The Loewen Group, Inc. and Raymond L. Loewen

v

United States of America

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

Decision on hearing of Respondent's objection to competence and jurisdiction

I. INTRODUCTION

1. This dispute arises out of litigation brought against the first Claimant, the Loewen Group, Inc ('TLGI') and Loewen Group International, Inc ('LGII'), its principal United States subsidiary, in Mississippi State Court by Jeremiah O'Keefe Sr., his son and various companies owned by the O'Keefe family (collectively called 'O'Keefe'). The litigation arose out of a commercial dispute between O'Keefe and the Loewen companies which are competitors in the funeral home and funeral insurance business in Mississippi. The dispute concerned three contracts between O'Keefe and the Loewen companies said to be valued by O'Keefe at $980,000 and an exchange of two O'Keefe funeral homes said to be worth $2.5 million for a Loewen insurance company worth $4 million approximately.

2. The Mississippi jury awarded O'Keefe $500 million damages, including $75 million damages for emotional distress and $400 million punitive damages. The verdict was the outcome of a seven-week trial in which, according to the Claimants, the trial judge repeatedly allowed O'Keefe's attorneys to make extensive irrelevant and highly prejudicial references (i) to the Claimants' foreign nationality (which was contrasted to O'Keefe's Mississippi roots); (ii) race-based distinctions between O'Keefe and the Loewen companies; and (iii) class-based distinctions between the Loewen companies (which were portrayed as large wealthy corporations) and O'Keefe (who was portrayed as running family-owned businesses). Further, according to the Claimants, after permitting those references, the trial judge refused to give an instruction to the jury stating clearly that nationality-based, racial and class-based discrimination was impermissible.

3. The Loewen companies sought to appeal the $500 million verdict and judgment but were confronted with the application of an appellate bond requirement. Mississippi law requires an appeal bond for 125% of the

judgment, but allows the bond to be reduced or dispensed with for 'good cause'.

4. Despite the Claimants' claim that there was good cause to reduce the appeal bond, the Mississippi Supreme Court refused to reduce the appeal bond at all and required the Loewen companies to post a $625 million bond within seven days in order to pursue its appeal without facing immediate execution of the judgment. According to the Claimants, that decision effectively foreclosed the Loewen companies' appeal rights.

5. The Claimants allege that the Loewen companies were then forced to settle the case 'under extreme duress'. Other alternatives to settlement were said to be catastrophic and/or unavailable. On January 29, 1996, with execution against their Mississippi assets scheduled to start the next day, the Loewen companies entered into a settlement with O'Keefe under which they agreed to pay $175 million.

6. In this claim the Claimants seek compensation for damage inflicted upon TLGI and LGII and for damage to the second Claimant's interests as a direct result of alleged violations of Chapter Eleven of the North American Free Trade Agreement ('NAFTA') committed primarily by the State of Mississippi in the course of the litigation.

II. THE PARTIES

7. The first Claimant TLGI is a Canadian corporation which carries on business in Canada and the United States. The second Claimant is Raymond Loewen, a Canadian citizen who was the founder of TLGI and its principal shareholder and chief executive officer.

8. Raymond Loewen submits his claim as 'the investor of a party' on behalf of TLGI under NAFTA, Article 1117.

9. In these proceedings, until June 1, 1999 the Claimants were represented and from that date the first Claimant has been represented by:

Mr Christopher F. Dugan	Jones, Day, Reavis & Pogue
Mr James A. Wilderotter	Jones, Day, Reavis & Pogue
Mr Gregory A. Castanias	Jones, Day, Reavis & Pogue

From June 21, 1999 the second Claimant has been represented by:

Mr John H. Lewis, Jr.	Montgomery, McCracken, Walker & Rhoads

10. The Respondent is the Government of the United States of America. It has been represented by:

Mr Kenneth L. Doroshow	U.S. Department of Justice
Mr Mark A. Clodfelter	U.S. Department of State
Mr Barton Legum	U.S. Department of State

11. The Government of Canada on September 7, 2000 and the Government of Mexico on September 7, 2000 gave written notice of their intention to attend the hearing on competence and jurisdiction.

12. Canada has been represented by:
Mr Fulvio Fracassi, Department of Foreign Affairs and International Trade, Ottawa, Canada

13. Mexico has been represented by:
Mr Hugo Perezcano Díaz, Secretaría de Commercio y Fomento Industrial (SECOFI), Mexico City, Mexico

III. PROCEDURAL HISTORY

14. On July 29, 1998 the Claimants delivered to the Respondent a Notice of Intent to Submit a Claim to Arbitration in accordance with NAFTA, Article 1119. On October 30, 1999 the Claimants delivered to the Respondent a written consent and waiver in compliance with NAFTA, Article 1121(2)(a) and (b).

15. On July 29, 1998, and pursuant to NAFTA, Article 1120, the Claimants filed their Notice of Claim with the International Centre for Settlement of Investment Disputes ('ICSID') and requested the Secretary-General of ICSID to approve and register its application and to permit access to the ICSID Additional Facility.

16. On November 19, 1998, the Secretary-General of ICSID informed the parties that the requirements of Article 4(2) of the ICSID Additional Facility Rules had been fulfilled and that the Claimants' access to the Additional Facility was approved. The Secretary-General of ICSID issued a Certificate of Registration of the Notice of Claim on the same day.

17. On March 17, 1999 the Tribunal was constituted. The Secretary-General of ICSID informed the parties that the Tribunal was 'deemed to have been constituted and the proceedings to have begun' on March 17, 1999, and that Ms Margrete Stevens, ICSID, would serve as Secretary of the Tribunal. All subsequent written communications between the Tribunal and the parties were made through the ICSID Secretariat.

18. On April 6, 1999, the Respondent filed an objection that the dispute is not within the competence of the Tribunal. The Respondent requested that the objection be dealt with by the Tribunal as a preliminary question and that the parties be given an opportunity to brief the issue in accordance with a separate schedule pursuant to Article 38 of the Additional Facility Rules.

19. The first session of the Tribunal was held, with the parties' agreement, in Washington D.C. on May 18, 1999. In accordance with Article 21 of the ICSID Arbitration (Additional Facility) Rules ('the Rules'), the Tribunal determined, with the agreement of the parties, that the place of arbitration would be Washington D.C.

20. The President noted the parties' agreement that the quorum for sittings of the Tribunal would be constituted by all three of its members. It was also noted that the Tribunal could take decisions by correspondence among its members, or by any other appropriate means of communication, provided that all members were consulted. Decisions of the Tribunal would be taken by the majority of its members.

21. The Tribunal made the following orders:

(1) The Claimants to file their memorial by Monday, July 19, 1999.

(2) Respondent to file its memorial on competence and jurisdiction, if any, stating the grounds of its objection, by Wednesday, August 18, 1999.

(3) Following receipt of the Respondent's memorial on competence and jurisdiction, if any, the Tribunal will rule whether the objection to jurisdiction and competence will be determined as a preliminary matter or joined to the merits of the dispute. The Tribunal reserves the right to call for a written response from the Claimants before giving its decision on the question whether competence and jurisdiction will be determined as a preliminary matter or otherwise.

(4) The Respondent to file its counter-memorial on the merits within 60 days after either the Respondent's not filing a memorial on competence and jurisdiction within the time limited or the Tribunal's determination that the objection to jurisdiction and competence shall be joined to the merits.

(5) Having regard to the statement made by the Claimants' counsel the Respondent shall be entitled to reasonable discovery within the time limit for the filing of its counter-memorial but that entitlement shall be exercised only for the purpose of the Respondent formulating its memorial on jurisdiction and competence and its counter-memorial.

22. On July 6, 1999 the Tribunal confirmed that, by subsequent agreement of the parties,

(1) the Claimants were to file their memorial by Monday, October 18, 1999; and

(2) the Respondent was to file its memorial on jurisdiction and competence, if any, by Friday, December 18, 1999.

23. Each Claimant through its attorneys has filed its own memorial, written submission and final submission on competence and jurisdiction, and has made its own submissions.

24. On May 26, 1999, the Respondent requested that all filings in this matter, not excluding the minutes of proceedings, be treated as open and available to the public. The Claimants agreed that the minutes and other filings should be publicly available but only after the matter is concluded.

25. On September 28, 1999, the Tribunal delivered its Decision on the Respondent's request for a ruling on disclosure. By its Decision the Tribunal noted that Article 44(2) of the ICSID Additional Facility Arbitration Rules provides that the minutes kept of all hearings pursuant to Article 44(1) 'shall not be published without the consent of the parties'. The Tribunal pointed out that this prohibition is primarily directed to the Tribunal but was understood in the *Metalclad* Arbitration (ICSID Case ARB(AF)/97/1) Decision as being directed to the parties as well. The Tribunal went on to deny the Respondent's request to the extent that it sought to bring about a situation in which the Tribunal or the Secretariat makes available to the public all filings in this case.

26. In its Decision the Tribunal rejected the Claimants' submission that each party is under a general obligation of confidentiality in relation to the proceedings. The Tribunal stated that in an arbitration under NAFTA, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties, the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs. The Decision concluded by repeating the comment made by the *Metalclad* Tribunal, namely that it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings the parties were to limit public discussion to what is considered necessary.

27. On November 1, 1999, the Respondent requested a further extension of time until February 18, 2000, within which to file its memorial on competence and jurisdiction. The request, which was opposed by the Claimants, was granted by the Tribunal on December 9, 1999. At the same time the Tribunal dealt with an application by the Respondent for further and better discovery. While rejecting the Respondent's submission that there had been a waiver by the Claimants of attorney-client privilege, the Tribunal ordered that the Respondent was entitled to discovery of the attorney-client communications of the Claimants or either of them relating directly to the issue of duress.

28. On February 14, 2000, the first Claimant sought clarification of the Tribunal's Decision of September 28, 1999, relating to confidentiality. The request followed the release by the Respondent on January 10, 2000 of materials relating to the arbitration, including 'the minutes of the May 18, 1999 hearing before the Tribunal as well as the audio recording of that hearing'. The Respondent interpreted the Decision as merely limiting the right of the Tribunal or the Secretariat to release information, not the right of the parties themselves to release information. On the other hand, the first Claimant interpreted the Decision as restricting the right of the parties to disclose minutes and related material. By its Decision on June 2, 2000 the Tribunal affirmed the correctness of the first Claimant's interpretation of the Decision on September 28, 1999, stating that the Convention and the Rules prohibit publication by the Tribunal and the parties of the minutes and a full record of the hearing and any order made by the Tribunal. However, the Decision of

June 2, 2000 stated that neither it nor the earlier Decision was intended to affect or qualify, or could affect or qualify, any statute-imposed obligation of disclosure by which any party to the arbitration might be bound.

29. By its Decision of June 2, 2000, the Tribunal also dealt with an application by the Respondent for further and better discovery, in particular relating to documents and information reflecting the advice and conclusions of the Claimants and their advisers during the Mississippi proceedings concerning alternatives to settlement of the Mississippi litigation. The Tribunal ordered the Claimants to produce all information in the possession of the Claimants, their counsel or others who acted on their behalf that relates directly to the question whether Loewen had alternatives to entering into the Mississippi settlement. The Tribunal stated that information ordered to be produced should include commitments from lenders for financing the Loewen Group's ongoing operations in anticipation of the possible reorganization filing and draft petitions for the purpose of seeking possible relief from the Mississippi Supreme Court's bonding decision in the US federal courts and the Supreme Court. The documents were to be produced within twenty-one (21) days of June 2, 2000.

IV. THE NATURE OF THE CLAIMANTS' CLAIM

30. The Claimants' case is that

(i) the trial court, by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, violated Article 1102 of NAFTA which bars discrimination against foreign investors and their investments;

(ii) the discrimination tainted the inexplicably large verdict;

(iii) the trial court, by permitting extensive nationality-based, racial and class-based testimony and counsel comments, violated Article 1105 of NAFTA which imposes a minimum standard of treatment for investments of foreign investors;

(iv) the excessive verdict and judgment (even apart from the discrimination) violated Article 1105;

(v) the Mississippi courts' arbitrary application of the bonding requirement violated Article 1105; and

(vi) the discriminatory conduct, the excessive verdict, the denial of the Loewen companies' right to appeal and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated appropriation of investments of foreign investors.

31. The Claimants allege that the Respondent is liable for Mississippi's NAFTA breaches under Article 105, which requires that the Parties to NAFTA shall ensure that all necessary measures are taken to give effect to the provisions of the Agreement, including their observance by State and provincial governments. The Claimants also allege that, by tolerating the misconduct which occurred during the O'Keefe litigation, the Respondent directly breached Article 1105, which imposes affirmative duties on the Respondent to provide 'full protection and security' to investments of foreign investors, including 'full protection and security' against third-party misconduct.

V. THE RESPONDENT'S OBJECTION TO COMPETENCE AND JURISDICTION

32. By its Memorial on Competence and Jurisdiction, the Respondent objected to the competence and jurisdiction of this Tribunal on the following grounds:

(i) the claim is not arbitrable because the judgments of domestic courts in purely private disputes are not 'measures adopted or maintained by a Party' within the scope of NAFTA Chapter II;

(ii) the Mississippi court judgments complained of are not 'measures adopted or maintained by a Party' and cannot give rise to a breach of Chapter Eleven as a matter of law because they were not final acts of the United States judicial system;

(iii) a private agreement to settle a litigation matter out of court is not a government 'measure' within the scope of NAFTA Chapter II;

(iv) the Mississippi trial court's alleged failure to protect against the alien-based, racial and class-based references cannot be a 'measure' because Loewen never objected to such references during the trial; and

(v) Raymond Loewen's Article 1117 claims should be dismissed because he does not 'own or control' the enterprise at issue.

33. Each of the Claimants filed submissions in answer to the Respondent's objections contesting each of the grounds of objection advanced by the Respondent. The Respondent filed its final submissions in reply. The Claimants then filed submissions in response.

34. The hearing on the Respondent's objection to competence and jurisdiction took place in Washington D.C. on September 20, 21 and 22, 2000.

35. After the conclusion of the oral hearing, pursuant to an order made by the Tribunal, the Government of Mexico filed, on October 16, 2000, submissions concerning certain matters of interpretation of NAFTA which addressed the effect of Article 1121, the meaning of the word 'measure', the rights of an investor to advance a claim under Article 1117 and the decisions in *Azinian v United Mexican States* Case No. ARB(AF)/97/2; 14 ICSID Review-FILJ 538 and *Metalclad v United Mexican States* Case No. ARB(AF) 97/1 which were referred to in oral argument by the disputing parties.

36. The disputing parties responded to Mexico's submission by filing written submissions pursuant to the order made by the Tribunal at the conclusion of the oral hearing on September 22, 2000. It will be convenient to refer to Mexico's submissions when we consider the Respondent's grounds of objection.

37. In determining the Respondent's objection, it is proper to look at the Claimants' notice of claim for it is by the Notice of Claim itself and the request for arbitration that the Claimants submit their claim to arbitration under Articles 1116 and 1117 of NAFTA. It has not been suggested that there is in this case any material difference between the nature of the claim formulated in the Notice of Claim and that formulated in the Memorials filed by the Claimants.

38. No distinction has been drawn in the submissions of the disputing parties between the concepts of competence and jurisdiction. The ICSID Arbitration (Additional Facility) Rules make specific provision for objections to 'competence' (Article 46) but make no such provision for objections to 'jurisdiction'. Article 46 has been applied on the footing that it extends to objections which go to jurisdiction as well as objections going to the constitution and composition of the Tribunal.

VI. THE RESPONDENT'S FIRST GROUND OF OBJECTION: WHETHER JUDICIAL ACTS IN LITIGATION BETWEEN PRIVATE PARTIES ARE 'MEASURES' REGULATED BY NAFTA?

39. Article 1101(1) of NAFTA provides:

> 'This Chapter [Eleven] applies to measures adopted or maintained by a party' relating to:
> (a) investors of another Party;
> (b) investments of investors of another Party in the territory of the Party; ...'

40. Article 201 defines 'measure' as including 'any law, regulation, procedure, requirement or practice'. The breadth of this inclusive definition, notably the references to 'law, procedure, requirement or practice', is inconsistent with the notion that judicial action is an exclusion from the generality of the expression 'measures'. 'Law' comprehends judge-made as well as statute-based rules. 'Procedure' is apt to include judicial as well as legislative procedure. 'Requirement' is capable of covering a court order which requires a party to do an act or to pay a sum of money, while 'practice' is capable of denoting the practice of courts as well as the practice of other bodies.

41. Article 1019(1), which requires each Party to promptly publish any law, regulation, precedential judicial decision, administrative ruling of general application and any procedure ... regarding government procurement' differs from the definition of 'measure' in Article 201, which contains no explicit reference to judicial decisions. While Article 1019(1) is directed only to the imposition of an obligation to publish rules of general application, it does not follow that this obligation should be regarded as co-extensive with the inclusive definition of 'measure' or as confining what the definition comprehends. Although Article 1019 clearly indicates that a precedential judicial decision is not only a 'measure' but also a measure 'adopted or maintained by a Party', the Article is consistent with the Respondent's submission that 'measures' does not extend to every judicial action.

42. Other NAFTA provisions indicate that judicial action is not beyond the reach of the word 'measures'. Article 1716, in requiring a NAFTA Party to provide 'that its judicial authorities shall have the authority to order prompt and effective provisional measures' to prevent infringement of intellectual property rights, recognises that judicial orders may constitute 'measures'. Article 1715 requires a Party to provide specified 'civil judicial procedures' for the enforcement of intellectual property rights. These 'procedures' extend to the making of a variety of judicial orders, including final judgments (Article 1715(2)). Article 1701(1) is concerned to ensure that 'measures to enforce

intellectual property rights do not themselves become barriers to legitimate trade'. Plainly 'measures' there includes the judicial procedures in Article 1715 i.e. judicial orders. See also Article 1715(2)(f) (where the reference to 'measures ... taken' must be understood as referring to judicial acts, including injunctions and other enforcement procedures).

43. The Respondent concedes that when a government entity is involved in a domestic court proceeding, it may be that, in appropriate circumstances, a resulting court judgment constitutes a 'measure adopted or maintained by a Party'. This concession is at odds with the argument that the failure to mention 'judicial order' or 'judgment' in Article 201 signifies an intention to confine 'measures' to legislative and executive actions. In general, where the meaning of 'measures' is so confined, the restricted meaning arises from an express limitation or an implied limitation arising from the context. No such limitation is to be found in Article 201.

44. Nor can 'measures' be confined to provisional or interim judicial acts as distinct from final judicial acts. Such a distinction finds support neither in Article 1701 nor Chapter 10 of NAFTA (which applies to 'measures adopted or maintained by a Party relating to procurement'). The reference in Article 1019(1) to 'precedential judicial decision' which is one instance of a measure 'adopted or maintained by a Party', is to a final decision as well as a provisional decision. See also Annex 1010.1B paras 2 and 3.

45. The approach which this Tribunal takes to the interpretation of 'measures' accords with the interpretation given to the expression in international law where it has been understood to include judicial acts. In *Regina v Pierre Bouchereau*, Case 30 77 [1977] ECR 1999, the European Court of Justice rejected the argument that 'measure' excludes actions of the judiciary, holding that the word embraces 'any action which affects the rights of persons' coming within the application of the relevant treaty provision (at 11). In the *Fisheries Jurisdiction Case (Spain v Canada)*, No. 96 (ICJ 4 December 1998), the International Court of Justice stated that 'in its ordinary sense the word ['measure'] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby' (at 66). See also *Oil Fields of Texas Inc v NIOC*, 12 Iran-US Cr Trib Rep 308 (1986) at 318-319 (where the judicial acts in question were held to be expropriations within the expression 'expropriations

or other measures affecting property rights', thus amounting to 'measures affecting property rights').

46. The significance for this case of the interpretation of 'measures' in the context of international law is that Article 102(2) of NAFTA requires the Parties to interpret and apply its provisions 'in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law'. Further, an interpretation of 'measures' which extends to judicial acts conforms to the objectives of NAFTA as set out in Article 102(1), more particularly objectives (b), (c) and (e), namely to

> '(b) promote conditions of fair competition in the free trade area;
>
> (c) increase substantially investment opportunities in the territories of the Parties;
>
> ...
>
> (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes'.

47. Such an interpretation of the word 'measures' accords with the general principle of State responsibility. The principle applies to the acts of judicial as well as legislative and administrative organs. (See draft Article 4 on State Responsibility adopted by the International Law Commission and later provisionally adopted by the United Nations General Assembly Drafting Committee on its second reading, Geneva, May 1–June 9, July 10-August 18, 2000, A/CN.4/L.600, August 21, 2000.) In *Azinian v United Mexican States* Case No. ARB(AF)/97/2, 14 ICSID Review-FILJ 538, the Tribunal, in rejecting the claim that there were violations of NAFTA, quoted (at 567) with approval the comments made by the former President of the International Court of Justice who, after acknowledging the reluctance in some arbitral awards of the last century to admit that the State is responsible for judicial actions, stated:

> '... in the present century State responsibility for judicial acts came to be recognized. Although independent of Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.'
> (Eduardo Jimenez de Aréchaga, 'International Law in the Past Third of a Century', 159-1 Recueil des Cours (General Course in Public International Law, The Hague, 1978).

The former President went on to say that State responsibility for acts of judicial authorities may result from three types of judicial decision, the first of which is a decision of a municipal court clearly incompatible with a rule of international law. The second type is what is known traditionally as a denial of justice. The Claimants assert that the NAFTA violations of which they complain fall within these categories of judicial decision.

48. The *Azinian* Tribunal pointed out (at 568) that State responsibility for judicial decisions does not entitle a claimant to a review of national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is neither true generally nor for NAFTA. As the Tribunal said,

> 'What must be shown is that the court decision itself constitutes a violation of the treaty' (at 568).

49. The views expressed by the *Azinian* Tribunal were not necessary for the decision in that case because it involved no challenge to the decisions of the Mexican courts. Subject to our later consideration of the rule of exhaustion of local remedies and the rule of judicial finality, the views are nonetheless persuasive and support our view that 'measures' in Chapter Eleven, according to its true interpretation, does not exclude judicial acts.

50. A Tribunal established pursuant to NAFTA Chapter Eleven, Section B, must decide the issues in accordance with the provisions of NAFTA and applicable rules of international law (Article 1131(1)). Further, as already noted, Article 102(2) provides that the Agreement must be interpreted in the light of its stated objectives and in accordance with applicable rules of international law. These objectives include the promotion of conditions of fair competition in the free trade area, the increase of investment opportunities and the creation of effective procedures for the resolution of disputes (Article 102(1)(b), (c) and (e)).

51. Guided by these objectives and principles, we do not accept the Respondent's submission that NAFTA is to be understood in accordance with the principle that treaties are to be interpreted in deference to the sovereignty of states. In *AMCO Asia Corp v Republic of Indonesia* 1 ICSID Reports 377 (1983) the Tribunal rejected the suggested principle (at 394, 397). Whatever the status of this suggested principle may have been in earlier times, the

Vienna Convention on the Law of Treaties is the primary guide to the interpretation of the provisions of NAFTA (*Ethyl Corporation v Canada*, Award on Jurisdiction, June 24, 1998, at 55-56, 38 ILM 708 (where a NAFTA Tribunal expressly rejected the argument that Section B of Chapter 11 is to be construed strictly). See also *Pope & Talbot v Canada*, Interim Award, June 26, 2000 (where a NAFTA Tribunal adopted a broad interpretation of the expression 'investment' in Article 1110). NAFTA is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (Vienna Convention, Article 31(1)). The context includes the preamble and annexes (Vienna Convention, Article 31(2)).

52. We agree with the Respondent that not every judicial act on the part of the courts of a Party constitutes a measure 'adopted or maintained by a Party'. Mexico submits that, in order to constitute a 'measure', the judicial action under consideration must have a general application. Thus a judicial affirmation of a general principle might well constitute a measure, whereas a specific order requiring a defendant to pay a sum of money would not. The definition of 'measure' in Article 201 (which includes 'requirement') is by no means consistent with this argument.

53. The question then arises whether the words 'measures adopted or maintained by a Party' should be understood, as the Respondent argues, to exclude judicial acts being the judgments of domestic courts in purely private matters. The purpose of Chapter Eleven, 'Section B – Settlement of Disputes between a Party and an Investor of Another Party' is to establish 'a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an arbitral tribunal'. The text, context and purpose of Chapter Eleven combine to support a liberal rather than a restricted interpretation of the words 'measures adopted or maintained by a Party', that is, an interpretation which provides protection and security for the foreign investor and its investment: see *Ethyl Corporation v Canada*, Award on Jurisdiction, June 24, 1998, 38 ILM 708, (where the NAFTA Tribunal concluded that the object and purpose of Chapter Eleven is to 'create effective procedures ... for the resolution of disputes' and to 'increase substantially investment opportunities' (at 83)).

54. Neither in the text or context of NAFTA nor in international law is there to be found support for the Respondent's submission that measures adopted or maintained by a Party', in its application to judicial acts, excludes the judgments of domestic courts in purely private disputes. Neither the definition of 'measure' in Article 201 nor the provisions of Chapters 10 and 17 relating to 'measures' and 'procedures' contain any indication that, in its application to judicial acts, the existence of a measure depends upon the identity of the litigants or the characterisation of the dispute as public or private. An adequate mechanism for the settlement of disputes as contemplated by Chapter Eleven must extend to disputes, whether public or private, so long as the State Party is responsible for the judicial act which constitutes the 'measure' complained of, and that act constitutes a breach of a NAFTA obligation, as for example a discriminatory precedential judicial decision. The principle that a State is responsible for the decisions of its municipal courts (or at least its highest court) supports the wider interpretation of the expression 'measure adopted or maintained by a Party' rather than the restricted interpretation advanced by the Respondent.

55. Generally speaking, litigation between private parties is less likely to generate a 'measure adopted or maintained by a Party' but, in some circumstances, private litigation may do so. In this respect, we do not regard the discussion of private litigation in *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 572, upon which the Respondent relies, as influential in the present context. The discussion relates to s. 32(1) of the Canadian Charter of Rights and Freedoms which applies Charter provisions to the legislative, executive and administrative branches (but not the judicial branch) of government.

56. As the Claimants submit, the Mississippi trial court's judgment ordering Loewen to pay O'Keefe $500 million and the Mississippi Supreme Court requirement that Loewen post a $625 million bond were 'requirements' within the meaning of the definition of 'measure' in Article 201, subject to consideration of Article 1121, the principle of finality of judicial acts and the rule of exhaustion of local remedies.

57. The Respondent argues that the words 'adopted or maintained' in Article 1101 are indicative of an intent to limit Chapter 11 to those actions that involve ratification by government. This limitation, so the Respondent submits, accords with the 'act of state' doctrine. That doctrine is a doctrine of

municipal rather than international law. See *W.S. Kirkpatrick & Co Inc v Environmental Tectonics Corporation International* 493 US 400 (1990) at 404 (where the Court acknowledged that it had 'once viewed the doctrine as an expression of international law' but had more recently described it 'as a consequence of domestic separation of powers, reflecting the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs (*Banco Nacional de Cuba v Sabbatino* 376 US 398, 423 (1964))'. No authority and no materials have been placed before us which justify the conclusion that the act of State doctrine has been adopted by sufficient countries to be considered as a rule of international law pursuant to Article 38 of the Statute of the International Court of Justice. In any event, the act of State doctrine is now expressed in terms of 'acts of a governmental character done by a foreign state within its own territory and applicable there' (Restatement (Third) of Foreign Relations Laws of the United States §443(1)), without differentiating between 'public' and 'private' litigation.

58. Whatever the effect of the act of State doctrine may be, Article 1105, in requiring a Party to provide 'full protection and security' to investments of investors, must extend to the protection of foreign investors from private parties when they act through the judicial organs of the State.

59. Further, the award of punitive damages would satisfy the public element of the Respondent's public/private dichotomy. It is generally accepted that punitive damages awards are intended to serve the public interest (D.B. Dobbs, Dobbs Law of Remedies §3.11(1) at 457 (2d ed 1993).

60. We reject therefore the Respondent's objection that the Mississippi Court judgments are not 'measures adopted or maintained by a Party' because they resolved a dispute between private parties.

VII. THE RESPONDENT'S SECOND GROUND OF OBJECTION: THE MISSISSIPPI COURT JUDGMENTS ARE NOT 'MEASURES ADOPTED OR MAINTAINED BY A PARTY' AND CANNOT GIVE RISE TO A BREACH OF CHAPTER 11 BECAUSE THEY WERE NOT FINAL ACTS OF THE UNITED STATES JUDICIAL SYSTEM

61. The Respondent argues that the expression 'measures adopted or maintained by a Party' must be understood in the light of the principle of customary international law that, when a claim of injury is based upon judicial

action in a particular case, State responsibility only arises when there is final action by the State's judicial system as a whole. This proposition is based on the notion that judicial action is a single action from beginning to end so that the State has not spoken until all appeals have been exhausted. In other words, the State is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort. The Respondent distinguishes this substantive requirement of customary international law for a final non-appealable judicial action, when an international claim is brought to challenge judicial action, from international law's procedural requirement of exhaustion of local remedies ('the local remedies rule').

62. The Respondent submits that there is nothing to show that in Chapter Eleven the Parties intended to derogate from this substantive rule of international law when judicial action is the basis of the claim for violation of NAFTA. To the contrary, the Respondent argues that the terms of Article 1101, 'adopted or maintained by a Party', incorporate the substantive rule of international law and require finality of action. Only those judicial decisions that have been accepted or upheld by the judicial system as a whole, after all available appeals have been exhausted, so the argument runs, can be said to possess that degree of finality that justifies the description 'adopted or maintained'.

63. The Claimants' response to this argument is that Article 1121(1)(b) of NAFTA requires an arbitral claimant to waive its local remedies, not exhaust them. This Article authorizes the filing of a Chapter 11 claim only if

> 'the investor and the enterprise waive their right to indicate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 ...'.

The Claimants submit, first, that 'the Article eliminates the necessity to exhaust local remedies provided by the host country's administrative or judicial courts'. (B. Sepulveda Amor, *International Law and International Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 Houston Journal of International Law 565 at 574 (1997)). The Claimants submit, secondly, that the so-called substantive principle of finality is no different from the local remedies rule and that international tribunals have reviewed the

decisions of inferior municipal courts where the exhaustion requirement has been waived or is otherwise inapplicable.

64. The Respondent argues that Article 1121(2)(b) is not a waiver provision and that it does not waive the local remedies rule or for that matter the rule of judicial finality. The Respondent acknowledges, however, that the Article relaxes the local remedies rule to a partial but limited extent, without defining or otherwise indicating what that extent is or may be.

65. Observations of the NAFTA Tribunals in both *Metalclad Corporation v United Mexican States* ICSID Case No. ARB/AF/97/1 (footnote 4) and in the *Azinian Case*, to which we have referred, support the Claimants' case to the extent that it is based on Article 1121(2)(b). But Mexico, in its written submissions to this Tribunal, points out that the *Metalclad* Tribunal which, in the relevant passage, purported to state Mexico's position in that case, did not do so accurately. Mexico also points out that, in the *Azinian Case*, as there was no complaint of any violation of NAFTA based on a judicial act, the Tribunal's observations were not necessary for its decision. Other cases relied upon by the Claimants include *G.W. McNear Inc v United Mexican States*, Docket No. 211, Opinions of the Commissioners 68 at 71, 72 (1928) and *The Texas Company Claim*, Decision 32-B, American-Mexican Cl Rep 142 (1948), but in these cases the relevant treaty waived exhaustion.

66. There is support for the view that no distinction should be drawn between the principle of finality and the local remedies rule. Indeed, Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad 198 (1915), upon which the Respondent relies, stated:

> 'It is a fundamental principle that the acts of inferior judges or courts do not render the state internationally liable when the claimant has failed to exhaust his local means of redress by judicial appeal or otherwise, for only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state'.

In the *Finnish Ships Arbitration* 3 RIAA 1497 (1937) it was pointed out that exhaustion of local remedies meant that there must be a final decision of a court which is the highest in a hierarchy of courts to which the claimant can resort in the host State. Borchard is not the only commentator who regards the principle of finality and the local remedies rule as different sides of the same coin (see C.F. Amerasinghe, Local Remedies in National Law 181 (1990)). And in the *Interhandel Case* (1959) ICJ 6, the claim was dismissed

expressly on the ground that Switzerland 'has not exhausted the local remedies available to it' (at 11, 19, 26-27). Although the case was taken by Interhandel to the United States Supreme Court, the Supreme Court remanded the case to the District Court and proceedings were still pending in that court.

67. While the content of the two rules is similar, if not the same, the rules were thought to serve different purposes. The local remedies rule (described as 'procedural') was designed to ensure that the State where violation of international law occurred should have the opportunity to address it by its own means, within the framework of its own domestic legal system (*Interhandel Case* (1959) ICJ Reports 6 at 27). Most, if not all legal systems, have a self-correcting capacity. In other words, the claimant was bound to take steps to ensure that the self-correcting mechanism of the State's judicial system is fully engaged as a condition precedent to recognition of the State's responsibility for breach of its international obligation. See the Report of the International Law Commission to the United Nations General Assembly, Yearbook of the International Law Commission, 1975, Vol. II, 62. Now, compliance with the local remedies rule is seen as a condition precedent to invoking the responsibility of a State for breach of an international obligation. (See Article 45 of the draft articles on State responsibility, provisionally adopted by the Drafting Committee of the United Nations General Assembly on second reading, based on the draft previously adopted by the International Law Commission (A/CN.A/L.600, August 21, 2000)).

68. On the other hand, the rule of judicial finality (often described as 'substantive') was thought to be directed to the responsibility of the State for judicial acts. As the statement by Borchard, already quoted, makes clear, it was considered that the State was not responsible for the acts of lower courts.

69. Although it has been said that the responsibility of the State for a breach of international law constituted by an alleged judicial action arises only when there is final action by the State's judicial system considered as a whole, it is now recognised that the judiciary is an organ of the State and that judicial action which violates a rule of international law is attributable to the State (A.V. Freeman, *The International Responsibility of States for Denial of Justice*, 31-33 (1970)). The rule of judicial finality was influenced by the principles of separation, independence of the judiciary and respect for the finality of judicial decisions. However, the judiciary, though independent of

Government, is not independent of the State and the judgment of a court proceeds from an organ of the State as does a decision of the executive.

70. The modern view is that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State. That, in effect, is the principle expressed in draft Article 4 on State Responsibility, provisionally adopted by the Drafting Committee of the United Nations General Assembly, based on the draft previously adopted by the International Law Commission (A/CN.A/L.600, August 21, 2000). Although the draft has not been finally approved, it is a highly persuasive statement of the law on State Responsibility as it presently stands. Draft Article 4 accords with the view expressed by Eduardo Jimenez de Arechaga, the former President of the International Court ('International Law in the Past Third of a Century', 159-1 Recueil des Cours, (General Course in Public International Law, The Hague, 1978).[1]

71. Viewed in this light, the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

72. Just as it was said that the function of the local remedies rule was to establish whether the point had been reached at which the home State may raise the issue on the international level (G. Schwarzenberger, *International Law*, 604, (1957)), now it is the function of the rule to establish that State responsibility for a breach of an international obligation may be invoked.

73. We accept that an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear an intention to do so (*Elettronica Sicula SpA (Elsi) (United States v Italy)* (1989) ICJ 15 at 42). Such an intention may, however, be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.

---

[1] Cited in *Azinian v United Mexican States* Case No. ARB/(AF)/97/2, 14 ICSID Review-FILJ at 567.

74. Having reached this point in our consideration of the arguments, we have concluded that this ground of objection should be dealt with at the hearing on the merits. Our reasons for reaching this conclusion relate partly to the arguments based on Article 1121(2)(b) and Chapter Eleven and partly to other arguments advanced by the Claimants in response to the Respondent's objection. We have already mentioned the lack of specificity in the Respondent's acknowledgment that the Article partially relaxes the local remedies rule. Consideration might be given by the Respondent to the possibility of presenting an argument that Article 1121(2)(b) does no more than curtail or restrict rights that a claimant would otherwise have but for the existence of Article 1121(2)(b). The remarks of the International Court of Justice in *Headquarters Agreement* (Advisory Opinion) ICJ Reports 12 at 29, 42-43, a decision not cited in argument, may have a bearing on the operation of Article 1121(2)(b) and also on the Claimants' submission that an agreement to arbitrate dispenses with any obligation to have recourse to municipal courts. Another argument of the Claimants, namely that the local remedies rule has no application to denial of justice cases, is one that can conveniently be dealt with at the hearing on the merits where the argument can be considered in the context of the particular allegations by the Claimants of denial of justice on which findings can then be made. Similarly put over is consideration of the Respondent's submissions that the Loewen companies failed to pursue various local remedies which, according the Respondent, were open to them and would, if successful, have resulted in an effective remedy under municipal law. The hearing of this ground of objection should therefore stand over to the hearing on the merits.

VIII. THE RESPONDENT'S THIRD GROUND OF OBJECTION: THAT A PRIVATE AGREEMENT TO SETTLE A MATTER OUT OF COURT IS NOT A GOVERNMENT 'MEASURE' WITHIN THE SCOPE OF NAFTA CHAPTER ELEVEN

75. This ground of objection was not strongly pressed. In this case much turns on the circumstances in which the Mississippi proceedings came to be settled and that is a matter which must be dealt with at a hearing on the merits.

IX. THE RESPONDENT'S FOURTH GROUND OF OBJECTION:
THAT THE MISSISSIPPI TRIAL COURT'S ALLEGED FAILURE TO PROTECT AGAINST THE ALIEN-BASED, RACIAL AND CLASS-BASED REFERENCES CANNOT BE A 'MEASURE' BECAUSE LOEWEN NEVER OBJECTED TO SUCH REFERENCES DURING THE TRIAL

76. This ground of objection does not, in our view, go to competence or jurisdiction. If the Respondent's case on this point is made out, it could result in a dismissal of the claim. It is an issue which appropriately and conveniently should be heard and determined at a hearing on the merits.

X. THE FIFTH GROUND OF OBJECTION:
RAYMOND LOEWEN'S ARTICLE 1117 CLAIM SHOULD BE DISMISSED BECAUSE HE DOES NOT OWN OR CONTROL THE ENTERPRISE AT ISSUE

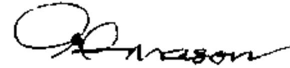
The objection on this ground, if upheld, would not be dispositive of the second Claimant's entire claim which is partly based on Article 1116. Further, it is far from clear that the objection goes to jurisdiction and, in any event, it is an objection which can be dealt with at the hearing on the merits. For this reason we do not consider it appropriate to decide this question on an objection to competence and jurisdiction.

ORDERS

In the result we make the following orders:

1. Dismiss the Respondent's objection to competence and jurisdiction so far as it relates to the first ground of objection.
2. Adjourn the further hearing of the Respondent's other grounds of objection to competence and jurisdiction and join that further hearing to the hearing on the merits.
3. The Respondent to file its counter-memorial on the merits within 60 days of the date of this Decision.
4. The Claimants to file their replies within 60 days of the time limited for the filing of the Respondent's counter-memorial on the merits.

5. The Respondent to file its rejoinder within 60 days of the time limited for the filing of the Claimants' replies.
6. Fix October 15, 2001 as the date of the hearing on the merits.



Sir Anthony Mason, President

L. Yves Fortier CC QC

Judge Abner J. Mikva

DATED the fifth day of January 2001.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Arbitration between

Raymond L. Loewen,
7629 Burris Street
Burnaby,
British Columbia
Canada, V5G 3S8

Petitioner,

and

The United States of America,

Respondent.

CASE NUMBER 1:04CV02151

JUDGE: Richard W. Roberts

DECK TYPE: General Civil

DATE STAMP: 12/13/2004

NOTICE OF PETITION TO VACATE

TO:

Mark A. Clodfelter
Jennifer Toole
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
2201 C Street, N.W.
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555 4th Street, N.W.
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Please take notice that on December 13, 2004 a petition to vacate the arbitration award in the above-cited case was filed at the U.S. District Court for the District of Columbia. All pleadings and motions and other subsequent filings must be filed at the U.S. District Court for the District of Columbia with the Judge's initials and the case number.

I hereby certify that on this 13th day of December, 2004, I caused a true and correct copy of the foregoing Petition to Vacate Arbitration Award to be served upon:

Mark A. Clodfelter
Jennifer Toole
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
2201 C Street, N.W.
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Washington, D.C. 20520

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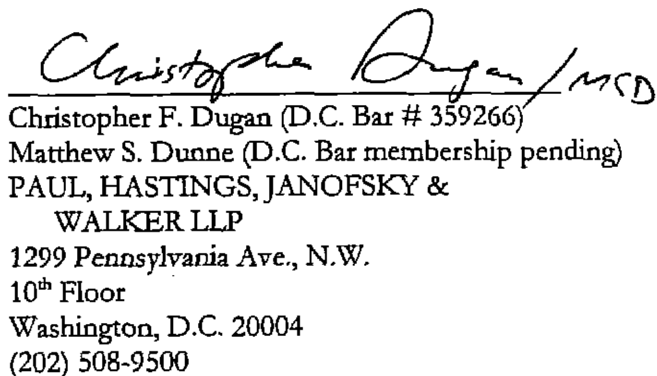

Christopher F. Dugan (D.C. Bar # 359266)
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WDC/294467.1 09071.00001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Arbitration between Raymond L. Loewen, 7629 Burris Street, Burnaby, British Columbia, Canada, V5G 3S8 Petitioner, and The United States of America, Respondent.	CASE NUMBER 1:04CV02151 JUDGE: Richard W. Roberts DECK TYPE: General Civil DATE STAMP: 12/13/2004

PETITION TO VACATE ARBITRATION AWARD

I. INTRODUCTION

Pursuant to Section 12 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 12, please take notice that on January 21, 2005, at the U.S. District Court for the District of Columbia, or on another date to be set by the Court, Petitioner Raymond Loewen will file a "Motion for Summary Judgment Vacating the Arbitration Award" ("the Motion"). In the Motion, Petitioner will move for an order vacating and setting aside the award made in the above-entitled matter on September 13, 2004.

The Motion will argue that under well-established principles of U.S. arbitration law, this Court should vacate and set aside the award because the arbitrators: engaged in misconduct in effectively refusing to hear and consider evidence pertinent and material to the controversy; engaged in misbehavior by which the rights of the Petitioner have been prejudiced; exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made; and acted in manifest disregard of the law. The Motion will also be made

on the grounds that the award lacks a rational basis and that the Petitioner has been injured by the arbitrators' conduct and acts.

The Motion will be based, *inter alia*, on the arbitrators' failure to decide one of the Petitioner's specific treaty claims; the arbitrators' manifest disregard of the law it deemed controlling on a critical issue; the arbitrators' disregard and refusal to consider uncontested record evidence on the "central question" concerning a critical issue; and other arbitral acts.

The Motion will be based on this Petition, the decisions of the arbitrators, and the pleadings and papers to be filed in this action.

II. BACKGROUND

Petitioner Raymond Loewen founded the Loewen Group Inc. ("TLGI") in 1969. Based in Vancouver, it became one of the largest funeral home operators in North America. As it grew, it expanded into the U.S. market, purchasing funeral homes, cemeteries, and related funeral insurance businesses.

In 1991, TLGI bought a small funeral home in Jackson, Mississippi that had entered into funeral insurance contracts with Jeremiah O'Keefe, a local competitor. A dispute arose over those contracts, which were worth only approximately $3-6 million. O'Keefe sued TLGI in Mississippi state court, and later hired a Florida lawyer named Willie Gary to represent him and his companies. The jury ultimately rendered a verdict against TLGI in the amount of $500 million, including $74 million for emotional distress and $400 million in punitive damages. It was then the largest damages award in Mississippi court history.

When TLGI sought to appeal, it was stymied by the state's appeal bond requirement. A Mississippi court could not normally issue a stay of execution pending appeal unless the judgment debtor posted a bond equal to 125% of the verdict appealed as security for payment of the judgment. The Mississippi Supreme Court ultimately refused to relax the 125% requirement, and

gave TLGI seven days to post a $625 million bond. TLGI was unable to raise the money, and since O'Keefe threatened immediate seizure of the company's assets, TLGI ended the litigation through a $175 million settlement with O'Keefe.

In 1998, TLGI and Ray Loewen jointly filed an investment arbitration claim against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"), and selected the ICSID Additional Facility rules to govern the proceedings. TLGI and Mr. Loewen claimed that the United States had violated a number of substantive provisions of NAFTA designed to protect foreign investors such as TLGI and Mr. Loewen. This was the first claim against the United States under NAFTA.

The Tribunal was originally composed of: Sir Anthony Mason, former chief justice of the Australian High Court (chairman); Abner Mikva, a former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit (appointed by the United States); and Yves Fortier, Canada's former representative to the United Nations and now a prominent arbitration practitioner (TLGI and Mr. Loewen's appointee). Before the hearing on the merits, Mr. Fortier withdrew from the case due to potential conflicts of interest that were "thrust" upon him by a law firm merger; he was replaced by Lord Michael Mustill, a retired Law Lord from England.

In the aftermath of the O'Keefe settlement, TLGI experienced serious financial difficulties, and it eventually filed for bankruptcy. At the beginning of 2002, TLGI adopted a bankruptcy reorganization plan pursuant to which the parent corporation emerged as a U.S. entity, the Alderwoods Group. The United States then submitted a jurisdictional objection to the NAFTA Tribunal, asserting that because of this change in nationality TLGI was no longer an "investor of a Party" within the meaning of NAFTA. The U.S. argued that under customary international law, a claimant before an international tribunal must maintain appropriate nationality until the date an

award is rendered, and it therefore requested that the Tribunal dismiss the case. The United States did not challenge the Tribunal's jurisdiction as it related to Petitioner Raymond Loewen.

The Tribunal issued three substantive decisions. On January 5, 2001, it rejected some of the United States' jurisdictional objections and joined others to the merits (the "2001 Award"). On June 26, 2003, the Tribunal issued its main award, dismissing all the claims, on jurisdictional grounds (the "2003 Award") (Exhibit A). On August 11, 2003, the United States filed a "Request for Supplementary Decision," seeking clarification as to one of Petitioner's treaty claims that was overlooked by the Tribunal. On September 13, 2004, the Tribunal issued a decision on that request (the "2004 Award") (Exhibit B). The 2004 Award was the final award in the arbitration.

III. GOVERNING LAW

A. Notice of Motion to Vacate

Section 12 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 12, requires Petitioner to serve "notice of a motion to vacate, modify, or correct an award . . . upon the adverse party or his attorney within three months after the award is filed or delivered." The statute requires notice of a motion to vacate, and not the actual motion to vacate itself, to be served within three months. *See Karuth v Prescott, Ball & Turben, Inc*, 1990 WL 91579 at *2 (D.D.C. June 19, 1990) ("[A] party to an arbitration may not move to vacate or modify an award unless it has given notice within three months after the award."); *DeAngelis v Shumway*, 1987 WL 18453 at *1 (S.D.N.Y. Oct. 2, 1987) ("On August 22, 1986, DeAngelis caused service of a notice of motion to vacate the award [dated May 23, 1986] to be served upon Shumway at the latter's office in Iowa. DeAngelis accordingly complied with 9 U.S.C. § 12, which requires that a notice of motion to vacate, modify or correct the award must be served within three months after the award is filed or delivered. DeAngelis filed his motion [to vacate] in this Court on September 29, 1986.").

This Petition constitutes "notice of a motion to vacate the arbitration award." In *Western Employers Ins. Co. v. Jefferies & Co., Inc.*, the Ninth Circuit held that a "Petition to Vacate the Award" filed within the three-month deadline "met the other requirements of Fed. R. Civ. P. 7(b)(1)— it stated with particularity the grounds for the petition and set forth the relief sought— and that it satisfied the purposes of 9 U.S.C. § 12." 958 F.2d 258, 261 (9th Cir. 1992). This Petition states with particularity the grounds for the petition and sets forth the relief sought, and thus satisfies the purposes of Section 12 of the FAA.

B. Grounds for Vacating the Award

Section 10 of the FAA, 9 U.S.C. § 10, sets out the statutory grounds for vacating an arbitration award. At a minimum, the following grounds of the FAA are relevant here:

> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

FAA caselaw also recognizes that an award may be vacated if the arbitrators act in "manifest disregard of the law." The "manifest disregard of the law" concept, while not set forth in the FAA, is widely accepted as a ground for vacating arbitration awards. *See, e.g., Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381 (5th Cir. 2004) ("[M]anifest disregard is an accepted nonstatutory ground for vacatur."); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (11th Cir. 1997) ("[E]very other circuit . . . has expressly recognized that 'manifest disregard of the law' is an appropriate reason to review and vacate an arbitration panel's decision.").

The Tribunal's decision should be set aside and vacated on all of these statutory and nonstatutory grounds.

IV. THE TRIBUNAL'S FINDINGS THAT ARE GROUNDS FOR SETTING ASIDE THE AWARDS

The Tribunal's central conclusion in its 2003 Award was that the Mississippi trial and $500 million verdict were a gross miscarriage of justice:

> 54. Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law.
>
> . . . .
>
> 119. By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.
>
> . . . .
>
> 137. In the light of the conclusions reached in paras. 119-123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.

Despite its finding that the Mississippi trial was a "manifest injustice" and a "disgrace," the Tribunal refused in the 2003 Award to grant any relief to either claimant, for two reasons. First, TLGI had, during the course of its bankruptcy reorganization, changed its nationality from Canadian to U.S., thus destroying the continuing diversity of nationality that the Tribunal concluded was a jurisdictional requirement. Second, the Tribunal held that Mr. Loewen did not control TLGI when the arbitral claim was filed, and thus the Tribunal lacked jurisdiction over either of his claims. These were the only actual holdings in the 2003 Award, and it was on these "jurisdictional" bases that the Tribunal dismissed all the claims. In addition, the Tribunal concluded that TLGI had not shown that it had exhausted its local remedies, which the Tribunal concluded was a prerequisite to

international relief. The Tribunal characterized this as a "merits" issue, but because of the jurisdictional decisions, none of the claims were dismissed on this basis. This conclusion was, accordingly, *dicta*.

After the Tribunal issued the 2003 Award, the United States, which had won the case, asked the Tribunal for a supplemental decision pursuant to Article 58 of the ICSID Additional Facility Rules. It is, of course, very unusual for a winning party to ask for any type of supplemental or clarifying decision. Indeed, whenever the winning party to any dispute asks for a clarification, that is compelling evidence that the original decision was deficient in some important respect. Such is the case here.

The Tribunal's 2003 Award was deeply flawed in at least three respects. First, the Tribunal failed to consider or decide one of Mr. Loewen's two treaty claims, his Article 1116 claim as an investor who was damaged by the United States' acts. It was this deficiency that the U.S. asked the Tribunal to correct. Second, after deciding that the appropriate legal standard for the exhaustion issue was an objective standard of "reasonable availability," the Tribunal inexplicably failed to apply that objective standard. Instead, the Tribunal examined whether TLGI subjectively believed it had any reasonably available alternative to settlement. Third, the Tribunal completely failed to consider and thus to hear the uncontested record evidence on what the Tribunal described as the "central question" concerning the exhaustion issue – whether TLGI subjectively believed it had any reasonable alternative to the $175 million settlement. Under well-established principles of U.S. arbitration law, these fundamental deficiencies require that this Court set aside and vacate the arbitration award.

A. The Tribunal's Failure To Decide Petitioner's Article 1116 Claim

In the 2003 Award, the Tribunal either ignored or failed to recognize one of Mr. Loewen's treaty claims. Mr. Loewen had filed two NAFTA claims: a personal claim under Article 1116 as a

Canadian investor who was damaged by the United States' breaches of NAFTA; and a claim under Article 1117 as the controlling shareholder in, and on behalf of, TLGI. In disposing of Mr. Loewen's claims, the entirety of the Tribunal's reasoning and decision is found in the following paragraphs described in this section:

> 9. First Claimant TLGI is a Canadian corporation which carries on business in Canada and the United States. Second Claimant is Raymond Loewen, a Canadian citizen who was the founder of TLGI and its principal shareholder and chief executive officer. TLGI submits claims as "investor of a Party" on its own behalf under NAFTA, Article 1116 and on behalf of LGII under Article 1117. Likewise, Raymond Loewen submits claims as "the investor of a party" on behalf of TLGI under NAFTA, Article 1117.

Exhibit A at 4. As is obvious from the Tribunal's own language, it overlooked Mr. Loewen's NAFTA Article 1116 claim.

With respect to the continuous nationality issue, the Tribunal stated:

> 29. Subsequently, on January 25, 2002 Respondent filed the motion to dismiss Claimants' [sic] NAFTA claims for lack of jurisdiction, based on the reorganization of TLGI under Chapter Eleven of the United States Bankruptcy Code. An element in that reorganization was the assignment by TLGI of its NAFTA claims to a newly created Canadian corporation, Nafcanco, which was owned and controlled by LGII (re-named "Alderwoods, Inc", a United States corporation).

Exhibit A at 7. Again, the Tribunal overlooked the impact and consequence of Mr. Loewen's two discrete NAFTA claims, for neither of them was affected by the United States' objection as to lack of continuous nationality.

In its final conclusions and legal holding in the 2003 Award, the Tribunal stated:

> 239. Raymond Loewen argues that his claims [sic] under NAFTA survive the reorganization. Respondent originally objected to Raymond Loewen's claims [sic] on the ground that he no longer had control over his stock at the commencement of the proceeding. The Tribunal allowed Raymond Loewen to continue in the proceeding to determine whether he in fact continued any stock holding in the company. No evidence was adduced to establish his

> interest and he certainly was not a party in interest at the time of the reorganization of TLGI.

Exhibit A at 69. The Tribunal again missed Mr. Loewen's 1116 claim, which had nothing to do with whether he was a controlling shareholder.

In the legally operative part of its 2003 Award, the Tribunal stated:

> ORDERS
>
> For the foregoing reasons the Tribunal unanimously decides -
>
> (1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.
>
> (2) That it **lacks jurisdiction to determine Raymond L. Loewen's claims** [sic] under NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.
>
> (3) TLGI's claims and Raymond L. Loewen's are hereby dismissed in their entirety.

Exhibit A at 69-70. Yet again, the Tribunal overlooked Mr. Loewen's Article 1116 claim. It dismissed his claims – both of them – **only** on jurisdictional grounds and for a reason – lack of control – that was relevant only to Mr. Loewen's Article 1117 claim.

The fact that the Tribunal ignored or failed to recognize Mr. Loewen's Article 1116 claim is reinforced by what the Tribunal said at the start of its decision, where it distinguished between its "jurisdictional" holdings on continuous nationality and its "merits" conclusion on the exhaustion issue.

> Introduction
>
> 1. This is an important and extremely difficult case. **Ultimately it turns on a question of jurisdiction** arising from (a) the NAFTA requirement of diversity of nationality as between a claimant and the respondent government, and (b) the assignment by

> the Loewen Group, Inc. of its NAFTA claims to a Canadian corporation owned and controlled by a United States corporation. **This question was raised by Respondent's motion to dismiss for lack of jurisdiction filed after the oral hearing on the merits. In this Award we uphold the motion and dismiss Claimants' NAFTA claims.**

Exhibit A at 2 (emphasis added). Thus, the Tribunal again describes its "ultimate" holding as jurisdictional in nature, and dismisses **all** the claims before it – "Claimants' NAFTA claims" – on the jurisdictional grounds.

The Tribunal then goes on to describe what it views as the "merits" issue, *i.e.*, the exhaustion of local remedies.

> 2. As our consideration of the merits of the case was well advanced when Respondent filed this motion to dismiss and as we reached the conclusion that Claimants' NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion. As will appear, the conclusion rests on the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA.

Exhibit A at 2.

Because the Tribunal had already disposed of all of "Claimants NAFTA claims" on jurisdictional grounds, at this stage in the proceeding it clearly viewed its "merits" conclusion as *dicta*. This dichotomy is also apparent from the operative legal language at the end of the Award, the Tribunal "Orders." These holdings are limited to its disposition of TLGI's claims on the continuous nationality issue and the disposition of Mr. Loewen's claims on the control issue. There is no mention of Mr. Loewen's Article 1116 claim, which, because the U.S. had no jurisdictional objection to it, could only be disposed of on exhaustion grounds. The Tribunal's silence in its "Orders" as to the "merits" issues reinforces the conclusion that it viewed its findings on that issue as *dicta*, and not as dispositive of any of the claims. In particular, the Tribunal did not state or even vaguely imply that it had actually decided Mr. Loewen's Article 1116 claim on exhaustion grounds.

It is thus apparent from the repeated statements and the express holding and Orders of the 2003 Award that the Tribunal completely overlooked Mr. Loewen's Article 1116 claim. It did not consider or discuss why his Article 1116 claim was deficient; indeed, it never mentioned or discussed in any manner his status as an investor who had lost over $100 million as a result of the Mississippi "disgrace." Instead, it discussed a single fact that was relevant only to Mr. Loewen's Article 1117 claim— whether Mr. Loewen controlled TLGI at the time that the NAFTA claim was filed.

It is, of course, extraordinary for a tribunal to miss and thus fail to consider one of only four claims before it. It was because of this deficiency that the United States, knowing full well that the fault was so serious that the 2003 Award would be set aside, asked the Tribunal for a supplemental decision to clarify the 2003 Award.

In its 2004 Award, however, the Tribunal, rather than admitting its mistake, asserted that it had, in fact, considered the Article 1116 claim and resolved it on the merits:

> 16. Respondent contends that, although the Award explicitly stated that all claims (including Raymond Loewen's claims) were dismissed on the merits, it did not state expressly that his art. 1116 claims were dismissed on the merits. Respondent concedes that the Award was not "silent" as to the question but argues that further explication would resolve a minor ambiguity and that art. 58(1) extends to such a case.
>
> 17. Raymond Loewen contends that the Tribunal omitted to decide his art. 1116 claim in the Award and that it is obligated to render a supplementary decision under art. 58. Raymond Loewen submits that the Tribunal overlooked the claim and that, in the course of determining it now, the Tribunal should consider whether its "obiter dicta" as to the merits require correction, as Raymond Loewen argues.
>
> 19. We agree that, apart from the dismissal in the Award of June 26, 2003 of all the claims "in their entirety", there is no distinct reference in the Award to a discussion of Raymond Loewen's claim under art. 1116. We agree also that, as there was no jurisdictional objection to his claim under art. 1116, that claim fell to be determined by the decision on the merits.

> 20. But the dismissal of all the claims "in their entirety" following the examination of the merits was necessarily a resolution of the art. 1116 claim. That dismissal was a consequence of the reasoning expressed in paras 213-216. We therefore reject the argument that the Award did not deal with the art. 1116 claim.
>
> 21. It follows that Respondent is correct when it argues that Raymond Loewen is asking the Tribunal to reconsider its decision to dismiss that claim and to reconsider the reasoning (described by Raymond Loewen as "obiter dicta") which led the Tribunal to dismiss the claim. In the context of the dismissal of Loewen's claims, that reasoning was not merely "obiter dicta." It was the reasoning on which that part of the Award was based and it is not open to the Tribunal to reconsider it. There is no logical basis on which the Tribunal can draw a distinction between the relationship of that reasoning to the dismissal of the Loewen claims on the one hand and to the Raymond Loewen claim under art. 1116 on the other hand.

Exhibit B at 4-5.

With all due respect to the distinguished Tribunal, its *ex post facto* rationalization cannot withstand scrutiny: it quite evidently did not consider Mr. Loewen's Article 1116 claim in the 2003 Award. Again, the first paragraph of the 2003 Award dismissed "Claimants NAFTA claims" on jurisdictional grounds, and the operative portion of the 2003 Award – the "Orders" – makes clear that both of Mr. Loewen's claims were dismissed on jurisdictional grounds, and not "on the merits." Thus, the Tribunal's claim in ¶ 19 of the 2004 Award is simply not true.

As a result of its failure to consider or decide Petitioner's Article 1116 claim in the 2003 or 2004 Awards, the Tribunal is guilty of misbehavior by which the rights of the Petitioner have been prejudiced. In failing to carry out its duties to consider and decide this claim, the Tribunal acted in manifest disregard of the law and exceeded its powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made. *See Smart v International Broth. of Elec. Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002) (holding that the purpose of the "imperfectly executed" ground "is merely to render unenforceable an arbitration award that is either incomplete in the sense that the arbitrators did not complete their assignment

(though they thought they had) or so badly drafted that the party against whom the award runs doesn't know how to comply with it"); *IDS Life Ins. Co. v Royal Alliance Associates, Inc.*, 266 F.3d 645, 651 (7th Cir. 2001) (clarifying that arbitrators have "imperfectly executed" their powers where "the award itself, in the sense of judgment, order, bottom line, is incomplete in the sense of having left unresolved a portion of the parties' dispute"); *ComTech Development Co. v University of Connecticut Educ.*, 102 F.3d 677, 686 (2d Cir. 1996) ("An award is mutual, definite and final if it 'resolve[s] all issues submitted to arbitration, and determine[s] each issue fully so that no further litigation is necessary to finalize the obligations of the parties.'"); *Michaels v Mariforum Shipping, S. A.*, 624 F.2d 411, 413-14 (2d Cir. 1980) (same).

B. The Tribunal's Manifest Disregard of the Objective Standard for "Reasonably Available" Local Remedies

In its 2003 Award, the Tribunal concluded that TLGI was required to exhaust local remedies before obtaining international relief, so long as such remedies were "reasonably available." First, the Tribunal stated the legal standard it would apply:

> 169. Availability is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy.

Exhibit A at 49. It stated further:

> 214. Respondent argues that, because entry into the settlement agreement was a matter of business judgment, Loewen voluntarily decided not to pursue its local remedies. That submission does not dispose of the point. **The question is whether the remedies in question were reasonably available and adequate. If they were not, it is not to the point that Loewen entered into the settlement, even as a matter of business judgment.** It may be that the business judgment was inevitable or the natural outcome of adverse consequences generated by the impugned court decision.

Exhibit A at 61.

Thus, the Tribunal recognized and concluded that the controlling law concerning exhaustion was a standard of "reasonable availability." Any standard based on reasonable availability is normally an objective standard.[1] However, the Tribunal then disregarded that legal standard, refusing to consider the extensive expert testimony provided by Professor Laurence Tribe and Professor Charles Fried, former Solicitor General of the United States, that TLGI did not have a reasonably available alternative to settlement. *See* Expert Witness Statements of Laurence Tribe and Charles Fried. Instead, the Tribunal disposed of the exhaustion issue on a different legal principle: whether TLGI subjectively believed it had any reasonable alternative to settlement. Furthermore, as discussed below, it improperly applied that standard by overlooking all the evidence of TLGI's state of mind. But more importantly, it manifestly disregarded the law that it had deemed controlling: whether there was, objectively, a reasonably available alternative.

As a result of its failure to apply the proper legal standard, the Tribunal engaged in misbehavior by which the rights of the Petitioner have been prejudiced. In failing to carry out its duties and apply the proper legal standard, the Tribunal acted in manifest disregard of the law and exceeded its powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made. *See Montes v Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (11th Cir.1997) ("To manifestly disregard the law, one must be conscious of the law and deliberately ignore it."); *Jeffrey M. Brown Assocs., Inc. v Allstar Drywall & Acoustics, Inc.*, 195 F. Supp. 2d 681, 84-685 (E.D. Pa. 2002) ("'Manifest disregard of the law' encompasses situations in which it is evident from the record that the arbitrator recognized the applicable law, yet chose to ignore it.").

[1] *See, e.g., Department of Justice v Federal Labor Relations Authority*, 991 F.2d 285, 291 (5th Cir. 1993) (describing reasonable availability as an objective standard); *Brehm v Eisner*, 746 A.2d 244, 260 (Del. 2000) (referring to the "objective test[] of reasonable availability").

C. The Tribunal's Failure to Hear and Consider the Evidence on Why Petitioner Settled

The third signal failure of the Tribunal in the 2003 Award was that it completely overlooked all the evidence relevant to whether TLGI believed it had exhausted its local remedies. In considering TLGI's subjective belief, the Tribunal stated the following:

> 215. **Here we encounter the central difficulty in Loewen's case. Loewen failed to present evidence** disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached. It is a matter on which the onus of proof rested with Loewen. It is, however, not just a matter of onus of proof. **If, in all the circumstances, entry into the settlement agreement was the only course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy.** (Emphasis added.)
>
> 216. Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, **we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options.** It is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take. (Emphasis added.)
>
> 217. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.

Exhibit A at 61.

The Tribunal was simply wrong. Claimants had submitted clear, uncontradicted, uncontested, comprehensive, and corroborated evidence why Loewen had settled the case. The Tribunal missed all of this evidence, a deeply embarrassing omission for so distinguished a panel.

TLGI's reasons for settling were addressed in two declarations filed with the Tribunal in 2000, long before the 2003 Award. The first was the declaration of Wynne S. Carvill, the American attorney in charge of all post-verdict proceedings. It was supported by the equally clear declaration

of a director of TLGI, John Napier Turner, the former Prime Minister of Canada. *See* Declaration of Wynne S. Carvill (May 24, 2000) (Exhibit C) and Declaration of Rt. Hon. John N. Turner, P.C, C.C., Q.C. (May 25, 2000) (Exhibit D). The U.S. never questioned, challenged, or cross-examined either of these declarations, nor did it put in counter-declarations rebutting this evidence.

In his declaration, Mr. Carvill, a graduate of Harvard Law School, a law clerk to the U.S. Court of Appeals, a leading counsel and a partner in a distinguished firm, testified to his personal involvement in the assessment of the options identified by Loewen in the face of the Mississippi proceedings. Exhibit C ¶¶ 1, 3. Mr. Carvill and his firm were not involved in the discovery or trial of the *O'Keefe* matter, but he was the principal outside counsel responsible for coordinating a response to the Mississippi developments. Exhibit C ¶¶ 2-3. He assessed the outcome at trial, retained new counsel to assist in post-trial motions and appeals, interviewed and selected a specialist counsel to consider possible appeals to the U.S. Supreme Court, participated in the decision to retain and discharge bankruptcy counsel, coordinated settlement discussions and eventually represented Loewen in the negotiations which resulted in the settlement. Exhibit C ¶ 3. In short, Mr. Carvill was the central professional witness who addressed the very issue of whether a motion to the Supreme Court was considered a reasonably available and adequate remedy open to TLGI.

With respect to the option of an appeal to the Supreme Court of the United States, in his Declaration Mr. Carvill addressed the general issue of consideration of relief in the federal court system and testified that all the options were reviewed and rejected on professional and rational grounds including:

> (a) Collateral attack on the Federal District Court was foreclosed by the commanding *Pennzoil* precedent such that an attorney signing the pleadings might have been subject to sanctions for doing so. In any event, they viewed a collateral attack in Federal Court as prejudicing whatever chances existed for relief from the Mississippi Supreme Court which was throughout seen as the best alternative;

(b) An action based on constitutional grounds was carefully considered, but could only have been raised through an appeal on the merits and not through a collateral attack in the Federal District Court. In particular, there was no evidence on which it could be said that the Mississippi Supreme Court's decision on the bond was infected by anti-Canadian bias which might raise a constitutional issue meriting pursuit;

(c) Very serious consideration was given to the possibility of direct appellate relief, but in the circumstances was concluded to be "an illusory choice";

(d) Supreme Court specialists were retained and advised that the chance of success was "extremely remote";

(e) In particular, the timing was made extremely difficult because the company did not know how much time it would have to seek relief. Indeed, "[c]onceivably, on any court day we could receive an order lifting the stay effective within a matter of days unless the bond were increased to $625 million." Mr. Carvill also carefully identified the company's analysis of bankruptcy considerations.

Exhibit C ¶¶ 6-8, 12-14; *see also* Submissions of the Loewen Group, Inc. concerning the Jurisdictional Objections of the United States, May 26, 2000, ¶¶ 59-62.

Mr. Carvill's declaration was supported and fully corroborated by a declaration filed by John Napier Turner, an outside director of TLGI, a former Prime Minister of Canada, and a distinguished lawyer. In that declaration, Mr. Turner confirmed that a group of senior management and outside advisors including Mr. Carvill simultaneously considered the several options and remedies available after the O'Keefe verdict, including settlement, financing and appeal bond, and pursuing federal court collateral relief or appeal to the U.S. Supreme Court. Mr. Turner declared that:

> The Board was advised by Mr. Carvill that, after consulting with several experts in the area and fully considering all avenues of possible relief in the U.S. federal court system, the possibility of relief from the U.S. Supreme Court was extremely remote and the likelihood of a collateral attack was so remote that the lawyers would run a risk of being sanctioned under U.S. procedural rules for filing such a case. The Board was also advised that any efforts in federal court would greatly prejudice the Company's chances of obtaining bonding and other relief in the Mississippi state courts. Such relief in

> the Mississippi state courts was the primary strategic objective at that time.

Exhibit D ¶ 14.

As noted, the United States elected not to cross-examine either Mr. Carvill or Mr. Turner, and it did not submit any counter-declarations rebutting their testimony. In accordance with the standard set by the Tribunal at paragraphs 159 and 216 of its Award, the uncontradicted and unchallenged evidence of Mr. Carvill and Mr. Turner clearly meets the burden of establishing that TLGI believed that the settlement option, in accordance with TLGI's determination at the time, was indeed "the only reasonable option."

When the Tribunal was confronted with the evidence on the "central question" it completely overlooked in its 2004 Award, its response was:

> 22. While the Cargill [sic] and Turner declarations were relied upon to support a view contrary to that reached in paras 215-216 of the Award, they did not satisfy us, in all the circumstances, that the settlement agreement was the only course for Loewen to take. The declarations did not purport to present a comprehensive record or account of TLGI's Board's consideration of the option which it should pursue. Nor did the declarations record or identify the information presented to the Board on which it arrived at its conclusion that it should pursue the settlement option. The declarations did not ground an inference that the settlement option was the only available alternative or that certiorari petition and the bankruptcy petition were not available remedies.

Exhibit B at 5-6.

This response in the 2004 Award is compelling evidence of arbitral misbehavior and the Tribunal's imperfect execution of its powers. First, the Tribunal statement that the uncontested testimony "did not satisfy us" implies that the Tribunal actually considered the evidence before it issued the 2003 Award. With all due respect, that cannot be a correct statement, for it is indisputable that the Tribunal completely overlooked that evidence in 2003. Recall, again, the language of the 2003 Award: the Tribunal claimed that Loewen "failed to present evidence" and

that the Tribunal was "simply left to speculate on the reasons why the decision was made." Those words could only have been uttered by arbitrators who had, literally, viewed no relevant evidence at the time they made their decision. In its 2004 Award, without honestly admitting it, the Tribunal changed its basis for deciding the merits – it now claimed it was not "satisfied" by the uncontradicted evidence. As the Tribunal itself points out, it was not permissible for it to retroactively change the basis for its decision.

Second, and more important, the Tribunal's belated claim that the uncontested evidence "did not ground an inference that the settlement option was the only available alternative" is preposterous. The Tribunal was undoubtedly deeply embarrassed by its previous oversight, but to pretend that the uncontradicted evidence does not say what it says was a grossly inappropriate response. In all fairness, the only inference to draw from the uncontested, uncontradicted, corroborated, comprehensive and clear testimony of Mr. Carville and Mr. Turner was that TLGI settled because it was the only reasonably available alternative.

Because the Tribunal effectively excluded and failed to hear and consider this critical evidence, it engaged in arbitral misconduct, and it engaged in misbehavior by which the rights of the Petitioner have been prejudiced. *See Hoteles Condado Beach v. Local 901*, 763 F.2d 34, 40 (1st Cir. 1985) (holding that vacatur is appropriate when the arbitrators' "refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings," or "when the exclusion of relevant evidence 'so affects the rights of a party that it may be said that he was deprived of a fair hearing;'" and holding that an arbitrator's refusal to give any weight to testimony contained in a trial transcript "effectively denied [the appellee] an opportunity to present any evidence in the arbitration proceeding" because "[t]he testimony was unquestionably relevant" to a critical question of fact, and "no other evidence was available" on this issue); *see also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 300-01 (5th Cir.

2003) ("It is appropriate to vacate an arbitral award if the exclusion of relevant evidence deprives a party of a fair hearing."). In failing to carry out its duties and accord proper weight to this critical evidence, the Tribunal acted in manifest disregard of the law and exceeded its powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made.[2] *See Smart*, 315 F.3d at 725; *IDS Life Ins.*, 266 F.3d at 651; *ComTech*, 102 F.3d at 686; *Michaels*, 624 F.2d at 413-14.

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[2] There is additional evidence that the Tribunal acted in manifest disregard of the law and so imperfectly exercised its powers that the award must be set aside and vacated. The Tribunal made two striking mistakes with respect to TLGI's corporate claims – it missed the evidence concerning which entities owned TLGI's NAFTA claim after the bankruptcy reorganization, and it missed TLGI's MFN arguments concerning the continuous nationality issue.

First, during the arbitration proceedings, TLGI explained to the Tribunal that 75% of TLGI's NAFTA claim was transferred to Nafcanco, a Canadian subsidiary of the now-U.S.-based parent, and 25% was transferred to a Canadian trust to be held for the benefit of TLGI's unsecured creditors. *See* Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence, *The Loewen Group Inc. and Raymond L. Loewen v The United States of America*, ICSID Case No. ARB(AF)/98/3 (Mar. 29, 2002), at 50-79. Nevertheless, in its 2003 Award, the Tribunal overlooked the portion of the NAFTA claim held by the Canadian trust, thus imperfectly executing its powers and prejudicing the rights of TLGI to a fair hearing. *See* Exhibit B at 62, 68-69; *see also Hoteles Condado*, 763 F.2d at 40; *Karaha Bodas*, 364 F.3d at 300-01.

Second, TLGI informed the Tribunal that neither NAFTA nor any of the U.S. bilateral investment treaties ("BITs") in force at that time contained any provisions imposing an obligation to maintain continuous Canadian nationality throughout the arbitration proceedings. *See* Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence, *The Loewen Group Inc. and Raymond L. Loewen v The United States of America*, ICSID Case No. ARB(AF)/98/3 (Mar. 29, 2002), at 50-79. TLGI further argued that under NAFTA Article 1103, the United States was required to accord most-favored-nation ("MFN") treatment to TLGI – *i.e.*, the most favorable treatment that the U.S. extends to other foreign investors. Given that no other foreign investors were required to maintain "continuous nationality" during investment disputes, no such requirement could be imposed on Canadian entities like TLGI. By ignoring this argument, the Tribunal displayed a manifest disregard of the controlling law. *See Montes*, 128 F.3d at 1460; *Jeffrey M. Brown*, 195 F. Supp. 2d at 684-685.

V. CONCLUSION

In accordance with Section 12 of the FAA, this Petition constitutes "notice of a motion to vacate the arbitration award." In the Motion, Petitioner will move for an order vacating and setting aside the awards made by the Tribunal, for the reasons set forth above.

Dated: December 13, 2004

Respectfully submitted,

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