 102(2) and 1131(1), in providing the Agreement is to be interpreted "in accordance with the applicable rules of international law," implicitly incorporates the interpretive standards of the Vienna Convention, now generally recognized as codifying customary international law in this respect. Article 31 (general rule of interpretation) of the Vienna Convention provides, as here most relevant:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

.....
3. There shall be taken into account, together with the context:

.....
'any relevant rules of international law applicable in the relations between the parties.'"

Article 32 (supplementary means of interpretation) adds that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

The requirements in Articles 102(2) and 1131(1), indicating that the Agreement is to be interpreted and applied, not only in accordance with the provisions of the Agreement, but also “in accordance with the applicable rules of international law”, manifest the intent of the parties that its provisions be interpreted and applied in a manner consistent with, and presumably supportive of, the contemporary corpus of customary international law regarding state responsibility for the treatment of foreign investment. This mandate is particularly significant in relation to Chapter 11 since various articles in that Chapter relevant to this matter expressly or implicitly incorporate specific customary law standards as measures of obligation for the parties. Thus, Article 1105(1) expressly provides that the parties shall accord each other’s investments a minimum standard of treatment “in accordance with international law,” and other provisions of Chapter 11 utilize concepts and standards drawn from the customary law of state responsibility and treaties regarding the treatment of foreign investment – for example, the provisions of Art. 1102 and 1103 providing respectively for “national” and “most-favored-nation treatment” of foreign investment, and the provisions of Article 1110 regarding “Expropriation and Compensation”.

6. Since the meaning of some of the provisions of Chapter 11 relevant to this matter are here in dispute, and the “applicable rules of international law” referred to in Chapter 11 are not further defined, any interpretation and application of these provisions may appropriately draw not only on their context and purpose, but also, as appropriate, on supplementary means of interpretation, as recognized by Articles 31 and 32 of the Vienna Convention. Article 32(b) of the Convention reflects the settled canon that any textual interpretation should not be either “unreasonable” or “manifestly absurd”. In my opinion, the considerations which should be taken into account in construing the most reasonable and likely intent of the parties with regard to the

interpretation and application of Chapter 11 include the following:

- (i) The objectives expressly set out in Article 102(1) of NAFTA, including, inter alia, to “(c) increase substantially investment opportunities in the territories of the parties,” “(e) create effective procedures . . . for the resolution of disputes,” and “(f) establish a framework for further . . . cooperation and expand and enhance the benefits of this Agreement.”
- (ii) The NAFTA parties’ recognition that each of them is a federal state and that they vary as to their respective division of powers between their federal and state or provincial governments. While Article 105 obligates the parties to ensure that the provisions of the Agreement are carried out by their respective state or provincial governments, all of the parties must have been aware that each would, pursuant to the processes and constraints provided by its own constitutional structure, have to implement this obligation in its own way.
- (iii) The parties’ recognition of the diversity of their legal systems and that each of them has its own judicial system, judicial procedure and legal culture. Except as clearly discriminatory or otherwise expressly provided in Chapter 11, it cannot be assumed that the parties intended, in agreeing to NAFTA, to insulate each others’ nationals from the normal risks of private commercial litigation to which their own nationals doing business or making investments in their own countries were typically subject; to waive or change their usual judicial processes or ways of dealing with private commercial disputes simply because the suits involved each others’ investors; or to require the establishment of any special legal regime

favoring foreign investors over a party's own nationals. That is, I believe that NAFTA's purpose was and is to create a "level playing field" among NAFTA parties' investors, not to put foreign investors in a privileged or more favorable position than a party's own nationals engaged in like activities, or to excuse another party's investors from "playing-by-the-rules" of the judicial system and legal culture in which they choose to participate.

- (iv) The continued effectiveness and broad acceptability of NAFTA to its parties. The parties must have believed that the obligations they were undertaking were ones that they were legally and practically capable of fulfilling. It seems very unlikely that any of the NAFTA governments would have knowingly assumed, or would continue their exposure, to risks of substantial financial liability for alleged breaches of NAFTA which they were legally or practically unable to either prevent or remedy.
- (v) The importance, not only to the NAFTA parties, but to the international community generally, of maintaining and strengthening a practical, reasonable, effective and broadly acceptable structure and fabric of customary international law principles and rules regarding state responsibility for the treatment of foreign investment, as well as supporting the extensive structure of treaties that has developed with respect to the encouragement of foreign investment. As indicated, the provisions of NAFTA, and of Chapter 11 more specifically, amply demonstrate the parties' intent that it be interpreted and applied in the light of and consistently with existing rules of applicable international law. While it is true

that arbitral interpretations of NAFTA will not constitute internationally legally binding precedents, they will most likely have at least some – perhaps considerable – persuasive and law-influencing effect. Consequently, it is important that any interpretation of NAFTA’s provisions relating to customary international law be consistent with, support and strengthen, rather than weaken or confuse, the customary international law of state responsibility.

III. DID THE TRIAL COURT’S CONDUCT DURING THE TRIAL VIOLATE ARTICLE 1102 OF NAFTA, THEREBY TAINTING THE VERDICT?

7. Loewen alleges that the Trial Court, by admitting what Loewen alleges was extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, violated Article 1102 of NAFTA, which bars discrimination against foreign investors and their investments. In my opinion, the trial court judge’s conduct during the trial was fair and unbiased and not of a nature or consequence as to, if not remedied on appeal, constitute discrimination in violation of the national treatment standard of Article 1102.

8. Article 1102(1) and (2) requires each party to accord investors and investments of another party “treatment no less favorable than it accords in like circumstances to its own investors” or their investments. Article 1102(3) makes clear that this requires, with respect to a state or province:

“ . . . treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.”

As here relevant, I read this article as meaning that the Mississippi trial court judge could not, in his conduct of the trial, show bias or behave less favorably toward Loewen because of its Canadian nationality than he would toward an investor involved in similar activities and a similar commercial lawsuit from another state of the United States, such as New York or California, or from another location in Mississippi. I believe that this provision, like all of Chapter 11, must be construed reasonably and in a practical way so as to proscribe only demonstrable and significant indications of judicial bias on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial. In my view, the provision does not by its terms, or as reasonably construed, require that an alien investor's foreign nationality be kept secret, or that it cannot even be permitted to be mentioned in the course of the trial. Nor does Article 1102 itself address other issues of alleged bias, based on considerations other than nationality, such as race, wealth or simply being non-local or an "outsider". As I read Chapter 11, complaints of bias on grounds other than nationality are more appropriately considered under the provisions of Article 1105.

9. In my opinion, the trial court record fails to support Loewen's contentions that the trial court judge's allowance of the testimony and comments Loewen complains of demonstrates that the judge was biased against Loewen because of its Canadian nationality and that this allegedly anti-Canadian testimony and comments so prejudiced the jury against Loewen because of its Canadian nationality as to have influenced the verdict. I find nothing in the record suggesting any anti-Canadian bias on the part of the judge. It just is not there! Indeed, at one point the judge strongly rebukes counsel for an apparent ethnically insensitive remark, stating:

"I'm not going to allow any courtroom where any witness, any litigant is insulted based

on race, ethnicity or national origin. I'm not going to have that in this courtroom." (Tr. at pp. 4325-26)

Nor do I find support in the record for Loewen's charge that the judge wrongfully permitted anti-Canadian testimony or remarks to an extent likely to have produced, or reenforced, anti-Canadian bias on the part of the jury. There were, as Loewen states, various instances in which the testimony or counsel's remarks identified Loewen as Canadian – for example, the testimony concerning Loewen's practice of inviting O'Keefe and others to Vancouver to discuss business matters. But the record, read in context, indicates that many of these references identifying Loewen as Canadian were either relevant or simply incidental to the testimony elicited; indeed, many of them were brought out by Loewen's own counsel or incidental to its own presentation of its case. I would suggest that, in a trial of this length involving a Canadian corporation, the presiding judge could hardly have been expected to have kept secret from the jury that Loewen was a Canadian national; nor, as indicated, do I believe that Article 1102 can be reasonably interpreted as requiring him to do so. Significantly, Loewen's counsel never objected to any of these identifying references or remarks on the grounds of possible prejudicial effect. Moreover, even if one accepted Loewen's contention that at least some anti-Canadian remarks were made in the course of the trial, these should be considered in the context of the entire more than seven-weeks and almost 6000 page record of the trial. In my opinion, it is very unlikely that the relatively few and brief remarks Loewen cites could, in any case, have had the kind of prejudicial weight and effect on the jury that Loewen would attribute to them. Finally, I believe that Loewen's premise – that the jury had some "latent" anti-Canadian bias or was likely to have been prejudiced against Loewen by anti-Canadian testimony or remarks – is highly questionable. My

understanding is that the jury foreman was a former Canadian citizen who had served in the Royal Canadian Air Force; it seems inconceivable that he would have been receptive to or supported efforts to create anti-Canadian bias. Indeed, throughout the trial Loewen's counsel elicited testimony of allegedly anti-Canadian advertisements by the plaintiff O'Keefe, presumably because it believed this jury would disapprove of O'Keefe's efforts to stimulate anti-foreign prejudice. Moreover, based on my own experience from a long-standing involvement in U.S.-Canadian issues, I am confident that most Americans typically have quite friendly, rather than negative or prejudiced feelings toward Canadians, viewing them as "much like Americans". It would be surprising if this Mississippi jury felt otherwise. Consequently, I believe that the references Loewen complains of did not either demonstrate such anti-Canadian bias or have such likely anti-Canadian prejudicial weight as to have accounted for the jury's verdict or constituted a violation of Article 1102.

10. In my opinion, the jury rendered its substantial verdict against Loewen, not because it had any bias towards Loewen because of its Canadian nationality, but because the jury was persuaded by plaintiff's evidence and argument that Loewen was an extremely predatory, ruthless, dishonest and exploitive company, which was improperly taking advantage of both a long-established local concern and of local people from whom it deliberately concealed the fact it was not locally owned. The record amply demonstrates that this was the thrust of plaintiff's case. Thus, the plaintiff's evidence related principally to Loewen's predatory and dishonest character and practices – in particular, the deceptive way it acquired and then concealed its ownership of well-established local funeral homes and its highly exploitive pricing policies once it had obtained control of local or regional markets. Certainly, part of the plaintiff's argument was that

Loewen was a non-local or "outside" company, deceptively portraying itself as a local company with local connections and local interests at heart. I understand that this was important in the funeral home business: bereaved families were more likely to trust long-established local funeral homes, rooted in the community, not to exploit or take unfair advantage of them at a time when they were most vulnerable. But this argument was based on Loewen's "non-localness", not its Canadian nationality; plaintiff's contentions would likely have been the same if Loewen was based in some other part of the United States rather than in Canada. To the extent that the plaintiffs' case against Loewen was based on the claim that Loewen was a predatory "outsider", unrelated to its specifically Canadian or foreign nationality, Loewen received treatment from the court and jury equivalent to, and certainly no worse than, similarly situated "predatory outside investors" from other states of the U.S. outside Mississippi – or indeed from another part of Mississippi – and would not in terms come under the protection of Article 1102.

11. As previously indicated, Loewen's counsel failed on almost all occasions to object to what Loewen now claims was prejudicial and improperly admitted anti-Canadian testimony and comments. The U.S. suggests that, in accordance with U.S. practice generally requiring that objections be "contemporaneously raised" in order to be preserved on appeal in the U.S. courts, Loewen has similarly waived its right to raise such complaints at the international level. I believe that Chapter 11 cannot properly be construed as intended to relieve foreign investors involved in private litigation in other NAFTA parties' courts, such as Loewen, from abiding by the usual procedures and "rules of the game" normally required in such proceedings. And apart from the possible applicability of the "contemporaneous objection" rule itself, it seems disingenuous for Loewen to now complain of supposed errors which it never called to the trial

court judge's attention. However, as previously indicated, I find particularly persuasive the argument that the failure by Loewen's counsel to object to this testimony or comment suggests that they themselves did not at the time regard that testimony and comment as seriously prejudicial or of concern. Indeed, if Loewen's counsel had considered anti-Canadian bias a significant problem, it would presumably have sought either a change of venue before trial or protective measures such as jury sequestration or motions in limine to exclude such potentially prejudicial testimony.

12. In conclusion, I believe the record clearly indicates that neither the trial judge nor the jury discriminated against Loewen because of its Canadian nationality, and in fact accorded Loewen treatment no less favorable than they would have accorded a New York or Mississippi-incorporated corporation involved in a similar lawsuit, as required by Article 1102. Indeed, if Loewen is correct that the judge's highly professional and even-handed conduct in this trial constituted discrimination on the basis of nationality in violation of Article 1102, it is difficult to imagine any private commercial civil trial involving a foreign investor in any NAFTA country that will not risk similarly running afoul of Article 1102. In my opinion, NAFTA Article 1102 was intended by the parties to provide a "level-playing-field" by making sure that foreign investors were not subjected to significant disadvantage, as compared with national investors, simply on the basis of their foreign nationality. It was not intended to provide an avenue of recovery for foreign investors subjected to adverse court judgments in private commercial litigation for reasons unrelated to their particular nationality.

13. As will be discussed subsequently, I also believe that, even if the trial court's conduct of the trial is considered to have somehow violated Article 1102, this violation remained, under

the NAFTA and applicable rules of international law, as yet incomplete and inchoate pending Loewen's seeking, but failing to achieve, a remedy through appeal or other appropriate recourse within the available U.S. state and federal judicial processes.

IV. DID THE TRIAL COURT'S CONDUCT DURING THE TRIAL VIOLATE ARTICLE 1105 OF NAFTA?

14. Loewen claims that the trial court, by permitting extensive nationality-based, racial and class-based testimony and counsel comment, violated Article 1105 of NAFTA, which imposes a minimum standard of treatment for investments of foreign investors. In my opinion the trial court's conduct during the trial was again not of such a nature or consequence as to, if not remedied on appeal, constitute a denial of justice in violation of the minimum standard of treatment required by Article 1105(1).

15. Article 1105: Minimum Standard of Treatment provides in relevant part:

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

As here relevant, the parties agree that this provision in effect incorporates into the treaty the international law minimum standard of treatment regarding foreign investment, which, inter alia, establishes state responsibility for certain types of injuries to aliens consisting of, or resulting from, denial of access to courts or denial of procedural fairness and due process in relation to judicial proceedings – often described as a "denial of justice". However, as indicated in the extensive discussions in the parties' submissions, the precise content of this international

minimum standard – that is, what kind of conduct by a court constitutes a “denial of justice” so as to impose state responsibility – remains uncertain. In Article 1105(1), the parties have themselves interpreted the international minimum standard to include “fair and equitable treatment and full protection and security.” But, again, the precise meaning and scope of these phrases remain undefined, either in the Agreement or in customary international law.

16. While, as indicated, the precise content of the international minimum standard in relation to judicial proceedings – what constitutes a “denial of justice” in such cases – is uncertain, I believe that its general contours as here relevant are reasonably clear. On the one hand, the concept has been said to broadly embrace a discriminatory, arbitrary or capricious refusal by courts or other appropriate tribunals to entertain proceedings for the redress of injury suffered by an alien, undue delay in judicial proceedings affecting aliens, serious inadequacies in the administration of justice, or an obvious and deliberate misapplication of the law in a case involving an alien. Thus Article 1105 to some extent overlaps and reinforces Article 1102’s proscription of nationality-based discrimination. On the other hand, it appears accepted that mere error by a national court does not in itself constitute a denial of justice, absent discriminatory intent. One classic attempt at definition, indicating this distinction, is Article 9 of 1929 Harvard Draft Convention on Responsibility of States, which provides that:

“A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to the courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees 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.”

Harvard Draft, art. 9, reprinted in 23 AM. J. INT’L L. SUPP. 133.

17. For help in defining the line, or perhaps better, area between these extremes, we have only a few classic treatises and a relative handful of disparate arbitral decisions, many of which are 75-100 years old. What seems evident, however, from these sources and precedents is that the international minimum standard has been applied only to those situations in which a national court's conduct has been very obviously unjust, discriminatory, arbitrary or unfair. Thus, commentators and tribunals have said that, in order to constitute a "denial of justice", the conduct in issue must be -- the adjectives used to describe the strictness of the standard vary -- "gross", "outrageous", "egregious", "flagrant", "clearly unjust", a "palpable injustice", "manifestly unfair", or "manifestly iniquitous". For example, in the Putnam award delivered by the U.S.-Mexico General Claims Commission, Commissioner MacGregor observed:

"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 the national decision presented before it and to scrutinize its grounds of fact and law."

4 R.I.A.A. 151, 153 (award of Apr. 15, 1927). Again the Salem award referred to "claims only [of] exorbitant cases of judicial injustice", including "obvious discrimination of foreigners against nationals [and] palpable and malicious iniquity of judgment. . . ." Salem Arbitration (U.S. v. Egypt), 2 R.I.A.A. 1161 (award of June 8, 1932).

18. Conversely, the international minimum standard and concept of denial of justice have generally not been regarded as embracing those more "garden-variety" and relatively inconsequential procedural or substantive errors that are endemic in every legal system. For otherwise, almost every legal case involving an alien might, in practice as well as theory, be subject to diplomatic complaint and international oversight. As restated in a well-regarded

American international law casebook:

"It is well-settled that a mere error in a decision or relatively minor procedural irregularities do not constitute unlawful denials of procedural justice. The injustice must be egregious. The decision must be 'so obviously wrong that it cannot have been made in good faith and with reasonable care', or 'a serious miscarriage of justice' must otherwise be 'clear'." Henkin, Pugh, Schachter and Smit, International Law (3rd ed. 1993) at p.715, n.3.

Again, Freeman, in discussing in his treatise the issue of irregularities in the conduct of civil proceedings as a denial of justice, comments:

"Ample protection against arbitrary violations of the local law will normally be afforded within the State itself by the conventional means of appeal to a superior court. Ruling improperly on evidence, erroneously charging a jury, exceeding the decorous limits of judicial restraint with prejudicial effects for one of the parties (such as openly insulting the claimant's attorney before the jury), emotionally addressing the jurymen with the aim of kindling their hostility, and the like will usually find rectification in the wisdom of the reviewing bench. Where this does not happen, there is still left the question of whether these various deviations from regular judicial activity are sufficiently flagrant to embroil the State. For it is generally agreed that mere "minor irregularities" in the course of the procedure will not justify interposition. As the General Claims Commission put it in the McCurdy case, "the existence of some irregularities in the proceedings against an offender does not necessarily constitute a sufficient ground in itself to justify a declaration of denial of justice." This is simply another way of stating that those violations of the local adjective law which do not have the effect of vitiating guarantees exacted by the international duty of judicial protection must be disregarded. But when does an irregularity become sufficiently gross so as to be considered as a denial of justice?

Obviously, no a priori or general answer to this question can be attempted. . . ."
A.V. Freeman, The International Responsibility of States for Denial of Justice (1938), at pp. 291-93.

19. Is the phrase "full protection and security" in Article 1105(1) intended simply to emphasize and reenforce the scope of protection afforded aliens by the international minimum standard, or was it meant to expand the scope of that protection beyond that normally accorded by international law? I believe the most reasonable construction is the former – that the phrase is designed simply to emphasize that the parties are obligated to afford full protection and security

– in particular, full protection against physical threats to another party’s investors and property – to the extent required by applicable international law. Clearly, an “international minimum standard” – as used in the Article’s heading – is something less than “full protection and security” in its most expansive possible meaning. It is unreasonable to assume that any of the NAFTA parties intended that foreign investments or investors be guaranteed complete inviolability, even from the normal legislative, regulatory or criminal or civil judicial processes of their host state. Indeed, if such an all-encompassing scope of protection was intended, there would be little need for Article 1105 to establish a minimum international standard – for “full protection and security” would be its own very high standard. In my opinion, this interpretation applies similarly to the phrase “fair and equitable treatment” in Article 1105(1) – that is, that this phrase was also intended simply to emphasize and make doubly clear that the minimum international standard includes fair and equitable treatment.

20. Loewen alleges that the trial court committed a “denial of justice” and violated the international minimum standard required by Article 1105(1) by permitting extensive nationality-based, race-based and class-based testimony and counsel comment, and that this testimony and comment prejudiced the jury against Loewen and accounted for the substantial verdict. In my opinion, the trial record clearly demonstrates that the trial court, overall, conducted this very lengthy and complex trial in a competent, unbiased, evenhanded and judicious manner, which in no way could reasonably be regarded as falling beneath the international minimum standard or constituting a “denial of justice”. During the very lengthy and wearing trial, the trial judge was required to rule on a multitude of evidentiary objections, motions and complaints by counsel; in my opinion, he did so ably, fairly and often with surprising good humor. It is possible, of course,

to argue that some of these many rulings were in error and warranted appellate review; it would be surprising if, in a trial of this length and complexity, no minor irregularities or errors occurred. But I believe that one cannot look at this record without concluding that the trial judge had conducted it, overall, in a fair and judicious manner. More particularly, I believe that it cannot reasonably be argued, as Loewen contends, that the trial judge's conduct of the trial was so "obviously wrong", "outrageous" or "manifestly unjust" as to constitute a "denial of justice" under applicable international law. Indeed, as noted, Freeman specifically mentions "ruling improperly on the evidence" as an example of a minor procedural irregularity that "will usually find rectification in the wisdom of the reviewing bench" and may not justify international intervention.

21. I have already stated my opinion that the relatively few references to Loewen's Canadian nationality in the course of this lengthy and complex trial – a fact which it would have been difficult if not impossible to conceal from the jury – were unlikely to have occasioned the jury's sizable verdict against Loewen; that the verdict is more likely explained by the plaintiff's counsel's successful persuasion of the jury that Loewen was a predatory, dishonest and exploitive company from "outside" the particular locality – without regard to its Canadian nationality – which was taking unfair advantage of a local company and the local people; and that I do not believe that the admission of this testimony and statement was of sufficient import or likely consequence as to have constituted a denial of "national treatment" under Article 1102. Similarly, and for the same reasons, I do not believe that the failure to exclude this testimony and comment was of such a character or likely consequence in the case as to violate the minimum standard established by section 1105(1).

22. Similarly, I do not believe that the facts or record support Loewen's allegation that it was the victim of race-based or wealth-based bias and discrimination by the trial judge and jury. Loewen and its expert stress the fact that while Loewen was white, the trial judge, a number of jurors and plaintiff's counsel were black. In fact, it appears from the record that in this case both parties employed both white and African-American counsel – certainly not in itself improper; Loewen's lead counsel and three of its five trial counsel were African-American. Four of the twelve jurors, including the jury foreman, were white; three of these four, including the foreman, joined in the eleven-to-one jury verdict of which Loewen complains. But, regardless of these numbers, it is apparent – and a matter of national pride – that the U.S. is a diverse society, committed to inclusiveness in its governmental processes. Consequently, I believe that any suggestion that a civil trial in the U.S. involving a foreign national in which the judge, some members of the jury, and/or plaintiff's counsel are of different race from the foreign national is inherently, or even presumably, either discriminatory and a "denial of justice" under international law or otherwise impermissible under NAFTA must be categorically rejected. Loewen places much emphasis on the trial judge's remark concerning "the playing of the race card" (Tr. at pp. 3595-96), which it contends indicated that racial bias had affected the case. It seems evident that some reference to race was necessary in testimony during the trial since race was relevant to market definition in the funeral industry. However, I read the judge's remark, in context, as simply expressing the judge's irritation at both parties' apparent attempts to ingratiate themselves with the African-American members of the jury by deliberately including prominent African-American attorneys on their trial teams, and, in particular, at the immediate time of the remark, his irritation at Loewen's attempt to do so by eliciting testimony of its contract with the National

Baptist Convention, a large African-American organization – which the Court in fact decided to allow. As noted, the judge had previously expressly made it clear to counsel that he would not tolerate racist remarks in his courtroom. (Tr. at pp. 4325-26) Finally, Loewen and its expert make much of plaintiff's lead counsel's alleged flamboyance and dramatic manner of presenting testimony and evidence. But again, as the media have exhaustively documented, this was not in itself unusual or improper in the "rough and tumble" of adversarial American trial practice, was not a practice with which Loewen's experienced counsel were unfamiliar, and, in my opinion, cannot reasonably be regarded as in itself a "denial of justice" under international law.

23. Loewen points also, as evidence of bias and unfairness, to the trial judge's refusal of its request for a special instruction that the jury disregard defendant's nationality (in addition to the standard instruction the trial judge did issue that the jury disregard bias more generally, to which Loewen's counsel did not object), to the judge's refusal to declare a mistrial when the jury submitted a combined verdict, and to the judge's refusal to waive the requirement of a supersedeas bond pending appeal. I believe that the record shows that the trial judge dealt with these matters fairly and judiciously, offering Loewen's counsel ample opportunities to state their objections and even the option to accept the jury's combined verdict rather than go back to the jury on the issue of punitive damages – an option which would have turned out much to Loewen's advantage. In any case, I would regard all of these decisions as clearly within the bounds of judicial reasonableness and the normal discretion of a trial judge in such proceedings, or at most the type of close judgment calls or relatively minor procedural irregularities that can be found in any trial. In my opinion, none of these decisions demonstrably indicated such evident bias or were of such a flagrant or clearly erroneous or outrageous character as to

reasonably be regarded as a denial of justice.

24. As evident from the above discussion, I cannot agree with Loewen's expert, my esteemed colleague Professor Jennings, either as to his characterization of the trial and trial judge's conduct, or as to his conclusion that this conduct constituted on its face an obvious discrimination and "denial of justice" under international law. Professor Jennings' opinion portrays the trial – in his words – as "a remarkable travesty of the most elementary notions of justice", in which a jury drawn from a "small, remote and not at all well-off African-American community" – "manipulated", "befuddled", "mesmerized" and "seduced" by the "unsavory performance" of plaintiff's counsel who, unrestrained by the trial court judge, engaged in a "gross abuse of the system" and "ruthless and blatant" stirring-up of the jury's "latent" racial and nationalistic prejudice – predictably awarded "absurdly and outrageously inflated damages" against Loewen. I believe that this misperceives, and indeed caricatures, the trial proceedings. As I read the record, it instead portrays a rather typical, although certainly lengthy, wearing, and not always well-presented "high-stakes" American trial, in which an able, well-respected, careful and conscientious trial judge did about as good a job as one could expect in fairly and efficiently conducting such a complex and contentious proceeding. Certainly, the trial exhibits all of the adversarial posturing, counsels' tactical errors and less-than-perfect examination and cross-examination, spur-of-the-moment evidentiary rulings, often pro forma objections, motions and rulings, and occasional minor judicial misjudgments commonly found in any such proceeding. But, in my opinion, the trial, overall, represents the very opposite of "a travesty of justice" – rather, a serious, conscientious, even-handed and painstaking, if necessarily flawed and imperfect, attempt to do justice as best this judge and jury were able. As previously indicated, I

would attribute the result, including the substantial verdict, not to any "remarkable travesty of justice", but rather to the persuasive effect of the evidence and the admittedly flamboyant but clearly skilled and effective plaintiff's counsel simply "out-lawyering" defendant's counsel in persuading the jury that Loewen had in fact engaged in highly predatory, exploitive and dishonest conduct which deserved punishment through the award of substantial exemplary damages.

25. In conclusion on this point, I believe that it is evident from the record that the conduct of the trial in this matter cannot reasonably by any measure be regarded as so "gross", "outrageous", "clearly unjust", or "manifestly iniquitous" as to fall below the international minimum standard and constitute a violation of Article 1105 of NAFTA. Indeed, if Loewen's contention that the conduct of this trial constitutes a "denial of justice" in violation of NAFTA is accepted, the NAFTA parties may have to confront the possibility that many other private commercial civil actions involving alien investors may be similarly open to international challenge and oversight – a possibility I doubt they contemplated. More broadly, I believe that any such reading of the concept of "denial of justice", as applicable under the facts of this case, could have serious precedential consequences for the continued international viability and acceptability of the important and highly useful doctrine of "denial of justice". For, if the even-handed, professionally conducted, lengthy, and costly trial portrayed by this trial record fails to meet an international minimum standard and justifies international intervention, it is likely that many other judicial proceedings in many other countries will also fail to do so.

26. Again, as will be discussed subsequently, I believe that, even if the trial court's conduct of the trial is considered to have constituted a "denial of justice" in violation of the international minimum standard established by Article 1105(1), this violation remained, under

NAFTA and applicable rules of international law, as yet incomplete and inchoate pending Loewen's seeking but failing to achieve a remedy through appeal within the available U.S. state and federal judicial processes.

**V. DID THE SUBSTANTIAL JUDGMENT
IN ITSELF VIOLATE ARTICLE 1105?**

27. Loewen alleges that the large and in its view disproportionate compensatory and punitive damage verdict and judgment in itself constituted a "denial of justice" and violated the international minimum standard established by Article 1105(1). In my opinion, there is no support for the view that international law prohibits the award of punitive damages against an alien – that is, that punitive damages are inherently a "denial of justice" – and I see nothing in NAFTA that suggests that it otherwise does so. It is, indeed, possible that a damage award against an alien might be so disproportionate, unreasonable, arbitrary, or explicable only in terms of nationality-based or other bias as to constitute a "denial of justice". However, under the facts and circumstances of this case, involving substantial evidence that Loewen engaged in highly predatory, dishonest and exploitive conduct, I do not believe that the award in the Loewen case, while admittedly quite large, can appropriately be regarded as so clearly unreasonable, arbitrary or disproportionate as to reasonably be considered a "denial of justice" under the international standards previously discussed.

28. The award of punitive damages is a long-established and recognized part of American law (see, e.g., the extensive discussion of punitive damages in U.S. law in Dobbs, Law

of Remedies (2nd ed. 1993), Vol. 1, § 3.11.), as well as of the law of various other countries.

Nothing in NAFTA expressly bars the imposition of punitive damages against an investor or another party in the normal course of judicial proceedings, and it is unreasonable to think that the NAFTA parties would have intended to do so by implication. I believe that it is similarly unreasonable to suggest that the customary international law of state responsibility, in the formation and maintenance of which U.S. practice and opinio juris necessarily play a major part, would prohibit a practice so firmly and widely established in U.S. and other countries' law.

29. However, even though under the present international law of state responsibility a punitive damage award does not per se constitute a "denial of justice", a clearly disproportionate, arbitrary and unreasonable award, explicable solely on the basis of nationality or race-based bias or discrimination, might do so. In the U.S., there has been extensive scholarly and public debate concerning the usefulness, appropriateness and implications of punitive awards, stimulated by a number of very large such awards. Frequently, punitive damage awards by juries have been reduced, either by the trial judge involved or on appeal. Indeed, the U.S. Supreme Court has indicated that, at some level of disproportion, punitive damage awards may offend the "due process" clause of the XIVth Amendment to the U.S. Constitution. Thus in the recent case of *BMW v. Gore*, 517 U.S. 559 (1996), the Court said:

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. [cit.] In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. [cit.] Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. [cit.] For that reason, the

federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." (at p.568)

The Supreme Court also indicated that the "grossly excessive" inquiry turns on the reprehensibility of the defendant's conduct and the ratio between the actual harm inflicted by the defendant and the punitive damages awarded. Thus, in *BMW*, the Court found as excessive a punitive damage award that was a multiple of 500 times the actual damages. But the Court observed:

Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. [cit.] Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said ... in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus.'" [cit.] In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." (at pp. 582-83]

Consequently, the parties appear in agreement that the damage award in this case was appealable to, and, in terms of relevant precedents, may have been reduced by the Mississippi Supreme Court. It seems also likely that, if such relief was denied by that court, the punitive damage issue was subject to potential review by the U.S. Supreme Court.

30. While it appears possible that the Mississippi Supreme Court, on appeal, may have reduced the damage award in the *Loewen* case, this does not necessarily mean that the award was so grossly excessive, disproportionate, arbitrary or unreasonable as to constitute a "denial of

justice” under international law and within the meaning of Article 1105(1). For, in my opinion, the standard required for a finding of “denial of justice” on the international level is not necessarily the same as, and is likely to be more demanding than, the standard which might be applied for review or remittitur in an American state or federal court. An international tribunal appraising such an award under NAFTA is not an appellate body conducting a de novo review of the decisions of domestic juries and courts. In order to hold the award a “denial of justice” in violation of the international minimum standard, an international tribunal must find, not simply that the award was very large or more than the tribunal itself would have awarded but – to use the words typically used by commentators and tribunals – that the award was truly “outrageous”, “egregious”, or a “manifest injustice.”

31. In my opinion, the punitive damages awarded by the jury in this case cannot be considered so unreasonable, outrageous or unjust as to fall beneath the international minimum standard required by Article 1105. As previously suggested, I believe that the record in this case supports the conclusion that the jury returned its substantial verdict against Loewen, not because it was Canadian, but because they reached the reasonable belief, on the basis of ample evidence, that Loewen had engaged in egregious and highly reprehensible predatory, dishonest and exploitive behavior of a character that deserved punishment and deterrence, and that, given the character of Loewen’s conduct and the evidence of its very substantial resources and apparent market value, only a very substantial punitive damages award would reasonably suffice to teach Loewen – and other similarly inclined predatory companies – the appropriate lesson. This jury’s award was neither discriminatory nor unique with respect to Loewen; it is common knowledge – of which Loewen must have been aware – that American juries not infrequently hand down large

punitive damage awards, most usually against American companies. Nor, under any ratio formula, can it be reasonably said that the ratio of \$400 million punitive damages to \$100 million compensatory damages – a four-to-one ratio – is in itself “outrageous” or excessive. But most important, under American law, the determination of punitive damages is properly the province and function of the American jury, which is vested with a wide measure of discretion with respect both to its assessment of the character of a defendant’s wrongful behavior and the amount of punitive damages necessary or appropriate to punish and deter such behavior. The American people, in their exercise of democracy, have said that this is the jury’s job. While one may disagree with the jury’s judgment, and the Mississippi Supreme Court may well have exercised its discretion to reduce the award, I see nothing in the record which establishes that the award was clearly unreasonable, outrageous, or wrong as a matter of international law. I believe that, so long as the jury exercised the discretion vested in it by American law in a nondiscriminatory, nonarbitrary and reasonable way, applicable international law does not, and should not, purport to permit an international tribunal – particularly a tribunal which has not itself heard the evidence and testimony upon which the jury’s judgment was made – to “second-guess” or overturn that judgment.

32. As is evident, I must again disagree with Professor Jennings’ suggestion that the size of the award in itself, and the disproportion between the award and the underlying contract claim involved in the suit were in themselves so “manifestly unjust” and “bizarrely disproportionate” as to necessarily constitute a “denial of justice” under applicable international law. In my opinion, the case was not simply what Professor Jennings describes as “a relatively straightforward, small-scale contract matter”, but instead involved very serious allegations that Loewen had engaged in

a pattern of fraud and deceptive trade practices – charges that the jury ultimately accepted. As is suggested by the U.S. Supreme Court in *BMW v. Gore*, fairness, justice and the demands of due process require only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence, and any categorical approach regarding the absolute or relative size of the award must be rejected. Where, as here, an American jury reasonably and nonarbitrarily exercised its best judgment within the discretion American law allows, an international tribunal should not substitute its own judgment.

VI. DID THE MISSISSIPPI COURT'S APPLICATION OF THE
BONDING REQUIREMENT VIOLATE ARTICLE 1105?

33. Loewen alleges that the refusals by the Mississippi trial court and Supreme Court to waive or reduce the requirement that Loewen post a supersedeas bond as a condition of appeal constituted a "denial of justice" in violation of Article 1105. In my opinion, a failure to reduce or waive a supersedeas bond in a case involving an alien defendant cannot reasonably be in itself argued to violate the international law minimum standard and constitute a "denial of justice" contrary to international law. However, a denial of such relief for clearly discriminatory reasons or for the deliberate purpose of denying the alien the possibility of remedy through access to the appellate process might possibly do so.

34. The requirement that a defendant post a bond in an amount equal to or exceeding the amount of the judgment as a condition of appeal, or a stay of execution pending appeal, is well-established in the U.S. and in many other legal systems, as is the practice that decisions as to

reduction or waiver of such bonding requirements are normally within the reasonable discretion of the courts involved. Once again, it is unreasonable, given this widespread practice and opinio juris, that such a practice could be held violative of customary international law.

35. It is my understanding that, under Mississippi law, Loewen was entitled to appeal the trial court's judgment to the Mississippi Supreme Court without any bond requirement; the supersedeas bond requirement was only a condition of Loewen's obtaining a stay of execution during the pendency of the appeal, the bond being intended to protect the plaintiff from a possible dissipation of the defendant judgment debtor's assets during the appeal process. It is my further understanding that the practice of the Mississippi trial court and Supreme Court was generally not to reduce or waive bond requirements or, at least, that they have never done so in a way that is suggestive of discriminatory application to aliens, and that, despite the suggestion of a Loewen expert, there is no persuasive evidence that the refusals to do so in this case were motivated by a discriminatory or improper intent. Were the facts otherwise and clearly discriminatory, arbitrary and "outrageous", such a denial might arguably constitute a "denial of justice". However, once again, such a denial would be inchoate and as yet incomplete to the extent that such a denial was appealable to, or subject to remedy by, other courts within the U.S. system, such as the U.S. federal district courts or the U.S. Supreme Court.

VII. DID THE CIRCUMSTANCES RELATING TO THE LITIGATION
AGAINST LOEWEN IN THE MISSISSIPPI COURTS
CONSTITUTE A VIOLATION OF ARTICLE 1110?

36. Loewen alleges that the totality of the conduct it complains of – which Loewen alleges included discriminatory conduct, an excessive verdict, denial of the Loewen companies' rights, and a coerced settlement – violated Article 1110 of NAFTA, which provides that:

“No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization of expropriation of such investment . . . except (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1103(1); and (d) on the payment of compensation in accordance with paragraphs 2 through 6.”

In my opinion, this Article has little useful application to this case since, whatever may be the truth of the alleged wrongs of which Loewen complains, they do not in my opinion fall within the usual meaning and understanding in international law of the terms “nationalization or expropriation”. Thus, I would consider this claim as, at most, duplicative of those Loewen makes under Articles 1102 and 1105.

37. The terms “nationalization and expropriation” normally are used in international law to apply to governmental takings or deprivations, although they may apply more broadly to forced deprivations coerced by government in favor of a private party. A court’s judgment for money damages in a private commercial trial — even one resulting in a punitive damage award (which arguably serves a public purpose) – does not, in my opinion, fit comfortably or usefully within this concept. Moreover, in this case the U.S. never “took” anything from Loewen; Loewen’s direct monetary loss was pursuant to its purely private settlement with the plaintiff rather than pursuant to or in satisfaction of a court judgment. Consequently, to the extent Loewen’s claims have merit, they would seem most reasonably and more clearly considered

under Article 1102 and 1105.

VIII. WAS LOEWEN REQUIRED TO PURSUE ALL REASONABLY AVAILABLE APPEALS OF THE TRIAL COURT'S JUDGMENT BEFORE IT WAS ENTITLED TO RECOVER FOR A CLAIM UNDER NAFTA?

38. In my opinion, under applicable international law incorporated by reference into NAFTA, Loewen was required to first exhaust any reasonably available remedies for the conduct it alleges was wrongful within the U.S. judicial system itself before being entitled to recover for an international claim under NAFTA. I believe that, whatever might arguably be other implications or consequences of the provisions of Article 1121(1) regarding the requirement of exhaustion of local remedies more broadly, it was not intended to effect a waiver of at least the traditional rule requiring aliens whose claims arise from alleged wrongful conduct by judicial organs of a state to exhaust the remedies reasonably available to them within that judicial system itself, and thus achieve a decision from the highest available court, before a denial of justice could be said to have occurred.

39. The applicable international law requiring exhaustion of local remedies has been authoritatively restated in Article 22 of the International Law Commission's (ILC's) Draft Articles on State Responsibility, adopted at first reading, as follows:

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment. (1996 2 Y.B. Int'l

In its more recently revised draft articles adopted at second reading last summer, the ILC, recognizing that a detailed elaboration of the relevant rules will be considered in its recently authorized and currently ongoing study on diplomatic protection, expressed the exhaustion requirement more briefly in what is now Article 45 of the Draft Articles which provides:

The responsibility of a State may not be invoked if:

(b) the claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted.

(UN Doc. A/CN.4/L600 (Aug. 11, 2000).)

The International Court of Justice has confirmed that this rule is "a well-established rule of customary international law." The Interhandel Case, ICJ Rep. (1959), p.27. As explained in the recent ILA 2000 Report on "The Exhaustion of Local Remedies" of the International Law Association's Committee on Diplomatic Protection of Persons and Property (available on the ILA's website, <http://www.ila-hq.org>, under "Committees"), the rationale of the rule of prior exhaustion of remedies is to allow the State to attempt to resolve the dispute and do justice under its own internal law and within its own system before being confronted with any international proceeding. Based on considerations both of sovereignty and practical common-sense efficiency, the exhaustion rule acts, in effect, as a filter, keeping off the international plane cases that can more easily and efficiently, as well as less conflictually, be settled within the national system itself.

40. However, the rule also has broader relation to the law of state responsibility and the rules concerning attribution of wrongful conduct to a state. Thus, the ILC in its commentary on Article 22 discusses at length the theoretical underpinnings of the rule, distinguishing among

various schools of thought. These are described in the previously-mentioned ILA Committee

Report as follows:

Three schools of thought shall be distinguished: the procedural theory, the substantive theory and an "intermediary" view. They all agree that the rule of exhaustion of local remedies has procedural aspects. However, according to the procedural theory the rule does not go beyond being "a practical" rule designed as a device for the implementation of state responsibility.

The substantive theory, on the contrary, focuses on a material or substantive corollary. It assumes that it is not the original act or omission which creates the violation of international law, but that such violation arises only if a subsequent court decision upholds the disputed act or omission. The breach of the international obligation is, therefore, neither constituted solely by the last stage of its perpetration, nor by the first. It results from a whole series of successive acts of state conduct. Consequently, as set out by the ILC with regard to Art. 22, the non-exhaustion of local remedies by the individual excludes the wrongfulness and thereby the existence of an international offense.

According to the third intermediary school of thought, the local remedies rule concerns the origin of state responsibility in cases where the breach of the international obligation derives exclusively from the action of judicial organs which have failed in their duty to provide an individual with the internationally required judicial protection against injuries sustained in breach of purely internal law. In other cases, however, it concerns only the procedures for the implementation of responsibility. (at p. 9-10)

41. As this discussion suggests, it is generally accepted that, where the alleged breach of an international obligation arises from allegedly wrongful conduct on the part of some subordinate level of a national judiciary itself, that judicial system should be given the opportunity to remedy and correct the matter before international responsibility can be said to arise, or at least before an international claim can appropriately be brought. This doctrine – what the U.S. submissions in this case refer to as the principle of "judicial finality" (a phrase which I will use here) – is widely reflected in a variety of scholarly writings, international decisions and state practice. Thus, the International Court of Justice has held: "[b]efore the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been

consummated". Interhandel Case (Switz. v. U.S., 1959 ICJ 6, 45-46. Borchard, in his authoritative treatise, states: "[i]t is a fundamental principle that [with respect to acts of the judiciary] ... only the highest court to which a case is appealable may be considered as an authority involving the responsibility of the state." E.M. Borchard, The Diplomatic Protection of Citizens Abroad (1985), at p.198. See also, e.g., Case of Christo G. Pirocaco, American-Turkish Claims Commission, Nielsen's Opinions and Reports, at pp. 587, 599 (as cited by Freeman, at p.415) ("As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort"); French Indemnity of 1831, 5 Moore, International Arbitrations, 4472-4473 (1898): ("[T]he Commissioners recognize ... the principle that a state is politically answerable only for the decisions of its highest tribunals"); and E. Borchard, "Responsibility of States at the Hague Codification Conference," 24 Am. J. Int'l L. 517, 532 (1930) ("[J]udicial action is a single action from beginning to end, and ... it cannot be said that the State has spoken finally until all appeals have been exhausted") (citing the Belgium delegate).

42. The parties to this matter have expressed differing positions as to the effect of Article 1121 on the applicability of the exhaustion of local remedies rule to this matter. Article 1121(1) provides in relevant part:

1. A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) both the investor and an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

As I understand these positions, Loewen asserts that Article 1121(1) constitutes a complete waiver of the requirement that it exhaust remedies or achieve "judicial finality" before bringing an international claim, and that it is consequently entitled to assert a claim for what it alleges was the international wrongful conduct and judgment of the trial court, without regard to whether it did or did not, or could or could not, have appealed from this judgment to the Mississippi Supreme Court or the U.S. federal courts or U.S. Supreme Court. The U.S., on the other hand, asserts that Article 1121(1) constitutes only a partial waiver, freeing the parties from the requirement that they exhaust remedies in situations where an alien investor alleges that the wrongful conduct is on the part of a state's legislature or executive, but retaining the rule in cases where, as here, the wrongful act is that of lower court — at least insofar as the rule may be said to require exhaustion of remedies and judicial finality through appeals within that state's own judicial system before that state can be regarded as having breached any obligations under NAFTA.

43. In my opinion, Article 1121(1) cannot reasonably be read as intended to effect a waiver of the traditional rule requiring the exhaustion of remedies in all circumstances. I would read it rather as a standard "election of remedies" provision, requiring that a disputing investor or enterprise, which can appropriately claim to have been "denied justice" and is otherwise entitled to and elects to submit that claim to international arbitration under the provisions of NAFTA, first waive its right to subsequently begin or continue any other proceedings within national administrative tribunals or courts regarding the same matter. Certainly, such a provision is customary and makes good sense in this context. I see nothing in the language of Article 1121(1) that would suggest that it was intended to have any broader effect. Indeed, any reading of the

provision as a complete waiver of the traditional exhaustion of remedies rule seems completely at odds with the repeated mandate in Articles 102(2) and 1131(1) directing the parties and any arbitral tribunal to interpret, apply or decide issues involving NAFTA "in accordance with applicable principles of international law." Moreover, when states have intended to waive the rule of exhaustion of remedies, they have typically done so by using clear and express language — for example, in the 1981 Algiers Accords Claims Settlement Declaration and the 1926 U.S.-Mexican General Claims Convention. Consequently, I believe it must be presumed that, if the parties in Article 1121(1) had intended to make inapplicable to the Agreement one of the most fundamental and widely-accepted principles of international law — the rule requiring the exhaustion of local remedies — they would surely have said so more clearly, rather than by what might be described, most charitably, as very unclear and ambiguous indirection and implication. It is relevant that the International Court of Justice has held in the ELSI case that such an "important principle of customary international law" as the exhaustion rule could not be held to have been "tacitly dispensed with, in the absence of any words making clear an intention to do so." (Case Concerning Electronica Siccula S. p.A (ELSI), 1989 I.C.J. Reports, at 42, para. 50), and my understanding is that this presumption has been recently approved by the Tribunal in its January 5, 2001 Jurisdictional Decision.

44. In any event, I believe it is particularly unlikely that the parties intended the scope of any such waiver to go so far as to include a waiver of the traditional requirement of judicial finality in cases where, as here, the alleged wrong the alien complains of concerns actions or decisions of subordinate courts of a NAFTA party, taken in the course of a private commercial civil action involving a private investor from another party. Thus, it is conceivable to me that the

parties might have wished to dispense with the exhaustion requirement with respect to situations involving direct governmental actions, such as legislative or administrative discrimination, takings or interferences, which were likely of most concern and most on the minds of those negotiating NAFTA as regards to the protection of foreign investment. That is, as regards these kinds of clearly governmental, most significant and disruptive potential breaches of NAFTA objectives, principles and obligations, the NAFTA negotiators and governments could reasonably have considered it more efficient to bypass potentially complex and lengthy judicial or other remedial procedures and instead permit a prompt resort to arbitral remedy. I consider it unlikely, however, that the parties could or would have reached such a judgment as to situations involving private commercial lawsuits before national courts – which, again, the negotiators may not have been thinking of – and where dispensing with the traditional rule of judicial finality seems clearly unreasonable, undesirable, and inefficient.

45. More particularly, my reasons for believing that it is highly unlikely that the parties intended in Article 1121(1) to waive the rule of judicial finality include the following:

- (a) As previously discussed, such a waiver is not evident in the express language of Article 1121(1); is strongly inconsistent with the incorporation of applicable rules of international law into NAFTA expressly provided in other articles of the Agreement, such as Articles 102(2) and 1131(1); and, as the ICJ has held, should not be implied in the absence of language clearly providing otherwise.
- (b) Such a waiver, as applied to cases of alleged wrongful conduct in judicial proceedings, would be inconsistent with both the NAFTA objectives stated in Article 102 to “(e) create effective procedures for the implementation and

application of this Agreement . . . and for the resolution of disputes”, and to “(f) establish a framework for further . . . cooperation to expand and enhance the benefits of this Agreement.” As previously indicated, NAFTA and applicable rules of international law mandate that its provisions be interpreted in accordance with its objectives. Where an alien investor involved in a private commercial civil action claims that it has been wrongfully treated by a trial court in that suit, it seems clearly more efficient and reasonable to require that the alien investor pursue the normal appeals within the state’s own judicial system, thus giving the state an opportunity to remedy the matter and resolve the dispute itself, than to permit it to resort immediately and directly to the level of international claim and possibly arbitration, thus prolonging and escalating the dispute. Similarly, allowing or encouraging an alien investor involved in private litigation to resort immediately to an international level, without first seeking a remedy through the normal process of appeal within the national judicial system itself, is more likely to create international conflict, strain relations among the parties, and disrupt their further cooperation.

- (c) Such a waiver would be inconsistent with the traditions and accepted practice of, not only the U.S., but of virtually every state and every judicial system. The concept of appeal within a judicial system from possible error or bias of lower courts is central to the idea of the rule of law, and it should not be assumed that the parties would have intended to bypass or dispense with it in the NAFTA Agreement.

- (d) Such a waiver of the requirement of judicial finality, in cases where the conduct complained of involves acts of subordinate judicial officials in the course of private civil action, would also be inconsistent with basic international concepts of state responsibility and attribution. The international law of state responsibility, like most systems of responsibility, is based primarily on broad concepts of delict or fault. Thus, a state is normally held responsible only for allegedly wrongful conduct and consequences with which it has some connection and which it can reasonably either prevent or remedy. However, in the case of private commercial lawsuits involving alien investors, a state may not practically be in a position to ensure that subordinate judicial officials will never commit errors; consequently, a state can, as a practical matter, only reasonably commit itself internationally to correct and remedy such errors should they occur. The rule requiring judicial finality recognizes this important interest and makes it possible for states to assume such obligations by ensuring that the state will in fact be given an opportunity to review and, if necessary, correct a lower court's errors. I believe that it is unreasonable to believe the NAFTA parties would have intended a result inconsistent with that rule.
- (e) If it is held that Article 1121(1) waives the rule of judicial finality, the question arises, at what point is an alien investor involved in private commercial civil litigation entitled to simply "walk away" from or bypass national court proceedings and go directly to NAFTA arbitration? For example, could Loewen have claimed that the U.S. had breached its NAFTA obligations and sought

NAFTA arbitration on the first occasion when the Mississippi trial judge permitted testimony referring to Loewen's Canadian nationality? On the second occasion? When the trial judge refused to give a jury instruction Loewen requested? Or when the trial judge refused to set aside the jury's verdict? It may be recalled that Article 32(b) of the Vienna Convention counsels that provisions of international agreements should not be interpreted in a way that "leads to a result which is manifestly absurd or unreasonable." Any suggestion that an alien investor can immediately seek international recourse under NAFTA for even low-level, comparatively trivial, or easily-remedied alleged breaches of NAFTA obligations would, in my view, be "manifestly absurd or unreasonable".

- (f) More broadly, I believe that such a waiver would be simply unfair to a party and its citizens in that it would place them at the mercy of alien investors claiming unlawful conduct by lower court judges or other officials but choosing not to appeal such actions, thereby denying that party opportunity to correct or remedy the action and avoid liability. In this case, Loewen seeks very substantial compensation from the people of the United States for alleged wrongful actions by Mississippi courts which Loewen never gave the U.S. or Mississippi courts a chance to correct. Although it chose to settle the case with O'Keefe rather than appeal, it wishes now to throw the costs of its settlement onto the U.S. taxpayer — despite the fact that the people of the U.S., through their federal government, never had any direct connection with this matter; never actually "did anything" to Loewen, and were never given any opportunity to remedy any wrong which might

have been committed and thus avoid such liability.

46. The question has been raised whether, if Article 1121(1) is held to have in terms waived “the exhaustion of remedies”, those words can definitionally be considered to also necessarily embrace the principle of “judicial finality”, as potentially applicable to this case. As indicated, I do not believe that Article 1121(1) or anything else in NAFTA was intended to, or can be read as, relieving Loewen of the customary, traditional and, in my view, sensible international law requirement that it pursue, to the point of finality, all reasonable possibilities of appeal or collateral action available within the Mississippi or U.S. federal judicial systems. Whether this requirement is termed “exhaustion of remedies” or “judicial finality” seems to me irrelevant to the conclusion reached. However, I believe that, while the doctrine of “judicial finality” is obviously closely related to and to a considerable extent overlaps that of “exhaustion of remedies”, and the term “exhaustion of remedies” is often used in judicial contexts, the idea behind “judicial finality” is somewhat different from that of “exhaustion”. For, together with the broad considerations of economy and efficiency, subsidiarity and respect for sovereignty that support the “exhaustion” doctrine more broadly, the doctrine of “judicial finality” in addition reflects and respects the virtually universal concept of appellate review and of the self-correcting capacity of judicial systems – in itself, a feature of the “rule of law” as well as being in the words of Article 38 of the Statute of the International Court of Justice, a “general principle[s] of law recognized by civilized nations”. Indeed, some sense of the distinctiveness of the idea of “judicial finality” – and a reluctance to concede that state responsibility should arise prior to an alien’s exhausting his appeals within a state’s own judicial system itself – may in part explain the continuing and thus far unsettled theoretical debate, noted in paragraph 40, supra, as to whether

the "exhaustion" doctrine should be perceived as "procedural" or "substantive". (See also, e.g., Fachiri, "The Local Remedies Rule in the Light of the Finnish Ships Arbitration", XVII BYIL 19 (1936), discussing the Arbitrator's treatment of the issue in that case and quoting extensively, at pp. 22-25, from the explication of this distinction in the Memorial of the UK Government in that case.) Given this ambiguity and lack of settled meaning, I believe that the interpretation of Article 1121(1) is best left to more substantive considerations of the parties' probable intentions, reasonableness and practicality, rather than primarily definitional considerations.

IX. CONCLUSION

47. In conclusion, it is my opinion that:

- (1) The trial court's conduct during the trial did not violate Article 1102 of NAFTA, thereby tainting the verdict.
- (2) The trial court's conduct during the trial did not violate Article 1105 of NAFTA.
- (3) The substantial verdict and judgment in the trial did not violate Article 1105 of NAFTA.
- (4) The Mississippi court's application of the bonding requirement did not violate Article 1105 of NAFTA.
- (5) The circumstances relating to the litigation against Loewen in the Mississippi courts did not together constitute a violation of Article 1110 of NAFTA.
- (6) Article 1121(1) of NAFTA cannot be construed as waiving applicable international law requirements of judicial finality and Loewen was consequently

required to pursue all reasonably available appeals of the trial court's judgment
before it was entitled to recover for a claim under NAFTA.

Richard B. Bilder

March 16, 2001 ,

Richard B. Bilder
Foley & Lardner-Bascom Emeritus Professor of Law

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Current Employment

Foley & Lardner-Bascom Emeritus Professor of Law, University of Wisconsin Law School
Assistant Professor (1965-66); Associate Professor (1966-67); Professor (1967-84); Burrus-Bascom Professor (1984-97). Foley & Lardner-Bascom Professor (1997-98).
Principal areas of teaching and research international law, international organizations, international transactions, international dispute settlement, law of the sea, international environmental law and foreign relations law. Have also taught courses in torts, contracts, criminal law, admiralty, legal process, art law and other subjects.
Additional appointment as Professor of Environmental Studies, Institute of Environmental Studies, University of Wisconsin-Madison.

Visiting Professorships

University of Georgia Law School (Visiting Woodruff Professor of International Law) (Spring 1992)
University of Tromso (Norway) (Summer 1989)
University of Toronto (Claude T. Bissell Professor of Canadian- American Relations, Fall 1986)
University of North Carolina Law School (William Neal Reynolds Visiting Professor, Spring 1981)
University of Virginia Law School (1974-75)
Institute for the Study of International Organization, University of Sussex, England (Visiting Fellow, Spring 1972)
University of Michigan Law School (Summer 1971)
George Washington University Law School (Lecturer-in-Law, 1961- 62)
Florida State University Law School (Edward Ball Eminent Scholar Chair in International Law) (Spring 2000)

Past Employment

Attorney-Adviser, Office of Legal Adviser, U.S. Department of State (1956-1965)
Legal work on a variety of international legal problems, particularly those involving economic and international organization matters. Duties included assignments as Special Assistant to the Legal Adviser; Acting Assistant Legal Adviser for African Affairs; Deputy U.S. Agent in U.S.-French Air Arbitration; legal adviser and member of U.S. delegations to various international meetings and negotiations including U.N. General Assembly, U.N. Human Rights Commission, U.N. commodity and aviation conferences, U.S.-Rumanian claims negotiations, U.S.-Soviet air transport negotiations, P.L. 480 negotiations, GATT "Kennedy Round," and others; Chairman of Legal and Drafting Committee, U.N. Coffee Conference, 1962; service on a number of U.S. Government interdepartmental committees and task forces, e.g. Reporter for InterAgency Committee on Gifts From Foreign Governments and others.

Education

Williams College (1946-49)—B.A., 1949, Magna Cum Laude with Highest Honors in Political Economy;
Phi Beta Kappa (junior year).
Pembroke College, Cambridge University (1949-50) — Fulbright Fellow. First Class Honors in
Economic Tripos; Titular Exhibitioner, Pembroke College.
Massachusetts Institute of Technology (1950-51) — Goodyear Tire and Rubber Fellow in Economics
(Returned to military service 1951-53).
Harvard Law School (1953-56) — J.D., 1956

Bar Memberships

New Jersey (1956)
District of Columbia (1956)
U.S. Supreme Court (1960)
Wisconsin (1965)
U.S. Court of Military Appeals (1968)

Professional Activities

Vice-President, American Society of International Law (1981-83)
Honorary Vice-President, American Society of International Law (1994-99)
Counselor, American Society of International Law (1999-)
Executive Committee, American Society of International Law (1981-83) (1992-94)
Board of Editors, American Journal of International Law (1972- present)
Book Review Editor, American Journal of International Law (1993-)
Executive Council, American Society of International Law (1971-74), (1990-94) and (1994-)
Board of Directors, Law of the Sea Institute (1987-1993)
Rapporteur, American Society of International Law-American Branch, International Law Association
Special Committee on "The Role of the Legal Adviser of the U.S. Department of State" (1988-
1990)
Chair, International Courts Committee, Section of International Law and Practice, American Bar
Association (1989-1992)
Chair, International Law Association Committee on Diplomatic Protection of Persons and Property
(1996-)
A.H. Robertson Chair Lecturer, International Institute of Human Rights (Strasbourg, France, Summer
1995)
Lecturer, European University Institute, Academy of European Law (Summer 1999) (Xth Anniversary
Session)
Member, various ABA committees, e.g., Working Group on Improving the Effectiveness of the UN
(1994), and Treaty Law Working Group for Slovakia of ABA Central and East European Law
Initiative
Member, American Law Institute
Member, Council on Foreign Relations

Member, Antarctic Section of Oceans and International Environment and Scientific Affairs Advisory
Committee to U.S. Department of State (1990-96)
Member, National Academy of Sciences-National Research Council Committee on Antarctic Policy and
Science (1992-94)
Public Member, U.S. Delegation to Conference on Security and Cooperation in Europe (CSCE)
Conference of Legal Experts on the Peaceful Settlement of Disputes, Valetta, Malta (Jan.-Feb.
1991)
Board of Editors, International Organizations (1976-79)
Senior Rapporteur, Montreal Assembly for Human Rights (1968)
Ocean Policy Committee, National Academy of Sciences Ocean Affairs Board (1972-75)
Commission to Study the Organization of the Peace

Professional Activities (continued)

- Member, Special five-person arbitral panel established by International Coffee Council to give an opinion on flexible quota dispute (London 1965)
- U.S. Delegate to U.N. Conference on Succession of States in Respect of Treaties (Vienna 1978)
- Governor of Wisconsin's Commission on the United Nations (1970-79)
- Committee on Environmental Law, International Law Association (early 1980's)
- Carnegie Lecturer, Hague Academy of International Law (The Hague, the Netherlands 1975)
- Advisory Board, Institute on Procedural Aspects of International Law
- International Human Rights Law Group
 - U.S. Institute for Human Rights
 - Virginia Journal of International Law
- Consultant, U.S. Naval War College International Law Studies (1966-69)
- Agency for International Development on Maquarin Dam Project (1975)
 - U.N. Environmental Program, Working Group on Liability for Pollution Damage (Nairobi, Kenya 1977)
- Various other committees and working groups of the American Society of International Law (e.g., ASIL Chair and member various Annual Meeting Committees, Nominating Committee, Committee on Governance and others), American Bar Association, American Branch of International Law Association and other professional organizations.
- Various University of Wisconsin, law school, government and private foundation research grants and fellowships (e.g., UW Leonardo Scholar, NSF Sea Grant, UW Law School Smongeski Award, UW Faculty Development Fellowship Award and others)

Arbitral Experience

Member, panels of arbitrators of Federal Mediation and Conciliation Service, Wisconsin Employment Relations Commission, and American Arbitration Association. Arbitration of a number of labor and other disputes (approximately 100 decisions and awards).

Military Service

U.S. Navy 1945-46 (Atlantic) and 1951-53 (Korea). Presently, Commander, (Judge Advocate General Corps), U.S. Naval Reserve (Ret.).

Marital Status

Married (Sally Robbins) with four children (Mary, Anne, David, Deborah)

University of Wisconsin Activities

Service on a number of regular and ad hoc University and Law School committees including six terms on University of Wisconsin Faculty Senate; Chairman, University Committee on Student Conduct; Chairman, University Library Committee; University Oceanography Committee; University Nominating Committee; Steering Committee, Center for International Cooperation and Security; Board of Directors East Asian Legal Studies Institute; and others; Steering Committee, PROFS (Professional Representation of Faculty) (UW-Madison faculty lobbying organization).

Civic Activities

Elected to two terms on Board of Trustees of Shorewood Hills, Wisconsin (1969-73); Executive Board local religious denomination; various other community activities; Member, Downtown Rotary Club of Madison (Wisconsin); and other community activities.

PROFESSOR RICHARD B. BILDER
UNIVERSITY OF WISCONSIN LAW SCHOOL

PRINCIPAL PUBLICATIONS

I. BOOKS

MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (Madison: University of Wisconsin Press, 1981)

II. CHAPTERS IN BOOKS AND MAJOR STUDIES

"Beyond Compliance: Helping Nations Cooperate," to be published in D. Shelton (ed.), COMMITMENT AND COMPLIANCE: THE ROLE OF NONBINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Oxford U. Press, June 2000).

"Rethinking International Human Rights: What Have We Learned, Where Are We Going?," to be published in COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (Oxford U. Press 2000).

"International Adjudication" in W. Zartmann and L. Rasmussen (eds.), PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES (U.S. Institute of Peace 1997), Chpt. 5.

"Possibilities for Development of New International Judicial Mechanisms," in L. Hargrove and L. Henkin (eds.) A HUMAN RIGHTS AGENDA FOR THE 90'S (Amer. Soc. Intl. Law 1994), Chpt. 12.

Science and Stewardship in the Antarctic (National Academy Press 1993) (co-author as member of National Research Council Committee on Antarctic Policy and Science)

"Judicial Procedures Relating to the Use of Force", in D. Scheffer and L. Damrosch, LAW AND FORCE IN THE NEW WORLD ORDER (Westview Press 1991) at p.269.

"Colloquium Summary and Concluding Remarks," in C. Brower (ed), INTERNATIONAL ARBITRATION IN THE 21st CENTURY: TOWARDS JUDICIALIZATION AND UNIFORMITY? (U. of Virginia Press 1993)

"Can Minorities Treaties Work?" in Y. Dinstein and M. Tabory (eds), THE PROTECTION OF MINORITIES AND HUMAN RIGHTS (1992) at p. 60.

"The Fact/Law Distinction in International Litigation", in R. Lillich (Ed), FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS (Eleventh Sokol Colloquium, University of Virginia Press 1991), at p.95.

The Role of the Legal Adviser of the Department of State. A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association (July 1990), (American Society of International Law, October 1, 1990) (Rapporteur of the Joint Committee), printed in 89 American Journal of International Law 358 (1991).

"The Role of States and Cities in Foreign Relations", in L. Henkin, M. Glennon, W. Rogers, FOREIGN AFFAIRS AND THE CONSTITUTION (Transnatl. Press 1990), at p. 115.

II. CHAPTERS IN BOOKS AND MAJOR STUDIES (continued)

LEGAL REGIMES FOR THE MINING OF HELIUM-3 FROM THE MOON, R.B. Bilder, E.N. Cameron, G.L. Kulcinski, and H.H. Schmitt (Technical Report WCSAR-TR-AR3-8901-1 (Jan. 1989) (prepared for National Aeronautics and Space Administration).

"International Third Party Dispute Settlement", in W.S. Thompson and K.M. Johnson (Eds), **APPROACHES TO PEACE: AN INTELLECTUAL MAP** (U.S. Institute for Peace 1991), at p. 191.

"International Dispute Settlement and the Role of Adjudication" in L. Damrosch (Ed) **THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS** (Transnatl. Publ., Dobbs Ferry N.Y. 1987) at p.155 (collecting studies of the American Society of International Law's Special Panel on International Adjudication and the International Court of Justice). (Volume received American Society of Intl. Law Certificate of Merit 1988)

WHEN NEIGHBORS QUARREL: CANADA - U.S. DISPUTE SETTLEMENT EXPERIENCE (The Claude T. Bissell lectures, University of Toronto 1986-87) University of Wisconsin Madison Law School, Institute for Legal Studies, Dispute Processing Research Program Working Paper 8:4 - May 1987) (under revision for publication)

"Nuclear Weapons and International Law", in M. Feinrider and A. Miller (Eds.), **NUCLEAR WEAPONS AND LAW** (Greenwood Press, 1984) p.3.

"Some Limitations of Adjudication as an International Dispute Settlement Technique", in T. Carbonneau (Ed), **RESOLVING INTERNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION** (University of Virginia Press, 1983), p. 1.

"An Overview of International Human Rights Law", in H. Hannum (Ed), **GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE** (University of Pennsylvania Press, 1984), Chpt. I. (Volume received American Society of Intl. Law Certificate of Merit 1985); Revised Second Edition published 1992; Revised Third Edition published 1999.

"The Current Legal Situation in Antarctica", in J. Charney (Ed), **THE NEW NATIONALISM AND THE USE OF COMMON SPACES** (Allanheld Osmun & Co. 1981), Chpt. 7.

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"The Status of International Human Rights Law", in J. C. Tuttle (Ed), **INTERNATIONAL HUMAN RIGHTS: LAW AND PRACTICE** (Am. Bar Assoc. 1978).

"**LEGAL QUESTIONS ARISING OUT OF THE CONSTRUCTION OF A DAM AT MAQUARIN ON THE YARMUK RIVER**", Report of an American Society of International Law Working Group for the Agency for International Development, Washington, D.C., July 31, 1977 (coauthor).

II. CHAPTERS IN BOOKS AND MAJOR STUDIES (continued)

- "THE SETTLEMENT OF INTERNATIONAL ENVIRONMENT DISPUTES", in VOLUME I 1975, RECUEIL DE COURS (Hague Academy of International Law), pp. 141-238 (5 lectures published by the Hague Academy).
- "The Emerging Right of Physical Enforcement of Fisheries Measures Beyond Territorial Limits", in J. Gamble (Ed), FISHERIES CONFLICTS IN THE NORTH ATLANTIC: PROBLEMS OF JURISDICTION AND ENFORCEMENT (Law of the Sea Institute - Ballinger, 1974), Chapt. 11.
- "Controlling Great Lakes Pollution: A Study in U.S.-Canadian Environmental Cooperation", in L. Hargrove (Ed), LAW, INSTITUTIONS AND THE GLOBAL ENVIRONMENT (Oceana-Sijthoff, 1972), pp. 294-380.
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- "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs", in American Society of International Law (L. Gross, ed.), INTERNATIONAL LAW IN THE TWENTIETH CENTURY (Appelton-Century-Croft 1969), pp. 785-836 (Am. Soc. Intl. Law Sixtieth Anniversary anthology of articles selected from the American Journal of International Law).

III. ARTICLES

(Asterisked items also published or reprinted in books above.)

- "Kosovo and the New Interventionism: Promise or Peril?," Journal of Transnational Law & Policy, Vol. 9, No. 1, p.153 (Fall 1999).
- "U.S. Attitudes on the Role of the UN Regarding the Maintenance and Restoration of Peace," 26 Georgia J. Int'l & Comp. Law 9 (No. 1, Fall 1996).
- "Perspectives on Sovereignty" in "Proceedings of Conference on Sovereignty in the North American Context," 20 Canada-United States Law Journal 9 (1994).
- "International Law in the New World Order", 1 Florida State University Journal of Transnational Law and Policy 1 (1992).
- "The Role of International Law in U.S. Foreign Policymaking: The Role of the Public and Professions", in 1993 Proceedings of the 86th Annual Meeting of the American Society of International Law 436 (1992).
- "International Law and U.S. Foreign Policy: Some Reflections on the ASIL/ILA Report on the Role of the Legal Adviser", 1 Transnatl. Law and Contemp. Problems 201 (1991).
- "The United States and the World Court in the Post-"Cold War" Era (The Brandon Brown Lecture), 40 Catholic Univ. L. Rev. 251 (1991)
- *"Judicial Procedures Relating to the Use of Force", 31 Virginia J. Intl. L. 501 (1991)
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- *"The Role of States and Cities in Foreign Relations," 83 American Journal of International Law 821 (1989)

III. ARTICLES (continued)

- **"International Third Party Dispute Settlement", 17 Denver Journal of International Law and Policy 471 (1989)
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- "An Overview of International Dispute Settlement", 1 Emory Journal of International Dispute Resolution 1 (1986)
- **"International Dispute Settlement and the Role of the International Adjudication", 1 Emory Journal of International Dispute Resolution 131 (1987), reprinted in C.K. and D.F. Diehl, INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS (Lynn Rejner 1998).
- "Don't Give Up on Arms Control Treaties: A Reply to Professor Hardin", Bulletin of Atomic Scientists (April 1985), p. 51
- "International Law and the United States Action in Grenada: A Report of the Committee on Grenada of the American Bar Association, Section of International Law and Practice", 18 International Lawyer 331 (1984) (coauthor).
- **"Some Limitations of Adjudication as an International Dispute Settlement Technique", 23 Virginia Journal of International Law 1 (1982).
- Comment, "Distinguishing Human Rights and Humanitarian Law: The Issue of Nuclear Weapons", 31 Am. Univ. L. Rev. 959 (1982).
- "Integrating International Human Rights Law Into Domestic Law: U.S. Experience", 4 Houston Journal of International Law 701 (1982).
- "The Role of Unilateral State Action in Preventing International Environmental Injury", 14 Vanderbilt J. Transnational Law 51 (1981).
- "International Law and Natural Resource Policies", 20 Natural Resources Journal 451 (1980).
- "The Individual and the Right to Peace", 4 Bulletin of Peace Proposals 387 (1980).
- **"The Settlement of International Environment Disputes", University of Wisconsin Technical Report No. 231 (Feb. 1976).
- "The Arab Oil Boycott and International Law", 12 Texas International Law Journal 41 (1977).
- "Human Rights and U.S. Foreign Policy: Short Term Prospects", 14 Virginia Journal of International Law 597 (1974).
- "The Anglo-Icelandic Fisheries Dispute", 1973 Wisconsin Law Review 27-134 (1973).
- **"Controlling Great Lakes Pollution: A Study in U.S.-Canadian Environmental Cooperation", 70 Michigan Law Review 469-556 (1972).
- "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea", 69 Michigan Law Review 1-54 (1970).

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- "East-West Trade Boycotts: A Study in Private, Labor Union and State Interference with Foreign Policy", 118 University of Pennsylvania Law Review 841-938 (1970).
- "Rethinking International Human Rights: Some Basic Questions", 1969 Wisconsin Law Review 171-217 (1969) and 2 revue de Droits de L'Homme (Human Rights Journal) 557-608 (1969).
- "Emerging Legal Problems of the Deep Seas and the Polar Regions", 20 Naval War College Review 34 (Dec. 1967).
- "Breach of Treaty and Response Thereto", 1967 Proceedings of the American Society of International Law 193 (1967).
- "Control of Criminal Conduct in Antarctica", 52 Virginia Law Review 231 (1966).
- "The Prospect for World Law in 1982", 55 AAUW Journal 205 (May 1966) (Amer. Assoc. University Women's Journal).
- "The International Promotion of Human Rights: A Current Assessment", 58 American Journal of International Law 728 (1964).
- "The International Coffee Agreement: A Case History in Negotiation", 28 Law and Contemporary Problems 328 (1963).
- Comment, "The International Coffee Agreement, 1962", 57 American Journal of International Law 888 (1963).
- "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs", 56 American Journal of International Law 633 (1962).

IV. OTHER WRITINGS AND PROFESSIONAL CONTRIBUTIONS

Other shorter articles, comments and book reviews in the American Journal of International Law, Proceedings of the American Society of International Law, American Journal of Comparative Law, Southern California Law Review, University of Pennsylvania Law Review, Columbia Journal of Transnational Law, Stanford Law Review, American University Law Review, Newsletter of the American Branch of the International Law Association, Newsletter of the Lawyers Alliance for Nuclear Arms Control, various published conference and symposium proceedings, such as the Proceeding of the Law of the Sea Institute, and various newspapers, including Washington Post, Manchester Guardian Weekly, Chicago Tribune, St. Louis Post Dispatch, Milwaukee Journal, and local Madison, Wisconsin papers. These include:

Book reviews in e.g., 85 Am. J. Int'l L. 217 (1991), 83 id. 190 (1989), 27 Stanford L. Rev. 1361 (1975), 25 Am. J. Comp. L. 786 (1973), 6 Columbia J. Transnatl. L. 375 (1968), 39 So. Cal. L. Rev. 476 (1966), 111 U. Pa. L. Rev. 518 (1963);

IV. OTHER WRITINGS AND PROFESSIONAL CONTRIBUTIONS (continued)

Chair or panelist in published conference proceedings in, e.g., 1999 Proceedings Am. Soc. Intl. Law ; 1998 id. 342-, 1993 id. 488 and 553, 1992 id. 436; 1989 Proceedings Am. Soc. Int'l L. 412 and 251, 1987 id. 157, 1986 id. 456, 1985 id. 26 and 58, 1984 id. 68, 1980 id. 242, 1974 id. 151, 31 Am. Univ. L. Rev. 959 (1982) e.g. in T. Mensah (ed.), Ocean Governance Strategies and Approaches for the 21st Century (Law of the Sea Institute 1994) at ___; and A. Couper & E. Gold (ed.) The Marine Environment and Sustainable Development (Law of the Sea Institute 1993) at 1; A.H.A. Soons (ed), Implementation of the Law of the Sea Conventions Through International Institutions (Law of the Sea Institute 1991) at 571 and 701;

Co-editor, "Contemporary Practice of the United States Relating to International Law" (1962-65), in e.g., 56 Am. J. Intl. L. 1027 (1962); 57 id. 119 (1963); 58 id. 454 (1964), 58 id. 752 (1964); 59 id. 377 (1965);

Newspaper and magazine articles in e.g., Bilder, "A Lump Sum Settlement for Bhopal", Washington Post, Jan. 3, 1985 at A 19, reprinted Washington Post National Weekly Edition, Jan. 21, 1985 at 25 and Manchester Guardian Weekly, Jan. 20, 1985 at 17; Bilder, "Force and the Rule of Law", Chicago Tribune, Dec. 8, 1984, Sec. 1.9; Bilder, "In Contempt of Court", St. Louis Post-Dispatch, Aug. 7, 1986, at 38; Bilder, "Eight Steps That Can Provide A Blueprint For the New World Order", Chicago Tribune, Aug. 24, 1992; Bilder, "Give Minorities Treaties A Second Try", Wisconsin State Journal, Oct. 26, 1992.

Miscellaneous published arbitral opinions, memoranda, reports and briefs, e.g., "Report of the Advisory Panel on the Legality of a System for the Selective Adjustment of Quotas", Intl. Coffee Org. Doc. No. ICC-7-60 (Nov. 30, 1965), (coarbitrator) reprinted in 5 International Legal Materials 195 (1966); AMF Harley-Davidson Motor Co. arbitration, reported in 79- 2 Labor Arbitration Awards 5408 (1979); Semling-Menke Co., 62 Labor Arb. Rpts 1184 (1974); letter to Senators Pell and Biden on "The Reinterpretation of the ABM Treaty", submitted at their request (May 3, 1987), reprinted in "The ABM Treaty and the Constitution", Jt. Hearings Before the Committee on Foreign Relations and the Committee on the Judiciary, U.S. Senate (100th Cong. 1st Sess.) (March 11, 26 and April 29, 1987), Appendix at p. 542.

Drafting Committee or conference participation in preparation of various international instruments, e.g., International Coffee Agreement, 1962, 14 UST 1911, TIAS 5505, 469 UNTS 169; Montreal Statement on Human Rights, J. Intl. Commn. Jurists 94 (1968); U.N. Declaration on the Elimination of All Forms of Racial Discrimination, 1963, 58 AJIL 1081 (1963); Vienna Convention on Succession of States in Respect of Treaties, 72 AJIL 971 and 22 ILM 306 (1978); Final Document, CSCE Valetta Conference on Peaceful Settlement of Disputes, 30 ILM 382 (1991); and others, as well as various American Society of International Law, American Bar Association, University of Wisconsin and other reports, studies and statements.

While attorney for Office of Legal Adviser of U.S. Department of State (1956-65), preparation and authorship or co-authorship of a variety of State Department or U.S. Government public studies, delegation and other reports, draft agreements, draft legislation, Congressional or International organization position papers and statements, and state, federal and international court pleadings and briefs, e.g. participation in preparation of U.S. Memorial and Counter-Memorial in the 1963 U.S.-France Air Arbitration and of Amicus brief for U.S. government in McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

Various distinguished and other lectures at other law schools and universities (e.g. Claude T. Bissell Lecturer, University of Toronto (1986); Myres McDougal Distinguished lecturer, Univ. of Denver Law School, 1989; Brandon Brown Distinguished Lecturer, Catholic University Law School, 1990; Distinguished Lecturer, Florida State University Law School, 1992); Deutsch Lecturer, Tulane Law School (1997); and lectures at other law schools and universities and to other groups); regular invited presentations of papers and participation on panels or programs of various professional associations, (e.g. ASIL, ILA, ABA, LSI, CCIL, UNA), meetings, conferences, colloquia and workshops, both in U.S. and abroad.

