

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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In the Matter of the Arbitration		)
between		)
		)
Raymond L. Loewen,		)
7629 Burriss Street		) 1:04-CV-02151 (RWR)
Burnaby, British Columbia		)
Canada V5G 3S8		) Judge Richard W. Roberts
		)
	Petitioner,	)
and		)
		)
The United States of America,		)
		)
	Respondent.	)
<hr/>		)

**MOTION TO VACATE AND REMAND ARBITRATION AWARD**

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## I. INTRODUCTION

Pursuant to Section 10 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 10, Petitioner Raymond L. Loewen (“Mr. Loewen”) moves this Court to vacate the award (“the Award”) made in the North American Free Trade Agreement (“NAFTA”) Chapter 11 arbitration between Claimants Mr. Loewen and The Loewen Group, Inc. (“TLGI”) and Respondent the United States of America. In addition, Mr. Loewen moves this Court to remand the Award to a new arbitral tribunal.

Based on well-settled principles of U.S. arbitration law and precedent, this Court should vacate the Award because the arbitral tribunal (“the Tribunal”) engaged in misconduct by effectively refusing to hear and consider evidence pertinent and material to the controversy; engaged in misbehavior by which Mr. Loewen’s rights have been prejudiced; exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was never made; and acted in manifest disregard of the law.

Specifically, the Tribunal failed to decide one of Mr. Loewen’s two claims under NAFTA. In addition, in its consideration of the merits issue, the Tribunal disregarded and failed to apply the proper legal standard, even though there was a consensus on the standard that should be applied. Finally, the Tribunal based its consideration of the merits issue on the absence of key evidence, when ample evidence on that issue was in fact in the record.

The Tribunal compounded this substantial misconduct in its consideration of the United States’ very unusual Request for Supplementary Decision (“U.S. Request” or “Request”) to correct the obvious deficiencies in the Award.<sup>1</sup> In response to the U.S. Request, Mr. Loewen urged the Tribunal to consider the NAFTA claim that it had missed and to consider the evidence it had

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<sup>1</sup> The United States made its Request under Article 58 of the ICSID Additional Facility Rules, which allows arbitrators “to decide any question **which it had omitted to decide** in the award.” *See* International Centre for Settlement of Investment Disputes (“ICSID”) Additional Facility Rules, art. 58.

obviously overlooked. The Tribunal issued a terse denial of the U.S. Request, making assertions about its previous decision that were, at best, economical with the truth.

As a result of this misconduct, the Award remains incomplete and contradictory, and disregards controlling legal principles. U.S. courts have long circumscribed their review of arbitral awards based on the expectation that the arbitrators would uphold the integrity of the arbitral process. Where, however, the arbitrators breach the integrity of the arbitral process, the principle of arbitral autonomy must yield to judicial review.

Based on the injuries he has suffered at the hands of the Tribunal, Mr. Loewen moves this Court not only to vacate the Award, but also to remand it to a new tribunal. Mr. Loewen urges the Court to recognize the exceptional nature of the Tribunal's misconduct, and the necessity of remanding to a new arbitral tribunal that will be willing and able to resolve the outstanding issues in the dispute.

## **II. BACKGROUND**

### **A. NAFTA Chapter 11**

In 1990, the United States, Mexico and Canada entered into negotiations to create a "free trade zone" on the North American continent through the phased elimination or reduction of both tariff and non-tariff barriers to trade. Following extensive negotiations, NAFTA was completed and signed by the leaders of the three countries on December 17, 1992. Through the passage of the NAFTA Implementation Act<sup>2</sup> on December 8, 1993, Congress approved NAFTA and provided for a series of domestic laws to effectuate and enforce NAFTA's provisions.

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<sup>2</sup> Pub. L. No. 103-182, 107 Stat. 2057 (1993), codified at 19 U.S.C. §§ 3301-3473.

NAFTA is divided into chapters, with each chapter discussing a different topic – for example, Chapter 6 is devoted to Energy and Basic Petrochemicals, Chapter 10 to Government Procurement, and Chapter 11 to Investment.

The U.S., Canada, and Mexico enacted NAFTA, and Chapter 11 in particular, to “ensure a predictable commercial framework for business planning and investment”<sup>3</sup> and to “increase substantially investment opportunities in the territories of the Parties.”<sup>4</sup> Scholars have described the objectives for Chapter 11 as being to “achieve the benefits of economic liberalization”<sup>5</sup> and to further the “creation of a truly open and nondiscriminatory environment for investment in the United States, Canadian, and Mexican economies by investors of the NAFTA Parties.”<sup>6</sup>

In broad terms, NAFTA Chapter 11 was meant to accomplish two goals. First, it was meant to provide foreign investors with specific, substantive legal protections, such as national treatment and fair and equitable treatment. Second, it allows a foreign investor to file an arbitration claim if it believes a NAFTA signatory has breached these substantive protections.

Mr. Loewen and TLGI filed their arbitration claims under Chapter 11, asserting claims under Article 1116 and Article 1117.<sup>7</sup> Article 1116 states, in relevant part:

**Article 1116: Claim by an Investor of a Party on Its Own Behalf**

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under [NAFTA] . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

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<sup>3</sup> NAFTA Preamble.

<sup>4</sup> NAFTA, art. 102(1)(c).

<sup>5</sup> Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 Int'l Law. 727 (1993).

<sup>6</sup> Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA: L. & Bus. Rev. Am. 82, 83 (1996).

<sup>7</sup> For general guidance on NAFTA Chapter 11, see, e.g., S. Benton Cantey, *International Arbitration To Resolve Disputes Under NAFTA Chapter 11: Investment*, 9 Tulsa J. Comp. & Int'l L. 285 (2001); Jack J. Coe, Jr., *Taking Stock Of NAFTA Chapter 11 In Its Tenth Year: An Interim Sketch Of Selected Themes, Issues, And Methods*, 36 Vand. J. Transnat'l L. 1381 (2003).

Article 1117 states, in relevant part:

**Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under [NAFTA] . . . and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

Mr. Loewen filed a claim under Article 1116 as an individual investor (a shareholder of TLGI), and a second claim under Article 1117 on behalf of an investment that he controlled, TLGI. TLGI, in turn, articulated a claim as an investor under Article 1116 and another claim under Article 1117 on behalf of its investment, its American subsidiary. These claims were ultimately dismissed by the Tribunal on jurisdictional grounds in two decisions in 2003 and 2004, as discussed in detail below.

**B. The Mississippi Proceedings<sup>8</sup>**

Mr. Loewen founded TLGI in 1966. 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 by 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, and Mr. O’Keefe sued TLGI in Mississippi state court.

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<sup>8</sup> For additional detail on the Mississippi and NAFTA proceedings, see Notice of Claim, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Oct. 30, 1998), at 8-45 (hereinafter “Notice of Claim”) (attached as Exhibit 1); Memorial of Raymond L. Loewen, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Oct. 18, 1999), at 5-41 (attached as Exhibit 2); Memorial of The Loewen Group, Inc., *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Oct. 18, 1999), at 8-62 (attached as Exhibit 3).

During the Mississippi trial, O'Keefe's counsel sought to infect the jury with a nationalistic animus against TLGI and Mr. Loewen based on their Canadian nationality. O'Keefe's counsel continually contrasted Mr. O'Keefe's status as a local citizen with TLGI and Mr. Loewen's status as foreigners, and invited the jury to make its decision on that basis. In addition, O'Keefe's counsel repeatedly and falsely implied that TLGI and Mr. Loewen were racists who refused to provide services to African Americans.

In 1995, the jury 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 ever in Mississippi 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. Despite initially permitting TLGI to pursue its appeal by posting a \$125 million bond, the Mississippi Supreme Court then vacated its interim order 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 in 1996 through a \$175 million settlement with O'Keefe.

### **C. The NAFTA Proceedings**

In 1998, TLGI and Mr. Loewen jointly filed their arbitration claims against the United States, and selected the ICSID Additional Facility rules to govern the proceedings. In their Notice of Claim, TLGI and Mr. Loewen asserted that the United States had violated a number of substantive provisions of NAFTA designed to protect foreign investors such as TLGI and Mr. Loewen. For example, TLGI and Mr. Loewen asserted that the Mississippi proceedings as a whole breached the minimum standard of treatment guaranteed to foreign investors by NAFTA.

The Tribunal was originally composed of: Sir Anthony Mason, former Chief Justice of the Australian High Court;<sup>9</sup> 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. Mr. Fortier 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 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. Based on this reorganization, the United States submitted a jurisdictional objection to the Tribunal, asserting that because of this change in nationality from Canadian to American, 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 asked the Tribunal to dismiss the case. As the Tribunal noted, the United States did not challenge the Tribunal's jurisdiction as it related to Mr. Loewen.<sup>10</sup>

The Tribunal issued three substantive decisions, which together constitute the Award. On January 5, 2001, it rejected some of the United States' jurisdictional objections and joined others to

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<sup>9</sup> Sir Mason served as chairman of the Tribunal throughout the arbitral proceedings.

<sup>10</sup> Award, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Cases No. ARB(AF)/98/3 (Sept. 13, 2004) ("2004 Decision"), para. 19 ("[T]here was no jurisdictional objection to [Mr. Loewen's] claim under art. 1116").

the merits (“2001 Decision”).<sup>11</sup> On June 26, 2003, the Tribunal issued its main decision, dismissing TLGI’s and Mr. Loewen’s claims “in their entirety” on jurisdictional grounds (“2003 Decision”):<sup>12</sup>

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 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 [claims] are hereby dismissed in their entirety.<sup>13</sup>

The Tribunal found that it had no jurisdiction to determine the merits of the claims for two reasons. First, the Tribunal held that continuing diversity of nationality was a jurisdictional prerequisite, and that TLGI failed to meet this requirement because it changed its nationality from Canadian to American during the course of its bankruptcy reorganization. Second, the Tribunal held that continuing control over investments was a jurisdictional prerequisite, and that Mr. Loewen did not meet this requirement because he did not control TLGI when his claim was filed. These were the only actual holdings in the 2003 Decision, and it was on these jurisdictional bases that the Tribunal dismissed all the claims. Indeed, the Tribunal stated: “Ultimately it turns on **a question of**

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<sup>11</sup> Award, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Cases No. ARB(AF)/98/3 (Jan. 5, 2001) (attached as Exhibit 4).

<sup>12</sup> Award, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (June 26, 2003), at 70.

<sup>13</sup> 2003 Decision, at 69-70.

**jurisdiction . . . This question** was raised by Respondent’s motion to dismiss for lack of jurisdiction . . . In this Award we uphold the motion and dismiss Claimants’ NAFTA claims.”<sup>14</sup>

Even though the Tribunal based its 2003 Decision on jurisdictional grounds, the Tribunal did not hesitate to pass judgment on the Mississippi proceedings:

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 [TLGI] 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 [TLGI] 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.**<sup>15</sup>

In addition, the Tribunal described how it would have resolved the issue of exhaustion of local remedies (“exhaustion issue”), which it characterized as a “merits” issue. The Tribunal held that NAFTA claimants who based their claims on a denial of justice had to exhaust their local remedies before seeking international relief. The Tribunal concluded that TLGI had not shown that it had exhausted its local remedies. However, because the Tribunal expressly based its 2003

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<sup>14</sup> 2003 Decision, para. 1 (emphasis added)

<sup>15</sup> 2003 Decision, para. 54, 119, 137.

Decision solely on jurisdictional grounds, the Tribunal's considerations of the merits issues – the Mississippi courts' breach of international law, and the exhaustion of local remedies – were *dicta*.

After the Tribunal issued its 2003 Decision, the United States, which had won the case, requested that the Tribunal issue a supplemental decision pursuant to Article 58 of the ICSID Additional Facility Rules.<sup>16</sup> 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.

In its 2003 Decision, the Tribunal expressly dealt with only one of Mr. Loewen's two NAFTA claims, his Article 1117 claim. The Tribunal never mentioned or discussed his second claim under NAFTA Article 1116. Faced with such a glaring deficiency, the U.S. asked the Tribunal to declare that “by its terms and logic, the Award plainly dispose[d] of Raymond Loewen's Article 1116 claims on their merits.”<sup>17</sup> The U.S. then proceeded to ask the Tribunal to “clarify[] its disposition of that claim,” based on the Tribunal's failure to “expressly recite its disposition of [Mr.] Loewen's Article 1116 claims.”<sup>18</sup>

Importantly, the U.S. Request, which was filed on the last possible day of the 45-day period allotted by Article 58, precluded Mr. Loewen from seeking to vacate the Award at that time. It was

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<sup>16</sup> Article 58 provides:

- (1) Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.
- (2) The Tribunal shall determine the procedure to be followed.
- (3) The decision of the Tribunal shall become part of the award and the provisions of Articles 52 and 53 of these Rules shall apply thereto.

<sup>17</sup> U.S. Request for Supplementary Decision, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Aug. 11, 2003), at 2 (attached as Exhibit 5).

<sup>18</sup> *Id.*, at 2-3

widely expected that Mr. Loewen would seek to vacate the Award, given the scholarly consensus that the Tribunal's reasoning was "preposterous," "quite wrong," and "completely appalling."<sup>19</sup>

In response to the U.S. Request, Mr. Loewen asked the Tribunal to remedy its substantial misconduct. Mr. Loewen urged the Tribunal to recognize that it had "completely overlooked his Article 1116 claim, and that . . . [that it had to] return to the merits and decide the merits of his claim in accordance with all the submissions and to make all findings necessary to determine the claim."<sup>20</sup> Mr. Loewen also requested that the Tribunal "perfect an otherwise incomplete Award," in particular by making a fair and impartial determination based on the "[u]ncontradicted and unchallenged evidence" that it had overlooked.<sup>21</sup>

On September 13, 2004, the Tribunal issued a decision denying the U.S. Request ("2004 Decision"). Although the Tribunal issued three separate decisions, there can be no doubt that they are but constituent parts of a larger Award. Article 58 clearly states that the Tribunal's supplemental decision "shall become part of the award."<sup>22</sup> As such, Mr. Loewen's Motion to Vacate and Remand challenges not only the 2004 Decision, but the entire Award.

### **III. THE TRIBUNAL'S FINDINGS AND MISCONDUCT THAT CONSTITUTE GROUNDS FOR VACATING AND REMANDING THE AWARD**

The Tribunal's 2003 Decision 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

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<sup>19</sup> Michael D. Goldhaber, *A "Completely Appalling" Decision*, *The American Lawyer*, available at [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com) (2004).

<sup>20</sup> Article 58 Submission As To Raymond L. Loewen's Article 1116 Claim, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Sept. 19, 2003), para. 4 (attached as Exhibit 6).

<sup>21</sup> *Id.*

<sup>22</sup> See ICSID Additional Facility Rules, art. 58.

Tribunal to correct. Second, even though there was a consensus that the appropriate legal standard for the determination of the exhaustion issue was an objective standard of “reasonable availability,” the Tribunal manifestly disregarded and failed to apply that 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 constituted arbitral misconduct, rendered the Award incomplete and contradictory, and require that this Court vacate the Award.

**A. The Tribunal’s Failure To Decide Mr. Loewen’s Article 1116 Claim**

In the 2003 Decision, the Tribunal either ignored or failed to recognize one of Mr. Loewen’s treaty claims. As noted, 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. Through Article 1116, Mr. Loewen claimed that **he** was harmed in his personal capacity as an investor. Through Article 1117, Mr. Loewen claimed that **his investment** was harmed.

It is indisputable that Mr. Loewen properly filed and repeatedly articulated his Article 1116 claim before the Tribunal. In his original Notice of Claim, Mr. Loewen affirmatively set out a claim under Article 1116:

**CAUSES OF ACTION**

...

178. **Raymond Loewen also satisfies all of the elements for a claim under Article 1116.** *First*, Mr. Loewen is an investor of Canada and of no other state. Mr. Loewen’s investments in the United States, through TLGI, include substantial

portions of LGII, Riemann Holdings, and Wright & Ferguson Funeral Home. *Second*, as noted above, both the United States and Mississippi (for which the United States is responsible) repeatedly breached their obligations under NAFTA Articles 1102, 1105 and 1110 during the *O'Keefe* litigation. *Third*, as explained above and below, Mr. Loewen suffered grave damages as a result of those breaches, either directly or through TLGI or its United States investments.<sup>23</sup>

During the arbitration proceedings, Mr. Loewen reaffirmed that he was stating a claim, and pursuing relief under, under Article 1116:

**I want most emphatically to clear up any confusion that may have been created in the tribunal's mind by the assertion that somehow Mr. Loewen's claims for damages come all under 1117 and not under Article 1116.**

As the pleadings in this case show, and I'm referring specifically to paragraph 181 of the notice of claim in this case, Mr. Loewen asserts a claim under Article 1117 on behalf of [TLGI], and I quote, "[TLGI] to recover the grave damages that [TLGI] suffered as a result of the NAFTA breaches complained of."

**Mr. Loewen has an entirely separate, entirely independent cause of action under Article 1116 for damage that he personally suffered to his investment**, and those are the damages that were discussed, I believe, during the government's – during the government's presentation, and those damages are spelled out in the memorial that we filed on behalf of Mr. Loewen at pages 69 and forward, in response to the tribunal's request for a sketch of damages.

**It's made very clear here that these are Mr. Loewen's personal estimated damages, including the loss in the value of his TLGI stock, loss to his personal reputation.**

We are prepared, as is the company, at the appropriate time to set forth the damages suffered by [TLGI], all we have spoken to and all we were asked to speak to was Mr. Loewen's personal damages. **So we would vigorously contest the statement that was made towards the close of the government's presentation that if you strike Mr. Loewen's standing under Article 1117, you strike the whole of his claim. You strike only a small part of it.** He does not seek any personal recovery under Article 1117. That recovery would be to [TLGI].<sup>24</sup>

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<sup>23</sup> Notice of Claim, at para. 178 (Exhibit 1).

<sup>24</sup> Transcript (Sept. 21, 2000), at 508:2-509:16 (Mr. Mills on behalf of Claimants) (Sept. 2000 Hearing transcripts attached as Exhibit 7).

Mr. Loewen also made clear that he had been injured in his personal capacity as an investor under Article 1116:

The next point I want to make is that there really is no question that [Mr.] Loewen is a proper claimant before this tribunal. He founded the company, it was named after him, he was the president and CEO. He was the chairman of the board of directors. He and his family were by far the largest stockholder. To the public he was the company.

And although damages are not before the tribunal, I will merely note that **[Mr.] Loewen has suffered a devastating injury from this coerce[d] settlement, as stated in [our] memorial, he lost his company, he lost a substantial value in his stock, he lost the value of his stock options and he suffered a devastating loss to his business and personal reputation.**

It's our view that **Mr. Loewen, as a Canadian citizen, having suffered this injustice in the state of Mississippi, brings before this tribunal a claim based on precisely the type of conduct that NAFTA was intended to prevent, brought by precisely the type of claimant that NAFTA was intended to protect, and at the very least, there is absolutely no basis for the contention that the merits of Mr. Loewen's claim cannot even be considered by this tribunal.**<sup>25</sup>

\* \* \*

Raymond Loewen is the one person before this tribunal who personally endured the O'Keefe trial and its aftermath and is the person against whom the Mississippi jury directed its nationalistic and racial animus.<sup>26</sup>

Indeed, the United States recognized that Mr. Loewen had stated a claim, and was pursuing relief, under Article 1116:

**If Mr. Loewen's contention is that he personally suffered some kind of harm as a result of any violation of Chapter 11 that is within the jurisdiction of this tribunal, Article 1116 is there for**

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<sup>25</sup> Transcript (Sept. 20, 2000), at 31:14-32:17 (Mr. Lewis on behalf of Claimants) (Exhibit 7).

<sup>26</sup> Transcript (Oct. 15, 2001), at 35:20-36:2 (Mr. Lewis on behalf of Claimants) (Oct. 2001 Hearing transcripts attached as Exhibit 8).

him. That is designed for investors to bring a claim on their own behalf, saying that they have been injured.<sup>27</sup>

...

Clearly, the drafters contemplated that noncontrolling shareholders would have recourse only under Article 1116, and that only controlling shareholders might potentially have recourse under both articles. **Mr. Loewen is not a controlling shareholder. His recourse, if he has any, is under Article 1116, and not 1117.**<sup>28</sup>

In his Counter-Memorial dated March 29, 2002, Mr. Loewen noted the United States' failure to object to his Article 1116 claim on jurisdictional grounds:<sup>29</sup>

#### **RAYMOND LOEWEN'S 1116 CLAIM UNAFFECTED BY US OBJECTION**

1. The Claimant, Raymond L. Loewen, advances claims as an investor under Article 1116 and claims on behalf of [TLGI] pursuant to Article 1117.
2. **No objection has been made in the recent filing by the United States to Raymond Loewen's Article 1116 claim.** Raymond L. Loewen has always been and remains a Canadian citizen.
3. **Raymond L. Loewen respectfully notes that[,] as there has been no objection to his claim pursuant to Article 1116 of NAFTA[,] he requests that the Tribunal render its award on the merits of his claim.**<sup>30</sup>

The United States even conceded its failure to object to Mr. Loewen's claim under Article 1116 on jurisdictional grounds.

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<sup>27</sup> Transcript (Sept. 21, 2000), at 485:2-9 (Mr. Legum on behalf of the United States) (Exhibit 7).

<sup>28</sup> Transcript (Sept. 21, 2000), at 492:8-15 (Mr. Legum on behalf of the United States) (Exhibit 7).

<sup>29</sup> Counter-Memorial of the Claimant Raymond L. Loewen on the U.S. Objection Dated March 1, 2002, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Mar. 29, 2002) (hereinafter "Raymond Loewen Counter-Memorial") (attached as Exhibit 9). For the U.S. pleadings contesting the jurisdiction of the Tribunal vis-à-vis TLGI's claims under Article 1117, see Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of the Loewen Group, Inc., *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Mar. 1, 2002) (attached as Exhibit 10); Reply of the United States of America to the Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Apr. 26, 2002) (attached as Exhibit 11).

<sup>30</sup> Raymond Loewen Counter-Memorial, at 1 (emphasis added) (Exhibit 9).

I just make one point of clarification, which is an issue was raised yesterday as to what the question was that the United States was asking the tribunal to decide. In our presentation yesterday, we noted that the tribunal's disposition of the 1117 claim will have the effect of disposing of the bulk of Mr. Loewen's claims because those claims are clearly derivative of injuries to the corporation.

To be clear, however, **the only issue presented for the tribunal to decide here is the 1117 claim. That's the only objection that's before the tribunal that it needs to address responding to the United States' Memorial contesting the jurisdiction of the Tribunal to consider [TLGI]'s claims under Article 1117.**<sup>31</sup>

In sum, there is no question that Mr. Loewen repeatedly articulated his claim under Article 1116 to the Tribunal. It is also clear that the United States never contested Mr. Loewen's claim under Article 1116 on jurisdictional grounds, as the Tribunal itself acknowledged: "there was no jurisdictional objection to [Raymond Loewen's] claim under art. 1116."<sup>32</sup>

Despite the emphasis Mr. Loewen had placed on his Article 1116 claim, the Tribunal ignored it in its 2003 Decision. 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. First, the Tribunal purported to list all of TLGI and Mr. Loewen's claims under Chapter 11:

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 [TLGI] under Article 1117. **Likewise, Raymond Loewen submits claims as "the investor of a party" on behalf of TLGI under NAFTA, Article 1117.**<sup>33</sup>

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<sup>31</sup> Transcript (Sept. 22, 2000), at 664:10-21 (Mr. Legum on behalf of the United States) (Exhibit 7).

<sup>32</sup> 2004 Decision, para. 19.

<sup>33</sup> 2003 Decision, para. 9 (emphasis added)

The Tribunal listed TLGI's claims under Articles 1116 and 1117, as well as Mr. Loewen's claim under Article 1117. However, the Tribunal completely overlooked Mr. Loewen's claim under Article 1116.

With respect to the continuing diversity of 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 [TLGI] (re-named "Alderwoods, Inc", a United States corporation).<sup>34</sup>

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 the lack of continuing diversity of nationality.

With respect to the continuing control over investments issue, 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.<sup>35</sup>

In holding that Mr. Loewen had not established his continuing control over his investment – TLGI – the Tribunal sought to decide Mr. Loewen's NAFTA claims on jurisdictional grounds. While this holding decided Mr. Loewen's claim under Article 1117, it had absolutely no impact on his claim under Article 1116. Recall that under Article 1117, Mr. Loewen claimed that **his investment** was

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<sup>34</sup> 2003 Decision, para. 29.

<sup>35</sup> 2003 Decision, para. 239.

harm, but under Article 1116, Mr. Loewen claimed that **he** was harmed in his **personal capacity** as an investor. The Tribunal thus left one of Mr. Loewen's treaty claims unresolved and undecided.

In the legally operative part of its 2003 Decision, 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.<sup>36</sup>

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 utterly irrelevant to Mr. Loewen's Article 1116 claim.

The fact that the Tribunal ignored or failed to recognize Mr. Loewen's Article 1116 claim was reinforced by what the Tribunal said at the start of its decision, where it distinguished between its "jurisdictional" holdings on continuing diversity of 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

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<sup>36</sup> 2003 Decision at pp. 69-70 (emphasis added).

requirement of diversity of nationality as between a claimant and the respondent government, and (b) the assignment by [TLGI] 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.**<sup>37</sup>

The plain language of the Award indicates that the Tribunal decided the case on jurisdictional grounds. The Tribunal described its “ultimate” holding as jurisdictional in nature, explained the basis for that holding, and proceeded to dismiss **all** the claims before it – “Claimants’ NAFTA claims,” including all of Mr. Loewen’s claims – based on that holding.

In contrast, the Tribunal’s description of its consideration of the “merits” issue – the exhaustion of local remedies – reinforced the impression that it was ancillary to the core jurisdictional holding.

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 [TLGI] 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.<sup>38</sup>

The Tribunal did not say that its decision “ultimately” turned on a merits question, nor did it purport to deny TLGI or Mr. Loewen’s claims on the merits.

Because the Tribunal had already expressly 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 Decision, the Tribunal “Orders.” These holdings are limited to the Tribunal’s disposition of TLGI’s claims on

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<sup>37</sup> 2003 Decision, para. 1 (emphasis added).

<sup>38</sup> 2003 Decision, para. 2.

the continuing diversity of 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 the merits.

It is thus apparent from the Tribunal's own repeated statements and the express holding and Orders of the 2003 Decision that the Tribunal completely ignored 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 Decision would be vacated, asked the Tribunal for a supplemental ruling to clarify the 2003 Decision.

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

#### **RESPONDENT'S CASE**

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.

#### **RAYMOND LOEWEN'S 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.

18. Central to the submission is the argument that paras. 215-217 of the Award are in error and that the Tribunal overlooked the declarations of Mr. Wynne S. Carvill and the Rt. Hon. John N. Turner. These declarations were before the Tribunal and were relied upon by Claimants at the oral hearings.

**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 [TLGI]’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 [TLGI] claims on the one hand and to the Raymond Loewen claim under art. 1116 on the other hand.<sup>39</sup>

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<sup>39</sup> 2004 Decision, para. 16-21 (emphasis added).

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 Decision. As the Tribunal conceded, there was no mention of Mr. Loewen's Article 1116 claim in the 2003 Decision, and the Article 1116 claim was not resolved on jurisdictional grounds.<sup>40</sup> The clear language of the 2003 Decision demonstrates that the Tribunal did not base its decision on the merits: "Ultimately it turns on a **question of jurisdiction . . . This question** was raised by Respondent's motion to dismiss for lack of jurisdiction . . . In this Award we uphold the motion and dismiss Claimants' NAFTA claims."<sup>41</sup> Thus, the Tribunal's claim in paragraph 20 of the 2004 Decision that it had, in fact, resolved Mr. Loewen's Article 1116 claim on the merits is intellectually dishonest and clearly false.

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

The Tribunal's second substantial failure was its manifest disregard of the controlling principle of law: whether TLGI had, as an objective matter, exhausted its local remedies after the Mississippi verdict. In its 2003 Decision, the Tribunal concluded that TLGI was required to exhaust local remedies, in particular by filing a petition for certiorari with the U.S. Supreme Court, 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.<sup>42</sup>

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<sup>40</sup> 2004 Decision, para. 19.

<sup>41</sup> 2003 Decision, para. 1 (emphasis added).

<sup>42</sup> 2003 Decision, para. 169.

It stated further:

214. Respondent argues that, because entry into the settlement agreement was a matter of business judgment, [TLGI] 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 [TLGI] 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.<sup>43</sup>

Thus, the Tribunal recognized and concluded that the controlling law concerning exhaustion was a standard of “reasonable availability.”<sup>44</sup>

Any standard based on reasonable availability is normally an objective standard.<sup>45</sup> Indeed, there was a consensus that the standard was an objective one. In its 2003 Decision, the Tribunal stated:

168. This passage, in our view, correctly expresses the scope and content of the principle relating to exhaustion of local remedies. **It is an obligation to exhaust remedies which are effective and**

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<sup>43</sup> 2003 Decision, para. 214 (emphasis added).

<sup>44</sup> In a discussion with counsel for the United States, the Tribunal noted that the standard is not the mere availability of alternatives, but instead whether such alternatives are reasonably available.

MR. LEGUM: . . . Justice is not denied where justice remains to be pursued. The United States cannot have denied [TLGI] justice if the courts of justice were available but [TLGI] chose not to avail itself of them. The very nature of a claim of denial of justice is such that a showing of systemic failure is necessary.

LORD MUSTILL: Is there not perhaps a little bit more to it? You might be able to waive a little bit more aside. **It's not so much that the only requirement was that there was a means of seeking a remedy, but that the remedy would actually have been given**, because if there had been -- if there had been conduct amounting to a denial at the first stage, then it's not much consolation, wouldn't have been much consolation, to know that there was a means of putting it right if in the event it wouldn't have been put right.

Transcript (Oct. 17, 2001), at 772:9-773:4 (Lord Mustill on behalf of the Tribunal) (Exhibit 8).

In another discussion with Claimants' counsel, the Tribunal affirmed its adherence to the objective “reasonable availability” standard.

JUDGE MIKVA: There's no question. If you didn't have a reasonable possibility of certiorari, then all of this is just idle discussion.

Transcript (Oct. 16, 2001), at 482:1-3 (Judge Mikva on behalf of the Tribunal) (Exhibit 8).

<sup>45</sup> See, e.g., *Dep't of Justice v. Fed. Labor Relations Auth.*, 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”).

**adequate and are reasonably available to the complainant in the circumstances in which it is situated.**<sup>46</sup>

The test then was not whether the complainant believed that the alternative remedy was effective, adequate and reasonably available, but instead whether the alternative remedy **was**, objectively speaking, effective, adequate, and reasonably available.

When the United States introduced evidence relating to TLGI's subjective state of mind, Claimants' counsel pointed out that this evidence was inconsistent with the objective standard, and thus irrelevant.

So it goes back to was it reasonable not to go to the Supreme Court of the United States. Yes, it was reasonable, for all the reasons you heard yesterday about why it was like winning the lottery, as far as doing it. And it made sense in the context of what [TLGI] had to do.

I might also say that **the government states at page 36 of its original response that the test is an objective test. I mean, are we really going to get into a hearing of what everybody felt and thought that this was a good idea, bad idea?**

The fact of the matter is, **the government says whether or not this was a reasonably effective remedy is an objective test.** And the only thing they now say is they have got a bunch of drafts which shows that [TLGI] were careful warriors and they considered this.

But I think **the real test is whether or not this was an effective or reasonably effective remedy.**<sup>47</sup>

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My fifth point is simply a comment with respect to some of the testimony that was read into the record yesterday and that we've seen with regard to the supposed subjective intentions of the [TLGI] board of directors in determining not to enter into bankruptcy. I think with regard to the extensive reading of such statements that was done yesterday, as well as the extensive reliance that's been placed on that in the government's submissions, **it is well worth**

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<sup>46</sup> 2003 Decision, para. 168 (emphasis added).

<sup>47</sup> Transcript (Sept. 21, 2000), at 502:9-503:6 (Mr. Lewis on behalf of Claimants) (Exhibit 7).

returning to the United States' July 7 response, at page 36, where the United States says, and I quote, "the test of ineffectiveness of the remedy is meant to be objective."

**I can understand, perhaps, rhetorically, why one might want to rely on such subjective statements, but in point of fact, those are wholly irrelevant, even under the standard espoused by the United States.<sup>48</sup>**

\* \* \*

Against both subjective and objective showings, it cannot possibly be said that entering into bankruptcy is a means for appealing the O'Keefe judgment, was a reasonable option for [TLGI] in 1995 or 1996.<sup>49</sup>

...

[T]he objective evidence, including the evidence offered by the contrary opinions in this case, is that federal court relief from the United States Supreme Court on writ of certiorari and, more specifically, on a stay, would not have been available to [TLGI], under any conceivable standard that the government wishes to apply to our claim of duress or claim of – or local remedies issue.<sup>50</sup>

Upon Mr. Loewen's objection to the subjective evidence introduced by the United States, the U.S. reaffirmed that "reasonable availability" was an objective standard, and stated, perhaps a bit disingenuously, that the subjective evidence demonstrated the objective availability of alternatives.

**Now, the question was raised yesterday and today whether or not this standard is objective or subjective, and we've been reminded that we have stressed that it's an objective test, and it's been suggested that we contradict ourselves by citing the state of mind of [TLGI]'s lawyers and executives at the time by quoting things that they have said and what they have thought.**

**Of course, that does not turn the standard into a subjective one. We are quoting those items merely as evidence that, in fact,**

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<sup>48</sup> Transcript (Sept. 22, 2000), at 595:22-596:17 (Mr. Castanias on behalf of Claimants) (Exhibit 7).

<sup>49</sup> Transcript (Oct. 16, 2001), at 464:22-465:4 (Mr. Castanias on behalf of Claimants) (Exhibit 8).

<sup>50</sup> Transcript (Oct. 16, 2001), at 475:4-11 (Mr. Castanias on behalf of Claimants) (Exhibit 8).

**objectively, indeed, [TLGI] had these reasonable alternatives** which they were required to attempt so that they could finalize the lower court judgment and actually be able to establish a breach.<sup>51</sup>

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I would simply note, for purposes of this point, that **effectiveness is an objective, not a subjective test. It's not a question of what an applicant thought was reasonable, but rather whether the remedy provided was, in fact, effective.**<sup>52</sup>

Even though there was a consensus that “reasonable availability” was an objective standard, the Tribunal disregarded that legal standard. In so doing, the Tribunal also ignored the evidence that was presented by Mr. Loewen and TLGI that demonstrated that TLGI did not have a reasonably available U.S. Supreme Court alternative to settlement.

Expert evidence showed that U.S. Supreme Court review of the Mississippi judgment was not “reasonably available,” primarily because the judgment was subject to discretionary review.<sup>53</sup> Two of the three expert reports prepared for the Tribunal (Tribe and Fried) confirmed that there was little prospect of Supreme Court review. Professor Tribe stated: “[A]s a practical matter, Supreme Court review was unavailable. . . . I do not believe that [TLGI] could have had any basis for believing that a petition for certiorari would have been granted or would indeed have stood a non-negligible **chance** of being granted.”<sup>54</sup> Similarly, Professor Fried stated: “It is my opinion that the specific circumstances of this case, as measured by the Supreme Court rules and practices, made

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<sup>51</sup> Transcript (Sept. 22, 2000), at 653:11-654:3 (Mr. Clodfelter on behalf of the United States) (Exhibit 7).

<sup>52</sup> Transcript (Oct. 18, 2001), at 833:22-834:4 (Mr. Legum on behalf of the United States) (Exhibit 8).

<sup>53</sup> 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4006 (2d ed. 1996) (“The basic pattern of review established in 1789 has been altered only by expanding it to include all federal questions properly presented to state courts, and by gradually shifting all proceedings to discretionary review by certiorari rather than the formally obligatory appeal jurisdiction.”).

<sup>54</sup> Statement of Laurence Tribe (Oct. 18, 1999), at 2, 24 (emphasis in original) (attached as Exhibit 12).

this an exceedingly remote candidate to be chosen as one of the 85 or 90 cases, selected from among several thousand petitions, that the Court hears each year.”<sup>55</sup>

The United States’ expert, Days, merely concluded that “[TLGI] **could** have sought and would have had a **reasonable opportunity** to obtain Supreme Court review of the Mississippi Supreme Court’s decision.”<sup>56</sup> Days never explained what he meant by the term “reasonable opportunity,” and for good reason. Only 87, or 1.3%, of the 6685 petitions for writs of certiorari considered during the 1996 term were granted.<sup>57</sup> In addition, the criteria governing the selection of cases for Supreme Court review remain “opaque.”<sup>58</sup> As a result, it is exceedingly remote that even cases with a “reasonable opportunity” will be granted certiorari. Days’ emphasis on the *possibility* of Supreme Court review cannot obscure this fact.

In this battle of the experts, the Tribunal was obligated to determine which testimony was more credible, as the Tribunal itself recognized: “But instead of battling the experts, because I really think both sides have exhausted that matter, **we’ll resolve which set of experts – whether Larry Tribe or Drew Days should get the most weight.**”<sup>59</sup> Even the United States agreed that the Tribunal had to make this determination: “[T]he tribunal does have to decide, make a judgment about the availability of U.S. Supreme Court review.”<sup>60</sup> Even though the Tribunal recognized its duty, the plain language of the 2003 Decision demonstrates that the Tribunal made no such determination.

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<sup>55</sup> Op. of Charles Fried, at 7-8 (attached as Exhibit 13).

<sup>56</sup> Statement of Drew S. Days III (Feb. 15, 2000), at 3 (emphasis added) (attached as Exhibit 14).

<sup>57</sup> *The Supreme Court, 1996 Term: The Statistics*, 111 Harv. L. Rev. 431, 431 (1997).

<sup>58</sup> Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067, 1072 (1988) (“[T]he criteria that the Court is expected to apply in deciding whether to grant certiorari are... opaque. Neither the Judiciary Act of 1925 nor any other statutory enactment define such criteria.”).

<sup>59</sup> Transcript (Sept. 21, 2000), at 368:19-369:1 (Judge Mikva on behalf of the Tribunal) (Exhibit 7).

<sup>60</sup> Transcript (Sept. 21, 2000), at 368:11-13 (Mr. Blackwell on behalf of the United States) (Exhibit 7).

211. This Tribunal is not in a position to decide whether the opinion of Professor Days or that of Professor Tribe is to be preferred. Nor is the Tribunal in a position to decide which of their conflicting opinions is to be preferred on a related question, namely whether collateral review was available in the Federal District Court.<sup>61</sup>

Instead of addressing the ample objective evidence, the Tribunal disposed of the exhaustion issue on a different legal principle: whether TLGI subjectively believed it had any reasonable alternative to settlement. In so doing, the Tribunal manifestly disregarded the law that it had deemed controlling: whether there was, objectively speaking, a reasonably available alternative.

In the 2004 Decision, the Tribunal tried to change the standard yet again, more than one year after the close of the arbitral proceedings. The Tribunal essentially read the word “reasonable” out of the standard. As a result, TLGI now had to prove (after the arbitral proceedings had already ended) that “the settlement option was the **only available alternative**,” and that the “certiorari petition and the bankruptcy petition were not **available remedies**.”<sup>62</sup> By eliminating the word “reasonable,” the Tribunal transformed the “reasonable availability” standard into one where the mere availability of alternatives sufficed, regardless of whether they were reasonable or not.

However, the Tribunal in its 2004 Decision still did not apply the objective standard to the evidence before it, continuing to disregard the controlling legal standard.

### **C. The Tribunal’s Failure to Hear and Consider the Evidence on Why TLGI Settled**

The third signal failure of the Tribunal in the 2003 Decision 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 [TLGI]’s case. [TLGI] failed to present evidence** disclosing its reasons for

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<sup>61</sup> 2003 Decision, para. 211.

<sup>62</sup> 2004 Decision, para. 22.

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 [TLGI]. 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 [TLGI] could reasonably be expected to take, that would be enough to justify an inference or conclusion that [TLGI] had no reasonably available and adequate remedy.**

216. Although entry into the settlement agreement may well have been a reasonable course for [TLGI] 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 [TLGI] could reasonably be expected to take.

217. Accordingly, our conclusion is that [TLGI] failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, [TLGI] has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.<sup>63</sup>

The Tribunal was simply wrong. Claimants had submitted clear, uncontradicted, uncontested, comprehensive, and corroborated evidence explaining why Mr. Loewen had settled the case. The Tribunal overlooked 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 Decision, attached to the first Memorial filed by TLGI. The first was the declaration of Wynne S. Carvill, the American attorney who was the "principal outside counsel for [TLGI] in charge of coordinating the various efforts to respond to the developments in Mississippi."<sup>64</sup> It was supported by the equally clear declaration of a director of TLGI, John Napier Turner, a former Prime Minister of Canada who served on the Special Committee established by

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<sup>63</sup> 2003 Decision, para. 215-17 (emphasis added).

<sup>64</sup> Declaration of Wynne S. Carvill (May 24, 2000) ("Carvill Decl."), ¶ 3.

TLGI's Board of Directors to consider "actions necessary to protect the assets and interests of the Company" in the wake of the Mississippi verdict.<sup>65</sup> The U.S. never questioned, challenged, or cross-examined either of these declarants, nor did it put in any declarations rebutting this evidence.

In his declaration, Mr. Carvill, a graduate of Harvard Law School, a law clerk to a U.S. Court of Appeals judge, a leading counsel and a partner in a distinguished firm, testified to his personal involvement in the assessment of the options identified by TLGI in the face of the Mississippi proceedings.<sup>66</sup> 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.<sup>67</sup> 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 TLGI in the negotiations which resulted in the settlement.<sup>68</sup> In short, Mr. Carvill was **the** witness who could best address the very issue of why TLGI settled.

In his declaration, Mr. Carvill testified that all the options for relief in the federal court system, including appeal to the U.S. Supreme Court, 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;

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<sup>65</sup> Declaration of Rt. Hon. John N. Turner (May 25, 2000) ("Turner Decl."), ¶ 13.

<sup>66</sup> Carvill Decl. ¶¶ 1,3.

<sup>67</sup> *Id.* ¶¶ 2-3.

<sup>68</sup> *Id.* ¶ 3.

(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."<sup>69</sup>

Mr. Carvill's declaration was supported and fully corroborated by a declaration filed by Mr. 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 the 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

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<sup>69</sup> Carvill Decl. ¶¶ 6-8, 12-14; *see also* Submission of the Loewen Group, Inc. concerning the Jurisdictional Objections of the United States, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (May 26, 2000), at para. 59-62 (attached as Exhibit 15).

the Mississippi state courts was the primary strategic objective at that time.<sup>70</sup>

Claimants' counsel discussed the import of the Turner and Carvill declarations throughout the arbitration proceedings, primarily in the context of Mr. Loewen's subjective state of mind as to the availability of reasonable alternatives.

**The petition for certiorari was not filed because, in the words of Mr. Carvill and the words of Mr. Turner, it was concluded by the lawyers who were advising [TLGI] that the chances of success were extremely low, and that's the reason it's in the record and that, in fact, is the reason why we did not pursue it.**<sup>71</sup>

\* \* \*

**As both Wynne Carvill and the Right Honorable John Turner have testified to this tribunal, the advice given to the company with regard to a petition for certiorari was that the chances were exceedingly remote and completely consistent with the opinions given to this tribunal by Professor Tribe.**<sup>72</sup>

...

Well, I think that goes back to the question that Mr. Castanias had talked about and we've been talking about for two years, that it's not -- it's a lottery. The chances of -- in this case, the chances of obtaining, first of all, the grant of a stay, emergency stay, second, the granting of actual certiorari, and third, the granting of -- reversal of the Mississippi Supreme Court, that the odds against that are very, very long indeed, to the point where [TLGI] was advised, **as the affidavits of Mr. Carvill and Mr. Turner made clear, [TLGI] was advised that the chances of that actually happening were exceedingly remote**, and I think that's consistent with Professor Tribe's and Professor Fried's conclusions as well.

And again, the central -- [TLGI]'s central point with respect to the remedies is that [TLGI] exhausted the remedies, it did all that it was

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<sup>70</sup> Turner Decl. ¶ 14

<sup>71</sup> Transcript (Sept. 21, 2000), at 504:22-505:7 (Mr. Dugan on behalf of Claimants) (Exhibit 7).

<sup>72</sup> Transcript (Oct. 19, 2001), at 1078:21-1079:5 (Mr. Castanias on behalf of Claimants) (Exhibit 8).

required to do under Article 1121 and under international law. And once it was deprived of its only appeal of right, its only normal appeal, it had no place left to go, to use Professor Fried's words.<sup>73</sup>

Similarly, there was exhaustive evidence that bankruptcy was not a reasonable "remedy," as Claimants' counsel demonstrated in its submissions and throughout the arbitration proceedings:

Loewen did what any reasonable investor would do. The cost of settling the case fell below the cost of bankruptcy, it settled.<sup>74</sup>

...

[T]he costs of bankruptcy were so high . . . [that] when the cost of settlement dropped below those costs, it became the more tactical option.<sup>75</sup>

...

[B]ankruptcy for Loewen in 1996 was not a reasonable remedy. It would not have been an effective remedy. It would not have been a remedy at all. . . . I am going to make three points. First, bankruptcy is injury, not remedy. . . . It is not a remedy. The second point I will make is that United States bankruptcy law, as it has been explained by leading scholars of that law, including some of those who are present in this case through declaration or statement or affidavit, those scholars show all the additional damage that bankruptcy would have caused to the company. That demonstrates that it is not in any way effective. And finally, I'll demonstrate that the sworn testimony of experts in this case show that corporate bankruptcy under Chapter 11 of the United States bankruptcy laws would not have been a reasonable option for the company.<sup>76</sup>

...

[T]he advice given to the Loewen Group in 1996[] [was] that Chapter 11 bankruptcy is particularly ill-suited for certain business types, that it carries with it certain indirect but very substantial reputational costs, the stigma, and that bankruptcy would have posed serious

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<sup>73</sup> Transcript (Oct. 19, 2001), at 1134:1-22 (Mr. Dugan on behalf of Claimants) (Exhibit 8).

<sup>74</sup> Transcript (Sept. 20, 2000), at 25:18-21 (Mr. Dugan on behalf of Claimants) (Exhibit 7).

<sup>75</sup> Transcript (Sept. 20, 2000), at 162:14-16 (Mr. Dugan on behalf of Claimants) (Exhibit 7).

<sup>76</sup> Transcript (Sept. 20, 2000), at 163:22-165:9 (Mr. Castanias on behalf of Claimants) (Exhibit 7).

risks of disrupting Loewen's business operations, both the acquisition component and the service component.<sup>77</sup>

...

[N]o bankruptcy expert in this case was willing to swear that bankruptcy was a reasonable option for Loewen in 1996.<sup>78</sup>

The Turner and Carvill declarations reaffirmed that bankruptcy was not a viable or reasonable option for TLGI. Carvill, the American attorney charged with coordinating TLGI's response to the Mississippi proceedings, stated:

The bankruptcy option was seriously considered by the Company. . . . The problem, however, was that it appeared to senior management and the Board that a bankruptcy filing would effectively force a fundamental change in the Company's business plan. Those plans depended on ready access to the capital markets for the purpose of financing continued growth. It also depended on industry perception of Loewen as a viable acquirer, and the willingness of some sellers to accept Loewen stock for a substantial portion of the consideration. Placing the company in bankruptcy was seen by management as a serious threat to its ability to access the capital markets and to present itself as a credible partner to potential sellers. The fear was that a Chapter 11 [bankruptcy] filing would have a serious adverse impact on stock prices and make potential sellers reluctant to accept equity in lieu of cash.

In addition, there were concerns expressed about the viability of continuing as a successful acquirer under the supervision of the bankruptcy court. . . . If [TLGI] needed to seek bankruptcy court approval for each new acquisition, its plans might be more transparent to competitors and its ability to respond to competitive offers would likely be seriously constrained. All of these concerns were voiced to bankruptcy counsel by senior management, and counsel failed to persuade [TLGI] that, in light of these and other issues, bankruptcy was a viable option for a company that defined itself in terms of rapid expansion based on easy access to capital markets. Thus, the Board considered and rejected the bankruptcy option as a viable alternative to settlement.

...

[W]e also recognized the serious and permanent damage a bankruptcy filing would have done to the Company and its ability to continue with its business plan.<sup>79</sup>

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<sup>77</sup> Transcript (Sept. 20, 2000), at 181:21-182:6 (Mr. Castanias on behalf of Claimants) (Exhibit 7).

<sup>78</sup> Transcript (Sept. 20, 2000), at 183:2-4 (Mr. Castanias on behalf of Claimants) (Exhibit 7).

<sup>79</sup> Carvill Decl., ¶¶ 12-13, 17.

Similarly, Turner stated:

[T]he Board considered bankruptcy as a refuge, not a realistic “remedy.” The sole justification for a bankruptcy filing at that time would have been to obtain relief from the immediate execution on [TLGI]’s assets, which execution had been seriously threatened by the *O’Keefe* lawyers. The Company was otherwise in excellent financial condition, and in particular, had no need to void pending acquisition agreements or other contracts. Avoidance of the supersedeas bond requirement, the filing of which would have stayed the ability of [] *O’Keefe* to execute on their Mississippi judgment, was the only advantage of a Chapter 11 reorganization petition, assuming that such a petition would have been granted. . . .

From the outset the Board and the two emergency Committees, as well as [TLGI] management, believed that between the options available to the Company, bankruptcy was “by far the least desirable.” The reasons were straightforward and, in the Board’s considered judgment, stemmed from the particular nature of the Company’s business plans and operating strategies, and its current and future operations. . . .

The [TLGI] Board carefully considered a filing in Chapter 11, as one option. The Board concluded that such a filing would have devastating and irreparable consequences for [TLGI] for at least these reasons:

- (i) [TLGI] was an aggressive acquisition company, reliant on regular and successful access to the capital markets for both equity and debt financing. In the considered judgment of the Board, after advice from external advisors, a Chapter 11 filing posed grave risk to the capacity of [TLGI], once in Chapter 11, to obtain the substantial, on-going equity and debt financing necessary to enable the [TLGI] acquisition program to continue.
- (ii) [TLGI]’s perceived inability to obtain debt or equity financing, once in Chapter 11, did not only impact [TLGI]’s future as an acquisition company. It would have had a second and catastrophic effect upon [TLGI]’s existing but not completed contractual commitments for many acquisitions, totalling millions of dollars. In the absence of the necessary financing to complete these acquisitions already under contract, [TLGI] would be in default of these purchase commitments; such default under the existing purchase contracts would have dealt a mortal blow to [TLGI]’s reputation and credibility as an acquisition company. (Indeed during the months following the *O’Keefe* trial verdict and before settlement, the Company was constantly receiving reports of whisper campaigns that the Company would default on existing purchase contracts; a great deal of management time was spent refuting these rumors).

(iii) Goodwill and business reputation are an extremely important part of the day-to-day operation of the funeral home and cemetery business. A Chapter 11 filing would have seriously harmed the goodwill attaching to [TLGI]’s successful, local funeral home and cemetery operations. Although these local operations were managed under the name of the local business at the time of acquisition (and not under the name “[TLGI]”), the Board was greatly concerned that competition in a local market (well aware that the local enterprise was owned by [TLGI]) would aggressively “spread the word” in the local marketplace that the local business (owned by [TLGI]) was in Chapter 11. This worry has been proven to be correct, as a consequence of [TLGI]’s Chapter 11 filing in June 1, 1999.

(iv) A key feature of Loewen’s success as an acquisition company, was its position as a “friend of the independents” and its cultural differences from its major competitor, Service Corporation International (“SCI”). Many families sold their businesses to [TLGI] for the reason that they absolutely would not ever want to sell their businesses to SCI. As part of the negotiations leading to acquisitions by [TLGI], families often sought assurances that [TLGI] would always stay independent of SCI and pursue [TLGI]’s preferred, independent business culture. In the event [TLGI] filed in Chapter 11, there would be serious doubt in the minds of potential sellers to [TLGI] as to whether [TLGI] could continue as a truly independent company, without worry that SCI might, in whole or in part, directly or indirectly, acquire control of [TLGI] or some of its locations.

(v) The devastating effect on [TLGI]’s share price . . .

Additionally, the Board recognized that in the event of a bankruptcy filing, management’s attention would have been fundamentally distracted by the unique, and vastly different, requirements of a reorganization proceeding.<sup>80</sup>

Instead of assessing the import of all this evidence, the Tribunal either overlooked or ignored it. Its claim that “[TLGI] **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”<sup>81</sup> is demonstrably false, as the excerpts from the arbitration proceedings noted above prove conclusively.

When the Tribunal was confronted with the evidence on the “central question” it completely overlooked in its 2004 Decision, its response was, with all respect, lacking in honesty:

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<sup>80</sup> Turner Decl., ¶¶ 15, 19-21.

<sup>81</sup> 2003 Decision, para. 215 (emphasis added).

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 [TLGI] 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.<sup>82</sup>

This response in the 2004 Decision is compelling evidence of arbitral misbehavior and the Tribunal's imperfect execution of its powers. First, the Tribunal's statement that the uncontested testimony "did not satisfy us" implies that the Tribunal actually considered the evidence before it issued the 2003 Decision. That cannot be a true statement, for it is indisputable that the Tribunal completely overlooked that evidence in 2003. Recall, again, the language of the 2003 Decision: the Tribunal claimed that TLGI and Mr. 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, reviewed **no** relevant evidence at the time they made their decision. In its 2004 Decision, 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 most 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 the discovery of its incompetence in 2003, but to pretend in 2004 that the uncontradicted evidence did not say what it

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<sup>82</sup> 2004 Decision, para. 22.

says was a grossly unjust response. In all fairness, the **only** inference to draw from the uncontested, uncontradicted, corroborated, comprehensive and clear testimony of Mr. Carvill and Mr. Turner was that TLGI settled because it was the **only** reasonably available alternative. The Tribunal's cursory and contrary conclusion shows that the Tribunal never fairly and impartially heard and considered the relevant evidence.

**IV. UNDER U.S. LAW, THE AWARD SHOULD BE VACATED AND REMANDED TO A NEW TRIBUNAL.**

The Tribunal acknowledged in its 2003 Decision that TLGI and Mr. Loewen had been very badly treated by the Mississippi courts – a “disgrace” in the Tribunal's words. But the Tribunal, in its own way, behaved as badly as the Mississippi courts did, engaging in the disturbing misconduct described above. Under U.S. law, that misconduct requires that this Court vacate the Award.

**A. Governing Law: The Federal Arbitration Act**

Section 10 of the FAA 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.<sup>83</sup>

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,

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<sup>83</sup> 9 U.S.C. § 10.

is widely accepted as a ground for vacating arbitration awards.<sup>84</sup> The D.C. Circuit held that “to modify or vacate an award on this ground, a court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.”<sup>85</sup> Similarly, the U.S. District Court for the Eastern District of Pennsylvania held that “[m]anifest 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.”<sup>86</sup>

One of the purposes of the “mutual, definite, and final” ground in § 10(a)(4) is to ensure the completeness of arbitration proceedings. “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.’”<sup>87</sup> Similarly, the purpose of the “imperfectly executed” ground is “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.”<sup>88</sup> The Seventh Circuit has held that arbitrators have “imperfectly executed” their powers where “the

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<sup>84</sup> 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.”).

<sup>85</sup> *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001).

<sup>86</sup> *Jeffrey M. Brown Assocs., Inc. v. Allstar Drywall & Acoustics, Inc.*, 195 F. Supp.2d 681, 684 (E.D. Pa. 2002); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997) (“To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.”).

<sup>87</sup> *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 686 (2d Cir. 1996); *Michaels v. Mariforum Shipping, S. A.*, 624 F.2d 411, 413-14 (2d Cir. 1980) (same).

<sup>88</sup> *Smart v. Int’l Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002).

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."<sup>89</sup>

U.S. courts routinely decline to enforce incomplete awards.<sup>90</sup> In a case similar to this one, a New York court discussed the arbitrator's failure to decide one of the claims against the defendant.

**It is quite plain, therefore, from his own words that the arbitrator did not decide the first question submitted.** It is evident that he did not regard the first issue as a matter in dispute or one which he was obligated to decide. Indeed, he treated the subject as if it had been disposed of some time prior to the submission and that it was unnecessary for him to pass upon it. . . .

**There is no evidence and no claim is made that the first item was abandoned or withdrawn from the proceedings in arbitration or that its consideration by the arbitrator was waived. On the contrary, the record of the hearings before the arbitrator establishes that . . . [it] was the subject of testimony by witnesses, the argument of counsel and even comment by the arbitrator himself.**

**It is suggested that an affirmative answer to the first item is inferable from the determination of the second item.** Applying to the award the most liberal construction possible, in the face of the express declarations of the arbitrator that he was not called upon to and did not decide the first issue, **any such inference would be unwarranted and improper.** The court may not, under the guise of inference, supply an answer which the arbitrator failed to make, although he could have done so by the mere use of the simple affirmative. In short, no award can be supported by implications inconsistent with the actual facts.

**In the circumstances, the conclusion is unavoidable that the arbitrator failed to decide the first item of the submission. His award is in no sense mutual, final and definite upon all the subject-matter submitted to him by the parties. It is, therefore, invalid.**<sup>91</sup>

U.S. courts also routinely refuse to enforce awards that are found to be contradictory, primarily because such awards cannot be considered "mutual, final, and definite."<sup>92</sup> For example,

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<sup>89</sup> *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 651 (7th Cir. 2001).

<sup>90</sup> *Smart v. Int'l Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002); *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 651 (7th Cir. 2001); *ConnTech Dev. Co. v. Univ. of Conn. Educ. Profs., Inc.*, 102 F.3d 677, 686 (2d Cir. 1996); *Michaels v. Mariforum Shipping, S. A.*, 624 F.2d 411, 413-14 (2d Cir. 1980).

<sup>91</sup> *Application of MacMabon*, 187 Misc. 247, 250-51, 63 N.Y.S.2d 657, 659-61 (1946). As a result of the arbitrator's failure to decide this claim, the court vacated the award and stated that it would confer with counsel for referral to a new set of arbitrators. *Id.*

<sup>92</sup> 9 U.S.C. § 10(a)(4); *Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745 (9th Cir. 1985) ("Courts will not enforce an award that is incomplete, ambiguous, or contradictory."); *Dworkin-Cosell Interair Courier Servs., Inc. v. Avraham*, 728 F. Supp. 156, 161-62 (S.D.N.Y. 1989) ("[I]t is well established under the [FAA] that "[c]ourts will not enforce an award that is incomplete, ambiguous or contradictory."); *Sea Dragon, Inc. v. Gebr. Van*

(continued...)

the Second Circuit remanded an award to arbitration where it was found to be “contradictory on its face.”<sup>93</sup> The arbitration was supposed to determine which one of two unions would be responsible for a certain job category at a factory, but the award seemed to assign the job category to both unions. The Second Circuit emphasized that “[t]he purpose of arbitration is to resolve disputes, not to create new ones[;] [and] [a]n award which does not fulfill this purpose is unacceptable.”<sup>94</sup> The court found that the award failed this test because it was impossible to determine what the arbitrators had decided.

U.S. courts have the power to remand incomplete, ambiguous, or contradictory awards.<sup>95</sup> For example, the U.S. District Court for the District of Columbia held that remand is appropriate where “the award is incomplete or ambiguous.”<sup>96</sup> The court emphasized that “[a]n ambiguous award should be sent back to the arbitrator so the court ‘know[s] exactly what it is being asked to enforce.’”<sup>97</sup>

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(...continued)

*Weelde Scheepvaartkantoor B.V.*, 574 F. Supp. 367, 371 (S.D.N.Y. 1983) (“Courts will not enforce an award that is incomplete, ambiguous or contradictory.”); *United Mine Workers of Am. v. Dickenson County Med. Ctr.*, No. 1:00cv00078, 2001 WL 420374, at \*5 (W.D. Va. Mar. 20, 2001) (“It is well-settled that a court cannot enforce an arbitration award that is ‘incomplete, ambiguous, or contradictory.’”)

<sup>93</sup> *Bell Aerospace Co. Div. of Textron v. Local 516, Int’l, et al.*, 500 F.2d 921, 924-25 (2d Cir. 1974).

<sup>94</sup> *Id.*

<sup>95</sup> A Canadian court partially set aside and remitted for reconsideration a NAFTA Chapter 11 arbitration award in *The United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359 (S.C.), 2001 BCSC 664. The Supreme Court of British Columbia found that the arbitral tribunal in the *Metalclad* dispute had “misstated the applicable law” on the minimum standard of treatment, and “then made its decision” on that basis. The court also found that the tribunal’s misstatement of the governing law “infected,” and thus undermined, the tribunal’s analysis of the expropriation question. The court set aside the tribunal’s holdings on these two issues, and remitted the dispute to the tribunal to correctly address the outstanding questions. The dispute was settled before the tribunal reviewed the matter further.

<sup>96</sup> *Office and Prof’l Employees Int’l Union, Local 2 v. Washington Metro. Area Transit Auth.*, Civ. A. No. 89-1264(OG), 1990 WL 174892, at \*2-3 (D.D.C. Oct 25, 1990).

<sup>97</sup> *Id.*

In remanding arbitration awards, U.S. courts have the power to determine whether to remand to the original arbitrators or to new arbitrators.<sup>98</sup> In considering the propriety of a district court's order remanding a dispute to a new arbitrator, the Sixth Circuit emphasized that "district courts are usually afforded broad discretion in fashioning appropriate relief," and that discretion includes the power to appoint new arbitrators.<sup>99</sup> Importantly, the Sixth Circuit rejected the appellant's argument that "remand to a new arbitrator is appropriate only where an arbitrator's actions compromise the appearance of impartiality," as well as the argument that "remanding to a new arbitrator produce[d] an unneeded inefficiency, because the former arbitrator [was] already familiar with the merits of the case."<sup>100</sup> Similarly, the Southern District of New York held that "[a]lthough not explicit in the FAA, it is within this Court's discretion to remand a matter to the same arbitration panel or a new one."<sup>101</sup>

## **B. The Tribunal Manifestly Disregarded the Law**

This Court should vacate the Award because the Tribunal manifestly disregarded the law that it had deemed controlling on the exhaustion issue: whether there was, objectively, a reasonably

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<sup>98</sup> *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1020 (5th Cir. 1990) (discussing the district court's power to "nullif[y] the decision of an arbitration panel . . . [and] remand[] the case to a different arbitration panel"); *Grand Rapids Die Casting Corp. v. Local Union No. 159, United Auto., Aerospace and Agr. Implement Workers of Am., UAW*, 684 F.2d 413, 416 (6th Cir. 1982) ("We suggest to the District Court that remand should be to a different arbitrator."); *Hart v. Overseas Nat'l Airways, Inc.*, 541 F.2d 386, 393-94 (3d Cir. 1976) ("If after such review the district court finds no bias on the part of the referee as would affect liability and that the proceedings before the referee were otherwise full and fair, there would seem to be no barrier to affirming the referee's liability finding and remanding only for the computation of damages. In the event, however, that a defect in the proceedings or bias on the part of the referee is found by the district court, the district court should formulate an appropriate remedy to provide for the resolution of the parties' differences by arbitration, including, if necessary, a procedure whereby a new arbitrator is selected."); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) (holding that district court judge properly appointed neutral arbitrator to replace designated arbitrator).

<sup>99</sup> *Aircraft Braking Systems Corp. v. Local 856, Int'l Union, United Auto., Aerospace and Agr. Implement Workers, UAW*, 97 F.3d 155, 162-63 (6th Cir. 1996) (citations omitted).

<sup>100</sup> *Id.*

<sup>101</sup> *Matter of Arbitration Between Tempo Shain Corp. v. Bertek, Inc.*, No. 96 Civ. 3354 (LAP), 1997 WL 580775, at \*2 (S.D.N.Y. Sept. 17, 1997) (discussing numerous other state and federal cases on this issue); *see also In re A.H. Robins Co., Inc.*, 230 B.R. 82, 87 (E.D. Va. 1999) ("[T]he Court's decision as to whether to remand a matter to the same arbitrator or a new one is within the Court's discretion.").

available alternative. Instead, the Tribunal attempted to dispose of the exhaustion issue on a different legal principle: whether TLGI subjectively believed it had any reasonable alternative to settlement.

As the numerous excerpts in this Motion demonstrate, the consensus during the arbitral proceedings was that “reasonable availability” was an objective standard. As a result, it is indisputable that the Tribunal was conscious of the proper legal standard, and recognized it as such. Yet the Tribunal failed to apply this standard at all.<sup>102</sup>

The Tribunal manifestly disregarded the principle of law that it hear and fairly consider unchallenged, uncontested, clear and uncorroborated evidence.<sup>103</sup> Because the Tribunal effectively excluded and failed to hear and consider the critical evidence concerning exhaustion, it engaged in

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<sup>102</sup> 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 vacated. The Tribunal’s misconduct also affected its consideration of TLGI’s corporate claims – the Tribunal missed the evidence concerning which entities owned TLGI’s NAFTA claim after the bankruptcy reorganization, and 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 (hereinafter “TLGI Counter-Memorial”) (attached as Exhibit 16). 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* 2004 Decision, at 62, 68-69; *see also Hoteles Condado*, 763 F.2d 34, 40 (1st Cir. 1985); *Karaba Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 300-01 (5th Cir. 2003).

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*, TGLI Counter-Memorial, at 50-79 (Exhibit 14). 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.

<sup>103</sup> *See Hoteles Condado Beach*, 763 F.2d at 40 (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 Karaba Bodas*, 364 F.3d at 300-01. (“It is appropriate to vacate an arbitral award if the exclusion of relevant evidence deprives a party of a fair hearing.”).

arbitral misconduct. As discussed above, there was ample evidence in the record describing why TLGI settled, why it did not pursue the U.S. Supreme Court option, and why it did not file a bankruptcy petition.

Because the Tribunal manifestly disregarded controlling principles of law, the Award should be vacated.

**C. The Award Was Incomplete**

The Tribunal engaged in misconduct and misbehavior because the Award was incomplete. It is plain from the Tribunal's own words that it did not actually decide Mr. Loewen's Article 1116 claim, even though it was raised in the submissions to the Tribunal and throughout the arbitration proceedings. Its assertion in 2004 that it had "necessarily" decided the claim in 2003 cannot be credited: it is a *post hoc* attempt to pretend that the Tribunal did something that it did not in reality do. The Tribunal's failure to fairly and properly weigh the law and the evidence on the Article 1116 claim renders the Award fatally incomplete.

The Award is also incomplete because the Tribunal unfairly and improperly failed to assess the existing evidence on exhaustion and decide if there was a reasonably available alternative to settlement. It ignored or overlooked all the relevant evidence in 2003, and then dishonestly claimed that the evidence it had previously ignored did not "satisfy" it. The Award is incomplete because there was never a fair and impartial adjudication of the record evidence on this point.

In rendering an incomplete award, and subsequently refusing to remedy its misconduct, the Tribunal engaged in substantial misbehavior by which the rights of Mr. Loewen have been prejudiced.

#### **D. The Award Was Contradictory**

The Award was contradictory on its face. On the one hand, the 2003 Decision, by the Tribunal's own admission, said nothing about Mr. Loewen's Article 1116 claim,<sup>104</sup> and resolved Mr. Loewen's claims entirely **on jurisdictional grounds**.<sup>105</sup> On the other hand, the 2004 Decision stated that the Tribunal resolved Mr. Loewen's Article 1116 claim **on the merits**.<sup>106</sup> The two decisions cannot be reconciled on any rational basis.

The Award is also contradictory because the 2004 Award pretends that the Tribunal considered all the relevant exhaustion evidence in 2003. That is contradicted by the Tribunal's own words in 2003, which make clear that it never considered such evidence. That contradiction cannot be reconciled. Accordingly, the Tribunal engaged in misbehavior by which Mr. Loewen's rights have been prejudiced.

#### **E. This Court Should Remand to a New Tribunal**

The Tribunal's misconduct and misbehavior cannot be remedied by remanding to the original group of arbitrators. Mr. Loewen has asserted that the Tribunal is guilty of misconduct, including an absence of honesty in how it dealt with Mr. Loewen's requests for reconsideration. If this case is remanded to the same Tribunal, Mr. Loewen will not obtain a fair and impartial review, any more than he did in 2004, and he will surely not obtain the justice he deserves.<sup>107</sup>

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<sup>104</sup> 2004 Decision, para. 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 [Mr.] Loewen's claim under art. 1116.").

<sup>105</sup> 2003 Decision, para. 1 ("Ultimately it turns on a question of jurisdiction . . . This question was raised by Respondent's motion to dismiss for lack of jurisdiction . . . In this Award we uphold the motion and dismiss Claimants' NAFTA claims.").

<sup>106</sup> 2004 Decision, paras. 19-20.

<sup>107</sup> Mr. Loewen will not speculate on the reasons behind the Tribunal's refusal to correct its own substantial misconduct. Some observers have suggested that the Tribunal members were embarrassed because the Award was not well-received by the international arbitration community. Indeed, arbitrators characterized the 2003 Decision as "preposterous," "quite wrong," and "completely appalling." Michael D. Goldhaber, *A "Completely Appalling" Decision*, *The American*

(continued...)

**V. CONCLUSION**

Mr. Loewen moves the Court to vacate the Award and remand the outstanding issues – the determination of his Article 1116 claim, the application of the objective legal standard to the exhaustion issue, and the consideration of the Turner and Carvill affidavits and other relevant evidence – to a new arbitral tribunal.

Dated: February 25, 2004

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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Lawyer, available at [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com) (2004). Other commentators have attributed the Tribunal's misconduct to the United States' change of heart on investor-state arbitration. "[A] double standard toward investment arbitration seems to be creeping into American attitudes toward investment arbitration. Arbitration is good when it corrects misbehavior by foreign host states, but not so desirable when claims are filed for alleged wrongdoing by the United States. [T]he United States [is now] pursuing a course and a tone quite different from when negotiating NAFTA. . . . After claims for unfair treatment were filed against the United States government, arbitration looked different than when American companies were the investors." Guillermo Aguilar Alvarez and William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, Mealey's Int'l Arb. Rep., Jan. 2004 at 29, 41.