LOEWEN GROUP AND ANOTHER v UNITED STATES OF AMERICA

OPINION BY SIR IAN SINCLAIR, KCMG, QC

My full name and title is Sir Ian McTaggart Sinclair. Since 1984, I have been in practice at the English Bar, specialising in the field of public international law. This is because my previous career had been devoted almost exclusively to the study and practical application of public international law. I took my first degree in Law (BA) in the University of Cambridge in 1948, and my immediate post-graduate degree (Bachelor of Laws - LL.B), also in the University of Cambridge, in 1949, specialising in the field of international law. I began to study for a doctorate (Ph.D.) at Cambridge during the academic year 1949-50, but never in fact completed my thesis, which was on an international law topic, because, in the summer of 1950, I was recruited into the Legal Branch of the British Foreign Office in London as an Assistant Legal Adviser. I served in the Foreign Office for 34 years, apart from the period 1957 to 1960 when I was appointed as Legal Adviser to the British Embassy in Bonn (Germany), and the period 1964-1967, when I was seconded, on promotion, to the post of Legal Counsellor to the British Mission to the United Nations in New York and simultaneously appointed to the post of Legal Adviser to the British Embassy in Washington. During the years 1961 to 1963, when I was based in London, I served as Legal Adviser to the UK Delegation to the (unsuccessful) negotiations for British entry into the European Communities. I served in the same capacity from 1970 to 1972 as Legal Adviser to the UK Delegation during the (successful) negotiations in Brussels leading to the signature of the Treaty of Accession by the then British Prime Minister, Mr. Edward Heath, on 22 January,

1972, followed by British entry into the European Communities with effect from 1 January, 1973. I was promoted to the post of Legal Adviser to the Foreign and Commonwealth Office on 1 January, 1976, and served as such until 1 April, 1984. During this period, I was heavily involved in giving legal advice to successive Foreign Secretaries and Prime Ministers on such problems as the independence of Zimbabwe (the former Southern Rhodesia), the future of Hong Kong (the Sino/British Joint Declaration was signed in 1984) and the handling of the conflict in the South Atlantic in 1982 following the Argentine occupation of the Falkland Islands.

2. Since my retirement from the Foreign and Commonwealth Office on 1 April, 1984, I have been in practice at the Bar in London, again specialising in the field of public international law, whether as counsel or in the giving of legal opinions. I appeared as one of the counsel for Egypt in the Taba arbitration between Egypt and Israel in the years 1986 to 1988; for Libya in the Territorial Dispute (Libya/Chad) case before the International Court of Justice (ICJ) between 1990 and 1994; for Finland in the provisional measures phase of the Passage through the Great Belt case (Finland v. Denmark) before the ICJ in 1991; for the United Kingdom in the Heathrow User Charges Arbitration (United States v. United Kingdom) between 1988 and 1991; for Qatar in the jurisdiction and admissibility phase (between 1993 and 1995) and in the merits phase (between 1995 and 2001), of the Qatar v. Bahrain case before the ICJ on territorial questions and maritime delimitation between the two States; and for Cameroon since 1994 in the ongoing proceedings before the ICJ against Nigeria in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, these proceedings having already (in 1998) resulted in a judgment from the Court rejecting the vast majority of the preliminary objections to the jurisdiction of the Court raised by Nigeria.

3. During the same period, I have also given written legal opinions to the United Kingdom Government, to the Attorneys-General of Jersey and Guernsey (on fisheries matters), to the Government of Turkey and to other para-statal entities in overseas countries on various international legal issues. I have twice given oral evidence (as an expert witness) in ICC arbitrations, and on one occasion provided a detailed legal opinion to the Commercial Court in Zurich (Switzerland) on how a disputed question of the law of sovereign immunity might hypothetically be determined by the English courts.

4. In addition, I have published two books, The Vienna Convention on the Law of Treaties (1973): 2nd Edn. (1984), and The International Law Commission (1987), and have been part-author of a third, International Court of Justice: Process, Practice and Procedure (1997) together with Sir Derek Bowett, Sir Arthur Watts and Professor James Crawford. I delivered a course of five lectures at The Hague Academy of International Law in 1981, under the title "The Law of Sovereign Immunity: Recent Developments", published in 167 Recueil des Cours, pp. 117-284. Further details of these and other publications and activities are given in my curriculum vitae annexed to this statement.

5. I have been asked by Messrs. Jones, Day, Reavis and Pogue of Washington D.C. to give my opinion on certain of the international law issues which have been raised in the case of the Loewen Group Inc. and Raymond Loewen v. United States of America (ICSID Case No. ARB (AF)/9873), and in particular to comment on any relevant arguments in the opinion of Professor Christopher Greenwood of 26 March, 2001 (hereinafter referred to as "the Greenwood Opinion"), and Professor Richard

Bilder of 16 March, 2001 (hereinafter referred to as "the Bilder Opinion"), both of which are appended to the Counter-Memorial of the United States of America.

6. To this end, I have been provided by Messrs Jones, Day, Reavis and Pogue with copies of the following documents in the case:

(a) Notice of Claim of 30 October, 1998, by the Claimants/Investors (the Loewen Group Inc. and Raymond Loewen) against the United States of America submitting to arbitration a claim pursuant to Chapter 11 of NAFTA against the United States of America for damage suffered by the Claimants/Investors as a direct result of breaches by the Respondent of several of its NAFTA obligations during litigation filed in the State of Mississippi against the Loewen Group by Jeremiah O'Keefe, his son and some of their family-owned companies (collectively referred to hereinafter as "O'Keefe");

(b) Memorial of the Loewen Group, Inc. of 18 October, 1999 in the case of Loewen Group Inc. and Raymond Loewen v. United States of America (hereinafter referred to as "Loewen Memorial";

(c) Decision of the Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdiction, dated 5 January 2001 (hereinafter referred to as "Arbitral Tribunal's Decision on Jurisdiction");

(d) the Counter-Memorial of the United States of America (hereinafter referred to as "US Counter-Memorial"), together with the opinions, statements and declarations appended thereto; and

(e) the Trial Transcript ("Tr.tr.") in two volumes of the proceedings in the case of O'Keefe v. The Loewen Group Inc.

7. I shall accordingly deal in this Opinion with the international law aspects of the following three issues which relate to the merits of the claim by the Claimants/Investors against the United States of America:

(a) the claim under Article 1102 of NAFTA and the issue of discrimination;

(b) the claim under Article 1105 of NAFTA and the standard of treatment required thereunder; and

(c) the claim under Article 1110 of NAFTA and the question of expropriation.

I. The claim under Article 1102 of NAFTA and the issue of discrimination

8. Paragraph 1 of Article 1102 of NAFTA provides as follows:

> "1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investor with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."

Paragraph 2 of the same Article 1102 applies the same rule, expressed in identical terms, to "investments of investors of another Party". Paragraph 3 of Article 1102 states unequivocally:

> "3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."

9. During the course of the proceedings in the case of O'Keefe v. The Loewen Group Inc. and Others, which took place in 1995 in the Hinds County Circuit Court of the State of Mississippi before Judge Graves, and indeed in direct-mail advertisements long before these proceedings were even instituted, the Loewen Group and Raymond Loewen were castigated and vilified as "foreigners" (the Loewen Group being a Canadian corporation owned substantially by Canadians) who had come to Mississippi to make profits for their funeral homes business at the expense of local funeral home businesses located in Mississippi. The nationalistic (indeed xenophobic) language of these direct-mail advertisements in 1990 is sufficiently demonstrated by the extracts given in paragraphs 18 to 20 of the Loewen Memorial. Further developments in the increasingly acrimonious dispute between O'Keefe and the Loewen Group are recorded in paragraphs 21 to 28 of the Loewen Memorial.

10. But it is to the transcript of the trial in 1995 of the case involving O'Keefe as plaintiff and the Loewen Group as defendants that we must look primarily for evidence of the breaches of Article 1102 alleged by the Claimants/Investors in the present proceedings against the United States of America. In this context, the Tribunal will of course be aware that the 1995 case was in fact a civil case before a jury in which O'Keefe was seeking aggravated damages from Loewen for breach of contract and unconscionable trade practices to the detriment of families from Mississippi. The lead lawyer for O'Keefe in the 1995 trial was William (or Willie) Gary, a highly combative and colourful plaintiffs' lawyer from Florida. A flavour of his highly prejudicial performance in the trial can be seen in his conduct of the questioning on behalf of O'Keefe during the voir dire process: see paras. 35 to 45

of the Loewen Memorial. It will be seen that his questions are directed towards stressing the patriotism and willingness to fight for the United States displayed by O'Keefe, implicitly contrasting this with the lack of such qualities in the defendants, stigmatised as being "foreigners" from Canada: paras. 36 to 38 of the Loewen Memorial. Gary also took this opportunity of effectively inviting prospective jurors to award extremely large punitive damages against Loewen: para. 39 of the Loewen Memorial. He also specifically alleged that Loewen had come "down" from Canada to deceive Mississippi families, thus again stressing (but as usual in a pejorative fashion) the Canadian nationality of the Loewen Group which, he alleged, bought up small family business funeral homes in Mississippi but sought to disguise the fact that they were now owned by foreigners: para. 41 of the Loewen Memorial.

11. In the opening statements for O'Keefe by Michael Alldred and Willie Gary, the same themes were sounded - namely, nationality (Mississippians and Americans versus Canadians), race (Loewen was alleged to be a racist company) and size (O'Keefe was a small local company in dispute with a giant foreign corporation).

12. Alldred focussed initially on race, maintaining that the funeral homes businesses which Loewen had bought in Mississippi principally served the white community (this was clearly designed to incite prejudice in the jury, the majority of whose members were black, against Loewen). He also encouraged the jury to exercise the power of the people of Mississippi to "say no to people like Loewen who would build rich fortunes upon the misery and poverty of burying loved ones of the people of the poorest state in our nation": para. 49 of the Loewen Memorial.

13. Gary concentrated his venom on the nationality issue. He emphasized the long-standing connection of the O'Keefe family with Mississippi, contrasting this with the recent arrival of Loewen in the State. O'Keefe was characterised as a "fighter" for "our country" in contrast to the Loewen Group which had descended on the State of Mississippi in an endeavour to put O'Keefe out of business. Constant stress was laid on the Canadian ownership of Loewen. Complaint was even made that O'Keefe had been invited to come to Canada to seek to resolve his differences with Loewen, but eventually "went back home" (semble to Mississippi) in order to file this lawsuit: paras. 50 to 54 of the Loewen Memorial.

14. Even more revealing is Gary's questioning of Mike Espy, a prominent local black politician who gave evidence that O'Keefe (who is white) is not a racist. As this had never been alleged by Loewen it is clear that Espy's evidence was wholly irrelevant; indeed, the only purpose it appeared to serve was to appeal to the instinctive reaction of a jury which contained a significant proportion of black jurors. Leaving this aside, it is interesting to recall the following line of questioning put by Gary to the witness on re-direct:

Q. Now, let's talk about the North American Trade —.

A. Free Trade Agreement.

Q — Free Trade Agreement. Everybody in America didn't agree with it, did they?

A. No. Mr. Ross Perot didn't a degree [? agree] with it for sure.

Q. A lot of people expressed their opinions about it. They said they thought it wasn't fair to the American people, didn't they?

A. Absolutely. A lot of people.

Q. Now, the fact that you go - you went and entered - now, this was an agreement, right?

A. It was an agreement?

Q. It was that North American Free Trade, it said agreement?

A. Yes, agreement.

Q. That means that people had to give their word they were going to do what they said they were going to do: is that right?

A. Yes.

Q. It didn't mean that because you were from Canada or from Mexico or from any other country that you could sign it and have no intention of living up to it, did it?

A. True: [Tr. tr., pp. 1109-10].

This highly revealing interchange between Gary and Espy not only discloses Gary's less than complimentary view of NAFTA but also his preconception that Canada and Mexico were failing to comply with its provisions, no mention being made of possible non-compliance by the United States.

15. Gary's questioning of O'Keefe was also clearly designed to elicit, for the benefit of the jury, irrelevant evidence about the military career of O'Keefe during the Second World War (presenting him as a patriotic American citizen) and contrasting his concern to protect the interests of both black and white Mississippians with Loewen's Canadian nationality and very recent interest in Mississippi, resulting from the purchase of Riemann Holdings and the takeover by the latter of Wright and Ferguson. In addition, Gary was able to have on the record (again, no doubt for the benefit of the jury) some irrelevant testimony about the personal wealth of Mr. Raymond Loewen: paras. 64 to 72 of the Loewen Memorial.

16. The cross-examination of David Riemann, one of the witnesses called by Loewen, by counsel for O'Keefe (Lorenzo Williams) is also disfigured by the constant reiteration by Williams of Loewen's "Canadian nationality" or his transparent attempt to have confirmation that Riemann Holdings "is owned by Loewen Group and Ray Loewen out of Vancouver, Canada". Subsequent questions are framed in terms of seeking confirmation that particular discussions had taken place when the witness had "to go up to Vancouver, Canada" or that there had been "too much interference from Canada". Paras. 74 and 75 of the Loewen Memorial are replete with citations containing quite uncalled-for references by Williams to "Vancouver, Canada" or to "Canada" tout court.

17. Finally, we have the extract from pages 3595-96 of the transcript of the trial which is cited at paragraph 77 of the Loewen Memorial and which demonstrates that Judge Graves at least was fully aware that Gary, as counsel for O'Keefe, had been seeking to play to the black majority on the jury in the course of his opening statement and subsequent examination and cross-examination of witnesses. As a result of the racial implications of the case-in-chief presented by O'Keefe, counsel for Loewen sought leave to present testimony by Dr. Edward Jones and Dr. Henry Lyons of the National Baptist Convention. Gary objected to this request, but Judge Graves in effect overruled him by maintaining that "actually before the trial started, race has been injected into this case, and nobody has shied away from raising it when they thought it was to their advantage ....."; he continued by pointing out that on the plaintiff's side, certain witnesses had been called, character issues raised, and demonstrations had been made that the plaintiff had done business with black people; and he concluded that "in the vernacular of the day, the race card has already been played".

18. Paragraph 78 of the Loewen Memorial explains that this reference to "the race card" is a clear reference to the notorious trial and acquittal only nine days previously of O. J. Simpson by a predominantly black jury, the football star having been charged with the murder of his ex-wife and her companion.

19. The Claimants/Investors in the present proceedings against the United States of America are not of course seeking to impute to the Respondent responsibility for all the discriminatory remarks made by counsel for O'Keefe (and Mr. Gary in particular) during the course of the trial presided over by Judge Graves in 1995 in the case of O'Keefe v. Loewen Group and Others. That would be wholly inappropriate. What they do, however, contend is that the conduct of the trial, and particularly the failure by Judge Graves to exercise sufficient control over Mr. Gary and other of the counsel acting for O'Keefe by preventing them from making inflammatory and prejudicial assertions and implications based on the Canadian nationality of the Loewen Group or of Ray Loewen when contrasted with the patriotic services performed by Jerry O'Keefe and his devotion to the interests of the local black community in the State of Mississippi, or based on the size and wealth of the Loewen Group and Ray Loewen when compared to the more modest circumstances of O'Keefe's business, amount to a clear breach of paragraphs 1 to 3 of Article 1102 of the NAFTA. The Claimants/Investors cannot condone the failure of Judge Graves to exercise sufficient authority in his own court-room to control the excesses of counsel for O'Keefe in their all too blatant attempts to stir up the latent anti-foreign and pro-local enterprises prejudices of a predominantly black jury and firmly believe that this was the prime cause of the injustice done to the Claimants/Investors as a result of the jury verdict. In the United Kingdom, we have had fairly recent experience, at least in the context of criminal trials. of how the

appalling circumstances of a particular crime committed for political ends and involving the deaths of many innocent victims have resulted in a miscarriage of justice discovered and rectified only many years later. In at least one case, that of the so-called "Guildford four", the conviction which was later quashed was found to be unsafe in part because of the atmosphere surrounding the trial at the time, the crime forming part of a significant bombing campaign by the Provisional IRA on the mainland of Britain in the early 1990s.

20. It has of course been argued by the United States that the Claimants/Investors have been unable to show that they and/or their investments, when compared to U.S. investors or investments in like circumstances, received treatment that was less favourable: U.S. Counter-Memorial, pp. 119-20. To this, it can surely be replied that if the contentions of the Claimants that the trial was infected by the failure of the trial judge to control the excesses of counsel for O'Keefe in constantly stressing the "foreign" or "Canadian" status of the Loewen Group, and in comparing this adversely with the American (indeed Mississippi) status of O'Keefe, is accepted, there was a self-evident breach of paragraphs 1 to 3 of Article 1102 of NAFTA. As we shall see, the same facts can also be invoked by the Claimants to sustain their charges that the United States is also in breach of Article 1105 of NAFTA by reason of the self-evident failure of the trial judge to ensure that the trial was conducted in such a way as to ensure for the Loewen Group and Ray Loewen "treatment in accordance with international law, including fair and equitable treatment and full protection and security".

21. Reverting to the interpretation of Article 1102, however, the Claimants have never suggested that this Article should be interpreted as requiring that an alien investor's foreign nationality should be kept secret and possibly not even be mentioned in the course of a trial, as Professor Bilder seems to suggest in paragraph 8 of his Opinion. No, the position of the Claimants is rather that what Article 1102 proscribes is constant reference in the course of a jury trial to an alien investor's foreign nationality when contrasted, as in this case, with the American, and indeed local Mississippi, origin of the other party to the case. Nor are the claimants contending that there were demonstrable and significant indications of judicial bias on the basis of nationality in this particular case (as opposed to an inherent bias against non-local non-Mississippi litigants deriving from the pressures of the judicial electoral system); their contention is rather that the trial judge should have exercised his undoubted powers to control Mr. Gary and the other counsel acting for O'Keefe and prohibit them from making constant references (purely in order to influence the jury) to the Canadian nationality and foreign location of the Loewen Group and Ray Loewen, and that his failure to do so was the prime contributing factor to the grossly excessive jury verdict. It is the conduct of the trial by Judge Graves which is primarily in issue here in these proceedings, particularly when combined with the consequences of that conduct, namely, the outrageous and indefensible jury verdict.

22. Indeed, it is at this point that I should perhaps make reference to the jury verdict itself as possibly constituting a separate "measure" within the meaning of Article 1101 of NAFTA, that measure itself being in violation of Article 1102 of NAFTA precisely because the jury verdict in the 1995 trial in the State of Mississippi was self-evidently the direct and immediate consequence of a trial in which multiple violations of Article 1102 of NAFTA were permitted to take place by the trial judge.

In the judicial system of the United States, and the State of Mississippi in particular, the jury trial plays an important role in the resolution of some types of civil case. But it can be manipulated by unscrupulous and ruthless advocates in particular cases, of which the Loewen case in the State of Mississippi is a prime example. It is probably the better view to regard the 1995 trial itself, together with the resulting jury verdict and the refusal of the judicial system in the State of Mississippi to waive or reduce the bond requirement so as to enable the present Claimants/Investors to appeal against the verdict free from the immediate threat of execution against their assets, as constituting one single complex act giving rise to State responsibility on the part of the United States. But, to the extent that it may be possible to view these as separate and distinct acts, it is clear that they must all be regarded as "measures" within the meaning of Article 1101 of NAFTA. Of course, there is no doubt that there can be a denial of justice at any level of a judicial system, and that there can be multiple denials within the same judicial system.

23. To the extent that the jury verdict may be regarded as a distinct "measure" separate from the trial itself, it is clear that the Respondent must also bear responsibility for a verdict which was itself the product of the prejudice and anti-Canadian rhetoric to which the jury were subjected by counsel for O'Keefe throughout the 1995 trial. It is the actions of the jury, as well as the acts and omissions of the trial judge, which render the United States liable in this case. That members of the jury were quite improperly influenced by the inflammatory and provocative anti-Canadian and pro-Mississippi statements made by counsel for O'Keefe during the 1995 trial emerges clearly from a study of the Report on Post-Trial Juror Interviews and the records of particular juror interviews summarized at paras. 24 to 33 below.

24. The US Counter-Memorial naturally make much play with the fact that none of the counsel for Loewen made objections to the inflammatory and prejudicial statements made by some of the counsel for O'Keefe (particularly Mr. Gary) at the trial: see paragraphs 69 and 70 of the Greenwood Opinion, and paragraphs 9 and 10 of the Bilder Opinion. But it is of course the cumulative effect of the repeated anti-Canadian and pro-Mississippi remarks by Mr. Gary and others which is bound to have had an impact upon the jury. Indeed there is some evidence in the Report on Post-Trial Juror Interviews and the Juror Interviews themselves (both of which are appended to Professor Vidmar's statement at Tab D to the U.S. Counter-Memorial) which bear out this assessment. Thus, in the Report on Post-Trial Juror Interviews, it is said under the heading "Plaintiff Witnesses" at page 6 of the Report:

> "The jury undoubtedly identified with Jerry O'Keefe and his family, although it is not clear that this came from the witness stand"

Now, the Post-Trial Juror Interviews were conducted by Messrs. Corlew and Robertson for the benefit of the Claimants in the present proceedings, and this should be borne in mind. Nevertheless, the analysis in the Report on Post-Trial Juror Interviews does, it is submitted, warrant close attention. Under the heading "Analysis" at pages 7 and 8 of the Report, it is stated:

> "Beginning with the voir dire, William Gary pounded the magnitude of damages. He developed the theme of a non-caring foreign corporation exploiting bereaved families for profit and commented on Ray Loewen's absence from the courtroom. The Loewen Group was characterized as unscrupulous and underhand.
>
> The theme stuck. The characterization stuck. The jury saw no other identity or personality for the corporate defendants. The jury heard no message to shake William Gary's storyline. The trial was over in the opening days."

The Analysis also draws attention to the fact that the black jurors loved the cross-examinations by two of the counsel for O'Keefe (William Gary and Lorenzo Williams):

> "If they acted like a witness was lying, or said it, or signalled it by body language, it apparently was accepted as the gospel": at p.8.

The Analysis also refers to the influence that the contemporaneous O. J. Simpson trial may have had on the jury:

> "The O.J. Simpson verdict was never mentioned in post-trial interviews, but we believe the impact of that verdict, dictated by a minority jury, strongly influenced the sense of power that these black jurors obviously felt, and influenced their "lynch mob" mentality" : at p.9.

25. The Report on Post-Trial Juror Interviews also discusses the "race strategy" pursued at the trial by the O'Keefe lawyers:

> "There was unquestionably a deliberate stratagem to identify the O'Keefe side of the litigation as the right side for black jurors to be on": at p.10.

26. Finally, among the six conclusions and recommendations at the end of the Report on Post-Trial Juror Interviews are two which should be noted by the Tribunal. They are numbers (4) and (6):

> "(4) Plaintiff's counsel improperly communicated with the jury through the use of facial gestures and body language ....."
>
> "(6) Regardless of whether there is conduct which rises to the dignity of juror misconduct, the cumulative effect of improper argument, the campaign to influence black jurors and improper juror communications through body language are a compelling argument that plaintiffs succeeded in getting what they wanted, a verdict infected by passion and prejudice": at pp. 12-13.

27. Lest it be thought that this summary of the content of this Report has been slanted in favour of the contentions of the Claimants in the present proceedings against the United States, I will briefly draw attention to the relevant portions of the records of particular juror interviews, beginning with Barbara Chapman.

Barbara Chapman (second interview on 29 November, 1995).

She was the only juror who dissented from the verdict, both on liability and damages. White, divorced, aged 63. Former school teacher, in 1995 in a post with the Christ United Methodist Church. Lived in Hinds County for 38 years. She said that:

> "..... juror Guyton tried to be fair and described him as an intelligent young man. .....Willie Gary said he needed a $105 million dollar verdict, and that's what the jury wanted to give him. Guyton disagreed with that. Akida Emir was the ringleader. She said that this was her one chance to make a difference and we ought to double it. Rhonda Johnson [a 37 year old white secretary/underwriting screener] said $500 million. The white men disagreed and got it to $260 million, $100 million compensatory and $160 million punitive, more than double what Willie Gary had asked for."

She also revealed that:

> ".... this jury stopped listening after two weeks. When they found out that Willie Gary was on "Lifestyles of the Rich and Famous" they just loved it and they wanted to reward him for being so good ..... They loved Willie Gary. She did not think the jurors knew who the plaintiff or defendant were, that they were ignorant of that. She said they really didn't want to know what was happening and didn't care ..... Gloria [?Gayle] Staggs told Barbara before she got sick and went off the jury that she was afraid that the decision was going to be based on which black lawyer captured the black vote. ... Barbara did not think that the judge was a great influence on the way that the jury reacted ..... She said Gary was ugly, and badgered the witnesses and that sometimes the judge would rein this in. Lawrence Williams did it too, and always the jury

> loved it ..... Gary would throw back in his chair and put his hands over his face for the jury to see when he did not like a witness's answer. The defense never objected to that. He would roll his eyes back, and that's all the jury needed. Gary would throw depositions on the floor. He did this more than once ....."

Interestingly, she also disclosed some of her own views:

> "The case was decided the second or third week. She knew it was going to be bad, but not this bad ..... They viewed Loewen as a smart white man getting something out of blacks vis-à-vis the Convention contract. They said Loewen was not even giving the people a little piece of ground to put "our people" into because the Convention contract required the church groups to establish their own cemeteries. The screaming and yelling really helped. They saw the power of the jury in the O.J. trial ..... The trial was way too long.
>
> It probably hurt the defense. Glen Millen [the jury foreman] is from Canada and hates Canadians and the Canadian Government ..... The jurors viewed this as their one thing, their one big chance, saw themselves as doing something that is really important."

28. If I have focussed carefully on this interview with Barbara Chapman, that is not because she was the one dissentient on the jury, but rather because the views which she expresses seem to be borne out by the records of some of the other post-trial juror interviews.

Robert Bruce. White male, 63 years old, lives in Jackson, but had lived in Hinds County for 25 years. Had retired by November, 1995. Interviewer (Mr. Corlew) characterised Mr. Bruce as a "know-it-all":

> "He [Mr. Bruce] said that it didn't take too long to find out what the case was about, as far as he was concerned it was over by the third day and that nothing came up after that to change anyone's minds: that most of the defense witnesses helped the plaintiff: that they had no defense and simply tried to discredit Jerry O'Keefe, and put up smokescreens."

Mr. Bruce also thought that "Ray Loewen was a pretty good fellow until he started lying" by claiming not to know about certain matters. In his view, Willie Gary "was a thorough lawyer"; he made no comment on his performance in court. In general, Bruce thought that the defense had made a mistake in calling upon former employees to testify on behalf of the Loewen Group. He was also of the view that "Judge Graves did an excellent job."

29. Rosie Mae Clincy. 61 years old, black female, retired public employee. Widow. Reluctant to talk, but eventually did so:

> "She stated that she formed no opinion about the case until the end, and was somewhat defensive that the judge had told them they had to follow the entire trial to see where it led before forming an opinion."

Of the lawyers in the case, she thought that:

> ".... Mr. Gary was just telling the truth. Mr. Blackman and Mr. Sinkfield were "pretty good", but it seemed like they would end up with things that were not just true."

Her overall opinion was based on her assessment of where the truth lay on contested issues:

> "It looked to me like very time it just led back to O'Keefe telling the truth. You had to listen to all of it to see. There was something going on, but in each letter O'Keefe was telling the truth. Someone on the other side was not telling the truth."

The record of this interview seems to reveal that this juror was not highly educated and that she formed her views, not so much on a critical assessment of the strength of the evidence presented by one side or the other on a particular issue, but more on an impressionistic hunch about who was telling the truth.

30. Akida Emir — 48 year old black female. Executive Assistant to the Secretary of State in Mississippi in 1995. She confessed that she now understood that "people think we [the jury] gave an astronomical amount". She had no idea "it was such a history-making amount". But she was convinced that "we did the right thing based on the evidence we heard". However, she went on to say that "because of the amounts involved, she [was] not sure the jury verdict [would] stand".

At a second meeting with the interviewer, she admitted that "... she formed important impressions early in the trial". She was "highly impressed" with Gary - "he was the most effective in communicating his message because he spoke in plain language, made lots of eye contact with the jurors from the very outset, and clearly established a rapport with the jury". It was her view that "Jerry O'Keefe is certainly not a squeaky clean individual" and she knew that he was a wheeler-dealer and a politico; but she felt that he had been "wronged in the contractual dealings" with Loewen.

She seemed to have been impressed with the fact that "Loewen had former employees [like Loraine McGrath and John Turner] testifying against him". She would never have let Ray Loewen "get on the stand and lie like he did", for example, by pleading that "he "didn't know" in answer to key questions". On damages, she told me that "the $260 million would have been their verdict originally"; the jury wanted to send Ray Loewen a message, especially because he was a man for whom money was nothing. Her view was that the defendants "just had no case on punitives", and they did not clearly provide the jury with any numbers, whereas "Willie Gary was citing them numbers from day one".

From this juror interview, it seems apparent that Akida Emir was strongly against the Loewen Group from a very early stage of the trial; what she reveals about her own views rather tends to confirm Barbara Chapman's conclusion that she influenced other jurors to follow her lead.

31. Glen Millen — White male, 68 years old in 1995. Retired engineer who had been born in Canada, and lived there for about 27 years. Foreman of the jury. The interviewer described Mr. Millen as gregarious, articulate and "as having a pretty good grasp of the entirety of the trial". Mr. Millen stated

at the outset, not entirely facetiously, that "this trial convinced him that he was going to be cremated". More seriously, he said that "Willie Gary was really strong. He wanted $1.1 billion dollars". Millen and two other jurors tried to keep the verdict down, but there were eight jurors who wanted to give $1 billion dollars. It was his view that "the defense was asking the wrong questions and got in bad shape because they were using the wrong numbers". He also said that the evidence of the two former Loewen employees [Turner and McGrath] "really hurt". He concluded by saying that:

> ".... if Loewen were testifying in Canada he might have been okay, but people down here [in Mississippi] don't relate to that. He said that two of the Loewen Group were Canadian ministers, which meant nothing here. But he implied that Canadian ministers have a sort of superior attitude."

On damages, Millen admitted that he felt bad about the amount of money awarded:

> "Maybe O'Keefe lost $1 million dollars. $6 to $8 million dollars I'd say was right, but even if you went up to $10 million dollars and doubled that figure for punitive damages, $30 million tops would be a figure. But that's what we had to work with."

Two points are significant in the record of the post-trial juror interview with Millen. In the first place, Millen himself seems to confirm the view expressed by Barbara Chapman that he "hates Canadians and the Canadian Government": see first citation above. This seems effectively to dispose of the argument advanced in

paragraph 9 of the Bilder Opinion that, because 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". The same argument is advanced in paragraph 70 of the Greenwood Opinion, and is open to the same rejoinder. Whatever views Millen did harbour about Canada and Canadians (and there is of course evidence that these views were more negative than positive), he clearly did not in any event conceive it to be his duty - as opposed to that of the judge - to counter the anti-foreign or anti-Canadian prejudices of his fellow-jurors which are so apparent on the record. By the same token, the other suggestion made in paragraph 9 of the Bilder Opinion that Loewen's lawyers had put in evidence of the clearly (not "allegedly") anti-Canadian advertisements distributed by O'Keefe because they "believed this jury would disapprove of O'Keefe's efforts to stimulate anti-foreign prejudice" is taken out of context, because in fact it was of course O'Keefe who first raised the issue of Loewen's nationality. In other words, O'Keefe was not averse to playing the "anti-foreign", more specifically "anti-Canadian", card in his propaganda war against Loewen.

32. Barbara Chapman We reviewed in paragraph 24 above the record of the second post-trial juror interview which took place on 29 November, 1995. The first interview with her took place on 3 November, 1995, and it reveals a few additional points of interest. In general, Ms. Chapman felt that O'Keefe and the Gulf National Companies had suffered severe losses, but, as she saw it, these were the result of their own mismanagement and not as a result of anything done by Loewen. She also stated that several of the jurors appeared almost drunk with power and to have an almost unreal attitude towards money. There was also a powerful under-current in the jury:

> "There was a populist prejudice against a giant foreign corporation they came to view as a ruthless, price gouging monopolist"

The same thought is expressed in her report that "the jurors bought into the idea that the O'Keefes were a hardworking and worthy family which had been victimized by a large foreign corporation".

Despite the fact that she was the lone dissentient on the jury, Ms. Chapman was reluctant to question the motives of her fellow jurors:

> "She considers them uninformed and misguided. Ms. Chapman is basically a kind and [undecipherable] person and refused to attribute to the jurors any malicious [? motives]. They were simply doing right as they saw the right .....

> She also stated she wished there had been more white jurors, her point being that white jurors would not have been nearly so impressed with Willie Gary."

She did not believe there had been any jury tampering or improper contact by anyone with any of the jurors. Ms. Chapman was complimentary about Judge Graves, but added the following caveat:

> "She stated there were times, however, when Willie Gary's "in your face" attacks on Loewen witnesses was carried to excess. She thought Judge Graves should have stepped in and protected the Loewen witnesses more than he did."

33. These extracts from the record of post-trial juror interviews give some of the flavour of the atmosphere of the trial. What the Claimants/Investors are contending in the present proceedings is that the United States, as a party to NAFTA, bears responsibility for the conduct by Judge Graves of the trial in 1995 in the Hinds County Circuit Court in the State of Mississippi in the case of O'Keefe v. The Loewen Group Inc. and Others which resulted in a grotesquely inflated award of damages by the jury, for which the United States also bears responsibility. The outcome of that trial was quite improperly influenced by the blatant efforts of counsel for the plaintiff to appeal to the anti-foreign (more specifically, anti-Canadian) prejudices of the jury and to play heavily upon the (not unnatural) sentiments of a predominantly black jury in wishing to favour a relatively small local enterprise engaged in the funeral homes business in a dispute against what was portrayed as a rich and overbearing foreign competitor in the same business. The conduct of the trial judge in failing to control the wholly improper actions of counsel for O'Keefe in pandering to, and even encouraging, these prejudices and sentiments,

led to a flagrant miscarriage of justice. The result was a grossly inflated $260 million dollars verdict for the plaintiffs in the trial, supposedly comprising $100 million dollars by way of compensatory damages and $160 million dollars by way of punitive damages. But even this extraordinary award of damages was effectively set aside by the trial judge who had forgotten that, at the outset of the trial, it had been agreed between the parties that the jury should be asked, initially, to assess the amount of compensatory damages, if any, and only at a later stage to consider the question of punitive damages. The jury was accordingly called upon to make a re-assessment of the amount of punitive damages to be awarded against the Loewen Group and Ray Loewen, and decided to assess the punitive damages at $400 million dollars to be added to the $100 million dollars by way of compensatory damages.

34. Precisely the same appeals to the jury as disfigured the main jury trial were made by counsel for O'Keefe in the brief hearing on punitive damages. Gary, as counsel for O'Keefe, immediately appealed to the Mississippi sympathies of the jury:

> "Punitive damages, no doubt about it, it's going to punish them. And if you don't do that, then you come short of your duty. It's to stop wrongdoing. It's to deter wrongdoing. It's to make sure that this doesn't happen to the citizens of Mississippi or the citizens of this nation again. That's what punitive damages are for": Tr.Tr. p.5755.

35. The point made in paragraph 9 of the Bilder Opinion that, at the trial in 1995, counsel for Loewen never objected to any of the references made by Gary and other counsel acting for O'Keefe to the Canadian nationality of the Loewen Group on the grounds of possible prejudicial effect, is exaggerated. But, even if were not, that would not excuse the failure of Judge Graves to exercise sufficient control in his own

courtroom to prevent counsel for one party from reminding the jury constantly, and in increasingly strident terms, that he is representing a small local Mississippi business pitted against a large and powerful Canadian investor. Once or twice may not constitute an improper appeal to the sympathies of the jury based upon the nationality of one or the other party: it is the constant reiteration of this kind of improper rhetoric, combined with the failure of the trial judge to control those indulging in this type of behaviour, which constitutes the gravamen of the Claimants' charge that the Respondent is, by virtue of its overall responsibility for the conduct of the trial court in 1995, in breach of its obligations under Article 1102 of NAFTA which, generally speaking, prohibits discriminatory treatment (in the instant case, discriminatory treatment on the grounds of nationality) with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

36. Finally, I note that the U.S. Counter-Memorial has advanced the argument that the Claimants have failed to meet the Article 1102 requirements of "less favourable treatment" and "like circumstances" to be found in Article 1102 (1) and (2) of the NAFTA. But we know from the award of the Pope & Talbot Tribunal of 10 April, 2001, on phase 2 of the merits of that case that the Tribunal in that case was of the view:

> ".... that the language of Article 1102 (3) was intended simply to make clear that the obligation of a state or province was to provide investments of foreign investors with the best treatment it accords any investment of its country, not just the best treatment it accords to investments of its investors": Award, para. 41.

The Tribunal concludes at a later stage:

> ".... that "no less favourable" means equivalent to, not better or worse than, the best treatment accorded to the comparator."

On this view of the matter, it would be astounding if the State of Mississippi were able to attract any inward investment from potential investors in any other State of the United States if the "best treatment" to be given to such a potential investor were taken to be the treatment accorded to the Loewen Group by the courts of Mississippi in 1995.

37. By the same token, the argument that the "like circumstances" requirement in Article 1102 has not been met by the Claimants in the present case is pettifogging. Again, light is thrown on the interpretation of "like circumstances" in the context of Article 1102 of NAFTA in the recent award of the Pope & Talbot Tribunal (of 10 April, 2001). In the Pope & Talbot award, the Tribunal accepts that the legal context of Article 1102 includes, as the Investor had argued, "the trade and investment-liberalizing objectives of the NAFTA". The Tribunal continues (at para. 77 of its award):

> "Differences in treatment will presumptively violate Article 1102 (2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies and (2) do not otherwise undermine the investment liberalizing objectives of NAFTA"

Taking this analysis a step further,

> "A formulation focusing on the like circumstances question, on the other hand, will require addressing any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments."

Both O'Keefe and the Loewen Group were of course in the funeral houses business, O'Keefe as a domestic investment and the Loewen Group as a foreign investment. In that sense, they were "in like circumstances" at the time of the litigation in the State of

Mississippi in 1995. In fact, they were competitors in the same business. As the Tribunal will be aware, the Arbitral Tribunal in the case of S.D. Myers v. Government of Canada has recently stated:

> "The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor". The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector": Partial award, para. 250.

The Tribunal in the Myers case indeed went on immediately to emphasize that where there was a business relationship that was adversial - as in the case of O'Keefe and Loewen - that very relationship was sufficient to satisfy the "like circumstances" requirement.

38. Accordingly, there is no substance in the United States contention that the Claimants in these proceedings have failed to meet the Article 1102 requirements of "less favourable treatment" and "like circumstances".

II. The claim under Article 1105 of NAFTA and the standard of treatment required thereunder

39. At the outset of this section, it is as well to recall the precise terms of paragraph 1 of Article 1105 of NAFTA (paragraphs 2 and 3 of the Article being clearly inapplicable in the present case):

> "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"

It is also necessary to bear in mind the scope and nature of the present proceedings before this particular Tribunal. These are not proceedings by way of appeal from the verdict rendered by the trial court in Hinds County in the State of Mississippi in 1995. They are between different parties and they raise quite different issues. It is the

essence of the present proceedings that the Claimants/Investors are seeking compensation from the Respondent (the United States of America) for alleged breaches of specified provisions of the NAFTA - a treaty to which the United States, Mexico and Canada are parties - arising out of the totality of the circumstances surrounding the 1995 verdict and the subsequent inability of the Claimants/Investors to secure a review of that verdict on appeal within the United States legal system. That inability was occasioned inter alia by the refusal of the trial court and the Mississippi Supreme Court to reduce the amount of the supersedeas bond (in the amount of $625 million dollars) required under Mississippi law to preclude execution upon the final judgment of the trial court (in the amount of $500 million dollars) pending the outcome of the appeal.

40. It is also necessary to bear in mind that the NAFTA is a treaty of a special type. Not only does it embody rights and obligations binding upon the three States parties to the Agreement: it also establishes in Chapter Eleven rights for the benefit of the investors of one Party making investments in the territory of another Party. Such investors, together with the investments which they make, are the beneficiaries of the rights stipulated for them in Chapter Eleven. We are a long way away from the situation which existed only fifty years ago when the parameters of the concept of "denial of justice" had indeed been broadly fixed, but, and the caveat is important, only within the framework of an international legal system which was constructed on the basis that only States were subjects of international law, so that the claim of a private individual or corporation against a foreign State alleging breaches of international law could only be pursued if the national State of the injured individual or corporation took up (or "espoused") that claim on the international level. Under a treaty such as the NAFTA, there are direct remedies available to a foreign individual

or corporation asserting a claim against another State party to NAFTA which is alleged to have caused injury to the foreign individual or corporation concerned as a result of acts or omissions of organs of the defendant State.

41. Professor Bilder is thus right in directing attention in his Opinion to what the Tribunal should take as its standard of interpretation in applying and giving effect to the relevant provisions of Chapter Eleven of NAFTA. On the other hand, I must take issue with him over part at least of his analysis of the standard of interpretation set by Article 31 of the Vienna Convention on the Law of Treaties. We seem to be in agreement that paragraph 1 of Article 31 sets out the basic rule of treaty interpretation:

> "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."

But Article 31 also embodies a series of ancillary or subsidiary rules which serve to enlarge and give further content to the basic rule. Thus paragraph 2 of Article 31 defines the context for the purpose of the interpretation as comprising, "in addition to the text, including its preamble and annexes":

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

What is significant for the present case is the fact that the preamble and annexes to the treaty are regarded as forming part of the text of the treaty itself. The author of this

opinion has written elsewhere that "the preamble to a treaty may assist in determining the object and purpose of a treaty", and has cited several sources as authority for this proposition : Sinclair, The Vienna Convention on the Law of Treaties, 2nd Edn. (1984), p. 127. Among the sources cited is the judgment of the International Court of Justice (ICJ) in the United States Nationals in Morocco case where the Court referred to the preamble to the Madrid Convention of 1880 to ascertain its object and purpose, and went on to say:

> "In these circumstances, the Court cannot adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects": I.C.J. Reports (1952), at p. 196.

We shall consider shortly the relevance of the preamble to the NAFTA to the interpretation of its Chapter Eleven.

42. Professor Bilder also refers (rightly) to paragraph 3 of Article 31, although he cites only sub-paragraph (c). Unfortunately, he does not draw attention to the essentially subsidiary nature of paragraph 3 of Article 31. As the late Professor Reuter puts it:

> "According to Article 31 of the 1969 .... Convention, interpretation must be based simultaneously on the "context" (paragraph 2) and on other elements (paragraph 3) which appear to carry less weight .... These carefully and subtly graduated elements constitute, primarily and simultaneously, the basic guidelines of interpretation. As for the terms used in these agreements, they are to be interpreted in good faith following their ordinary meaning and in the light of the object and purpose of the treaty. The ordinary meaning of the terms may only be departed from if the parties' intention to do so can be established": Reuter, Introduction to the Law of Treaties (1989) (revised version of the second edition published in French in 1985), p. 75 (para. 144).

43. By the same token, Professor Greenwood formulates some of the propositions which he advances at too high a level of abstraction. For example, he states, at paragraph 23 of his Opinion:

> "While allegations of a denial of justice may turn upon decisions of the courts, what constitutes a denial of justice is a failure of the system of justice within a State. To put it in another way, the obligation which the State owes the foreign national in this context ..... is to provide a system of justice which affords fair, equitable and non-discriminatory treatment."

This formulation entirely fails to take into account the consideration that it is the application of the system of justice in all the circumstances of the particular case which must be considered before a conclusion can be reached as to whether a denial of justice has been committed. Again, Professor Greenwood's statement, which follows immediately upon the passage from paragraph 23 of his Opinion which I have just cited, requires considerable qualification. Here, Professor Greenwood says:

> "So long as the system itself provides a sufficient guarantee of such treatment, the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal."

But surely if a situation arises, as in the Loewen case, where in practice the only means available to the foreign national for challenging the judgment of the trial court is to go bankrupt, there has been, even in Professor Greenwood's terms, a failure of the system. There is, in any event, a certain confusion in seeking to import into the definition of a "denial of justice" within the framework of Chapter Eleven of the NAFTA elements of the local remedies rule which, as Sir Robert Jennings points out, is simply not applicable to claims brought by an investor of a State party to NAFTA against a foreign State also party to NAFTA alleging that the foreign State is in breach of its Chapter Eleven obligations and has thereby caused injury to the investor.

There may be other procedural hurdles which an injured claimant/investor has to overcome in order to render his claim admissible under Chapter Eleven of NAFTA - for example, the requirement under Article 1118 to attempt to settle his claim through consultation and negotiation - but not the local remedies rule. In these circumstances, it is confusing, to put it at its lowest, to seek to make the exhaustion of local remedies an integral part of the concept of "denial of justice".

44. On the other hand, I do not dispute the point made in paragraph 29 of Professor Bilder's Opinion that "even though 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". It is precisely for this proposition inter alia that Loewen is contending in the present proceedings. In the context of the first section of this opinion devoted to the claim under Article 1102 of NAFTA, I have reviewed briefly the materials from the trial transcript and post-trial juror interviews which support and sustain the claimants' contention that the jury award in this case by way of punitive damages was clearly disproportionate, arbitrary and unreasonable, and, although the jury was not prepared to give much credence to the evidence of witnesses for the Loewen Group or for Loewen, could only have been motivated by race - or nationality - based discrimination in favour of a local Mississippi plaintiff and against a Canadian group attempting to enter into competition with that plaintiff in the State of Mississippi itself.

45. Professor Bilder also devotes part of his Opinion (paragraphs 33 to 35) to whether the failure by the trial court and Mississippi Supreme Court to waive or reduce the supersedeas bond in the Loewen case constitutes a further violation of

Article 1105 of NAFTA. Professor Bilder (in paragraph 33) argues that the refusal by the trial court and the Mississippi Supreme Court to waive or reduce 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". In purely abstract terms (and the phrase "in itself" proves that this is being presented as an abstract proposition), I would not take serious issue with the argument advanced. But what Loewen are in fact maintaining is that it was the failure of the trial court and the Mississippi Supreme Court to waive or reduce the massive supersedeas bond requirement in the Loewen case (it was $625 million dollars based upon the jury award of $500 million dollars, including $400 million dollars for punitive damages, the highest punitive damages award ever given in the State of Mississippi) which compounded the original "denial of justice" produced by the conduct of the trial in the trial court. In other words, although neither the trial court nor the Mississippi Supreme Court may, in failing to waive or reduce the massive supersedeas bond requirement in the Loewen case, have done so for the deliberate purpose of denying to the present Claimants a possibility of remedy through access to the appellate process, this was unquestionably the effect of their actions. Even one of the jurors in the Loewen trial in 1995 who voted unhesitatingly for the total award of $500 million dollars, revealed in her post-trial juror interview that, because of the amounts involved, she was not sure the jury verdict would stand (Akida Emir: see paragraph 27 above).

46. Earlier in this opinion, I drew attention to the terms of paragraph 1 of Article 31 of the Vienna Convention on the Law of Treaties and indicated that the "object and purpose" of a treaty might be revealed by a study of the preamble. In the case of NAFTA, however, the preamble does not shed too much light

on its object and purpose, particularly the object and purpose of Chapter Eleven on investment. The three Governments (of Canada, Mexico and the United States) do, however, in the preamble to NAFTA, express their resolve to:

> "Create an expanded and secure market for the goods and services produced in their territories;
>
> Reduce distortions to trade;
>
> Establish clear and mutually advantageous rules governing their trade;
>
> Ensure a predictable commercial framework for business planning and investment;"

The principal added value that these preambular paragraphs may have for the interpretation of the provisions of Chapter Eleven, and particularly of Article 1105, is that the reference to "a predictable commercial framework" for investment must surely embrace the non-discriminatory treatment by each Contracting Party of investors and their investments, whatever their nationality, and the application by each Contracting Party of "fair and equitable treatment and full protection and security" for the investments of investors of another Party in accordance with international law. The preamble to NAFTA does not unfortunately shed any further light on the meaning to be given to the phrases "fair and equitable treatment" and "full protection and security". On the other hand, Article 102 of the NAFTA, which expresses the objectives of the Agreement does contain certain provisions which enunciate the "object and purpose" of the NAFTA and which should be taken into account in interpreting and applying the substantive rules set out in Chapter Eleven. The relevant provisions in paragraph 1 of Article 102 are the following:

> "1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured nation treatment and transparency, are to:
>
> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
> (b) promote conditions of fair competition in the free trade area;
> (c) increase substantially investment opportunities in the territories of the Parties;
> (d) [irrelevant]
> (e) [irrelevant]
> (f) [irrelevant]"

Paragraph 2 of Article 102 completes paragraph 1 by requiring that:

> "2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

It is surely fair to conclude that, if the Parties have set as one of the objectives of NAFTA the need "to increase substantially investment opportunities in the territories of the Parties", they have equally accepted that that objective of a substantial increase in investment opportunities will only be achieved if the actual treatment accorded to a foreign investor and his investment is in full accordance with the "fair and equitable treatment" and "full protection and security" requirements set in Article 1105 of NAFTA. In the light of this stated objective of the Parties, it is not a question of a "minimum" standard of treatment but of a standard of treatment which is fully compatible with the notions of "fair and equitable treatment" and "full protection and security", so that the stated objective of a substantial increase in investment opportunities is met.

47. What further guidance can we get from the text of paragraph 1 of Article 31 of the Vienna Convention on the Law of Treaties? We are also directed, in the context of the interpretation of Article 1105, to two elements which form an integral part of the process of treaty interpretation:

(a) interpretation in good faith; and

(b) interpretation in accordance with the ordinary meaning to be given to Article 1105 in its context.

We shall consider these two elements separately.

48. Interpretation in good faith. It is interesting to note that the International Law Commission (ILC) which drew up the proposed text of what later became, virtually unchanged, Articles 31 and 32 of the Vienna Convention on the Law of Treaties, had this to say in its commentary on Article 31 as embodied in the final set of draft articles on the law of treaties which it submitted to the UN General Assembly in 1966:

> "When a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted": Yearbook of the International Law Commission (1966-II), p. 219.

In other words, the principle of effectiveness expressed in the maxim ut res magis valeat quam pereat is subsumed in the reference to "good faith" and "[the] object and purpose" of a treaty in paragraph 1 of Article 31: Sinclair, op. cit., p. 118. It will be recalled that Article 26 of the Vienna Convention on the Law of Treaties in terms re-states the rule pacta sunt servanda by providing that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". The ILC indeed

justify the inclusion of the "good faith" element in their proposal for what later became Article 26 of the Vienna Convention by recalling that the principle of interpretation in good faith "flows directly from the rule pacta sunt servanda": Yearbook of the International Law Commission (1966-II), p. 221. The late Mustafa Kamil Yasseen, who was Chairman of the Drafting Committee at the Vienna Conference on the Law of Treaties in 1968-9, has this to say in a course of lectures which he delivered at the Hague Academy of International Law in 1976:

> "The principle of good faith applies to the entire process of interpretation, including the examination of the text, the context and subsequent practice. In addition, the result obtained must be appreciated in good faith - that is to say, good faith as an objective criterion in the light of the particular circumstances, not good faith as an abstract notion": Yasseen, "L'interprétation des traités d'aprés la convention de vienne sur le droit des traités," 151 Recueil des Cours (1976-III), at pp. 22-3 (author's own translation).

In other words, the person most closely concerned with the formulation of the general rule of interpretation embodied in paragraph 1 of Article 31 of the Vienna Convention has personally stressed the significance of the reference to good faith in that provision by characterising good faith as "an objective criterion in the light of the particular circumstances not ..... as an abstract notion".

49. Interpretation in accordance with the ordinary meaning to be given to Article 1105 in its context.. The obligation binding upon all the Parties to NAFTA is to accord to investments of investors of another Party:

> ".... treatment in accordance with international law, including fair and equitable treatment and full protection and security."

What the Tribunal has to consider in the present case is whether the Claimants/Investors in the present case were accorded "fair and equitable treatment" and "full protection and security" (by definition forming an integral part of the concept "treatment in accordance with international law") during the course of the trial of the O'Keefe v. Loewen Group Inc. and Others case before the Hinds County Circuit Court of the State of Mississippi in 1995 and during the course of subsequent proceedings before that court and the Mississippi Supreme Court in an attempt to secure a waiver or reduction of the bonding requirement of $625 million dollars in order to be protected against execution by the then plaintiffs in the Mississippi proceedings. The determination as to whether the Claimants/Investors received such treatment in these proceedings has to be made by the Tribunal in the light of the totality of the evidence relating to the conduct of the trial and the subsequent proceedings. Although Article 1105 of the NAFTA bears the heading "Minimum Standard of Treatment", it is the language of Article 1105 itself rather than the language of its heading which has to be interpreted. The "minimum standard of treatment" to which reference is made in the heading to Article 1105 is the standard laid down in Article 1105 itself. Some confusion may have arisen from the fact that the term "minimum standard of treatment" was used in the past primarily in order to ensure that aliens present or resident in the territory of another State were so far as possible protected against physical harm. But in the early years of the twentieth century many Latin-American States complained that the "minimum standard of treatment" concept had been invoked as a ground for intervention in their internal affairs. The content of the traditional "minimum standard of treatment" concept is thus controversial, bearing in mind the circumstances in which it was first developed.

As a recent British authority puts it:

> "Some indeed have argued that the concept never involved a definite standard with a fixed content, but rather "a process of decision", a process which would involve an examination of the responsibility of the State for the injury to the alien in the light of the circumstances of the particular case": Malcolm Shaw, International Law, 4th Edn. (1997), pp. 570-1, citing the late Myres McDougal and Lillich.

50. If not much guidance is forthcoming from the early case-law relating to classic instances of denial of justice for the reasons given, what lessons can be learnt from much more recent case-law relating to the interpretation and application of Article 1105 (and indeed Articles 1102 and 1110) by other Arbitral Tribunals constituted under Chapter Eleven of NAFTA. The very first case brought before an Arbitral Tribunal constituted under Chapter Eleven of NAFTA in which the Claimants alleged violations of Articles 1105 and 1110 and which reached the stage of a final award on the merits is the case of Azinian v. United Mexican States (hereinafter cited as the "Azinian case"). The award, which was rendered in October, 1999, has been published in 39 ILM (2000), pp. 537-556. Briefly, this was a case brought by three United States citizens and shareholders of a Mexican corporate entity (DESONA) which had been the holder of a concession contract relating to waste collection and disposal in a suburb of Mexico City (Naucalpan), that concession contract having been annulled by the Naucalpan City Council shortly after it had been concluded.

Without going into all the procedural complications of the case, it is sufficient to recall at this stage the Arbitral Tribunal's finding on the alleged breaches of Article 1105 of NAFTA, leaving until Section III of this opinion the Arbitral Tribunal's conclusion on the alleged breach of Article 1110 of NAFTA. In dismissing

the argument of the Claimants supposedly based on Article 1105 of the NAFTA, the Arbitral Tribunal states:

> ".... it should be recalled that the Claimants originally grounded their claim on an alleged violation of Article 1105 as well as one of Article 1110. While they have never abandoned the ground of Article 1105, it figured very fleetingly in their later pleadings ..... This is hardly surprising. The only conceivably relevant substantive principle of Article 1105 is that a NAFTA investor should not be dealt with in a manner that contravenes international law. There has not been a claim of such a violation of international law other than the one more specifically covered by Article 1110": Award in the Azinian case, 39 ILM (2000), p. 551.

Clearly, the award in the Azinian case gives no guidance at all as to how Article 1105 should be interpreted and applied in the present case.

51. Nor does the interlocutory award of the Arbitral Tribunal constituted under Chapter Eleven of the NAFTA in the case of Waste Management v. Mexico. In this case, the Arbitral Tribunal, by a majority, held that it lacked jurisdiction to determine the merits of the dispute because the Claimants had not complied with the formal requirements of Article 1121 of NAFTA by failing to give the unqualified waiver required by Article 1121(2)(b) of NAFTA. Nonetheless, there are a few dicta in the Tribunal's interlocutory award in the Waste Management case which are relevant to the interpretation of Article 1105 of the NAFTA. The Claimants had in fact set forth their understanding of the scope of the waiver required by Article 1121 by including the following sentence in their notice of institution of arbitration proceedings dated 29 September, 1999:

> "Without derogating from the waiver required by NAFTA Article 1121, Claimants have set forth their understanding that the above waiver does not apply to any dispute settlement procedures involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico."

The Claimant had included this additional sentence in its formal Article 1121(2)(b) waiver because Waste Management had already instituted continuing proceedings against BANOBRAS before the Mexican courts involving claims for non-payment of invoices arising out of alleged breaches by BANOBRAS of a credit line agreement, proceedings which the plaintiffs were reluctant to discontinue. The majority of the Arbitral Tribunal justified their refusal to assume jurisdiction in this case for inter alia the following reasons:

> "(a) It is clear that one and the same measure may give rise to different types of claims in different courts or tribunals. Therefore, something that under Mexican legislation would constitute a series of breaches of contract expressed as non-payment of certain invoices, violation of exclusivity clauses in a concession agreement etc. could, under the NAFTA, be interpreted as a lack of fair and equitable treatment of a foreign investment by a government (Article 1105 of NAFTA) or as measures constituting "expropriation" under Article 1110 of the NAFTA."
>
> (b) ..... The term "alleged" ..... appearing in Article 1121 is clearly indicative of the framework within which we have to operate at this very early state of the arbitration proceedings, which means that the elements of comparison to be used at the time of verifying compliance with the waiver are the presumed or supposed violations of NAFTA invoked by the Claimant and the actions effectively in progress before other courts or tribunals at that time ..... It remains clear that at no time did Waste Management intend to abandon the domestic proceedings, rather, on the contrary, its manifest intention was to continue legal proceedings against BANOBRAS and ACAPULCO.....": 40 ILM (2001), pp. 67-8.

52. Rather more in the way of guidance as to the interpretation of Article 1105 of the NAFTA is given in the award of the Arbitral Tribunal constituted under Chapter Eleven of the NAFTA in the case of Metalclad Corp. v. Mexico. In this case, Metalclad, an enterprise of the United States, was alleging that Mexico, through its local governments of SLP [San Luis Potosi] and Guadalcazar, had interfered with its development and operation of a hazardous waste landfill, claiming that this

interference was in violation of the investment provisions of the NAFTA. In particular, Metalclad was alleging violations of Articles 1105 and 1110 of NAFTA.

53. In the proceedings before the Arbitral Tribunal, it emerged that COTERIN, a Mexican company which had been purchased by ECONSA, another Mexican corporation itself wholly owned by ECO (a Utah corporation), in turn wholly-owned by Metalclad (a Delaware corporation), was the owner of record of the landfill property as well as of the permits and licences involved in this dispute; it was indeed COTERIN which was the "enterprise" on whose behalf Metalclad had, as an "investor of a party" submitted its claim to arbitration under Article 1117 of NAFTA.

54. In 1990, the federal government of Mexico had authorized COTERIN to construct and operate a transfer station for hazardous waste in a valley located in Guadalcazar in the State of San Luis Potosi (SLP). On 23 January, 1992, the National Ecological Institute ("INE"), an independent sub-agency of the federal Secretariat of the Mexican Environment, National Resources and Fishing ("SEMARNAP") granted COTERIN a federal permit to construct a hazardous waste landfill at the chosen site. Three months after the issue of the federal construction permit, on 23 April, 1993, Metalclad entered into a 6-month option agreement to purchase COTERIN together with its permits, in order to build the hazardous waste landfill. Shortly thereafter, on 11 May, 1993, the government of SLP granted, subject to certain conditions, a state land use permit to construct the landfill. Metalclad asserts that it was told by the President of INE and the General Director of the Mexican Secretariat of Urban Development and Ecology ("SEDUE") that all necessary permits for the landfill had been issued with the exception of the federal permit for operation of the landfill. On 10 August, 1993, the INE granted COTERIN

the federal permit for operation of the landfill. On 10 September, 1993, Metalclad exercised its option and purchased COTERIN, the landfill site and the associated permits. Metalclad stated that it would not have exercised its COTERIN purchase option but for the apparent approval and support of the project by federal and state officials.

55. In May, 1994, believing that it had secured SLP's agreement to support the project, Metalclad began construction of the landfill after it had received an 18-month extension of the previously issued construction permit from the INE. Construction of the landfill proceeded openly and without interruption until October, 1994. Indeed, Federal officials and state representatives inspected the construction site during this period.

56. On 26 October, 1994, however, the Municipality of Guadalcavar ("Municipality") ordered the complete cessation of all building activities on the site, on the ground that a municipal construction permit had not been obtained. Accordingly, construction at the site was abruptly terminated, although it was resumed on 15 November, 1994, on which date Metalclad submitted to the Municipality an application for a municipal construction permit, having previously, so it asserts, received assurances from federal officials that it had all the authority needed to construct and operate the landfill, combined with advice from the same officials that it should nonetheless apply for a municipal construction permit to facilitate an amicable relationship with the Municipality. Metalclad also stated that federal officials assured it that the Municipality would issue the permit as a matter of course and indeed lacked any basis for denying the construction permit. Mexico, as

Respondent in the proceedings, denied that federal officials had given any such assurances.

57. Metalclad completed construction of the landfill in March, 1995, but its inauguration on 10 March, 1995, attended by a number of dignitaries from the United States and from Mexico's federal, state and local governments, was impeded by demonstrators.

58. Negotiations were thereupon engaged between Metalclad and Mexico, through two of SEMARNAP's independent sub-agencies. After a number of months, this resulted in an agreement ("Convenio") between the parties concluded on 25 November, 1995, which provided for and permitted operation of the landfill on certain additional conditions to be fulfilled by Metalclad.

59. According to Metalclad, SLP had been invited to participate in the negotiations, but had declined. The Governor of SLP denounced the "Convenio" shortly after it was publicly announced.

60. Only 10 days after the "Convenio" had been concluded, that is to say, on 5 December, 1995, and some thirteen months after Metalclad's application for the municipal construction permit had been filed, the Municipality turned down the application. In doing so, the Municipality recalled its decision to deny a construction permit to COTERIN in October 1991 and January 1992 and referred to the "impropriety" of Metalclad's construction of the landfill prior to receiving a municipal construction permit.

61. Metalclad complained inter alia that there was no evidence that the Municipality ever required or issued a municipal construction permit for any other construction project in Guadalcazar; and that there was no evidence that there was an established administrative process with respect to municipal construction permits in the Municipality of Guadalcazar. Furthermore, Metalclad had not been notified of the Town Council meeting where the permit application was discussed and rejected, nor was Metalclad given any opportunity to participate in that process nor to have the rejection of the request for a permit reconsidered.

62. Following proceedings instituted by the Municipality in the Mexican courts challenging SEMARNAP's dismissal of its complaint against the "Convenio", the Municipality succeeded, in 1996, in separate proceedings, in securing an injunction barring Metalclad from conducing any hazardous waste landfill operations. This injunction was only lifted in May, 1999, when the separate proceedings were dismissed.

63. Between May and December 1996, Metalclad and the State of SLP attempted without success to resolve their differences with respect to the landfill, and on 2 January, 1997, Metalclad instituted the present arbitral proceedings against Mexico under Chapter Eleven of NAFTA.

64. Finally, on 23 September, 1997, and three days before the expiry of his term of office, the Governor of SLP issued an Ecological Decree declaring a Natural Area for the protection of rare cactus, the Natural Area encompassing the area of the landfill. Metalclad relies in part on this Ecological Decree as an additional element in its claim of expropriation contrary to Article 1110 of NAFTA.

65. In ruling on the Applicable Law in the Metalclad case, the Arbitral Tribunal recalled that, under Article 1130 of the NAFTA, it must decide the issues in dispute "in accordance with NAFTA and applicable rules of international law". The award continues:

> "In addition, NAFTA Article 102(2) provides that the Agreement must be interpreted and applied in the light of its stated objectives and in accordance with applicable rules of international law. These objectives specifically include transparency and the substantial increase in investment opportunities in the territories of the Parties (NAFTA Article 102(1)(c).)": 40 ILM (2001) p. 45 (para. 70).

66. The Tribunal found that Metalclad's investment was not accorded fair and equitable treatment in accordance with international law, and that Mexico had violated NAFTA Article 1105(1) : para. 74 of the award. In explanation of this finding, the Tribunal stated:

> "An underlying objective of NAFTA is to promote and increase cross-border investment opportunities and secure the successful implementation of investment initiatives. (NAFTA Article 102(1))": 40 ILM, p. 47.

The Arbitral Tribunal's award in the Metalclad case thus supports a broad, rather than a narrow, interpretation of the term "fair and equitable treatment" in Article 1105 of NAFTA.

67. The final case to be considered in this context is that of S.D. Myers v. Government of Canada where an Arbitral Tribunal constituted under Chapter Eleven of NAFTA rendered a partial award on the merits on 13 November, 2000. In this arbitration, S.D. Myers, a United States corporation, claimed that it had suffered loss or damage as a result of one or more breaches by Canada of its obligations under Chapter Eleven of NAFTA.

68. The core business of the Myers company during the relevant period was PCB remediation - analysing equipment and oil to assess the level of contamination, the transportation of the oil or equipment to a facility, and the extraction of the PCBs from the materials so transported. "PCB" is an abbreviation for a highly toxic chemical substance used for insulation in electrical equipment and some other products. The usual technique for destroying PCBs is high-temperature incineration. Because of the highly toxic properties of PCBs, they have, since the early 1970s, been the subject of strict regulatory regimes, both in Canada and internationally. In the mid-1970s, and to give effect to an OECD Council Decision, the USA and Canada, together with other nations, banned the future production of PCBs and began to consider the best way of resolving the substantial environmental problem caused by existing PCBs.

69. The Canadian PCB Waste Export Regulations, 1990, effectively banned the export of PCB waste from Canada to all countries other than the USA; exports to the USA were permitted with the prior approval of the US Environmental Protection Agency. Similar regulatory controls were applied in the USA. In 1980, the USA closed its borders to the import and export of PCBs and PCB waste for disposal. Since then the US - Canadian border has been closed so far as PCBs are concerned. It was open to imports from Canada from 15 November, 1995 to 20 July, 1997.

70. In 1986, Canada and the USA concluded a Transboundary Agreement which contemplated the possibility of cross-border activity and the transboundary shipment of hazardous waste. During the arbitration, Canada took the position that this Agreement did not cover PCBs because PCB waste had never been classified as a

"hazardous waste" in the USA. Myers responded that under the terms of the Transboundary Agreement, it was not necessary for PCBs to be so classified.

71. In 1989, a number of countries including Canada signed the Basel Convention dealing with international traffic in PCBs and other hazardous wastes. The USA also signed the Basel Convention but had not ratified it by the time of the events under review in this arbitration. Amongst other things, the Basel Convention prohibits the export and import of hazardous wastes from and to States that are not party to the Convention, unless such movement is subject to bilateral, multilateral or regional agreements or arrangements embodying provisions not less stringent than those of the Basel Convention.

72. Before the Basel Convention came into force, a Canadian body (CCME), which included the Federal and provincial ministers responsible for the environment, agreed that the destruction of PCBs should be carried out to the maximum extent possible within Canadian borders. Simultaneously, Canada confirmed its policy that PCB wastes from Federal sites would not be exported for disposal in other countries.

73. This was the regulatory and policy background in 1990 when Myers began its efforts to obtain the necessary approvals to import electrical transformers and other equipment containing PCB wastes into the USA from Canada. By this time, Myers had become one of the leading operators in the PCB disposal industry in the USA. It had also expanded into Australia, Mexico and South Africa and was looking for other markets. Myers also possessed details of the inventory of PCBs in Canada because a computerised data-base was available. It felt it could compete successfully against the Canadian hazardous waste disposal industry which was virtually non-existent in 1990.

74. In 1993, Myers Canada was incorporated in Canada as a Canadian corporation. In 1993, it only had one competitor in Canada : Chem-Security, located in Alberta. The majority of the Canadian PCB inventory was located in Ontario and Quebec, so that Myers had a significant cost advantage over Chem-Security and indeed many of its US competitors.

75. Myers started a major lobbying campaign in Canada later in 1993 in an endeavour, through its employees and Myers Canada, to persuade Canadian PCB holders to have their PCBs remediated by Myers using its facilities in the USA.

76. On 26 October, 1995, the US Environmental Protection Agency (USEPA) issued an "Enforcement Discretion" to Myers, valid from 15 November, 1995, to 31 December, 1997, for the purpose of importing PCBs and PCB waste from Canada into the USA for disposal. The Tribunal accepted that Canadian Ministers and their officials were taken by surprise by the lack of government-to-government consultation before the USEPA took this decision, although being generally aware that it was likely to take action to open the border within a reasonably short period.

77. The effect of the "Enforcement Discretion" granted to Myers was that the USEPA would not enforce the US regulations banning importation of PCBs as against Myers, provided that Myers abided by the detailed conditions attached to the USEPA's 26 October, 1995, letter.

78. These developments gave rise to what the Tribunal terms "legitimate concerns" on the part of Canadian Ministers and officials. Among these concerns were the following:

(a) whether the "Enforcement Discretion" fully complied with US law;

(b) Whether exports of PCB wastes to the US, a non-party, would be compatible with Canadian obligations under the Basel Convention;

(c) Whether PCBs would be disposed of in the US in an environmentally sound manner;

(d) the effect upon Canada's 1989 policy to destroy Canadian PCBs in Canada;

(e) the long-term viability of domestic PCB disposal facilities; and

(f) what would happen if US disposal facilities subsequently became unavailable, or if the US border was closed again as eventually happened.

Simultaneously, the fledgling Canadian PCB disposal industry started a vigorous lobbying campaign to persuade Canada to maintain the closed status of the border.

79. The next development was that, on 20 November, 1995, the Canadian Minister of the Environment signed an Interim Order which had the effect of banning the export of PCBs from Canada. This Interim Order was approved by the Canadian Privy Council on 28 November, 1995. On 26 February, 1996, the Interim Order was turned into a Final Order banning the commercial export from Canada of PCB waste for disposal. In February, 1997, Canada opened the border by a further amendment to the PCB Waste Export Regulations. The border was accordingly closed for the cross-border movement of PCBs and PCB waste

by regulations introduced by Canada for a period of some 16 months, from 20 November, 1995, to February, 1997. Thereafter, the border was open, but only for a brief period, since it was closed again to PCBs and PCB wastes as a result of a decision of the Ninth Circuit of the US Court of Appeals.

80. In these proceedings, Myers alleged breaches by Canada of its obligations under Articles 1102, 1105, 1106 and 1110 of NAFTA. For the purposes of this Opinion, the alleged breaches of Canada's Article 1106 obligations can be ignored, and in this section I will deal only with the alleged breaches of Canada's Articles 1102 and 1105 obligations under NAFTA which are closely linked.

81. On the interpretation of NAFTA, the partial award in this case carefully reviewed the relevant positions. As regards the Myers complaint that Canada had breached its Article 1102 obligations by making the Interim Order, Canada had contended that the Interim Order was non-discriminatory in the sense that it ".... merely establishes a uniform regulatory régime under which all were treated equally". The Tribunal regarded this Canadian argument as "one-dimensional", and also maintained that it "does not take into account the basis on which the different interests in the industry were organized to undertake their business". The Tribunal recalled that Article 1102 referred to treatment that is accorded to a Party's own nationals "in like circumstances". The case-law on "like products" which had been developed by WTO dispute resolution panels and its appellate body emphasized that the interpretation of "like" must depend on all the circumstances of the case and the legal context in which the word "like" appears. The Tribunal in the Myers case concluded that, in considering the meaning of "like circumstances" in Article 1102 it is similarly necessary to keep in mind the overall legal context in which the word appears.

Myers had noted in its written pleadings that all three NAFTA partners belonged to the OECD. OECD practice suggested that an evaluation of "like situations" in the investment context should take into account policy objectives in determining whether enterprises are in like circumstances.

82. The Tribunal concluded (at para. 251 of the partial award) that Myers and Myers Canada were in "like circumstances" with Canadian operators such as Chem-Security and Cintec. They were all engaged in providing PCB waste remediation services. Myers was in a position to attract customers that might otherwise have gone to Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. That was why Chem-Security and Cintec had lobbied the Canadian Minister of the Environment to ban exports of PCBs when the US authorities opened the border.

83. The Tribunal also took the view that "protectionist intent is not necessarily decisive on its own" (para. 254):

> "The existence of an intent to favour nationals over non-nationals would not give rise to a breaching of [Article] 1102 of NAFTA if the measure in question were to produce no adverse effect on the non-national complainant" (ibid.).

Canada was concerned to ensure the economic strength of the Canadian industry, in part because it wanted to maintain the ability to process PCBs in Canada in the future. This was a legitimate goal.

> "..... but preventing [Myers] from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not [a legitimate way by which Canada could have achieved it]" (para. 255).

The Tribunal accordingly concluded that the issuance by Canada of the Interim Order and the Final Order was a breach of Article 1102 of NAFTA.

84. As regards the alleged breach of Article 1105, the Tribunal in the Myers case considered that:

> ".... a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case" (para. 263).

The Tribunal then cites with approval a passage from Dr. Mann's article on "British Treaties for the Promotion and Protection of Investments", first published in the 1981 issue of the British Year Book of International Law and later re-printed in Further Studies in International Law, published by Dr. Mann in 1990. The passage cited is the one where Dr. Mann submits:

> ".... that the right to fair and equitable treatment goes much further than the right to most-favoured-nation and to national treatment ..... So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that other provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty."

85. In this context, it is rather alarming to see in the US Counter-Memorial the late Dr. Mann included dismissively among "the few scholars" who contend that the requirement of "fair and equitable treatment" announces a new standard distinct from what is asserted to be the customary international law standard. The fact is that the late Dr. Francis Mann was not only a legal scholar of the highest distinction. He had been engaged full time in the practice of public and private international law in London as a partner (and eventually consultant) in the well-known firm of Messrs. Herbert Smith & Co for over 40 years. He was elected a member of the Institut de Droit International in 1979, and was made an honorary member of the American

Society of International Law in 1980. In that very year the late Lord Denning wrote of him:

> "Of all my learned friends, Francis Mann is the most learned of all" : Denning, Due Process of Law (1980), p. 4.

Dr. Mann also pleaded for Belgium before the International Court of Justice in the Barcelona Traction case, and, much later, for the Federal Republic of Germany in the Young Loan Arbitration. He was the first practising solicitor in England to be made an honorary Queen's Counsel (Q.C.) in 1991, which is a measure of his distinction. To refer to him, as the US Counter-Memorial does, as being simply a "scholar" obviously does much less than justice to his multifarious talents and achievements.

86. The Tribunal in the Myers case accordingly determined that, on the facts of that particular case, the breach of Article 1102 essentially established a breach of Article 1105 as well (para. 266). One of the three arbitrators (Mr. Chiasson) dissented on this point.

87. This brief review of the relevant case-law on the interpretation by Arbitral Tribunals under Chapter Eleven of NAFTA of Articles 1102 and 1105 of NAFTA does seem to lend support to the view expressed by Dr. Mann that the term "fair and equitable treatment" envisages conduct which goes beyond the traditional minimum standard and affords "protection to a greater extent and according to a much more objective standard than any previously employed form of words": Mann, Further Studies in International Law (1990), p. 258. The author continues:

> "A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously" : ibid.

88. It may be just worth adding that a recent scholarly analysis of the "fair and equitable treatment" standard in investment treaties bears out this conclusion. This is a lengthy (but clearly well-researched) article by Dr. Stephen Vasciannie which was published in the British Year Book of International Law (BYIL) for the year 1999 under the title "The Fair and Equitable Treatment Standard in International Investment Law and Practice". On the meaning of "fair and equitable treatment", Dr. Vascannie suggests that two different views have been expressed as to the meaning of "fair and equitable treatment" in investment relations:

> "One possible approach is that the term is to be given its plain meaning: hence, where a foreign investor has an assurance of treatment under this standard, a straightforward assessment is to be made whether particular treatment meted out to that investor is both "fair" and "equitable": Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice", 70 BYIL (1999), pp. 99-164 (at p.103).

The author concedes that "the plain meaning approach is not without its difficulties" since the words "fair" and "equitable" are "somewhat subjective and therefore lacking in precision" (ibid.). He also accepts that "the plain meaning approach presumes that, in each case, the question will be whether the foreign investor has been treated fairly and equitably, without reference to any technical understanding of the meaning of fair and equitable treatment" (loc. cit., at p. 104).

89. The second view as to the meaning of "fair and equitable treatment" is that it is "synonymous with the international minimum standard in international law" (ibid.). Dr. Vasciannie accepts that if this second view is correct, "some of the difficulties of interpretation inherent in the plain meaning approach may be overcome". As against this, he is careful to point out that "the approach which equates fair and equitable treatment with the international minimum standard is problematic in certain respects" (at p. 105). For one thing, most investment treaties or other instruments do not make a link between the two standards. For another thing, the international minimum standard, developed in the late nineteenth century and early twentieth century, has always been a controversial concept, Latin American countries in particular having had reservations as to whether this standard had become part of customary international law.

90. Dr. Vasciannie, after a lengthy analysis of the fair and equitable treatment standard in investment practice, seeks to assess that practice. He says:

> "One of the underlying trends evident in the foregoing analysis has been the increasing use of the fair and equitable standard in investment instruments in the post-war era. This trend reflects, in part, investor desire to have the safety net of fairness, in addition to assurances of national treatment and most-favoured-nation treatment. To some extent, however, it also reflects the general movement towards greater liberalization which has come to characterize international economic relations. Since the end of the 1970s ..... capital-importing countries as a group have adopted a more open attitude towards foreign investment in the last two decades. This opening-up has been accompanied by greater legal safeguards for foreign investors, including assurances of fairness and equity": loc.cit., at pp. 119-20.

He also notes that, by the beginning of the 1990s, over 300 bilateral investment treaties included the "fair and equitable treatment" standard, and that this number had increased considerably during the 1990s: loc.cit., at pp. 113-4. He also notes at p.127 (and this of particular interest in the context of the Loewen case under

consideration by the present Tribunal) that, in the Model Draft Treaty of April, 1994, prepared by the United States of America, Article II(3)(a) stipulates that:

> "Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law."

The author of this opinion would simply comment that this language appears to establish "fair and equitable treatment" as an independent standard which could afford greater protection to investors than treatment required by international law.

91. Another issue discussed by Dr. Vasciannie is whether the fair and equitable treatment standard is equivalent to the "international minimum standard" which forms part of the traditional law on protection of nationals. He draws attention inter alia to Dr. Asante's dissenting opinion in the ICSID case of AAPL v. Republic of Sri Lanka: 30 I.L.M. (1991), p. 628. Dr. Asante had expressed the view that Article 2(2) of the Sri Lanka/UK Agreement of 13 February, 1980, for the Promotion and Protection of Investments prescribed the general standard for the protection of foreign investment. The juxtapositon in that provision of the "fair and equitable treatment" standard with the requirement that investments should enjoy "full protection and security" seemed to him to mean that "fair and equitable treatment" is tantamount to the international minimum standard.

92. In the final analysis, however, Dr. Vasciannie, while conceding that the law on this point is characterized by a fair amount of contradiction and uncertainty, concludes that the "fair and equitable treatment" standard is not synonymous with the international minimum standard:

> "On the other hand, given the substantial volume of State practice incorporating the fair and equitable standard, it is noteworthy that the instances in which States have indicated or implied an equivalence between this standard and the international minimum standard are relatively sparse. Moreover, bearing in mind that the international minimum standard has itself been an issue of controversy between developed and developing States for a considerable period, it is unlikely that a majority of States would have accepted the idea that this standard is fully reflected in the fair and equitable standard without clear discussion. These considerations point ultimately towards the conclusion that the two standards in question are not identical .....
>
> Following Mann, where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable" : 70 BYIL (1999), p. 144.

93. It is evident that the attention of Arbitral Tribunals constituted under Chapter Eleven of NAFTA has until now been focussed on the "fair and equitable treatment" element of Article 1105(1) rather than the "full protection and security" element. In the present Loewen case, however, both elements are relevant.

94. There can be no doubt that, during the trial of the case of O'Keefe v. Loewen Group and Ray Loewen in the State of Mississippi in 1995, Loewen repeatedly drew to the attention of Judge Graves instances of the prejudicial and inflammatory tactics being pursued by counsel for O'Keefe, notably Willie Gary. Loewen unsuccessfully objected to Gary's efforts to prejudice the entire pool of prospective jurors at the outset of the case. Counsel for Loewen asked Judge Graves to remove a potential juror who stated that he could not give a foreign corporation a fair trial, so that Loewen had to use one of its limited peremptory challenges to secure his removal. The detailed instruction to the jury against bias proposed by Loewen (see Loewen Memorial, p.39) was rejected out of hand by Judge Graves, so that they were provided only with a generalised one-sentence instruction not to be influenced by bias, sympathy or prejudice rather than a more specific instruction drawn up to

address the heightened risk of improper nationality-based, racial and class bias in the light of the manner in which the trial had been conducted: Loewen Memorial, pp. 36-40, and Loewen Group's Submissions on U.S. Jurisdictional Objections, pp. 43-46.

95. The factual basis for the Claimant's contention in the present proceedings that the Loewen Group were not afforded "full protection and security" during the course of the proceedings before the Mississippi State Courts in 1995 is accordingly fully established. The failure of the trial judge to instruct Willie Gary at the very outset of the trial to refrain from appeals to prejudice based on nationality, race or class, and, if he failed to abide by the instruction, to declare a mis-trial, created the circumstances in which this manifest injustice occurred. The conduct of the trial in 1995 before the Hinds County Circuit Court in the State of Mississippi not only constituted a violation of the Claimants' right to "fair and equitable treatment", but also denied to the Claimants the "full protection and security" to which they were entitled under Article 1105(1) of NAFTA.

III The claim under Article 1110 of NAFTA and the issue of expropriation

96. I can be brief on the international law aspects of the claim under Article 1110 of NAFTA, considered in the light of all the circumstances of the Loewen case before the trial court and the Mississippi Supreme Court in 1995.

97. The U.S. Counter-Memorial takes the view that there is no support in international case-law for the proposition that a civil court judgment entering money damages against a foreign investor in a private dispute can constitute an expropriation. This misunderstands completely the nature of the Claimants' position on Article 1110 in the present proceedings. What Loewen is claiming is that "the excessive verdict, denial of appeal, and coerced settlement were tantamount to an

uncompensated expropriation in violation of Article 1110 of NAFTA" (Loewen Notice of Claim of 30 October, 1998, para. 162). In other words, it is the totality of the circumstances leading up to a situation in which the Mississippi courts effectively compelled Loewen to pay an excessive $175 million dollar settlement under extreme duress which constitutes the violation of Article 1110. That judicial actions can constitute expropriation of property attributable to the State of the Court is clear from the precedents analysed at paragraphs 225 to 230 of the Loewen Memorial.

98. There are three cases under Chapter Eleven of NAFTA which shed some light on the interpretation of Article 1110 of NAFTA. The first is Azinian v. Mexico (award at 39 ILM (2000), p. 537. In this case, the claimants were contending that annulment of a concession contract by the City Council (Ayuntamiento) of the town of Naucalpan was an act of expropriation in violation of Article 1110 of NAFTA. The Ayuntamiento believed it had grounds for holding the concession contract to be invalid, and these grounds were upheld by three levels of Mexican courts, the concession contract by its terms being subject to Mexican law and to the jurisdiction of the Mexican courts. As the Arbitral Tribunal maintains (loc. cit., at p. 551),

> "A governmental authority [in this case, the Ayuntamiento] surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level."

The Tribunal rightly goes on to state:

> "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellete jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty" : (loc. cit., at pp. 552 : emphasis in original).

The Tribunal then goes on to point out that the claimants in the proceedings under Chapter Eleven of NAFTA had raised no complaints against the Mexican courts. In particular, they had not alleged a denial of justice.

99. All this is quite sufficient to show that the Azinian case is clearly distinguishable from the present case where the Claimants have from the outset asserted breaches by the Mississippi state courts of Articles 1102, 1105 and 1110 of NAFTA arising out of events in the case of O'Keefe v. Loewen Group in 1995, amounting to a "denial of justice".

100. The second case is that of S.D. Myers v. Government of Canada (partial award rendered on 13 November, 2000). This case has already been reviewed in the context of Loewen's claim under Article 1105 of NAFTA at paragraphs 67 to 86 of this Opinion. The Arbitral Tribunal in its partial award in the Myers case states:

> "The term "expropriation" in Article 1110 must be interpreted in light of the whole body of State practice, treaties and judicial interpretation of that term in international law cases. In general, the term "expropriation" carries with it the connotation of a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the "taking". (at para. 280).

The partial award goes on to recall that the Interim Order and the Final Order (see paragraphs 70 to 73 of this Opinion) were regulatory acts that imposed restrictions on Myers, and comments:

> "The general body of precedent usually does not treat regulatory actions as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of NAFTA, although the Tribunal does not rule out that possibility" (at para. 281).

101. Myers had relied in argument:

> ".... on the use of the word "tantamount" in Article 1110(1) to extend the meaning of the expression "tantamount to expropriation" beyond the customary scope of the term "expropriation" under international law" (at para. 285).

But the Tribunal agreed with the conclusion in the Interim Award of the Pope and Talbot Arbitral Tribunal that the primary meaning of the word "tantamount" is "equivalent" and that something that is equivalent to something else cannot logically encompass more:

> "In common with the Pope and Talbot Tribunal, this Tribunal [the Myers Tribunal] considers that the drafters of the NAFTA intended the word "tantamount" to embrace the concept of so-called "creeping expropriation" rather than to expand the internationally accepted scope of the term expropriation" (at para. 286).

102. One may agree with the Arbitral Tribunal in the Myers case that regulatory action would not normally be regarded as amounting to expropriation. Nor indeed would the award of damages in a civil case normally be regarded as amounting to expropriation. But there is the exceptional case, such as the Loewen case, where it is the totality of the judicial acts in the State of Mississippi, namely, the grossly exaggerated and inflated award of damages in the trial court following a trial in which various incidents occurred amounting to a "denial of justice", the final refusal to reduce or waive the wholly excessive burden of a supersedeas bond in the sum of $625 million dollars in order to allow an appeal to be taken from the jury verdict, and the subsequent coerced settlement, which can be presented as an uncompensated "expropriation" of the assets of the Claimants, not in consequence of a legislative act, nor of the act of a regulatory body, but of acts of the judiciary in the State of

Mississippi constituting a cumulative denial of justice to the Claimants in violation of Articles 1102, 1105 and 1110 of NAFTA.

103. The third case is that of Metalclad v. Mexico which we have already considered in the context of the alleged breach of Article 1105 of the NAFTA: see paragraphs 52 to 66 of this Opinion. We now have to look at the reasoning of the Arbitral Tribunal in Metalclad as regards the allegation that Mexico was in violation of its Article 1110 obligations in its treatment of that corporation. The key elements in the thinking of the Arbitral Tribunal on this issue are to be found in paras. 103 and 104 of the award:

> "103. Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.
>
> 104. By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad [see paragraphs 50 to 56 of this Opinion] which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1)" : 40 I.L.M. (2001), p. 50.

104. It will be recalled that, three days before the expiry of his term of office, the Governor of SLP (San Luis Potosi) had issued an Ecological Decree declaring a Natural Area for the protection of rare cactus, the Natural Area encompassing the area of the landfill (see paragraph 58 of this Opinion). As regards this aspect of Metalclad's expropriation claim, the Arbitral Tribunal in Metalclad concluded:

> "The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's findings of a violation of NAFTA Article 1110(1). However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation" : loc. cit., at p. 51.

105. In the present case, the Claimants have pleaded that the Respondents are in breach of Article 1110 of NAFTA precisely because the settlement made by them with O'Keefe in the sum of $175 million dollars on 29 January, 1996, was made under extreme duress following the failure of the trial court and the Mississippi Supreme Court to waive or reduce the supersedeas bond in order to permit Loewen to pursue an appeal from the jury verdict. The claim under Article 1110 of the NAFTA is thus a claim which is consequential to the claims made by the Claimants based on conduct in violation of Articles 1102 and 1105 of NAFTA.

106. In Conclusion, I should indicate that I have seen, and entirely agree with, the opinions rendered by Sir Robert Jennings on the international law aspects of certain procedural issues raised in this case, notably the question of the applicability of the local remedies rule, and also of the substantive issues involved in the claims raised by the Claimants/Investors against the Respondent alleging violations by the latter of its obligations under Articles 1102, 1105 and 1110 of the NAFTA.

IV. Conclusions

1. The claim against the Respondents under Article 1102 of NAFTA is based primarily upon the conduct of the trial judge in the case of O'Keefe v. The Loewen Group and Others before the Hinds County Circuit Court of the State of Mississippi in 1995, in particular his failure to exercise sufficient control over counsel for O'Keefe by preventing them from making inflammatory and highly prejudicial

statements in the presence of the jury based upon the Canadian nationality, alleged racial bias and wealth of the Claimants in the present proceedings as compared with the Mississippi residence and United States nationality, combined with racial sympathies, of O'Keefe (paras. 8 to 20); but, to the extent that it is possible to treat the jury verdict as a separate "measure" within the meaning of Article 1101 of NAFTA, the Article 1102 claim is based secondarily upon the jury verdict, given the clear evidence that the jury in the O'Keefe case were improperly and prejudicially influenced by the constant efforts of counsel for O'Keefe to stir up nationalistic emotions and vent racial slurs against Ray Loewen and the Loewen Group. That clear evidence is contained in the Report on Post-Trial Juror Interviews and the records of particular post-trial juror interviews (paras. 21 to 33).

2. The same improper appeals to the jury as disfigured the main trial were made by counsel for O'Keefe in the brief hearing on punitive damages (para. 34).

3. The failure of the trial judge to control these repeated and consciously distorted appeals to the natural, if misguided, sympathies and emotions of the jury constitutes a clear violation by the Respondent of its obligation to accord non-discriminatory treatment under Article 1102 of the NAFTA to the Claimants in the present proceedings - that is to say treatment no less favourable than that it accords, in like circumstances, to its own investors (para. 35). The award of the Arbitral Tribunal in the Pope & Talbot case confirms that "no less favourable treatment" means the best treatment accorded to any investment of its own country (para. 36). That, in the Mississippi court proceedings, Loewen and O'Keefe were "in like circumstances" (because they were both competitors in the funeral homes business)

is consistent with the award in the Pope & Talbot case and the partial award in the Myers v. Government of Canada case (para. 37).

4. The claim against the Respondents under Article 1105 of NAFTA arises out of the totality of the circumstances surrounding the 1995 verdict and the subsequent inability of the Claimants in the present proceedings to secure a review of that verdict on appeal within the United States legal system. That inability was occasioned by the refusal of the trial court and the Mississippi Supreme Court to waive or reduce the amount of the bond ($625 million dollars) required under Mississippi law to preclude execution upon the final judgment of the trial court ($500 million dollars) pending the outcome of the appeal (para. 39).

5. NAFTA is a treaty of a somewhat special type in that it establishes rights capable of being invoked directly by individual investors of one State party making investments in the territory of another State party in respect of allegations that the latter State party has violated one or more of these rights, thereby causing injury to the investor and/or his investment (para. 40).

6. The basic rule of interpretation of treaties under the Vienna Convention on the Law of Treaties is to be found in Article 31(1) of the Convention, which is declaratory of customary international law. Ancillary or subsidiary rules which serve to give further content to the basic rule are to be found in later paragraphs of Article 31 (paras. 41 to 42).

7. The propositions put forward in paragraph 23 of the Greenwood Opinion are formulated at too high a level of abstraction, it being the application of the system of justice in all the circumstances of the particular case which requires consideration

before a conclusion can be reached on whether there has been a denial of justice in that case (para. 43).

8. By way of qualification to what is said in paragraphs 33 to 35 of the Bilder Opinion, the failure of the trial court and the Mississippi Supreme Court to waive or reduce the massive bond requirement required to preclude execution on the $500 million dollar jury award had the effect of denying to the Claimants a possibility of remedy through access to the appellate process, even if that might not have been the deliberate intent of the courts concerned (para. 45).

9. Although the preamble to NAFTA does not shed much light on the object and purpose of the Agreement in general and of Chapter Eleven of the Agreement in particular, Article 102 of the Agreement is significant from this point of view. By stating that one of the objectives of the Agreement in general is to "increase substantially investment opportunities in the territories of the Parties", the Parties must have equally accepted that that objective will only be achieved if the actual treatment accorded to a foreign investor and his investment is in full compliance with the "fair and equitable treatment" and "full protection and security" requirement set forth in Article 1105 of the NAFTA (para. 46).

10. The concept of interpretation "in good faith" incorporates the principle of effectiveness, and, according to the International Law Commission, flows directly from the rule pacta sunt servanda. There is strong authority for the view that good faith in this context means good faith as an objective criterion in the light of the particular circumstances, not good faith as an abstract notion (para. 48).

11. The concept of interpretation in accordance with the "ordinary meaning" to be given to the terms of Article 1105 of NAFTA in its context requires the Tribunal

to determine whether the Claimants in the present proceedings were accorded "fair and equitable treatment" and "full protection and security" during the course of the 1995 trial and the subsequent proceedings to secure a waiver or reduction of the bond requirement. That determination has to be made in the light of the totality of the evidence. It is not a question of determining what is the content of an asserted "minimum standard of treatment" in the light of arbitral awards made in the late nineteenth century or early twentieth century, but of seeing what guidance can be obtained from much more recent awards by arbitral tribunals constituted under Chapter Eleven of NAFTA (para. 49).

12. The award in the case of Azinian v. United Mexican States is relevant more for the interpretation of Article 1110 (see point 20 below) than for the interpretation of Article 1105 of NAFTA (para. 50).

13. The case of Waste Management v. Mexico was decided on the basis that the Tribunal lacked jurisdiction because the Claimants had not given the unqualified waiver required by Article 1121(2)(b) of NAFTA. The Tribunal did make it clear, however, that one and the same measure could be interpreted as a lack of fair and equitable treatment of a foreign investment under Article 1105 of NAFTA and/or as a measure constituting expropriation under Article 1110 of NAFTA (para. 51).

14. In Metalclad v. Mexico, the Tribunal determined that, in all the circumstances of the case, the refusal of the Municipality of Guadalcazar to grant to Metalclad a municipal construction permit for the construction and operation of a hazardous waste landfill amounted to a denial of fair and equitable treatment and accordingly ruled that Mexico had violated Article 1105. In doing so, the Tribunal

relied on Article 102(1) of NAFTA as an aid to the correct interpretation of Article 1105 (paras. 52 to 66).

15. The partial award in the case of S.D. Myers v. Government of Canada, in finding, on the particular facts of the case, that the breach by Canada of its obligations under Article 1102 of NAFTA essentially established a breach of Article 1105, cited with approval a passage from an article by Dr. Francis Mann in which the author contended that the right to fair and equitable treatment goes much further than the right to m.f.n. treatment and to national treatment, and that, in consequence, other provisions of the Agreements [in that particular context, bilateral agreements for the promotion and protection of investments] affording substantive protection may be no more than specific examples of this overriding duty (paras. 67 to 86).

16. Dr. Mann also expresses the view that, within the framework of its determination whether a claimant has been afforded fair and equitable treatment, a tribunal should not be concerned with a *minimum*, maximum or average standard. It has to decide whether in all the circumstances the conduct complained of is fair and equitable or unfair and inequitable (para. 87).

17. A very recent scholarly analysis in the British Year Book of International Law for 1999 on "The Fair and Equitable Treatment Standard in International Vestment Law and Practice" lends strong support to Dr. Mann's view that the fair and equitable treatment standard is not synonymous with the international *minimum* standard and is indeed an independent and autonomous standard (paras. 88 to 92).

18. There is no real discussion in any of the awards rendered by Arbitral Tribunals constituted under Chapter Eleven of NAFTA of the "full protection and security" element embodied in the text of Article 1105(1). However, the conduct of

Judge Graves at the trial in 1995 in (a) refusing to remove a potential juror who openly admitted that he could not give a foreign corporation a fair trial and (b) in rejecting a detailed, tailor-made instruction to the jury directing them that both parties in the case (Loewen and O'Keefe) stand equal before the law and are to be dealt with as equals, shows that the factual basis for the Claimant's contention in this case that their investment was not accorded full protection and security in the context of the 1995 proceedings is fully established (paras. 93 to 95).

19. The claim against the Respondents under Article 1110 of NAFTA is essentially that it is the totality of the circumstances leading up to a situation in which the Mississippi courts in effect compelled Loewen to pay an excessive $175 million settlement under extreme duress which constitutes an uncompensated expropriation in violation of Article 1110 of NAFTA (para. 97).

20. The award in the Azinian v. Mexico case, where the Arbitral Tribunal denied a claim to compensation for an alleged violation of Article 1110 is clearly distinguishable from the Loewen case, since, in Azinian the claimants had raised no complaints against the Mexican courts (paras. 98-99).

21. The partial award in the case of Myers v. Government of Canada did not rule out the possibility that regulatory action might amount to expropriation, although indicating that the general body of precedent did not support that conclusion. In common with the Pope and Talbot Tribunal, the Myers Tribunal considered that the drafters of NAFTA intended the word "tantamount" in Article 1110 to embrace the concept of "creeping" expropriation rather than to expand the internationally accepted scope of the term "expropriation". While agreeing with the Arbitral Tribunal in Myers that regulatory action would not normally be regarded as amounting to

expropriation and while equally accepting that the award of damages in a civil case would not normally be regarded as amounting to expropriation, there is the exceptional case such as Loewen where it is the totality of the judicial acts in the State of Mississippi culminating in the coerced settlement which can be characterised as an uncompensated "expropriation" of the assets of the Claimants (paras. 100-102).

22. In Metalclad v. Mexico, the Tribunal found that the Respondent Government was in breach of its obligations under Article 1110 of NAFTA, "expropriation" under NAFTA covering not only outright seizure of property, but also covert or incidental seizure of property; and that the Mexican Government, by permitting or tolerating the actions of Guadalcazar which the Tribunal had already determined to be in breach of Article 1105 and thus acquiescing in the denial to Metalclad of the right to operate the landfill, had taken a measure "tantamount" to expropriation within the meaning of Article 1110 of NAFTA (paras. 103 and 104).

23. In the instant case, the claim under Article 1110 is, in the light of all the relevant circumstances, a claim which is consequential to the claims under Articles 1102 and 1105 of NAFTA (para. 105).

Ian Sinclair

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9 May, 2001.