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State Responsibility for Denial of Substantive and Procedural Justice under NAFTA Chapter Eleven

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BY DON WALLACE, JR.*

Transcript of Remarks

Professor William S. Dodge (Moderator): We have four speakers this afternoon. The first of them is Professor Don Wallace, Jr. from Georgetown University Law Center. He is a professor there and also Chairman of the International Law Institute. He received his Bachelor's Degree from Yale and his Law Degree from Harvard. Professor Wallace is very well-known and very well-regarded in international law circles. He's a co-author of [a] prominent and well-respected casebook in international business transactions. He has been involved to some extent, I understand, in the Loewen case, which, I understand, he will speak about to some degree, and we're very pleased to have him with us today.

Professor Don Wallace, Jr.: Thank you very much, Bill.

Dan Price was on a program about maybe a month ago, and there were other people on the panel with him, and one of them said he was a "combatant," meaning he was involved in one of these cases. Well, I'm more of a camp-follower. I'm, actually . . . counsel and advisor to Jones, Day, Reavis & Pogue, which represents Loewen in the case which has been referred to, and [about] which I will not say much. I will not go into the facts at length, except occasionally, but it's summarized here [in the symposium conference program]. We're under sort of a gag order. The arbitrators in that case are a Canadian, a Messier Fortier, an American Judge Mikva, and the former Chief

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Justice of Australia, Anthony Mason, and he said the parties should not talk too much about this case, but, in point of fact, the government submissions are subject to [Freedom of Information Act] requests, [and can thus] come out, and so I'm authorized to speak. I said I was going to speak about denial of justice, both procedural and substantive, which is, in our view, one of the . . . major issues raised by this case.

First, a word about NAFTA itself. We've heard a great deal about it already. As Dan Price would know as well as anybody, Chapter Eleven of NAFTA is an unusual thing. It's really, I wouldn't call it a "marriage," and I'm not sure it's a carriage drawn by two horses, but it has two elements. One [is] the trade element, typified by the term "measures." The parties to NAFTA agree not to undertake certain measures, measures very broadly defined, and I think it's in Section 201, and I could read it if I had to. It's become relevant to the way the U.S. government, which is the defendant, is arguing the case. So . . . that's trade language.

And then . . . , as has been brought out, it also has the public international law investment protection language, in 1105, where it talks about . . . international treatment, and then in 1131, I think, where it talks about international law, and "this agreement will be governing." So, and people point out that investment has come together with trade, but I think there's a more profound element, which I tried to suggest in one of my questions, that, whatever you say about the technicalities of exhaustion versus non-exhaustion, my own view is certainly that of Professor Dodge and others, Mr. Price, that there is clearly no requirement of exhaustion of local remedies, because, in fact, 1121 talks about having to waive, just the opposite, having to waive. And, indeed, in the *Azinian* case, in paragraph 86, they say it wasn't fatal that they pursued local remedies for a while, this owner—just the opposite— . . . so exhaustion is out. But that's a profound thing, because it means that, in a sense, we're out of the diplomatic protection (exhaustion of remedies, espousal of the claimant's claim, rising to [the] international level). No, what we *are* is something else, but this is, of course, is the direct investor's right to bring an action against the state.

So you have trade language and [the] concept [of] public international law, . . . but the public international law . . . normally presupposes exhaustion and espousal, unless futile, espousal of remedies . . . . So that's sort of the background.

Second, the law in [the] case is . . . that, briefly, very briefly, Ray

Loewen, a Canadian from British Columbia, owing a . . . so-called "consolidator" of funeral homes company, proceeds all around Canada [and] the United States purchasing small—and they were small—funeral homes, comes to, whatever the town is, Biloxi, Mississippi. He already owns a funeral home, negotiates for a new one with Mr. O'Keefe, to buy . . . yet another small, family owned funeral home from Mr. O'Keefe, probably through one of his existing subsidiaries in Mississippi. The amounts of money to change hands net were about $1.5 million, running from Loewen to O'Keefe.

If there were a contract, and I don't, wouldn't admit it for a moment, and if there were a breach, and I wouldn't admit that for a moment, what could the damages be in breach of contract for $1.5 million net? A few hundred thou? But the jury, in its finite wisdom, came back with $500 million, and that's stated here [in the symposium conference program]. Loewen did seek to appeal, as, I think Dan [Price] mentioned. The trouble—and he went up to the Mississippi Supreme Court—and I can't go into all of the merits of this, of course—and the question was: What kind of a bond would he have to post in order to stay execution? That's the important thing because under . . . Mississippi law, . . . you have to post a bond to stay execution, not to appeal, and in his highly conceivably over-leveraged position, and we've stated this under oath, the bond would have cost him $200 million. And we tried to get the Mississippi court, in its discretion which it had, to reduce it. The max is 125%—it was mentioned before. It could have been 125% of the compensatory part, which is $24 million or $26 million, I can't remember. . . . I think the compensatory damages alone were $24 million or $26 million, on . . . I think . . . a few hundred thousand. Mental distress, which Mr. O'Keefe's family suffered, was $74 million, and then punitive damages [were] $400 million.

So here you have a vastly disproportionate award, and the way we looked at it was this way: disproportion is, in our view, a violation of basic justice notions. I'll come to the law in a moment. *Magna Carta*, in Article 20, not mentioned in our papers, says a disproportionate penalty is a basic violation of the law of the land. Here you had this violently disproportionate award, on the one hand, a few hundred thousand bucks, maybe, in dispute, as damages, [a] $500 million award, and $200 million to pursue your procedural remedy. So we said there was a denial of both, we *say* there's a denial of both substantive and procedural justice. [W]e also say there've been actions tantamount to an expropriation, [a] violation of national

treatment, [and a] failure to protect and give security. The investment provision requires, 1110, due process. There's also the language, which maybe someone can explain, there's "fair and equitable," you know, the whole lot of stuff, and we cite them all, but I'm just going to talk briefly about the denial of justice.

Now, . . . some people are shocked by this for lots of different reasons. [W]hat are going to do? Every time you're unhappy with American courts, you're going to go to the Court of . . . of North America called NAFTA? You know what I mean? Chapter Eleven? NAFTA? Or, gosh, we'd never intended it to apply to the United States as a defendant. An acquaintance of mine, . . . reckons . . . this place, this claim, with delight, I believe. He said, "We'll see what's going to happen." People say it could never have been applied, it could never been intended, in any of Chapter Eleven, that the judiciary as such . . . and we'll call it "the judiciary"—you could call it "the decision of this court;" you could call it, "the instruction of this judge;" you could call it what a friend of mine calls it, "the home cooking of Mississippi, the Southern states: high punitive damages," whatever . . . . We're not pinning ourselves down as we're talking about the court . . . system, but people have said, "How could a judicial system and juries act only on their judge's instructions?" Or you can take it away from a jury, you know, or you can enter a judgement notwithstanding the verdict, so this is judicial. I'm not going to just say it's juries, and there are endless things one could talk about.

It was kind of highly inflammatory, very anti-foreign. . . . Ray Loewen was compared to the Japanese attack on Pearl Harbor repeatedly to the jury. [How] can [we] try this case where we [have us], a foreigner, on the one hand, and then we have Mr. O'Keefe, . . . whose father was fighting against the "Japs" (quote unquote) at Pearl Harbor? They went on and on. They had posters in the town. They had a billboard [with] four flags—the Mississippi flag [and] the Confederate flag on one side, [and] the Canadian flag and the Japanese flag on the other—and Mr. Loewen's name in the middle. Only in America. That, by the way, is the basis of a national treatment claim . . . which we've made.

Now, . . . can the judiciary be engaged . . . as part of the state responsibility of the United States? Because, as I said, this is trade measures language on the one hand, public international law, state responsibility, on the other. My answer is, "Why not?"

Recently, in the Shrimp Turtle case, paragraph 173, the panel in

the Shrimp-Turtle case said, because of an action by the Court of International Trade, "[A] state responsibility is engaged by the actions of any of its agencies, including the judiciary." So, I don't think that is a question.

The question is: How does it work? ... I'm going to be quick here, and superficial. If... denial of justice can mean a grossly disproportionate result, criminal or civil, rendered by a court, if there's no question but that a court can be an instrumentality of the state which engages responsibility, talking about substantive denial of justice, or denial of substantive justice, how does it work? In other words, the way I put it in my notes is, "When does denial kick in?" In other words, do you start with the trial? You have to wait for the verdict or the judgement before you appeal? In other words, where along the way would the denial of justice engaging Chapter Eleven take place?

And I think the existing learning is irrelevant. The existing learning is about exhaustion of remedies... that you're going to have to exhaust remedies. You've got to go to finality. You don't have to exhaust remedies if it's futile. That's all, in my view, ancient history. That's before the flood. That's B.C.

So the question, really, it's a question in my view of, in a sense, of new impression. When does the denial of justice take place? In other words, we've seen you don't have to exhaust remedies, so, when does it happen? Does it happen when you get a sense that the judge isn't going to run a good trial? And that, of course, would lead to, "What's this going to be, the court of appeals... for North America, trying [cases] whenever you're unhappy with a judicial result?" That's certainly an issue.

I could spend a lot of time on the facts. We have as expert witnesses Larry Tribe and Charles Fried. They've given us affidavits on this to the effect that Loewen could not have effectively pursued remedies if he had chosen to exhaust, or, you know, go further—I wouldn't even use the word "exhaust," it's a misnomer—go further down the U.S. track to make it look more and more like a final judicial action. They say cert[iorari] never would have been granted. I think I agree, notwithstanding that Larry Tribe argued that it should be in *Pennzoil.* But then, that's Larry Tribe.

The United States has now come in with the opinion of another solicitor. We have Charles Fried, and they've come up with Drew Days, I think, on this issue. Another position which you could have [is] collateral attack;... you could go into... federal court and stay

the state proceedings. I think these are all Monday morning quarterbacking.

The third, which I find appalling, although apparently *Texaco* did it, [is that] the U[nited] S[tates] says, "Well, you could have gone into bankruptcy." "But of course," I said, "Ray Loewen was over-leveraged and wanted to be more and more leveraged. He was borrowing a great deal. And it's hard for me to think you could have conducted an aggressive investment campaign, albeit in small companies, if you were in Chapter Eleven." [So the] U.S. government says, "Well, sure, you know, it just is continuing operations." I don't think that's the kind of continuing operations that Chapter Eleven of the bankruptcy law contemplates. So . . . we take the position that he had no alternative.

And what we did was, confronted with this $500 million judgement, which, incidentally, reduced his share value—. . .the company was listed in New York and Toronto—by a half a billion the day that the word got out, he settled under duress. In other words, he felt he had no choice, and, clearly [there was a great deal of] economic pressure. . . . [H]e had to pay $200 million for a bond, non-refundable. . . . [I]t would have cost him $200 million, at least [according to] the calculations we have provided. He basically had no choice, and if you know the foreign compulsion [cases], [of] which there are not many . . . , jurisdictions come together. Compulsion does not have to be gunpoint. Duress does not have to be gunpoint. It can be economic, overweening pressure.

And, yes, the next day, you can say, "Well, you could have made a different decision," but he considered this very hard. They went back and forth for months in all this. I mean, Loewen didn't believe it. He thought his world was coming to an end. He just didn't believe it was possible that in the American [system], the famous American tendency to litigate and give big judgements could have reached this level. So he settled and, I think, Dan [Price] has already mentioned, or Bill [Dodge], that it was $175 million. In fact, it was to be paid out over a long period of time; part of it was stock, which, of course, went down in value. So . . . it was a lot of money.

Okay, so that's the situation. Now, and as I say, we have alleged both that the substantive result, to which we had to cave . . . under pressure, maybe paid $175 million, that number, to avoid . . . having a $500 million judgement levied on you . . . plus the bond, the cost of the bond, which we think is a denial of access. Someone read out before the definition of denial of justice, do you remember? All those

various things. And no one . . . really knows what denial of justice means. It probably means at least two things. For one, it's just a synonym for [a] violation of international law. That's what denial of justice means, just means a violation of state responsibility. But it also has this judicial flavor. And it's not really clear. It means both.

And, on this part of our claim, which is on the judicial side, we would say that this grossly disproportionate verdict, which, realistically speaking, we could not get out from under, and we had to settle for an enormous amount of money, is a denial of justice. And there are cases, there's a guy called Al Freeman I happen to know, [who] wrote an article long ago in the thirties on denial of justice, reciting the cases up to that point, disproportionate, typically criminal penalties, but also some civil cases, and this is punitive damages, by the way.

And then there's the procedural denial of justice. If it costs $200 million to essentially—what are the alternatives, go into bankruptcy? Why? Because you had a dispute with Mr. O'Keefe, who himself was on the verge of bankruptcy and was being investigated by the FBI and the State Insurance Commission because Funeral Homes tend to run insurance companies too, and that was part of the deal? But . . . you come into a situation, now, [and] I can see the arguments against it: "Well, gee, where does it stop? Does every misbehavior by the court system lead to this?"

Well, that's what judges are for, or maybe arbitrators without an appellate court. That's what dispute settlers are for, . . . case-by-case exercising judgement to see how you apply what are . . . , in my view, pretty clearly norms that are applicable to this fact situation, to see where they come out. If they do it, well, we've asked for $750 [million], I think, . . . plus interest. We show our calculation in our papers.

It's a very interesting case. It's a very interesting case. And, so that's essentially what the situation is. And I'd be happy to answer questions. . . . . I was told they would like to do this quickly, so I did it in fifteen minutes.

. . . .

Professor Dodge: Thank you for those very interesting remarks. I guess the first question raised in my mind is one that I might direct at Dan Price. Is a court judgment a "measure"? Chapter Eleven only applies to "measures," and Professor Wallace was raising that issue in

his remarks. Is a court judgement a "measure"?

Mr. Price: Again, I give you a personal view. The . . . the answer is yes, but it's going to take me a while to get there. What Don identified was that NAFTA brought together two cultures. One, a culture of investment negotiations and investment rules to which the concept of "measure," as a term, is alien. And on the other hand, it brought in the trade world, which has dealt with measures for a long time. In the investment world, the world from which I came to NAFTA, any action of any governmental authority—legislative, executive, or judicial—is subject to being tested against the disciplines and obligations of an investment agreement. Can the actions of the judiciary give rise to international liability under an investment agreement or under Chapter Eleven? Yes. So I would not say, as a jurisdictional matter, that actions by courts, or decisions by courts, are outside of the scope of governmental actions challengable under NAFTA. So I don't see this as jurisdictional.

Professor Wallace: I agree with that, of course. .... Dan mentioned jurisdiction. We have a memorial from the U.S. government . . . attacking the jurisdiction of ICSID along the lines that Dan implied. . . . I agree, certainly, [that] the NAFTA engages both the trade measures language and, of course, the traditional public international [aspect]. But even on the trade measures side, just parsing the words, 201 defines measures as . . . : "Measure includes"—this means "including, but not limited to," you know—"any law, regulation, procedure, requirement, or practice." Now, let me just make two verbal points, because the government, in its memo, in its memorial, has endless verbal parsing. First of all, the word "measures" is used ambiguously in NAFTA itself. There's a reference to intra-measures . . . in the intellectual chapter, which clearly contemplates [that] courts, furthermore, administrative agencies, as they endlessly say, the government, take measures. Administrative agencies make decisions. The word "decisions" is not in here. I mean, if administrative decisions are okay, why not judicial decisions?

Furthermore, it isn't limited to measures. If you look at . . . — this is a little bit on the, kind of, almost literary criticism side—105 says, "Parties shall ensure that all necessary measures are taken in order to give effect to the provisions, including their observance." Now, "measures . . . including their observance," there's a kind of a

tension in there, a kind of a verbal tension, "observance of measures" being different from "measures."

In the expropriation chapter, and . . . the Government goes on for pages on this, the U.S. government, it talks about expropriation, which is different from denial of justice, or measures tantamount thereto. In other words, "measures" is not that alpha and omega, you get me, of the obligations here. It's a word that's used a great deal, but, in terms of, if you really do a kind of a radioactivity analysis of the use of the language, it isn't . . . completely limited to "measures." But, as I say, since presumably administrative decisions and other decisions count, why not judicial ones? That's . . . purely on the . . . verbal side. Thank you.

Professor Dodge: I'm wondering if any of our other panelists have questions on . . . this case, or [if] members of the audience do?

(Unidentified audience member): [Question inaudible on recording.]

Professor Wallace: Well, I don't know, because, maybe you noticed, I, you remember, I asked Bill [dodge] how did res judicata work, because I didn't quite know, but I would have thought—I'm going to speak rather superficially now—let's accept the application of a doctrine of res judicata, which I don't fully understand, but in its totality, so we accept everything that the Mississippi courts did. Well, that's just a datum. It's the sum, it's the totality of everything that [the] Mississippi court did, accepting all, sort of like a motion to dismiss, you accept all the facts as they have found them. That's the violation.

In other words, everything that they did is the facts that you then compare [to], you hold up against, the international standard. So you know what I'm saying? They didn't . . . pass an international law. I don't think they could have. . . . [T]here were [just] endless requests for instructions and stuff like that, and we accept all of that. . . . . I mean, it was lunacy, it was a breach of contract case, and they thought they had unfair competition[, etc.], but let's [assume] we accept everything. They applied the Mississippi law as they found it. . . . [T]he facts were found as they were found. That is the wrong. . . . [T]hey've done our work for us. They've recorded what we challenge. I mean, that would be my superficial answer. Sure.

(Unidentified audience member): Imagine though that . . . there were two defendants in that case, and that both defendants [bore] liability. One defendant is an American company and one defendant's a Canadian.

Professor Wallace: Canadian, right.

(Unidentified audience member): The Canadian company, in your analysis, would be able to go to NAFTA to challenge the measure, and the American [would be] stuck [with] res judicata?

Professor Wallace: Well, . . . there were, in fact, several defendants. One was an American company and one was a Canadian, the parent. Well, I don't know. Is it joint and several liability, is it joint liability, is it several liability? In other words, that's all right. That doesn't bother at all. That goes back to Calvo. You see, that's why I was amused to get this, this wonderful discussion of ancient history . . . . Calvo said, "You come to Mexico, you're a Mexican." And the Mexicans said, and we, and the Mexicans, in effect, or Calvo . . . said, "We accept international law, but our international law is: you get treated no worse or no better than our own." But the minimum standard of the dirty capitalists in the north was: "Good, . . . but we're telling you that you have to meet a minimum standard." And it's the same thing here. An American company does not have the benefit of the minimum standard, and a foreigner does. That's what the Investment Chapter's all about. Foreigners get the benefit of a minimum standard, which may be higher than . . . national treatment, . . . etc. That's what international law in the investment protection area is. In fact, that is what it is, and that's what 1105 says. So there it is. . . .

Professor Dodge: . . . [T]his is harkening back to Mr. [Raymundo E.] Enriquez's point about whether an investment agreement ought to go beyond simply providing for national treatment, and, if I took his point correctly, he was saying it shouldn't. And if I take Professor Wallace's point, he's saying, I suppose, regardless of whether it should, it does.

Professor Wallace: It does. Yeah. That's my point. Yeah, I'm

not talking about the . . . philosophy or the justice of it. That is, . . . in fact this is what has happened on an overwhelming scale . . . . Look at Mexico negotiating the bits with everybody on the Mexican model, not on the German, Swiss, you know, whatever. There are thousands of these treaties today, and they all incorporate the . . . doctrine [of] prompt, adequate, and effective compensation, public purpose—that's the world.

. . . [J]ust to digress for a moment, I spend a lot of time working for developing countries. I work in Africa a lot. I think of Jesse Jackson, Jr., who says [to] keep the multinationals out, and the developing countries say, "Please bring them in, and we will give you a prompt, adequate, and effective standard to do so." That is what has happened. . . . That's the truth of it, and that's what NAFTA incorporates in these investment arrangements.

Professor Dodge: Mr.[Carlos] Garcia Fernandez, how does Mexico feel about the prospect of NAFTA tribunals being able to review Mexican court decisions to see whether they are denials of justice? How would Mexico feel about Loewen prevailing in this case? (And, of course, the case itself doesn't involve Mexico).

Mr. Fernandez: I think that it will be rather difficult for us to digest that piece of reflection because of the manner in which we have handled so far trying to strike a balance between, on the one hand—it was discussed some minutes ago . . . —the possibility of suing, [the] Mexican government being sued by foreigners because of any denial of justice or problem related to the measures (these are defined in NAFTA) for example, . . . and on the other hand, bringing the possibility for the Mexican state to have these two different scenarios which will not contradict each other. That means, if you are going to sue me, you have to make up your mind from the very beginning either to do that before my domestic courts and in my internal jurisdiction, and you will accept—even if you go to the very, very far [level of] recourse [for] this, which will be the Supreme Court [of] Mexico—the judgement by it, or, from the very beginning, you have to make up your mind in order to avoid forum shopping, and then [set out for] the arbitration schemes.

So, for these reasons, in order to avoid parallel proceedings, and by the end, assume the possible risk of getting contradictions between a judgement by, rendered by, a Mexican court, let's say, the supreme court, and the arbitral tribunal's award, I think that, for these, even

for these technical reasons, I don't see when—and I even brought my crystal ball with me and it doesn't say when—if possible, that could happen. I do not foresee that because of these technical reasons. . . .

Professor Dodge: Mr. [Joseph] de Pencier, how does Canada feel about having its court judgements reviewed?

Mr. de Pencier: . . . . In fact, in one of our cases, the *Sunbelt Water* case, where we have a notice of intent, the actions of the British Columbia Supreme Court are very directly implicated. And, so far, . . . the matter hasn't proceeded beyond [the] notice of intent stage, although there's some dispute about that. (We've received a document that purports to be a notice of arbitration, but there's a problematic waiver attached to it, so we're fighting about that.) But thus far, I think, our position has been that we don't take immediate objection to the fact that they are challenging an action of a British Columbia judge in his courtroom, and, as I say, that seems to be the heart of the claim. So, I suspect, if that matter does unfold, we are not going to fight it on that preliminary or jurisdictional point.

Professor Dodge: Maybe I can address another question to Professor Wallace. In the affidavit . . . of Sir Robert Jennings that's attached to the notice of claim, which is public, he states, as I understand it, that essentially the standard for denial of justice is that the judgement "shocks the conscience." And he certainly says it shocks his. Is that the standard, or can we flesh out the standard for denial of justice any further than that?

Professor Wallace: I know Robert Jennings quite well, and he has a very disciplined conscience, a very modest man, and . . . he said this case was so disproportionate as to be "bizarre." That's sort of an English understatement. I . . . think I suggested in my remarks what . . . a broad range of factual possibilities are engaged by . . . applying, "the denial of justice" to the operation of a domestic court system. So where you draw the line, I don't know. And remember, I ended my remarks by saying, well, we can trust the judgement of the deciders to case-by-case decide what is and what isn't.

. . . .

So I don't know what the answer is. I would say . . . let's step back for a moment and just look at Loewen. . . . [L]et's say there was

a contract and it was breached. The amounts—this is not in dispute—the amounts, the net amounts going from Loewen to O'Keefe, would have been $1.5 million because they were swapping a funeral home for an insurance company and stuff like . . . funeral insurance. And let say it's a breach of contract. What could the damages be? Expectancy damages, etc., on one point five? It could only be a few hundred thousand dollars. Now, . . . you have a legitimate damage award of a few hundred thousand—accepting my version—and you get $500 million because [of] an extremely clever lawyer arguing to a rather gullible jury . . . .

I think, by the way, that, if one looks at the . . . negotiating history of Chapter Eleven, . . . my impression is [that] you would not find in it any suggestion that such a possibility as engaging the judgement of a court is excluded. It's not excluded from "measures."

. . . .

If there is a court decision, or a court system, which allows punitive damages to be given in this way, where instructions are not given—[and] instructions were asked for, or course, endless instructions; [the judge] was asked for a judgment notwithstanding the verdict which . . . we wanted [because we wanted] to appeal [because] we couldn't pay [$200 million] for the bond—it seems to me this is about as beautiful a fact situation as you're going to have. [And] how much further down it would go? Would $400 million be as bad, if the bond only cost $100 million, . . . if the damages weren't a few hundred thousand, but . . . were $10 million? I don't know.

You're getting [the point of] this, of course. I mentioned due process in the expropriation part of NAFTA, in 1110, whatever it is. And, as you know, I think that in the *Gore*[1] case, . . . they didn't call it "cruel and unusual punishment," so they called it "due process," "grossly excessive." That case, by the way, came down [from] the Supreme Court after *O'Keefe*, so it wasn't around at the time, shortly after. I think I'm right about that. I mean, if I were sitting as an arbitrator, sitting as an ICSID arbitrator, I could bring myself . . . to find it here, and not elsewhere . . . .

Now, the U.S. government's fearing this, and, sensing this possibility, is fighting like hell to get it thrown out on jurisdictional grounds. But, when you look at their jurisdictional objections, which go on for probably a hundred pages, they're awfully meritorious to me, you know. They're caught up in fact-determined questions and

1. BMW of N. America, Inc. v. Gore, 517 U.S. 559 (1996).

stuff like that, because they're basically saying, "This can in no way be a measure that engages the state responsibility of the United States." Now, that's the easy way for us to put it. We say, "in no way," which is not to say we know where you would draw the line . . . .

Professor Dodge: Mr. Price?

Mr. Price: Two observations, one with respect to denial of justice. And I come back to something [Professor] Joel [R. Paul] said . . . . There're two different rubrics for denial of justice in our discussion here. One is where denial of justice is your primary claim, where the essence of your complaint is that the judiciary hurt you in a way contrary to international law norms. The other, which was adverted to during the discussion of Calvo and also raised by Joel's remarks, is when you take some other dispute and expro[priation] claim, a claim that the transfers provisions weren't honored or that national treatment was denied. You take that to the local courts, and you don't like the result, and I think what the *Azinian* panel was saying, and what our colleague from Mexico was saying, was that take all of the protections of NAFTA, and collapse them to denial of justice, because what we invite you to do is go to local court, test your substantive claim, and if you're dissatisfied with it, then bring a second claim before a NAFTA panel, which claim is the denial of justice. And I think this second reading of the norm of denial of justice is erroneous and dangerous, because it collapses all of the fairly carefully elaborated protections of the treaty down to one. Observation number one.

Observation number two. What's troubling about Loewen to many people is the idea that a NAFTA tribunal will subvert a fundamental political choice, even if that political choice is irrational. Lots of people think our punitive damages system is crazy . . . . And there's tort reform, and there're legislative initiatives, but, in any event, that's our system. And people ask, "Was it really intended that three panelists, unaccountable to a domestic political system, pass on such a fundamental choice?" And, you know, I don't know what the correct answer to that is. I mean, I have my own view, but that, I think we have to acknowledge, is the troubling prospect of Loewen, together with that identified by the Justice Department, which is that any dissatisfied litigant in a dispute in court between private parties will have a second avenue of appeal.

. . . .

Professor Wallace: You know, I agree with everything. "Agree" is the wrong word, but I understand everything that Dan said. In law school, I occasionally make a distinction between poetry and law, and here I'd make one between politics and policy on the one hand, and law [on the other]. That may very well be the political reality, but these are three lawyers sitting as arbitrators, having to apply a legal instrument, namely the North American Free Trade Agreement, to a case that has been brought to them. The fact [is] that the negotiators put into—and it's more than negotiators—the fact [is] that these three governments have subscribed to something which, in retrospect, they [may] find embarrassing....

Take the regulatory side, which we're going to get to in a few moments. I mean, EPA is squirming, the... environmentalists are squirming, a lot of people are uncomfortable with this, and maybe we have to amend this. I wonder, however, whether the United States would like to amend an investment protection provision when we spent the last thirty or forty years promoting them all over the world to protect our investors.

I admit it's difficult, but if you are sitting as a lawyer, you have a duty to the law, not to politics. That's why I'm a conservative who believes in judicial restraint, whatever that may mean. If I was an arbitrator—and, as I say, I sit as an arbitrator in cases—I'm going to do my duty in the light of the law, not in the light of the embarrassment it causes to a government. And then, if needs be, change it.

Professor Dodge: Mr. de Pencier, then Mr. [Clyde] Pearce, and then I think we need to move on.

Mr. de Pencier: Well, I would just say, in partial answer to the people who are troubled by the notion of ad hoc appointed arbitrators who are doing the work of judges, is that qualitatively [are they] any better or worse than ad hoc appointed arbitrators reviewing the work of elected parliaments or legislatures? I'm not sure it's really any different in kind at all, and any more or less objectionable.

Professor Dodge: Mr. Pearce?

Mr. Pearce: Sometimes I think we succumb to some of the

concepts that seem to distance us politically or governmentally from certain decisions. There are always those afraid of international agreements because they claim that they are seeding sovereignty, and, I guess what they're doing is exercising sovereignty to engage in this agreement. I think that I would like to suggest that the decision is not free of political consequences. Or certainly, at least in this country, if they don't like the kind of decision that may be reached by an international tribunal in Loewen, you can guarantee that there will be a move in Congress to repeal NAFTA, or to withdraw from it. So these are the very things, then, that the political leaders would consider in terms of either accepting or rejecting the treaty that they have engaged in.